



Chapter One

Basic Conceptual Framework

1.1 State as a Political and Juridical Concept

1.1.1 State as a Political Concept

constitution is a mechanism by, or a channel through which political power is converted into an institution of the state, as a consequence of which power is structured.⁵ Because of the nexus between and among state, power and law, a constitution does not only govern the relationship between the governed and the government (government understood as the agency or

machinery of the state), but also lays down the basis and justification of state and government, as juridical concept and structure.

1.2 State as a Juristic Person

From the point of Political Science, the concept of state comprises three fundamental elements

- (1) A community of people,
- (2) With a definite territory, and
- (3) A political power.

1.2.1 Sovereignty

The capacity to monopolies on the use of force (state power) over a given political community of within a given territory is known as sovereignty.

All states enjoy sovereign equality. They have equal rights and duties and are equal members of the international community not withstanding differences of an economic, social, political or other nature.²⁵ In particular, sovereign equality includes the following elements:-²⁶

- a. States are judicially equal;
- b. Each state enjoys the rights inherent sovereignty in full;
- c. Each state has the duty to respect the personality of other states;
- d. The territorial integrity and political independence of the state are inviolable;
- e. Each state has the right to freely to choose and develop its political, social, economic and cultural systems;
- f. Each state has the duty to comply fully and in good fully with its international obligation and to live in peace with other states.

1.2.3.1 Forms of Sovereignty in International Law

There are six main forms of sovereignty:

a. Internal or Territorial Sovereignty

our planet is legally divided into approximately 200 sovereign states. Within its own territory, each of these states is exclusively sovereign, in the sense that it has *“exclusive competence”* or *“domestic jurisdiction”* and the *monopoly of power* over its territory and nationals.

b. External Sovereignty

The state is externally sovereign, in the sense that it is not subjected (against its will) to another state or to any higher authority. International Law, however, imposes certain limits to both the internal and external aspects of sovereignty of states. The most important ones are formulated in the UN Charter and the 1970 Declaration on Principles of International Relations.³⁸ They include the obligation that states, in their international relations, shall refrain from threatening or using force, oblige to co-operate with one another, abide by the principles of equal rights and self-determination of peoples.

c. Sovereign Equality

All states are juridically equal, in the sense that, formally they have identical rights at the international level.

Extraterritorial Sovereignty

In the 19th Century, some Asian and African states were forced to sign *capitulation treaties* with European states, whereby European nationals and their property were made immune from local authority and jurisdiction.

d. Permanent Sovereignty over Natural Resources

It is a well-established principle of International Law that every state can freely dispose of the natural wealth and resources within its territory a principle which is commonly known as *permanent sovereignty over natural resources*.

1.2.3.2 Sovereignty as a Dynamic Concept

The changes in the theory and practice of sovereignty, as they evolved in the past, are a reflection of the changing functions attributed to sovereignty and the state in a given period.

1.2.4 The Concept of Nationality

Nationality of an individual is his quality of being a subject of a certain state. Hence, it is one of the attributes given to a physical person.

"Although it is for the international law of each state to determine who is and who is not a national of the state² it is nevertheless of legal and practical interest to a certain how nationality can be acquired under such laws.

The five most common modes of acquiring nationality are

1. birth, 2. naturalization, 3. Reintegration, 4. annexation and 5. cession.³

According to this rule, every child⁴ born on the territory of such a state, whether the parents be citizens or aliens becomes a national of such state, whereas a child born abroad is foreign although the parents may be nationals.

1.2.5 Democracy and Constitutionalism

Constitutionalism enshrines respect for human worth and dignity as its central principle, too. To protect that value, citizens must have a right to political participation, and their government must be hedged in by substantive limits on what it can do, even when perfectly mirroring the popular will. What constitutionalism insists on is having limited government. Predictability of governmental actions is also a characteristic feature of its typology.

1.2.5.2 Constitutionalism

Constitutionalism, therefore, pertains to two kinds of relationships. The relationship between government and nationals/citizens, residents/ is the first category – the substantive. The second (the formal) refers to the appraisal of one branch of government vis-à-vis the other; and to their inter-relationship. It is these two aspects of constitutionalism which are the quit-essentials of a constitution, be that written, rigid, flexible, etc...

Constitutionalism and democratic theory raise questions about the concept of a constitution and the relationship of any particular constitution to those theories

1.2.5.3 The Concept of "Constitution"

A constitution as sham/cosmetic or real, has a principal function.

A Constitution as a Charter for Governments:⁵⁴ At minimum, an authoritative constitutional text would more often sketch the fundamental modes of legitimate governmental operations.

A constitution as a guardian of fundamental rights:

The constitution as covenant, symbol, and aspiration: In so far as a constitution is a covenant by which a group of people agree to (re) transform themselves from mere *state* into a *nation*,

1.2.6 Rule of Law

These identified eight elements of law, recognized as necessary for a society aspiring to institute the *Rule of law* state as follows:-

1. Laws must exist and those laws should be able to win obedience.
2. Laws must be published.
3. Laws must be prospective in nature so that the effect of the law may only take place after the law has been passed. Laws should be written with reasonable clarity to avoid unfair enforcement.

4. Law must avoid contradictions. (intelligibility)
5. Law must not command the impossible. (Non self-contradictoriness)
6. Law must be general.
7. Laws must stay constant through time to allow the formalization of rules; however; law also must allow for timely revision when the underlying and political circumstances have changed.
8. Official action should be consistent with the declared rule. (Congruency)

A. Important Components of Rule of Law Reforms

I. Court Reforms

To increase independence of the courts, the government can provide them with funding that will allow them to make their own financial and administrative decisions. Furthermore, for countries that have already established these structural reforms to encourage the adoption of the rule of law, court performance should be evaluated on a periodic basis.

II. Developing Legal Rules and Legal Systems

Chapter II

Creating Paradigms of State

- The constitutional politics cannot possibly be understood without reference to the respective and related histories.
- Greek constitution gave *political philosophy* and its inspiration opened men's minds to the finer purpose of political organization.
- *Roman constitutionalism* gave western world the reality of law and the ideal of unity. *Feudalism* bridged the gulf between the chaos following the fall of the Roman Empire in the west and the emergence of the modern state.
- The progress of centralization through the crown in England, France and Spain during the Middle Ages was necessary to destroy the evils of feudalism and to lay the foundations of a national policy, while the growth of partially representative institutions in those countries marked in Western Europe the first faint beginnings of the democratic state.
- The Renaissance carried forward the centralizing process in the west of Europe and planted yet more securely the seed of nationalism there.
- English constitutionalism supplied a continuity of life to liberal institutions through many centuries where they were dead or had never lived, permitted the growth of its own institutions among those communities in all parts of the world of which England herself was the mother and supplied the pattern of a constitution when the moment came for any newly-liberated community to found one.
- *The American and the French Revolutions* gave the modern world the first examples of

documentary constitutions, thus finding an immediate way of reconciling liberty and authority, the rights of man and organized movement.

- **The 19th century saw the ideals of liberal reform and nationalism** struggling for recognition, and their partial retaliation in political forms.
- The industrial Revolution intensified both nationalism and constitutional reform, first by fostering the policy of economic protection and then by extension of the franchise and the organization of national parties.
- The first World War **gave a tremendous incentive to constitutionalism** by destroying the illiberal governments, by creating new states out of hitherto oppressed nationalities, by establishing constitutions on the basis of nationalism and democracy and finally by creating the will to international peace of constitutional lines through the establishment of the League of Nations.
- But in the succeeding years there was a violent reaction against political constitutionalism, and the Russian Revolution of 1917 was followed by the fascist outbreak in Italy, the Nazi upheaval in Germany, and the victory of Franco over the Republicans in Spain, while the nations of Eastern Europe generally tended under Nazi and Fascist influences, to sacrifice the constitutional safeguards they had so recently won. The Second World War left a complex and menacing situation for the national democratic constitutionalism of the west which has to meet not only the challenge of communism but the danger of a resurgence of fascism and the incalculable effects of emergent Afro Asian nationalism.
- The second fact which should emerge from this sketch is that national democratic constitutionalism, ancient though its origins may be, is still in an experimental stage and that if it is to survive in competition with more revolutionary types of government, we must be prepared constantly to adopt it to the ever-changing conditions of modern society.
- **The basic purpose of a political constitution is, after all, the same whatever form it takes to secure social peace and progress, safeguard individual rights and promote national well-being.**

2.2 Developments in Ethiopia

2.2.1 Attempts in Developing the Ethiopian Nation-State

A. The Nobility

The existence of the “*Mekuanent*” and the “*Kahenat*” (the nobility and the clergy, respectively) was, likewise, upheld as another significant factor for the maintenance of the status quo. The class of nobility consisted of the royal nobility, their power was all encompassing with respect to the particular material and local jurisdiction.

B. The Church

Constitutionally, church and state were, in form and in essence, one and the same thing in

traditional Ethiopian polity. Their respective source of authority was different. The king's authority emanated from Solomoic, King David and Jerusalem, The Emperor and the church working together "provided the unifying elements which continually countered the centrifugal forces of geography, ethnicity and aristocracy".²⁸

2.2.2.1 The 1931 Constitution: the Japanese Paradigm

The Emperor had the prerogative to determine the organization of all organs of administration, pursuant to which the cabinet⁶ headed by the prime Minister was appointed by the Emperor on the advice of elder statesmen. Judicial authority was, in similar manner, vested in the sovereign power of the Emperor.

2.2.2.2 The 1955 Revised Constitution: the Westminster Paradigm and the Aborted Reform thereof

*"the sovereignty of the Empire is vested in the Emperor and the supreme authority over all the affairs of the Empire is exercised by him as a Head of state, in the manner provided for in the present constitution"*¹⁴

The legislative body was bi-cameral: Senators were appointed from the nobility and a few from the commons for their meritorious achievements, while the Deputies were directly elected from equally populated constituencies.

The judiciary was appointed by the Emperor, subject to a special law, which was yet to come and which was supposed to regulate manner of selection, tenure, appointment and dismissal.

Finally, the constitution was declared to be the supreme law of the Empire and as such, acts or enactments which were found inconsistent with the constitution were rendered null and void.

2.2.2.3 The 1974 Revolution and the 1987 Constitution: the Soviet Paradigm

Rural and urban lands were nationalized. All production and distribution, private enterprises, including rental houses were brought under the ownership and control of the state. The Emperor, along with ministers, governors, the high nobility and the top brass were executed, the rest were detained. *Red Terror* was unleashed against opposition and even against individual dissenters. In short, the Russian model of revolution and socialism were in the making; what made different the Ethiopian case was that military dictatorship was combined

Judges were elected, recalled and dismissed by the parliament and more interestingly the term of their office was made to be congruent with that of the parliament. Although judges were in those days, as in the past, to be guided by "no other authority than the law", it was clear more than ever before that the judiciary was under the double yoke of the executive and the parliament. On top of this socialist legality required the construction of laws in accordance with "revolutionary legal consciousness".⁶⁴ Unfortunately, revolution knows very little of law.

The constitution does not merit so much discussion because it was dead well before it was born

2.2.2.5 The Transitional Charter: A Prelude to Federalism

The Transitional Period Charter has completely changed the structure of the State, i.e., from a unitary to a federal structure. Although there was no mention of federal arrangement in the Charter.

The Transitional Period Charter came to force immediately after the downfall of the P.D.R.E. The Charter declared that the provisions of the Universal Declaration of Human Rights were respected fully.

a new chapter in Ethiopia in which freedom, equal rights and self-administration of all the peoples shall be the governing principles of political, economic and social life. The Charter also guaranteed each nation, nationality and peoples the right to administer its own affairs within its own defined territory and effectively participate in the central government on the basis of freedom, and fair and proper presentation.

Chapter Three

3.1. Making a Constitution

To start with, it is a truism that countries make a new constitution when they wish to make a fresh start, mostly for compelling **political reasons**. This can be evidenced from the fact that the making of a new constitution or amendment of the existing ones usually, if not always, involves a significant re-allocation of political or other powers.

In hierarchical polities, constitution making is essentially a process of handing down a constitution from the top, the way medieval kings granted charters.

In organic polities, the process of constitution making is also an organic one, consisting of a series of acts negotiated among the established bodies that share in the governance of the polity. In such polities constitutions are rarely written and are even more rarely replaced. Rather constitutional making and change come in bits and pieces - on a gradually basis.

The New World Experience **Covenant, Compact, Contract**

Covenants can bind any number of partners for a variety of purposes, but in their essence they are political in that their bonds are used principally to establish bodies political and social.

Covenant is tied in an ambiguous relationship to two related terms, compact and contract. On the one hand, both compacts and contracts are derived from covenant, and sometimes the terms are even used interchangeably. On the other hand, there are very real differences between the three which need clarification.

Both covenants and their derivative, compacts, differ from contracts in that the first two are

constitutional or public and the last private in character.

As such, covenantal or compactual obligations are broadly reciprocal. Those bound by one or the other are obligated to respond to one another beyond the letter of the law rather than to limit their obligations to the narrowest contractual requirements.

Hence, covenants and compacts are inherently designed to be flexible in certain respects as well as firm in others.

As expressions of private law, contracts tend to be interpreted as narrowly as possible so as to limit the obligation of the contracting parties to what is explicitly mandated by the contract itself.

***A covenant** differs from a **compact** in that its morally binding dimension takes precedence over its legal dimension. In its heart of hearts, a **covenant is an agreement** in which a transcendent moral force, traditionally God, is a party, usually a direct party, to or guarantor of a particular relationship; whereas, when the term compact is used, a moral force is only indirectly involved. A compact, based as it is on mutual pledges rather than the guarantees of a higher authority, rests more heavily on a legal though still ethical grounding for its politics.*

In other words, compact is a secular phenomenon. This is historically verifiable by examining the shift in terminology that took place in the seventeenth and eighteenth centuries.

the distinction is not always used with strict clarity, it does appear consistently.

3.2. What a Constitution should contain

- since the major purpose of a constitution is to **establish the main organs of a government** and
- **ensure appropriate power division** among them and
- **also to control the exercise of governmental power**, especially as affects the rights and interests of individual citizens and those of different communities in a multiethnic community,
- **the constitution is supposed to set standards against which governmental actions could be measured.**

It should also reflect or take good account of the country's geography and history, its legal system, and existing form of government and the culture of the people. Is the country homogeneous or multi-ethnic? What are the units of social organization and the importance given to customary rights? And how are individual rights reconciled with group rights? are few of the questions that need to be addressed by the constitution?

3.3. Status of International Instruments under Ethiopian Constitutional Framework

- Under this topic we will try to locate the place of international agreements to which Ethiopia is a party in the hierarchy of laws in Ethiopia. Pursuant to Art 9(4) of the FDRE constitution, international agreements ratified by Ethiopia make **an integral part of the law of the land.**

- In fact, some people argue that international treaties are not laws, despite ratification, unless they are published in the federal Negarit Gazette by virtue of Art 71(2) of the FDRE constitution.
- But this agreement doesn't hold water as what is stated in this specific sub article is not to be taken as having an effect of rendering international treaties not published in the Negarit Gazette invalid.
- This is because the provision doesn't clearly state that international treaties will not become laws unless published.
- It only tries to indicate the formal requirements, the non-fulfillment of which doesn't necessarily render that particular instrument non-binding as much as the failure and/or refusal of the president to put his signature on the draft bill doesn't stop it from becoming a binding law.
- Moreover, as states cannot invoke their laws as defense for failure to conform to international commitments they have entered into, adhering to the earlier arguments would not take us any further since *ratification alone would elevate their status from mere agreements to binding laws.*
- Thus, it would be naive to argue that these treaties do not have binding effect for they are not published in the federal Negarit Gazette as the latter is no more than a matter of formality.
- Coming back to the main issue at hand, can we say, as international treaties to which Ethiopia is a party will arguably become part and parcel of the law of the land once ratified by an organ authorized to do so, i.e., the House of Peoples' Representatives¹⁶, that they will have greater or equal status with the constitution? To put the question differently, if international instruments are regarded as part and parcel of the law of the land, what is their hierarchy in the Ethiopian legal system?
- To begin with, it is provided under Article 9(1) of the FDRE constitution that the constitution is the supreme law of the land and any law (emphasis added) contradicting with the constitution is null and void.
- As international agreements which are ratified by Ethiopia will become an integral part of the law of the land by virtue of Article 9(4) of the constitution and the phrase "any law" in sub-article 1 of Article 9 includes international treaties, one can have the audacity to conclude that international treaties are subordinate to the constitution as much as other subsidiary legislations are.

- But, it is provided in Article 13(2) of the FDRE Constitution that the third chapter shall be interpreted in a manner conforming to (emphasis added) the principle of the Universal Declaration of Human Rights, International Conventions on Human Rights and international instruments adopted by Ethiopia.
- What one can discern from the above article is that international instruments are not always subordinate to the constitution, at least, partly. Pursuant to the aforementioned article, where never there arises the need for interpretation of any of the provisions under the third chapter of the constitution, resort should be made to relevant international instruments such as the UHDR and other human rights instruments to which Ethiopia is a party.
- Thus, as long as the application of any of the provisions under the third chapter of the constitution meshes well with the spirit of those international instruments and there is no need for interpretation, all international instruments ratified by Ethiopia are subordinate, in hierarchy, to the constitution.

Chapter Four

Making paradigm of Constitutions by Classifications

4.1. Classification of Constitution

4.1.1. By looking at the Nature of the Constitution itself: Traditional approach

4.1.1.1. Written /unwritten, codified/uncodified

What is meant by a written constitution is, therefore, one that is reduced into a form of a document having special sanctity. The term written constitution, shows complete single document.

Unwritten constitution on the other hand is one which has grown up on the basis of custom rather than of written law. It is found in different documents.

4.1.1.2. Rigid/flexible, Conditional/unconditional Classification

if the amendment or alteration procedure of a constitution is not made to depend on some conditions or special procedures, then it may be called flexible constitution.

If some conditions or a special procedure has to be met before the amendment of a constitution, then it is a rigid constitution.

Thus, flexible constitutions have elasticity as they can be bent and altered in form without any need to fulfill some conditions while retaining their main features. Rigid constitutions, on the other hand, are those whose lines are hard fixed.

4.1.2. By looking at the Nature of the State itself: Federal/Unitary classification

In a federal constitution, powers of governments are divided between government for the whole and governments for parts of the country in such a way that each government is independent and

none is subordinate to the other, and legislature in both cases have limited powers.

In a unitary constitution on the other hand, the legislature of the whole country is the supreme law-making body and it has the mandate to allow other legislatures to exist and exercise their powers while reserving the right to overrule them as they are subordinate to it.

4.1.3. By looking at the nature of the Government itself: Presidential/Parliamentary Classification and Republican/Monarchical Classification

4.1.3. 1. Presidential/Parliamentary Classification

- If the executive is immediately answerable to the parliament, then it can be called parliamentary executive.
- But if it is immediately responsible at definitely arranged intervals to some wider body and is not amenable to removal by the action of the legislature, then it is called presidential executive.
- Differently stated, in constitutions that provide for presidential executive, there is a rigid separation of institutions from the bottom upwards. Hence the president and his subordinates may not sit in the congress (legislature).
- In constitutions that provide for parliamentary executive, although the great majority of the members of the executive (civil servants and office holders) are excluded from the parliament, the heads of department and ministers may sit in the parliament and hence may be accountable to the parliament.

4.1.3.2. Republican/Monarchical Classification

- where the head of state is a president, then that state is a republic,
- where the head of state is a king, that state is a monarchy or a kingdom.(i)

4.1.4. By looking at the Legislature

4.1.4.1. Unicameral/Bicameral/Tricameral/Tetracameral

(i) Unicameralism

Unicameralism is the practice of having only one legislative or parliamentary chamber. Many countries with unicameral legislatures are often small and homogeneous unitary states and consider an upper house or second chamber unnecessary.

Unicameral legislatures were and are also common in Communist (like People's Republic of Poland, People's Republic of China and Cuba) and former Communist states (like Ukraine, Moldova and Serbia),

(ii) Bicameralism

For example. the upper house would have states represented equally, and the lower house would

have them represented by population.

(iii) Tricameralism

Tricameralism is the practice of having three [legislative](#) or [parliamentary](#) chambers. It is contrasted to [unicameralism](#) and [bicameralism](#), both of which are far more common.

The term was used in [South Africa](#) to describe the [Parliament](#) established under the [apartheid](#) regime's new [Constitution](#) in [1983](#). Other instances of tricameral legislatures in history include [Simón Bolívar](#)'s model state. The word could also describe the [French States-General](#), which had three 'estates'.

South African tricameralism

The South African tricameral parliament consisted of three [race](#)-based chambers:

- **House of Assembly** – 178 members, reserved for whites
- **House of Representatives** – 85 members, reserved for [Coloured](#), or mixed-race, people
- **House of Delegates** – 45 members, reserved for [Asians](#)

(vi) Tetracameralism

Tetracameralism (Greek *tetra*, four + Latin *camera*, chamber) is the practice of having four legislative or parliamentary chambers. It is contrasted to [unicameralism](#) and [bicameralism](#), which are far more common, and [tricameralism](#), which is rarely used in government.

Medieval Scandinavian [deliberative assemblies](#) were traditionally tetracameral, with four estates; the nobility, the clergy, the burghers and the peasants. The Swedish and Finnish [Riksdag of the Estates](#) maintained this tradition the longest, having four separate legislative bodies.

4.1.4.2. The Upper House

An upper House is one of two chambers of a [bicameral legislature](#), the other chamber being the [lower house](#).

(i) Features

An upper house is usually distinct from the lower house in at least one of the following respects:

- It is given less power than the lower house, with special reservations, e.g. only when seizing a proposal by evocation, not on the budget, not the house of reference for majority assent.
- Only limited legislative matters, such as constitutional amendments, may require its approval.
- 'Houses of review', in that they cannot start legislation, only consider the lower houses' initiatives. Also, they may not be able to outright veto legislation.
- In [presidential systems](#), the upper house usually has the sole power to try [impeachments](#)

against the [executive](#) following enabling resolutions passed by the lower house.

- Composed of members selected in a manner other than by popular election. Examples include hereditary membership or Government appointment.
- Used to represent the [states](#) of a [federation](#).
- Fewer seats than the lower house (or more if hereditary).
- If elected, often for longer terms than those of the lower house; if composed of peers or nobles, they generally hold their hereditary seats for life.
- Elected in portions for staggered terms, rather than all at once.

4.1.4.3. Lower House

A Lower House is one of two chambers of a [bicameral legislature](#), the other chamber being the [upper house](#). Despite its theoretical position "below" the upper house, in many legislatures worldwide the lower house has come to wield more power.

The supremacy of the lower house usually arises from special restrictions placed (either explicitly by legislation or implicitly by convention) on the powers of the upper house, which often can only delay rather than veto legislation or has less control over [money bills](#).

Under [parliamentary systems](#) it is usually the lower house alone that designates the [head of government](#) or [prime minister](#), and may remove them through a [vote of no confidence](#). There are exceptions to this however, such as the [Prime Minister of Japan](#), who is formally selected with the approval of both houses of the [Diet](#). A legislature composed of only one house is described as [unicameral](#).

Common attributes

In comparison with the upper house, lower houses frequently display certain characteristics:

- Given greater power, usually based on restrictions against the upper house.
- Directly elected ([apportionment](#) is usually based on population).
- Given more members.
- Elected more often, and all at once.
- Given total or original control over budget and monetary laws.
- Able to override the upper house in some ways.
- In a [presidential system](#), given the sole power to impeach the executive (the upper house then has to try the impeached).

4.1.5. *By looking at the nature of the Executive*

4.1.5.1. Monosepalous Executive

- The best typology in this respect is the kind of executive we find in Britain parliamentary or cabinet form of government (executive).
- The Prime Minister is not a mere spokesman of the Council of Minister, but its leader. As a leader, it is the Prime Minister who determines the agenda of the Council of Ministers. This means the power to determine the priority of governmental action at any one time is in his

hands.

- It's the Prime Minister who initially organizes the Council of Ministers,
- In addition to this, the Prime Minister is assisted by numerous experts of various professions in the office of the secretariat
- **4.1.5.2. Bicephalous Executive**

The 1958 reformulated constitution of France has created an executive with two heads, i.e. the President and Prime Minister. The President is elected for seven years and has a lot of executive power.

The Prime Minister, on the other hand, is appointed by the president for five years.

The president is required to appoint the Prime Minister who owns the largest vote.

Thus, the Prime Minister owes his position primarily to electorates which makes him a contending power owner.

4.2. Reflections on the Ethiopian Constitution

- in traditional Ethiopia, no written constitution in the modern sense of the term formed the basis for constitutional process.
- Fetha Negest, which regulated the secular and religious aspects, the Kibre Negest which served the politico - religious needs of the day, the Serate Mengist of the nineteenth century which provided for certain administrative matters and protocol directives useful to the constitutional process.¹⁷
- Thus, we can say that Ethiopia had no written constitution prior to 1931. But this doesn't signify, as per our discussion on written/unwritten constitution dichotomy, the absence of a constitution as Ethiopia had **a sophisticated traditional unwritten constitution.**¹⁸
- Those unwritten constitutions embraced the ideals of monarchy, an imperial court system involving monarchy, the church, and the nobility, in an complicated power relationship.¹⁹
- That succession to the throne hinges on two requirements-dynastic (Solomonic dynasty) claim and the monarchy's profession of the Orthodox Christian faith (the requirement of anointment by the church) - is sufficient proof for the existence of an unwritten principle (constitutional in essence).
- We can also cite several other traditional constitutional principles such as the office of the Abun (head of the Ethiopian Orthodox church), male succession to the throne etc are proof enough for the existence of traditional (unwritten) constitution.

- The constitution institutionalizes the ministerial system wherein collective and individual ministerial responsibilities resided in the person of the emperor thereby rendering the centralization of power inevitable.
- When we come to the judiciary, the 1931 constitution belongs to the second category, i.e., the prerogative state in which the executive is under the protective shield of a special system of administrative law, as the constitution in its Art. 54, clearly states that suits related to administrative affairs are entertained by a special court staffed by judges withdrawn from the jurisdiction of other courts.
- More or less, we can say the same thing about the 1955 constitution except that the country adopted a federal form of government as of the federation of Eritrea to Ethiopia by the resolution of the UN General Assembly on the 2nd of Dec. 1950.

The 1987 PDRF constitution is also written and codified constitution rendering the country a unitary state in which all nationalities live in equality.²⁰

- The constitution had conferred ultimate state power on the National Shengo and its Standing Council.
- ***It also endorses a unicameral parliament.***
- a three fourth majority decision of members of the National Shengo has to be obtained in order to amend the constitution.
- Coming back to the 1995 FDRE constitution, in much the same way as its predecessors, this constitution is a written and codified document having 106 articles.
- Just like the PDRE constitution, the incumbent constitution provides for a republican form of government although the former provides for a unitary single-party system and the later provides for a federal multi-party system.
- ***The 1995 constitution establishes a parliamentary democracy.***²¹ The constitution also provides for a bicameral/two-chamber parliament, namely the House of Peoples' Representatives and the House of Federation both of which are federal houses.
- It also provides for a ***one chamber State Council at State level*** which is the highest organ of State authority as much as the House of Peoples' Representatives is the highest authority of the federal government.
- The other chamber, i.e., the House of Federation which is composed of representative of

nations, nationalities and peoples is entrusted with the power to interpret the constitution and to decide on serious constitutional concerns such as *the right to secession*.

- When we come to the amendment procedure of the constitution, we find it to be a rigid constitution as it puts in place a stringent requirement for amendment.

Chapter Five

Forms of Government and Electoral systems

Generally, there are two forms of governments: these are presidential and Parliamentary forms of governments.

5.1.1. The presidential system

- The presidential system, also called the *congressional system*, is a system of government where an executive branch *exists and presides* (hence the name presidential) *separately from the legislature*.
- Under this political system the president is *both the Head of State²² and the Head of Government.²³*
- Thus in the presidential system, the president is said to enjoy a direct mandate from the people and hence is not accountable to the parliament and the latter cannot dismiss him have on exceptional grounds through a *process known as impeachment.²⁴*

5.1.1.1. Features

- Although presidential governments in different countries have certain differences, nearly all presidential systems share the following features.
- *In a presidential system, there is no distinction between the positions of the Head of State and Head of Government both of which are held by the president.*
- That is, the president is the Head of State and the Head of Government and hence the chief executive.
- He has the mandate to administer the country and appoint or remove executive officers and thus can effectively control government department.
- Heads of government departments, ministers, commissioners, or secretaries are under the president.

²²

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- The president enjoys ultimate power decision and, therefore, has complete political responsibility for all executive actions.
- In such systems the president appoints secretaries who are heads of his executive departments. *In other words, the executive branch is uni-personal.* Members of the cabinet²⁵ serve at the pleasure of the president and must carry out the policies of the executive and legislative branches.
- *In presidential system, the executive branch, headed by the president, is distinct from other branches of the government which are all independent from one another.*
- This separation of power serves to check and balance the powers of the three branches of government.
- While members of the legislature are elected, the members of the cabinet are appointed by the president and may require the confirmation or consent of the legislative branch.
- The president has a fixed term of office/tenure and his government has a fixed tenure. Thus, he cannot be removed or dismissed from office before the expiry of his term unless under highly unusual and exceptional process of impeachment.²⁶
- the president can be removed from office only through death, resignation, inability to discharge his responsibilities, or by congressional impeachment and conviction on charges of treason, bribery, or other serious crimes.
- The president could be elected directly by the people or by an electoral college, a system of electing a president or another representative or leader by a group of persons who are elected from the people for the purpose of electing the president or another leader.
- *The president is not accountable to the legislature.* Instead, he is accountable to the *constitution*. Presidential governments make no distinction between the positions of head of state and head of government both of which are confided in the person of the president.

5.1.1.2. Merits and Demerits

▪ Merits

- The first advantage of presidential government is the fact that the executive is stable by virtue of a fixed term. Since the existence of the executive doesn't depend on parliamentary whim, it is more stable than a prime minister (in parliamentary form of government) who can be dismissed at any time.
- By way of making more than one electoral choice, voters in presidential system can more accurately indicate their policy preferences. In the United States, for instance, some political

²⁵

²⁶

Scientists interpret the late cold war tendency to elect a Democratic Congress and a Republican President as the choice for a Republican foreign policy and a Democratic domestic policy.

- **The existence of separation of powers is another advantage of this system.**
- **The other advantage of this system is that the president can recruit ministers of highest caliber** as he can appoint his ministers from people who do not belong to the legislature. This is so because the president selects persons of greater competence and integrity without any need to make political considerations or party affiliations.

(ii) Demerits

- Although the president's fixed tenure has its own advantages, it has disadvantages as well because it brings with it the **difficulty in removing an unsuitable president** from office before his/her term has expired.

5.2. Parliamentary System

parliamentarism is a system of government in which the executive is dependent on the direct or indirect support of the legislature

- A parliamentary system of government is a government that is led by a party or a coalition of parties ***that has the largest number of seats*** in the parliament.
- ***Absence of clear-cut separation of power between the executive and the legislative is the main characteristic of this system.***
- ***They usually have a distinct heads of state and head of government,***
- the parliamentarianism does not necessarily imply multi-party arrangements are usually the outcomes of an electoral system known as proportional Representation.²⁷

(i) Features

- In parliamentary system it is the prime minister who has effective control over the executive as he is the chief executive. He/she deals with the day-to-day political activities.
- The head of state, on the other hand, has such roles as symbolic role, chief diplomatic officer, nominal chief executive officer, chief appointments officer, legislative role (formality-signing on bills passed by the legislature), and other prerogative such as pardon/amnesty and granting various titles and ***other honors***.
- ***In parliamentary system***, ministers are members of the parliament although not the case in all countries..
- a political party or coalition of parties, as the case may be, which has the largest seat in the parliament will constitute a government.

- The leader of the party which has won the majority seat in the parliament will become a prime minister and the latter would, then, form his/her cabinet by nominating either from among the parliamentarians or from outsiders whom he believes are competent enough to discharge their responsibilities.
- *In the parliamentary system*, the government has no fixed tenure
- But this is a very rare occurrence as party discipline is very strong in this system although the executive is answerable to the parliament.
- The executive in a parliamentary system is responsible to the legislature: the legislature conducts control over the executive's function nearly on a day-to-day basis.
- Members of the council of ministers may be required to report, respond to questions, etc... to the legislature whenever they are requested to do so.

5.1.2.2. Merits and Demerits

(i) Merits

- The executive is better placed to execute the legislations passed by the House and deliberations are not stringent as the ministers can effectively influence the course of the discussion.(EASE OF LEGISLATION)
- This system, therefore, is preferable for countries with an infant democracy as it allows coordination of the executive and the legislative which could in turn result in an effective implementation of the programs and policies of the executive.
- it is a lot easier to pass legislations; this is because the executive branch is dependent upon the direct or indirect support of the legislative branch and often includes members of the legislative.
- On top of the ease for quicker legislative action, parliamentarianism has attractive features for nations that are ethnically, racially, or ideologically divided.
- In presidential system, all executive power is vested in the president. In parliamentary system, however, with a collegial executive, power is more divided.

(ii) Demerits

- The fact that the Head of Government is not directly elected is one of the critiques staged against this form of government.
- parliamentary system, unlike the presidential system where the president is elected by the public, the prime minister is elected by the legislature often under strong party influence.
- Absence of clear distinction /separation of power between the executive and the legislative is another criticism.
- In other words, lack of inherent separation of powers places too much power in the executive.

5.2. Electoral systems

5.2.1. Meaning and features of election

An election is a ***decision making process*** by which ***a population chooses an individual to hold formal offices***. It is the usual mechanism by which modern democracy fills offices in the legislature, sometimes in the executive and judiciary, and for regional and local governments. According to Jean Kirkpatrick, scholar and former United States Ambassador to the United Nations, "***Democratic elections are not merely symbolic***.... they are ***competitive, periodic, inclusive, definitive*** elections in which the chief decision makers in a government are selected by citizens who enjoy broad freedom to criticize government, to publish their citizens' criticism and to present alternatives.

5.2.2. Types and Features of Electoral systems

5.2.2.1. Majoritarian Representation systems

This is the oldest and simplest electoral system, in which a candidate in whose favor a majority of votes are cast is returned to office. There are many variants of the Majoritarian system, the most prominent of which is simple majority (relative majority) also known as **First Past the Post (FPP) and Absolute Majority**.

The term First Past the Post was coined as an analogy to horse racing, where the winner of the race is the first who gets past a particular point on the track and the rest runners automatically and completely lose the race.

In the case of absolute majority, however, a candidate will be declared a winner only if he/she gets an absolute majority of votes (50 percents +).

If there is no candidate that has met this minimum requirement, a second round is held between the two candidates who get the highest number of votes and the one who gets the least number of votes will be excluded.

5.2.2.2. Proportional Representation system

- Under Proportional Representation, political parties or candidates will have the percent of seats that reflect their support.
- Proportional representation has such advantages as greater voter turn-out (typically 70-80%) owing to the more choices for voters which in turn lead to more diverse representation,

5.3. Reflection on the Ethiopian Legal Regime

- Although Ethiopia had written constitution as early as 1931, members of two chambered parliament established by the constitution did not assume their seats by election.
- Members of the upper chamber- the senate were handpicked/appointed by the emperor from among the nobility (*mekuanint*) and local chiefs (*'shumoch'*) who served the empire as ministers, judges or military officers. Members of the lower chamber, on the other hand, were elected by the nobility and local chiefs.

- It was only in 1955 that the idea of election was introduced by the revised constitution as members of the lower chamber begun to assume seats through election. Since the coming into existence of the revised constitution, various laws meant to regulate the country election procedure were issued.
- The first electoral law was issued on the 27th day of August, 1956. This law established a National Board for registration and elections and determined the powers and duties of the Board.
- Finally, when we come back to the system of election followed by Ethiopia, we find on Art. 13 of the Proclamation that:
 1. Any election shall be based on free, direct, and popular suffrage.
 2. A candidate with more votes received than that by other competitors within the constituency shall be declared the winner.
- What one can easily discern from the reading of sub Article 2 of the above article is that the proclamation endorses the First-past-the-post system of election where in a candidate with plurality of votes will be returned to office.

Chapter Six

Making the Constitution Adjustable

6.1. Interpretation of a Constitution

6.1.1. Methods of Constitutional Interpretation

Most legal scholars recognize six main *methods* of interpretation: *textual*, *historical*, *functional*, *doctrinal*, *prudential*, *equitable*, and *natural*, although they may differ on what each includes, and there is some overlap among them.

1. **Textual.** Meaning of words may be ascertained by associated words.
2. **Historical.** No one can properly understand a part until he has read the whole.
3. **Doctrinal.** Decision based on the prevailing practices or opinions of legal professionals, mainly legislative, executive, or judicial *precedents*, according to the meta-doctrine of *stare decisis*, which treats the principles according to which court decisions have been made as not merely *advisory* but as *normative*.
4. **Prudential.** Decision based on factors external to the law or interests of the parties in the case, such as the convenience of overburdened officials, efficiency of governmental operations, avoidance of stimulating more cases, or response to political pressure.
5. **Equitable.** Also called *ethical*. Decision based on an innate sense of justice, balancing the

interests of the parties, and what is right and wrong, regardless of what the written law might provide.

Some scholars put various balancing tests of interests and values in the prudential category, but it works better to distinguish between *prudential* as balancing the interests and values of the legal system from *equitable* as balancing the interests and values of the parties. Equity is a sort of perfect reason which interprets and amends written law; comprehended in no code, but consistent with reason alone.

6. **Natural.** Decision based on what is required or advised by the laws of nature, or perhaps of human nature, and on what is physically or economically possible or practical, or on what is actually likely to occur.
1. **Rights and powers are complementary.** Every right recognized by the Constitution is immunity, that is, a right against a positive action by government, and is equivalent to a restriction on delegated powers. Conversely, every delegated power is a restriction on immunities. An immunity may be expressed either as a declaration of the right, or as a restriction on powers.
2. **Original "intent" is functional, not motivational.** The private motives of the framers or founders are irrelevant and largely unknowable, and likely to have been diverse.
The common law rule of interpretation understood by the founders was to discern the functional role of elements of the law, not the private purposes of the lawgivers.
3. **The ratification debates are the best evidence of original understanding.** The arguments of those opposed to ratification are not just the positions of the losers in the debates, which some might dismiss as not indicative of original understanding. As the debates proceeded, understandings evolved and clarified, and positions changed.
4. **Powers are narrow, rights broad.** The entire theme and tenor of the ratification debates was that delegated powers were to be interpreted as strictly as possible, consistent with the words and rights as broadly as possible, with the presumption in favor of the right, and the burden of proof on those claiming a power. *Potestas stricte interpretatur.* A power is strictly interpreted. *In dubiis, non præsумitur pro potentia.* In cases of doubt, the presumption is not in favor of a power.
5. **The power to regulate is not the power to prohibit all modalities of something.** It is only the power to issue prescriptions to "make regular", enforceable only by deprivations of property or privileges, not of life, limb, or liberty. There must always be some modality that is not prohibited.

6.2. Amendment of a Constitution

An **amendment** is a change to the [constitution](#) of a nation or a state. In jurisdictions with "rigid" or "entrenched" constitutions amendments require a special procedure different from that used for enacting ordinary laws.

6.2.1. Amendment procedures

A flexible constitution is one that may be amended by a simple act of the legislature, in the same way as it passes ordinary laws.

The constitutions of a great many nations provide that they may be amended by the legislature, but only by a special, extra large majority of votes cast (also known as a [supermajority](#), or a "qualified" or "weighted" majority). This is usually a majority of two-thirds the total number of

votes cast.

In a bicameral parliament it may be required that a special majority be achieved in both chambers of the legislature.

Some constitutions may only be amended with the direct consent of the electorate in a [referendum](#). In some states a decision to submit an amendment to the electorate must first be taken by the legislature.

6.2.2. Form of changes to the text

The manner in which constitutional amendments are finally recorded takes two main forms. In most jurisdictions, amendments to a constitution take the form of revisions to the main body of the original text.

Thus once an amendment has become law, portions of the original text may be deleted or new articles may be inserted among existing ones.

The second, less common method is for amendments to be appended to the end of the main text in the form of special *articles of amendment*, leaving the body of the original text intact. Although the wording of the original text is not altered, the [doctrine of implied repeal](#) applies. In other words, in the event of conflict, an article of amendment will usually take precedence over the provisions of the original text, or of an earlier amendment

2 Constitution II

Chapter I

Development of Documentary Constitution

Section I: Ancient and Medieval Documents of Constitutional Nature:

The Ser'ata Mengist²⁸

The Ser'ata Mangist can hardly be considered to be a document of Constitutional Law in its widest sense.

The leader being crowned used to be referred to as '*Atse*' meaning King or '*Niguse Negest*' meaning King of Kings.

⇒ The most real decrees of the Sar'ata Mangist were:

1. *King's Coronation;*
2. *According to a custom initiated by King Amda Seyon, the daughters of Zion bar – the way of the new King with a rope when he goes to Axum to be crowned, and*
3. *Queen's coronation (on Sunday's);*

The Fetha Nagast¹

"Law of the Kings', is a collection of laws which in use in Christian Ethiopia for many centuries.

It was originally written in Arabic by the Coptic Egyptian writer Abu-l Fada'il Ibn al-Assal (commonly known as Ibn al-Assal)

1.1 The Classical Gada System

The Gada system of the *Borena* Oromo's is one of the Neolithic [sic] social systems practiced by indigenous nationalities of Ethiopia proper. For the purpose of clarifying its attributes to the Law of Constitution, we make a short note of the Gada system.

The *Borena* Gada system represents a structure of

"a society that is stratified into two .. cross-cutting systems of peer-group structures. One... on the basis of chronological age [the harriya system].. [t]he other .. on the basis of genealogical ties [gada system]. .. Both sets of groups pass from one stage of development to the next every eight years ..[, while] newly born infant boy always enters the system of grades exactly forty years behind the father, regardless of the age of the father."

Chapter II

Dimensions in respect of Nation, Nationality and Peoples of Ethiopia

Section I: Putting the Conflict in Perspectiveⁱⁱⁱ

"Multi-ethnic society can survive only if all respective groups within the polity feel themselves as winners."

2.1 Building Multi-Cultural Democracies

2.2 Ethnicity, Nationalism and Multicultural States^v

Ethnicity is a state of mind emanating from feeling of separate identity, based, more importantly on the myth of common descent

nationalism combines shared common identity, feeling of distinctness from other nationals, concerted political action to these ends. It also has the objective of attaining some level of statehood.

As building and/or enhancing the nation can be achieved by advancing political values like democracy, economic welfare, especially in a multicultural federal system that should be done by entrusting only those commonly shared interests to the federal state.

2.3 The Position of FDRE Constitution of Nation Nationality and Peoples

Here Abera Degafa writes:-^{vi}

"From the text of the Constitution, the right of Nations, Nationalities and Peoples seem to occupy a central place. For example, the opening words of the Preamble read 'We, the Nations, Nationalities and Peoples of Ethiopia ...' The Preamble identifies the Nations, Nationalities and Peoples of Ethiopia as the authors of the Constitution. In addition, the provisions of the Constitution dealing with the rights of Nations, Nationalities and Peoples of Ethiopia are made difficult to amend and even during a state of emergency these rights may not be suspended, although many other rights can be.

the Constitution declares that the fundamental rights and freedoms specified in the Constitution shall be interpreted in a manner conforming to the principles of the Universal

Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.

In the following sub-sections, the rights of Nations, Nationalities and Peoples of Ethiopia as provided in the scope of their rights.

But in order to do that, having the general overview of the Nations, Nationalities and Peoples living in Ethiopia is necessary.”

2.4 Minorities in the Context of Nations, Nationalities and Peoples²⁹

“Minorities’ is a term that defies simple literal definition. The dictionary meaning of the term minority is ‘the condition or fact of being small, inferior, or subordinate. If we give the term the simple literal interpretation, almost all communities existing within a State can easily be taken as minorities. Since minorities usually appear in various forms and sizes, it is possible for any person to belong to a minority. For example, cultural groups, social classes, persons belonging to a group of particular profession, immigrants, refugees and nearly all communities within a state could be styled minorities

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.^{vii}

Section III: - The Agenda of the Then, Today and Tomorrow^{viii}

- where citizens, in addition to their identification with their country, might also feel a strong sense of identity with their community – ethnic, religious, linguistic and so on.
- Most states feared that the recognition of such variance would lead to social fragmentation and prevent the creation of a harmonious society.
- In short, such identity politics was considered a threat to state unity.
- so many states in the past had usually resorted to either suppressing these diverse identities, or ignoring them in the political domain.
- Centralization of political power, eliminating forms of local sovereignty or autonomy historically enjoyed by minority groups, so that all important decisions are made in forums where the dominant group constitutes a majority.
- Construction of a unified legal and judicial system, operating in the dominant group’s language and using its legal traditions, and the abolition of any pre-existing legal systems used by minority groups.
- Adoption of official-language laws, which define the dominant group’s language as the only official national language to be used in/at each levels of the bureaucracy, courts, public services, the army, higher education and other official institutions.

²⁹ Id., pp. 22-27.

- Construction of a nationalized system of compulsory education promoting standardized curricula and teaching the dominant group's language, literature and history (favoring the dominant group's wishes) and defining them as the 'national' language, literature and history (accordingly).
- Diffusion of the dominant group's language and culture in particular through national, cultural institutions, including state-run media and public museums.
- Adoption of state symbols celebrating the dominant group's history, heroes and culture; reflected through preferential treatment on such things as choice of national holidays or the naming of streets, buildings and geographic characteristics.
- Seizure of lands, forests and fisheries from minority groups and indigenous people and declaring them 'national' resources.
- Adoption of settlement policies encouraging members of the dominant national group to settle in areas where minority groups historically resided.
- Adoption of immigration/emigration/ policies that give preference to immigrants/emigrants/ who share the same language, religion or ethnicity as the dominant group.
- The strategies of assimilation and integration sometimes worked to ensure political stability, while, at times, could be accomplished by putting at risk a great amount of human cost and denying of human choice. At worst, coercive simulation might be employed that ultimately could lead to genocidal assaults or expulsion of some groups.
- In today's world of increasing democratization and global networking, policies that deny cultural freedoms are less and less acceptable. People are increasingly assertive in protesting assimilation without choice. Assimilation policies were easier to pursue with illiterate peasant populations.
- Efforts to allege today in any case the historical evidence suggests that there need be no contradiction between a commitment to one national identity and recognition of diverse ethnic, religious and linguistic identities.
- Redressing the cultural exclusion of minorities and other marginalized groups requires more than providing for their civil and political freedoms through instruments of majoritarian democracy and equitable socio-economic policies. It requires explicit multi-cultural policies to ensure cultural recognition.

This part explores the fact how states are integrating cultural recognition into their human development strategies in five areas:

- Policies for ensuring the political participation of diverse cultural groups.
- Policies on religion and religious practices.
- Policies on Customary Law and legal pluralism.
- Policies on the use of Multiple Languages
- Policies for redressing socio-economic exclusion.

3.1 Proposition: Policies for Ensuring the Political Participation of Diverse Cultural Groups

Article 46- States of the Federation

1. *The Federal Democratic Republic shall comprise of States.*
2. *States shall be delimited on the basis of the settlement patterns, language, identity and consent of the people concerned.*

democracy is often required. Several models of multicultural democracies have developed in recent years that provide effective mechanisms of power sharing between culturally divers groups, thereby ensuring the rights of diverse cultural groups and preventing violations of their rights through imposition of simplified model of majoritarian rule or unnecessary political dominance of the ruling elite.

- There are two broad categories of democratic arrangements in which culturally diverse groups and minorities can share power within political processes and state institutions.
- The first involves sharing power territorially through federalism and its various forms. Federalism is a system of political organization based on a constitutionally guaranteed balance between shared-rule and self-rule.
- It involves at least two levels of government, namely a central authority and its constituent regional units.
- The Constituent units enjoy autonomy and power over constitutionally defined subject-matters;
- they can also play a role in shaping the policies of the central government.

Coming together or Bonding together:- In “coming together” federal arrangements, is when the regions choose to form a single federal polity.

In “holding together” arrangements, the central government devolved political authority to the regions to maintain a single unified state.

One identity or many:- **Mono-national** or “national” federations assert a single national identity.

“Multi-national” federation, constitutionally recognize multiple identities. Other states combine the two. India and Spain assert a single national identity but recognize plural aspects of their heterogeneous poli (diverse)

Symmetric or Asymmetric:- In symmetric federalism the constituent units have identical, that is symmetric, powers, relations and obligations relative to the central authority and each other; example, as in Australia.

In asymmetric federalism some provinces enjoy different powers. In Canada, fore example, asymmetric federal powers provided a way of reconciling Quebec to the federal system by awarding it specific powers connected to the protection and promotion of French-Canadian language and culture.

The second category of arrangement involves power sharing through consociations; i.e. using a series of instruments to ensure the participation of culturally diverse groups dispersed throughout the country. These arrangements address claims made by groups that are not territorially concentrated or do not demand autonomy or self-rule. Consociations are based on the principle of proportionality: the ethnic or cultural composition of the state. Achieving proportionality requires specific mechanisms and polices. Electoral arrangements such as

proportional representation can better reflect group composition, as can the use of reserved seats and quotas in the executive and legislature.

Power Sharing through Federal Arrangements: Asymmetric Federalism

Federalism provides practical ways of managing conflict in multi-cultural societies through democratic and representative institutions, and of enabling people to live together even as they maintain their diversity.

such “asymmetric” federal systems, the powers granted to subunits are not identical. Some regions have different areas of autonomy from the others.

3.2 Policies on Religion and Religious Practices

Article 11-Separation of State and Religion

1. *State and Religion are separate.*
2. *There shall be no state religion.*
3. *The state shall not interfere in religious matters and religion shall not interfere in state affairs.*

Sometimes the arguments for women’s rights and principles of equality get entangled with concerns for minority rights and cultural recognition.

- *Gender Equality – how patriarchal customs and laws, be they Hindu or Muslim, treat men and women differently in terms of their legal entitlements.*
- *Cultural Freedoms and Minority Rights – whether the state should reserve the right to intervene in matters of religious practice to assert natural rights while at the same time protecting the right of groups to practice their religion.*

3.3 Policies on Customary Law and Legal Pluralism

Article 91(Sub 1)-Cultural objectives

Government shall have the duty to support, on the basis of equality, the growth and enrichment of cultures and traditions that are compatible with fundamental rights, human dignity, democratic norms and ideas and the provisions of the Constitution.

Article 34(Sub 4 & 5)- Marital, Personal and Family Rights

4. *In accordance with provisions to be specified by law, a law giving recognition to marriage concluded under systems of religious or customary laws may be enacted.*
5. *this Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute. Particulars shall be determined by law.*

Certain religious and ethnic minorities and indigenous groups feel alienated from the large legal system for a number of reasons.

In many countries indigenous people are almost entirely unrepresented in the judiciary.

From a human development perspective all legal systems – whether unitary or plural – must conform to international standards of Human Right, including gender equality. Some critics, therefore, argue that if the legal system of the larger society respects Human Rights norms, there is no need to maintain legal pluralism. However, even where there is a consensus on Human Rights norms, there may still be a valuable role for legal pluralism.

Plural legal systems existed in almost all societies; evolving as local traditions, these were

historically accommodated, also with other formal systems of jurisprudence. Customary practices, which acquired the force of law over time, coexisted alongside introduced systems of jurisprudence.

Such legal pluralism often had roots in the colonial logic of protection of minority rights, which allowed certain customary systems to continue while imposing the colonizer's own laws.

Accommodating Customary Law can help protect the rights of indigenous people and ensure a fairer application of the rule of law. Efforts to accord public recognition to

Customary Law can help create a sense of inclusion in the wider society.

Often the most pragmatic case for Customary Law, especially in parts of failed states, is that the choice is between Customary Law and no law.

Recognizing the ability of indigenous people to adopt and administer their own laws is also a repudiation of historic prejudice – and can be an important part of self-government for indigenous people.

3.4 Policies on the use of Multiple Languages

Article 5- Languages

1. *All Ethiopian languages shall enjoy equal state recognition.*
2. *Amharic shall be the working language of the federal Government.*
3. *Members of the federation may by law determine their respective working languages.*

“Let us each retain our own language in certain spheres, such as schools and universities, but let us also have a common language for joint activities, especially in civil life.”

In multilingual societies a multiple language policy is the only way to ensure full democratic participation.

In addition to issues of language use in national institutions, there is also a risk that national information media could be monopolized by speakers of one (or two) dominant languages.

3.5 Policies for Redressing Socio-Economic Exclusion

Article 35(Sub 3)-Rights of Woman

“...woman in Ethiopia ... are entitled to affirmative measures. The purpose of such measures shall be to provide special attention to woman so as to enable them compete and participate on the basis of equality with men in political, social and economical life as well as in public and private institutions.

Article 89(Sub 4)- Economic Objectives

Government shall provide special assistance to Nations, Nationalities and Peoples least advantaged in economic and social development. (Emphasis added)

- Addressing unequal social investments to achieve equality of opportunity;
- Recognizing legitimate collective claims to land and livelihoods and
- Taking affirmative action in favor of disadvantaged groups

Addressing Unequal Social Investments to Achieve Equality of Opportunity

Policies that promote growth of equity are necessary to achieve socio- economic inclusion for all groups. For most developing contrives this would include investing in the agricultural and other

labor intensive sectors and broadening access to assets, especially agricultural land. But too often, development policies become a source of inter-group tension. In other words, development itself can create, sustain and often intensify inequalities between groups and between individuals.

Taking Affirmative Action in Favour of Disadvantaged Groups

Affirmative action policies allocate jobs, promotions, public contracts, business loans, admissions to higher education and legislative seats on the basis of membership in a disadvantaged group. Such policies are needed when the disadvantage is under cultural exclusion.

Typologies of Federations

Section I: Theoretical Foundation of Federalism³⁰

The term “*federal*” was coined in 1685 by a group of theologians who revived the study of the holy and everlasting covenant which, from time to time made between god and people. They derived the term from the Latin word *foedus* (covenant) using it as the basis for their own philosophy of life.

The real meaning of “*federalism*” refers to an alliance, a treaty, or an oath of allegiance and, by implication, emphasizes the right of those who share in the covenant to make their own decisions.

Prerequisites for Federal Associations³¹

When separate states or communities want to unit on a federal bases, there are two basic considerations,

Firstly there must be a strong need and desire to shoulder common interests jointly.

Secondly there must be an equally strong need and desire to shoulder domestic interests separately.

Section II: Different types of Federations

One can differentiate one form of federalism from another on two bases: the first is based on its origin the second is based on its foundation.

Centripetal and Centrifugal Linking Units

- a. Centripetal linking is where independent states move closer together to create a federal state. Most federations have this type of origin, for example the USA and Switzerland.
- b. Centrifugal linking is where decentralized unitary units are converted into a federation. Usually unilateral action is initiated by the central authority. At the moment Belgium is in the process of changing over to a federal system in this way.

Federal Units³²

a. Territorial Units

Here, it is territorial area that serves as unit of the federation. These areas can again be subdivided into two kinds, namely city-states on the one hand and states on the other hand.

b. Corporate Units

is a type of federalism in which various groups or communities inhabit the same region and attend to their own domestic interests in accordance with the subsidiary principle, but naturally co-operate with each other on matters of common concern.

As far as the composition of the central legislative body is concerned, the various communities themselves compose the constituent parts or corporations.

The departure point is that a state such as this does not consist merely to a collection of individuals but of whole which consists of various collectivities.

a. Nation Centered Federalism: the foundation of the nation centered federalism was laid by Alexander Hamilton in "The Federalist". His belief in a strong national government was later reinforced by judicial decisions.

judicial review was often used as a weapon for, *"keeping the states within bounds"*. *"the national government is the government of all, its powers are delegated by all, it represents all and acts for all"*. It was the court's decision in this case that became the source of the "doctrine of implied powers"

b. State Centered Federalism:

"The powers delegated by the proposed constitution to the federal government are few and defined (article 1). Those which are to remain with the state governments are numerous and indefinite. The former will be exercised principally on external objects..... the powers reserved to the several states will extend to all the objects, which in the ordinary course of affairs, concern the lives, liberties and properties of the people and the internal order, improvement and prosperity of the state."

c. **Dual Federalism** *"the federal constitution, so far from intending to make its political spheres morally unequal in powers or to invest the greatest (union/center) with any species of:sovereignty over the least (states), intended the very reverse"*.

d. **Cooperative Federalism:**

they consider the possibilities of mutual aid. The most important device of cooperative federalism is that of providing grants-in-aid to the states. The Federal Government can attach stipulations while granting funds and finally is free to withdraw the grant whenever it discovers that the state is not complying with the stipulated conditions.

e. Creative Federalism: This has all the features of cooperative federalism, yet has some unique elements of its own. It lays emphasis on cooperation, not only between the federal and state governments but between them and the local units, private organizations and the public at large. All are regarded as a working team, dedicated to positive action in solving the problem facing the nation, with perhaps a different combination of forces at work in each different problem area and with the national government, not always the senior partner.

Part II: FDRE Constitution: Vertical and Horizontal Division of Power (HPR)

Chapter I

Form and Scope of Distribution of Powers³³

Section I: Exclusive Powers

In general, this refers to the powers to be distributed in federal systems falling to one of two main categories: exclusive powers and non-exclusive powers.

Traditionally the use of exclusive powers refers to the powers for which the federal constitution has created a monopoly, which either is in the hands of the federation or of the states

Section II: Shared Legislative Powers³⁴

Shared powers represent the meeting point of the two levels of governments, otherwise considered exercising exclusive shares of federal and state powers. These powers refer to that category of powers in which both the federation and the states exercise at some point at least part of the power.

Framework of Power³⁵

The federal government may use framework legislation to regulate federation wide standards while leaving the states room to legislate the details and to deliver the services in a manner adaptable to local situations. The states under this category of powers are allowed to fill in the gaps with more detailed laws. On the other hand, in Ethiopia Civil Law is the residual power of the states

Section III: Concurrent Powers³⁶

Article 51(1) provides that “[t]he Federal Government] shall protect and defend the Constitution.”

From this proposition one may arrive at the following conclusions, namely:

- a) Each and every state shall protect and defend its own, respective Constitution.
- b) Jointly and severally, states shall protect and defend the FDRE Constitution.
- c) The Federal Government shall also be responsible for protecting and defending the respective Constitutions of each and every state.

Here, aren't (b) and (c) concurrent powers?

Section IV: Residual Powers³⁷

Residual powers represent those powers not listed or partly listed by the Constitution and assigned to either unit of government.

The United States, Switzerland, Germany, and Ethiopian Constitutions have preferred to leave residual powers with the states while in India such powers belong to the center.

Section V: Fiscal Federalism: A General Description³⁸

In brief, the literature on fiscal federalism encompasses: principles of fiscal relations between central and sub national levels of government that is the command over resources by the various levels of government and the direction and size of inter governmental fiscal flows. This includes the divisions of tax powers and the means through which resources are adjusted to match expenditure responsibilities for central and sub national levels of government.

Generally, the study of fiscal federalism focuses on the allocation of expenditure responsibilities,

revenue raising powers and adjusting vertical and horizontal imbalances through intergovernmental fiscal transfers.

Division of Revenue-Raising Powers and Responsibilities³⁹

In a federal system, powers allocated to governments could be of two general kinds: functions and responsibilities to be discharged by each government, and means for affecting these responsibilities.

General Constitutional Methods in Division of Tax Powers⁴⁰

the entire revenue sources can be given either to the centre or to the states, or can be divided between them,.

Structure of Allocation of Taxation Power in Ethiopia

The FDRE Constitution divides taxation power into three categories, namely:- a) federal power of taxation, b) state power of taxation, and c) concurrent power of taxation.

In Ethiopia, the FDRE Constitution declares that the Federal Government shall levy taxes and collect duties on sources reserved to it, and the states, likewise, exercise the same power with respect to sources that fall under their jurisdiction. Thus, the two levels of government exercise their legislative and administrative powers within their respective spheres of taxation. As a result, the revenue generated from the respective sources belongs exclusively to each level of government. Each level of government is bound to respect the powers of the other.

Concurrent Power of Taxation⁴¹

several issues arose regarding the exercise of the concurrent power of taxation. Article 98 of the Constitution states that regional states shall jointly levy and collect revenue.

Residual Taxes⁴²

Article 99 of the Ethiopian Constitution reads: *"the house of Federation and the House of Peoples' Representatives shall, in a joint session, determine by a two-thirds majority vote on the exercise of powers of taxation which have not been specifically provided for in the Constitution"*.

Questions that matter

1. Do you differentiate between and among
 - a) Concurrent,
 - b) Joint, and
 - c) Shared taxation powers.

Delegated legislation:-

- A) Parliament is too busy a body. If it devotes its time in entering into minor and subsidiary details and attempts to lay down all rules, all its time will be taken over by only a few Acts. The pressure of time prevents Parliament from providing all the details and, therefore, has to confer on the executive rule-making powers to supplement the Act.

Limits:- is that, essential powers of legislation cannot be delegated. The essential legislative power consists of the determination or choice of the legislative policy and of formally enacting

⁴¹ Ibid.

⁴² Ibid.

that policy into a binding rule of conduct.

When we see the Ethiopian Constitution, there is a delegation of power at the federal level under Art 77(13), which stipulates that the Council of Ministers shall enact regulations pursuant to powers vested in it by the House of Peoples' Representatives. But, what about the case at state level? Does the state council, for example, in the Amhara Region., delegate its legislative power to the state administration the highest organ of executive power?

Chapter II

HoF and the Office of the President

Section I: - Federations and Second Chambers: HoF⁴³

The power of second chambers

In assessing the legislative power of upper houses in Federal countries, two trends are prominent. The first category of upper houses is equally share the power of law making with lower houses. The consent of both houses is a unconditional for a bill to obtain a legal force. The two houses in this regard are co-equal as no law can be enacted unless both houses agree on the same text . The second category of upper houses plays a subsidiary role. Each piece of legislation does not need the approval of both the lower and upper houses, but the latter make sure that the interests of the states are taken into account..

The HF: A non legislative second chamber

The FDRE constitution fulfills the minimum requirement of having a second chamber but with a totally different function. Article 53 states that there shall be two federal house named the house of people's Representative (HPR) and the House of Federation (HF).

The power and responsibilities of the House of Federation according the constitution and the proclamation consolidation the powers and responsibilities of the House of Federation are to:

- Interpret the Constitution;
- Organize the Council of Constitutional Inquiry;
- Decide, in accordance with the Constitution, on issues relating to the rights of Nations, Nationalities and peoples to self-determination, including the right to secession;
- Promote the equality of the peoples of Ethiopia enshrined in the Constitution, and promote and consolidate their unity based on their mutual consent.
- Strive to find solutions to disputes or misunderstandings that may arise between states;
- Determine the division of revenues derived from joint federal and State tax sources, and the subsidies that the Federal government may provide to the States;
- Determine civil matters which require the enactment of laws by the house of peoples'

Representatives.

- Order the federal Government to intervene if any state threatens the Constitutional order in violation of the Constitution;
- Determine on the draft proposal of electoral constituencies submitted by the National Election board based on Article 103/5/ of the Constitution;
- Determine jointly with the house of peoples' Representatives the power of taxation on revenue sources, in accordance with Article 99 of the Constitution, of which neither the Federal nor the State governments have responsibility
- Elect the president of the country in a joint session with the House of peoples' Representatives in accordance with Article 70/2/ of the constitution.
- Participate in the process of the Constitutional amendment as stipulated in sub-Article (I) and (2) of Article 105 of the Constitution:
- In collaboration with others, offer education and training, and whenever necessary, carry out research in matters pertaining to its responsibilities
- Establish permanent and ad hoc committees of the House;
- Elect the speaker and Deputy Speaker of the house

In this long list of the house of Federations powers and responsibilities, the only provisions we can trace legislative functions are Article 99, 62(7) and 105.

- To determine undesignated power of taxation (concurrently with the House of People's Representative)
- To determine the division of revenues derived from joint Federal and State tax sources, and the subsidies that the Federal government may provide to the States;
- To amend the constitution.

Tenure

If we examine the Ethiopian constitution, the House of Federation as the house of people's Representative is dissolved every five years. Furthermore, the election year for both the HPR and HF is congruent. As type of government is parliamentary democracy, the executive will also leave office and the ceremonial president is the only individual holding office between parliamentary elections. This clearly creates a power vacuum which could be a bodied if the terms of the HF and HPR are separated and the HF made a permanent institution which is not subject to total dissolution.

Judicial review by ordinary judiciary

Principle

Judicial review is the power of courts to pass judgment upon the constitutionality of the legislative acts which fall within their normal jurisdiction.

Courts can refuse to enforce a legislative which are unconstitutional and hence void.

HoF: Its Role in the Interpretation of Constitution

1. General

- 1) The House shall have the power to interpret the Constitution.

- 2) Notwithstanding with sub-Article (1) of this Article the House shall not be obliged to render a consultancy service on Constitutional interpretation.

2. Constitutional Interpretation

- 1) The house shall make the final decision upon draft proposal of constitutional interpretation submitted to it by the Council of Constitutional Inquiry.
- 2) A party dissatisfied with the decision of the Council of constitutional inquiry of rejection of case relating to review of constitutional interpretation may appeal to the House.

3. Forwarding cases of Constitutional Interpretation

The house shall forward new cases of Constitutional interpretation, submitted to it directly, to the Council of Constitutional Inquiry.

4. Principles for Executing Constitutional interpretation

- 1) The House shall identify and implement principles of Constitutional interpretation which it believes help to examine and decide Constitutional cases submitted to it.
- 2) Where the Constitutional case submitted to the house pertains to the fundamental rights and freedoms enshrined in the Constitution, the interpretation shall be made in a manner conforming to the principles of the Universal Declaration of human Rights, International Covenants on human Rights, and International instruments adopted by Ethiopia.

5. Additional Information and Evidence

The house shall collect additional information or order the pertinent body to produce evidence as may be necessary before it makes a final decision upon Constitutional interpretations.

It's Role in Fiscal Matters

The Ethiopian Constitution provides a separate regime of allocation of powers on matters concerning taxation (see above). The Ethiopian federal system insists on the allocation of separate legislative, executive, financial and judicial powers to each and every level of government.

Stability and Effectiveness⁴⁴

In much of the literature 'stability' is the major indicator of working democracy. The reasoning is that if a parliamentary system obtains stable government, then it equally obtains effective government. Conversely, unstable governments attest to inefficient government.

The Office of the Prime Minister

*"The prime minister is the chief executive, the chairman of the Council of Minister, and the commander-in-chief of the National Armed Forces."*⁴⁵

Appointment of the PM⁴⁶

- (1) *The prime minister shall be elected from among members of the House of Peoples' Representatives.*

- (2) *Power of government shall be assumed by the political party or coalition of political parties that constitute(s) a majority in the House of Peoples' Representatives.*

INTERVENTION IN CASE OF DETERIORATING SECURITY SITUATION

1. Principle

The security situation shall be deemed to have been deteriorated where there is an activity that disturbs the peace and safety of the public and the law enforcement agency and the judiciary of the Region are unable to arrest the security problems in accordance with the law.

2. Request of the Region

The State Councilor the highest executive organ of the Region shall present its request to the Prime Minister through the Ministry of Federal Affairs where any Region faces a deteriorating security situation and is unable to arrest it on its own.

3. Deployment of Force by the Federal Government

1. The Prime Minister shall deploy the Federal Police or defense force, or both to arrest the deterioration security situation taking into consideration the gravity of the situation. The force to be deployed shall be under the command of the concerned Federal organ;

6. Report

The Prime Minister shall present periodic report to the House of Peoples' Representatives on the activities carried out by the forces in the Region.

INTERVENTION IN CASE OF VIOLATIONS OF HUMAN RIGHTS

INTERVENTION WHEN THE CONSTITUTIONAL ORDER IS ENDANGERED

Parliamentary Control over Defense

I. Direct Control:

a. By Enacting Legislations

Following the procedures established by law and the Constitution, the House of Representatives, has as per Article 55(7) the power to determine by enactment the organization of the national defense and public security.

b. Allocation of Budget

On the basis of the budget proposal formulated by the Ministry of Defense, developed and submitted by the Council of Ministers, the House of Representative has the power to ratify the federal budget as per Article 55(11).

c. Enforcing Transparency

There is no direct reference to transparency with respect to defense, but the Constitution under Article 12 states that the conduct of affairs of Government shall be transparent. Then

- How is the scope of state secret determined?
- How much should the mass media have access to state secrets?

d. Enforcing Political Neutrality

Under chapter ten, Article 87(2)(4) and (5), captioned as on National Policy and Objectives, the Constitution stipulates

- Composition of the defense force shall reflect ethnic composition of the Country;
- The Minister of Defense shall be civilian;

- The armed forces shall at all times obey and respect the Constitution; and
- The armed forces shall carry out their functions free of any partisanship to any political organization(s)

Then:-

e. International Relation

The House of Representatives, as per Article 55 (12) has the power to ratify international treaty.

f. Human Right Infringement

- Under Article 55(7), it is provided that if the conduct of the forces infringe upon human rights, the House of Representatives shall carry out investigation and take the necessary measures.

g. The use of Defense in time of War and Peace

The House of Representatives has the power to:-

- As Commander-in-Chief of the Army, the Prime Minister leads the operational aspect of defense matters. The General Chief of Staff is directly under him.

h. The Council of Ministers

- determines on the implementation of the laws and decisions adopted by the House of Representatives;
- decides on the organizational structure of ministries and other organs of government; and it coordinates the activities of same;
- draws the annual federal budget and when approved by the House of Representatives, it implements same;
- submits draft laws to House of Representatives, including Emergency Decree made as per Art 93 of the Constitution;
- has the power to regulate matters by issuing regulations.

ssII. Peripheral Control Mechanisms

a. The House of Federation/Council of Constitutional Inquires:-

- by interpreting the Constitution.

b. Federal Ethics and Anti-Corruption Commission

- By creating awareness and promoting public service code of ethics.
- By preventing, if possible, when it is committed by investigating and bringing the cases before a court of law.

c. Human Rights Commission and Ombudsman

- What is and would be its role in defense matters?

d. Auditor General and the Ministry of Finance

- Conducting auditing annually and inspecting budget performance: fiscal and asset auditing;
- Regulating disbursement and purchasing of goods and services.

Charter III

The Judiciary and Other Organs of Control

Section I:- Judicial Power⁴⁷

Exclusive Power

The Ethiopian judicial system, theoretically speaking, is organized on a dual basis in which there are two parallel court systems, the federal courts and the state courts with their own independent structures and administrations.

Article 2(3) of Proclamation 25/96 as "*laws of the federal government include all previous laws in force which are not inconsistent with the constitution and relating to matters that fall within the competence of the federal government as specified in the constitution.*"

The Power of Cassation

the Federal Supreme Court shall have the highest and final judicial power over federal matters, whereas the State Supreme Court shall have the highest and final judicial power over state matters. In this regard, it appears, as far as state matters are concerned, there is no appeal from State Courts to Federal Courts. However, the assertion of matters within each respective state is not without difficulty. The Federal Supreme Court has found ways and means of reviewing State Supreme Court of last resort for appeals in civil and criminal cases.

- A. The Federal Supreme Court has a power of cassation over any final court decision containing a basic error of law.
- B. The State Supreme Court has power of cassation over any final court decision on state matters which contain a basic error of law.

Section II:- Power of other Organs of Control

- The Institution of the Ombudsman;
- The Human Rights Commission;
- Auditor General;
- The House of Federation together with CCI, as interpreters of the Constitution, which have been already treated, above.

Organization and Duties

The Ombudsman's Office is strictly unpolitical, and it has been a tradition that an Ombudsman should be acceptable to all the political parties

The Ombudsmen usually come from the judiciary and are recruited among persons who are, or would be suitable as Justices of the Supreme Court or the Supreme Administrative Court.

The Jurisdiction of the Ombudsman

The Ombudsman's supervision covers virtually all governmental agencies and the local government as well as the individual members of their staff. The four Ombudsmen, thus, supervise the police, the security police, the armed forces and the prison administration, respectively.

The Ombudsmen also supervise all other persons who exercise public power. For example, an employee of a state-owned company which is responsible for safety controls of cars can be subject to supervision by the concerned Ombudsman to ensure that no car with faulty design or

defects makes it to the roads.

Investigatory Powers

The Ombudsmen have vast powers of investigation which are laid down in the Constitution. Thus, they have access to all official documents

The Ombudsman's Office is usually described as an extraordinary institution.

The role of the Ombudsman is, instead, based on the principle of personal accountability of every official for his decisions.

Part III: Miscellaneous Concerns

Chapter II

Emergency Powers

Need for extra powers during Emergency⁴⁸

"In a federal country, such extraordinary emergency situation would call for a greater concentration of powers in the federal or national authorities and a greater encroachment (infringement) on the powers normally assigned to the State Governments.

The problem of Emergency in a Democracy

"Whatever be the form of Government, emergent situations are bound to arise in any country, owing to various factors like war, rebellion, natural disaster, economic or financial breakdown which call for immediate measure to be taken by the Government to safeguard the stability of the country or the safety of the citizens, which, in order to be adequate, must be different from or in addition to the normal system of administration.

Public emergency

Tests of: "Combining the foregoing two observations, a 'public emergency', which authorizes extraordinary measures derogating from human rights, may be defined as -

- a) An exceptional situation,
- b) Which threatens the organized life of the whole community,
- c) Which calls for extraordinary measures, and
- d) Which are not permitted by the normal machinery of the administration.

War Emergency

Other Public Emergency⁴⁹

International Charters

"*Natural catastrophe*, such as famine, or pestilence, flood, earthquake, causing destruction of life or property.

- a) *Economic* or financial crisis caused by war by continuing even after its termination.
- b) An *economic crisis*, like inflation, in time of peace, imperiling the well being of the nation as a whole, so as to require a regulation and control of prices, profits, wages, salaries, dividends and

the like. ..”

What measures would be justified to deal with the Emergency⁵⁰

- i) The safeguards taken for preventing abuse of the extraordinary powers;
- ii) The extent of invasion of human rights and liberties;
- iii) The manner in which the measure were applied.

Rights which cannot be derogated front even in Emergency

- (i) Right to life (Art. 6).
- (ii) Immunity from torture or inhuman treatment (Art.7).
- (iii) Freedom from slavery or servitude (Art. 8(1)-(2))
- (iv) Immunity from imprisonment for non-fulfillment of contractual obligations (Art.11).
- (v) Immunity from retroactive or *ex post facto* criminal laws and penalties (Art. 15).
- (vi) Right to be recognized as a person before the law (Art.6).
- (vii) Freedom of thought, conscience, religion (Art.18).

Chapter III

Constitutional Interpretation and Creating Nexus with (Mainstreaming) of Constitutional Values

Section I: Principles of Interpretation in Continental and Common Law Systems⁵¹

In detail, the following series were developed in the process of interpretation of statutes in Common Law Countries:-

- o literal theory,
- o subjective theory,
- o purposive theory,
- o teleological or value-coherent theory,
- o systematic or comparative theory,
- o judicial or free theory,
- o objective theory or delegation theory.

Literal Theory

the words do not by themselves determine the legal meaning but have to be interpreted in their legal context or by going back to the intent of the law-giver. The relationship between words and their meaning is not mathematical or quantitative. According to the theory the following rule was accepted: *“Words should be generally given the meaning which the normal speaker of the English language would understand them to bear in the context, in which they were used.”*

Intentional or Subjective Theory

There are also two different ways to detect the subjective meaning or the intent of the law-giver: *“The first way would mean to find out what the draftsmen or members of parliamentary committees wanted to express in their comments or papers. Sometimes it might be*

possible to find out what the legislator really meant when he used a certain word or a certain language.

"There is however a second way, which is to find out the aim of the lawgiver in changing the policy of the existing law or in correcting an inadequacy in it. The same is also sound as a fiction, and, as such, the aim of the legislator must be carefully detected out of the law giving process. This form of subjective interpretation is very close to another method which will be explained in the next

The Purposive Theory

The purposive theory can be said objective and much more general with regard to the interpretation of a rule or regulation. This theory does not look at the always doubtful intention of the law-giver, but at the objectives of the law as a whole rather than at the specific rule which is to be applied.

In such instances, a method, which is called the contextual approach, is employed; a method that prescribes that the regulation or the very specific rule in question be put into the whole system of the enactment or even the code itself.

Teleological Theory

The judges tried to find the spirit or the letters of the law. This method is not identical with the purposive method because the teleological theory is based on equity.

The idea that laws have to be softened or tempered by equity can already be found in antiquity. This teleological method is clearly value oriented; which means that in an equitable approach such basic values like freedom and equality, fairness and due process by means of interpretation of the law and the Constitution should be given effect to. Although in Continental Law, the idea of equity does not play the same role as in the Common Law, the idea of teleological interpretation, as a value oriented instrument, is often employed.

Systematic or Comparative Theory

some elements of the intentional theory, the purposive theory and the teleological theory are put together in this method. This results from the fact that Continental Law is generally based on codified law; i.e. on an organized and logical system of rules. The purpose of a law or regulation can therefore often be found in other parts of the same enactment. In the same way, the so called contextual aids or elements, which are used by the intentional theory, also form a systematic order and belong, therefore, to the systematic method of interpretation.

Objective Theory or Delegation Theory

This theory was originally developed as a reaction against the intentional theory, because it was believed to be more or less a fiction that the interpreter could find out the real intention of the lawgiver. This theory believes that the words of a regulation are just a delegation to the Court; one that gives it the competence for its own interpretation. Therefore the more imprecise the regulation would be, the more authority would be transferred to the Court to decide.

6. Intervention of the Federal government

- 1) The House shall order the Federal Government to intervene in any State in which it believes the constitutional order is endangered.
- 2) The House shall take this measure having due regard to the general constitutional structure and

division of powers. The following cases are, however, sufficient to say that the constitutional order is in danger:

- a. Suspension of government institutions recognized in the constitution directly or indirectly from their regular functioning or;
- b. The failure of any state to execute directives given to it by the House of Peoples' Representatives in accordance with Article 55/16/ of the constitution, or its unwillingness to do so or;
- c. Where the state fails to secure peace and security using its own regular peace keeping mechanism due to the fact that the problem is beyond its control and fails to call the Federal Government to intervene in such state of affairs

3 HUMAN RIGHTS LAW

Chapter One: Introduction to Human Rights Law

Nature and Definition of Human Rights- they belong to an individual as a consequence of being human.

Human rights differ from other rights in two respects. Firstly, they are characterised by being:

- Inherent in all human beings by virtue of their humanity alone (they do not have, *e.g.*, to be purchased or to be granted);
- Inalienable (within qualified legal boundaries); and
- Equally applicable to all.

Secondly, the main duties deriving from human rights fall on states and their authorities or agents, not on individuals.

Classification of Human Rights

1) CLASSIC AND SOCIAL RIGHTS

'Classic' rights are often seen to require the non-intervention of the state (negative obligation), entail an obligation for the state to refrain from certain actions. civil and political rights, often require considerable investment by the state.

'social rights' as requiring active intervention on the part of the state for their effective realization, oblige it to provide certain guarantees.

2) CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS

civil rights - the right to life, liberty and security of the person

political rights- freedom of expression, freedom of association and assembly, the right to take part in the government of one's country.

economic and social rights- to the right to property, the right to work, the right to a fair wage, a reasonable limitation of working hours, and trade union rights.

cultural rights- the right to participate freely in the cultural life of the community, to share in scientific advancement, and the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author.

DIFFERENCES

*civil and political rights are considered to be expressed in a very precise language, imposing merely negative obligations which do not require resources for their implementation, and which, therefore, can be applied immediately.

economic, social and cultural rights are considered to be expressed in vague terms, imposing only positive obligations conditional on the existence of resources and therefore involving a progressive realisation.

* civil and political rights are justiciable whereas economic, social and cultural rights are not.

3) FUNDAMENTAL AND BASIC RIGHTS ?????

Fundamental rights are taken to mean such rights as the right to life and the inviolability of the person.

basic rights, which should be given absolute priority in national and international policy. These include all the rights which concern people's primary material and non-material needs- the right to life, the right to a minimum level of security, the inviolability of the person, freedom from slavery and servitude, and freedom from torture. . .

4)OTHER CLASSIFICATIONS

Freedoms- Preconditions for a dignified human existence have often been described in terms of freedoms (*e.g.*, freedom of movement, speech, belief, freedom from torture, and freedom from arbitrary arrest).

Civil liberties- The concept of 'civil liberties' is commonly known, particularly in the United States, Zese refer primarily to those human rights which are laid down in the United States Constitution: freedom of religion, freedom of the press, freedom of expression, freedom of association and assembly

Individual and collective rights- Although the fundamental purpose of human rights is the

protection and development of the individual (individual rights),

some of these rights are exercised by people in groups (collective rights), eg, selfdetermination (membership is a must)

First, second and third generation rights

The division of human rights into three generations was first proposed by Karel Vasak at the International Institute of Human Rights in Strasbourg. His division follows the principles of *Liberté, Égalité* and *Fraternité* of the French Revolution.

First generation rights are related to liberty and refer fundamentally to civil and political rights.

The second generation rights are related to equality, including economic, social and cultural rights. Third generation or 'solidarity rights' cover group and collective rights, which include, *inter alia*, the right to development, the right to peace and the right to a clean environment.

Sources of Human Rights Law

- International conventions, whether general or particular;
- International custom, as evidence of general practice accepted as law;
- The general principles of law recognised by civilised nations;
- Subsidiary means for the determination of rules of law (*judicial decisions and the teachings of the most qualified publicists*)
- decisions and teachings of the most highly qualified publicists.

Chapter Two: Human Rights Systems :(Substantive Rights, Institutions and Procedures)

1)The Universal System: The UN System

***The Legal Framework-** UN Charter, UDHR, ICCPR, ICESCR (boz 've normative & procedural parts), International Convention on the Elimination of All Forms of Racial Discrimination ,1965 (CERD), CEDAW (1967) (The issues of gender-based violence are not specifically addressed in the convention. The committee set up under the convention has also addressed this subject in its General Recommendation of Article 19), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), CRC (1989),

Reservations and Declarations

a reservation is a statement made by a state by which it purports to exclude or alter the legal effect of certain provisions of a treaty in their application to that state.

A state may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) The reservation is prohibited by the treaty;
- (b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) In cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Some conventions allow or even require states parties to make declarations concerning the extent to which they are bound by a certain provision. Such statements may relate to the competence of a supervisory mechanism.

Eg. Article 41 ICCPR stipulates that a state party may choose (not) to recognise the competence of the Human Rights Committee to receive state complaints regarding its human rights performance.

Restrictions and Derogations

Conventions and other instruments may contain a number of restrictions or limitations to the rights they stipulate. (no rt is absolute)

Some human rights instruments allow states to take measures derogating temporarily from some of their obligations. Derogating measures must be of an exceptional and temporary nature. the state is allowed to suspend the exercise of some rights when necessary to deal with an emergency situation.

The rationale for derogation provisions is to strike a balance between the sovereign right of a government to maintain peace and order during public emergencies, and the protection of the rights of the individual from abuse by the state. the state is allowed to suspend the exercise of some rights when necessary to deal with an emergency situation.

***Institutions and Procedures**

-Treaty-based mechanism: supervisory mechanisms enshrined in legally binding human rights instruments or conventions.

-Non-treaty- based (charter-based) mechanisms: supervisory mechanisms not based on legally binding human rights treaty obligations. Zey r based on the constitution or charter of an intergovernmental human rights forum, or on decisions taken by the assembly or a representative

body of the forum in question. (ICJ, UNGA, UNSC, Eco and Soc Council, UNHRs Council, ILO)

The various supervisory procedures established in human rights treaties can be divided into four main groups:

- Reporting procedures
- Inter-state complaint procedure
- Individual complaint procedure
- Inquiries and other procedures

2)Regional Human Rights systems

The African Human Rights System- In June 1981, the ACHPR was unanimously adopted at the Nairobi Assembly of Heads of states and Government of the OAU. It became operative in October 1986, and an African Commission (An 11 member) began functioning on 2 November 1987.

In 1998, the thirty-fourth summit of Head of State and Government of the OAU adopted a protocol to the ACHPR for the establishment of an African Court on Human and People's Rights.

The Arab and Asian Human Rights System- The Arab and Asian states have not yet created regional human rights regimes, but some steps have been taken in that direction.

In Asia, despite efforts by NGOs and the U.N., governments in the region have been unwilling in general to ratify global human rights instruments, or create a regional human rights system.

Chapter three: Systems of Protection for Vulnerable Groups

There are particular groups who, for various reasons, are weak and vulnerable and consequently require special protection for the equal and effective enjoyment of their human rights.

Twelve groups are discussed: 1) women and girls; 2) children; 3) refugees; 4) internally displaced persons; 5) stateless persons; 6) national minorities; 7) indigenous peoples; 8) migrant workers; 9) disabled persons; 10) elderly persons; 11) HIV positive persons and AIDS victims.

Women's rights

After the Second World War, a number of treaties on the protection of women were drafted and both the UN Charter and the International Bill of Human Rights proclaim equal rights for men and women and ban discrimination on the grounds of sex.

In addition to instruments relating to discrimination in general, a whole series of instruments have been developed specifically for the protection of women, the elimination of discrimination against women and the promotion of equal rights.

CEDAW calls for national legislation banning discrimination. It allows for temporary special measures ('affirmative action') to accelerate the achievement of equality in practice.

On 6 October 1999, the General Assembly adopted an Optional Protocol to the CEDAW. It establishes a procedure that allows individual women, or groups of women, to submit claims of violations of rights protected under the Convention to the CEDAW Committee.

UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949), the UN Convention on the Political Rights of Women (1952) and the UN Convention on the Nationality of Married Women (1957), the Rome Statute of the International Criminal Court (1998)

The rights of the child

In 1924, the League of Nations adopted a Declaration on the Rights of the Child (Declaration of Geneva), containing five basic principles reflecting the clear consensus that children were in need of special protection.

In 1959, the UNGA unanimously adopted another more elaborate Declaration on the Rights of the Child, stating in the preamble that 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'.

Serious work on drafting a convention on the rights of the child began in the final years of the 1970s, resulting in the UNGA adoption of the Convention on the Rights of the Child (CRC) on 20 Nov. 1989. As of July 2004, 192 states had ratified it. (The United States and Somalia are the only UN members)

- The principle of non-discrimination (Article 2);
- The best interests of the child (Article 3);
- The right to life, survival and development (Article 6); and
- Respect for the views of the child (Article 12).

The CRC establishes the Committee on the Rights of the Child to supervise the progress made by

the states parties in achieving the realisation of their obligations contained in the Convention.

United Nations Children's Fund (UNICEF), one of the key organisations concerned with children's rights.

The rights of indigenous people

They have only after World War II become the subject of international human rights debate.

Similar to the case of minorities, the diversity of indigenous peoples impedes a definition. The indigenous differ enormously in cultures, religions, and patterns of social and economic organisation

The first international standard on indigenous populations was ILO 107 (1957), revised and reformulated in 1989 and amended in ILO 169.

Since the 1970s, the United Nations has been involved in initiatives, frequently in co-operation with the ILO and the OAS, concerning the development of specific standards for the protection of indigenous peoples. In 1982, the UN Working Group on Indigenous Populations was created as a body of the Sub-Commission for the Prevention of Discrimination and Protection of Minorities

The Working Group on the Draft Declaration on the Rights of Indigenous Peoples, which was established by the UN Commission on Human Rights, has been debating the draft Declaration on an article-by-article basis, with the participation of a number of organisations of indigenous peoples.

The Declaration was to be adopted by the UN General Assembly in December 2004 at the end of the decade of the rights of indigenous peoples. However, as of July 2004, there was still no consensus on a draft text; indigenous peoples and governments differ on issues related to the right to self-determination, collective rights and the exclusive right to use natural resources.

At the UN treaty-based level, the Human Rights Committee has been called upon several times by indigenous persons to decide on possible infringements of their human rights.

Three charter-based bodies have been established to deal with issues relating to indigenous peoples at the UN: a) the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, b) the Working Group on Indigenous Populations, and c) the Permanent Forum on Indigenous Issues.

Protection of disabled persons

international human rights instruments protect the rights of persons with disabilities through the principles of equality and non-discrimination.

The UDHR refers expressly to disabled persons, stipulating in Article 25 that ‘everyone has the right to security in the event of [...] disability’, but nor its derivatives, the ICCPR and ICESCR.

the ACHPRs stipulates in Article 18(4) that the disabled shall be entitled to special measures of protection. The European Social Charter (revised), Article 6 of the Protocol of San Salvador stipulate

Two international conventions dealing directly with the rights of disabled persons have been drafted r

One is the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities 1999) (see 2.3), the only regional convention of its kind in the world & ILO 159 concerning Vocational Rehabilitation and Employment (Disabled Persons) (1983).

Specific non-binding instruments have also been adopted at the international level addressing the rights of disabled persons. These include the Declaration of the Rights of Mentally Retarded Persons (UNGA Resolution 26/2856 (XXVI), 1971); the Declaration on the Rights of Disabled Persons _ (UNGA Resolution 30/3447 (XXX), 1975); the World Programme of Action concerning Disabled Persons (UNGA Resolution 37/52, 1982)

Elderly Persons

As the world’s population ages and the traditional role of the family as the main support of older people weakens, the elderly are increasingly vulnerable to abuse and various forms of negative stereotyping and discrimination.

the rights stipulated for the elderly in international instruments stem from the principles of dignity and non-discrimination.

Neither the UDHR nor its derivatives, the ICCPR and ICESCR , contain any explicit reference to older persons, but many provisions of these instruments are of direct relevance to ensuring equal opportunities and the full participation of the elderly.

Three regional human rights instruments expressly mention older persons as a group in need of special protection r , Article 18(4), the African Charter , The Protocol to the African Charter on the Rights of Women in Africa & Article 17 of Protocol San Salvador.

In 1992, the General Assembly adopted the Proclamation on Ageing.

In 2002, the 2nd World Assembly on Ageing adopted a 2nd International Plan of Action on Ageing.

Refugees

In the aftermath of World War II, the international community included the right to seek and enjoy asylum in the 1948 Universal Declaration of Human Rights. In 1950, the Office of the United Nations High Commissioner for Refugees (UNHCR) was created .

in 1951, the United Nations adopted the Convention Relating to the Status of Refugees. The Protocol relating to the Status of Refugees (the 1967 Protocol) helped to widen the definition of a refugee, as it lifted the time and geographic limits found in the 1951 Convention.

Stateless persons

Nationality is not granted indiscriminately, but is normally based on factors such as the place of birth of a person, parentage or the relationship a person has established with a state through, for example, marriage to a national or long-term residence there.

A stateless person is the person who is not considered a national of any state under operation of its law. Statelessness occurs for many different reasons.

A person may lose her/his nationality and is not able to acquire a new one because of extended stay abroad or because of marriage or dissolution of marriage to a person of a different nationality.

The two primary international conventions on statelessness are the Convention relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961).

Ozers r Convention on the Nationality of Married Women (1957), CEDAW (Article 9) and CRC (Articles 7 and 8).

At the regional level, the American Convention on Human Rights (1969) and the European Convention on Nationality (1997) underline the need of every person to have a nationality.

Similar to the situation of IDPs, there is today no specific body that deals with the problem of statelessness, or that supervises the 1954 and 1961 statelessness conventions. In order to fill this vacuum, upon the entry into force of the Convention on the Reduction of Statelessness in 1975, UNHCR was provisionally asked to assume the responsibilities.

Migrant workers

Historically, the rights of migrant workers have fallen under general diplomatic protection, based on the international law governing the treatment of non-nationals.

In 1990, the UNGA adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

It provides for the establishment of a Committee. In 1997, the UN Commission on Human Rights

established the Working Group of Intergovernmental Experts on the Human Rights of Migrants with a mandate to gather all relevant information.

in 1999 the Commission appointed a Special Rapporteur on the human rights of migrants.

HIV Positive Persons and AIDS Victims

The incidence of HIV/AIDS is disproportionately high in groups who already suffer from lack of protection and discrimination; such as women, children, those living in poverty, minorities, refugees and internally displaced people.

The key human rights principles are to be found in ICESCR; ICCPR; CEDAW; CAT; CERD; and the CRC . the Paris Declaration on Women, Children and AIDS (1989).

At the regional level, the American Convention on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the African Charter on Human and Peoples' Rights also enshrine general state obligations.

The UNGA has emphasised the need to counter discrimination and to respect human rights of people with HIV/AIDS in several resolutions & The UN Commission on Human Rights doing z same.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) and the joint United Nations Programme on HIV/AIDS (UNAIDS) have developed guidelines to assist states.

Chapter Four: Culture, Globalization and Human Rights

Section One: Culture and Human Rights

Universal Human Rights and Cultural Relativism

Cultural relativism is the assertion that the promotion, protection, interpretation and application of human rights which could be interpreted differently within different cultural, ethnic and religious traditions. human rights are culturally relative rather than universal.

Accordingly, the promotion and protection of human rights perceived as culturally relative would only be subject to State discretion, rather than international legal imperative.

Based on universal perspective human rights are the natural-born rights for every human being, universally. They are not privileges.

human rights are for all human beings, regardless of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

The denial or abuse of human rights is wrong, regardless of the violator's culture.

UN as proclaimed in its Charter, which states that human rights are "for all without distinction".

The Charter further commits the United Nations and all Member States to action promoting "universal respect for, and observance of, human rights and fundamental freedoms".

consensus is embodied in the language of the Universal Declaration itself.\

Human Rights, Cultural Integrity and Diversity

Like most areas of international law, universal human rights are a modern achievement, new to all cultures. Human rights are neither representative of, nor oriented towards, one culture to the exclusion of others.

universal human rights emerge with sufficient flexibility to respect and protect cultural diversity and integrity.

Most directly, human rights facilitate respect for and protection of cultural diversity and integrity, through the establishment of cultural rights embodied in instruments of human rights law.

Every human being has the right to culture, including the right to enjoy and develop cultural life and identity. Cultural rights, however, are not unlimited.

cultural rights do not justify torture, murder, genocide, discrimination on grounds of sex, race, language or religion, or violation of any of the other universal human rights and fundamental freedoms established in international law.

Section two: Globalization and Human Rights

Because of this more people are crossing borders in search of jobs and in most conditions people are forced to work in inhuman conditions for lower wages.

The transnational companies are the spearheads of globalization and have become the dominant economic and political force in the world economy.

Globalization has substantially contributed to the intensification of debt, poverty and economic crisis in the developing world.

Human rights have become an integral part of the process of globalization in many ways. The Western countries are increasingly using their view of human rights concept as a yardstick to judge developing countries and to deal with economic and trade relations to extend development assistance.

The aims and objectives of the so-called development models promoted by different

governments or international development agencies are not compatible with human rights standards.

Human rights have entered the already numerous criteria for allocating aid fairly recently. this entry has been neither easy nor smooth because no general criteria have been developed by donors and consequently decisions have been made on case-to-case basis.

several developed countries in the world have been trying to inter-relate trade policy with human rights policy. The case of China has been controversial, with opinion in the United States sharply divided on the desirability of conditioning trade preferences on compliance with specified human rights.

Keeping millions of Chinese in poverty by restricting their right to trade, in the hope of promoting human rights, is neither logical nor moral. Likewise, depriving Americans of the freedom to trade and invest in China violates their rights to liberty and property”.

Impact of Globalization on Human Rights

The Human Development Report of 1997 revealed that poor countries and poor people too often find their interests neglected as a result of globalization.

it ultimately causes increased impoverishment, social disparities and violations of human rights.

CHAPTER Five: RESPONSES TO GRAVE VIOLATION OF HUMAN RIGHTS

Section One: National responses -Transitional Justice

The international system of addressing violations becomes relevant if the domestic system is unable/unwilling to provide remedies.

Regime change is a prerequisite for putting the national mechanism of responding to such violations.

transitional justice means justice at the time of transition.

Societies in transition may have variety of needs/concerns related to past violations.

-The need for justice - The need to know the truth - The need for conciliation

The modalities of transitional Justice

-Prosecution - Truth & reconciliation - Amnesty

Section Two: International Responses

The criminal responsibility of individuals under international law contributes to fight impunity, however, limited it is.

The mechanism by which international law ensures that has taken different forms. These include:

(1) the recognition & application of the principle of universal jurisdiction- Universal jurisdiction allows for the trial of international crimes committed by anybody, anywhere in the world. There are offences recognized by international law as punishable by any country.

(2) prosecution and trial by *ad hoc* international tribunal, and

(3) prosecution & trial by a permanent international tribunal called the International Criminal Court.

4 FEDERALISM

Chapter one

The Context of the Federal System in Ethiopia

Part One- HISTORIC ETHIOPIA AS A DE FACTO FEDERATION

Except for the twentieth century, a cursory reading of history reveals that Ethiopia has for the most part been under a decentralized rather than a centralized system of governance.

One observes a co-existence of a duality of authorities, mainly that of the Imperial throne, representing the center and a number of *provincial nobilities* effectively exercising decentralized power.

regionalism or provincialism, one essential element of diversity that defined the Ethiopian state, characterized the relationship between the center and the provinces.

The cluster of kingdoms existed effectively for centuries until they were finally incorporated into the Ethiopian state in the second half of the 19th century. there always existed a network of trade relationships as well as relationships based on religion. The imperial throne served as a symbol of unity and the political system combined a balance of forces between the monarchy and regional nobility.

The process of centralization, modernization, nation building shined during Haile Silassie.

the religious, lingual, cultural as well as political and economic dominance gave birth to the 'question of nationalities.' the state failed to accommodate them.

THE PROCESS OF CENTRALIZATION (1930-1991)

*The Era of Written Constitutions

The 1931 Constitution- The first measure the Emperor took along the process of centralization was the grant of the Constitution.

the Constitution's major outcome was its ability to establish the legal framework within which governmental power was to be channeled and distributed. It was aimed against the personal, arbitrary and ill-defined powers traditionally held by the nobility.

The 1955 Revised Constitution- continued to reinforce the process of centralization.

a significant political factor that influenced the revision of the 1955 Constitution was The Ethio-Ertirean federation.

Interestingly enough it also contained an elaborate regime of civil and political rights for the *subjects*.

A basic development was the introduction of the representative principle for the chamber of Deputies whose members were elected on the basis of universal adult suffrage.

was a legal charter for the consolidation of absolutism.

The 1987 Constitution- The draft constitution was completed in 1986 and was formally submitted to public debate and ratified by a referendum in February 1987.

In an election in which a single party, WPE members, participated members of the National *Shengo* (parliament) were elected.

The Constitution stated that Ethiopia is a unitary state constituting administrative and autonomous regions.⁵² It stated that the nationalities are equal and ensured the equality of nationalities.

⁵² See Article 59.

each nationality would have regional autonomy to decide on matters concerning its affairs. Eritrea but without its Afar inhabited areas, Tigray, Assab for the Afars, Dire Dawa for the Issas, and Ogaden.

the WPE played this role and in the end not even the minimal versions of self-autonomy were put into practice. The Constitution in dealing with regional autonomy did not offer any hope in terms of reconciliation for peace with the opposition.

***THE TRANSITIONAL PERIOD (1991-1994)**

a national conference for this purpose was convened in Addis Ababa from July 1-5, 1991. The Conference resulted in the signing of the Charter by the representatives of some 31 political parties, the creation of an 87 seat Council of Representatives and the establishment of Transitional Government of Ethiopia (TGE).

The Charter established the framework for the provisional government and guaranteed nationalities to preserve their identity, administer their own affairs within their own defined territory, the right to participate in the central government based on fair and proper representation, and the right to self-determination.

The establishment of national regional self-governments was provided for in another proclamation. the proclamation enumerated sixty-four identified nations, nationalities and peoples and set up fourteen regions.

The striking point is that nowhere do the charter and the proclamation employ the term federation in either their preamble or specific legal provisions, although both documents ensure each nationality with the right to self-determination including secession.

If one looks at the legal framework from the angle of a federal system, there is no doubt that the balance swayed in favor of the center. the enumeration of the powers of the central government was not exhaustive and contained broad terms.

In the language of the Charter, the Transitional Government shall exercise all legal and political power for the governance of Ethiopia. In no unequivocal manner, the proclamation also stated that national regional transitional self-governments are in every respect, entities subordinate to the central TFG.

One of the major tasks of the transitional Council of Representatives was to direct the process of constitution making and pave the way for a new national election based on the ratified constitution.

*there is a widely held view that considers constitutions merely as instruments for promoting the political

will of the victorious ones/ruling elites of the time and not of the people per se and hence are viewed as instruments of submission, hence the saying “*Negus Aykesees Semay Aytates*”.

*Many of the constitutions have not been results of negotiated outcomes or of a publicly held consensus.

Chapter Two

Some Common Features among Federations

INTRODUCTION

in the contemporary world, federalism as a political idea remains still popular for reconciling unity and diversity under a single political system. (despite USSR & Yugoslav case)

Federalism as a political concept and federations in the form of institutions seem to provide ‘the closest institutional solution’ combining shared rule for some commonly shared purposes and self-rule for other purposes of regional interest in the world today.

federalism is also getting popular because it is employed as a means of solving ethnic conflicts.

FEDERALISM AND FEDERATIONS

Within the context of the older federations, federalism might mean the joining together of some semi-autonomous units for some common goals.

Within the context of the EU it might refer to the coming together of the bulk of European states and the emergence of new institutions combining confederal as well as federal features.

Within the context of former communist federations, federalism may mean the existence of some features associated with the division of powers in constitutional form rather than in operational reality.

In the African context, federalism is associated with the colonial experience of divide and rule. It means different things to different people depending on historical and cultural context.

* federalism refers to an ideology: a normative principle, while federations refer to institutions. Federation is descriptive concept referring to the actual system of governments.¹⁴ Federalism as a political philosophy is essentially an organizing principle.

¹⁴ King, *supra* note 11 at 74.

Federations constitute the institutional and structural techniques for achieving one of the goals of federalism.

-In confederation the central government had no direct authority to act upon the people. confederations occur when several pre-existing polities join together to form a common government for certain limited purposes such as foreign relations and defense, but the common government is dependent upon the states.

- As opposed to confederations, in decentralized governments the units, often called local governments, are subordinate to the center. However wide powers they may exercise, the local governments are merely creations of the center by a statute and as a result they may be wiped out by the center at any time.

- in decentralized systems, the emphasis is on self-rule rather than on shared rule. In a federation, the division of power is constitutionally guaranteed and the states are not creations of the federal government. Both the federal government and the states derive their authority from the federal constitution and as a result neither level can change the terms of the compact as enshrined in the constitution.

SOME COMMON FEATURES AMONG FEDERATIONS

* **Division of Power**- leg, exec, judicial & financial functions is constitutionally divided b/n the federal govt & the states,& that both orders of govt r autonomous with respect to z powers granted to them.

* **Written and Supreme Federal Constitution**- Federations originate from particular bargains. Written constitutions are, therefore, necessary records of the terms of the bargain. to write and adopt a constitution is to agree to the bargain itself.

The terms of the agreement, which establish the federal government and the states and which distribute powers between them, must be enshrined in a supreme federal constitution, which is binding.

It is supreme federal constitution b/c from w/c the federal govt and the states derive their authority.

-Federalism is a covenant b/c federations are considered to have resulted from the federal idea of compact, implying an agreement that is freely and mutually consented to.

But the assertion that federations are based on contracts needs to be adopted with a serious qualification.

1st, federations unlike confederations are not exclusively based on the presumed existence of sovereign states.

2nd, even referring to the states, they do not in all cases freely agree to enter or remain in the union.

3rd, even if it results from contracts, it still has a *unilateral* character. If we focus on the center-seeking federations (as in Switzerland and the US), the central government, crucial for the federation is absent during the federal bargain. In centrifugal federations (qedmo begara yenoru gizatoch yalubet Eth.), it could be said that the states are absent during the federal bargain. b/c zey were not in existence unlike Confederations.

***Rigid Constitution-** it must be rigid and require the participation of both the federal government and the states for their amendment.

Constitutions change and adapt and an agreed method for achieving constitutional adjustments as the need arises is often the key to the continued success of the federation.

const r amended according to procedures that differ from z procedures for amending ordinary laws. The Ethiopian Constitution is perhaps more rigid compared to the other federations.

***Umpiring the Federation-** z power to see the constitutionality of laws & settlement of disputes is vested to an impartial body, independent of the federation and the states.

Zere must be an umpire to rule on the interpretation of cases involving the division of power specifically and on the rule of constitutionality in general.

In US Supreme Court, in Switzerland through a referendum, In Germany the Constitutional Court, In Ethiopia the HoF.

*** Origin of Federations and Territorial Autonomy of the States-** The fact that federalism is considered the territorial distribution of power presupposes that the states have a stable territory.

in centrifugal federations there is a tendency to think that the states prior to the establishment of the federation or during the formative stages did not reflect major diversities that define the states and demands for territorial adjustments.

- centrifugal or 'holding together' federations are federations resulting from either a previously unitary state or a retiring colonial state.

-‘coming together’ federations r existing states r zero. Zey r center-seeking federations

* Existence of two or more orders of government

Chapter Three

Federations and Second Chambers

RATIONALE

With in Bicameral legisla-tures, federations are designed carefully with institutions that reflect the people as a whole on the one hand and the people as parts, often identified as states, on the other.

Representation by territories and representation by size of population as distinct princi-ples, operate in federations.

the lower house is often uniformly organized on the principle of proportional representation and there is a less strong federal element in it. But the upper chamber is often expected to reflect some federal idea and its legislative role is defended.

The first rationale emanates from the qualified application of the concept of sovereignty in federations, limit majority rule. Second chambers in federations provide a protective mechanism to smaller and more sparsely populated units feel potentially threatened by more densely populated states.

The second explanation emanates from division of power, in itself is premised on the idea that federations are principally organized on the concept of ‘self-rule’ for some purposes and ‘shared-rule’ for other purposes.

Self-rule means that an entity can decide certain matters autonomously over competencies within an overarching federal system.

Shared rule refers to shared competencies as well as shared institutions through which federal units are accorded special participation and input in the decision-making process at the level of the encom-passing entity.

*z FDREC, in the sense of having two cham-bers, the legislative power of the latter is very much contested. The only provisions where one may by stretch of imagination trace legislative functions are Articles 99, 62(7) and 105.

It declares: 'The HPR shall have the power of legislation in all matters assigned by this Constitution to Federal jurisdiction.'

4 z nationalities, the right to be represented in federal government stipulated by Article 39(3) could not be pushed further to include the federal legislature. unlike the other federations, the Ethiopian Constitution fails to entrench the states or to use the terms of the Constitution, the nations, nationalities and the peoples to be part of the federal law-making process.

Art 39(3) is 4 z representations in z executive, HoF & other federal organs.

*Ethiopian Constitution 'betrays' the federal idea significantly. The territorial units have neither the minimum participatory role nor the even greater functions assigned to upper chambers. being hijacked by a few more populous ethnic groups.

*It betrays federal principle (incorporation of the states in the federal law-making process and federal practice) b/c HoF has no power of law making. Nor equitable representation can be applied in z HPR.

COMPOSITION

The principle of equality of regions- In the United States, the Senate embodying the principle of equal representation of the states, notwithstanding disparities in their population, was the price that the larger states had to pay for the participation of the smaller states in the federation. Accordingly, each of the 50 states enjoys formal equal representation in the upper house

The less populous states often fight to safeguard their interests from being swamped by the legislature composed by a popularly elected lower house. Accordingly, second chambers based on equal state representation are instituted to take care of the concerns of the less populous states.

The same principle is adopted under the Swiss Constitution, except for introducing the notion of full and half Cantons. Six half Cantons elect one and the remaining twenty each shall elect two senators.

The principle of equality of citizens - the Indian Constitution and German Basic Law represents a different principle that tries to balance the interests of the most populous states on the one hand and those of the less populous ones on the other.(provides a list of states and the corresponding seats allocated to each state)

Dilemma in Eth- Article 61(2) of the 1995 Constitution stipulates 'each Nation, Nationality and People shall be represented in the House of Federation by at least one member. Each Nation or Nationality shall be represented by one additional representative for each one million of its population.'

the organizational principle of the HoF is the same with the HoPR except that there is a significant difference in the number of constituencies, 100,000 for the former and one million for the latter.

*the nearly majoritarian HoF in Ethiopia, minority protection in the US and Switzerland, the German and Indian Houses balancing the tension between territorial and citizen equality, in between.

SELECTION

In the Ethiopian situation Article 61(3) envisages two possibilities. Members of the House of Federation may be elected indirectly by the state legislatures or the state legislature may decide the members to be elected directly by the people. So far experience indicates that all members are indirectly elected by the states.

In the US (until 1913) and Switzerland, at least initially, representation is based on the territorial principle and theoretically speaking the two representatives are expected to stand for the interests of the states.

In the US ,Since then, it is doubtful whether the Senators represent the interest of the citizen, the state or some regional interest such as the mid west, east or the south, as the citizen directly elects them.

Article 61(1) of the Ethiopian Constitution provides that the HoF is composed of representatives of nations, nationalities and peoples.

POWERS

in the US and Switzerland where the two chambers are co-equal in power and are directly elected. in the United States all legislative powers are vested in both houses.

It has equal powers in all bills including money bills, except that it is introduced in the House of Representatives. the advice and consent of the Senate (two-thirds vote) is a requirement for the approval of treaties concluded by the President. The Senate has a similar role in the appointment of ambassadors, or other ministers, consuls, and judges of the Supreme Court.

The Swiss Council of States is equally empowered in all legislative affairs.

In the German federation a bill requires the consent of the upper chamber (*Bun-desrat*) if it has financial implications or affects the duties of the Länder.

German federal-ism is often uniquely described as ‘executive federalism,’ signifying the fact that federal government is predominantly responsible for legislating most of the laws while the states are responsible for implementing such laws. *Bundestag/lower house*

The second chamber of India (council of states) with subsidiary power and playing a precipitate function in the law-making process.

It enjoys an even greater authority, going beyond the co-equal legislative role, compared to the lower house. ‘bills shall not be deemed to have passed by the houses of parliament unless it has been agreed to by both houses. . .

the Ethiopian HoF has completely different role. It does not have a legislative function. Some of the important powers conferred to the House under Article 62 include constitutional interpretation (political rather than a judicial function) and organizing the Council of Constitutional Inquiry.

It is perhaps in the area of fiscal federalism that the HoF could be considered important.

THE ROLE OF THE HOF IN INTERGOVERNMENTAL RELATIONS

Fiscal federalism is governing the allocation of revenue and expenditure responsibilities between federal and state governments and it also attempts to deal with the system of intergovernmental transfers between the federal government and the states as well as among the states.

HoF] shall determine the division of revenues derived from joint federal and state tax sources and the subsidies that the federal government may provide to the states.

the role of the HoF is double: it is the HoF that determines the criteria for the allocation of concurrent tax (Article 98) as well as on the subsidies that the states receive from the federal government.

Other powers of the HoF include: deciding issues related to self-determination of nations, nationalities and peoples, promoting the equality of the peoples; deciding disputes or misunderstandings that may arise among states; exercising concurrent powers together with the HoPR and this includes: the residue power on tax, election of the federal president, and constitutional amendment under Articles 104 and 105;

determining the division of revenues derived from joint federal and state tax sources and the subsidies that the federal government may provide to the states; determining civil matters which require the enactment of laws by the HoPR; ordering the federal government to intervene if any state threatens the constitutional order in violation of the constitution.

The main function of the House appears to be an institution for conflict resolution and adjudication of constitutional issues rather than a law-making organ.

*second chambers at *constituent units level* that take care of the interests of local minorities or indigenous people, on the one hand and a lower house that represents the interests of every citizen on the other, is vital.

Chapter Four

Forging Unity out of Diversity in Multicultural

Federations: The Ethiopian Experience

Federalism and the Accommodation of Diversity: The Ethiopian Experience

The federal system that started *de facto* since 1991 and *de jure* following the adoption of the 1995 constitution attempts to end the cycle of political crisis by decentralizing power and resources and by ensuring self rule to the ethno-linguistic groups at various levels.

Some of the features of the coming together include- the phrase 'We the Nations, Nationalities and Peoples of Ethiopia ...

However, the overriding power of the federal government in practice, the limited role of the constituent states in influencing the federal law-making process, explains its 'holding together' aspect.

The Constitution attempts to balance the interest of maintaining national unity on the one hand and the ethno-linguistic groups demand for cultural preservation and distinctiveness on the other.

Distinct Features of the Federal System

*The Explicit Recognition of Nations/Nationalities as Building Bricks of the Federation and Its Implications

Unlike many constitutions, the Preamble of the Const does not commence with the traditional constitutional

formula of “we the people,” but with “We the Nations, Nationalities, and Peoples of Ethiopia”

“All sovereign power resides . . . , right to self-determination, takes the territorial principle seriously, seven out of the nine constituent states (the only exceptions being the SNNPRS and Gambela) are named after the major nationalities that “dominate”, AA & DD r less autonomous compared to the constituent states b/c accountable to z fed govt,

* Shared Rule

* **Unicameral Legislature/Adjudication of Disputes-** the second/upper chamber (HoF) is not part of the law making process at federal level. federal law does not need the consent of the HoF, to be a law.

the Ethiopian federal system departs from this trend and grants the HoF among other things with the power to interpret the Constitution, resolution of disputes among the regions, decide on intergovernmental subsidies and joint taxes.

Some of the Contending Views on the Federal System- contradictory perspectives

The first group -the “ethnic” federation as a sign of the first mark of disintegration.“regionally based ethnicity may reinforce the demands of some ethnic groups for more and more states and finally for secession.

The second group - the paradox between generously granted constitutional powers and a centralized federal system in practice resulting from centralized policy making process and a dominant ruling party system that is responsible for generating most of the policy documents.

The third groups -Ethiopia's multicultural and multi religious context, the present federal system is the only panacea to the country's age old political crisis as it provides a decisive remedy for Ethiopia's long-standing problem of the “nationality question”.

Federalism and the Treatment of Minorities in the Regions

The notion of majority and minority in the Ethiopian federal context is indeed confusing.

The minority are nationals of the state of residence and possess ethnic, linguistic or religious characteristics (*identity stuff*) that distinguish them from the rest of the population.

Chapter Five

Division of Legislative Powers

THE FORM AND SCOPE OF DISTRIBUTION OF LEGISLATIVE POWERS

By *forms* of distribution of legislative power we are referring to the ways in which these powers are constitutionally allocated between the federal government and the states. (the technique of allocation of power.)

While the *scope* of legislative powers refers to the areas and amount of jurisdiction assigned to each order of government. (the substance of power allocated)

The constitutional allocation of legislative power is defined on the basis of three categories, namely exclusive powers (of the federal government and/or of the states), shared powers and reserve powers.

the use of exclu-sive powers refers to the powers for which the federal constitution has created a monop-oly, which either is in the hands of the federation or of the states.

-The Ethiopian Constitution in general follows the United States and Swiss forms of distribution of powers. According to Article 50(2) 'the federal government and the states shall have legislative, executive and judicial powers.'

-Shared Powers

***framework legislation** has been prescribed for the exercise of a power, a special type of shared power exists that in principle grants the federal government the compe-tence to issue general legislation in a specific policy field.

It is to regulate federation-wide standards while leaving the states room to legislate the details and to deliver the services in a manner adaptable to local situations.

Although it has traditionally been argued that the Ethiopian Constitution has no shared powers except in the area of taxation, it is clear that it provides some provisions dealing with framework powers. Art 55(6) the HPR is empowered to enact *civil laws*, w/c the HoF deems 'necessary to establish and sustain one economic commu-nity'. (civil law is a matter reserved to the states.) & Art 51(2) and sub (3) versus 52(2) c, Articles 52(2) d, 55(2) a, and 51(5)

***concurrent powers** As one category of shared powers, it refers to powers attributed to both entities. the general thinking about shared powers has been that Article 52(1)

one author notes that there are no concurrent powers in Ethiopia except on tax matters. However, it is still possible to argue that even in other, non-tax fields, Eg The states may, however, enact penal laws too on matters that are not specifically covered by the federal penal legislation.

The Ethiopian Constitution is silent as far as the thorny issue of regulating the relation-ship between federal and state law in general and in relation to shared powers in particular is concerned. (in case of conflict between state and federal law.)

two views- If one adopts the federal supremacy clause by default, then most of the principles stated in this section discussing shared powers in other federations, will hold true in Ethiopia as well.

But if one adheres to the 'supremacy of nations, nationalities and peoples' literally because of the principles stated on the preamble, the pretentious aggregate nature of the federation, Articles 8 and 39, then it may be difficult to state that federal law will pre-empt state law.

-Residual powers represent those powers not listed or partly listed by the constitution and assigned to either unit of government. The Ethiopian Constitution expressly confers residual powers on the states. **The** Constitution enumerates a list of seven jurisdictions given to the states in addition to the reserve clause. One may doubt the relevance of the enumeration of state powers as the states are granted reserve powers.

-frequency of federal intervention, the grounds for intervention and the effects of such intervention

(Art 359/2003) * federal government] shall deploy at the request of a state administration, federal defense forces to arrest a deteriorating security situation within the requesting state when its authorities are unable to control it.

* the HPR shall on its own initiative request a joint session of the HoF and of the HoPR to take appropriate measures when state authorities are unable to arrest violations of human rights within their jurisdiction.

*HoF shall order under Article 62(9) federal intervention if any state, in violation of this federal constitution endangers the constitutional order.

Chapter Six

Division of Executive Power and Intergovernmental Relations

DUAL VERSUS EXECUTIVE OR FUNCTIONAL FEDERALISM

federal systems enforce their laws and policies by setting up dual structures, federal and state institutions or by entrusting the state machinery with the power to enforce both federal and state laws.

executive power is co-extensive with the legislative power. FDREC states: 'The federal government and the states shall have legislative, *executive* and judicial powers.

It is true that there are some federal executive organs organized throughout the country to enforce federal laws, eg ERCA, Post Office, Insurance, Banking, Tele, Public Prosecutor, Some Ministries.

Dual Federalism - represented by the United States federation, where the allocation of executive authority is in principle considered co-extensive with the distribution of legislative responsibilities.

it follows that not only legislative but also executive, financial and judicial powers should be divided between the federal government and the states so that each will act autonomously.

Executive Federalism - The second possible arrangement of the executive. Germany and Switzerland and to some degree in India.

administrative responsibility has not coincided with legislative authority. Administration for many areas of federal legislative authority is constitutionally assigned to the governments of the units.

federal govt is for the most part responsible for law-making while the states are for administering it.

THE SYSTEM OF INTERGOVERNMENTAL RELATIONS IN ETHIOPIA

* **Delegation**- FDREC seems to provide for downward delegation only. It is silent as to whether the states can delegate their powers to the federal government.

the fear that upward delegation might affect the autonomy

*Co-operation through Executive Institutions

The political relationship between the federal government and the states is regulated by both formal structures weakly defined in the constitution and various proclamations as well as practice outside the legal framework. Eg Ministry of Federal Affairs.

the federal government provides the emerging states with additional support and this placed them under the Prime Minister's scheme of formerly the Office for Regional Affairs and presently the Ministry of Federal Affairs, which oversees their political development.

the Ministry in its conflict handling power, there is certainly an overlap with what is stated under Articles 48

and 62(6) of the Constitution on the powers of the HoF. The general scope is that the HoF does the legal aspect of the conflict but the Ministry of Federal Affairs handles administrative, political and developmental affairs with the states.

Co-operation through Party Channels- not unique to the Ethiopian federation. A political party is expected to harmonize the policies of the federal government and constituent states.

If the officials of both sets of government are adherents of the same ideology or followers of the same leader or leaders, then they might be expected to pursue harmonious policies.

the EPRDF is controlling all the regional state governments in the Ethiopian federation; either directly through the member parties or indirectly through affiliated parties.

the party structure in Ethiopia undermines the federal division of power and subordinates the regional governments to the federal government, centralizing trend in the federal system, intergovernmental conflicts are rare, perhaps absent.

* **Co-operation through the Process of Policy-Making**

states accept the economic, social and development plans issued by the federal government. In theory they can adapt the policies to fit their own circumstances but the federal government does play a key role in influencing through national policies.

Chapter Seven

Federalism and the Adjudication of Disputes

Constitutional Adjudication in Ethiopia: Exploring the Experience of the HoF

Art 62 and 83, the HoF is not only empowered to decide constitutional disputes but also to interpret the constitution.

The rationale can be gathered from the minutes of the Constitutional Assembly emanate from two sources.

A) One is related to the framers view of the 'nature' of the constitution in general and to the role of the nationalities in particular.

The framers think that the new federal dispensation is the outcome of the 'coming together' of the nationalities. Indeed, it is clearly stipulated in the preamble and Article eight that the 'nations, nationalities

and peoples are sovereign.’ The Constitution is considered as the reflection of the ‘free will and consent’ of the nationalities. It is, in the words of the framers, ‘a political contract’ and therefore only the authors that are the nationalities should be the ones to be vested with the power of interpreting the constitution. To this effect, the HoF that is composed of the representatives of the various nationalities is expressly granted the power to review the constitutionality of laws and of course other essential powers as well.

B) The second reason is related to the first. The framers were well aware of the fact that empowering the judiciary or a constitutional court may result in unnecessary ‘judicial adventurism’ or what some prefer to call ‘judicial activism’ in which the judges would in the process of interpreting vague clauses of the constitution put their own preferences and policy choices in the first place., this might result in hijacking the very document that contains the ‘compact between the nationalities’ to fit the judges’ own personal philosophies.

BOZ R FALSE B/C zen z time EPRDF was not in a position to believe in courts. It has had a great FEAR of courts b/c zey were z abusive machineries during z repressive military govt.

ORGANIZATION OF THE JUDICIARY IN A FEDERAL SYSTEM

the Ethiopian judicial system theoretically speaking is organized on a dual basis in which there are two parallel court systems, the federal courts and the state courts with their own independent structures and administrations.

There is a question as to whether the division of power inherent in federalism applies for judicial power to the extent of requiring each order of government to have its own court system.

On the one hand there is the view that state courts subject to review by the Supreme Court are sufficient to protect the interest of the federal government.

On the other hand, there is a view that federal courts like federal executive agents are desired to effectively implement the power of the federal government. If one takes the federal principle of division of power strictly, not only are legislative and executive functions divided between the federal government and the states, but judicial authority too is divided.

FDREC gives some hint about the organization of the judiciary. it states that supreme federal judicial authority is vested in the federal Supreme Court. It is only one Court with nation wide jurisdiction.

With the recent decision of parliament to establish inferior federal courts a full-fledged dual court structure is on its way, at least in five regional states. As a result there are inferior federal courts in some states while the delegated power seems to continue in three other states, Oromia, Amhara and Tigray.

In a nutshell, there may obviously be, like other powers, exclusively federal, exclusively state and shared judicial powers.

JURISDICTION

The Ethiopian judicial system, compared to other federations, stands constrained in its jurisdiction.

Firstly, judicial powers are being taken away from the regular judiciary to special other tribunals whose constitutional status remains controversial.

despite the constitutional clause under Article 78(4) stipulating that 'special or *ad hoc* courts which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions, there are controversial tribunals introduced from time to time by the federal legislature and they do seem to dismantle the courts jurisdiction.

(but still access to justice. It is stated 'every one has the right to bring a justiciable matter to and to obtain a decision or judgment by, a court of law or any other competent body with judicial power)

While the tribunals are unavoidable they should either be autonomous or else the highest judicial organ as in the supreme court should exercise judicial power on specific grounds. The trouble in Ethiopia is that such tribunals are neither autonomous nor subject to review at a higher level.

although the judiciary arguably has power to interpret the constitution, it has no power of reviewing the constitutionality of laws.

the judicial branch's power of reviewing decisions of several other tribunals is far from clear and the Court has not yet established it beyond doubt.

The Power of Cassation

* The minutes of the Constitutional Assembly also suggest that the federal Supreme Court has the power of cassation not only over federal matters but also on state matters and even more interestingly the federal Supreme Court reviews state matters in which the state Supreme Court has rendered a final decision by

way of cassation.

There is a contrary view saying practice should not justify the wrong interpretation of the law. Ethiopia has adopted a dual court structure and the practice distorts the structural set-up of the courts. This approach forces one to interpret 'any court' under Article 80 of proc 25/96 (it must be limited to the delegated function of the state courts.)

Basing the principle of federalism, when a matter is assigned to belong to a state jurisdiction it is based on the view that the matter is of local rather than of national importance.

Guaranteeing uniformity is often limited to federal laws, and not to state laws.

5 UNIT-I

INTRODUCTION TO CRIMINAL LAW

Section 1: General Considerations:

The Place Of Criminal Law In Criminal Science:

Criminal Law is the body of law defining crimes against the community at large, regulating how suspects are investigated, charged, and tried, and establishing punishments for convicted criminals.

"Crime" is an offence committed by an individual who is a basic unit of a society. Therefore, study of crime i.e. Criminal Science" is a social study. The main aims of Criminal Science are:

- To discover the causes of criminality,
- To devise the most effective methods of reducing the amount of criminality,
- To perfect the machinery for dealing with criminals.

branches of Criminal Science r

A) Criminology: the study of crime and criminal punishment as social phenomena. & concerned with causes of crimes.

1) Criminal Biology: investigates causes of criminality, which may be found in the mental or physical constitution of the delinquent.

2) Criminal Sociology: deals with enquiries into the effects of environment as a cause of criminality.

B) Criminal Policy or Penology: concerned with limiting harmful conduct in society. termed as 'Penology' and deals with treatment, prevention and control of crimes.

C) Criminal Law: The Criminal Policies postulated by the above twin sister-branches i.e. Criminology and Penology, are implemented through the instrumentality of 'Criminal law'.

*Criminal law in its wider sense consists of two branches, Substantive & Adjective/Procedural.

Nature and Scope Of Criminal Law

the whole body of criminal law to be efficient must have four important elements- Politicality, Specificity, Uniformity and Penal sanction.

Politicallity implies only the violations of rules made by the state are regarded as crimes.

Specificity of criminal law connotes that it strictly defines the act to be treated as crime.

General Objectives Of Criminal Law

protection of persons and property, the deterrence of criminal behavior, the punishment of criminal activity and rehabilitation of the criminal.

*'Purpose' can be defined as the ultimate objective to be attained. Art 1

Criminal Law, Private law and Morality-Distinguished

For a proper appreciation of the distinction between criminal law, civil law and morality, it is necessary to understand the "concept of wrongs" and their classification.

morality explains the values of a particular society.

Wrongs

(Acts forbidden by the Society)

Moral wrongs

(Interference of law is considered

Legal Wrongs

(where the interference of law is necessary)

Civil wrongs	Criminal wrongs
(Law interferes at the instance of the injured party)	(State as a matter of right interferes in most of the cases)

Relation between Morality and Criminal Law

- both aim at maintaining social order (murder, rape, arson, robbery, theft r condemned)
- Everything that is regarded as enhancing the moral guilt of a particular offence is recognized as a reason for increasing the severity of the punishment awarded to it.

Section 2: The Concept Of Crime:

Crime is a Deceiving Concept: b/c because it covers an enormous range of human behaviour.

It is in the bed room of a married couple where wife battering and marital rape happen, among the family members where child abuse and incest . . .

Crime is A Multidimensional Problem: has its effects on everyone-not just the criminal and his victim.

Definition of Crime:

-Literal Meaning of Crime: The word "Crime" was originally taken from a Latin term "Crimen" which means "to charge". crime is applied to *those acts that go against social order and are worthy of serious condemnation.*

- General Meaning of Crime: Oxford Dic. defines crime as "an act punishable by law as forbidden by statute or injurious to public welfare".

Blackstone, (1968) has defined crime as "*an act committed or omitted in violation of a public law either forbidding or commanding it*".

Stephen, crime is "an act forbidden by law and which is at the same time revolting to the moral sentiments of the society".

Austin, "*A wrong which is pursued by the sovereign or his subordinates is a crime. A wrong which is pursued at the discretion of the injured party and his representatives is a civil injury*".

the Criminal Code of FDRE, 2005, does not give any standard definition of crime, Art. 23(1) simply states stg.

'Crime' Distinguished From 'Civil Wrongs':

- “Crimes” r said to be harms against the society and are therefore, considered as graver wrongs.
- “Torts” & “Breaches of contract” r wrongs against individuals & r treated as lesser wrongs.
- unlike criminal offences tort may arise irrespective of fault (strict liability) or due to harm caused by others for whom a person is answerable (vicarious liability).
- “analogy” is forbidden in criminal cases (Art. 2 (1), but may be permissible in Civil cases where legal provisions embody illustrative (rather than exhaustive) lists.
- Criminal cases require certainty beyond reasonable doubt while the preponderance. . .
- Crime is a public wrong i.e. a harm done against the society. A ‘tort’ is a private wrong committed against an individual

Section3. The Development Of Criminal Law Of Ethiopia

The Fewuse Menfessawi, The Fetha Negest, The Ethiopian Penal Code, 1930, The Penal Code of the Empire of Ethiopia, 1957, The 1974 Revolution and Criminal Law Special Penal Code of 1981

The Criminal Code of the FDRE, 2005

- To Incorporate the Modern Legal Concepts w/c r adopted by z FDREC & IHRs instruments: HRs, Equality, . . .
- To Fill in the Lacunae: To Adopt a Comprehensive Criminal Code:
- Punishments for Certain Offences Increased
- Matters Concerning the Determination of Sentence Revised (sentencing manual art 84)
- Purpose of Criminal Law and Objectives of Punishment Redefined

Scheme of the Criminal Code of FDRE, 2005:

has incorporated the Ethiopian Criminal law systematically, coherently and comprehensively & organized in to general, special & petty parts.

the Special Part does not operate by itself but has to be considered together with the General Part. a person who behaves in a manner contrary to provisions of the Special Part is not automatically punishable.

mechanical imposition of sentence is not what is expected of a Judge, simply by referring to the punishment mentioned in the pertinent article of the Special Part.

Classification of Crimes under the Criminal Code

-Classification based on the “Seriousness of the Crimes” – CC simply classifies crimes into various titles on the basis of content rather than on the scale of punishment. ‘rigorous imprisonment’, ‘simple imprisonment’ and ‘arrest’ r there (de facto classification)

-Classification based on the “Subject matter” of the Crime- it is a clear cut and explicit kind of classification in CC. crimes against d/t interests are kept under various Titles.

*A ‘petty offence’ is an infringement of a mandatory or prohibitory provision of a law or regulation issued by a competent authority or a minor offence which is not punishable under the Criminal Law. Such acts or omissions are made punishable under the Petty Code. Art 735

UNIT -II

BASIC PRINCIPLES OF CRIMINAL LAW

Section 1: The Principle of Legality

Brief History of the Principle

there can be no crime committed, and no punishment meted out, without a violation of penal law as it existed at the time. *‘there is no crime or punishment without a pre-existing law that prohibits that crime’.*

This principle first became prominent at the time of the French Revolution towards the end of 18th C & was included in ‘the French Declaration of the Rights of Man’.

the king and the nobility were able to oppress their enemies and use the criminal law as an instrument of politics through the capacity of their judges to invent crimes and punishments as the need arose.

“nullum crimen sine lege, nulla poena sine lege”, is an important principle of Criminal law that has been inherited from the Roman Law. *“there must be no crime or punishment except in accordance with fixed predetermined law”*. Art 2 CC .

1) ‘nullum crimen sine lege’- The first ingredient of the principle is that “there are no offences other than those which are expressly provided by law”.

2) ‘nulla poena sine praevia lege poenali’- no punishment (can be imposed) without (having been prescribed by) a previous penal law.

3) ‘Non bis in idem’- Nobody shall be punished twice for the same act (double jeopardy)
common law maxim *“autrefois acquit and autrefois convict”* which means “the previous

acquittal or previous conviction may be pleaded by the accused as a bar to the subsequent trial”.

Section 2: The Principle Of Equality art 4

“All men are equally the children of god and Equal in his sight despite their widely differing temporal circumstances”

originated in the process of the development of Roman law. Romans and non-Romans (peoples they conquered) within the empire were governed under different sets of laws, by *‘jus civile’* (Civil Law) & *‘jus gentium’* (law of the nations) respectively.

Then after the belief in natural law led to the idea that non-Romans within the empire should have the same rights as citizens.

Meaning Of The “Equality” Principle:

All men are born equal and must be treated equally. Its two formulations are, “Equality before the law” and “the equal protection of the laws” (treating equals, equally and unequal unequally)

Exceptions By Virtue Of Recognized Immunities:

three exceptions to the principle of equality:

- Immunities sanctioned by Public International law,
- Immunities sanctioned by Constitutional law, and
- Requirements of individualization of Criminal Justice.

*Art.4 does not specify the persons who enjoy diplomatic immunity. But according to the well established principles of International law foreign sovereigns, ambassadors, diplomatic agents, war-ships of foreign countries, UN & AU officials, their families, secretaries, messengers and servants are exempted from the liability before municipal (domestic) courts of the state.

the remedy is to make a demand of his recall by the sending state, where appropriate action may be taken against him at the discretion of the sovereign whom he represents.

*Whenever a doubt arises as to whether a person who has committed a crime in Ethiopia does or does not enjoy diplomatic immunity, the decision must be made according to:

- a) Such laws or regulations as may have been enacted in the state of which the person concerned is a citizen or, by the international organization which he represents, or
- b) According to international practice.

* If an alien enemy commits a crime unconnected with war as theft, cheating, etc., they would be triable by the local criminal courts. Troops of foreign nations are also treated under the Martial Law.

* When armies of any state are stationed on the land of another state with the consent of the government of that State, they are immune from the jurisdiction of the local criminal courts.

* Art, 54 (5) & (6) & 63, FDREC, declare immunities to the 'Members of the HPR & HoF respectively.

*** Grounds for differential treatment in sentencing:**

- 1) The conditions in which the crime was committed, for instance, at night, by violence
- 2) Certain differences may exist among the criminals themselves, even when they have acted in similar conditions. an adult & a young person ,first criminal as on a habitual criminal,
- 3) Special situations might arise in which the court would have to deal with persons acting under special duties

* Article.4 makes room for differential treatment of women, children and the mentally abnormal (feeble minded) criminals.

Section3. The Principle Of Individual Autonomy:

Meaning of the Principle- each individual should be treated as responsible for his or her own behavior.

1)The Factual Element of Autonomy- individuals in general have the capacity and sufficient free will to make meaningful choices.

2) The Normative Element of Autonomy- the individuals should be respected and treated as agents capable of choosing their acts and omissions, and that without recognizing individuals as capable of independent agency they could hardly be recognized as moral persons.

the individuals should be protected from official censure, through the criminal law, unless they can be shown to have chosen the conduct for which they are being held liable.

Some Instances which can raise Dilemmas relating to the Principle of Autonomy

A)Euthanasia: Your Body, Your Death, Your Choice?- “good death” and refers to the action of a third party (Assisted suicide), usually a doctor to deliberately end the life of an individual, *voluntary or non-voluntary*.

*It is the doctor’s intention to cause the death of the individual that distinguishes euthanasia

from other medical practices causing death. This is *doctrine of double effect* since the treatment provided to ease pain has the additional effect of ending the patient's life.

* forcing people to live against their wishes violates personal freedoms and human rights and that it is immoral to compel people to continue to live with unbearable pain and suffering. But can anyone decide when and how to die? Value of life? Meaning of health care?

UNIT-III

JURISDICTION OF THE ETHIOPIAN CC

(Arts 11-22 of Z CC)

'Jurisdiction'- an aspect of sovereignty and refers to judicial, legislative, and administrative competence.

It is "the legal competence of a particular court to hear a certain type or class of cases".

1)'Negative' conflict of Jurisdiction: different courts deny the existence of jurisdiction, over the matter in question. there is the possibility of a criminal escaping punishment.

2)'Positive' conflict of Jurisdiction: different courts claim to have jurisdiction on the same crime, there is a risk that the criminal might be exposed to "double jeopardy".

*Conflicts of Jurisdiction at National level: arise as between Ethiopian Criminal courts, settled in accordance with Arts 99-107 of CPC.

Conflicts of Jurisdiction at International level: arise between an Ethiopian court and a foreign court, settled in accordance with Arts 11-22 of CC.

Section 1: Fundamental Principles Of Application Of Jurisdiction:

1)The Principle of Territoriality:- the courts of the place where the crime is committed may exercise jurisdiction has received universal recognition. Art 11

2) The Principle of Quasi-Territoriality or the Protective or Security Principle:- in a variety of political, immigration & economic related crimes. Art 13

3) The Principle of Active Personality or the Nationality Principle:- crimes committed in foreign countries by Ethiopian citizens may be tried in Ethiopia [Arts. 14, 15, (2) and 18 (1)].

3)The Principle of Passive Personality or the Passive Nationality Principle:- aliens may be punished for acts abroad harmful to the nationals of the forum. Art 17

4) The Principle of Universality or the Principle of Universal Jurisdiction:- acts of non-nationals

where the circumstances, including the nature of crime, justify the repression of some types of crimes as matter of international public policy.eg hijacking, trafficking, terrorism.

Application Of The Criminal Code As To Place

1. Principal Jurisdiction

2. Subsidiary Jurisdiction

A. Territorial Jurisdiction B. Extra-Territorial Jurisdiction.

* The word **any person** under Art. 11 mean and include a citizen of Ethiopia as well as a non-citizen. Exceptions to “any person” Art 11(2) r Ambassadors and Diplomats & Premises Occupied By The Foreign Missions.

* The principle of legality prohibits Ethiopian Courts from trying a person who does an act which is not declared unlawful by the territorial law of the country.

* the courts of Ethiopia have principal jurisdiction when an ‘act’ or ‘omission’ constituting an ingredient of the crime has occurred in Ethiopia, although the consequential harm might have been caused abroad. Art 25

* The land comprises not only that portion of the earth within the boundaries of Ethiopia, embassies abroad, Ships (a floating island) and Aircrafts flying Ethiopian flag. 104 CPC.

* subsidiary jurisdiction- crimes that do not directly and chiefly concern Ethiopia. These crimes also are committed extra-territorially.

- the Ethiopian Courts derive the jurisdiction from the foreign courts. This is to prevent a negative conflict of jurisdiction. Art 15(1),17(1) a& b, 18 (1)

Section 2: Extradition:

Meaning- the process whereby under a treaty or upon a basis of reciprocity one state surrenders to another state at its request a person accused or convicted of a crime committed against the laws of the requesting state, such requesting state being competent to try the alleged criminal.

* Extradition is made, as to a legal right, in respect of only those countries with which there is an agreement for this purpose, although countries generally do not, as a matter of international practice, even in the absence of an Extradition treaty refuse extradition.

Rationales

- The general desire of all states to ensure that serious crimes do not go unpunished

- The state on whose **territory** the crime has been committed is best able to try the criminal because the evidence is more freely available there, has the greatest interest in the punishment of the criminal, and the greatest facilities for ascertaining the truth.

Extraditable Persons art 21(2)

Extradition Crimes- The ordinary practice is to list these in each bilateral extradition treaty.

As a general rule,; Political crimes; Military crimes, for example, desertion; Religious crimes are not subject to extradition proceedings.

Extradition under the Criminal Code of FDRE, 2004 Art.21:

1) Extradition of a “Foreigner” Art. 21(1) 2) Extradition of “Ethiopians” Art. 21 (2)

Procedure to request for Extradition (Art. 21/1 and 3)

UNIT-IV

CONDITIONS OF CRIMINAL LIABILITY

Section 1. The Crime And Its Commission:

The Essential Elements of Crime- Mental element (*mens rea*) 57, The legal and material element (*Actus reus*).

Actus reus means, ***the result forbidden by law brought about by human conduct***. A harm brought about by evil conduct manifests the evil mind behind it.

The legal element refers to the infringement of any law, which is a criminal nature.

material element is Deed of commission or Result of omission.

If a criminal shoots at and kills a person, his “act” does not include the event but only involves the willed act of pointing the gun and pulling the trigger.

“Crimes of Omission” are characterized by the non- performance of a mandatory act & A crime is committed when a person fails to perform a duty recognized by law, such as, professional duty of a doctor. (*failure and refusal*)

In Mental element The perpetrator should be held criminally liable and be punished if he or she acts

in a blameworthy manner, Criminal Guilt.

Analysis of Provisions Relating to Essential Ingredients of Crime under the CC

independent existence of these elements at different times in one person is not sufficient to constitute criminal liability. Rather, they shall exist together at the time of the commission of the offence.

Intention:- the state of mind of a man who not only foresees but also wills the possible consequences of his conduct.

1) Recklessness (indirect intention) - A man may foresee the possible or even probable consequences of his conduct and yet not desire them to occur.

A man who is reckless may prefer that – the event shall not happen, or he may not care whether it happens or not.

Art 58, with full knowledge of the consequences and intent.

The desire that impels the motion is known as volition. The longing for the object desired which sets the volition in motion is motive.

The expectation that the desired motions will lead to certain consequences is the intention. Intention is the foreknowledge of the act, coupled with the desire of it.

Direct Intention Art 58/1/Para (a)- a fixed object, a clear foresight of consequences , and a desire for consequences.

Indirect Intention “recklessness” GIDELESH (*Dolus Eventualis*):- the criminal does not desire the occurrence of the harm. However, he is aware of the possible consequences and yet is unwilling to renounce his act since he has some other object in his mind. In other words, though the criminal does not desire, he accepts the occurrence of possible harm in order to achieve his own object. The driver’s case.

Criminal Negligence Art. 59:- Negligence is not taking care where there is a duty to take care. In negligence, there is a state of mind in which there is absence of desire to cause a particular consequence.

-Acting by imprudence or (inadvertent)

-Being aware that his act may cause illegal and punishable consequences acts in disregard of such consequences, or (Advertent)

-Acting by a criminal lack of foresight, or (Advertent)

-Acting without consideration of possible consequences while he should or could have been aware that his act may cause illegal and punishable consequences.(Inadvertent)

*like in the case of in direct intention, foresees the possibility of some harm but disregards (or rejects) its occurrence. Under indirect intention the criminal accepts the occurrence of the possible harm whereas in the advertent negligence the person rejects the possibility of the harm which in fact materializes as a result of his negligence.

* Under inadvertent negligence the accused is not aware of a possible harm. The offender does not foresee the result at all.

Art. 58 Criminal Intention		Art. 59 Criminal Negligence	
Direct Intention	Indirect Intention	Advertent Negligence	In advertent Negligence
1. There is full knowledge i.e., awareness of consequences accompanied by with (intent).	There is awareness of consequences and unwillingness to renounce the course of conduct.	There is awareness of consequences but disregards the possibility	There should or could have been awareness of consequences but lack of consideration of the same
2. The foresight is certain or nearly certain as to the consequences.	The foresight is not certain but awareness of the possibility of the consequences is	There is awareness of possibility of consequences.	Failure to foresee the consequences.

	present.		
3. There is desire for the consequences.	There is no desire for consequences but disregards and runs the risk of possible harm. i.e. accepts the occurrence of possible harm	Rejects the occurrence of the possible harm.	Lack of foresight i.e. failure to exercise care. Does not foresee at all.
4. Clear foresight of consequences.	Uncertain foresight	Criminal lack of foresight.	Imprudence

Accident:- *when the act by which it is caused is not done with intention of causing it and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought under the circumstance in which it is done, to take reasonable precaution against it. Art. 57 (2)*

Section 2: Relationship of Cause and Effect: ART 24

Tests to Establish the Relationship of Cause and Effect:-

* Sine qua non Test or the Theory of Absolute Causation- “without which not” –“An act in the absence of which the result would not have been achieved is deemed to be the cause of such result”.

*Adequate or Proximate Cause Test- A’s act of striking ‘B’ and the slight injury suffered by ‘B’, it cannot be extended to anything that may happen after striking and apply to B’s death.

Factors That Might Break the Chain of Causation- 24(2)

- Existence of preceding causes (‘A’ hit ‘B’ a hemophiliac),
- Existence of concurrent causes (‘A’ and ‘B’ simultaneously shoot ‘C’ with the intention of killing him),
- Intervention of extraneous causes (two or more consecutive (not simultaneous) events has caused the harm in issue.)

Difficulties in the Assessment of “Physical Element” Of Crime

- A man may be held fully liable although he has taken no physical part at all in the actual commission of the crime. principals and accessories, incitement and conspiracy.
- A person will be held fully “responsible if he has made use of an “innocent agent” to commit a crime.

Section.3 Concurrence Of Crimes- Guilt In Case Of Concurrence Crimes Art. 60-67

- 1)When several unlawful acts are done in contravention of one or more articles of the law, concurrence of crimes or Material Concurrence, or
- 2)When one unlawful act is done in contravention of several articles of the law, concurrence of criminal provisions or Notional Concurrence. rape (Art.620) incest (Art.654), adultery (Art.652) and public indecency (Art. 639)

Section. 4. Corporate Criminal Liability

Goals of Corporate Criminal Liability

- deterrence—effective prevention of future crimes.
- the rehabilitation of corporate criminals.
- retribution and reflects the society's duty to punish those who inflict harm in order to "affirm the victim's real value."
- clarity, predictability, and consistency with the criminal law principles in general.
- it is the goal of general fairness.

Kinds of Corporate Liability:

Generally, criminal sanctions include [imprisonment](#), fines and community service orders.

[civil law remedies](#) such as [injunction](#) and the award of [damages](#) which may include a penal element.

Principles of Corporate Liability:

1) Vicarious liability: to hold one person [liable](#) for the actions of another when engaged in some form of joint or collective activity. The general rule in the [criminal law](#) is that there is no vicarious liability. a crime is composed of an [actus reus](#) & a [mens rea](#).

2) Direct liability: *a company is a legal person that could sue and be sued in its own name, has given way to the law maker superimpose its individualistic conception of criminal liability to legal persons.*

UNIT-V

DEGREES IN THE COMMISSION OF CRIME

Section.1. Different Stages In The Commission Of Crime

2)Preparation:- a crime, is not completed unless all its legal, material and moral ingredients are present.

A criminal crosses this line firstly by preparing the commission of a crime within the meaning of Art. 26.

The phases of desire, decision and initial planning (in the thoughts of the criminal) are mental that do not involve exterior acts. CC does not in principle punish preparatory acts, b/c

- behaviors cannot be considered to constitute the material element of the crime unless they are proximate and definite that the offence is likely to be committed.

- remoteness of the preparatory acts towards the offences intended to be committed

There are two situations where *preparatory acts* are punishable.

1) Where the Acts Constitute a Crime in Themselves (Art 26/a)- buying a gun to kill.

2) Where the Preparatory Acts Constitute a “Special Crime” by Owing to Their Gravity (Art 26/b): material preparation of offences against the state (Art. 256, 257),

Attempt- a willful effort but without success, & includes intent, overt act, and failure to achieve the result. Incomplete, Complete & impossible attempts.

*without establishing his guilty intention it is impossible to make him liable for an attempt. As long as the consequence is intended, erroneous appreciation of the material circumstances may not alter the liability for attempt.

the crime of conspiracy is said to be completed even if there is no further act to put the agreement into effect.

Section 2. Importance of Distinction between Preparation and Attempt:

The relative proximity between the ‘act’ done and the ‘evil consequences’ contemplated largely determines the distinction.

preparation consists in devising or arranging the means or measures necessary for the commission of the crime; while an attempt is the direct movement towards the commission of the crime after preparations have been made.

Identification Of The Stage Of Attempt

1) Reasonable Inference test or Unequivocality Test- an act done with intent to commit a crime is not a criminal attempt unless it is of such a nature as to be in itself sufficient evidence of the criminal intent with which it is done. To constitute an attempt, the act must be such as to clearly and unequivocally indicate the intention to commit the crime.

2) The Commencement of Execution Test:- there is an attempt as of the moment the accused begins to commit the crime. Art. 27/1

3) Proximity test:- An act of attempt must be sufficiently proximate to the crime intended, it should not be remotely leading towards the commission of a crime. Failing due to some defect in

the gun.

UNIT- VI

PARTICIPATION IN THE COMMISSION OF CRIME

Section.1. Participation In Principal Capacity:- if and only if he/she participates in the commission of the offence materially.

But In Ethiopia, principal participation is defined broadly that it takes the forms of material, moral and indirect offenders. Art 32.

* **Material Criminal-** 32(1) (a) * ***Moral Criminal*** 32(1) (b) * **Indirect Criminal** 32(1) (c)

Legal Effects Of Participation:- A person who involves himself is liable for the crime committed being considered as a criminal in the first degree.

Co-criminals- CC defines it broadly so as to include all principal parties who involve in the commission of the crime either as a material criminal, moral criminal or indirect criminal.

Persons may also be categorized as co-criminals in general crimes (w/c can be committed by any one. This relates to homicide, theft, robbery, bodily injury) and special crimes (w/c requires special qualification.)

Section.2. Participation In The Secondary Capacity- exists either before or during the commission of the crime, incitement or complicity (accessories).

Criminal Conspiracy- Conspiracy is defined as an agreement between two or more persons to effect something unlawful. In case of conspiracy there is a need of an overt agreement beyond independent intentions of the persons involved which of course constitutes the material element of the crime.

*The crime of conspiracy is completed at the moment when two or more persons have agreed that they will do at once or at some future time an act which is unlawful.

*In the Ethiopian law, conspiracy, as a rule, is *not* considered to be an independent crime. Rather, it is a ground for aggravating punishment when persons participate in the commission of a crime based on prior agreement as per Art 38(1).

* Though our law disregards the act of conspiracy as an independent crime, Article 38(2)

provides exceptions that it is taken as an independent crime

Participation Of Juridical Persons In A Crime- CC makes both the juridical person and its officials or employees who commit a crime criminally liable.

Accessories After The Fact:Art.40- 440, 682, 460

UNIT-I

CRIMINAL RESPONSIBILITY

General Defenses:- are circumstances that relieve an accused from conviction of guilt and its consequent penalty. Zese r general defenses, to all crimes (excuses and justifications) & special defenses 4 special crimes.

- The Criminal Code of 2005 does not follow this dichotomy.

Excuses are defenses that arise because the defendant is not blameworthy for having acted in a way that would otherwise be criminal. the focus is on the individual criminal rather than on the crime committed.

Defenses that arise when the defendant has acted in a way that the law does not seek to prevent are called justification defenses. when there is an attack on legally protected rights, the steps taken to reverse the attack is justifiable act.

Section 1: Criminal Responsibility and Irresponsibility

Responsibility is a person's mental fitness to answer in a court for his/her action. Persons are criminally liable only if they are responsible for their acts.

Responsibility or irresponsibility is concerned with the criminals' awareness and their capabilities to control their action.

Irresponsibility may arise in three cases. With regards to adults, it may arise from *insanity* or *intoxication*, and with regards to *infants*, it may arise from their immaturity.

* Absolute Irresponsibility: Art. 48

Responsibility could not be defined in a positive, but only in a negative manner, and this is why most codes including the ours do not describe responsible but irresponsible persons.

Insanity:- is a complete defense to a criminal charge. He has no mens rea.

a defendant first, does not know the nature and quality of his act (no act requirement), second he does not know the wrongfulness of his act (no mens rea).

* Limited Responsibility: Art. 49- guilty but mentally ill . Such a person may neither be relieved of liability, since he is not fully irresponsible, nor should he be liable to a full punishment, since he is not fully responsible.

This is a question of degree may arise. In most cases only expert evidence will enable the court to decide whether and to what extent the accused is irresponsible.

A person is not partially responsible for the sole reason that he is of low intelligence or poor education.

Section.2. Intoxication-Intentional or Culpable Irresponsibility: Art. 50

* Voluntary and Involuntary Intoxication- The main deference between Art. 50 and 48, 49 is not the bio-psychological condition of the offender but it is the condition,that creates the irresponsible nature of the offender. it is the doer who puts himself into a condition of irresponsibility or of limited responsibility by means of alcohol or drugs or by any other means.

Sub-Art.	State of the Defendant	State Induced By	Crime Committed	Legal Consequence
Art. 50/1	Absolute or Limited irresponsibility	Own fault (Voluntary Intoxication)	Intentionally (In order to...)	Fully liable to punishment
Art 50/2	Absolute or Limited irresponsibility	Own fault (Negligence)	Negligently	Punishable for negligent commission of the crime
Art. 50/3	Absolute irresponsibility	Own fault	Accidentally (Neither contemplated nor intended)	Punishable under Art. 491 provided the crime is punishable with at least 1 year.

Art. 50/4	Absolute irresponsibilit y	No fault on his part (i.e. has been coerced)	While incapable of forming any mental element	Shall not be liable to punishment
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Section. 3. Infancy/Immaturity 0-9: Art. 52

an infant is incapable of distinguishing between right and wrong and so no criminal responsibility could be fastened in regard to his deeds.

Young persons 9-15 , are criminally liable b/c . First, persons begin to understand the nature of their acts, to be able to form a decision and to keep to it between the age of nine and fifteen. their intelligence and volition develop and become gradually closer to those of adults.

Secondly, the commission of a crime shows that the time has come to take action because no action has been taken at home or school or it has failed.

the primary aims of any action taken with respect to young persons are and must be education and correction. To make zem useful citizens.

Transitory Age 15- 18 : the court has three options. First, it may order any of the penalties applicable to adults and mitigate it according to article 179. Secondary, it may order one of the special penalties applicable to young persons. Finally, the court may order special measures applicable to young criminals based on the conditions laid down under article 177.

UNIT-II

AFFIRMATIVE DEFENSES

legal defenses against a criminal charge.

Section.1. Lawful, Justifiable and Excusable Acts:

The Ethiopian Code does not follow lawful(acts done in circumstances which legitimate them) , justifiable (acts done in circumstances excluding intentional guilt) & excusable (acts done in circumstances reducing the degree of guilt) classes of acts with respect to which the ordinary

rules concerning criminal guilt do not apply or fully apply.

Lawful Acts- (Acts Required or Authorized by Law: Art.68) Because of the existence of the legal right or duty to act, the act, which would otherwise be criminal, is a legitimate one for which the doer is not punishable.

A. Acts Relating to Public, State or Military Duties

B. Right of Correction or Discipline:- Art.2039(c) of the Civil Code impliedly authorizing the parents, guardians and masters to use reasonable use of force for the purposes of chastisement. Art.576/3 OF cc LIMITS ZIS RT.

C. Exercising Private Rights: - Arts.1148 and 2076(2) justify the protective actions of a holder.

* **Professional Duty: Art. 69-** Acts done in the exercise of a professional duty come within the general category of acts authorized by law. It is exempted b/c the fact that the act is ordered by law.

if a doctor terminates a pregnancy on medical ground and report that to the right authority, as he is required to so by law, he would not be punished for breach of professional secrecy.

* **Consent As a Defence: Art. 70-** Consenting to donate any of his bodily parts.

* **Coercion/Duress: Arts. 71 & 72-** a defense that the actor engaged in the conduct charged to constitute an offense because he is coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.

like an insane person or intoxicated person he is totally deprived of his freedom of choice and therefore equally deserves the same treatment as long as the loss of will power is involuntary.

* **Superior/Subordinate Relation: Arts. 73 & 74-** arises when a person commits an offense on the order of someone to whom he owes obedience. In both administrative and military superior.

Section: 2. Necessity and Legitimate Defence:

General State of Necessity: Arts.75-76- the doing of harm is the only alternative to the suffering

of harm. sometimes called an “act of God,” , fire, a storm, an earthquake, or a shipwreck

necessary acts, unlike acts done in legitimate defense, are not deemed to be lawful. In case of necessity the actor does not have the right to protect his interests at the expense of those of another and is not authorized by law to cause harm so long as he is not threatened with or subjected to, an unlawful attack.

Under the 1957 penal code, the defense of necessity covers everyone who falls in a state of emergency. The second paragraph of Art.75 provides for an exception where necessity is not a defense notwithstanding that all the necessary conditions to raise the defense is met.

- There must be a Danger
- The Danger must be Imminent
- The Danger must be Serious
- The Danger Could Not Otherwise Be Averted
- The Harm must be Proportional
- the absence of fault on the side of the doer. If a person intentionally creates the situation of necessity, . . .

Legitimate Defense: Arts. 78, 79- when a person is suddenly faced with an attack to his person or property and immediate aid from the state machinery is not available, that person is entitled to defend himself and resist the attack and to inflict on the attacker any harm that is necessary for the purpose of defense.

Legitimate defense is one specific type of necessity, and therefore has much in common. In both cases, a situation of distress arises which cannot be solved otherwise than by the doing of harm. D/nces

- (i) necessity is basically one of aggression while an act under Art 78 is one of defense,
- (ii) the doer of a necessary act, unlike a person who defends himself, is not resisting an unlawful assault.
- (iii) in the case of necessity the conflict occurs is between two legitimate interests but in the case of legitimate-defense the conflict occurs is not between two legitimate interests.

Section. 3. Mistake of Fact, Mistake of Law and Ignorance of law: Arts.80&81

Mistake of Fact and Mistake of Law- Mistake or ignorance of fact can serve as a defense if it negates the state of mind (mens rea) required for the crime.

A fact may consists of, a phenomenon perceptible by the sense. (e.g. the doer mistakes arsenic for sugar) or a state of mind (e.g. the doer believes that someone intends to kill him)

Mistake of Law and Ignorance of Law- ordinarily means mistake as to the existence of any law on a relevant subject as well as mistake as to what the law is.

Ignorance of the law has rarely been sufficient to excuse criminal conduct. It is permitted as a defense only in situation in which the law is not widely known and a person cannot be expected to be aware of a particular law (foreigner).

In Eth, Art.81 (2) CC, ignorance of law is not excuse but the court may reduce the punishment.

Art.81 (3) states that in exceptional cases of absolute and justifiable ignorance and good faith and where criminal intent is not apparent, the court may impose no punishment. This stand of the criminal code shows that it stands in a half way between the two schools (no defense & defence wiz exception).

UNIT-III

CRIMINAL PUNISHMENT AND ITS APPLICATION

Section. 1. Definition and Purpose of punishment:

Definition of Punishment:- Broadly speaking punishment is the response of the society to socially dangerous behavior.

Purpose of Punishment-

*Retribution- punishment satisfies the feeling of revenge.

*Deterrence:-the purpose of the punishment is to deter the criminal from committing crime in future and to set as an example to the prospective criminals.

*Prevention/Incapacitation:-to prevent the criminal from committing crimes by physically disabling him by separating him and keeping him in seclusion from the society for a certain period of time.

***Reformation /Rehabilitations-** to change the character of the offender. The effort to restore a

man to society as a better and wiser man and as a good citizen.

Section.2. Kinds Of Punishments

- Ordinary punishments applicable to Adults –Book II, Title I, Articles 90-156.
- Measures and penalties applicable to young persons-Book II, Title I Articles 57-177.
- Penalties and measures applicable to Petty offences-Petty Code, Book VII Title II Art 746-764.

*three categories of punishments mentioned in Articles 90-156:

I. Principal penalties II. Secondary penalties III. Special measures applicable to Adults

Principal Penalties - can be put under the following heads:

-Pecuniary Penalties-art. 90-102- Fine, Sequestration & Other pecuniary effects

-Punishments Restricting or Depriving Liberty – Art. 103-116- compulsory labour, Imprisonment

1. Simple Imprisonment- art 106

2. Rigorous Imprisonment-art 108

-Death Penalty – Art. 117-120- the most precious right to life embodied under Art 15 of the Constitution which obviously permits the deprivation of life as a punishment for serious crimes without doubt is interpreted subject to the most important international instruments that guarantee the right to life.

Secondary Penalties- before imposing a secondary penalty the court has to pronounce a primary penalty, which it deems to be appropriate for a crime. However, they may replace the principal penalty under the conditions stated by the provision of article 122(2).

Special Measures Applicable to Adults- have the purposes of reforming and educating the person so that he abstains from committing further crime when he gets back to the society after serving his sentence in the prison.

* Measures applicable Irresponsible persons and criminals with limited responsibility

* General Measures for the Purposes of Prevention and Protection

* Measures of a Material Nature (Guarantee of Good Conduct, seizure of all dangerous articles)

* Measures Entailing Restriction on Activities (Suspension and withdrawal of a license, Prohibition and closing of an undertaking)

* Measures Entailing a Restriction on Personal Liberty (Prohibition from resorting to certain places, Prohibition to settle down or reside in a place, Obligation to Reside in Special Place or Area, Placing under Supervision, Withdrawal of Official Papers, Expulsion)

* Measures for the Purpose of Information (Notification to the Competent Authority, Publication of the Judgment, Entry in the Judgment Register)

Section.3. Determination Of Punishment:

General Principles of Determination of Punishment: Arts. 87-89

Extenuating Circumstances 82-67

Section.4. Post Conviction Processes

➤ Suspension of penalty and conditional release,

➤ Pardon and Amnesty 129 & 130

Reinstatement Arts.232-237

Differences between Pardon and Amnesty:

- Pardon is remittance of penalty while amnesty is a general pardon especially for political crimes against government.
 - Pardon is granted by the competent authority where as amnesty is granted by the appropriate competent authority.
 - In pardon, the remission of sentence may be whole or in part and in amnesty, it is always complete remission.
 - Pardon may completely remit the penalty or commute the same to a penalty of lesser nature or gravity.
 - Pardon may apply to all penalties and measures whether principal or secondary. But amnesty may be granted in respect to certain crimes and certain classes of criminals only.
 - The order of pardon may determine the conditions to which it is subjected to and its scope. Amnesty may be either absolute or subject to certain conditions and obligations.
- Pardon shall not cancel the sentence. However, amnesty, cancels both the indictment and the sentence and bars or discontinues any prosecution from the moment of its promulgation.

ADMINISTRATIVE LAW

UNIT ONE: INTRODUCTION TO ADMINISTRATIVE LAW

The Modern Welfare State and Evolution of Administrative Law

The change in the role of government and thereby the transformation of the 'police state' to the 'welfare state' has necessitated the need for conferring more power on the administration and simultaneously the need for controlling this power.

Administrative law is the by- product of the growing of socio- economic functions of the state and the increased powers of the government.

The welfare state in effectively carrying out these vast functions to attain socio- economic justice, inevitability will come in direct relationship and encounter with the private citizens.

Definition- It studies rules and principles applicable to the manner of exercising governmental powers such as principles of fairness, reasonableness, rationality and the rules of natural justice.

Purpose - controlling the manner of exercise of public power so as to ensure rule of law and respect for the right and liberty of individuals.

Sources of Administration Law- constitution, legislation, delegated legislations (Rules, directives and regulations), judicial review (z least source).

Scope of Administrative Law- the proper scope of the administrative law is procedure, not substance. This means, it is concerned with the decision-making procedure (how power is exercised), rather than the decision itself.

I- Public Law/Private Law Divide- The boundaries of administrative law extend only when administrative agencies and public officials exercise statutory or public powers, or when performing public duties.

The former govern the relationship between the state and the individual, whereas the later governs the relationship between individual citizens and some forms of relationships with the

state, like relationship based on government contract.

II-Substance vs. Procedure- The focus of administrative law is mainly on the manner and procedure of exercising power granted to administrative agencies by the legislature.

Theoretical Perspectives- the perspectives on administrative law are summarized by two contrasting models labeled by Harlow and Rowling as 'red light' and 'green light' theories.

A) Red Light Theory- advocates strong role for the courts to review administrative decisions. It considers that the function of law is to control the excesses of state power.

B) Green Light Theory- approach considers that the function of administrative law is to facilitate the operation of the state. It is based on the rationale that bureaucrats will function most efficiently in the absence of intervention.

It regards law not as a controlling mechanism, rather as facilitative tool. Consequently, it considers the court's intervention as an obstacle to efficiency.

It is originated from the utilitarian tradition, which proposes promoting the greatest good for the greatest number.

Constitutional Law and Administrative Law-AL is categorized as public law. So does z cons.

Constitutional law, being the supreme law of the land, formulates fundamental rights which are inviolable and inalienable. Hence, it supersedes all other laws including administrative law.

AL does not provide rights. Its purpose is providing principles, rules and procedures and remedies to protect and safeguard fundamental rights. it is a tool for implementing the constitution.

Both share a common ground, and supplement each other in their mission to bring about administrative justice.

Administrative Law and Human Rights

Both systems of law aim at restraining arbitrary or unreasonable governmental action and, in so doing, help to protect the rights of individuals.

Both laws assert that governments must not intrude on people's lives without lawful authority.

Human rights law is principally concerned with protecting and ensuring substantive rights and freedoms, whereas administrative law focuses more on procedure and judicial review attempts made to preserve a strict distinction between the legality and the merits of a decision.

HRL law is underpinned by the paramount ideal of securing human dignity, whereas AL is more committed to good decision-making and rational administration.

Administrative Law and Good Governance

AL helps to realize the three underlying principles of good administration: i.e. accountability, transparency and public participation.

AL ensures transparency in the conduct of government administration and the decision making process.

AL lays down the legal framework by which public's participation is recognized and practically implemented.

AL ensures transparency in the conduct of government administration and the decision making process.

AL enabling citizens have access to government information, it also ensures openness in the decision-making process. It lays down the legal framework by which public's participation is recognized and practically implemented.

Administrative Law and Democracy

Their meeting line rests in accountability of all branches of government, in the principle of rule of law

The 2 may in conflict when administrative agencies make individual decisions affecting citizens' lives and also set general policies affecting an entire economy.

Development of AL in Ethiopia

French administrative law is known as "droit administratif", which means a body of rules which determine the organization, powers and duties of public administration and regulate the relation of the administration with the citizens of the country.

In Eth it is still not well developed, and it is an area of law characterized by the lack of legislative reform.

Up to 1987, the previous three constitutions of the 1931, 1955 and 1974 did not contain any meaningful and practical limit on the power of government.

During HIS era, an unsuccessful attempt was made to introduce for the first time an Administrative Procedure Act that governs the decision making process of the administrative agencies. there was the establishment of the office of the Ombudsman. Attempts to establishment of some the administrative courts like the Civil Service Tribunal.

Administrative law didn't show any progress during the Dergue regime. The 1987 constitution was not devised to limit the power of the government.

Z FDREC contains key principles of government administration like accountability, transparency, and public participation. It also envisages the establishment of the Ombudsman and the Human Rights Commission.

Still there is no administrative procedure governing administrative decision-making or delegated legislation, either at the federal or state level. There are only few administrative courts poorly organized.

Institutional control through the Ombudsman and the Human Rights Commission is not as developed and effective.

UNIT TWO: CONSTITUTIONAL FOUNDATION AND LIMITATION OF ADMINISTRATIVE LAW

Rule of Law as a Base of Administrative Law

RoL provides protection to the people against the arbitrary action of the administrative authorities. Only the law rules.

Its procedural elements r

- A. Supremacy of Law (Principle of Legality)- every administrative action that should be taken according to law.
- B Principle of Equality - equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts.
- C Constitution Is the a result of the Ordinary Law of the Land

Substantive (ideological) elements r

Rule of Law as a Foundation of Administrative Law- the rule of law requires that government should operate with in the confines of the law; and that aggrieved citizens can go to court. the basic purpose of the administrative law is to control excessive and arbitrary governmental power.

Separation of Powers as a Limitation on Administrative Law - none of the government, i.e., the legislative, executive and judicial should ever exercise the powers of the other, separated & distinct.

The same person should not form part of more than one organ's job, One organ should not interfere with any other & it should not exercise the functions assigned to any other.

The division of governmental powers into legislative, executive and judicial is not an exact classification. It is abstract and general and there are many powers which may be assigned to one department, or delegated to a commission, or agency.

Even though the principle of separation of powers mainly draws a line between z 3 administrative law runs, to some extent, contrary to this principle.

in order to ensure efficient and effective enforcement of laws, it has become a compulsive necessity to delegate the executive and administrative agencies with additional legislative and judicial powers (functions).

Delegation of legislative powers by the legislature is clearly against the principle of separation of powers. However, it is justified on practical grounds.

the principle mainly serves as a limitation on the scope of administrative law, by making courts not to question the substance of administrative action, but only its legality.

UNIT THREE: ADMINISTRATIVE AGENCIES: SUBJECTS OF ADMINISTRATIVE LAW

Definition of adm agencies- An agency is any department, board, bureau, commission, division, office, council, committee or officer of the state or a public benefit corporation or public authority at least one of whose members is appointed by the governor.

Most agencies have names like department, authority, commission, bureau, board etc.

Classification of Administrative Agencies - based on mode of accountability.

1)those agencies directly accountable to the executive branch are known as executive agencies (usually accountable to a certain ministry, or council of ministries, or the prime minister)

2)where those accountable to parliament are called independent agencies (The Federal Ombudsman, The Human Right Commission, The National Election Board, The Auditor General & The Population and Census Commission)

Mode of Creating an Agency - are created in two ways: one is through the constitution, and the second is through act of parliament.

The only difference b/n the two modes is that when the constitution requires the establishment of some agencies the HPR has a duty to promulgate the enabling act for that specific agency.

When an agency is created only through the enabling act, in the absence of constitutional duty from the parliament, its existence is totally dependent on the will or option of the parliament.

Reasons for the Creation of Agencies

- A. Providing Specificity- The legislative branch of government cannot legislate in sufficient detail to cover all aspects of many problems.
- B. Providing Protection- Many government agencies exist to protect the public, especially

from the business community.

C. Providing Services

Structure and Organization- The structure and internal organization of an administrative agency may greatly vary depending on the government policy and the programme it is expected to accomplish.

Purpose of Administrative Agencies- They are usually charged with the day-to-day details of governing.

to regulate, to control monopoly power, to control excess profit, to compensate for externalities (when the cost of producing something does not reflect the true cost to society for producing the goods), To compensate for inadequate information, To compensate for unequal bargaining of powers, Disbursement of money or other commodities.

Classification of Powers of Administrative Agencies

A)Legislative (Rule Making) Power- it is more formally delegated legislation, is the power of agencies to enact binding rules through the power delegated to them by the legislator.

B) Judicial (Decision – Making) Power- administrative agencies that write and enforce their own regulations have also often been given the power of judging them in their own courts and through their own "administrative law" judges.

C) Administrative power- is the residual power that is neither legislative nor judicial.

Administrative Agencies in Ethiopia – during Tewodros, apart from the establishment of a territorial police force and a regular army any specific agency charged with public administration was unknown and non-existent. Civil service were 1st established.

In 1907, Emperor Menelik created the first ministerial framework.

The 1931 C laid a foundation for the existence of the first administrative agencies in the Ethiopian history of public administration. (recognized the existence of the executive branch.)

The 1987 C gave all administrative powers to the council of ministers.

In 1995 C administrative agencies are established at the federal and state level. The constitution does not directly or indirectly make a reference to administrative agencies as parts of the system of government. It recognizes the separation of powers among the three branches of government. This means, in effect, the source of legislative and judicial power of administrative agencies, typically those at the federal level could not be easily justified on constitutional grounds. For instance, the constitution does not in any way allow HPR to share or transfer some of its law

making powers to agencies headed by unelected officials. Legislation through delegation is only mentioned with respect to the council of ministers.

Two types of agencies exist at the federal level: These are independent and executive agencies. Due to the lack a precise definition of an administrative agency in Ethiopia, every government entity partially or fully funded by the government is considered to be an administrative agency.

UNIT FOUR: RULE-MAKING (QUASI-LEGISLATIVE) POWER OF ADMINISTRATIVE AGENCIES (DELEGATED LEGISLATION)

The Nature and Definition of Delegated Legislation- Any other legislation that is subordinate or auxiliary to primary legislation is known as delegated (or sometimes ancillary) legislation.

It means the exercise of legislative power by an agency that is subordinate to the legislature.

The Need for Delegated Legislation

Clearly parliament does not have time or resources to enact every single piece of legislation it will be far from being flexible without delegating some of its powers to the executive.

Technicality Subject of Matter - Members of the parliament are not experts, and so they cannot comprehend the technicality of the subject matter of some economic and social issues. Technical matters are distinct from policy issues.

During emergency, it may not be possible for the parliament to pass necessary legislation to cope up with the situations.

Theoretical Objections against Delegated Legislation

-the doctrine of non delegability of power, which holds that power delegated to one branch may not be redelegated to another. (People elect their representatives)

Since the constitution entrusted a power to one department should be exercised exclusively by that department without encroaching up on the power of another.

Scope of Delegated Legislation

The legislature after formulating the fundamental laws, can delegate to administrative agencies the authority to fill in gaps which is an authority necessary to carry out their purposes.

only the subsidiary part of the legislation could be delegated. the legislative body ought to state an intelligible principle and that the executive branch would merely fill in the details.

The delegated legislation must be consistent with the parent act and must not violate legislative policy and guidelines.

Form and Classification of Administrative Rule Making

1) Regulation- Art 71(13) of the F.D.R.E.C, the council of ministers has the power of issuing regulations.

2) Directive- r issued by each adm agency to implement regulations and other primary legislations.

In other classification

A-Enabling act- Such acts contain an “appointed date” clause under which the power is delegated to the executive to appoint a date for the act to come into operation. the legislature prescribes the gun and the target and leaves it to the executive to press the trigger.

B-Extension and application act- used for the extension and application of an act in respect of a territory, or a given for duration of time.

C-Dispensing and suspending act- to make exemptions from all, or any provision of the act in a particular case or class of cases.

D- Classifying and sanctioning acts- to fix standard of purity, quality or fitness for human consumption.

E- Penalty for violation acts - to prescribe punishment for the violation of rules.

UNIT FIVE: JUDICIAL POWER OF ADMINISTRATIVE AGENCIES

Meaning and Nature of Administrative Adjudication

the agency’s decision must have a binding effect on the parties in dispute without any need for confirmation by any other organ (conclusiveness of the agency’s decision).

While exercising their adjudicatory powers, administrative agencies normally follow preset procedures.

interpretation of laws, application of laws to resolve specific factual disputes and declaration of laws

the draft federal administrative procedure proclamation of Ethiopia (2001) exclude some administrative acts, which may pass the general test, from the definition of adjudication.

Forms of Administrative Adjudication

1) Informal Adjudication- it tries to provide the minimal statutory safeguards for the protection of fundamental rights of individuals & it does not involve full-blown trial type hearing.

hearing in the majority of cases does not involve oral hearing, but written submission of opinions, arguments, data, and so on.

The more the process of administrative adjudication is highly formalized, the less would be the resultant advantages sought from the delegation of adjudicatory powers to administrative agencies.

2) Formal Adjudication- is an almost full-blown trial type hearing from notification of charges to rendering decision.

The greater an agency's action tends to encroach to the fundamental constitutional rights of individuals, the greater should be the procedural protections provided to such individuals.

To date, Ethiopia has not come up with an instrument that provides uniform standards or guidelines that regulate administrative agencies' adjudication process.

Federal administrative agencies can refer to this draft document (2001) like any other an unbinding legal literature at their discretion & there is the principles of due process of law.

Tribunals and the Tribunal System

Tribunals r administrative courts w/c r the forums where administrative disputes are being formally resolved.

Tribunals are bodies established outside the structure of ordinary courts to adjudicate disputes that involve the government as a party on matters pertaining to governmental functions.

The Advantages and Disadvantages of Administrative Adjudication

It is done with the purpose to provide cheap, accessible, informal, convenient, speedy (expediency) and specialized justice.

But there will be lack of legal expertise, partiality (as many or all of the members of the administrative tribunals are at the same time employees of the various offices or agencies, they might not be free from bias and partiality towards the agency), violation of the principle of separation of powers and rule of law (b/c adjudication is the primary business of ordinary courts)

The Organizational Structure of Administrative Tribunals

In Ethiopia, like in many common law countries, there is no integrated administrative justice system. There are some sector wise tribunal-like adjudicating agencies/ known by different names such as disciplinary committees, boards, commissions and so on, that have the first instance (original) & appellant jurisdiction.

There are also second instance (reviewing agencies/tribunals) that are formed by statutes to hear grievances on appeal in different areas of the administration activities. Eg. Federal Civil Service Commission Appeal Tribunal, the Social Security Appeal Tribunal and the Tax Appeal Tribunal.

In 2001 procl, intended to establish "Federal Administrative Grievances Appellate Court", which is a division within the Federal High Court.

Qualification, Appointment and Dismissal of Administrative Judges

There is no general requirement set.

Inquiries- are organs concerned with fact-finding directed towards making recommendations on questions of policy.

The typical tribunal finds facts and decides the case by applying legal rules laid down by statute or regulation. The typical inquiry hears evidence and finds facts, but the person conducting it finally makes a recommendation to a minister as to how should the minister act on some questions of policy.

UNIT SIX- CONTROLLING MECHANISMS OF GOVERNMENTAL POWERS

The Need for Controlling the Powers of Government -for controlling abuse of powers.

Controlling Mechanisms- Internal administrative review by superior officials, Parliamentary control, Political control, External administrative review by tribunals, External scrutiny and recommendations by Ombudsmen and other watchdog institutions, mass media controlling and Judicial control.

Benefits

- Improves the quality, efficiency and effectiveness of government decision-making;
- Enables people to test the legality and merits of decisions that affect them;
- Provides mechanisms for ensuring that the government acts within its lawful powers;
- Provides mechanisms for achieving justice in individual cases and
- Contributes to the accountability system for government decision-making.

UNIT SEVEN: JUDICIAL REVIEW

Judicial review Vs. Merits Review

In terms of purpose and scope, merits review of an agency's decision is different from judicial review (technical review).

the purpose of merits review action is to decide whether the decision which is being challenged was the 'correct and preferable' decision.

The primary purpose of judicial review is to keep government authorities within the bounds of their power.

The issue in merits review is to test whether decision complained is 'right or wrong' & the reviewing body would make a different decision

Merits review is said to be the sole responsibility of the executive, because the person or tribunal conducting the review 'stands in the shoes' of the original administrative decision maker.

in judicial review, while reviewing an agency's decision, the court is concerned with the legality or illegality of the decision under review.

The reviewing court does not substitute its own new decision in place of an agency's invalidated decision on account of illegality.

Unlike merits review which is statutory in origin, the source of judicial power is not statute; statutory authority is not necessary the court is simply performing its ordinary functions in order to enforce the law.

The Bases of the Power of Courts to Supervise Administrative Action

1) a group of statutes which establishes an agency and incorporates provisions for the review of its actions.

2) there is a branch of remedies which has been developed by the combined action of the common law and statutes consolidating, simplifying, or in some other ways reforming the common law remedies.

In Ethiopia, there is no clearly defined jurisprudence on the evolution and status of the judicial review.

The power of the court to review administrative decisions, thus, may be derived from the very principle of separation of power that vests judicial power in the judiciary and the doctrine of rule of law enshrined under the FDREC.

the parent acts that create the respective agencies may also empower courts to review administrative decisions under specified conditions.

Grounds of Judicial Review - to test the lawfulness of government's decisions.

-When there exist substantive ultra vires (where the decision maker passes decisions on matters falling outside the boundary of his statutory powers)

-Procedural ultra vires (Even if the decision-maker passes a decision within the scope of the statutory power conferred upon him, a decision may be passed disregarding mandatory (formal) procedural requirements.)

The term 'ultra vires' means 'without power', while 'intra vires' means 'within power.'

- Jurisdictional Error (either due to the wrong interpretation of the law or the wrong appreciation of facts that are essential conditions precedent for assuming jurisdiction over a subject matter.)
- errors of law - 'errors going to jurisdiction' (jurisdictional errors of law) and errors of law 'within jurisdiction'.
- failure to discharge a statutory duty - abuse of power (broad ultra vires) - Unreasonableness
- proportionality- a sever penalty for a small offence may be challenged based on the principle of proportionality or reasonableness.
- irrationality -the distinction between irrationality and unreasonableness is not as such clear. But Failure to exercise discretion properly, abusing it, failing to exercise any discretion at all, An authorized delegation, applying policy without flexibility: Uses of power for an improper purpose or to frustrate the legislative purpose; Forming decision on basis of irrelevancies or ignoring relevant factors; And unreasonableness r in it.
- Bad Faith

Limitations on Judicial Review

1) Standing -in order to obtain leave/permission to bring an action for judicial review, the applicant must have **sufficient interest** in the matter to which the application relates. Article 37 of FDREC.

In determining whether or not the applicant has sufficient interest (locus standi) for judicial review, the general opinion is that the legal and factual circumstances of each case need to be considered critically.

the purpose of the standing requirements is simply to 'filter out' unmeritorious, frivolous or trivial applications, and thereby to save the court time.

Concerning application for judicial review by pressure groups, there is no consistent practice among jurisdictions.

2) Justiciability- "Justiciable controversy" is a controversy in which a present and fixed claim of right is asserted against one who has an interest in contesting; rights must be declared upon existing state of facts and not upon state of facts that may or may not arise in future."

Courts are expected to entertain only issues that can be legitimately judicialized (justiciable issue) – issues that can be conclusively resolved through the application or interpretation of laws in force.

So, the judiciary should refrain from unduly interfering in matters that are exclusively entrusted to the other organs of the government.

3) *Exhaustion and Ripeness*- Judicial review is the last resort that can be invoked by a party aggrieved by the decision of an administrative body after exhausting all the avenues or agency internal remedies available in the concerned agency.

In order to invoke judicial review, the case complained of must be 'ripe for review'. It requires the complainant to wait until the concerned agency has passed its final decision.

Both requirements are designated to prevent premature court intervention in the administration process.

4) *Finality Clause*- although the source of the reviewing power of the court is not statute, such power can be excluded by incorporating a finality clause in a statute (the Parent Act).

However, such exclusion has to be expressly stated if it is needed to have effect in limiting or eliminating the inherent power of the court.

But what about in case the legality of the finality clause that prohibits judicial review is questionable? In Eth, where the constitutionality of the finality clause is a matter of interpretation, this is exclusively the power of the House of Federation.

UNIT EIGHT: REMEDIES AND GOVERNMENT (ADMINISTRATIVE) LIABILITY

Remedies- the varieties of awards/relieves that may be granted by the reviewing court following an application for judicial review.

1) Public Law Remedies- Technically speaking, they are prerogative remedies & may be invoked by an application for leave for judicial review but this is not the case in most private law remedies.

- **certiorari**- also referred to as quashing order, is a procedure through which the reviewing court investigates the legality of an agency's decision complained of, and will quash or nullify where the decision in question is found to be ultra vires.

- **prohibition**- is an order issued by a higher court to prevent an inferior tribunal or administrative authority from exceeding or from continuing to exceed its authority, or from behaving ultra vires while dealing on matters that affect the interest of the complainant. The applicant may seek both.

- **Mandamus (mandatory order)**- certiorari and prohibition are concerned with control of the exercise of discretionary powers, whereas the prerogative order of mandamus is designed to enforce the performance by governmental bodies of their duties.

- **Quo warranto**- was originally a prerogative writ which the Crown [in the United Kingdom] could

use to inquire into the title to any office or franchise claimed by the subject until z 16 C.

- habeas corpus (produce the body) physical release, is used to obtain the release of someone who has been unlawfully detained, e.g., wrongfully arrested.

Private (Ordinary) Law Remedies

- An injunction -it is in the discretion of the court whether or not to grant it. It is a court order, which in the majority of cases that orders the party to whom it is addressed not to do a particular act.

- Declaration- This is simply asking the court to make a ruling on what the law is says in relation to a certain uncontested fact. Its main purpose is to determine or ascertain what the law says without changing the legal position or rights of the parties.

- damages (compensation)- it is to repair the pecuniary or non-pecuniary harm inflicted upon the complainant because of administrative wrongs.

Liability of the Administration

Like the practice in English, but unlike the French one, the tortious liability of the administration (the state and its servants) in Ethiopia is governed by the ordinary law of the country. And like the French practice, but unlike the English one, the tortious liability of the state and its servants in Ethiopia is not limited to fault based liabilities.

Concerning the contractual liability of the state, too, the practice in Ethiopia neither fits the common law nor the continental law counter parts. Normally, the state is contractually liable for damages it caused to a contracting party due to breach of its contractual obligation. Special provisions that particularly deal with administrative contract are incorporated under the Ethiopian Civil Code.

regular courts determine the contractual liability of the state and its administrative units in Ethiopia, like the common law counter parts; but unlike the practice in French where administrative courts entertain jurisdiction on disputes related to administrative contract.

while providing immunity to some officials seems acceptable from policy perspective, it should not be done at the expense of individual victims.

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7 TAX LAW

Chapter One: General Introduction

Definition and Classification of Taxes

Taxes are defined to be burdens, or charges, imposed by "the legislative power of a state upon persons or property," to "raise money for public purposes." It is a power inherent in sovereignty, and without which constitutional government cannot exist.

A tax is a compulsory contribution of persons toward the needs of government.

- (a) that a tax involves coercion upon its bearers,
- (b) who are in every case, either natural or legal persons, and
- (c) a specific public purpose as its end. Taxation includes the processes of levying, collecting, and paying taxes.

A commonly applied classification of taxes is into direct and indirect taxes. The classification of taxes into direct and indirect owes to the relationship between the nature of the taxes and the reason for payment of the taxes.

A direct tax- the taxpayer is not able to pass the burden to someone else. Accordingly, direct taxes are paid entirely by those persons on whom they are imposed.

an indirect tax- is a tax whereby the taxpayer's burden to pay the tax can easily be passed on to another person.

In sharing of revenues, taxes are grouped into three: central (that of the Federal Government), regional and joint.

General Theories and Principles of Taxation

* An individualistic theory - Every person needs, say, protection and justice, and experience shows that these can best be obtained in a society; the taxes he/she pays may be a quid pro quo, a payment for the services rendered.

* socialistic view- a State can be considered as the most definite institution in society; and, further, since from one point of view wealth has no meaning except in a society, the part played by that society in the production of wealth may be looked upon as making the State "the residual owner of all income which exceeds the requirements of maintenance and normal growth"

The two central principles of taxation relate to the impact of tax on efficiency (concerned with the allocation of resources) and equity (fairness) (concerned with the distribution of income).

Efficiency can be measured against three standpoints: administrative costs, compliance costs and excess costs. These three relate to the cost of operation of the tax system, to its flexibility

and certainty.

equity or fairness is further highlighted by two principles: the ability-to-pay principle and the benefits principle. The ability-to-pay principle implies two things:

- i) Horizontal Equity: People in equal positions should be made to pay the same amount of taxes.
- ii) Vertical Equity: A tax system should distribute the burden of paying taxes fairly across people with different abilities to pay.

General Introduction to Fiscal Federalism and Division of Revenues under the Ethiopian Constitution

fiscal federalism is the study of how competencies (expenditure side) and fiscal instruments (revenue side) are allocated across different (vertical) layers of the administration.

It is the division of public sector functions and finances among different tiers of government.

While fiscal federalism constitutes a set of guiding principles, a guiding concept that helps in designing financial relations between the national and sub-national levels of the government, fiscal decentralization on the other hand is a process of applying such principles.

The main economic rationale behind fiscal decentralization is improving efficiency of public resource utilization, creating enabling environment for private sector development and the growth of the national economy.

the ideas of fiscal federalism are relevant for all kinds of government, unitary, federal and confederal.

Application differs because unitary and federal governments differ in their political & legislative context and thus provide different opportunities for fiscal decentralization.

fiscal federalism is a general normative framework for assignment of functions to the different levels of government and appropriate fiscal instruments for carrying out these functions.

Fiscal federalism in Ethiopia has been adopted within a unique political landscape of ethnic federalism.

Fiscal federalism derives its nature and characteristics from constitutional provisions as well as the state of economic development, the pattern of income and resource distribution, and the institutional capacity of the system.

The Ethiopian Tax Reform of 2002

coupled by a series of reduction in the import tariff, excise tax and income tax and widening of

the budgetary deficit, introducing a neutral and efficient tax, i.e. the VAT with broad tax base VAT was considered. since January, 2003.

Major Types of Taxes in Ethiopia

1. Value Added Tax (VAT) - This is a sales tax based on the increase in value or price of product at each stage in its manufacture and distribution.

2. Excise Tax - this is imposed and payable on selected goods, such as, luxury goods and basic goods which are demand inelastic. It is the tax on goods that are hazardous to health and which are causes to social problems will reduce the consumption thereof. ('Excise Tax Proclamation No. 307/2002')

3. Turnover Tax- this is an equalisation tax imposed on persons not registered for value-added tax to fulfil their obligations and also to enhance fairness in commercial relations and to complete the coverage of the tax system.

Administrative feasibility considerations limit the registration of persons under the value-added tax to those with annual transactions to the total value exceeding 500,000 Birr.

Rate of turnover tax is 2% on goods sold locally and 10% on others; Proc 307/2002.

4. Income Tax- income taxable under the Ethiopian Income Tax Proclamation No. 286/2002.

5. Business profit tax- taxable business income of bodies is taxable at the rate of 30%

Sources of Ethiopian Tax Laws

Tax laws basically emanate from legislative, administrative and judicial sources.

The first law that can be taken as a source is the FDREC which has numerous provisions dealing with the administration of taxes. Then after, there are a number of proclamations and regulations dealing with taxes in the country.

Chapter II: Income Tax

General Definitions and the Notion of Income

According to the proc 286/2002, income is defined as "every sort of economic benefit including nonrecurring gains in cash or in kind, from whatever source derived and in whatever form paid credited or received". Its sources are listed down in Article 6.

'gross income' is taken to mean the total or aggregate income received by an individual.

'taxable income' refers to the amount of income on which actual income tax is charged, levied and collected after all deductions have been made in accordance with the relevant laws.

Income Tax Jurisdiction: Global Jurisdiction on Residents and Source Jurisdiction on non-

residents

Income Tax Proclamation of 2002 reveals that, in Ethiopia, income tax has global jurisdiction on residents whereas it has a source jurisdiction on non-residents.

the proclamation has applicability on non-residents of the country to the extent that the source of their income is in Ethiopia, art 3/2

The Foreign Tax Credit- Article 7- if during the tax period a resident derives foreign source income, the Income Tax payable by that resident in respect of that income shall be reduced by the amount of foreign tax payable on such income.

However, the reduction of the Income Tax shall not exceed the tax payable in Ethiopia that would otherwise be payable on the foreign source income.

The Scheduler System of Ethiopian Income Taxation

There are the global and the schedular systems of taxation.

in the global system of income taxation is that the tax is imposed on the total income of an individual regardless of the types of activities that he/she pursues and regardless of the sources from which he/she obtained his/her income. Individual has to declare his/her aggregate income for the purpose of taxation.

the scheduler system

-takes the different sources of income of an individual into consideration for the purpose of taxation.

-income is identified by its sources and each source has its own procedures and rates for the determination of income tax; thereby requiring an individual to declare his/her income from each source separately.

-each source of income is considered to have its own identifying unique features for the purposes of taxation.

-before taxation, sources of income have to be properly identified according to the correct schedule set by the system.

1)Schedule A Income- collected from employment.

Articles 2(12) and 12 employment is any arrangement, whether contractual or otherwise, whereby an individual to be called the employee is engaged, whether on a permanent or on a temporary

basis, to perform services under the direction and control of another person to be called the employer.

2)Schedule B Income- earned from rental of buildings.

the principle that tax has to be paid on income from rental of buildings remaining as it is, a taxpayer who leases furnished quarters is liable to pay tax on the income that he/she receives from the lease of the furniture and equipment in the leased quarters.

3)Schedule C Income- earned from businesses, i.e. from entrepreneurial activities.

Article 2(6) business or trade refers to “any industrial, commercial or vocational activity or any other activity recognized as trade by the Commercial Code of Ethiopia and carried on by any person for profit.”

businesses (bodies) are required to pay 30% flat rate of business income tax; and other taxpayers under Schedule C, i.e., unincorporated or individual businesses are required to pay taxes ranging from 10% to 35% according to the table.

*The periodic cost expiration is called depreciation. There are three factors that need to be taken into consideration while calculating an asset’s depreciable cost, Initial cost, Residual value; and Useful life.

CHAPTER THREE: VALUE ADDED TAX

Brief Introduction to the Predecessors of VAT in Ethiopia

The concept of VAT was propounded first by American experts by 1920’s. But at that time, Americans failed to implement it. The modern concept of VAT was truly introduced in France (1954)

In France, it was introduced to satisfy high demand of revenue on the part of the government in order to rebuild France from the civics of WWII. more than 123 states adopted.

In Ethiopia, VAT was introduced since January 1, 2003 designed to replace the out dated sales tax, which has served for more than four decades, which was collected at manufacturing level.

In other areas of taxation, where VAT is not regularly governing, turnover tax is introduced.

The major rationales behind introducing VAT in Ethiopia r

-sales tax doesn't allow collection on the added value created wherever sales transaction is conducted but VAT does .

-VAT allows little room for evasion. Taxes in VAT are collected at multi stages and business entities are allowed to have refund on the tax they paid for inputs (raw materials such as labor, transportation, ware housing, etc).

-VAT enhances saving and investment. VAT is a consumption variety tax. The fact that the final burden lies on consumers raises awareness to have means of reduction of payment for consumption at any possible incident. This undoubtedly will change the extravagant way of life imposed from the custom, on the part of final consumers.

-Out dated sales tax is not capable to generate adequate revenue for the government to cover necessary expenditures.

VAT from other sales taxes

VAT appears to be imposed on business entities as it belongs to sales tax family. In reality however, business entities are simple agents to collect tax from individuals, who bear the final burden, final consumers.

sales tax is normally levied at one stage of the whole marketing

the VAT proclamation does not provide flat definition for VAT. Blacks law D "VAT is a tax assessed at each step in the production of a commodity based on a value added at each step by the difference between the commodities production cost and its selling price"

Types of VAT

1) Gross product type - taxes paid on purchases of capital goods fixed capitals and depreciations there to are not allowed to be refunded.

2) Income type - refund on the purchase value of capital goods is prohibited like in case of goods product type of treatment. But, unlike the previous one, it allows refund on the periodic allowance for the depreciation value of capital goods.

3) Consumption type- the most used and widely accepted in most states of the world. all business purchases including that of capital goods and related depreciations are allowed to be rebated.

Advantage of VAT

- **It avoids cascading effect of a tax (Tax on Tax)**- VAT works when raw material passes through various manufacturing stages and manufactured product passes through various distribution stages, tax should be levied on the incremental value at each stage and not on the gross sales price.
- It is a more comprehensive and equitable tax system**- Even though the ultimate burden of VAT falls on the final consumer, VAT is collected by the government from all sectors, that is, from import, manufacturing, who sales and retail sectors.
- It reduces the possibility of tax evasion** - In each stage, every transaction is made using VAT invoice approved by the Tax Authority. In addition, each VAT register person (supplier) has to maintain appropriate records on their sales and purchases transaction those obligations make tax evasion difficult.
- It has less tax burden** - the tax is collected in small fragment at different stages of production and sales, hence, the VAT payers feel the burden of the tax less.
- It is neutral** - VAT is expected to be perfectly neutral in the allocation of resources in the form of production and commercialization b/c it is collected @ each stage.
- It improves productivity**- a firm has to pay tax even though it runs into loss. The firm cannot claim any exemption for loss because it pays taxes on the value produced and not on profits. So, firm will always try to improve their performance and reduce the cost of production.
- It promotes capital investment and saving**- VAT is a consumption tax since one pays VAT on its expenditure and has the option to save so as not to be taxed. Furthermore, relief from tax on capital goods may encourage investment. Potential investors also consider tax legislation as one of the factors in making investment decision.
- It enhances exports** - Exports of goods and services in most countries that implement VAT are liable to VAT at zero-rate. This may make export internationally competitive and, thus, encourages exports.

Criticisms on VAT

- It is regressive in nature** - A straightforward single rate VAT with few exemption would tax lower income groups (the poor) more heavily than the higher income groups (the rich. No ability to pay. In order to compensate for its regressive effect, a number of countries have exempted basic

goods particularly food items from VAT.

-It requires advanced economic structure- it also requires proper record keeping of invoices at each stage of production and sale by both the seller and buyer.

-It puts additional burden to tax authority- In VAT system, the manufactures, wholesalers and retailers have to fulfill various legal formalities in the form of maintaining various records, accounts, books, etc. the verification of those formalities puts additional burden to the tax enforcing authorities.

-It is uneconomical - VAT system involves high cost of administration, assessment, verification, collection, etc. hence, it is highly uneconomical.

-It has ream loopholes for tax evasion - Although VAT system requires proper record keeping of invoices at each stage of production and distribution by both the buyer and seller, it has ream loopholes for tax evasion. This may include

- Taxpayers could over report sales of zero rated goods;
- Taxpayers could use invoices they received for personal purchase to claim tax credit;
- It enables buyers and sellers to strike secret deals with regards the issuance of receipts;
- It could lead to the formation of forged companies receipts to claim tax credit on input VAT, etc.

Taxable activity- art 6

Taxable Transaction- is a process. It is related with supply of goods or rendition of services, Art 7(3)

Registration for VAT

A. Obligatory Registration- Pursuant to Art 16(1) if the total taxable turnover (transaction) over a period of 12 months exceeds 500,000 Ethiopian birr; the person shall be registered for VAT.

*B. Voluntary Registrations-*Any body interested may apply for voluntary registration .But Art 17 provided a condition that shall be satisfied.

Zero-Rated Transactions- In Ethiopia, two rates are recognized on taxable transactions: Standard rate and zero-rate, where the standard rate is 15% and zero rate 0%.

Zero-Rated Transactions is taxed at zero-rate of tax. In other words, the transaction by it self is taxable subject to VAT in the sense included under Art 7(3) “taxable transaction” But, the Law has given blessings so that the transaction (supply of goods or rendition of services) are completely free from tax.

zero-rated transactions are directly or indirectly connected with export goods or services to make domestic exporters more competent before international arena.

Exempt Transactions- is a transaction not subject to VAT. Thus the transaction is not considered taxable transaction for social, economic or development reasons. Art 8/2

* in zero-rated transactions & exempt transactions of course, in both transactions, persons are free from payment of taxes under VAT. But,

Pursuant to Art 23, a registered person making exempt transaction is not entitled to deduct input tax payable on its acquisition related to the making of exempt supplies and is not entitled to issue covering exempt supplies. A person that purchases goods or services exempt from tax is not entitled to claim an input tax credit for any tax in relation to the prices of those purchases, even if acquired for use in taxable activity, because the item was not purchased in a taxable transaction.

VAT-on Imports- - Art 2(9) “import of goods” is to mean bringing goods in to Ethiopia, according to customs legislation. Art 14 & 15

Tax Payable, Tax Credit Taxation and VAT Records

the simple arithmetic difference obtained by deducting creditable taxes from all taxable transactions. Art 20 & 21 , 23

tax credit (deductible tax) is an incentive that encourages persons to be participant in VAT enforcement.

Powers of Levying and Collection Enforcement for VAT- the federal government that has power to levy VAT in Ethiopia. **But**, VAT requires cooperation, regions are given delegations to collect.

Regarding collection enforcement mechanisms, the FIRA (federal Inland Revenue authority) is entrusted ???

Penalties and Criminal Offences

- engaging in taxable transactions with out registration
- issuing incorrect invoice
- issuing invoice with out registration for VAT- Failure to maintain tax records, file timely etc.

CHAPTER FOUR: TURNOVER TAX

Scope - its scope is on supply of goods, rendition of services, persons not registered for VAT
Unlike VAT, where the threshold to identify persons subject to it is 500,000 birr ,turn over tax is applicable for those whose annual transaction is below this amount save voluntary registration for VAT.

- to equalize and enhance fairness in commercial relations
- make complete the coverage of tax system so as to increase government's revenue from taxation.

Rates of Turnover Tax- Art 4 incorporates two kinds of rates: 2% on goods sold locally and for services rendered locally again in two rates:2% for contractors, grain mills, tractors and combine-harvesters and 10% on others.

Obligations of Tax Payers under the Turnover Tax Law

- Filing of Turn over Tax Return and payment-* art 10
- Keeping Recodes-* This obligation is common in income Tax proclamation and VAT proclamation.
- Notification of changes in business name, address...

CHAPTER FIVE: EXCISE TAX

INTRODUCTION

Excise tax is one variety of sales tax like VAT and turn over tax but unlike turn over tax and VAT, it is applicable not on all kinds of goods rather on selected goods. It is imposed on luxury goods and basic goods which are demand inelastic, hazardous to health and societal problems. proc No 307/2003

Specific excise tax is imposed based on the amount of the item subject to tax. But advalorem is calculated out from the value of the good.

Rationales to employ ET

- to improve government revenue by imposing excise tax payable on selected goods.
- to redistribute income and narrow the gap between rich and poor.
- to reduce their consumption hazardous to health and which are cause to social problem.

Products subject to Excise tax- The scope of application of excise tax proclamation is determined by the schedule attached to the proclamation. applicable to goods which are either produced locally or imported from other countries. Art 3.

goods or products are related to luxury goods, goods dangerous to health and that cause serious problems to the society, ranging from perfumes to tobacco and tobacco products.

Tax-rates, Bases and Payment of Excise Tax

The rate varies from 10% in textiles and textile products to 100% for other alcohol drinks, perfume and toilet waters; and motor vehicles above 1800 C.C.

Cost of production is taken as base to calculate the amount to be imposed on goods produced locally. In respect of goods imported, the base of computation of the tax is cost, insurance and freight (export rather than import is encouraged)

* In case of VAT, persons are allowed to deduct costs of productions/ inputs in general. But in excise tax, since attached with luxurious and dangerous product, the value of the object imported insurances and freight, are not deducted.

Obligation of Tax Payers

- maintain books and accounts in accordance with accounting principles;
- submit to the authority necessary information for proper collection of the tax;
- comply with inspections by delegates of the tax authority; and
- respect all the obligations mentioned in the proclamations

CHAPTER SIX: CUSTOMS DUTIES

INTRODUCTION

Customs duty is tax like other taxes but imposed on imported goods or exported goods.

It is the best instrument to prevent or reduce importation of goods. It serves as trade brevier whenever a state needs to ban or reduce importations to her territory, it can imposed high rate in some good (excise taxation)

Powers and Objectives of Ethiopian Customs Authority ?????????????? ERCA

proclamation No 60/1997 ?????????????????? 368/2003

Customs Control and Administration

A. Time of control- The supervision time begins from the time they reached the customs port through the completion of customs formalities until received by the importer in case of imported goods.

B. Treatment of Means of Transportation- Means of transportation is also under the control of the authority. Any master of means of transport engaged in the importation or exportation of goods assumes a number of obligations as per Art 16 of proc No 60/97.

C. Declaration, Examination and Release of Goods- Customs declaration is lodged after the arrival of goods at the port. The application for customs declaration helps to clear goods from the authority with in short period of time.

D. Goods in Transit, Temporary Importation and Exportation of Goods- “a transit good” is the movement of goods from one country to another or by crossing the Ethiopian territory, or from one customs station to another by the same or changing the means of transport.

custom duties as a matter of fact is imposed on imported or exported goods. But, exceptionally, temporarily imported or exported goods may not be imposed on obligations of customs duty.

CHAPTER SEVEN: STAMP DUTY

Stamp duty is another form of taxation basically imposed on the services given to individuals through affixing seals. Stamp is an official mark or seal placed on a document especially to indicate that a requirement tax has been paid. proc. No. 110/1998.

Bases of the Duty

Art 3 of the stamp duty proclamation exhaustively lists instruments chargeable with stamp duty

Memorandum and articles of association of any business organization cooperative or any other from of association, award, bonds, ware house bond, contractor agreements and memoranda thereof, security deeds, collective agreement, contract of employment, Lease, including sub-lease and transfer of similar rights, natural acts, power of attorney, documents

Exemptions from Stamp Duty - For economic, Social, or administrative reasons, Art 7

CHAPTER EIGHT: SURVEY OF SOME REGIONAL TAXES

power of taxation is given to the federal government, state government or concurrently for both central (federal) and state government.

states in Ethiopia can impose taxation on incomes received within their territory but, zey cannot have say on the powers exclusively given to federal government.

At this juncture, it is expected that certain questions regarding power of taxation on incomes that are not exclusively given to either the federal or regional government nor jointly given both government will be raised. Art 99 of the FDREC has z answer.

Agricultural income taxes- r earned from incomes of the farmers.

the role of regions in levying and assessing tax on an in come derived from agricultural activities is high but, the mode of assessment and collection of taxes will differ from region to region.

* Coming to the federal government the laws that govern taxation from agricultural income tax laws that govern proc NO 152/1978. According to such proclamation, the amount declared, will be assessed by the tax authority in manner described under the schedule of the proclamation.

Property Taxes

1) **Rural Land use Tax-** FDREC has given power of determination, levying and collection of taxes on rural land use payment to states (Art 97)

2) **Urban Land use Tax**

8 Employment & labor law

Chapter I- Introduction

Employment relation is established through **a contract of employment** and it shall be deemed formed where a person (**the employee**) agrees, directly or indirectly, to perform **work** for and **under the authority of another (the employer)** for **a definite or indefinite period** or piece work in return for **wages**.

*its sources of law, its definitional elements and its scope of application.

Chapter- II- Individual Employment Relation

Art.2 (3) with Art.4 (1) of the LP

Employment relations under the labour law and under the Civil Service have their own peculiar features. In the labour law setting, the legal instrument is limiting itself towards stipulating minimum conditions of labour providing sufficient room for flexibility for further bargain by the parties either through contract or collective bargaining.

Under the Civil Service, however, conditions of work are rigorously regulated by law and there is little or no room for negotiation. In this sense most (if not all) the work conditions spelt out in the Civil Service instruments are not only minimum but also the maximum.

Specific employment relations which are outside of the ambit of both the labour and civil service employment regime should be mentioned in order to show that **Ethiopian employment regime is not purely dual**.

It rather has a “third regime” at the margin. For example employees such as the police and armed forces, domestic workers, management staff and others are within the third regime.

Once a contract of employment is duly formed, the parties are expected to spell out their

respective rights and obligations under the contract exhaustively.

Suspension

Suspension is a situation where the employee will not be required to provide service to the employer and the employer will not be obligated to pay wages and other benefits to the employee.

the grounds are:

- Voluntary arrangement of the parties; -Societal interest;
- Due to reasons beyond the control of the employer; -Due to disciplinary reasons.

Unlawful termination and its effects

Any termination which fails to observe the substantive or procedural requirements of termination shall be held unlawful.(refer Arts.14(1)(c),23(1) & 42 of LP.

reinstatement(Arts.26(2)& 43(1)), compensation together with severance payment(Art.43(2),(3)(4) &39(1)(b)), payment in lieu of notice period(Art.44 & 45), fine(Art.14(1)(c)&184(2)(c) are the remedies stipulated by law for unlawful terminations.

Chapter III- Special categories of Employees

Probationary employees

At the commencement of a contract of employment, the employer is entitled to set a probationary period (i.e. trial period).

“whenever a person is dismissed for unfitness, it is sufficient that the employer **honestly believes on reasonable grounds** that the person is unfit. It is not necessary for the employer to prove that she is in fact incompetent.”

Under the Civil Service, probation period is mandatory & its length is specified by law and hence it is not subject to contractual bargain. This does not seem the case under the Labour Proclamation.

Apprentice

This is a situation through which the employer agrees to provide a person (i.e. the apprentice) complete and systematic training and the apprentice in return agrees to obey the instruction given to carry out the training. Strictly speaking, such an arrangement is not an employment relationship

Young employees⁵³ - between the age of 14 and 18.

The Civil Service Proclamation, in principle, prohibits civil service employment below the age of majority.

Their differential treatment is manifested in the following terms of employment under the labour law,

- * As regards to length of working hours and its timing- Arts.61 (1) & 90
- * As regards to types of work

Female employees

the Ethiopian legal system appears to be on the right track. The FDRE constitution has already incorporated both principles in its body of provisions.

Arts.13 & 41 of the Federal Civil Service and Arts. 14, 87, 88 of the Labour Proclamation

Two angles, The first type of regulation is providing flat protection available to all females by virtue of being female. The other type of regulation is providing special provisions for females under particular circumstances such as pregnancy and maternity.

Employees with disability

FDREC stipulates," *The State shall, within available means, allocate resources to provide rehabilitation and assistance to the physically and mentally disabled*, Art.41 (5).

Proclamation No.568/2008 has also important provisions for persons with disability.

The principle of non discrimination on grounds of disability has also been expressly inserted

⁵³ Reference to the UN Child Rights Convention is also recommended in order to possess full understanding of this issue. It is worth noting that Ethiopia ratified this Convention in 1992.

under the FCSP (Art.13 (1)). Though not as express as the FCSP, the LP prohibits discrimination among employees "...on the basis of nationality, sex, religion, political outlook or *any other condition*." (Art.14 (1) (f))

The Disability Act of Ethiopia (2008) has also incorporated principles

Non Ethiopian employees

the Ethiopian legislature lays down conditions on the basis of which foreign nationals may be employed in Ethiopia Art.174 LP & Art.15 & 22(2) FCSP.

for a foreigner to be lawfully employed in Ethiopia, he/she needs to possess double permits.(namely; Residence Permit & Work Permit) The Power to issue Residence Permit is vested on the Security, Immigration and Refugee Affairs Authority; while Work Permit is to be issued by the Ministry of Labour and Social Affairs.(Art.174 LP)

Under the Civil service employment regime, there is an express provision which stipulates "a person who is not an Ethiopian national may not be eligible to be a civil servant". exceptions (Art.15 FSCP).

Chapter IV- Legally stipulated minimum working conditions

Minimum Wage

Many jurisdictions have succeeded in prescribing minimum hourly/monthly wages to employees working within their territory. Others leave this issue to the contracting parties. The Ethiopian employment regime seems to adopt a hybrid of the two approaches.

The civil service regime has prescribed a minimum monthly wage for those working in the civil service;⁵⁴ while the labour law regime has left the issue to the parties themselves.

It is believed that in a free market economy, price of goods and services is to be fixed by taking into account the supply and the demand side of the item in a forum of bargain.

Employment security- is trying to protect the employee from unjustified dismissal.

⁵⁴ The current minimum monthly wage is Birr 320.

Normal Working hours- we mean those periods in a day or in a week when the employee regularly renders service to the benefit of his/her employer.

Safe and Healthy working conditions- Preventive measures

Remedial measures

Chapter V: Collective Bargaining & Collective Agreement

ILO principles on the right to collective bargaining

The standards and principles emerging from the ILO's Conventions, Recommendations and other instruments on the right to collective bargaining, and the principles set forth by the Committee of Experts and the Committee on Freedom of Association on the basis of these instruments may be summarized as follows:

- A. The right to collective bargaining is a fundamental right endorsed by the members of the ILO in joining the organization, which they have an obligation to respect, to promote and to realize, in good faith (ILO Declaration on Fundamental principles and rights at work and its follow-up)
- B. Collective bargaining is a right of employers and their organizations, on the one hand, and organizations of workers, on the other hand (first-level trade unions, federations and confederations); only in the absence of these latter organizations may representatives of the workers concerned conclude collective agreements.
- C. The right to collective bargaining should be recognized throughout the private and public sectors, and it is only the armed forces, the police and public servants engaged in the administration of the state who may be excluded from the exercise thereof (Convention No. 98).
- D. The purpose of collective bargaining is the regulation of terms and conditions of employment, in a broad sense, and the relations between the parties.
- E. Collective agreements should be binding. It must be possible to determine terms and conditions of employment which are more favorable than those established by law and preference must not be given to individual contracts over collective agreements, except where more favorable provisions are contained in individual contracts.

- F. To be effective, the exercise of the right to collective bargaining requires that workers' organizations are independent and not "under the control of employers or employers' organizations" and that the process of collective bargaining can proceed without undue interference by the authorities.

Chapter VI: Employment Dispute Settlement Mechanisms

The labour law and the Civil Service employment regimes follow different kinds of dispute settlement machineries.

Labor Dispute Settlement process^{*55}

the power to adjudicate over individual labour disputes are concurrently vested both in the Federal Courts and the State Courts.

the Proclamation establishes in each First Instance Courts of the States (a) labor division (s).⁵⁶ Labour divisions are also established in the State Appellate Courts to hear mostly appeals from decisions rendered by the First Instance Courts or by the Ministry of Labor and Social Affairs or Bureau of Labor and Social Affairs.⁵⁷

Ordinarily, labour disputes are either individual or collective. The labour proclamation has employed an illustrative listings of what constitutes individual labour dispute and what constitutes a collective one (*Arts. 138 (1) & 142(1) respectively*)

individual labour disputes are within the competence of the labour divisions of the ordinary woreda court while the collective ones are within the power of the Labour Relation Boards.

* As regards to composition, the Labour Divisions are to be operated by sitting judges of the ordinary courts while the Boards are composed of representatives of the employers' and employees associations in addition to the appointees of the government(i.e. tripartite arrangement).

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⁵⁵ Bibliography omitted.

⁵⁶ Art. 137

⁵⁷ Art.139

* With respect to the working systems, the labour divisions are expected to conduct business in accordance with the stipulations of the civil procedure in their judicial proceedings. Winner- loser determination is the final outcome in such forum.

Nevertheless, the Boards are expected to serve as more of negotiating forum rather than an adjudicating one. It is only when amicable settlement is not attained that the Boards will resort to judicial settlement.

* Decisions of the labour divisions are appealable to the upper floor in the judicial hierarchy and the decision of the appellate division is final irrespective of whether the appellate division affirms or reverses the decision of the lower court.

With the same token, decisions of the Boards are appealable, *on issues of law only*, to the Federal High Court and the decision of this court is held final regardless of whether it agrees or disagrees with the Board's position (but still there is cassation)

PERMANENT AND AD HOC LABOR RELATIONS BOARD- Once the Conciliation proceedings fail to bring forth a negotiated settlement, Art. 142(3) comes.

Firstly, the power to conciliate and decide over all collective labor disputes, except those on matters of wages and other benefits arising in the EPSU, is vested in the Permanent Labor Relations Board

Secondly, the power to decide over collective labor disputes arising particularly out of wages and other benefits in the EPSU is vested in the *Ad Hoc* LRB.

THE PLACE OF ARBITRATION UNDER THE LABOUR PROCLAMATION

Art.143 of LP - nowhere is the word 'arbitration' or 'arbitrator' alluded to but in this Provision!!

paragraph (1) of the Provision could be briefly put as enabling disputing parties to agree to submit their case to arbitrators for settlement in accordance with the appropriate law, either by inserting it in the main contract, i.e., arbitral clause (probably in the collective agreement) or concluding it as a separate agreement, i.e., arbitration submission.

Dispute settlement mechanism under the Civil Service employment regime - as there is no legal framework enabling civil servants to form associations of their own, collective employment

dispute under the civil service is unthinkable.

For this the Civil Service Proclamation has laid down mechanisms for grievance handling within the internal structure of every civil service office.⁵⁸ Accordingly, every government of is expected to establish a “Grievance Handling Committee”

“Disciplinary Committees” are also expected to be established in view of investigating alleged misdeeds committed by civil servants and recommend proportional measure to the head of the government office concerned.

Furthermore, civil servants are entitled to lodge appeals from the decisions of the government organs to Administrative Tribunals (Art 74)

CONCLUSION

ADR methods feature in settling labor disputes: individual labor disputes, though vested in the First Instance Courts of the States, can be submitted to conciliation and/or arbitration.

In the settlement of collective labor disputes, Conciliation is used both in the Essential Public Service Undertakings (EPSU) and in those Undertakings that are otherwise categorized (UOC). Whilst it seems to have been left for the discretion of the parties whether to resort to conciliation or not in the EPSU, it is compulsorily imposed on the UOC.

In the event that conciliation does not bear fruits, parties may resort to LRB (ad hoc or permanent). Ad Hoc LRB seems to have been devised for settlement of disputes arising from wages and other benefits in the EPSU. The judgment-debtor has the right to appeal against the decision of LRB to the Federal High Court or State Supreme Court.

Disputing parties may opt out of LRB, though. They may agree to submit their disputes for settlement to arbitration. The award-debtor may similarly appeal against the arbitral award, provided that, under their submission, the parties have not waived their right of appeal. The award-debtor may also resort, under certain circumstances, to the setting aside procedure. Here, it is good to note that arbitral awards are final i.e., no appeal to court lies against the award, under the arbitration rules of arbitration centers, if the parties submitted their disputes to the institutions so far established and operating in Ethiopia.

⁵⁸ Art.72 of Proc. No.515/2007

Finally, in Ethiopia, the use of ADR methods in the commercial dispute settlement is yet at its infantile stage. The low profile that ADR methods suffer from, amongst the business community, needs to be quickly addressed so that the emerging conciliation and arbitration centers in Ethiopia play their role in effectively settling disputes arising both from domestic and international trade and investment.

In this author's opinion, it is imperative for the efficacy of conciliation proceedings that statements, offers, admissions, suggestions made during the conciliation proceedings should not be adduced as evidence in court against the party making them. Today, short of legal provisions to this effect, parties may find it difficult to be transparent in the conciliation proceedings.

The arbitration laws in force are far from being modern, too. The fact that Ethiopia has recently ratified the Hague Convention on the Pacific Settlement of International Disputes (1899 and its commitment under the COMESA Treaty⁵⁹ to accede to multilateral agreements on investment dispute resolution, this author hopes, may serve as a catalyst in the process of ratifying the NYC and the International Convention on Settlement of Investment Disputes Between States and Nationals of Other States (ICSID), otherwise known as "The Washington Convention of 1965".

Industrial Action- *This action may take either of the two forms namely; strike or lock out. When the action is taken by the employees, it will be a strike while the measure will be lock-out where it is exercised by the employer.*

In both cases the measure is a sort of self help action where the aggrieved party takes its own action in view to compelling the other party to accept its terms.

⁵⁹ The COMESA Treaty, Art.162

9 PUBLIC INTERNATIONAL LAWS

CHAPTER 1: INTRODUCTION

public international law is the law that applies to *international actions*, whether committed by States, international organizations, or even individuals.

International laws are not written down in one book like the Civil Code of Ethiopia. There is no international government that has authority to pass such laws.

The domestic laws of Ethiopia – including the FDRE Constitution – are, for the most part, not relevant in deciding Ethiopia's international obligations in disputes before international tribunals.

the domestic laws of Ethiopia are extremely important in determining how international laws will apply in the domestic courts of Ethiopia. Domestic courts often refer to treaties (and international customs) when deciding disputes between the individual litigants before them.

CHAPTER 2: THE STATE SYSTEM

The stability of the State System rests on the stability of States, and for this reason international law places a great deal of emphasis on a State's continued legal existence and relative permanence of its borders.

The State system came into being with the birth of the so-called "nation-state" in Europe in the 16th and 17th centuries.

The modern international system is still a "State System," composed of States, but many new actors now play a role in international relations. Principal among these new actors are international organizations like the United Nations and the WTO.

State Sovereignty

Part A: Definition of Sovereignty and History

A State's sovereignty is its independence. The word "sovereign" implies some ultimate authority, a master with no master above him, a free and autonomous entity.

-State must speak with one voice at the international level

- other States should not concern themselves with certain internal matters of a sovereign State like the type of government a State adopts – whether monarchical, tyrannical, democratic, socialist, or otherwise – or the State's religion or the way a State treats its citizens.

State sovereignty and the modern nation-state really came into being in 1648 with the Treaty of Westphalia that ended the 30 Years War in Europe. The War arose in part out of tensions between Catholics and Protestants and fears of civil strife between these two religious groups.

The Treaty of Westphalia resolved religious tensions by giving each State the power to determine religious affairs within its own territory (birth of the modern *secular* state.)

Part B: Erosion of State Sovereignty

eroded by international laws and international bodies; that such laws and such bodies tend to restrain the activities of States from the outside, WTO, ILO

Part C: Theories of State Behavior

(1) interest-based theories (states act rationally to maximize their interests.) including realism, institutionalism, and liberal theory; and

(2) norm-based theories including constructivism and legal process theories.

*Realism's core assumptions can be variously classified

(1) states are key actors in world politics;

(2) states can be treated as homogeneous units acting on the basis of self-interest;

(3) analysis can proceed on the basis of the assumption that states act as if they were rational; and

(4) international anarchy – the absence of any legitimate authority in the international system – means that conflict between self-interested states entails the danger of war and the possibility of coercion...

* institutionalism- institutions could enable states to achieve their own objectives more efficiently. Institutions would alter state strategies by changing the costs of alternatives; institutionalization could thus promote cooperation.

institutions mattered because they could provide information, monitor compliance, increase iterations, facilitate issue linkages, define cheating, and offer salient solutions.

* Constructivism- seek to show that the preferences of individuals, and therefore state interests, can be influenced by international law and institutions.

State Formation and the Self-Determination of Peoples

Part A: Legal and Political Issues of Statehood

The 1933 Convention on the Rights and Duties of States (known as the Montevideo Convention), sets out four simple criteria for statehood.

a permanent population - no minimum number of inhabitants necessary to make a State.

b) a defined territory- even though its borders are disputed LIKE Israel.

c) government; d) capacity to enter into relations with the other states.

Increasingly, States and international organizations like the European Union and the United Nations are making express demands that must be met by new States before these States will be recognized. EG. promises by the new States to support human rights, prevent nuclear arms proliferation, etc.

Part B: The Right of Self-Determination

This principle was articulated first as a right of colonized people to self-government, but it has since been used to justify the creation of States in other ways, as by secession.

The right of self-determination was affirmed as an international law when it was written into the Charter of the United Nations in 1945.

Nowhere does the Charter specifically call for freedom for colonized territories. Apart from the undefined “right of self-determination,” the UN Charter in Article 73 laid out some specific duties of colonizing countries, “to promote to the utmost... the well-being of the inhabitants of these [colonial] territories, and, to this end... to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions...” These are ideal goals for political freedom, not specific requirements that can be measured.

Most of the international HRs instruments that include the right of self-determination gloss over

its various contradictions and leave its definition vague.

Again, the right is not clearly defined in z ACHPR.

Two very important General Assembly resolutions make reference to the right of peoples to self-determination. The first, passed in 1960, is the *Declaration on the Granting of Independence to Colonial Countries and Peoples*.

The second resolution, passed in 1970, is the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*.

This resolution seems to reinstate the tension between self-determination and territorial integrity. a State that does not comply with the principle of equal rights and self-determination (presumably a State that denies certain political rights to minorities) has forfeited its right to territorial integrity. Z Canadian supreme Court over Quebec.

Unlike the international instruments, Ethiopia's Constitution is quite clear about what the right of self-determination means, who the "people" are who can claim this right, and how this right can be lawfully exercised art 39.

Z Constitution uses a mixture of subjective and objective criteria to define the beneficiaries.

Part C: State Territory and Borders

Africa have been decided by the principle of *uti possidetis, ita possidetis* (or just *uti possidetis* for short), a Latin phrase which means literally, "[you may] keep what you had."

By this is meant that former colonies, on gaining independence, will keep the borders established previously by the colonizing power.

The principle of *uti possidetis* seems to have been first invoked and applied in Spanish America, inasmuch as this was the continent which first witnessed the phenomenon of decolonization involving the formation of a number of sovereign States on territory formerly belonging to a single...State.

(1) identify the issue, (2) state the rule, (3) apply the rule to the facts, and (4) give a brief

conclusion. This is the so-called "IRAC" method.

Recognition of Governments

As an expression of disapproval, other governments may refuse to recognize the government, cut off diplomatic contacts, suspend travel to that country, or cut off trade and foreign aid.

The issue of recognition is separate from the issue of whether to continue diplomatic relations, travel, and trade.

The U.S. for some time applied the so-called "Tobar Doctrine" which said that, in order to promote democratic transfers of power, new governments formed by use of force or subversion of legitimate democracies would not be recognized.

Estrada Doctrine (Mexican foreign minister), there are situations when the international community *must* determine the legitimacy of a new government.

Chapter 3: International Organizations and Other International Actors

an international organization is an organization, typically established by treaty, whose members are States or other international organizations.

The prototypical international organization is the United Nations. The UN has both more power and less power than the student might expect. regional organizations OAS, AU, EU

International Civil Aviation Organization. WTO, IMF, WB, WHO & the International Telecommunication Union.

Characteristics of International Organizations

- have attained a special status in international law that other organizations like NGOs do not have.
- Like States, international organizations can enter into treaties, enjoy certain privileges and immunities, as for example those enjoyed by UN diplomats traveling abroad on UN business.
- States have privileges and immunities that are general whereas international organizations have only such privileges and immunities as are necessary to carry out the organization's functions.

- An international organization cannot invoke “sovereign immunity” – immunity from liability in foreign courts in cases involving official acts – because an international organization is not a sovereign. Also, only States can appear before the International Court of Justice in contentious cases.

The Structure of the United Nations

The General Assembly (GA) is the Parliament of the UN, but it is a Parliament with little or no legislative power. GA resolutions are like recommendations to Member States – the resolutions are not binding.

The Security Council (SC), compared to the GA, has more power, but it is exercised within a narrower scope. In fact, the SC passes both non-binding resolutions and binding resolutions. The binding resolutions may be passed only when the SC is taking action “for the maintenance of international peace and security.” (15 members – 5 permanent members and 10 rotating members with 2-year terms)

The Secretariat is composed of all the administrative staff of the UN and headed by the Secretary-General. the role of the Secretary-General as a spokesman.

The International Court of Justice functions under its own statute which is “an integral part” of the Charter and is annexed to it , has fifteen judges all from different States.

Two types of cases come before the Court – contentious cases between States and requests for advisory opinions from organs of the UN or from specialized agencies.

ECOSOC functions like a mini GA with a special focus on economic, social, and humanitarian issues. makes studies and reports and may bring matters to the attention of the GA.

The Trusteeship Council was created to monitor those colonies placed under the administrative authority of another State following World War II.

* The UN has many problems in practice – most significantly the problem of preventing aggression and war by States – but the major *structural* problems are two. First, there is some confusion as to the respective areas of authority of the SC and the GA. Second, there is some question as to whether the ICJ can review the activities of the SC and GA and pass judgment on them.

the African Union

May 26, 2001, marked the Constitutive Act of the African Union entered into force.

The organs and institutions r

- (1) the Assembly of the Union; (2) the Executive Council;
(3) the Pan-African Parliament; (4) the Court of Justice; (5) the Commission;
(6) the Permanent Representatives Committee; (7) the specialized technical committees;
(8) the Economic, Social and Cultural Council; and (9) the financial institutions (African Central Bank, the African Monetary Fund, and the African Investment Bank)

* Although the organs and institutions forming its structure are provided for by the Act and offer great potential for the continent, their composition, powers, functions, organization, and rules of procedure have yet to be specified.

* the current state of the African economy is poor.

Other International Actors: NGOs, Corporations, and Individuals

NGOs, corporations, sporting federations, organized religions, regional governments, and international terrorists.

These non-state actors do not have the status of legal persons at the international level, so they cannot have rights and duties under international law. their activities are governed by national laws.

Three new areas of international law give greater standing to individuals in the international arena – human rights law, international humanitarian law (law of war), and international criminal law.

CHAPTER 4: INTERNATIONAL CUSTOMARY LAW

Custom is losing its status as a strong source of authority in international law. At least it is agreed now that *treaties* are a stronger source of international law than custom and take precedence over custom.

What is strange about this position, however, is that it is international custom that provides the basis for all treaty law, not the other way around. The principle *pacta sunt servanda* – that a State must abide by its treaty obligations – is an international custom.

From the principle of sovereignty to the treatment of foreign emissaries, the international system

is founded on customs.

English and American courts had long consulted treatises on international law as well as the practices of states.

Background Principles and the Hierarchy of Sources in International Law

International law is made chiefly in one of two ways: through agreements between states – ‘treaties’ – or through practice by states that fulfills certain requirements – ‘customary international law.

the ICJ statute contains a clear list of the sources of international law.

international conventions, international custom, the general principles of law recognized by civilized nations, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

*In z principle of *order of importance*, conventions (treaties) will take precedence over custom, and custom will take precedence over general principles of civilized nations. .

*Treaties tend to be more specific and clearer than customs, and certainly treaties are a better expression of the consent of States.

* treaty provisions may be interpreted according to rules of international custom

In the Lotus principle States have residual sovereignty or power in the absence of international law.

Customary Law: State Practice and *Opinio Juris*

it is hard to prove that a custom exists. So two elements must be proven – State practice and *opinio juris*. (elements of custom). “Practice” indicates the State’s overt behavior whereas *opinio juris* (“subjective” element) means the State’s belief that the practice is required as a matter of international law.

Opinio juris concerns statements of belief rather than actual beliefs. treaties and declarations represent *opinio juris* because they are statements about the legality of action, rather than examples of that action.

Opinio Juris is like a State’s official stamp that converts that State’s casual practice into a

binding rule. To have custom, States must not only exhibit a certain practice; they must also believe that the practice is legally required.

Which States Are Bound by Custom?- If a custom is general, all States in the world are bound by it. If a custom is regional or local, only States in that region or locality will be bound by it.

States that say and do nothing during the time when a custom is developing will be bound by that custom. The same applies to new States.

The only way that a State can get out of a general custom is by objecting to that custom loudly and continuously during the process of the formation of the custom. A State that does this may obtain “persistent objector status.”

the State must object when the custom is in the process of forming & the objection must be clear and “persistent.”

After a rule of custom has formed, any conduct contrary to the rule is a violation of international law.

Treaties and General Assembly Resolutions as Evidence of Customs

Customary law co-exists with treaty law. First, the treaty may restate an already existing international custom. Second, the treaty may crystallize an emerging international custom. That is, the treaty may be the final recognition of a custom that was previously just in the development stages.

A treaty may be used as evidence of custom along with other things like domestic court decisions and policy documents. the treaty may be the *only* evidence of the custom.

GA resolutions represent the opinion of a majority of States in the world. GA resolutions can be used as evidence of State practice or *opinio juris* for the purposes of establishing custom. However, Unlike treaties, General Assembly resolutions are not binding on States.

GA resolutions have been useful for proving that certain human rights standards have become international custom.

CHAPTER 5: International Law of Treaties

States may enter into contracts, commercial or otherwise, that are governed by the national laws of one of the States involved. A treaty is an agreement governed by international law.

treaties are entered into by States, but international organizations have the capacity to enter into treaties as well.

functions- Some treaties are like international “legislation” – they are open for all States to join and are intended to be universal and binding on all. Their purpose is to establish a set of universal rules to govern State conduct.

Other treaties are more like “contracts.” These treaties are the means by which two or more States transact business

serve as constitutions for international organizations

Laws-* the customary law “*pacta sunt servanda*” meaning that treaty promises must be kept.

* there is a “treaty on treaties” or in other words a treaty that many States have joined that provides rules for the interpretation and application of treaties. This is the 1969 Vienna Convention on the Law of Treaties (VCLT) (applies to written treaties entered into between States.)

*Even though Domestic laws are important in domestic courts, not in international courts, treaties are binding as law at two levels, the domestic level as well as the international level. In domestic courts, domestic laws will color the interpretation and application of treaties. FDREC Art 9

Treaty Formation

- negotiations over a potential treaty begin when representatives from the State parties meet.
- the State parties must express their consent to be bound by the treaty, may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed
- For multilateral treaties, it would be impractical to require all negotiating parties to consent before the treaty entered into force. Therefore, multilateral treaties usually provide that the treaty will enter into force upon the consent of a certain number of the parties.
- * A party not present at the original negotiation may be allowed to join the treaty at a later time if the treaty so provides. This is called “accession.”

Interpretation of Treaty Terms

The ultimate goal of a court in interpreting treaty terms is to fulfill the intentions of the parties to the treaty. A court is not there to make the deal fair when a treaty seems unfair.

two basic theories

- 1) the objective approach, requires that we take the parties at their word and interpret treaty terms according to their ordinary meaning and as an ordinary person would understand them.

- 2) the subjective approach- It is possible that the parties to the treaty had some special understanding as to the meaning of terms that is not found in a dictionary. Thus, a court should look at anything that might indicate what the parties were thinking – their behavior, letters, and the drafting history of the treaty.
- 3) The approach of the VCLT –is a combination of the objective and subjective approaches- A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

* The VCLT has rather specific rules in regard to the use of drafting history in treaty interpretation.

Invalidity of Treaties and Treaty Termination

a State cannot unilaterally terminate a treaty and simply pay damages for the unlawful breach. The treaty will continue in force even after payment of damages by the breaching party, unless of course the non-breaching party opts to terminate the treaty

In the absence of agreement among the parties as to termination, the default rule is that termination is possible only in four situations

- (1) material breach by the other party,
- (2) impossibility of performance,
- (3) fundamental change of circumstances such that it no longer makes sense to continue with the treaty
- (4) a new rule of *jus cogens* that emerges some time after the treaty is already in force and that conflicts with the treaty.

Treaty Reservations

It is a unilateral statement whereby a nation tries to exclude or modify the legal effect of a provision of a treaty while still joining the treaty. A State may want to ratify a treaty, but it disagrees with one provision in the treaty.

Reservations must be distinguished from “understandings” and “declarations.” Unlike reservations, understandings and declarations are interpretive statements that are not meant to change the treaty terms but rather clarify what that party understands the treaty to mean.

CHAPTER 6: State Responsibility

Meaning of State Responsibility

Until recently, the theory of the law of state responsibility was not well developed. The position

has now changed, however it does not replace customary international law, with the adoption of the **Draft Articles on the Responsibility of States for Internationally Wrongful Acts** ("Draft Articles") by the International Law Commission (ILC) in August 2001.

State responsibility is a fundamental principle of international law and it lies on the understanding that states are sovereign and equal. It provides that whenever one state commits an internationally unlawful act against another state, international responsibility is established between the two.

The nature of State Responsibility (characteristics or requirements)

- the existence of an international legal obligation in force as between two particular states;
- there has occurred an act or omission which violates that obligation and which is imputable to the state responsible; and
- loss or damage has resulted from the unlawful or omission.

The Question of Wrongfulness

* The principle of objective responsibility ('risk' theory) maintains that the liability of the state is strict. Once an unlawful act has taken place, which has caused injury and which has been committed by an agent of the state, that state will be responsible in international law to the state suffering the damage irrespective of good or bad faith.

*the subjective responsibility concept (the 'fault' theory) which emphasizes that an element of international or negligent conduct on the part of the person concerned is necessary before his state can be rendered liable for any injury caused.

Imputability (mamekagne OR malakek)/Attribution- is the legal fiction which assimilates the actions or omissions of state officials to the state itself and which renders the state liable for damage resulting to the property or person of an alien.

Ultra vires acts- The act of officials of a state may result in the responsibility of a state even when the former have acted beyond their authority.

Although private individuals are not regarded as state officials so that the state is not liable for their acts, the state may be responsible for failing to exercise the control necessary to prevent such acts.

State Control and Responsibility- if a person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out its conduct, the state is liable.

Where a state subsequently acknowledges and adopts conduct as its own, then it will be considered as an act of state under international law entailing responsibility, even though such conduct was not attributable to the state beforehand.

Consequences of Breach and Reparation

The breach of an international obligation entails two types of legal consequences. Firstly, it creates new obligations for the breaching state, principally, duties of cessation and non-repetition and a duty to make full reparation.

Second, create new rights for injured states, principally, the right to invoke responsibility and a limited right to take countermeasures.

* If illegal actions are continuing, the state has a duty to cease. The state also has duties to make reparation, which could involve restitution, compensation, or satisfaction.

CHAPTER 7: War and the Prohibition on the Threat or Use of Force

History of use of force: from the 'Just War' to the United Nations

Christianization of the Roman Empire and the ensuing abandonment by Christians of pacifism (war is a mistake, any disagreement must avoid *wiz* consensus) give rise to the doctrine of just war. In those days the doctrine was force could be used provided it complied with the Divine Will.

But with positive and the definitive establishment of the European balance of power system after the peace of Westphalia, 1648, the concept of the just war disappeared from international law as such. States were sovereign and equal, and therefore no one state could presume to judge whether another's cause was just or not.

The First World War marked the end of the balance of power system and raised afresh the question of unjust war.

The League system did not, it should be noted, prohibit war or the use of force, but it did set up a procedure designed to restrict it to tolerable levels.

The UN Charter's Article 2 provision is regarded now as a principle of customary international law and as such is binding upon all states in the world community. The reference to 'force' rather than war is beneficial and thus covers situations in which violence is employed which fall short of

the technical requirements of the state of war.

The Phrase 'Against the territorial integrity or political independence of any state'

No state has the right to intervene, directly or indirectly, for any reason what so ever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political economic and cultural elements, are condemned.

Categories of Force

-Retorsion- be nidet memeles- is the adoption by one state of an unfriendly and harmful act, which is nevertheless lawful, as a method of retaliation against the injurious legal activities of another state. legitimate method of showing displeasure.

severance of diplomatic relations and the expulsion or restrictive control of aliens, as well as various economic and travel restrictions.

-Reprisals are acts which are in themselves illegal and have been adopted by one state in retaliation for the commission of an earlier illegal act by another state.

- self-defense - There is extensive controversy as to the precise extent of the right of self-defense in light of Article 51. On the one hand, it is argued that article 51 in conjunction with article 2(4) now specifies the scope and limitations of the doctrine of use of force. self-defense can only be resorted to 'if an armed attack occurs' and in no other circumstances.

On the other hand, there are writers who maintain that the opening phrase in Article 51 specifying that 'nothing in the present Charter shall impair the inherent right of...self -defense' means that there does exist in customary international law a right of self-defense over and above the specific provisions of article 51, which refer only to the situation where an armed attack has occurred.

The concepts of necessity and proportionality are at the heart of self-defense in international law.

Necessity - the armed attack that has occurred or is reasonably believed to be imminent requires the response that is proposed.

Proportionality may also require consideration of the type of weaponry to be used, an

investigation that necessitates an analysis of the principles of international humanitarian law.

Terrorism- is the systematic use of terror especially as a means of coercion. Most common definitions of terrorism include only those acts which are intended to create fear (terror), are perpetrated for an ideological goal (as opposed to a lone attack), and deliberately target or disregard the safety of non-combatants.

Most government definitions outline the following key criteria: target, objective, motive, perpetrator, and legitimacy or legality of the act.

Collective Security- as an Approach to Peace", is seen as a compromise between the concept of world government and a nation-state.

- First: almost every state, especially all major states, has to be in the collective security arrangement and committed to it for it to work.

- Second: no one state can block the decision making process.

- Third: for sanctions to work, the international economy has to be sufficiently interdependent such that sanctions harm the intended country enough, but do not harm the countries doing the sanctioning.

- fourth for countries to trust collective security, they have to know it works well enough to safeguard their security.

The lines between what is considered "collective defense" and "collective security" have been blurred. "collective security" - avoid grouping powers into opposing camps, and refusing to draw dividing lines that would leave anyone out. (UN Principle)

Humanitarian Intervention- *When and Where to Intervene?

- where the scale of death and suffering is greatest,

- where intervention is unlikely to create great-power conflicts, and

- where a mission can be designed that promises many lives saved at low cost to intervening soldiers.

***How to Intervene?**

Should it simply do enough to feed starving people, should it create safe havens for individuals or groups at risk, should it impose a ceasefire line between warring parties—or might it even help one side to win a conflict? **It all depends.**

* Who Should Intervene?

The United States and other western countries can do a great deal to help in this regard by providing modest sums—perhaps a couple hundred million dollars a year in all—for improved training, equipment, and other basic military needs.

CHPATER 8: International Dispute Resolution

International disputes are solved in two general methods: in the first category lie the International Court of Justice and Other International Tribunals and in the second category are Arbitration, Negotiation, and Mediation-diplomatic means of dispute resolution mechanisms.

The International Court of Justice/ICJ/

has a dual jurisdiction: it decides, in accordance with international law, disputes of a legal nature that are submitted to it by States (jurisdiction in contentious cases) binding rulings

it gives advisory opinions on legal questions at the request of the organs of the United Nations or specialized agencies authorized to make such a request (advisory jurisdiction).

The jurisdiction of the Court in contentious proceedings is based on the consent of the States to which it is open. The form in which this consent is expressed determines the manner in which a case may be brought before the Court.

Although without binding effect, the advisory opinions of the Court nevertheless carry great legal weight and moral authority.

The ICJ and the Security Council

In practice, the Court's powers have been limited by the unwillingness of the losing party to abide by the Court's ruling, and by the Security Council's unwillingness to enforce consequences. However, in theory, "so far as the parties to the case are concerned, a judgment of the Court is binding, final and without appeal,"

Other International Tribunals

International war crimes tribunals are courts of law established to try individuals accused of war crimes and crimes against humanity. The war crimes tribunals of Nuremberg and Tokyo.

supports

- they act as a deterrent to potential war criminals.
- they offer a rare chance for the world's leaders and citizens to scrutinize both the deplorable decisions made by particular leaders, and the atrocities committed by the soldiers and agents of those leaders.
- give victims and their families an opportunity to regain a sense of power that may have been lost resulting from a war crime.
- For a country attempting to make a transition from a repressive regime to a democracy, war crimes tribunals offer citizens and leaders the opportunity to put their faith in an equitable rule of law.

criticism

- men like Hitler and Pol Pot, the leaders of violent movements, are never judged by tribunals for what they do. A war crimes tribunal that tries only middle ranking officers, soldiers, and politicians is not as effective as one that tries the mastermind behind the crimes.
- they do not alleviate the underlying causes of the conflict.
- they are ineffective in transforming a fractured society into one of stability and peace (necessarily demonize individuals and sometimes whole groups, further separating parties, instead of building peace.)
- they offer only the victors justice. What was most obviously missing following World War II was not Hitler at Nuremberg, but a trial for Americans, French, British, and Russian individuals who committed acts that would have been considered war crimes had the Allies lost the war. (Hiroshima)

The Creation of an International Criminal Court

officially established on July 1, 2002, and is located in The Hague, The Netherlands. However, all of the world's nations have not ratified the Rome Statute of the I.C.C (United States, Russia, and Japan)

only war crimes committed after the I.C.C.'s establishment can fall under its jurisdiction. only

those nations that ratify the document will fall under its jurisdiction.

the establishment of the Court is a significant step toward the creation of an international system of war crimes justice.

CHAPTER 9: National Courts and International Law Issues

Monism - This theory characterizes international and municipal law as a single legal system with municipal law subordinate to international law.

In states adopting this theory, the local courts automatically accept jurisdiction to adjudicate on lawsuits relying on international law principles.

Dualism - This theory regards international and municipal law as separate systems so that the municipal courts can only apply international law either when it has been incorporated into municipal law or when the courts incorporate international law on their own motion.

Customs and Treaties as Part of the Law of Ethiopia- Art 9(1) vs Art 13 (2) of FDREC.

Extradition Treaties/Agreements

There are two types of extradition treaties: list and dual criminality treaties. The most common and traditional is the list treaty, which contains a list of crimes for which a suspect will be extradited (surrendered).

Dual criminality treaties, used since the 1980s, generally allow for extradition of a criminal suspect if the punishment is more than one year imprisonment in both countries.

Many countries, such as Mexico, Canada and most European nations, will not allow extradition if the death penalty may be imposed on the suspect unless they are assured that the death sentence will not subsequently be passed or carried out.

Some countries, such as France, Russian Federation, Germany, Austria, China and Japan, have laws that forbid extraditing their respective citizens.

The refusal of a country to extradite suspects or criminals to another may lead to international relations being strained. Often, the country to which extradition is refused will accuse the other

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country of refusing extradition.
