FEDERALISM FOR LAW III

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COURSE DESCRIPTION

- The course on Federalism covers the meaning, pros and cons of a system of federation, the types of federation, and general features observed in different federal systems.
- It discusses such issues like whether federalism helps in regulating conflicts, what the historical antecedents of federalism are in Ethiopia,
- how they contribute to analysis of the present situation, whether lessons could be drawn from other multicultural federations,
- how legislative and executive powers between the federal and state governments are divided - with particular focus on the Ethiopian federal system and the ongoing debate concerning the authority of the constituent states,
- how federal polities are distinguished from other forms of polities, the main institutions established in a federation, and the role of second chambers in legitimating federal government and process of policy-making.

- The course also examines one of the consequences of introducing a federal system, i.e. intergovernmental financial arrangements in decentralized systems.
- Fiscal federalism analyses the theoretical and empirical basis of the division of expenditures and revenues between the levels of a government.
- The focus will be on the constitutional allocation and distribution of expenditure responsibilities and revenue-raising powers between the tiers of the government.
- This shall cover the vertical as well as horizontal fiscal imbalances in revenue capacity and expenditure needs among the constituent units, the processes and institutions of intergovernmental fiscal transfers and borrowing needed to respond to financial imbalances, and corrections for imbalances.

FACTS

- • Twenty-eight countries, home to over 40 per cent of the world’s people, either call themselves federal or are generally considered to be federal.
- • Almost all democracies with very large areas or very large populations are federal.
- • With democratization, Argentina, Brazil, and Mexico are becoming increasingly federal.
- • Belgium, Ethiopia, and Spain are formerly unitary countries that have become federal.
- • Federalism has been adopted in post-conflict environments in Bosnia, the Democratic Republic of Congo, Iraq, Sudan, and South Africa, and is being considered in Sri Lanka and Nepal.
- • The European Union has a number of federal characteristics.

- **The World’s Federations**

Argentina, Australia, Austria, Belau, Belgium, Bosnia-Herzegovina, Brazil, Canada, Comoros, Democratic Republic of Congo*, Ethiopia, Germany, India, Iraq*, Malaysia, Mexico, Micronesia, Nigeria, Pakistan, Russia, St. Kitts and Nevis, South Africa, Spain, Sudan*, Switzerland, United Arab Emirates, United States of America, Venezuela

CHAPTER I
GENERAL OVERVIEW OF FEDERALISM

- **MEANING AND APPLICABILITY OF FEDERALISM**

❖ the term Federalism refers to the existance of multi-tiered government with the element of shared rule and self rule.

❖It's a means of devolution of power ; the creation of two or more level of government having many centers.

❖ it is a system of state structure that, each order of government has an autonomous constitution-al existence.

- *In confederal systems, the central government is a legal creation of the constituent units*
- *In unitary systems, any regional governments are legal creations of the central institutions.*
- *In a federal system, each state structure i.e the central and the constituent units are created by the constitution.*

· RATIONALE FOR ADOPTING FEDERALISM

- in response to democratic political pressures for devolution and non centralization *(in former unitary and highly centralized states)*
- a federal structure permitted each unit to preserve some of its autonomy while pooling other aspects in the new community *(in coming together)*
- who feel the burden of diversity, conflict, and insecurity
- Federalism seems particularly suited to democracies with very large populations or territories or with highly diverse populations that are regionally concentrated.
- In response to *constitutionalism and Rule of Law*; hence each level of government assume power from the constitution and abide by it

- **PROS AND CONS OF FEDERAL SYSTEM**
- **Advantages**
- Devolution of power – minimizes tyranny , Responsive government
- Enhance Democracy- No democracy- no genuine federation
- Self rule- for member states
- Positive competition between members- benefit the citizens and other stakeholders
- Increase the level of participation by individuals; hence the local government is more close to them.
- Makes the government more responsive to individual needs; hence a nation state is unable to deliver services demand by the people.

Disadvantages

- Undermine Unity/
- Negative competition; againest their respective citizens.
- Local tyranny
- Conflict between the members and with the federal government
- Inefficiency. Gambella, Afar and Benishangul

· · FORMATION OF FEDERAL SYSTEM

- **Previously separate units—independent state join together in a federal arrangement *Coming together***
- **the country may have originally been created with a unitary and highly centralized *Holding together***
- **two processes combined.** *Canada -Ontario + Quebec + new provinces.*

❑ All federations evolve over time. Some have gone through major formal constitutional changes, while others have changed significantly despite largely stable constitutions.

- *United States 200 years 27 amendments*
- *Mexico ,Brazil, Venezuela had six, seven and twenty six constitutions respectively since independence*
- *India 94 amendments in 60 years*

❑· TYPES OF FEDERAL SYSTEM

1. **Based on the formation federal system** ***Coming ,Holding And Putting***

- ✓***Coming together- when previous independent states agree to form a new federal state ……US, Germany (S and N)***
- ✓***Holding together- when a former unitary state devolve its structure and form a federal state……Nigeria, Ethiopia***
- ✓***Putting together- happen when the federation is formed by force- the former soviet federation***

2. Based on the expression of the law about the federation *De Jure And De facto*

- ***De-jure- the federation if formed by an explicit constitutional provision Art 1 and 46 of FDRE***
- ***De-facto-the constitution either denies or silent about the establishment of a federal form of state structure. Spain and South Africa***

3. Based on the degree and extent of Power granted to the regional states *Symmetric And Asymmetric federalism.*

- ***Symmetric- equal and similar power is granted to all members of the federation.* Ethiopia Art 47 (4)**
- **asymmetry's used to describe a situation whereby some federated entities have gained greater self-governing powers than others.**
  - The federal systems of Spain, India, and Belgium contain elements of de jure asymmetry

CHAPTER II:
COMMON FEATURES OF FEDERATIONS

COMMON FEATURES OF FEDERATIONS

- **At least two orders of government**, one for the whole country and the other for the regions. Having *direct electoral relationship with its citizens.*
- **A written constitution** some parts of which cannot be amended by the federal government alone.
- A constitution allocates powers to the two orders of government ensuring some genuine autonomy for each order
- Usually some special arrangements, notably in upper houses
- An umpire or procedure to rule on constitutional disputes between governments.

· · WRITTEN AND SUPREME FEDERAL CONSTITUTION

- A federation must have a written constitution. A federation is a political partnership of various states and consequently there must be a written constitution.
- Hence it is a contract the terms shall be written in a supreme law (constitution)
- Neither level of government in a federation receives its powers from other.
- The constituent communities do not receive their powers from statutes enacted by the national legislature.
- And the national government does not receive its powers from decisions and actions of the regional legislatures.
- Both levels of government national and regional receive their respective sets of powers from a common source, and that common source is the *national constitution.*
- The constitution is the supreme law in a federation. Neither the central government nor the government of the units can go against its spirit. *Art 9 of FDRE Con.*

- **RIGID CONSTITUTION**
- The constitution of a federation should be better rigid so that it could be regarded as a sacred agreement, the spirit of which should not be easily violated. Art 104, 105
- A flexible constitution allows scope to the central government to curtail the autonomy of the federating states.
- **A written constitution and rigid constitution** some parts of which cannot be amended by the federal government alone. Art 104, 105 (1)(a), 105(2)(b)
- As an ordinary contract it can’t be amended by one of the party alone.

- **DIVISION OF POWERS**

- A constitution allocates powers to the two orders of government ensuring some genuine autonomy for each order.
- In a federal government, the powers of administration are divided between the centre and the units.
- In a federal system, the national constitution protects the right of each level of government to exist. Legally, neither level of government can destroy the other level
  - *each sphere exists in its own right, that is the final decision-maker on a defined range of functions and is accountable for its decisions.*

ALLOCATION OF POWER

The powers may be distributed in different ways.

1. *United States Constitution* has only 18 headings for the powers of the federal government and most of these are actually concurrent with federal paramountcy; all other powers (residual powers) lie with the states. Switzerland too, give residual power to the cantons

- 2. The Indian Constitution, by contrast, has three long lists: the union list has 97 headings, the concur-rent list, 47, and the state list, 66
- 3. The Spanish Constitution lists competences that may be assigned to the autonomous communities, but this is done legally through statutes of autonomy for each community, and these statutes can vary.
- 4. Ethiopia the Federal List accompanied by a residual and state list for regional states and fragmented concurrent list. *Art 51, 52,... /80/.....,96,97,98*

In General

In a federal union, the national constitution gives the central government control over matters of general, or common, concern to the country as a whole and permits the constituent political communities to regulate matters of more regional or local concern.

. .....*PAGE 24 AND 25 0F ANDERSON.....*

- On How To Assign That Power--dualist And Executive Federalism or a mixed one
- Canada, Brazil, and the United States are examples of largely dualist federations;
- Germany, Austria, South Africa, and Spain follow the interlocking model. *Administrative federalism*
- India and Switzerland have strong features of both.
- *…….The case of Ethiopia ???????……*

THE NOTION OF CO-ORDINATE RELATIONSHIP

- They cant work without interaction, hence they work at the same land and jurisdiction-----so coordination is necessary and inevitable
- The concern of Glocallaization and the responsibility of each level of government to achieve developmental and humanitarian goals------demands cooperation
- There are also concurrent , joint and shared areas of power that demand coordination

- In SOUTH AFRICA spelling out the principles of co-operative government and intergovernmental relations, expressed in three basic principles.
- First, there is a common loyalty to the Republic as a whole. This means that all spheres are committed to securing the well being of all the people in the country and, to that end, must provide effective, transparent, accountable and coherent government for the Republic as a whole. This is the object of cooperative government.
- Second, the distinctiveness of each sphere must be safeguarded. This entails the following: the constitutional status, institutions, powers and functions of each sphere must be respected; a sphere must remain within its constitutional powers; and when exercising those powers, a sphere must not do so in a manner that encroaches on the geographical, functional or institutional integrity of another sphere.

- Third, spheres of government must take concrete steps to realize cooperative government by:
  - Fostering friendly relations.
  - Assisting and supporting one another.
  - Informing one another of, and consulting one another on, matters of common interest.
  - Co-ordinating their actions and legislation with one another.
  - Adhering to agreed procedures.
  - Avoiding legal proceedings against one another.
- .....FDRE Art 50(8).....?????

- **UMPIRING THE FEDERATION**

An arbitrator------the right to decide when a particular situation happen in the federal system

  - the Supreme Court of the United States and
  - the German Constitutional Court.
  - Referendum in Switzerland
  - In Ethiopia- the HoF emanated from the nature of the Nature of the federation itself and HoF.
  - Art 8, 61 (1), and 62(1) with 83 (1)

· · ORIGIN OF FEDERATIONS AND THE TERRITORIAL AUTONOMY OF UNITS

What is the relationship between the origin (the formation of the federation) and the territorial autonomy of regional states? both *de jure* and *de facto* autonomy?

Hint:

The difference, if there is any, between a coming and holding together federalism

The difference ,if there is any, between dual and executive federal systems.

- ***CONSTITUTIONAL***
- Some have quite clear divisions of powers between the central and the territorial governments, while others have widely overlapping powers
- Some have prime ministers and parliamentary governments; others have presidents and congressional institutions.
- They may have proportional representation or plurality electoral laws.
- ***EXTRA-CONSTITUTIONAL***
- They may have only two political parties, or several.
- Some federations are stable and harmonious, while others are unstable and divided.

- economic development and the level of education
- Using constitution as a *Sham Value and the problem of Constitutionalization*
- The desire to centralize/decentralize services they have been providing, ----------particularly if decentralization involves a loss of prestige and resources to these agencies and they perceive each other as competitors.
- Most central agencies are hostile to decentralization and use poor local performance as an excuse for keeping the services centralize
- The formation of the political party ……..
- *ART 7 (1) (E) 0F EPRDF STATUE*

CHAPTER III:
FEDERATIONS AND SECOND CHAMBERS

- **RATIONALE**
- *Almost all federations have an upper house whose membership is in some way representative of the constituent units. Venezuelahas no upper house*
- In federations, these two houses (the upper and lower)
- **The central legislatures of federations usually have some *balancing* of representation by population with representation by constituent units.**
- This federal dimension of representation is usually embodied **in upper houses,**
- The prevalence of such upper houses in federations is associated with the idea that **both the population and the constituent units** are part of what makes a federation, and both dimensions need to be reflected in the central institutions

- **COMPOSITION**

- The **method for selecting members** of the upper house and the powers of the upper house differs greatly among federations, with important consequences for the functioning of federations.

- *Are always constituted on different representative principles, with the upper house usually using a* **formula based on** *constituent units and the lower house allocating membership closer to representation by population;*

- United States, Argentina, Australia, Brazil, Nigeria, Mexico, Russia and South Africa, , all have an equal number of members in their upper house from each full constituent unit

- Austria, Belgium, Canada, Ethiopia, Germany, and India have unequal representation by constituent units, with weight given to population differences.

- In Suitzerland The federal legislature is bicameral, composed of the National Council (Nationalrat) and the Council of States (Standerat);, out of 26 cantons, two representatives each and half cantons one.
  - dual membership in the cantonal and federal legislatures is permitted so that about one-fifth of federal legislators are also members of cantonal legislatures.
  - The demand of referendum to amend the constitution
- Spain represents all mainland provinces equally, but varies representation of autonomous communities (states) by population.
- Mexico gives all states equal representation, but elects one-quarter of senators nationally by proportional representation
- .....The case of Ethiopia..... Art 61
- Both NN, nn, pp and the representatives of the regional states of Ethiopia? 62, 98

- **SELECTION OF MEMBERS**
- are elected or named in different ways;
- Most federations elect members of their upper house directly,
- but a number (Austria, Belgium, India, Spain) elect all or some indirectly.
- In some federations, members of the upper house are indirectly elected by the legislature of the constituent unit. Länder delegations for the Bundesrat in Germany
  - In Austria The members of the second chamber (the Bundesrat) are indirectly elected by the assemblies of the Länder with representation fairly closely proportional to population except for a minimum guarantee of three representatives for each Land.
- The Russian and South African upper houses have representatives named by both the executives and the legislatures in the constituent units.
- In Malaysia, state legislatures name 38 per cent of members of the upper house, while minorities name the others.

the United States and Switzerland, seem to reflect another dimension of the interests of the electorate rather than the interests of the states

- In Ethiopia, constituent unit legislatures decide (directly by the people or indirectly by the state council) how to select their members of the national upper house. In Ethiopia Art 61(3),
- Where they are elected directly, (United States and Switzerland,) members of upper houses usually have longer terms than members of the lower house, and. seem to reflect another dimension of the interests of the electorate rather than the interests of the states
  - 6 years in USA

- many federations have allocations that take into account differences in population (e.g., larger units getting two or three times the number of representatives of small units) .....Germany
- Finally, in many federations, there are also provisions that give extra weight to representation from smaller constituent units in the lower house. These can guarantee a minimum (or even a maximum) number of representatives in the lower house Ethiopia 61 (2) Proclamation No. 251/2001 Consolidation of the H0use of the Federation and the Definition of its Powers and Responsibilities Proclamation Art 47.
  - USA maximum, of 2 (two) for all
  - Austria a minimum guarantee of three representatives for each Land.

US and Switzerland where the two chambers are co-equal in power

- **POWERS**
- In different federations the upper house can have quite similar or very distinct powers.
- There is no consistent pattern across federations on these matters. However, in parliamentary regimes, the lower house is usually the confidence chamber that determines who forms the government., Art 73 (2)
- The United States
- ‘All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.
- the two chambers are co-equal in power; IN ADDITION……..

- Senate has all the powers of the House of Representatives, but it alone can approve key appointments, declarations of war, and treaties.
- Upon institution of charges by the lower house, the Senate has the sole power to try impeachment.
- 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.

- Switzerland where the two chambers are co-equal in power
- The Swiss Council of States is equally empowered in all legislative affairs. the legislature may only be enforced if they have the approval of both chambers.
- (Council of State and the parliament)both houses play the same role in the selection of the Federal Council.
- The Argentine, Australian, Brazilian and Swiss
- upper houses have an absolute veto over all legislation

- **Germany**
- Legislation that affects the Lander (now about 40 per cent of all legislation) must be approved by the Bundesrat, (veto power) and a suspensive veto on other matters.
- allowed to initiate legislation,
- The Bundesrat is thus central to inter-governmental relations.

- In India
- The Indian Constitution states that parliament as a composite law-making body consists of the Council of States and the House of People.
- power to revise legislation potentially able to amend bills but only with a suspensive veto.
- The House also has important powers in amending the Constitution.
- house that can pass binding decisions calling parliament to enact law-covering matters included in the state list.
- In Indian and Nigerian the upper houses have a veto that can be overridden by a majority in a joint sitting of the two houses.

- **In Ethiopia**
- House of the Federation plays no role in normal legislation, Proclamation No. 251/2001; Art 3
- constitutional interpretation and organizing the Council of Constitutional Inquiry=Explanations can be inferred from Articles 8 and 61.
- Decide on a budget on the grounds of its fiscal allocations to states.
- it also addresses disputes between states and acts as a final interpreter of the constitution.
- Enforcement of fundamental rights and freedoms
- Deciding issues related to self-determination of nations, nationalities and peoples ***Art 39***
- On the Undesignated power on taxation Art 99? And on joint taxation Art 62 (7) and 98, election of the federal president Art 70 (2) and on constitutional amendment under Articles 104 and 105;

recommended that both legislation and collection of these taxes be assigned to the federal government but the allocation of the revenue would remain within the responsibility of the HoF as per Art. 62(7
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- **THE ROLE OF THE HOF IN INTERGOVERNMENTAL RELATIONS**

- Though Ethiopian Federal system adheres to 'dualism,....like other federal systems, because the federal government is assigned the task of redistribution as well as securing some level of economic stability.....leads to .... Revenue concentration on the hand of the federal government .... affect their autonomy and..... demands redistribution.....Art. 62(7)

- In concurrent power of taxation (98) difficult to legislate as the federal and state law-makers could not sit together to make laws....recommended that both legislation and collection of these taxes be assigned to the federal government but the allocation of the revenue would remain within the responsibility of the HoF as per Art. 62(7)

- HoF that is entrusted with the responsibility to **‘promote the equality of the peoples of Ethiopia … and consolidate their unity** .. Article 62(4)(9)
- ordering the federal government to intervene if any state threatens the constitutional order in violation of the constitution.

CHAPTER IV: FEDERALISM AND ACCOMMODATION OF DIVERSITY: THE ETHIOPIAN EXPERIENCE

- Unlike nation-state federations which aim at national integration or assimilation, **multicultural federations,** accommodation of ethno-linguistic, religious and regional diversities E.G Nigeria, India and Switzerland and Ethiopia
- The federal idea attractive, not only to accommodate diversity but also as a means to contain such conflicts
- Multi-ethnic federations the main emphasis, among other things, is on federalism's ability to reconcile the forces of unity and diversity
- THE CHAPTER WILL ANSWEAR TWO ISSUES ABOUT ETH-FEDERALISM
- One is how the federal system has been (un)able to accommodate the diverse ethno-linguistic groups since its establishment and the second is the contentious issue of how best to restructure the constituent states with a view to establishing a more viable federal system.

ETHIOPIA

- The home of un colonized black people-unique patriotism, the two oldest religions: Christian Orthodox and Islam still serve as unifying features.
- its own written script *Geez*, its number (*Kutur*) and own calendar.
- founding member of the United Nations, as it was of the Founder of League of Nations, Organization of African Unity and home to and a leading member of the African Union
- Ethiopia is a multicultural- hosting more than eighty of what the 1995 constitution calls "*nations, nationalities and peoples*", multi-religious state.

THE ORIGIN OF THE FEDERATION

- “Through nation building”

….. During the late 19th and the beginning of 20th century.

- Firstly, the incorporation of the South, the Southwest and the Eastern sides from their previously autonomous,…… values, institutions and culture of the national state were imposed on the incorporated kingdoms.
- Secondly, it brought about all sorts of diversities in terms of religion, language, tradition and culture……. Without recognition
- Thirdly, the state became extremely centralized at the expense of regional rulers. …creates continues confrontation

There were a *defacto* federal character

At the beginning of their incorporation (during Emperor Minilik II).

- The existence of kings and king of kings
- Regional forces have Significant powers- taxation, regulation of trade and maintaining local security, (a local military)

· AFTER THE 1031 CONSTITUTION

- Regional forces were changed by centrally appointed agents of the Emperor,
- dissolved private armies of the regional forces and
- introduced centralized taxation
- The introduction of national religion
- In the 1960s The Ethiopia Students and elites formulate two main types of problem as a cause for the entire problem of the country.
  - ❖ Class Problem; EPRP, Meison, Derg ….
  - ❖ Nationality problem: Walelign Mekonin, TPLF, OLF, ONLF

DERG- 1974-1991

- More centralization of power. Through the 1987 PDRE constitution
  - WPE is the only party to represent the people
  - The economy and social activity guided by a central plan Art 11
  - All state power is derived from the national shengo Art 3 (2)

- Positive Achivments of the Constitution
- Redistribution of land and Extra houses
- Creation of a secular state
- Equality of nationalities art 2(1)
- Equality of language of all nationalities Art 2(4)
- PRDE to comprise Administrative and Autonomous Regions Art 59 and 61

- However this all attempts never save the PDRE and its national plan and strategies…….hence it was defeated by the Nationality forces Mainly – TPLF, OLF….. In 1991.
- Establish the transitional government in 1991
  - Recognize the right of Nations and Nationalities Self determination including secession …Art 2 of the charter.
  - A *defacto* federal state was created through the charter
- National/regional Self governments were established by Proclamation 7/1992.
  - 14 regional states were created including Addis Ababa

- The alternatives were

1. To create a Civil Nation State -the majority culture, language, religion that becomes the national culture, language or religion.
2. A multicultural state through federalism.

Why Ethnic Based?

Identity does not necessarily vanish from the face of the political discourse even if political and economic situations are favorably accommodative.

The stand of the ruling party that the remedy for the resolution of Ethiopia's long standing problem of the "nationality question" by recognizing Soverignity and self determination for the NN, nn, PP.

The 1995 FDRE constitution and its federal features

- Its origin
- ….. The transitional govnment charter no. 1
- --- proc 7/1992 BEHERAWI KILILAWI YESHIGEGIR MESTEDADIROCH LEMAQUAQUAM YEWETA AWAJ
- ……
- The nomenclature of the constitution itself

1. Coming together

✓ The preamble, We…… In full and free exercise of our right to self determination

✓ All sovereign power vested to them Art 8

✓ Ethnicity as a criteria to establish regional state Art 46 and 47

✓ Self determination Art 39

1. Holding together

- No autonomous state before 1991
- The preamble as a prove for the accommodation of diversity not their previous independence

federal features

1. **Decentralization….. Art 50**

- decentralize power and resources and resolve the "nationalities question"
- the federal government and the states shall have legislative, executive and judicial powers. Art 50 (20)…. Art 51 AND 52,…79, 80…..94-99

2. explicit recognition of nations/nationalities as building bricks of the federation and its implications

- **The preamble**
- **Art 8**
- **Art 39**
- **Art 47 (2 and 3)**
- **Art 61 (1 and 2)**

3. **survival of the federation**

- Federation came from the victorious national liberation movements
- The recognition of self determination calm down the dozens of ethno-nationalist movements claim of some form of regional autonomy and even at times secession.
- **4. Unicameral Legislature**
- The federal system operates within a parliamentary form of government….Art 45 and 56
- federal level there are two Federal Houses: HPR and HoF
- Its Unicameral
  - (HoF) is not part of the law making process at federal level
  - is only the HoPR which has the sole power of legislation in all matters assigned to the federal government. Art 55 (1)
  - House is the highest authority in the federal government. Art 50 (3)

5. Federal Supremacy

- No supremacy clause rather a duty to respect each other: Art 50(8)

LIMITATIONS AND CHALLENGES OF TRANSITION TO DEMOCRACY

- constituent states lacked skilled manpower and resources to the newly established local institutions
- there was little or no infrastructure in the less integrated region
    - This let the ruling party to play a greater role in local administration than in other constituent states.
- The federation inclined towards asymmetry than a legally based symmetric formation.
- Fiscal imbalance and its effect on the autonomy of regional states
- Party channel relation than a principled and institutional based
- Absence of Rule of law and democracy

INDIVIDUAL ASSIGNMENT (10 PTS)

- ▪ What is the impact (positive or negative) of choosing an Ethnic based federal system in Ethiopia ? Do you think that it is feasible *(both theoretically and practically),* to apply other alternatives ?
- What do you think is the impact of secession clause *((Art 39 (1) and (4) of the constitution))* for the viability of Ethiopian federal system?

((better to make an inventory of positive and negative outcomes –in the past and in the future?))

- NB. Don’t underestimate your own observation and experiences.

CHAPTER V:
DIVISION OF LEGISLATIVE POWERS IN FEDERATIONS

· 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: *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. *substance of power allocated.*
- ✓Despite specific differences, there are some common features one observes in the forms of distribution of legislative powers between the federal government and the states.

1. EXCLUSIVE POWERS

- the powers to be distributed in federal systems fall into one of two main categories: exclusive powers and non-exclusive powers.
- 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.
- There are some general similarities in the allocation of exclusive powers between the federal government and the states in all federations.
    - functions by their very nature cover the entire territory of the federation and apply equally to all member states and citizens. Under exclusive power of the federal Government.

- IN USA
- Art 1 (8) empower the congress *The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States... to borrow money on the credit of the United States; to regulate commerce with foreign nations, and among the several states...; to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States; to coin money, regulate the value thereof... fix the standard of weights and measures; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to declare war...; to raise and support armies...; to provide and maintain a navy etc.....*
- An act of Congress is invalid unless it is affirmatively authorized / only when enumerated/ under the Constitution while State actions in contrast are valid as a matter of federal constitutional law unless prohibited explicitly or implicitly by the constitution

- Doctrine of implied powers: the exercise by Congress of power ancillary to an enumerated powers and the ‘necessary and proper’ clause as per the US court decision --*Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution are Constitutional.’*

- IN GERMANY
- The legislative areas in which the federal government exercises exclusive powers are enumerated in Article 73. The lists of exclusive federal powers are very much like the list of Congressional powers under Article I section 8 of the United States Constitution but with no necessary and proper clause
- *It states that the federation shall have exclusive power to legislate with respect to 'foreign affairs and defence, including the protection of the civilian population; citizenship, freedom of movement, passports, immigration, emigration, and extradition; currency, money and coinage, weight and measures and the determination of standards of time; the unity of the customs and trading area foreign trade; air transport; federal rail ways; postal and telecommunications services; industrial property rights, copy rights and publishing; statistics; regulation of federal employees.'*

- IN SWITZERLAND
- The federal government is competent to legislate only if defined in the Constitution and that the federation is able to intervene and legislate in a particular domain only if empowered to do so by the Constitution.
- Unlike The US constitution and Germany basic law The legislative power of the Swiss federal government and the states is found dispersed over various articles throughout the Constitution and it is not easy to single out which powers are exclusively federal and which are not.

- FDRE Constitution
- The Ethiopian Constitution in general follows the United States and Swiss forms of distribution of powers in the distribution of power in general between the *federal and regional states.*
- On legislative power
- Art 55 (1) and the following gives exclusive power to the federal legislature

. Art 50 (5) gives the state legislature excusive power on the areas of state

2. SHARED LEGISLATIVE POWERS

- “Shared’ means each order has some different legal powers in the broad area and decisions are made independently.
- There are deliberate and some unintentional overlaps in the division of power.
- Because the allocation of powers to the federal government and the states could not be done neatly, federations provide another set of powers commonly described as shared powers. *inevitability of overlaps of jurisdiction*
- Shared powers represent the meeting point of the two levels of governments,
- Even in the United States where there is no explicit list of shared powers, the Supreme Court has been able to create a wide regime of shared powers.
- Both can legislate over the same area- this may enable the states to enact a particular law but the federal government may enact a law for the sake of uniformity or to avoid spill-over effect.

- THE PROBLEM OF conflict on POWER
- Federations use mechanisms to avoid any conflict of jurisdiction on legislation over shared area. Mainly by Supremacy Clause
- that the existence of a separate list of powers other than exclusive and residual ones is liable to raise considerable problem on shared areas
- *If a shared list is added, there are not only disputes about the meaning of the words in the new list but about the extent to which these words overlap or conflict with the words in the exclusive list and about the extent to which laws passed by the unit exercising shared powers conflict with each other.*
- *INDIA- 2 exclusive and shared list.* interpretation becomes even more complex. Three lists must be compared
- Most of the time states are excluded from shared power like they are excluded from the federal list.

- the existence of shared powers shows how a clearly layered division of power is far from real and the undesirability of dividing political powers neatly and permanently.
- It shows the relevance of a cooperative federalism than a classic and dual form
- most part the social and economic spheres that demand extensive activity at both levels of government fall into this category.
- Better to classify shared powers: concurrent powers and framework powers.

A. FRAMEWORK 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 competence to issue general legislation in a specific policy field.
- This federal legislation is subject to strict conditions because it has to leave substantial room for the states to issue their own legislation within the limits set by the federation. Eg. Germany
- the federal law shall leave the states room to legislate the details and to deliver the services in a manner adaptable to local situations.
- States allowed to fill the gaps with more detailed laws.
- This enforce a significant decentralization of policy-making authority for the states without sacrificing uniformity.

FDRE CONSTITUTION

- 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.
- 1. Article 55(6) the HoPR is empowered to enact *civil laws*, ……. This is a total departure from Article 52 (1) that reserved civil laws as a state matter. But the former provision seems to imply that; whatever is not expressly given from the civil law to the federal government is not necessarily with the states.
    - If the federal government through the HoF decides that uniformity in some fields of civil law should be achieved in light of the potential and actual variation among states in terms of culture, religion and tradition, which may have a bearing on the rights of children, women or even inheritance, then the HoPR may be compelled to enact such laws.

- 2. Another area of great significance falling under the framework legislation appears to be Article 51(2) and sub (3) versus 52(2) c.
- There is obviously a lot of overlap between the powers of the federal government and the states concerning economic, social and development plans as well as health and education. To what extent could the federal government outline the national standards and policy criteria..... also not clear what is left for the states.
- E.g. EDUCATION AND THE ROAD MAP
- 3. The provision that empowers the states to legislate on state civil servants is also far from being exclusively a state matter Art. 52(2) f.

- 4. Article 51(5) also empowered to enact laws for the utilization and conservation of land while the states are empowered to administer land and other natural resources in accordance with federal laws (52(2)). Seems the federal shall legislate and the state only to execute. However;
- The practice is different. When a complain was lodged on the unconstitutionality of the Enactment of the Amhara Rural Land Proclamation The CCI ruled that the law is constitutional on two grounds: it is part of the residual power of the states and also because it has been retroactively endorsed by the federal proclamation

  - *Biyadglegn Meles* and others Vs *the Amhara National State*

B. CONCURRENT POWERS

- ‘Concurrent’ means both orders can make laws in a defined area
- As one category of shared powers, concurrent powers refer to powers attributed to both entities. However, one of the entities, often the states, are allowed to exercise this power until the federal government steps in to legislate on such powers. ▪
- Concurrent powers provide an element of flexibility in the distribution of power enabling the federal government to postpone the exercise of potential authority in a particular field until it becomes a matter of federal importance.

- In India, the third list constitutes a common or concurrent area in which both the Union and the states may operate simultaneously subject to the overall supremacy of the former.
- In India, the general idea underlying the concurrent list is that there may be subjects on which parliament may not feel it is necessary or expedient to initiate legislation in the first instance because these matters may not be of national importance.

- In Ethiopia, no express indication of concurrent power, except on taxation Art 98.
- Art 55 (5) appears more of a concurrent than parallel or framework one. Because the states may enact only if the federal penal law does not exhaust the list of offences.

3. RESIDUAL POWERS

- 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 Ethiopia have preferred to leave residual powers with the states, while in India such powers belong to the center.
- the greater the list of enumerated powers, the less significant the residual powers will be. E.g India
- In the United States, placing of residual powers with the states during the early phase of the federation was a sign of state sovereignty. The United States Constitution gives Congress the power to do certain things, a formulation inviting the call for the necessary and proper clause

- In Germany, after looking at the enumeration of exclusive federal powers and comprehensive concurrent powers one may doubt if the reserve power has any meaning.
- The only compensation to the continual diminishing of states' legislative power that the Germans contend with is through the *Bundesrat* and through the execution of federal law.

- In Ethiopia, the CCI ruled on the issue of the extent of residual powers of the states. E.g By interpreting Articles 52(1), 55(6) and 62(8) let the family code as a state matter. Because;
    - 1. family code is intertwined with the culture, tradition, and religion of society.
    - 2 reserve power belongs to the states and such power is not expressly granted to the federal government.
- What will happen if a given state recognize bigamous marriage legally? It is punishable with simple imprisonment.
- Art 650 and 651 of Criminal Code.

CHAPTER VI:
DIVISION OF EXECUTIVE POWER
1. DUAL FEDERALISM

- Dual federalism is 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 the principle 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.

- In the context of the United States federal system
- Firstly, it states that the federal government has one set of enumerated and limited functions and the states another set of un-enumerated reserve powers.
- Secondly, within their respective spheres the two governments are co-ordinate and sovereign.
- Thirdly, there is less overlap of power between the two governments and hence less sharing. There is rather a competition between the two levels of government as each legislates, executes and adjudicates its laws.
- Fourthly, changes in the power distribution between the two can be accomplished only by constitutional amendment.

- Congress would ever trust the states to enforce federal laws. The reason is that federal laws are enacted by the congress hence states have proved unwilling to tackle the problem. This reason applies to the executive power too.
- The doctrine stipulates that ‘all governments which are not extremely defective in their organization must possess within themselves the means of enforcing their own laws.

- **ADVANTAGES OF DUAL FEDERALISM**
- firstly, this is believed to reinforce the autonomy of the legislative body;
- secondly, it assures to the government the authority to implement and enforce its own legislation, which might otherwise run into difficulty when it relies on the state machinery;
- thirdly, in parliamentary systems, it is only when the legislative and executive responsibilities coincide that the legislature can exercise control over the body, executing its laws.

2. EXECUTIVE FEDERALISM

- Executive federalism is the one widely practiced in Germany and Switzerland and to some degree in India.
- In these federations 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.
- **IN GERMANY**
- The Basic Law provides: ‘the states shall execute federal laws in their own right in so far as the Basic Law does not otherwise provide or permit.
- While executing federal laws in their own right, the states regulate the establishment of the authorities and their administrative procedure but federal government can state otherwise or issue general administrative rules.

- In particular the federation cannot create its own federal agencies to be sent to the states, although the federal government exercises an oversight to ensure that the states exercise federal laws in accordance with the law.
- The Basic Law also provides for situations where the states enforce federal laws as agents of the federation and subject to binding federal instruction
- Bundesrat can decide as to whether a state has violated the federal law or not and an appeal can be lodged against such decisions before the Federal Constitutional Court.
- to the extent that there are direct federal agencies, there is dual federalism of some kind but its scope is very limited that federal administrative power is more the exception than the rule.

- As some would insist, the federal system is functional (legislative power mainly belongs to the federal government and execution to the states) but what is peculiar again is that *there is an implied law making power of the landers, because;*
    - the two levels of government as well as the two functions are (legislative and executive) tied up together through the Bundesrat, mainly composed of Länder governments and responsible not only for the making of laws together with the lower house but playing a crucial role as an institution of intergovernmental relations.

- IN SWITZERLAND
- Switzerland like Germany falls into the category that federal government is for the most part responsible for law-making while the states are for administering it. The phrase executive federalism in the Swiss context as well refers to the cantonal administration of federal law, constitutional or delegated.
- The Swiss Constitution states:
- ‘The cantons shall implement federal law in conformity with the constitution and the statute.
- ‘the confederation shall leave the cantons as large a space of action as possible, and shall take their particularities into account. grants the cantons greater freedom of action

- legal practice also indicates that the federal legislature can delegate the (executive, not legislative) power to execute federal laws even if the constitution does not specifically provide for it.
- IN INDIA
- The distribution of executive powers between the union and the states is somewhat distinct from that of the legislative powers. Opinions are slightly divided about the scheme of executive structure.
- administrative powers of the central government are not coextensive with its legislative powers, the latter being very extensive. As a result, the federal government executes its laws through the states.
- Owing to its unitary background preceding the federation, the unified arrangement for the administration of justice was left almost intact. Considerations of continuity and economy also explain to some degree why India follows some degree of executive federalism.

- **Advantages**
- Enhance cooperation between the levels of government
- Avoids repeated tasks of the two orders of government
- Effective implementation of policy and programs
- National Integration policies and programs
- **Disadvantages**
- May permit centralization of power
- Ignore diversity and local priorities

DIVISION OF EXECUTIVE POWER IN ETHIOPIA

- Many wrongly think that federal laws are limited to Addis Ababa and Dire Dawa. The fact, however, is that all laws made by federal parliament within the scope of its powers designated by the Constitution apply in all the states and the two autonomous districts. The federal government has the duty to see that such laws are executed throughout, in one way or the other.
- there is no clear constitutional framework governing the division of executive power between the federal government and the states.
- Ethiopian Constitution offers little guidance on managing federal-state relations relative to roles and tasks.
- there is neither a comprehensive dual structure nor executive federalism at work.

- In principle the Constitution seems to suggest that there are dual structures
- The Constitution states: ‘The federal government and the states shall have legislative, executive and judicial powers. Art 50 (2) of the constitution
- The Federal Council of Ministers is also empowered to ensure the implementation of laws and decisions adopted by the HoPR. Art 70 (1) of the constitution
- ensure the enforcement of the federal government laws; Each Ministry shall have the powers and duties to ensure the enforcement of federal laws. *Art 10 (1) b of proclamation no.691/2010 definition of powers and duties of the executive organs of the federal democratic republic of Ethiopia*

- Art 56 (1) of the ANRS and Art 53 of the ONRS revised constitutions revised Constitution
  - the highest executive power over the regional state is vested to the head and regional council. (shows dual federalism)

However;

- According to the regional Constitutions, among the power and duties of the regional council, one that takes the forefront is;
  - Ensure through the region the implementation of laws enacted and decisions passed by the federal state and regional council respectively. Art 58 (1) of the ANRS revised Constitution and Art 55 (1) of the ONRS revised constitution. (shows excutive federalism)

- A clear division of executive power of one type or another is crucial to the Ethiopian federation.
- First, the Ethiopian Constitution follows the old style division of granting enumerated and limited powers to the federal government and the residue to the states, Under such circumstances there is a higher potential of intergovernmental conflict and worse, the courts do not have the power to adjudicate such conflicts.
- Secondly, so far there are no formal federal-state mechanisms of intergovernmental relations
- Thirdly, Ethiopia has no law-making second chamber- States do not have control over the laws enacted by the federal government.

- There are some federal executive organs organized throughout the country to enforce federal laws. Chief among them are Customs Authority, Federal Inland Revenue, Telecommunications, Postal Services, Insurance and Banking and Federal Public Prosecution.
- *proclamation no.691/2010 definition of powers and duties of the executive organs of the federal democratic republic of Ethiopia establish more than twenty ministries,. However,* Many of the federal Ministries mentioned do not have branch offices outside Addis Ababa nor is there any express delegation of power to the state executive.
- The duality implied under Article 50(2) should, therefore, imply something beyond these few institutions to cover the whole field of other federal powers enumerated under Articles 51 and 55.

- Even in Germany and Switzerland, states that rely heavily on state executive organs for the enforcement of federal legislation, the federal government in each of them has these minimum federal institutions to enforce exclusive federal powers.
- despite the apparent lack of express concurrent powers, the bulk of social, education, economic and health affairs are shared between the federal government and the states. It is in these areas that the regime of co-operative federalism has been very influential in other federations.
- there are no institutionalized meetings, for instance, between respective heads of health, education and agriculture, of the federal government and the states.
- How is the Ethiopian federation act to execute its laws and policies cooperatively?

The Ethiopian Practice on IGR

- **1. CO-OPERATION THROUGH DELEGATION**
- According to Art 50 (9) ‘the federal government may, when necessary, delegate to the states powers and functions granted to it by Article 51 of this constitution.
- Articles 50 and 51 are general provisions not limited to legislative powers. They cover broad powers of the federal government, both legislative and executive.
- The federal government either expressly or impliedly delegate a number of executive powers to the regional states.
- Problems of delegation
- No upward delegation
- it is possible to change by legislation the basic tenet of the federal compact.
- Delegation gives the right to reclaim that power at any time. Not Stable

- **2. CO-OPERATION THROUGH EXECUTIVE INSTITUTIONS /Sector-based IGR/**
- The activity of the Ministry of Federal Affairs (ministry of peace) in the states is one of the semi-formalized practices that has an impact on federal-state relations.
- It is an unavoidable fact that different ministries, authority, agency and related institutions of the federal and regional states are in a continuous interaction with their respective counterparts in exercising their functions.
- Disadvantage
- Open a hole for the federal institutions to influence their regional counterparts in the guise of coordinating their shared policies and programs;
- Most of the time, a federal organ summons officials of organs in regional states when the issuance or implementation of a particular strategy or program demands an active involvement of regional state organs.

3. CO-OPERATION THROUGH THE PARTY CHANNEL

Party System is perhaps the most important factor that influences the working of a federal constitution

Implementation and coordination of shared policies and programs facilitated to a large degree by party channels.

EPRDFs democratic centralization policy let the party to execute government policies and strategies from top to down.

Disadvantage

- . limits political pluralism and puts in question the viability of multiethnic federalism.
- . it ignores the bottom up principle of federalism.

CHAPTER VII:
FEDERALISM AND THE ADJUDICATION OF DISPUTES

- the division of powers between the federal government and the states cannot be delineated in such a way as to avoid all conflicts----'division of power is artificial, imperfect and a generalized skeletal thing. Political life cannot be perfectly or permanently compartmentalized
- The constitution shall frame a principle and an organ to decide over any dispute that may be raised in federations.
- From the principle of constitutionally guaranteed division of power and the supremacy of the constitution follows that the last word in settling disputes about the meaning of the division of powers must not rest either with the federal government alone or with the states.

THE DIFFERENCE BETWEEN INSTITUTIONS

- constitutions have adopted different mechanisms for reviewing the constitutionality of laws and decisions of government bodies
- The (dis)trust that the states have over the judiciary, the differing commitments to natural law or legal positivism, the differing application of the notion of separation of powers, have influenced in one way or another, the nature and scope of the national institution established to review issues of constitutionality
- Two patterns are common regarding the institutions empowered to adjudicate constitutional issues. Many federal systems have vested this important power either in their ordinary courts or separate constitutional courts

- 1. DESENTRALIZED MODEL
- There is this diffused (decentralized) system also called the American- system that accords every branch of the judiciary the right to review the constitutionality of laws. In principle any court has the power to declare any law or decision of an executive body unconstitutional, if such a law or decision violates the constitution, final appeal being reserved to the federal Supreme Court.
- The ordinary courts decide constitutional issues in the process of disposing their routine function and review of constitutionality is, therefore, something that comes to the courts incidental to the case.
- The logic of the decentralized system in a nutshell, it is the duty of the judges to apply and interpret the law and in doing so if the judges find a contradiction and inconsistency between two laws of different hierarchies, it is the duty of the judges to apply the higher law.
- Besides the US Supreme Court would insist that the matter *must be justiciable* and must not involve '*political questions.*
- India too follow these trend. In Switzerland the courts have the power to disregard cantonal laws, judicial control is not, however, allowed over federal laws.

- 2. THE CENTRALIZED MODEL
- the centralized system confers the power of reviewing the constitutionality of laws to constitutional courts.
- Typical of which is the German Constitutional Court- characterized by its distinctive constitutional jurisdiction.
- It constitutes two senates each with eight judges: one handling mainly basic human rights cases, otherwise known as constitutional complaints while the other senate decides disputes involving constitutional issues proper.
- Half of the judges are selected for a single non-renewable term of twelve years, by a special electoral committee of the *Bundestag* while the other half are selected by the *Bundesrat* and to that extent by the governments of the states. Thus the federal government and the states have influence on the selection of the judges of the Court

- Constitutional Court has a hybrid role: political and legal. Distinct from and independent of the ordinary courts, the Constitutional Court serves as a *watchdog for the enforcement of the supremacy of the constitution.*
- The Court as such does not involve itself in the ordinary settlement of disputes unless the case relates to a constitutional question.
- However, it does not restrict itself to constitutional issues emanating from specific cases. It can also decide differences of opinions or doubts on the compatibility of federal or state law with the Basic Law upon the request of a few public bodies.
- Compared to the American Supreme Court, the German Constitutional Court has an extensive and wide-ranging jurisdiction regarding the Basic Law.

THE HOUSE OF FEDERATION: THE ETHIOPIAN CHOICE

- According to the Constitution Articles 62 and 83, the HoF is not only empowered to decide constitutional disputes but also to interpret the constitution.
- Unlike second chambers in other federations, the HoF has no law-making functions
- The rationale for vesting the power of interpreting the constitution in the HoF, can be gathered from the minutes of the Constitutional Assembly emanate from two sources.
- ▪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, ‘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.

- 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. it s tend to be a political document than a mere legal document
    - Thus the framers argued, this might result in hijacking the very document that contains the ‘compact between the nationalities’ to fit the judges’ own personal philosophies.
- **Disadvantages**
    - Diminishing the prestige of the Ethiopian judiciary
    - It’s a mere Political organ-affect the legal aspect of the constitution
    - Makes the constitution non consumable….. far from the day to day reach of the people

JURISDICTION AND PROCEDURES OF THE HOF

- Proclamation No. 250/2001, Consolidation of the CCI and Proclamation No. 251/2001, Consolidation of the House of the Federation stipulate the procedure of constitutional interpretation by the HoF..
- Art 4/ 251/2001 -General
- I) The House shall have the power to interpret the Constitution. Art 62 /1/ and 83 /1/ of constitution
- 2) Notwithstanding with sub-Article (I) of this Article. -the House shall not be obliged to render a consultancy service on Constitutional interpretation.
- HoF is assisted by the Council of Constitutional Inquiry (CCI) (an advisory body), consisting of eleven members that among others comprise the Chief Justice and his deputy of the federal Supreme Court, who also serve respectively as chairman and vice chairman of the CCI, six other legal experts appointed by the President of the Republic with the recommendation of the lower house, as a matter of practice coming from different constituent states, and three persons designated by the HoF from among its members. Art 82 (2) The CCI has the power to investigate constitutional disputes. **Art 84.**

- Art 5- Constitutional Interpretation…. Proc. 251/2001
- I) 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.
- Art 7 Principles for Executing Constitutional Interpretation
- 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.

- Gathering of opinions, to consult the Federal or State government depending on conditions and to render a decision within short period (30 days) after the submission of the recommendation are also few principles. Art 10, 11,13 of 251/2001.

- Interpretation of the Constitution proc 250/2001
- 17. Principle
- I) The Council of Inquiry shall have the power to investigate constitutional issues.
- 2) Where any law or decision given by any government organ or official which is alleged to be contradictory to the constitution is submitted to it, the Council shall investigate the matter and submit its recommendations thereon to the House of the Federation for a final decision.
- 3) If the Council, after investigating the case submitted to it, finds that there is no need for constitutional interpretation, it may reject the case and inform of its decision thereof to the concerned party.
- 18. Appealing to the House of the Federation
- 1) Any party who is dissatisfied with the decision of the Council, given pursuant to Article 17(3) of this proclamation, may Appeal to the House of the Federation.
- 2) An appeal under sub-Article (1) of this Article, shall be submitted within 60 days from receipt of the decision of the Council.

CHAPTER VIII:
THE ALLOCATION OF PUBLIC EXPENDITURE RESPONSIBILITIES IN FEDERATIONS

- · FISCAL FEDERALISM IN GENERAL
- The traditional economic theory of fiscal federalism, as pointed by Musgrave, identifies three major functions for the public sector: macroeconomic stabilization, income distribution and resource allocation.
- macroeconomic stabilization function is favored to be given to the central government which is inherently considered to be national in nature.
  - the two important policies are maintaining high level of employment with stable price because subnational levels of government are ineffective in dealing with the issues of unemployment and inflation
- Income distribution is also primarily the responsibility of a national government.
- Allocation function is in principle the responsibility of all tiers of government.
  - E.g defense by the central government and local public good by the local government

- Fiscal federalism literature focuses, in short, examining the following interrelated issues.
- First, it deals with the issue of „who does what“ – the distribution of expenditure responsibilities which in a federal system depends on the constitutional division of powers and responsibilities. CHAP 8
- The second issue is the division of revenue raising powers between the federal government and the regions. CHAP 9
- It is followed by the study of the causes and impact of fiscal imbalances between the tiers of government in executing their respective responsibilities. CHAP 10

Meaning of Public Expenditure- Principles And Objectives

- The division of expenditure responsibilities means determining the responsibilities of the tiers of government as to where and on what they can spend their money
- From the economics point of view, several scholars strongly argued for fiscal decentralization on the ground of efficiency, manageability, autonomy and accountability.
- The issue here is, *which authorities or functions* are divided between the tiers of government.
- In federations, this division of expenditure responsibilities is primarily determined by a federal constitution.
- the actual division of expenditure responsibility deals mainly with the interrelated aspects of the constitutional division of **legislative and executive and judicial powers.**
- Mainly, In order to understand the mode of the division of expenditure responsibilities, we focus on the division of executive powers.

Constitutional Methods For Division of Expenditure Responsibility: The USA And German Models

- There are two approaches for the allocation of executive powers.
- The first approach is followed by the older federations like the USA , Australia and Canada*, by laying down a principle that each level of government retains the executive responsibility in those matters in which it exercises the legislative power. dual federalism*
- The second approach (the Germany model) results in the division of labour where the legislative power is reserved for one of the tiers of government and its administration to the other. *functional federalism*

The Division of Expenditure Responsibility Under The FDRE Constitution

- According to the Constitution, each government has the legislative and executive powers on matters that fall under the respective jurisdictions (Art 50/2) and Each tier of government shall respect the powers of the other (Art50/8). *Dual Federalism*
- Expenditure principle in FDRE Constitution;
- **BOTH THE FEDERAL GOVERNMENT AND THE STATES HAVE TO COVER ALL THE FINANCIAL EXPENDITURES NECESSARY TO CARRY OUT THE RESPONSIBILITIES ASSIGNED TO THEM BY LAW** (ARTICLE 94/1).
  - the powers and functions of the federal government are listed under Article 51, *55, 62, 71, 74 and 77*
  - State powers under Are 52, 50 (2,4,5, 6, 9) of the Constitution
  - On judicial Power Art 78 (6 and 7) shall govern the matter

CHAPTER IX:
THE ALLOCATION OF PUBLIC REVENUE

- **· Meaning Of Public Revenue And Revenue Sources Of A Government**
- Revenue is the force and instrument to ensure the effective performance of powers and functions of the government.
- **Dalton** has defined ‘public income’ in broad and narrow sense, i.e. in terms of ‘public receipts’ and ‘public revenue’. Public revenue includes income from taxes, prices of goods and services supplied by public enterprises, revenue from the administrative activities, such as fees, fines etc., and gifts and grants; while public receipts include all the incomes of the government which it maybe having during a given period of time, i.e. public revenue plus income from all other sources such as public borrowing from individuals and banks and income from public enterprises.
- The main type of government revenues are categorized in to Tax and Non tax revenues.

Purpose And Types of Taxes

- **PURPOSE**
- **Financing government expenditure responsibilities**
- **Income distribution**
- **Stabilizing economy**
- **Encourage investment**
- **TYPE**
- Economists in general classify taxes into two major categories:
- (1) Direct taxes -, those taxes which are paid entirely by those persons on whom they are imposed are direct taxes. Direct taxes are those taxes which cannot be shifted to others. *Income Tax*
- (2) Indirect taxes -are those taxes the burden of which may not necessarily be borne by the assesse. They can be shifted or passed to other persons' shoulder. *VAT*
- May be also categorized in to; tax in *persona* (individual) and tax in *rem* (property).

Methods of Division of Revenue Sources Between Federal And State Governments

- There is no ideal allocation of tax power between the federal government and states, but there are a number of considerations that call for centralizing or decentralizing revenue sources by considering criteria of economic efficiency, equity, need and administrative feasibility
- As a general principle, there should be a framework in which each tier of government can levy or generate its own finance without there being a conflict between them.
- In practice, however, the degree of tax autonomy enjoyed by the state governments demonstrates wide variations.

- Musgrave enumerates the principles which, according to him, can secure independent autonomy and efficient utilization of resources by the federal and states governments. Accordingly, he proposes:
  - taxes suitable for economic stabilization should be central.
  - progressive redistributional taxes should be central.
  - personal taxes with progress rates should be levied by the jurisdictions which are most capable of implementing a tax on global base;
  - lower-level governments should tax bases with low mobility between jurisdiction;
  - tax bases distributed very unequally between jurisdictions should be centralized; and
  - benefit taxes and urban charges might be appropriately used at all levels.

- ·**Gordon** proposed that assigning taxes that cause **externalities effect**, *(like inter-jurisdictional tax spillovers)* for instance company tax, to the center, while addressing the financial cost of the units through revenue-sharing mechanisms from these taxes serve as allocation of taxes between the federal and state governments. ‘optimal taxation’ Principle.
- **Mathews** argues that the formulation of tax should be based on the assumption that tax avoidance and tax evasion of the general behavior of taxpayers rather than assigning taxes to predetermined level of governments for the reason of convince to levy and collect taxes. “effectiveness of taxes” principle

The Structure of Taxation Power In Ethiopia

- The division of taxation powers is a principal aspect of the Constitution that provides the legal foundation of the Ethiopian federation.
- The tax power is divided into three categories, namely ; the federal power of taxation", the state power of taxation and concurrent power of taxation
- 96 federal exclusive
- 97 state exclusive, and
- 98 concurrent center as well as each state has the right to enact laws.....The power of taxation comprises of two specific powers: the power to set a tax rate and the power to collect the tax paid.
- This is not practically implemented in Ethiopia the provisions have been put into effect in the form of shared taxes where the federal government levies and collects the taxes, while the states are entitled to the proceeds arising from the taxes.
- 99 Undesignated (Residual)- determine by a two-thirds majority vote of the House of Federation and the House of Peoples" Representatives shall, in a joint session,

- The division of taxation power in Ethiopia is mainly structured according to the categories of taxpayers or particular things as a source of revenue. not the tax base but the tax source.
- Thus, it does not result in taxing the same income, transaction or thing by both levels of government.
- PRINCIPLE OF TAXATION ---Art 100

CHAPTER X:
FISCAL IMBALANCES AND INTER-GOVERNMENTAL REVENUE TRANSFER

- **Fiscal Imbalances In General**
- Fiscal imbalance means a mismatch of revenue and expenditure in state or among the states.
- When the revenue source of the state can’t cover the expenditure responsibility of the states- Creates fiscal imbalance.
- The fiscal mismatch between the expenditure responsibility and revenue sources is generally termed as fiscal imbalance.
- It is of two kinds: vertical imbalance and horizontal imbalance.

- A. Vertical imbalance
- is a mismatch between the expenditure responsibility and the revenue capacity of regional governments in comparison with the ability of the federal government.
    - Though it is rare and impractical, this may also happen when the regional state acquire more wealth and revenue raising capacity than the federal government.
- It is a mismatch between the expenditure responsibility and the revenue raising capacity of regional governments.
- Comes due to revenue concentration at the federal level and expenditure decentralization on the regional states.
- Vertical Imbalance opens a way to the center to interfere ……. creates vertical relationship between the states and the center.
- The problem of vertical imbalance is also evident in the Ethiopian fiscal arrangement.
    - That is, while tiers of government have significant expenditure responsibilities, the major revenue sources remain concentrated at the center.

- There are two methods which enable to examine vertical imbalance.
  - The first way is to measure what share of regional government expenditures are financed with its own revenue sources under the control of the region.
    - If the substantial share of regional government is covered by the center, vertical imbalance imperatively exists.
    - The second way to examine the imbalance is to measure the share of revenue generated by the regions as a percentage of the total national revenue raised by all tiers of government.

- **B. Horizontal Imbalance:**
- One of the objectives of the fiscal arrangement is to ensure that individuals residing in different regions or localities have equal access to public goods and services
- However, the sub-national governments may not have equal fiscal capacity to provide public services although they are assigned with the same revenue sources.
- They usually have different capacities owing to the fact that single tax base may not generate the same amount of money in different places.
- Horizontal Imbalance, is fiscal imbalance which is related to the fiscal disparity in providing equal public services among the states. It entails that individuals in different states have different access to the same public service. Hence, this creates horizontal comparison among the states.
- In Ethiopia, all the regions have fiscal deficits (VERTICAL) and they also have widely divergent revenue-raising capacities., hence, they vary considerably in their skilled manpower, financial capacity, as well as in population size.

- REGIONAL GOVERNMENT EXPINDITURE FINANCED FROM THEIR OWN REVENUR F.Y 2006. (IN BILLION)

Region	Total Exp.	Own Revenue	% share of (2)	%share of total Regional revenue
	1	2	3	4
Tigray	695.7	194.9	28.0	12.0
Afar	332.0	38.0	11.4	2.3
Amhara	1899.7	380.3	20.0	23.5
Oromia	2958.3	624.3	21.1	38.5
Somali	506.2	31.0	6.1	1.9
Benishangul -Gumuz	229.0	22.1	9.7	1.4
SNNPR	1626.4	262.8	16.2	16.2
Gambela	156.2	12.4	7.9	0.77
Harar	119.0	20.5	17.2	1.3
Dire Dawa	153.9	34.3	22.3	2.1
Total/	8676.4	1620.6	18.7	100

- If we continue the comparison, the imbalance exists not only between the regions. There is also an imbalance between zones and local administrations within a region or in comparison with those in other regions.
- E.g. In the Oromia region, a few zones within the region were major contributors to the region's revenue capacity. For example, the recurrent expenditures of East and West Harerge zones are completely covered from locally collected revenue sources.
- In general, the horizontal fiscal imbalance refers not only to interstate but also intrastate imbalances between the sub-regional governments.

CAUSES AND IMPLICATIONS OF IMBALANCES

- Causes……
- Assignment of more revenue sources to the federal and expenditure responsibilities to the state. (V)
- Due to widely divergent revenue-raising capacities, skilled man power, luck of well-established institutions….(H)
- Effects……
- Permit the federal governments intervention and it affect the autonomy of regional states. (V)
- Create regional disparity, injustice and conflict.(H)

INTERGOVERNMENTAL REVENUE TRANSFER

- The outcome of the overall greater fiscal imbalances has led to the implementation of the transfer system that can be considered as the major revenue source of states in many federations.
- Transfer in crude sense is a mechanism which involves a vertical flow from the center to lower governments or the vice versa and horizontally from wealthier regions to poorer regions in order to maintain fiscal stability that creates broad correspondence between revenue resource availability and expenditure functional responsibility.

Objectives And Types Of Transfer
1-Objectives

- Revenue transfer has the main objective of addressing the states' financial constraints in executing their expenditure responsibilities
- The process of adjusting the horizontal as well as vertical imbalances is known as **'fiscal equalization system'**
- large differences in economic circumstances between regions are likely to threaten the cohesion of the federation, hence revenue transfer may save the federation.
- Addressing financial disparities between governments is sought for equity reasons and promoting an economic union.
- The disparity in the capacity (of revenue raising and expenditures) of the states also raises the question as to how to balance their role in the interest of the economic development of the federation as a whole. Inefficiency in some constituent units can have an impact upon the capacity of the federal government
- The other rationale of revenue transfer is to compensate for local spending which provides significant extra-territorial benefits or spill over but has unrecognizable local benefits.
- The relationship between revenue transfer and economic development- e.g Ethiopia

2. Types of Transfer

1. Revenue Sharing

- The nature of revenue sharing heavily depends upon the constitutional division of revenue sources between the levels of government. In general there are two cases:
    - i) in some cases, besides assigning independent revenue sources to the center and the states, revenue sharing applies to specific sources the revenues of which are jointly owned by the federal government and the states;
    - ii) in other cases, most or all revenue from federally assigned taxes are shared between the levels of government.

The Revenue-sharing Scheme As Reported By The Ministry of Revenue-Art 98

Types and sources of joint revenue established			The share of the centre and the regions on a tax-by- tax basis from each type of tax in %	
			Share of the Centre	Share of the Regions
1	Revenue from Enterprises jointly established by the centre and region		N.A. (not available)	N.A. **
2	Revenue from companies			
	2.1.	Profit taxes	50	50
	2.2.	Service, sales (V AT) and excise taxes	70	30
	2.3.	Tax on dividends	50	50
3	Revenue from large-scale mining and all petroleum and gas operations			
	3.1.	Tax on profits	50	50

2. Grant

- Apart from systems of revenue sharing, disparities between poorer and richer states are addressed through grants also known as ‘equalizing transfers’.
- In principle, the objective of allocating such grants is to reduce the horizontal imbalance between the states. It also has the effect of reducing the vertical imbalances by increasing the revenue capacity of the states.
- Each country may also have specific objectives which have to be met by using various grant instruments.
- Art 62 (7) empower the HoF to determine (enact a formula) on the division of revenue (Art 98) and Subsidies. (Grants).
    - Thus, the variables used in the grant formula were population (55 percent), level of poverty (10 percent), expenditure needs (20 percent), and revenue raising capacity and execution efficiency (15 percent).

- **A. General Purpose (Unconditional) Grants.**
- general purpose grants are allocated to states to spend the money in any area of public purposes designated by them.
- It is characterized by the absence of significant restrictions on the use of funds, as it is at the region’s discretion to spend the money for any preferred purposes.
- A general purpose grant is widely used as an instrument to equalize the revenue capacity of states.
- Thus, it should be equitably distributed between the sub-national governments.

B. Specific Purpose (Conditional) Grants; matching and non-matching

- These grants are also referred to as categorical grants. They are aimed at spending in a specific sector supported by the central government.
- As the conditions become more specific, the states will in effect be left with no option but of spending the money in the area specifically required by the center.
- **Matching grants**: are given on a basis when states commit themselves to sharing the costs in order to receive a grant for a particular program.
- **Non-matching grants:** are conditional transfers from the federal to the state governments but without any matching requirement on the part of the latter. The states are not required to spend a

3. Intrastate Transfers

- It is the transfer of revenue to the lowest level of government by the regional states.
- It was formally introduced in Ethiopia in the 2002/03 fiscal year in all regions.
- During the 2003/04 fiscal year, the grant formula which was applied at the federal level, was used to determine the amount of grants allocated to weredas and zones in SNNPR, Amhara and Oromia. Thus, the variables used in the grant formula were population (55 percent), level of poverty (10 percent), expenditure needs (20 percent), and revenue raising capacity and execution efficiency (15 percent). According to the preliminary data the State Council of Oromia transferred to the woreda 47 per cent, Amhara 51 per cent and SNNPR 81 per cent of the total regional financial resources.

4. Regional Borrowings

- Borrowing is the other possibility by which states may supplement their financial constraints.
- Unlike the center, sub-national governments are mostly restricted to domestic borrowing and they may even be subject to direct control by the central government.
- The main reason for participation and control by the center is that monetary and fiscal policies are centralized.
- But there are various forms of control and the extent of central control might significantly differ from one country to another.
- In a more general approach, control mechanisms have to be designed to suit the circumstances of a particular country. Moreover, it requires the creation of possibilities for a timely adjustment, depending on the capacity and fiscal balances or imbalances of regions.

Thank you!!!

QUIZ (10 Pts)
Select Only Two Questions of Your Choice.

Q . 1. Mention and briefly discuss at least three objectives of fiscal transfer. **5 pts.**

Q. 2. Conditional grant affect the autonomy of regional states than unconditional grant. Discuss how? **5 pts.**

Q. 3. What is fiscal imbalance? and what is the difference between Horizontal and Vertical Imbalance? **5 pts.**

Q.4. What is the difference between matching and non matching grant? **5 pts.**