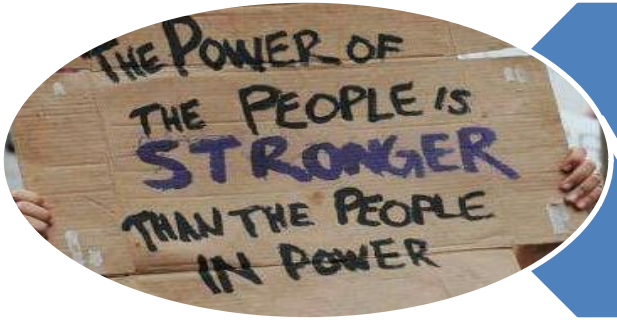
CONSTITUTIONAL LAW



MULUKEN K.

CHAPTER ONE



INTRODUCTION TO CONSTITUTIONAL LAW

– Constitution and Constitutionalism

- What is constitution?
- No universal definition
- Etymologically derived from Latin term “Constitutio” means a decree
- During Roman empire it referred to imperial legislations
- Medieval-Represents secular enactments
- Modern- used after American(1776) and French revolution(1789)

- **Current meaning**
- Defined by scholars from d/t angles
- A.V. Dicey;- ‘all rules which directly and indirectly affect distribution and exercise of sovereign power’
- Black law Dictionary(7th ed.)- ‘the fundamental and organic law of a nation/state, establishing the conception, character and organization of its gov’t as well as prescribing the extent of its sovereign power and manner of its exercise’
- Oxford law dictionary;- ‘constitution is the rules and practice, that determine the composition, and functions of organs of central gov’t in a state and regulate the relationship b/n individual and state.
- All definitions have their own strength and weaknesses

- **What makes constitution legitimate /valid?**
- Most constitution of states of the world starts by 'We the people". The question is, can all constitutions adopted by sovereign people and reflects the will of people?
- The original version of current USA constitution only adopted by white rich people of 13/50 states
- Post WWII Germany and Japan constitution designed by allied forces and American military, respectively, but across generations.
- The 1952 Eritrean federation constitution designed by UN and adopted by constitutional Assembly

- Indian constitution and Ethiopian regional constitutions adopted by their parliament
- 1987 PDRE constitution adopted by Referendum, but short lived
- Thus some constitution has cross generational effect, even without full popular participation during its making process, while others are vice versa. This implies legitimacy partly depends on ‘popular imagination’ towards the constitution.

- **Constitutionalism**
- Some constitutions are designed to build good will in their international image rather than ensuring constitutionalism eg. 1931 H/Sillasie constitution
- Constitutionalism is a belief &commitment of gov't, groups, &individuals obedience to the existing constitution with in diversified interest and ideas
- It presupposes legal & political limit of gov't, basic rights, predictability of gov't action' accountability of gov't officials for their action, separation of power, check and balance and independence of judiciary

- Neumann '*all states have constitution, but not all of them observe constitutionalism*' i.e having constitution can't guarantee for constitutionalism eg. African countries, USSR.
- Okoth ogendo describes African constitutions as '*constitution without constitutionalism'*
- K.C.wheare expressed absence of constitutionalism as 'what constitution says is one thing, and what actually happen in practice may be quite another'

- Constitutionalism can be practiced without having written constitution eg. UK
- Thomas pein quoted *'acknowledging the constitutions authority & obeying its commands do not require that a constitution can be in a written form nor is a written form a guarantee that constitutionalism present'*
- In short, constitution is a text of the document and constitutionalism is putting into practice of the constitution.

- Based on above scenario, Sartory classifies the world constitutions into three. Those are;-
  - Nominal constitution is a constitution adopted to formalize the wishes of power holders,
  - Facade(fake) constitution is appears to be true constitution, but not enforced and executed
  - Real/ Grantiste constitution is the constitution well arranged to limit gov't power & implemented really.

All above constitutions declare their supremacy as the law of the land.

- **Constitutional law**
- A branch of domestic public law
- It is a body of law that regulates the relationship of states and individuals and d/t gov't organs
- Constnal law is broader than constitution since it composes basic principles and rules not found in the constitutional document
- Also, since a constitution is a branch of public law it governs the relationship of inequality i.e state have power, huge human and financial resources, which individual/groups can't have.

- **Key Notion & Concepts: nexus to Constitutionalism**
  - **Democracy**

- Everyone invokes democracy to justify his own act/version eg. Nazi Germany elected by people
- Etymologically, it derived from demos and kratos which means rule by people
- Traditionally, defined as majoritarian politics

- **Features**
- It signifies a majoritarian rule since everyone can't agree on particular issue
- But majoritarian rule doesn't mean that majority tyranny b/c of pple of political equality that celebrates individual and collective interests
- Its about governing the relationship between governors and governed
- It's a reflection of popular sovereignty. i.e political autonomy of self gov't by people

- **Minimum Requirements**
- *Regular, Free and Fair election;-*
- Offering citizens to choose from real alternatives(not ruling party fabricated parties)
- Require impartial body that administer election process
- Ensure multi-party system, guarantee for freedom of opinion, speech, expression, assembly and association

- *Term limit-* it avoids temptation for abuse of power and corruption
- Term limit is clearly known in presidential system, while in parliamentary not(eg. Prime minister in Ethiopia;- but recently EPRDF changes its policy to two term limit & 65 years, PM Abiy Promise)
- Some African leaders amends their constitution to extend their power eg. Djibouti, Rwanda

- *Inclusiveness*- political equality
- No exclusion on ground of any status/ nondiscrimination pple
- In 1962 USA supreme court rules 'one man one vote' in the case b/n *Car Vs Baker*
- Exceptionally in Germany there is militant democracy and in Israel defensive democracy. Accordingly, democracy should defend itself before destroyed by the party. Hence, in Germany, the system prevents a political party that have neo-Nazi ideology from running for election and in Israel also, parties who advocate to destroy Israel from map of earth cannot run/ compete for election

- In Ethiopia, parliament designates some political parties are terrorist and should not compete for election. What about religion based political parties?
- *Uncertainty of outcomes*;- every competing political party should have equal chance of winning the election before the result of election are announced.
- As a conclusion, in real democracy '*Todays majority may become tomorrow's minority and vice versa since the notion of democracy signifies gov't with the consent of the people'*

- No permanent majority unlike some African countries such as Zimbabwe of Mugabe, and Uganda of Musevini.
- Unless it creates mistrust b/n majority and minority including deteriorating public confidence on the system eg. South Sudanese would never come to leading power before secession
- Currently, consociational democracy is emerging that can partially rectify monopolization of power by majoritarian rules since *'no party left out and no ballot thrown away'*

- Mo-ibrahim foundation is an NGO that works on democracy and promises to award 5 million dollar, if African leaders consensually removed from their power
- Some scholars says the term limit of various African leaders is death such as Gadafi. That is why more than 40 coup'deta attempted/committed in 33 African countries since 1990.

- ***Current elements of Democracy***
- *Procedural*;- it concern with
- Who is entitled to make decision?
- About what subjects?
- How individual decision can be turned to collective will?
- *Substantive*; embodies a political rights that are inherent to conception of democracy. Accordingly, decision making should reflect the value of the constitution

- **Aspects of Democracy**
- *Direct Democracy-* pure form of democracy/ Athenian democracy
- Signifies direct participation of the people in decision making
- Mostly practiced at local/small population size and through referendum
- *Indirect/Representative Democracy-*
- In early period practiced during roman civilization
- In modern sense, come into picture in 1789 when USA constn adopted
- Its about choosing agent b/n people and gov't
- Sometimes expressed through electoral mandate

- **Rule of Law**

- Rule of law is the most confusing concept because of many reasons.
- First of all, it is a universal concept in that every country claims for the prevalence of rule of law. It can be manipulated and can be used for any wrong purpose. *This is so because using this element even Nazi Germany & the Apartheid system in South Africa would qualify*
- Thus, what rule of law includes and excludes is not clear.

- Some people distinguish between rule by law from rule of law. *Rule by law* is using the law as an instrument of oppression. Even if law and order are necessary to prevent anarchy, they are not sufficient elements for the prevalence of rule of law.
- It is in the 19th century continental Europe except in England that law came to be considered as positive law. As a result, rule of law meant the concept of legality. A lot of problems occurred including the two world wars as a result.

- This calls for another interesting debate as to whether law is separate from morality and human rights. What is the relationship between power, law and rights? A battle exists among these triangular forces.
- Sometimes the law may serve as an instrument to fulfill political ends. In such cases, law submits itself to the supremacy of power.
- In other circumstances, law limits power, and this means that the rights of citizens are guaranteed. However, it is difficult to reach at hard and fast rule to get the balance among these three forces.

A. V. Dicey articulated the rule of law in terms of three overlapping aspects

- "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land…"
- Everyone is equal before the ordinary law.
- He considered the rule of law to be a product of the multitude and totality of "judicial decisions determining the rights of private persons in particular cases brought before the Courts.

- **Fredrik Hayek;**
- All rule of law systems possess three attributes: Generality, Equality, Certainty
- *Generality* requires that the law be set out in advance in abstract terms not aimed at any particular individual.
- *Equality* requires that the laws apply to everyone without making arbitrary distinctions among people.
- *Certainty* requires that those who are subject to the law be able to predict reliably what legal rules will be found to govern their conduct and how those rules will be interpreted & applied. Predictability is a necessary aspect of the foreknowledge that enables freedom of action.

- **Joseph Raz:-** lays down about eight important principles.
- All laws should be prospective, open, and clear.
- Laws should be relatively stable.
- The making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules.
- The independence of the judiciary must be guaranteed.
- The principles of natural justice must be observed.
- The courts should have review powers over the implementation of the other principles.
- The courts should be easily accessible.
- The discretion of the crime-preventing agencies should not be allowed to pervert the law.

- **Loan Fuller**
- Rule of law concept articulates in the negative ways & ***sets out ways in which the creation of law could be a failure***:
- **He lists 8 of them:**
- Most important is when there is no law at all so every issue would be decided on ad hoc basis
- A failure to publicize law or make it known to at least the party required to obey
- The abuse of retroactive legislation

- A failure to make rules understandable
- The enactment of contradictory rules
- Rules that require conduct beyond the powers of the affected party
- Frequent changes in the rules that make orientation of one's actions by them becomes impossible or so difficult
- A failure of congruence between the rules as announced and their actual administration

•Feature of the Constitution

- Social contract between citizen and state
- Wide popular participation than ordinary law making process
- Supreme /Grund norm/fundamental law of the land except England(parliamentary Supremacy)
- It's a legal and political document
- Master plan of socio-economic, political and legal system of a country eg. FDRE constn – Civil law legal system since ruled by positive law of parliament

- Guardian of fundamental rights. Constitutionally guaranteed rights are more protection than ordinary rights since there is rigid amendment procedure
- Source and symbol of sovereignty

•Functions of the constitution

- Constitution is a paradox of enabling & constraining function
- **Enabling function-** its about empowerment
- Accordingly, constitution enables gov't by creating public institution, & defines their power & function such as three gov't organs, Human right commission, election board, state & federal tiers of gov't.

- Also, the constitution empowers groups/ individual/ citizens how they exercise their sovereign power, recognition to their human rights, popular participation in gov't,
- **Constraining function-** putting limit on power of gov't and rights of individuals
- This includes providing constitutional supremacy clause, separation of power and check and balance, secularism, limitation to individuals exercise of their rights…etc

– Sources of Constitutional law

- Sources of constitutional law can be classified into primary and secondary sources;
- **Primary sources-** sources which have declared by authoritative law and legally binding effect such as statute, human rights instruments, precedent decisions
- **Secondary sources-** those sources which have persuasive effect and not binding in resolving disputes. It includes scholars opinion, legal articles, customary & religious laws

–Classification of Constitution

- Classifying constitutions helps to understand the nature, salient features and principles applicable to different constitutions.
- In general there are two approaches of classifying constitutions namely
  - Traditional &
  - Modern approaches

- **Traditional Approach-** Focus on the form and institutional structure of the constitution
- **Modern approach-** Based on its effect on socio-economic and political features the constitution
- In general no single method of classifying constitutions and various constitutions categorized based on multiple factors.
- Let briefly discuss some classifications

- **Based on Nature of the constitution (Traditional Approach)**

- **Written/Unwritten(Codified/ Uncodified)**
- Written- if the basic rules are compiled into single documents
- Unwritten- if document of constitution scattered into various documents. This is mostly grown up on the basis of custom rather than written law eg. UK- Precedent, Magna Carta, 1688 declaration, Israel(due to they have no int'l boundary)

- Some scholars argue that classifying constitution into written/unwritten is misleading because no constitution is entirely written nor constitution is entirely unwritten
- Thus it is better to use the term codified/ un-codified for above described features.
- In doing so, the points taken into considerations are;-

- ***Degree of Codification-*** Some constitution deal only with skeletal outline of topics and leaving the detail to be regulated by organic/ordinary laws eg. In France, bill of rights is found on organic law, which is below constitution and above ordinary legislations.
- ***Degree of written in detail-*** Eg. Indian constitution composes about 395 articles (about 119000 words) and Alabama state constitution about 300,000 words.
- ***Origin of Written Text-*** deals with the constitutional text either in original or copied / legal evolutionary or legal engineering/ common law or civil law

- **Strength and Weaknesses**
- Generally, the strength of written form is the weakness of unwritten form and vice versa.
- **Written strength-** stability and clarity, predictability and certainty, better protection for rights, safeguard from unwanted gov't interference
- **Written weakness-** rigid and difficult to adopt social changes, less innovative

- **Rigid/Flexible(conditional/Unconditional) constitutions**
- Based on amendment procedures
- **Flexible-** easily changed like any ordinary law. Not depend on some conditions/special procedures eg. UK- the same procedure for ordinary law and constitution. Constitution is subordinate due to parliamentary supremacy. Hence, some scholars describe UK parliament can make anything except changing men into women and women into men'

- **Rigid Constitution-** provides stringent procedures and various legal obstacles. Process of amendment involves stakeholder organ and minimum votes required
- K.C. Wheare argues flexibility not only depends on form of amendment, but also the extent of socio-economic and political stability that satisfies the interest of communities.
- Thus, the term conditional/unconditional has better describes than rigid and flexible to refer the plasticity of amendment provision of the constitution

- Also, in reality, unwritten constitution doesn't necessarily signifies flexible constitution and written constitution always mean rigid. For instance, Republic of South African Constitution amended about 17 times since it adopted in 1996 and Alabama State constitution of USA amended more than 800 times since 1902
- In Ethiopian regional state, Somali constitution is the most flexible one which amended only by 2/3rd majority of state council vote.

- **By Looking the Nature of State: Unitary/ Federal/Confederal**

- Based on the power of the gov't distributed in the constn among gov't of whole country and gov't of part of the country (sub-national gov't)

Unitary Constitution

- Supreme authority is in the hand of central gov't(Top-down approach)
- Superior subordinate r/nship b/n center & local gov't
- Legislature is supreme lawmaking body

- Central gov't can make/dissolve local gov'ts since they act as an administrative arm of the center
- Unitary state can be either decentralized or centralized
- Some unitary system are more decentralized than centralized federations like UK and China
- **Federal Constitution**
- Signifies at least two tier of gov't which the federal constitution is at the center that divides power b/n federal and states
- Each gov't tier is independent and equal
- No superior-subordinate r/nship

- Federal political system balances the paradox of shared rule and self-rule/ unity in diversity
- Central gov't cannot dissolve regions except in the case of emergency clause eg. India
- Powers can be categorized into Exclusive/shared/ residual powers
- Matters affecting the whole nation exclusively entrusted to central gov't such as foreign r/n, currency, defense
- Hence, legislature at both tiers have limited powers

- **Confederal Constitution**
- Its an association of independent and sovereign states
- Local gov't have superior and strong power over the centre(Bottom-up approach)
- Thus, there is weak and unstable central gov't
- Currently, it is not practiced at state level, but historically, Switzerland(1848) and USA (1981 article of confederation) has a confederal form of gov't

- Today, its formed to solve common problems by working together (Eg. EU)such as military alliance against external threat, larger market for goods, unified currency, controlling of illegal immigration
- In doing so, Individual countries often have veto power over decision making eg. The 2016 UK withdrawal referendum from EU
- Changing of constitution must secure the support of all member states
- N.B.- some countries use the term confederation to describe federation(eg. Swiss) or Union of provinces (Eg. Canada)

•By looking the Nature of Gov't

- It is either of presidential/parliamentary or republican/ monarchical
- **Parliamentary/Presidential**
- Based on the system of gov't adopted which try to answer who is going to control/check acts of executive since this organ holds the strongest gov't power
- Thus, it is necessary to check misuse/abuse of power either through legislature/public

- **Parliamentary constitution**
- Executive is controlled by parliament
- Parliament can remove members of executive including Prime Minister through Vote of No confidence and dissolve/reorganize structures
- Head of gov't elected from party/ies win election and no term limit

- Simultaneous membership of executive and legislative(weak Separation of power)
- Strong party discipline
- Interpellation system
- Head of state has ceremonial power
- Only parliament is directly elected, while executive members are appointed by Prime Minister/head of gov't

- **Presidential Constitution**
- Responsibility of executive is arranged to a wider body than parliament eg. USA-public
- Both legislature & president is directly elected by people
- No simultaneous membership of Excve and legislature
- Rigid/strong separation of power
- Weak party discipline eg. Trump sexual scandal vs Paul Rayan
- President hold the power of head of state and head of gov't(unity of executive power)

- President cannot dissolve parliament and vice versa except in case of impeachment
- Term limit for president
- **Republican/Monarchical**
- Based on who is the successor of head of state i.e Republican(President) and in Monarchical(King/Queen)
- **Republican-** Head of state is answerable to the electorate and to the constitution. Power is not hereditary
- **Monarchical-** A monarchy inherits a throne and become head of state.

- S /he is responsible to him/herself and no accountability to the people
- Power is hereditary and it is founded on the ‘doctrine of Devine right to rule’
- Today no absolute monarchy since the system transformed to constitutional/limited monarchy.
- Some countries combine ceremonial monarchy and Prime Minister as head of gov’t eg. UK and Japan

• By Looking at Legislature

- Based on having Number of legislative chambers
- **Unicameral**
- One chamber that known by d/t names in d/t countries.
- Practiced mostly by small & homogeneous unitary states
- Reviewing legislations done by parliamentary committee instead of second chamber
- Some countries have structurally bicameral & functionally unicameral chambers such as UK, Canada, Ethiopia

- In Ethiopia, most states and city/woreda council have unicameral chambers.
- **Critics**
- No double check and balance which ensures greater level of consensus on legislative issues
- Not ensures interest on sparsely populated rural areas
- Restrict right of minorities

- **Bicameralism**
- In most federal countries there is lower and upper house chambers
- Upper house- States have represented equally at Centre(Geographical)
  - Eg. USA(2), Germany(3-6), Swiss(1-2), Ethiopia (Represent NNP weightily)
- Lower house- Represent population at centre
- Bicameralism also practiced in EU(European parliament and Council of EU)

- **Features of Upper house and Lower house**
- **Common Features of Upper house**
- Less power than lower house with some exceptions
- Limited legislative role
- House of review rather than initiation
- Represent states at center

- Members selected through appointment/ hereditary
- Fewer seats than lower house
- St longer term limit than lower house eg. Canada -75 yrs
- In Presidential system the sole power to impeach against executive and give consent/denounce foreign treaties

- In parliamentary system serve as an advisory/revising chamber,
  - Lack of control over executive branch
  - No absolute veto of proposed legislation
  - Less initiation power on the laws
- Common terms- Senate(In many states including USA)
  - Bundesrat(Germany, Austria)
  - Council of state(Swiss and India)
  - HOF(Ethiopia)

- **Common Features of Lower House**
- Greater power than upper house
- Directly elected
- More members than upper house
- Control over budget and monetary laws
- Common Terms- House of representative, House of legislative, national Assembly
- **Relationship B/n Two Chambers**
- Equal Power- Federal+ Presidential system
- Superior-subordinate- Unitary + Parliamentary

- **Arguments**
  - **Proponent**
- Designed to prevent against the tyranny of majority
- Creates check and balance among centre and states
- Helps to prevent legve paralysis of the law
- Opponent
- Increased risk of political deadlock/tension b/n two chambers of equal power

- **Practice in Federal Countries**

Equal Representation of States in Upper house

- Such as USA, Mexico, Brazil and Australia
- Designed to ensure equality b/n smaller and larger states
- Also, designed to protect against tyranny of majority
- Combine pple of democratic equality with federalism
- "***All citizens are equal in lower house, all states are equal in upper house***"
- In USA this arrangement called Connecticut compromise

Weighted Representation

- Unequal representation among states
- The representation based on fixed/formula/population
  - Fixed- Swiss and Canada
  - Formula- Germany
  - Population- India(State) and Ethiopia(identity)

Method of Selection

- Appointment (By Executive (eg. Canada, and Germany)or Legislative)
- Election (Direct/Indirect (Eg. Austria and India))

- **Bicameralism in Unitary form of gov't**
- Eg. Japan, UK, France, Holland
- Upper house has scrutinizing and Vetoing the decision of lower house
- They are selected either through
  - Indirect election- eg. In France by Senate or
  - Chosen by provincial assemblies (Eg. Holland)

- **Bicameralism in Federal states**
- USA- except Nebraska
- Australia- Except Quensland
- Germany- all states(landers) have Unicameral
- Ethiopia- SNNP(State council and Council of Nationalities) and Harari(Harari National Assembly and Harari Peoples Representatives)

- **Tri-Cameralism**
- Its about having three legislative chambers
  - Eg- 1983 Apartheid Constn
- South Africa
- Designed by Apartheid implement "divide and Rule" policy based on race.
  - House of Assembly- 178 seats - reserved for whites
  - House of Representative- 85 (For mixed race)
  - House of Delegates -45 (for Asians)

- **Bolivars Tricameralism**
- South American revolutionary leader proposal
- House of Tribunes- hold power relate to gov't finance, foreign affair and war
- Directly elected
- Senate- enact law, supervise judiciary and appoint regional officials
- Hereditary officials like UK house of lords
- Censors- check against the power of two.

- **French- State generals**
- Three estates provide advise to kings
- Those are- clergy, nobility and commoners
- But they have no legve power
- **Tetra-Cameralism**
- Having four legve chamber
- Historically practiced by medieval Scandinavians (nobility, clergy, burghers and peasants) and Finnish until 1806

- **By looking at the nature of Executive**

- Based on the consideration of the quantum, quality, and configuration/arrangement of power assigned to Executive
- Accordingly, it may be characterized by either of
  - Monocephalous
  - Bicepalous
  - Acepalous(dispersed leadership)
- Cephalous- Greek word- meaning- Headed Gods

Monocephalous-

Eg. Great Britain

- Executive is drawn out of parliament as an independent entity which consists office of Prime minister and council of minister(COM)
- Both offices connected by the offices of Prime Minister
- Prime minister is the ultimate leader that empowered to determine the priority issues of government action, Organize COM. In doing so, s/he assisted by Multidisciplinary experts

- USA- Hybrid of Britain
  - D/c- Executive doesn't owe its origin to parliament since they're directly elected, & accountable to people
  - President stand as the top manager of state
  - But there is check and balance among gov't organs

Bicephalous

- Eg. 1958 France Constitution
- Executive has two heads namely President and PM comes from political party

- Both of them makes politically active decisions
- President
  - Elected for seven years
  - A lot of executive power
  - Appoint PM for 5 years from party occupy largest seat
  - St PM and President came from d/t parties
  - Designed to avoid single handed leadership

Acephalous (Dispersed Leadership)

- Multiple headed executives
- eg. Constitutions of Axis power countries designed after WWII i.e Japan, Germany, Italy
  - Framed by allied powers of USA, France and England
  - They agree No single headed leadership like Hitler on Germany and Mosoloni in Italy politics
  - In Germany, Chancellor holds Top executive office, and Shares a lot of power with other institutions like with Central Bank and PM shares executive power with group leaders (Coalition parties)

- Governor of Central bank leads the countries monetary, and commerce transactions (Economic life of Germany)

By looking Nature of Judiciary

- May be classified into Prerogative/ Rule of Law (ROL) system
- **ROL-** Executive is subject to operation of ROL(Judicial control) and unprotected
- **Prerogative states-** Executive is protected by special system of administrative law

–Contents of Constitution

- Structurally – many constitutions have Preamble and body part
- **Preamble-** Introductory part of the Constitution
  - It also called Preface (eg. Japan) and Foreword (eg. Bahrain Constitution)
  - Several countries constitutions have no preamble eg. Austria, Belgium, Italy and Singapore
  - Helps to understand the socio- political context of making priorities

Contents of Preamble

- *Source of Sovereignty-* "We the People"(USA, RSA, Japan and India), "We the 'Spanish', 'Lithuania' Nation", "We the citizens"(Czech Republic) and "We the Multinational people of Russian Federation"
- *Historical Narratives* such as historical injustice (like South Africa), longest history/Civilization (like China and Egypt) and struggle for independence and self determination (eg. Ukraine)

- *Supreme goals-* Justice and Fundamental human rights, stress for love (Turkey), and building one political and economic community(FDRE)
- *Reference to God/religion-* refer to God Supremacy (Canada, Swiss and USA) or secularism like China
- *National identity-* commitment to live in peaceful, declaration of independence

Body of Constitution

- Establish main organs of gov't like legve, Judiciary, Executive, Ombudsman, Election board… etc
- Division of power(horizontally and Vertically)
- Controlling the exercise of gov't power such as judiciary, interpellation, report & auditing, non derogable rights, election etc

- Takes into account the geography and history as well as legal system
- Public participation during making process
- All constitutional provisions have no similar hierarchy.
  - This can be deduced from Amendment procedures, non derogable rights, fundamental principles of constitution

The Tension B/n Democratic theory & Constitutional Theory

- This paradox b/n each theory focus on how we can control or maintain democracy due to usually *political parties democratically elected destroys themselves the notion of democracy* such as Nazi Germany

Democratic Theory

- They argue democracy can control/ maintain itself through periodical elections.

- Unelected judges of judiciary which has no direct accountability to people cannot able to maintain democracy and hence, they shouldn't invalidate acts of legislature/ people representatives
- Advocate for popular sovereignty & majoritarian governance
- They argue constitutionalist theory is anti-democratic theory and judiciary, HRC and ombudsman are anti-democratic institutions since their officials have no direct r/n with election nor accountable to people.

- Since Democracy is about rule by the people, there is no need of limiting/ controlling democratically elected gov't by those who have no relation with the people.

Critics

- Not considers the institutional competence /level of expertise
- Commits the fallacy of ad-popularum
- Against independence of judiciary eg. 1980s Florida state supreme court judges Gay right case
- Deteriorates minority rights and encourages majority tyranny eg. The 2007 Swiss minarates case

- **Constitutionalism Theory**
- Democracy should be limited by law and controlled by independent judiciary
- Argued majoritarian rule cannot ensures equality before law since it likely deteriorates minorities rights
- Advocate for limited gov't
- Argue democracy should be checked and controlled by competent institutions & experts rather than popularity

- Proposes idea of counter- majoritarianism by judiciary against majoritarian house/legislature in order to balance the majoritarian appetite with minority rights and interests.
- Quotes '*legislature word is not last word*'

Criticism

- They are not directly accountable to people for their failures in their decision.
  - For instance, in USA in 1850s in the case b/n Plessy vs Ferguson the federal Supreme Court decided segregation based on race is normal.

- Hence, segregated buses, schools, hotels…etc were accepted in contrary to amendment no. 13(Equality) until reversed in 1954 in the case b/n Brown vs Board of education.
- Also, the same court in 1857 in Dred Scot case decides 'Slave is the property of his master'. '*All animals are equal, but some of them are greater than others'*
- Sometimes used as an instrument of oppressive ideologies/ regimes or parrot of the system.
- **Judicial activism;-** decision influenced by personal feeling of judges. Sometimes judges abuse their interpreting power to law making.
  - Such as the 1973 Roe vs Wade Abortion case of USA.

- Members of judiciary appointed for life cannot satisfy the unborn and future generation needs, but democracy updates itself by term limits eg. USA supreme court judges
- The decision of judiciary may lead to democratic deficit when they declare acts of the people or laws of legislature as unconstitutional eg.
  - Eg. Quashing the 2012 Egypt election by Supreme Court,
  - South African constitutional court decision on Kwanza zulu natal and Western cape provincial constitution
  - Eth. FSCCB decision on Oromia Forest law

- Regular judiciaries are incompetent on politically sensitive issues eg. Courts decision on Indian state water dispute /Harmon doctrine
- In general the complexity b/n two theories can also appeared among gov't organs. Such as USA teenage burning of flag case during Vietnam war.
- **Some solutions**
- USA- 87% of state judges are linked with some periodical elections to balance the majoritarian and counter majoritarian interests. Eg. Florida – 7 yrs term
- Demarcating the boundary b/n political and non-political questions

CHAPTER TWO

UNDERLYING POLITICAL VALUES

INTRODUCTION

- World constitutions have been influenced by three broad and overlapping political perspectives.
- Each emphasizes a different aspect of human nature. Those are:-
- **Liberalism:-**concentrates on our individuality
- Focusing on rights and freedom
- Stresses tolerance & respect for individual freedom
- **Republicanism:-** emphasizes on our social nature as what Aristotle called 'political animals'
- Concentrates on political involvement as equal citizens in governing ourselves
- **Communitarianism:-**Emphasizes on our nature interdependent herd animals who live by copying each other.

– **Liberalism**

- Desire for peace contributed for emergence of modern liberalism as a response to religious conflicts disrupted in Europe in 16th& 17thCent. for more than 100 years.
- In 1648, they agreed dissolution of dominant religion, avoid imposition of religion by gov't on individuals & hence, individuals are at free to choose their own belief

Features

- Focus on the interest of individual rather than group
- Interest of individual should be respected except those who harmed others

- State should not favour one way of life, unlike communism. Rather choose among conflicting interests
- Limits governments in the interest of individuals. But no single method of controlling gov't.
- It favours democracy (democratic theory), thus conflict with its liking for courts. But not interested on whether citizens directly participated in governmental decision making, rather accept government by an elite accountable to citizens.
  - Liberal societies have been relatively stable & peaceful
- There is *variation among liberals on the extent of state entitled to interfere with individuals in pursuit of some public good such as providing infrastructures.*

- According to J. Raul social contract proposition libereralism comprises two fundamental principles of justice. i.e
- 1st. Each person is to have an equal right to the most expensive basic liberty compatible with a similar liberty for others. This liberties includes Political freedoms, freedom of speech, personal liberty, & right to hold private property
- This has priority over second principle.

  2nd.Difference Principle;- concern with allocating of resources to the society. Fundamental freedoms cannot be overridden in the interest of social goals. But, Social & economic inequalities are to be arranged through;-

  - **Reasonably expected to be everyone's advantage**
  - **Attached to positions and offices open to all**

- **Critics on Liberalism**
- Condemned as selfish and uncaring
- Separates the state from the community by drawing a line/ wall around state powers

Varieties of Liberalism

1. The Impersonal State and Individualism

- Proposed by Thomas Hobbe (1588-1679)
- Emerged when state and religion divorced
- *State is an impersonal organization intended to serve everyone*
- *Leviathan book-1651-* Explain the existence of state without drawing up on religion

- Argued Our private sphere and r/ship motivated by competition, fear and desire for power over others
- Recommend for individualistic approach;-Humans have a certain natural rights based on keeping promises, respect for individual freedom and equality
- Argued Government is better than none.
- Gov't should depend on the consent of governed
- *Hypothetical contract is made between the people who agree each other to surrender their natural freedom to a sovereign/government.*
- Sovereign has no special qualification for ruling, but is merely the representative of the community

Influence of Hobbes ideas on Modern Constitution

- Gov't depend on the consent of the people
- All citizens are equal
- Separation of politics from religion, church from state
- Freedom is the natural state of affairs as opposed to a gift bestowed by authority
- A single sovereign source of absolute power to protect the people particularly in emergency case.
- Distinction between the public and private sphere;- where public order and safety are not at risk, individuals are at freedom

Critics

- Not concern with popular participation in gov't
- Not provide how to make gov't accountable

2. Individual Rights and Majority Government

- Proposed by John Locke(1632-1704)
- Regarded as a founder of modern liberalism
- Argued the People first hypothetically contract with each other *unanimously to establish a gov't* and then choose an actual gov't by majority vote.
- Gov't as such doesn't enter into contract, but takes on a trust. Gov't has duties, but no rights of its own.
- Individuals had a certain natural rights identified by reasoning about human nature & existing, as he saw it, to serve God. These are life, health, freedom & property
- *Purpose of gov't is to protect these rights in the exceptional cases where conflict arise*
- In doing so, government has limited powers

Influence of Locke's principle on modern constitutions

- Gov't depends on the consent of the people;- Gov't should be appointed and dismissed periodically by majority vote of the community entrusted the power
- Limiting power of the government in order to protect the rights and freedoms of individuals.
- Separation of power;- he relied on dividing gov't power and hence, no one branch can be dominant
- Promoted toleration of different ways of life.

3. Welfare Liberalism & Utilitarianism

- Developed by David Hume, Jeremy Bentham and John Staurt Mill in 18th and 19th c

3.1. Welfare liberalism:-

- Favours democratic mechanisms rather than the courts
- Accordingly, the court might be presented as in 'partnership' with gov't to secure administration.
- The court role was to help the gov't deliver its policies

3.2. Utilitarianism :-

- It's the most influential version of welfare liberalism
- It evaluates conducts in terms of the result it produces
- The central concern of utilitarianism is to ask something like "what should I do to bring about the most happiness to the most people?"

- Utilitarianism derives from the principle of utility or usefulness.
- To put it briefly, utilitarianism is the doctrine which argues that we ought to act to : "Promote the greatest balance of good over evil"
- **David Hume**:- Gov't is the matter of practical comprise rather than the social contract
- Advocate for a pragmatic society based on coordinating individual interests

- **Jeremy Bentham**:- used the slogan of " the greatest happiness of the greatest number" i.e- Every act is judged by its results, not by its intrinsic and universal value.
- Respect for an idea of all powerful central government making general laws and accountable to majority of the people.
- Regarded law and courts as subordinate to utilitarian considerations.
- **Critics**;- disregards justice and fairness, against freedom of minorities
- Eg. Slavery if majority agree & Innocent should be shoot to disperse public meeting or kept in jail to preserve public confidence, even with no fault.

- **J.S. Mill**:- Try to reconcile utilitarianism with liberal individualism by claiming that maximizing individual freedom is the best way to advance general welfare since it encourages the virtues of creativity.
- No one way of achieving happiness
- State should not normally interfere to protect a person for his/her own good.
- The only ground on which state should interfere with freedom is to prevent harm to others.
- *Exception;- harm principle didn't apply to those who were unable to make rational judgments such as children, colonized peoples (Free from gov't interference)*
- Advocate for strong check and balance b/n gov't branches and belief in democracy.

Critics-

- Favour voting rights in favour of wealthy & learned
- Less valorizing to individual freedom as subordinate to general good.
- Utilitarian acts have no intrinsic value.
- Eg. The attempt to save a life is not an intrinsically valuable act.
- No benevolence, no sacrifice, no love has any value unless it happens to have good results.
- Eg. If forced to choose to save either a medical doctor or a poor child from a destructive house fire, one is obligated to save the medical doctor because we know he is able to help people; we don't know the future of the child.

4. Libertarian Liberalism

- Articulated by Robert Nozick(1938-2002)
- Driven by the idea of minimizing the role of state
- It relies on the natural rights of individual right
- Gov't is needed to secure basic rights
- Right of personal freedom and property are sacrosanct
- State should not use force against anyone without their consent
- The role of state is providing services that could not provided voluntarily by individuals
- State function is limited to protecting individuals against force, theft and fraud and enforcing contracts
- State can collect money(like tax) for redistributing wealth from rich to poor

- **Its contribution**
- Provides a model of a hypothetical minimum state that relates to contemporary ideas of privatization

5. Economic/Market Liberalism

- Proposed by Fredrik Hayek(1899-1992)
- Its about encouraging competition between individuals through free transaction in the market
- Price is determined by supply & demand effect of market(markets are driven by self interest)
- It attempts to harness self interest by creating competition in the provision of public services. Eg- bid by individuals to build infrastructures

- It's a kin to utilitarianism as it does not value freedom for its own sake, but for wealth maximization
- Market freedom may conflict with personal freedom since the reach may exploit the poor
- *Disregards central planning since official are incompetent to acquire millions of citizens interest*
- Favours rule of law and common law precedent since cross checking of individual faults at different levels
- In terms of creating accountability legal regulation are better than political solutions.

- **Positive and Negative Freedom**
- Enunciated by Isaiah Berlin(1907-1997)
- Concerned to protect liberalism against attempts by those in power to subvert the notion of freedom
- Idea of individual freedom, even if central to liberalism, but has different, vague and sometimes conflicting meaning.
- Moreover freedom may conflict with equality since the strong are free to exploit the weak.

- **Negative freedom;-**it's a freedom to be left alone.
- Liberty is understood … the absence of external impediments. A person is free only if he is not subject to control by others claiming to act under some sort of authority
- It enables us to exercise choices
- *Red-light*- Regards law as restriction and concentrates on limiting states power
- **Critics**; -
- It may seen as impractical and selfish.
- Even if some freedoms are important than others, the relative importance of competing freedoms may be controversial. Eg. Freedom of press against privacy. But, no litmus test to rank /compare d/t freedoms

- **Positive Freedoms:-**It's a freedom no to do what we want as such, but to do what is good for us by exercising the power of reason to make choices that enhance the possibilities of our lives , 'liberating' our higher nature from our animal instincts and allowing as to control our own destinies(autonomy)
- It requires distribution of resources
- It requires the use of public resources which are limited and so must be rationed out according to the state's preferences.
- It's a narrower in scope since it concentrates only on freedom to do good things.

- *Green light*- is open to greater gov't control since it is consistent with the state designating what are valuable choices.
- Linked with republican idea of democracy since we control our lives, if we participate in collective decision making. Hence, favours compulsory voting.
- To *Berlin* freedom means negative freedom, the right to do what we like however irrational. But, also, states might have sometimes had good reason for interfering with freedom. Thus, decision makers openly confront difficult choices.

- **Liberal pluralism(LP): Group Pluralism**
- Sometimes called identity politics or the politics of recognition
- It requires the state to respect the identities and way of life of different groups such as national, religious, ethnic, political associations or sexual minorities.
- Point of liberalism overlap with communitarianism
- It requires active steps to ensure that all such groups have the leverage to participate fully in the life of community and to express their identity against that of the dominant group.

- LP might conflict with other kind of liberalism particularly where the values of the group conflicts with more individualistic values.
- *Constitutionally*- LP emphasis open and dispersed gov't, local gov't equal representation of minority groups in public institutions
- LP favour voluntary mechanisms to enable individuals to participate in the society.
- **Critics**- sometimes tolerates intolerances

REPUBLICANISM

- Associated with positive freedom &
- Treats freedom as the right as the right to participate in gov't
- Limited and balanced gov't under law and political equality
- Unlike liberalism, Republicanism incorporates the community into states rather than built a wall.
- Favours the notion of the virtuous, politically active citizens

- **Features**
- Stresses the state exist for the benefit of all members of the community as free & equal citizen
  - The rulers have no rights of their own but only duties to the community
- Concern to ensure that no single person or group within the community can dominate others.

- All limits of the rulers must be secured by law so that the ruler cannot abuse his or her own power
- Republicanism scholars differ as to the best form of the constitution to achieve the goal of free and democratic citizenship.
- Some advocates for direct citizen participation in gov't, while others prefers representative system.

- **Communitarianism**
  - Its an economic and political system in which the Government makes almost all economic decision and owns all the factors of production (i.e labour, capital, land and Entrepreneurship)
  - Example: North Korea & Cuba.
- **Features**
  - the government owns all property and dominates all aspects of life in a country
- State/gov't ownership of factors of production.
- Central Planning/Controlled Economy
- Managers = Mandatory Party Membership

Role of Government

- The gov’t owns property such as business & firms
- provides its people's healthcare, education and welfare
- The government makes economic decisions about what should be produced, how much it should cost.

Types

- Communitarianism can be either socialism or communism.

- **Communism**, the government **runs all industries,** owns all property, sets wages, and prices, and people must do as they are told. Ex. North Korea
- **Problem**: Gov't has no way to know what to produce because prices don't reflect supply/demand!
- **Socialism**, economic system is based on the premise that basic industries should be owned or controlled by the gov't. So that resources may be more evenly distributed. Example: Denmark & Netherlands

- The government runs **some industries**, such as oil, and uses profits to pay for health care, education. Ex. Venezuela.
- **Features of socialism**
- Existence ofPrivate & Public Ownership
- Some Choices are Limited
- Creates Social Equality
- Reduces Individual Incentive- Brain Drain

- **Democracy and Communitarianism**
- Democracies are sometimes capitalist and sometimes socialist. Voters may elect a leader who promises to help the poor through socialism. Or voters may prefer capitalism as a way to create more jobs.
- Communist countries have been dictatorships in which leaders have tried to control all aspects of the country. But not all dictators are Communists

– DEMOCRACY

- Liberalism and republicanism share ideals of democracy, but from different perspectives.
- Democracy - gov't with the consent of the people
- *Since traditional understanding of democracy related with majoritarianism, there is a tension b/n constitutionalism, rule of law and individual freedom on one hand and democracy on other.*
- There are different versions of democracy.

I. Representative Democracy

- It's a gov't where people can choose, interpellate and remove
- Relies up on passive population since citizens only power is right to vote
- This democracy provides mechanisms on how gov't is accountable to the electorate. Those are;
  - Right to question the Executive
  - Policing financial limits on gov't spending
  - Internal control mechanisms
  - Judicial review
  - Public Consultation & access to information

II. Participatory/Deliberative Democracy

- Promotes continuous direct participation by individuals and groups in decision affect them
- Citizens should not only participate only during periodical elections, but also between terms of each election.
- The notion includes collective decision making with the participation of all who will be affected by the decision or representatives
- It includes decision by means of argument offered by and to participants who are committed to the values of rationality and impartiality.
- Decision making by discussion among free and equal citizens

III. Market Democracy: Political Parties

- In practice democratic institutions are dominated by political parties
- Influenced by market liberalism and recognize the role of political parties
- Argues currently, elections provide only a limited choice.
- Voters right is only to choose b/n products offered by competing parties
- There is a danger that political parties will be captured by the vested interest of those who fund them

- Competition will ensure that one party is unlikely to stay in control permanently
- Modern gov't may be chosen not on the basis of broad ideological/ class d/cs rather on the basis of managerial competence of individuals standing for election.
- Market democracy encourages gov't policies to be expressed in terms of outcomes, targets, & value for money rather than in terms of process value of fairness and justice

IV. Consociational Democracy/ Power Sharing

- Consociationalism is designed to produce a stable political system due to elite cooperation despite social segmentation.
- Articulated by Arend Lijpart of Holland
- It's an emerging form of democracy.
- Mostly, employed where there is no clear winner and political parties form a coalition gov't
- It's aimed to rectify monopolization of power by majoriarian and empower minority groups including political, religious and ethnic groups.

- Lijphart identified four characteristics of '*consociational*' constitutions as an ideal-type.
- **Grand coalition** allows all ethnic groups to participate in either the parliament or the executive branches of the government.
- However, *executive power-sharing* among a 'grand coalition' of political leaders drawn from all significant segments of society.

- eg. The presidency of Bosnia and Herzegovina is held by 3 elected officials 1 Bosnian Muslim, 1 Croat and 1 Serb. Each president is elected for a 4 year term and they rotate the chairman ship of the presidency every 8 months.
  - In Germany a party should at least secure 5% of the seats in the parliament in order to participate in the coalition government as a minimum threshold.
  - In Ethiopia, in case of Dire dawa city, Mayor from Oromo and Somali shares the five years ruling term for equal two and half years.

- **Mutual or minority veto:-**Grand coalition is not enough, because it does not guarantee that the minorities will not be outvoted by the majority on fundamental issues.
  - A *minority veto* in government decision-making, requiring mutual agreement among all parties provides such guarantee.
- **Eg-** The Burundese constitution of 2005 guarantees a 60% Hutu – 40% Tutsi representation in gov't as well as in the parliament. Furthermore, the Tutsi have a minority veto in the case of constitutional revision. Indeed, the approval of a constitutional revision proposal requires a 4/5 majority vote of the members of the parliament providing the Tutsi with a veto.

- **C. Proportionality:** ensures proportional representation of major groups in elected and appointed office However, care should be taken before recommending proportionality.
  - The case of Oromia and Benishangul cities is a prime example. In Oromia, there is a quota system where 50% of the seats are reserved to Oromo nationalities in first and second grade cities.
  - In Case of Benishangul 55% of city council is reserved for indigenous nations of the region (i.e Shinasha, Berta , Gumuz, Mao &Komo)

- **Autonomy**:- A high degree of *autonomy* for groups. These arrangements are thought to have several benefits over majority rule, generating 'kinder, gentler' governance with more inclusive processes of decision.
  - Actually, autonomy goes little farther than power-sharing mechanism. Autonomy can take different forms such as decentralization, or deconcentration
- **A. Deconcentration** is giving limited authority to be exercised by lower levels.
  - This is the case where the State Council of Oromia Region gives to zonal level local government.

- **B. Decentralization** is manifested in the powers given to the districts/Woredas in Ethiopia.
  - Huge powers are given to such districts including drawing their budgets and electing their own councils.
  - Federalism obviously is devolving powers and responsibilities from the central government to the regions.
  - But here, power devolution is larger than that of deconcentration and decentralization.

- Self-determination has both internal and external components.
  - The external Aspect- secession, the right to liberate from their colonizers.
  - Internal self- determination consists of different rights including language rights, culture, right to self-rule within the country and etc as a mechanism of protecting minorities.

CHAPTER THREE



DEVELOPMENT OF DOCUMENTARY CONSTITUTION IN ETHIOPIA

- Historically, Ethiopian history in northern part has been documented, while southern part pass generations through oral tradition.
- Various scholars classify the historical development of constitution into
  - Unwritten period (Pre 1931) and
  - Written period (since 1931).
- Ethiopia adopted four constitutions since 1931 within one century, which reflects our constitution is unstable and less life span averagely.

- **3.1. Constitutional Development of traditional Ethiopia till 1931**
- **3.1.1. Ser'at Mengist and Kibre Nigist**
- **Ser'at Mengist**;- It is the first document known to have been used for allocating power among the Crown, its dignitaries and the Church
- Contains twenty one articles
- This Law mostly deals with religious affairs, but also contains texts on civil and penal matters.

- **Crown**:-The leader being crowned used to be referred to as *'Atse'* meaning King or *'Niguse Negest'* meaning King of Kings. He also was referred to as *'Jhan'* meaning Judge.
- **Dignitaries**:- initially headed by 12 law-givers
- Composes Military and civil functionaries as well as Religious dignitaries at d/t hierarchy of power
- **Kibre Negest(1320s):-** It's a document limit power of emperor and define the core of Ethiopian Ethos and provides the source of legitimacy of emperors succession of throne based onthe descendant of Solomonic dynasty

- **3.1.2. Fetha Negest(Law of Kings)**
- 'Law of the Kings', is a collection of laws which in use in Christian Ethiopia for more than 6 cent.
- It was originally written in Arabic and translated to Geez
- It has two distinct parts. Those are
  - Parts deal religious matters (ecclesiastical) relied largely on the Old and New Testaments and
  - The second with secular/civil matters.

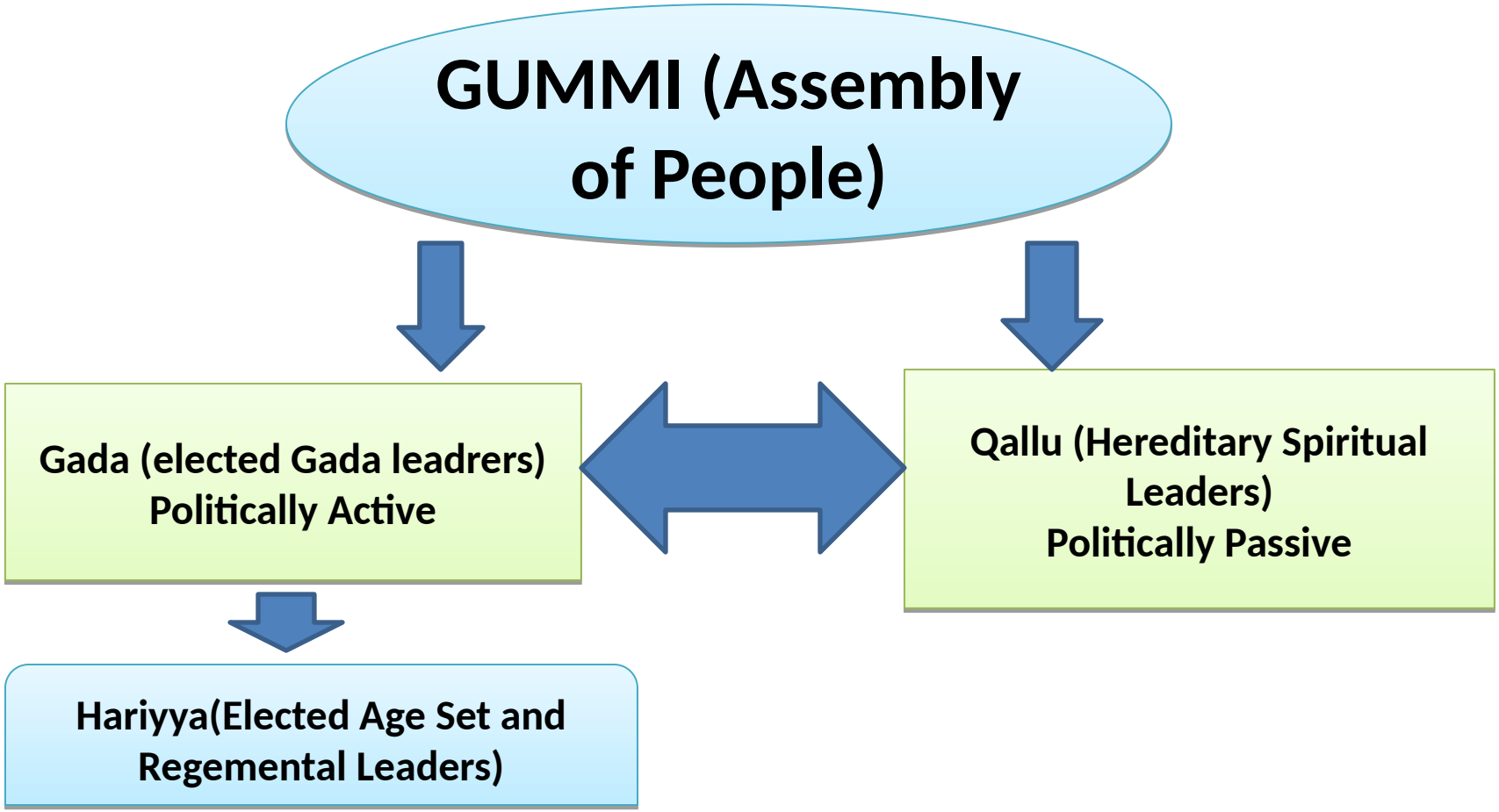
- The collection of laws found in four books known as “The Canons of the Kings”. This includes a
  - Handbook of Roman Byzantine laws(870 – 878),
  - The Syro-Roman Law Book’ written in Greek at about 480 A.D. ,
  - Roman-Byzantine law of the Emperors Leo III (Isauricus) and Constantine V (Copronimus), which was published in Constantinople in the year 726.
  - The fourth book has been identified as the ‘precepts of the Old Testament’, a compilation of ritual and moral precepts

- Hence, Ethiopia's present Civil Law owes its origin from Roman Law via two different epochs:
  - first through the Fetha Negest in the 14th Century,
  - second through Emperor Haile Selassie's codification program.
- Fetha negest influences as source law for Minelik's first ministerial establishment, 1930 and 1957 penal code, 1960 civil code

- **3.2. Gada System**
- The Gada system practiced by indigenous nationalities of the *Borena* Oromo's.
- The Borena Gada system represents a structure of two cross-cutting systems of peer-group structures.
  - On the basis of chronological age [the harriya system],
  - On the basis of genealogical ties Gada system
- The Gada system, accompanied by specific rituals, gives entitlement to each group of peers within the same life-age which include giving protective, political, judicial, administrative, etc … services.

- Some of constitutionally relevant features of gada system are
  - Qixxe (Equal) and balance,
  - Democratic election Process,
  - Limited term office,
  - Division of power,
  - Sovereignty of the people,
  - Umpiring role of qallu

- **Qixe(Equal) and balance;-** Matters of public importance made through public deliberation
- Every participant is not only encouraged, but also expected to contribute
- Power is also fairly distributed among representatives of different moieties
- Abba Gada come from one or the other moiety once he elected he serves as head of entire society


GUMMI (Assembly of People)
Gada (elected Gada leadrers) Politically Active
Qallu (Hereditary Spiritual Leaders) Politically Passive
Hariyya(Elected Age Set and Regemental Leaders)

- **Democratic election Process**:- the society gets to elect its representatives from eligible candidates for a seat at d/t levels including the post for Aba Gada.
- Election administered by Qallu council, which has an independent institution with the duty
  - to supervise election process,
  - the authority to convene electoral meeting and
  - evaluates candidates presented to them.

- Qallu council is consist six men elected by general meeting of the clan every eight years.
- Members of Qallu council should not compete for political office of Gada system in order to avoid the possible conflict of interest
- Candidates usually taking a part a competitive campaign on their quality &how to serve public

- **Limited Term Office**:- Power is transferred every eight years
- Society, also, may recall their representatives if they loss confidence on their representatives through procedure called Buqisu(Uproot)
- The time Reckoning experts called Ayantu who are in charge of keeping the Unique Oromo Calendar and determining the ‘Gada Chronology’ have the duty to fix exact place and time for transfer of power every eight years.

- **Division of Power**:- Power is highly distributed across age groups and Generations (Gada Classes)
- Every male member of society assume different power and responsibilities every eight years based on his Gada Grades, which even today western democracy not arranged this to enable youth in politics actively
- Political power under Gada system is divided both horizontally and vertically although there are overlaps mainly legislative and judicial function by Aba Gada

- In order to minimize concentration of power in the single person, the power is distributed among various public officials such as;-
  - Aba Gada/Bokku(Head of the system),
  - Abba Dula(Command of the army),
  - Abba Sa'a(Administration of Public property),
  - Abba Qallu/Muda(concern with ritual life of Oromo people)
- Also, Descendant of Qallu lineage are prohibited from assuming political office of Gada system

- **Sovereignty of the People:-**
  - Periodically elect their leader,
  - Peaceful transfer of power to elected officials,
  - Peoples retain ultimate power to oversee the conduct of elected officials through Gummi (Caffee),
  - Society delegates limited power to their leaders.
- Gumi(Caffee) which the people exercise his sovereignty including over the ruling of Gada Council

- The Gummi meets once every eight years and also, in the middle of Gada period they review the conduct of Gada officials, amend/proclaim if necessary, and settle major disputes.
- If Aba Gada has conflict of interest on the dispute, he will be replaced by another Aba Gada for the purpose of resolving disputes since ‘ *is judge in his own case’!*

- **Umpiring Role Of Qallu**:-
- Qallu is an independent institution which oversees and umpires the proper functioning of Gada system.
- The main function of Qallu are
  - act as election board which monitors the election process of Gada officials,
  - supervise peaceful transfer of power at the end of one Gada term office.
- Hence, Descendant of Qallu lineage are prohibited from assuming political office of Gada system with a view to avoid possible conflict of interests.

- **Limitations of Gada System**;-
- Women not actively participate in political life (except Siiqee)
  - Siqqee used as an instrument to defends the right of women members of the people and, also, serve as an institution that counter male domination/ patriarchy within the Gada system)
- Some fusion of power

- **3.3. The 1931 Constitution**
- In other countries, the dev't of modern constitution is the result of people's revolution and struggle such as USA & France,
- While in Ethiopia, b/c of effort of king to institutionalize& centralize his divine power.
- **Factors**- there are internal and external factors that influence adoption of this constitution

Internal factors

- To strength the descendant of Solomonic dynasty,
- To control and weaken the power of province rulers,
- To weaken power of church ,and
- To legalize unlimited and sovereign power of kings.

- **External factors**
  - Ethiopia's membership of League of nation which require civilization& abolish of slavery in order to enhance human dignity,
  - need of modernization in line of European thinking,
  - to build image through self-appointing as civilized country
- *Drafted by Bajerond Teklehawaryat Teklemariam and Blata Geta Hiruy Weldesillasie, whom visit japan and observe their 1898 Meiji constitution, later used as a model to design this constitution.*
- **It considered as Gift of the Emperor to his people and makes defacto suppression of traditional monarchy power.**

- **Features**
- Used as an instrument of centralization, institutionalize monarchy, absolute/unlimited imperial power
- Bicameral legislative chambers. Namely
  - House of Senate/upper (appointed by emperor from nobility) and
  - House of Deputies/lower house (Chosen by nobility & local of administrative provinces)
- Parliament has only the power of discussion (Deliberative chambers), which serve as advisory role for laws issued by Emperor.

- They also served as a communication bridge b/n the gov't and people
- One can't be a member of both Neither can initiate nor refuse a law proposed by the Emperor
- Contains some right and duties of citizens(art. 18-29) such as right to privacy and duty to pay tax
- Emperor has a veto power over any acts of executive, determine the structure of gov't organs

- **The progress of the constitution**
  - Creates of administrative units headed by appointed chiefs,
  - The establishment of a standing army, &
  - Innovate the concept of a fixed annual budget for gov't
  - Set up of a ministerial frameworks,
  - Establish system of individual and collective ministerial responsibilities (Through Council of Ministers)to the Emperor.

Court System

- Establish two separate court systems. i.e
  - Ordinary tribunals (civil & criminal cases)&
  - Tribunals of administrative handle civil cases related to gov't.
- Judges are appointed by the Emperor.
- Emperor chilot is the final appellate court on all matters.
- Interrupted by Italian invasion and
- Revived after Italy leaved the country, with further legislations and progresses such as appointment of Prime Minister by Emperor.

- **1955 Revised Constitution- West Minister model**
- The **reasons for revision** were socio-economic and political advancement which includes:
  - Modernity left by the Italians 1941
  - Ethiopian membership to the UN 1945 and adopts UDHR in 1948
  - Orientation of western ideas which could not be carried out under the 1931 constitution.
  - Federation with Eritrea which had a bit modern constitution (Liberal)- Marriage b/n unequal
- Proclamation No. 2/1942 that established Administrative provinces Awrajas and Woredas

- **Features**
- Based on west minister paradigm which
  - Composes the element of devolution of power to formulate gov't policy,
  - Majority seat in parliament forms gov't,
  - Popular will expressed through parliament/ associations, and
  - Strong and independent judiciary
- Emperor is sovereign and source of political authority, and the rest of gov't branch have derivative power

- Emperor act as head of gov't and head of state.
- He has the power of
  - Commander in chief of the armed forces,
  - Declare war martial law,
  - Final appellate,
  - Create gov't agencies & determine their functions,
  - Appoint & dismiss officials including Prime minister, cabinet, diplomats, and judges.
- Except in the area of spiritual administration, all church decrees, edicts, and regulations were promulgated by the emperor, who also had the right to approve the election and appointment of bishops and the Abun

- Bicameral legislature which compose
  - **House of Senate (appointed by Emperor from nobility and few intellectuals) and**
  - **House of Deputy (Directly elected by people).**
- The member of each organ have immunity, free debate & system of interpellation.
- The emperor had the power to dissolve both houses.
- 28/131 articles of constitution deals with right &duties of the people

- The progressive elements of the constitution are
  - Incorporation of basic tenets of fundamental human right and freedoms from UDHR,
  - Election of lower chamber by popular vote among nobilities,
  - Set up committee of ministers under chairmanship of prime minister
- Later,
  - The 1960 attempt to coup d'etat,
  - The 1962 dissolution of Eretria federation,
  - Unenforceability of liberties mentioned in the constitution questioned the value of monarchy & revealed popular dissatisfaction.

- Some reforms made towards power distribution to divert the growing revolution.
  - But, the students based on '*land to tiller'*,
  - Armed insurgent in Eretria and Ethio-somali boarder,
  - Strike by teachers, taxi driver, Muslim community for religious equality, and
  - Army unit revolted on feudal system makes emperor restless and finally ***lead to establish constitutional commission in order to draft new constitution.***

- **The 1974 Draft Constitution**
- Aimed to calm down various uprisings against emperor
- In 1973 the emperor appointed a 30 man Constitutional commission under the head of Endalkachew Mokonnen
- The draft characterized by constitutional monarchy, which limits the power of Emperor only acting as Heads of state and commander in chief of army
- But, the emperor was not satisfied with its contents and refused to present to legislative chambers& failed.

- **Tip;- the common features of pre 1974 written & unwritten Ethiopian constitutional dev't are;-**
  - Monarchy, feudalism and Unitary
  - Political legitimacy derived from force, Orthodox religion and legend of solomonic dynasty(12th c-1974)
  - No separation of power
  - Transplanted from foreign sources
  - Their application limited to Christian highlands up to Emperor Minelik's expansion
  - Ignores accommodating of religious and ethnic diversities
  - Male succession of power(patriarchy) with some exception such as Empress Zewuditu
  - Unity of Orthodox church and state power- Absolute fidelity of monarch to church

- **The 1974 Revolution – 1987 Constitution**
- The slogans against Emperor '*land to tiller'* and '*down with feudalism, up with socialism'* in September 1974 leads to
  - Deposition of emperor from power
  - Suspend the 1955 constitution,
  - Abolish monarchy and
  - the Military junta of Derg came to power.
- **The reason for revolutions are;-**
  - Land to peasants,
  - Right of nation, and nationalities(like Walelign Mokonnen article- 'On the question of nationalities in Ethiopia'),
  - Religious equality,
  - Equal opportunity and access to resources.

- Finally, the lower rank of new elite with lower rank and noncommissioned officers took up political stage headed by provisional military administration.
- Unfortunately, the struggle to establish democratic system has been hijacked by Derg and the later summarily execute the former senior feudal officials including emperor.
- Establishment of Derg leads to
  - Abolishment of the monarchy and
  - Introduction of socialism ideology.
- Derg articulated the promotion of godlessness and its "demotion" of religion

- **The period of 1974-1987**
- Ethiopia ruled by provisional military administrative council(PMAC) which compose 120 military men
- The country ruled by proclamation, which many scholars argue this period as period of constitutional lacuna since no written constitution.
- Derg nationalize rural & urban lands, immovable property, all production & distribution were brought under ownership & control of state

- Establish socialist ideology which manifests
  - ‘No rule of law, but socialist legality,
  - ‘No separation of power, but unity of state power’,
  - Eliminate civil legal relationship and broader horizon of public law.
- Adopt revolutionary democracy & then people’s democratic republic(since 1987 constitution)
- Set up the Workers Party of Ethiopia (WPE) as the sole political party in the country
- During this period, Derg gives solution to ‘*land to tiller’* slogan by redistributing land, but limits peasants use their production

- **The 1987 Constitution-Russian influenced**
- The shortest ever lived constitution in Ethiopia.
- The constitution drafted by constitutional commission that comprise 343 diversified members from different groups and experts.
- Step for adoption are;- Draft—Public deliberation---Referendum of the people

- Establish first ceremonial civil gov't based on socialist ideology
- PMAC constitute itself to civilian administration & head of military became President
- **Features**;-
  - Owners of constitution are workers,
  - Unitary form of republic gov't,
  - Follows Erastianism/secularism approach,
  - Guaranteed various unenforceable fundamental right and freedoms

- **Gov't organs and their functions**
- **Legislative-** it belongs to the unicameral of National Shengo(Nash) and
  - Council of state established by Nash to perform functions of legislations when the latter is no at session since it meets once in a year.
- **Council of state-** consists President, V/President, secretary and other members.
- The president of the council also President of Republic.

- The council empowered
  - To issue law,
  - Establish defence council,
  - Interpret constitution, and
  - When compelling circumstances proclaim state of Emergency, war and martial law
- **Judiciary-** Courts are responsible for ministry of justice and law
- Judges are elected, recalled and dismissed by parliament
- The term office of judge is the term office of parliament
- When compelling circumstances, President and its Vice of Supreme court are appointed by President

- **Executive-** it is the most powerful branch which composes President office and Council of Minister
- **President Office**- accountable to Nash.
- The President is the secretary general of the sole party and the chairman of the national Shengo
- The commander in chief of the armed forces. Power to present the nomination of members of executive and judges of supreme court to Nash
- When compelling circumstances, appoint President & its Vice of Supreme court judges & Prime Minister

Council of Minister-

- Highest executive and administrative branch
- Members are nominated by President and approved by Nash.
- Accountable to Nash and President(double accountability)
- Responsible for implementation of policies, laws and regulations
- Prepare plan, annual budget and foreign relation proposals

- **Down fall of Dergue**;- there are cumulative effect of external and internal factors.
- *Externally*;- End of Cold war era with downfall of USSR lead socialist ideology
- *Internally*;- More than 20 armed struggles largely ethnic based, overwhelmed incredible victory over the regime cronies

- **3.8. Transitional Charter**
- Proclaimed at peace and democracy conference held between July 1-5/1991
- Changes the state from unitary to federal structure implicitly.
- Provides guarantee for establishment of multi-party system
- Guarantee individual and group rights including the right to self-determination (Internal and External)

- **Council of Representative** exercises legislative function & oversaw work of Council of ministers
- Procl. 1 and 2/1991 provides the power and function of president, Prime minister, and Council of minister of Transitional gov't
- National regional Self gov't(NRSG) established by procl. 7/1992. As subordinate gov't entity below central gov't and Art. 3 of procl. Enumerates 63 identified ethnic groups and establish 14 regions

- Accordingly, eight regions have from 3-8 ethnic groups, four region identifies one ethnic group and Addis ababa amalgamated rural and urban peoples.
- 48 ethnic groups able to establish their own national/regional self-government at woreda and above, while the remaining small sized and less than 50% population of woreda were incorporated.
- Minority can be identified based on small sized population

- In Art. 9(1) of the Procl., which seemed to indicate that except for specifically enumerated powers of the Central Gov't, all other powers including residual powers, belonged to the NRSG
- Highest executive organ of NRSG belongs to **executive committee** of 11-19 members elected by and from the NRSG council.
- Two parallel court system established(art. 24)
- The procl. has programatory nature towards regional constitution with its gov't organs and their functions horizontally and vertically.

- **Council of ministers** issue regulation and directives for the effective implementation of certain laws and
- The regional executive committee has the same responsibility at NRSG level.
- Council of representative is the final arbiter and focal point for delimitation of power, boundary and settlement issues,
- while NRSG law doesn’t provide for constitutional review

- Lastly, bear in mind that, both Transitional charter and subsequent proclamations, like South African constitution, doesn't employ the term federalism explicitly.
- That might be due to fear of political disintegration since the notion of federalism interrelated with power division institutionally/horizontally and geographically/vertically.

- ***Which one continues to have Positive or Negative effects on present Public Life? How?***
- The past constitutions have both positive and negative effects on current generation.
- **Positive effect:-**
- Some principles incorporated into current laws like, from fetha negest various principles of family(like monogamy), law of person, tort, succession and good incorporated into civil laws.
- Also, idea of secularism, land policy, right to self-determination of FDRE constitution relatively incorporated from PDRE constitution.

- All constitutions contribute to Make Ethiopian legal system more of civil law legal system due to codification of laws and this reduces arbitrary discretions of power of officials as decision is based on documented law.
- Failure of all past modern constitutions is the lesson for designing socio- economic, legal and political aspect of the country to address interests of d/t aspects of our divided society.

- **Negative impact**
- FDRE constitution in its preamble provides about *rectifying historically unjust relationship* impliedly cross refer to the past systems mistakes and about eliminating their negative effect on current generation. Among these;-
- All past constitutions, more or less, contribute to current Ethiopia's low profile in socio-economic, political, democracy, good governance dev't
- B/c each constitutions are designed to satisfy political need rather than addressing citizens interest. Such as
  - The 1931 and 1955 shows the prerogative power of emperor,
  - During Derg absence of multiparty system hinders democracy and its benefits.

- Monopoly of one language, due to historical dominance, restrains current people from politics, education, and access to justice/information, job and many other aspects of civil life. It can entrench socio-economic inequalities between groups.
- Actual male domination in all aspect of public life results current affirmative action for women to rectify imbalances



CHAPTER FOUR



FDRE CONSTITUTION: - OVERVIEW, PRINCIPLES AND HISTORY

- **4.1. Making of the FDRE Constitution**
- The Constitution is the Master plan of one country's legal system, and benchmark of Socio-economic and political foundation of one country,
- Hence, the making process of constitution should be done with highly due care.
- **4.1. Constitutional Making Process in general**
- Constitutional making process in countries having written constitution has four main phases namely;- Drafting, Deliberation, Adoption and Ratification.

- **Drafting**
- It’s about initiation of document by multi-disciplinary professionals such as legal, political science, language expert, historian…
- Initiation should be based on socio-economic and political reality/changes of the country.
- That is why, unlike other laws, drafting constitution by foreigners is not recommendable.

- Such reality includes the motto for change, interest of people, programs of political parties, diversity and history of the country.
  - For instance the 1996 South African Constitution largely influenced by ANC Political programs
- The factors taken into consideration in due care are foreign and domestic policies, defence issues, sovereignty of the country, accommodation of diversity, socio-economic and other issues should be deeply investigated.

- **Deliberation**
- It should be presented to the owners of constitution for public deliberation including various groups, NGOs, any other stakeholders of the country.
- It should sensitively consider the interest of various minorities such as ethnic, political, religion …etc.
- In doing so, the citizens' opinion, suggestion and comments on the constitution should be included with in the constitution.

- **Adoption**
- It’s the phase where we determine what additional issues needs to be considered &which provisions are going to be reduced/modified based on the feedback of deliberation stage.
- This can be mostly performed by the body establish the drafting commission
- It is about checking whether citizens feedback incorporated on the drafted constitution or not

- At this stage citizens of the country has also the right to scrutinize whether their basic interests are comprised or not
- At this stage, the adopted constitution have no binding effect
- **Ratification**
- It's the phase where the citizens of the country proofs whether they accepted the document of the adopted constitution or not
- Such constitution should be designed as a supreme law of the land across generations.

- The trends of various constitution shows that, constitution of different country either ratified
  - **By Referendum (Swiss and PDRE constitution),**
  - **Constitutional Assembly (eg. France and FDRE constitution),**
  - **Parliament (Eg. India &Ethiopian regional states) or**
  - **Agreement among sovereign states (eg. EU constitution, coming together federal constitutions such as USA &Swiss constitutions).**
  - **West Germany and Japan Constitution are ratified by Allied forces of WWII, but pass across generations for more than half century with little amendments.**

- **4.1.2. The Making of FDRE Constitution**
- Art. 9G of transitional Charter entrusts Council of representative(COR) to establish the body that drafts the new constitution which is called **Constitutional Commission**
- The COR establishes constitutional commission by procl. 24/1992
- The commission composes 29 members that represents different groups.

- Accordingly,
  - From COR-7 members
  - From Political parties-7 members
  - From Eth. Chamber of Commerce-3
  - Workers association-3 members
  - Lawyers Association-2 members
  - Eth. Teachers association-2 members
  - Ethio. Health Professionals Association-2
  - Women representative-3 members

- The commission after drafted the constitution, present the document to COR.
- Then, COR opens for Deliberation.
- Then, NRSG council & woreda councils, people at kebele level& by gov't media discussed, in addition to preparing d/t seminars and symposiums in various topics.

- Then, after collecting feedback from d/t groups and citizens, the commissions modify the draft and present to COR.
- COR after considering various modifications adopts the constitution and decides to pass for Constitutional assembly/CA.
- COR in order to supervise the election process of CA members enacts Ethiopian election law by procl. 64/1993.
- CA composes 524 members which directly elected by people.

- CA members after discuss and deliberates on the adopted constitution, ratified the constitution on Dec. 8/ 1994 with only one abstention vote.
- The CA has been dissolved after performing his task of ratifying the new FDRE constitution
- The constitution came into effect after nine months of its ratification on August 21, 1995

- **Overview and Salient Features of FDRE Constitution**
    - **General Overview of FDRE Constitution**
- It enacted after end of cold war period. Hence, it's one of the '*New Generation Constitution*' since designed in all inclusive manner, unlike that of cold war era constitutions neither attached to western capitalist nor eastern socialist ideologies.
- All-inclusiveness can be expressed in terms of it includes all generation rights, neither attached its economic policy to capitalist nor socialist ideologies.

- It consists preamble and 106 articles within 11 chapters. Accordingly,
  - Ch-1(General Provisions- art. 1-7),
  - Ch-2(Fundamental principles of the constitution, art. 8-12)
  - Ch-3(Fundamental rights & freedoms, art.13-44)
  - Ch-4(State structure, art. 45-49)
  - Ch-5(The Structure and division of power, art. 50-52)
  - Ch-6(Federal Houses, art. 53-68)
  - Ch-7(President of the Republic, art. 69-71)
  - Ch-8(The Executive, art. 72-77)
  - Ch-9(Structure and Powers of the Courts, art. 78-84)
  - Ch-10(National Policy principles and objectives, art. 85-92)
  - Ch-11(Miscellaneous provisions, art. 93-106)

- **Salient Features of FDRE Constitution**

A. Diversity as Source of Sovereignty- currently, there are 76 officially recognized ethnic groups in Ethiopia. The power sharing arrangement

  - Seeks to create stability by constitutionally dividing political power among ethnic groups,
  - Allowing different ethnic groups to create a strong federal state without losing their identity or compromising their interests.

- Looking to the past and analyzing the current realities of Ethiopia, *it can be argued that there is no alternative to a federal system*.

B. Adopts Multicultural/Ethnic Federalism;-The Constitution has acknowledged past oppression and exploitation of ethnic groups.

- No Majority Ethnic groups at federal level since all NNP constitute less than half of population. That is why Ethiopia is known as the land of minorities.
- Each 9 states are organized based on settlement patterns, language, identity, and consent of the people(art. 46/2).

- From 9 regions;-
  - Five of them designated by majority ethnic group at regional level. Those are Tigray, Afar, Amhara Oromia, and Somale
  - One region designated by minority ethnic group. i.e Harari
  - Two regions based on name of location. i.e Benishangul and Gambella
  - One region designation is the composition of direction and multi-ethnic recognition i.e SNNP

- Also, Oromia, Harari, Afar and Somale region recognizes the ultimate sovereign power of their region is only in the hand of Oromo, Harari, Afar and Somale Ethnic group, respectively.
- There is, also, system of *federation with in federation* in Ethiopia due to many regions recognizes the way they celebrates diversity at regional level particularly for indigenous NNP of their region. Such as SNNP, Amhara, Afar, Benishangul, Gambella, and Tigray

- FDRE constn adopts territorial federalism, which each NNP exercise their sovereignty within their region (Art. 39/3)
- At *regional level* there is a variety among regions such as Benishangul recognizes non-territorial federalism within its region by regional procl. 33/2008, like that of Belgium.
- Ethiopian federalism does not limit number of the states. Every NNP has the right to establish, at any time, its own state. Therefore, the Number of the federal units could be '*increased*' based on the consent of ethnic groups. (Art. 47)

C. Balancing division of power- Each region has their own gov't organs.

- Constn shares power b/n central & state gov't.
- There is a principle of federal comity among states horizontally& vertically between regions and federal gov't (art. 50/8)
- In doing so, there is a kind of balancing shared rule and self-rule or unity in diversity.
- But, Federal gov't has too much exclusive power than states. (Art. 51+55+96 vs Art. 52+97)

D. The Right to Self-determination;-

- **H**istorically, the Ethiopian federal experience in many ways is the result of the quest for self-determination
- This has already guaranteed both in its
  - Internal (art. 5/3, 8/3, 39(2 +3), 47, 61/2, 88/1, 93/4C) &
  - External aspects(art. 39/1).

- Also, the right to secession is one of the peculiar features of constitution guaranteed for each NNP that even cannot be overridden during state of emergency (art. 93/4C).
- Accordingly, the Nation demand to establish its own state can require to fulfill the procedure of art. 47/3, while the nation demand to secede can require to fulfill the procedure of art. 39/4
- Here, in later case art. 39/1 sets substantive rights, while art. 39/4 puts procedures to enforce art. 39/1.

- Remember that, *exercising right to establish regional statehood and secession reserved for NNP, not states.*
- Accordingly, the regions which recognizes sovereignty of their region belongs to one nation have the right to secede b/c there is no other nation claim to them such as Oromia and Somale,
- But those states which guarantees regional sovereignty for two and above can't exercise right to secession due to their interest cannot reflect other NNP demand to secede, Such as SNNP, Benishangul, Amhara.

- In art. 39/4A the term '*legislative council'* is vague, but its appropriate to interpret the legve body of the Nation demanded secession that established either at regional or nationality zone or woreda level.
- Also, Unity in Diversity can be expressed in terms of accommodating the diverse interests and identity of ethnic groups by providing them the right to self-determination.

E. Language Policy; -The constitution makes Amharic the working language of federal gov't. The member states has the right to determine their respective working languages. Also, "every NNP, has the right to speak, to write and to develop its own language" (Art 39(2)).

- Currently, we have no national language
- At regional level, except Harari, all other regions recognize Mono-working language at state level.

- In Harari, Harari and Afan Oromo has the working language of the region.
- Other regions, like Oromia, Tigray, Amhara, Afar & Somale prefers the majority nation language in their region as working language at state level, while the SNNP, Gambella and Benishangul choses Amharic as regional working language.
- In addition, SNNP constitution recognizes for each nationality zones/special woredas to determine their own working language at their locality.

F. Structurally bicameral, functionally uni-cameral legislatures;- FDRE constn recognizes HPR and HOF as federal houses. But, in fact, only HPR actively involved in law making process, while the Upper House/HOF entrusted other tasks other than legislative function.

G. Upper house/HOF represents Nationalities, not states - Unlike other federation like USA which states are represented in upper house, in Ethiopia only NNP are represented at HOF, (art. 61) based on number of population they have**.**

- Accordingly, every NNP has represented by one person & for additional one million population they have one additional representatives.

- Hence, currently, out of 153 members of HOF in terms of ethnic group, the Oromo constitutes largest by 31 representative, while in terms of regional representation, the SNNP constitutes the largest by 67 members.
- Consequently, it's difficult for HOF to serve as Counter- majoritarian organ since there is weighted/unequal representation in the house.

H. Fundamental Human rights and Freedoms- 1/3rdof the provision of the constn deals with fundamental rights & freedoms(art. 13-44)

- The issue of human right is one of the fundamental principles of constitution(art. 10).
- Chapter three divided into Human right (art. 14-28) &democratic parts(art.29-44)
- The *earlier (Human Rights)* deals with rights
  - Acquired inborn,
  - Related with nature of humanity,
  - Imposes negative obligation on gov't, &
  - Respected for all human beings,

- While the *later (Democratic rights) are*
  - Acquired in group within one democratic society,
  - Related with politics,
  - Requires gov't positive obligation &
  - Respected only for citizens.
- All gov't organs at all levels have the "responsibility and obligation to respect and enforce" (Art. 13/1)
- There is strict/very rigid amendment procedure either to add, modify or reduce rights. Art. 105/1

I. Parliamentary Democracy/ art. 45;- FDRE constitution prefers Parliamentarian form of gov't, not presidential, where member of parliament simultaneously act as member of Executive, and PM is head of the gov't.

J. Constitutional interpretation;- by upper house of political organ that compose representatives of NNP, rather than independent body or experts

K. Collective Ownership of land by state, and people as well as NNP-art. 40/3- NOT 4 SALE!

- Compare art. 40/3 vs 40/7

Fundamental Principles of the FDRE Constitution

- No universally accepted fundamental principles of the constitution.
- Hence, each principles can be derived from scattered parts of constitution (eg. USA Constn) or compiled in one section
- In our case, its incorporated in chapter two of the FDRE constitution
- It can be considered as corner-stone or building blocks of the constitution that serves as the base for chapter three and following chapters.

- It differs from national policy principles (Ch-10 of constn) in a sense that the later deals with the obligation of federal & state gov’ts to carry out.
- There are five fundamental principles of the constitution, namely
  - Sovereignty of the people,
  - Supremacy of the constn,
  - Human & Democratic rights,
  - Secularism,
  - Transparency & accountability

These principles are also incorporated in all regional states constitution. The d/c lies on, most states provides stringent amendment procedures equivalent to fundamental Human right articles.

4.3.1. Sovereignty of the People

General Overview of Sovereignty

- Sovereignty is one of the criteria for the establishment of statehood.
- It defined as the ultimate owner of supreme power, that subject to no other.

- Sovereignty question is the question of ultimate power.
  - In *monarchy* it belongs to King/Queen (art. 1 of 1955 constn),
  - In *totalitarian/ dictatorial* gov't in the hand of single/few individuals and
  - In democracy the ultimate power is in the hand of the people. In later case, any law and gov't power derived from the will of the people

- There are two aspects of sovereignty. Namely Internal and External sovereignty
- ***Internal Sovereignty*** is practiced within one country and expressed in terms of citizens' makes their own governing laws/decisions either directly or through their representatives.
- *External Sovereignty* expressed through the r/nship among d/t countries based on equality and freedoms (See art. 86 of FDRE constn).

- State is externally sovereign, in the sense that it is not subjected (against its will) to another state or to any higher authority.
- Currently, this sovereignty eroded by western neo-liberalism ideology due to most developing countries (Southern pole) are depend on the aid of developed nations(Northern pole)
- Sovereignty can also classified into Legal and Political. The earlier, legal, deals with the supremacy of legislative power within one gov't structure, while the later, political, replicates the supreme authority within one gov't.

- In other word the political sovereignty signifies the sovereignty of the people. *The power of the people cannot be derived from the legislative action, rather from the people themselves*.
- Sovereignty of the people eroded when their right to self-determination on their own matters taken away from them by those who occupy gov't power or by force.
- Past struggles and revolutions around the world are mainly interrelated with claim for sovereignty eg. USA and France revolution, independence struggles from colony, Arab world revolutions

- **Sovereignty in Federal states**
- In most federal countries particularly in decentralized federations the notion of sovereignty practiced at central and state tiers of gov't both in its internal and external aspects.
- **Internal Sovereignty:-** states within its own territory has exclusively sovereign, in the sense that it has *"exclusive competence"* or *"domestic jurisdiction"* and the *monopoly of power* over its territory.

- **External Sovereignty**;- this can be expressed in terms of the relationship among other states horizontally and with federal gov't vertically which also called *Inter-gov'tal relationship*.
- In both cases, there is principle of equality (art. 47/4) and Federal comity which all relations depend on mutual respect. – art. 50/8

- In addition, at international level, member states of a federation are not singularly subject of International Law.
- A few federal state constitutions allowed member states to sign international treaties and participate in the works of international organizations.
  - Eg. Former U.S.S.R. & the cantons of Switzerland's federation do have such powers, even now.

Sovereignty in the case of FDRE constitution- art. 8

- NNP is the source of ultimate sovereign power in Ethiopia
- Owners of the constitution are NNP
- Constitution is an expression of sovereignty
- Sovereignty can be expressed through direct or indirect democratic participation
  - **Direct**- Art. 12/3, 38, art. 39/4c, 47/3, 48/1, 50/4, 54/1, 61/3, 92/3

- **Indirect**- periodical elections at d/t levels, selecting members of HOF, constitution ratified itself by Constitutional assembly

- At regional level some states guarantee for sovereignty of the region in the hand of one ethnic group, while others guarantee for their own indigenous NNP of their region

4.3.2. Supremacy of the constitution

- Supreme written constitution is one of the common feature of federal political system
- It's one of the constraining function that puts a limit to the power of the gov't

Why the constitution is fundamental/supreme law?

- It is the source of legitimacy
- Sets public institutions & at the same time limits them
- Unlike other laws that are made by majority vote or representatives in the legislature, the *authors of almost all constitutions in the world are the people*.
- That is why the preamble of constitutions begins by saying “we the people”

- **Supremacy of FDRE constitution**
- Since FDRE constitution is an expression of sovereignty of NNP, it is the supreme law of the land.
- When citizens of one country ruled under umbrella of one gov't there is right and duty.
- Art. 9 more focus on imposing individual and collective duty
- Any law(formal or informal), policy, decisions, acts should be confirm with the constitution
- ***Art. 9/1 'The Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect'***

- *Constitution is the supreme law of the land*- no law above constitution since it's the expression of sovereignty of NNP. Its Supremacy extend to state constitution and its subordinate legislations.
- Unlike USA, which adopt paramountancy clause(all federal laws are superior than state laws in case of conflicts), FDRE constitution adopts the doctrine of constitutional supremacy
- *Any law*- includes treaties, federal/ state proclamation, regulation, directives….etc

- *Customary practice*- either in act, word, or attitudes should be invalid retrospectively & prospectively. This aimed at eliminating discrimination against minorities & past assimi-lation policies, patriarchy, HTPs, discriminatory reconciliation processes, economic activity' traditional administrations…etc.
- It also includes religious practices. i.e even if FDRE constn recognizes legal pluralism, they should be guaranteed to the extent not contradicts the constn

- *Decision of organ of state*- Institutional/collective responsibility. i.e legislature in law making, executive in implementing & judiciary in interpreting both at federal & state tiers including local gov't(zone, woreda & Kebele) organ decisions
- *Decision of public official*- Individual responsibility whether appointed, or civil servant, military or professional acts should not contravene constn.
- ***Effect of contravention***- void ab initio/ no effect

  - *'Art. 9/2-All citizens, organs of state, political organizations, 'other associations as well as their officials' have the duty to ensure observance of the Constitution and to obey it.'*
- Impose both positive(ensure observance) and negative(Respect and obey) obligation, individually and collectively
- Such Responsibility imposed on citizens, gov't al and NGO (political, Civil society organization/CSO). The list are not exhaustive.

- ***9/3 It is prohibited to assume state power in any manner other than that provided under the Constitution***
- Related with assuming political power
- Impose negative obligation since orders groups to refrain from such activity
- Constitution provides assuming of power through democratic election periodically
- The obligation governs both ruling and opposition party, including other groups
- It *disregards monarchy/dictatorship*, *coup d'eta*, *armed struggles to assume power*

- African Charter On Democracy, Elections And Governance Article 23 states

‘ *State Parties agree that the use of, inter alia, the following illegal means of accessing or maintaining power constitute an unconstitutional change of government and shall draw appropriate sanctions by the Union:*

- *Any putsch or coup d’état against a democratically elected government.*
- *Any intervention by mercenaries to replace a democratically elected government.*

- *Any replacement of a democratically elected government by armed dissidents or rebels.*
- *Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; or*
- *Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government'*

- ***9/4 All international agreements 'ratified' by Ethiopia are an integral part of the law of the land.***
- International agreements impose obligation on the government of member states.
- Includes both human right/art. 13/2 and other ordinary agreements
- In Ethiopia, All international agreements including bilateral & multi-lateral agreements are signed by federal executive, ratified by parliament(art. 55/12) and promulgated by Negarit gazette.

- After their ratification they are considered as part and parcel of Ethiopian law & hence, became legally binding effect as far as not contradicts FDRE constitution. Art. 9/1 ‘all laws’

Methods of ensuring Constitutional supremacy

- Providing supremacy clause of the constitution
- Ensure ways of checking constitutionality of gov’t acts (priori/posteriori review)
- Making individuals and groups accountable, if they act against the constitution

- Constitution limits gov't to take proportionate measure during state of emergency only with the view to avert the existing danger and refrain from abusing its power.
  - This includes putting time limit, control and supervision mechanisms, and guaranteeing non derogable rights in the constitution ensures constitutional supremacy
- Amendment procedures- since constitution is designed for cross generational effect it requires updating through time to make it alive

- **3. Human and Democratic Rights-Art. 10**
- 1. *Human rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable.*
- *2. Human and democratic rights of citizens and peoples shall be respected*
- **Comments**
- Constitutionally guaranteed rights are more privilege than other ordinary rights
- The ultimate aim and goal of human right is to protect citizens from abuse of power by gov't

- Nature of human rights;- Universal, inborn, inviolable, eternal, inalienable, indivisible, interdependent and interrelated.
- Gov't duty towards human right- duty to respect, enforce and fulfill
- Restriction on rights-
  - Permanent(through limitation) or
  - Temporary(Derogation during state of emergency)

- *Ways of ensuring the guarantee for human rights-*
  - Constitutional supremacy,
  - Interpreting in light of int'l human right instruments adopted by country (by HOF/ Judiciary),
  - Strict amendment procedure,
  - Establishing human rights commission & ombudsman (art. 55/14+15), independent judiciary.

- Art. 10 & Chapter 3 divided right & freedoms into;- Human rights(art. 14-28) and democratic parts(art. 29-44). According to *constitutional explanatory note*, the *earlier*,
  - *Human rights*, deals with rights acquired inborn, related with nature of humanity, imposes negative obligation on gov't, & respected for all human beings,
  - while the *later* acquired in group within one democratic society, related with politics, requires gov't positive obligation & respected only for citizens.

4. Separation of State and Religion- art. 11

- General relationship b/n state & religion are;-
  - ***Theocracy-*** when the religion dominates state eg. Pre-1974 monarchical period
  - ***Erastianism*** – when the state dominates religion. For instance, Derg ideologically articulated the promotion of godlessness and "demotion" of religion
  - ***Secularism-*** when state and religion are separate, both affairs practice their own matter separately eg. Art. 46/3 of PDRE and art. 11 of FDRE constn

- According to 2007 census, No majority religion in Ethiopia at federal level, but in most states various religions constitute a majority such as
  - Amhara & Tigray- Orthodox Christianity,
  - Afar, Harari & Somale- Islam,
  - Gambella-protestant.
- But, all of them required to observe secularism in order to ensure rights of religious minorities

- **FDRE constitution provides four main components in relation to religion i.e**
  - Equality of all religion- preamble para. 2, art. 3/2, 25
  - Freedom of religion- art. 27
  - Separation of state & religion- art. 11, 27/5, 90/2
  - Legal pluralism (applicability of religious law on family & personal matters)- art. 34/5, 78/5

FDRE Constitution – art. 11

- 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*.

Comments

- Government should refrain from individuals /groups exercising of freedom of religion
- Gov't shall not organize religious organizations, should not open religious schools,
- Public officials as a human being they have freedom of religion, but as public official they serve public impartially

- In various countries even if there is secularism, some religions are recognized as *national religion* such as Egypt- Islam is national religion, in UK- Anglican church is national religion. That is why some countries flag emblem have religious signs.
- But, FDRE constn incorporates the notion of *'No Ethiopian religion since religion is personal', 'no religious gov't nor gov't religion'*
- **To what extent religious matters should not interfered by state? - Unresolved dilemma**

- **The Varying Models of Secularism in Federal Constitutional Democracies**
- The concept of separation of State and religion is in not peculiar to Ethiopia, but should be seen in context, and there is no one size fits all approach

A. USA

- In America the philosophical impetus behind secularism largely lies *on protecting religion from the State*.
- Giving people *the right to worship free from gov't interference* is the fundamental notion of American secularism.

- According to the U.S. constitutional jurisprudence the principle of secularism erects a *strict wall of separation b/n government and religion*.
- However, this notion of separation has been the subject of intense debate and controversy over the meaning and scope of 'Establishment clause' (Amendm II)

- The *first view* which is known as *"non-preferentialist"* holds that the Establishment clause only forbids the government from favoring one religion over others, but does not prevent government from aiding religion in general, as long as it does so evenhandedly.
- The *second view* insists on the idea that the Establishment clause commands strict gov'ntal neutrality on all religious issues, including neutrality between religious beliefs and non-religious beliefs.

- In the American system religion can be brought into the public sphere, as long as the gov't does not promote it.
- Of course, some religious institutions involve in political campaign in favor or against any candidate run for public office.
- *Public schools have broader autonomy to adopt their own rules pertaining to accommodation of religious expressions*

B. India

- India is the most religiously diverse nations in this planet with more than 3 million religions
- As per Indian Constn, the State shall have no religion, there shall be no discrimination on the ground of religion and every person shall have the freedom to profess, practice & teach religion
- As far as education, the Indian system provides for *three types* of educational institutions.

- First, institutions that run completely by the State are strictly prohibited from delivering religious instruction,
- Second, institutions in which the State acts a trustee, religious instruction is allowed,
- Third denominational institutions that receive some sort of aid from the gov't can provide religious instructions on a voluntary basis. These are mainly minority religious schools that are encouraged to help preserve their identities

- Indian secularism does not assume the total expulsion of religious expression from the public sphere, unlike the case in France or Turkey.
- As India is multi religious and multicultural State this may drive the gov’t to pursue more tolerant model of secularism that allows religious expressions in public sphere

C. The Federal Republic of Nigeria

- Constitutionally Nigeria claims to be a secular country, despite its explicit reference to God. The constn guarantees for freedom of religion, and also, provides the State may establish courts based on the common law, religious law and customary law.
- The Constitution allows *religious instruction in public schools, but no person is obliged to receive religious instruction or attend religious* ceremony or observance other than his own or religion not approved by his parent or guardian.

- The Nigerian Constitutional practice seems to transgress the boundary that ought to be maintained between State & religion.
- Traditionally, The Northern States of Nigeria employ *Sharia* law and *Sharia* Courts to regulate civil matters of the Muslim communities.
- However, starting from 1999, 12 Northern States, introduced the formal implementation of the criminal aspects of Sharia legal code that confined to Muslims.
- It has been, also, observed that *States are officially sponsoring religion*, *funding religious pilgrimages*, *construct mosques and churches including in public school premises*.

D. Germany

- The Germany model of secularism is called "positive neutrality", where by a relationship of partnership is encouraged between religion and the State.
- In Germany religion does not have open political role, the public sphere is by and large a secularized forum, though, *religious communities may use informal channels to influence and lobby for certain matters of interest*

- Religious communities can attain the status of public body, subject to some conditions; most often not to involve in activities that contravene the constitutional order.
- Hence, *the State authorities collect taxes for religious institutions that have got a status of public corporation*.
- In general the State promotes a social role for religious communities enabling them to play positive role in State schools, health care and charity services

5. Transparency and accountability-art. 12

- In democracy, since gov't power is result of peoples consent, the elected officials should be accountable to their electorates.
- Accordingly, they have duty to provide periodical reports, ensuring access to information for public, liability for failures or adequate compensation
- If officials are not accountable for their failures, the popular sovereignty will be eroded. Thus it is crucial to ensure public confidence on the system

- **Elements of art. 12----*Transparency***
- ***1. The conduct of affairs of government shall be transparent*.**
- People have the right to access to updated and right information-transparency on conduct of gov't domestically and in foreign relation in order to control maladministration
- The right to obtain access to official information:
- The requirements and processes to get all public services should be clearly regulated
- Public should actively involve in the deliberation of law and policy making process

- ***Accountability***
- *2. Any public official or an elected representative is accountable for any failure in official duties.*
- *3. In case of loss of confidence, the people may recall an elected representative. The particulars of recall shall be determined by law.*
- **Comment**
- Failure towards public service will entail responsibility for such act. Based on the nature and extent of the failure, it will entails administrative, civil and criminal responsibility.
- In the case of elected representative it will also lead to recall, in case of loss of confidence by concerned public

Methods of ensuring accountability

- Preparing code of conduct
- Protection for whistleblowers and witnesses
- Notification of owns property
- Independent Investigative journalism and anti-corruption commission
- Independent judiciary

4.4. Policy Objectives under FDRE constitution

- **General Overview**

- Many recently enacted constitutions, including the Indian, do also have such directive principles.
- *The question that many constitutional designers ask with such kinds of provisions of constitutions is whether they can be enforced in courts right away, or simply guideline provisions for future aspirations of the country.*
- *And, if they are simple guidelines, why including them in the constitutional document.*

- Such controversy arises, because including directive principles in a constitution will affect the legitimacy of the constitution, as they do not indicate serious government commitment but rather show simple promises for the future that cannot be enforced immediately.
- However, this doesn't mean that they don't have any benefit.
  - *The fact that they can't be enforced today doesn't mean that they won't be enforced in the future.*
  - *There is high chance of enforcement of such rights when resources permit.*

- *Moreover, these directive principles can be the source of new rights that can be claimed in courts.*
- In fact, one can witness that high emphasis is given to socio-economic rights by building infrastructures, spreading education, providing health facilities and etc. by both the federal and state governments.
- Yet, it doesn't seem that the same level of commitment is shown by the gov't for the protection of civil and political rights.

- There is argument, especially in East Asian countries like Singapore, that ensuring socio-economic rights for citizens creates a middle-class society by empowering them and creating equality among the members.
- This, they say, is the precondition for the enforcement of civil &political rights.
- Therefore, priority should be given to socio-economic rights over civil and political rights.

- But, this argument is appropriate for the condition of East Asian countries, because their constitutions do not provide for serious commitment for the protection of human rights in the first place,
- while in countries like Ethiopia that have liberal constitutions that highly commit themselves for the protection of human rights in their constitutions, but in practice give priority for socio-economic rights over human rights.

- A writer called Amartyasen, on his book entitled "*development as freedom*" argues that economic growth should bring equitable development widely shared across the society.
- According to this writer, development in the broader sense includes respect for civil and political rights.
- Obviously, such concepts like rule of law, federalism, and separation of powers can have effect only if we agree that there is limit to political power.

•Comments on Art- 85-92

- National policy principles and objectives/ NPPO (Ch-10 of constn) deals with the obligation of federal & state gov’ts to carry out
- Imposes positive obligation on government
- They dictates the final goal of both state and federal gov’ts since It laid downs fundamental principles that state and federal government that it stands for such objectives

- Designing of all policies should be founded on such NPPO.
  - Hence, any organ of gov't in implementing Constitution, other laws and public policies, shall be guided by the principles and objectives of chapter 10
- Hence, it's questionable/debatable on its relevance since they are not accountable in court for the failure to implement this policy objectives.
- However, the people through demonstrations, petition particularly during periodical elections quest for the extent of their implementation

- In doing so, the public examines the extent of commitments of government official to protect their public interest
- In addition, Explicitly providing of this policy principles in the constn can serve as a roadmap for gov't organs in doing their task and also serves as an instruments of examining gov't performance
- Such policy includes principles of foreign relation, principles of national defence, political, economic, social, cultural and environmental objectives from art. 86-92, respectively

- Art. 86 and 87 are the exclusive responsibility of federal gov't, while art. 88-92 are the responsibility of both federal and state gov'ts

Status of International Instrument under the FDRE constitution

- In Ethiopia, All international agreements are signed by federal executive, ratified by parliament(art. 55/ 12) & promulgated by Negarit gazette(art. 71/2).

- In connection to the status of int'l instruments in domestic constitution, some countries makes Int'l instruments to prevail in order to maintain healthy international relations such as Netherland,
- while other countries gives privilege to domestic constitution by claiming the notion of sovereignty & assuming domestic laws are more protects national interest.

- In our case, Art 9(4) of the FDRE constitution, reads:
  - ***'All international agreements 'ratified' by Ethiopia are an integral part of the law of the land'***
- Here the term ratified raises two main issues, first, the term implies retrospective application of law for int'l agreements ratified before FDRE constitution is made, and makes questionable whether it extend to future agreements will be ratified by Ethiopia.
- But, the constitutional explanatory note extends applicability of the term to prospectively ratified treaties.

- Second, the term ‘ratified’ also, signifies the step which int’l treaties became binding effect. *Accordingly, treaties signed by executive have no immediately binding effect before ratified by parliament*.
- And also, promulgation by official gazette is not criteria, but it only indicates 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.

- When we proceed to the main issue, there is no watertight status given to treaty in the FDRE constitution.
- But, there are different arguments claimed by scholars on status of treaties.
- Accordingly, scholars classify treaties in FDRE constitution into ordinary treaty and treaties related to Human rights adopted by Ethiopia.
- The ordinary treaty seems to be below the constitution due to the constn. gives recognition to such treaties, ratified by parliament like any other proclamation and constitution declares itself as a supreme law of the land.

- While in relation to human right treaties, *some scholars* argue as its above constitution due to Ethiopia is subject to internationally agreed human right instruments.
- And Ethiopia must conform to international human right obligation.
- Also art. 13(2) of constitution expresses interpretation of human right provisions in conform to UDHR and other conventions adopted by country emphasizes such obligation,

- While, *other scholars* argue that it's below constitution due to constitutional supremacy (art.9/1) based on the term 'any law' includes all treaties.
- criticize the former argument, it's against sovereignty of the country which allows others to interfere in internal matter of Ethiopia without her consent
- In this regard, the FDRE constitutional explanatory note try to resolve such debates by providing all international agreements since they are ratified parliament, acquire the status equivalent to proclamation.

- In this regard, the FDRE constitutional explanatory note try to resolve such debates by providing all international agreements since they are ratified parliament, acquire the status equivalent to proclamation.
- Hence, if conflict arise between FDRE constitution and any treaties (both human right & ordinary treaties), FDRE constitution will prevail due to constitutional supremacy clause(art. 9/1)
- Apart from this, various int'l human right instruments provide that member countries should not invoke domestic laws including constitution to violate the covenant.

- For instance, UN HRC general comment 31, which clarifies the Nature of the General Legal Obligation Imposed on States Parties to the ICCPR, para. 4 reads as follow;-
  - ***'State Parties may not invoke… the provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under this treaty (ICCPR)'***
- This general comment binds Ethiopia as per art. 9/4 & 13/2 of FDRE constitution since the country became a member party of the ICCPR in 1993.

CHALLENGES TO CONSTITUTIONALISM IN AFRICA;- FOCUS IN ETHIOPIA

- Oketh Ogendo describes Africa countries constitutionalism status ***'constitution without constitutionalism'***
- Ethiopia's constitutional design has achieved successes such as
  - Celebrating diversity,
  - Avoid domination of mono-culture,
  - Create political participation at local level, and
  - Guaranteeing the right to self-determination to NNP,

- Apart from its successes there are major obstacles which has been directly /indirectly faces ensuring of the constitutionalism in Ethiopia. Let see some of them as below

1. Challenges on National integration

Even if Ethiopia adopts territorial federalism, which *system assumes that every nationality is found inhabiting a territorially defined geographic area*, significant number ethnic group do not live in the place where the majority of their ethnic are recognized as sovereign.

- They have moved either,
  - Voluntarily, in search of better opportunity, or
  - By force ,due to the Derg's policy of resettlement villagization,
  - migration of youth to urban cities from different parts of the country intra-ethnic migration.
- Because of these facts, there exists to a large extent ethno linguistic diversity in most parts of the regional states of federation.

- But, the constitution define federal units expressly as belonging to a particular majority ethnic group, which ;
  - *Create a large number of minorities & failed to specify how they exercise their group rights*
  - *Fails to address the question of persons who are born from family of different ethnic group.*
  - *Underestimates the existence of a shared history among the groups.*
  - *Deprive regional non-indigenous NNP group rights such as right to self-rule*
- Hence, the regional minorities face the danger of domination and exclusion.

2. Challenges involving Boundary dispute

- When the federation is established, various ethno linguistic groups have to be territorially defined in order to be granted a mother state or local government, they are assumed to occupy neatly define territory.
- Redrawing regional states, create an immense concern particularly *in the lowland, population movement in search of natural resource, and this movements sometimes result in conflict*.

- Even though there was an ethnic conflict before the establishment of the Ethiopian federation b/n d/t ethnic groups over the utilization & control of natural resource, the demarcation of regional boundaries mainly based on ethnic settlement coupled with drought and scarcity of natural resource, *has intensified the conflict between the groups as to reach high degree up to the level of regional conflicts*,
- Some of the instance includes the conflict between Oromia and Somali regions over the control of Babile, Borena and Gari, the conflict between the pastoralist people of Issa and Afar between Afar and Somali regions.

3. The challenge of nonexistence of federal Supremacy clause

- In federations, even if division of power b/n the two levels of gov't guaranteed, existence of overlap of power is unavoidable. To resolve such paradox, most of federal countries has introduced in their constitution the federal supremacy clause to govern the conflict the center and regional laws.
- However, the FDRE constitution doesn't provide federal supremacy clause even if most states submit themselves to be bounded by federal 'laws' in their constitution.

4. The challenge of local tyranny

- Multi-cultural federations are envisioned to empower regionally concentrated minorities, in a way enabling them politically dominate in the area unit which they constitute a numerical majority.
- In our case, even though we don't have a numerically majority ethnic group in the country , *our federalism tries to transform every NNP in to a majority by granting local gov't to each state*,
- However this fact hold true for five ethnic groups namely Amhara, Oromia, Tigray, Afar and Somali, respectively in five states named after them, these majority ethnic groups dominate the political process in their respective regions,

- While for other non-indigenous ethnic minorities living in these regions, there is no sufficient constitutional mechanisms which regulate relations between them that lead to tension, and sometimes dispute between the ethnic groups.
- In addition, *the numerical majority remain to be political minority in terms of its influence in the regional politics*.
- *The constitution fails to sufficiently defining* how state political power in these regions are shared among the various minorities, as a result, it create rivalry between the ethnic groups over control of the state power.

- Besides, in many regional states, non-indigenous peoples have no political right to representation at the regional level,
- *while in some regions they are disqualified on account of language requirements,*
- *in others they do not have any political recognition or representation as they are not taken to belong to the region.*
- The constitutional clauses of some regions relegate the status of minorities to second rate citizenship such as the 2001 Benishangul & Gambella Region Constitution, Art.34 only ensures the right of minorities to work and live, and do not provide for the right to elect and to be elected

5. Challenge on Fiscal Federalism

- In most federal systems, there is a mismatch between the expenditure responsibility and the revenue capacity of the regional gov't. The financial capacity of the center and regional gov't is primarily influenced by the constitutional allocation of revenue sources.
- *Our federalism, also, characterized by Revenue concentration and expenditure decentralization since many functions are carried out by lower level of gov't with less revenue generation capacity.*

- Even though our constitution has given both level of the gov’ts power of taxation as a principal source of revenue, the dominant and lucrative source of revenue are reserved to the federal gov’t under its exclusive jurisdiction, or through concurrent power on the basis of which it has the ultimate power to levy & collect taxes.
- *Vertical imbalances in the Ethiopian fiscal arrangement makes most regional state failed to cover their expenditure and hence, highly dependent on the financial support of the federal government to carry out their constitutional duties.*

- This can highly affect regional states political power to resist federal intervention in regional matters and challenges the state right to self-rule.
- Currently this vertical imbalance b/n regions & the center may not be seen as a fundamental problem, since it can easily resolved through party channel but it is not difficult to imagine what would happen when d/t political parties take power in the center & region.

6. The challenge of Asymmetry

- When a new federation is designed *no member of the Federation should be allowed to be so big so as to threaten the viability of the whole Federation*, and it is inherent in federations that there should be mutual interdependence, rather than self- sufficiency, among the constituent states.
- According to Ronald Watt, Two kinds of asymmetry among regional units may affect the operation of federations.

- **Political asymmetry,** *arises from the impact of cultural, economic, social and political conditions affecting the relative power*, influence and relations of different regional units with each other and with the federal government.
- ***Constitutional asymmetry***, refers specifically to *the degree to which powers assigned to regional units* by the constitution of the federation are not uniform.
  - eg. Greater power than others- Quebec(Canada) & sabaha & Sarawak (Malaysia)
  - Lesser autonomy than others – Chechnya (Russia) & Kashmir (India)

- Constitutionally speaking, under the Ethiopian federal system, all regional states have equal right and powers (art. 47/4).
- Actual status of the regions, - *they are very different from one another when it comes to*
  - *Ethnic composition*,
  - *Size of population*, *area*,
  - *Human resources*,
  - *Economic development &*
  - *Political landscape, which challenge the political symmetry of federation.*

- Even though the constitutional promise to provide all the ethnic groups of the country with the right of self-administration& designed to empower NNP of the country, the existence of asymmetry b/n the regions to a great degree affect their capacities to implement the constitutional provisions in relation with each other and that of the Federal government.
- One of the way in which asymmetry can influence existence of a federation is *when populous state can easily dominate z less populated state in the federation unless they are institutionally checked*.

- Due to these, the major ethnic – linguistic groups can effectively take the control of the federal government. From this we can observe that the constitutional symmetry among state remain unequal on the ground.
- The existence political asymmetry is so critical in Ethiopia because, the only remedy seems available to the NNP who are affected by asymmetry seems to be the right of secession and affirmative action(art. 89/4).

7. Cassation over Cassation:

- The term signifies that the power of Federal Supreme Court to Review final decisions of state Supreme Courts on exclusive state matter
- In Ethiopia, Article 50(2) and 78 of the constitution, *established* dual court structure in the country which the states do have their own separate tiers of courts with certain jurisdiction over some matters,
- State courts must have a final say; the federal courts must not review, be it by way of appeal or cassation over matters squarely falling within the ambit of state courts.

- However, in practice, a decision of any court can be reviewed by the Cassation Division of the Federal Supreme Court if it manifests a *prima facie* case for basic error of law, based on cross reference to art. 80(3a) *'any final court decision' for its jurisdiction*
- *Apart from this many scholars claim on* the power of the Federal Supreme Court to review decisions of its counterpart in the state (on exclusive state matters) condemned as a causative factor of the ever growing centralization and is tantamount to put the states autonomy into question since it disregards the principle of self- rule of states which is the heart of federalism

8. Upper house has no law making power that can balance power of federal & state gov't

- In federal countries the upper chamber is designed to balance the majoritarian decision of lower federal house in order to maintain/advance states interest during law/decision making process.
- In our case, the upper house(HOF), even if it composes the representatives of NNP of each region, ordinary law making power not entrusted to it.
- But, they have power to check constitutionality of laws/decisions, if brought before them. This implies they have less role in proactively protecting interest of states, but curative role after problem exist.

9. Unfulfilled constitutional promises-

- The FDRE constitution recognizes some issues that will be determined by particular law but not yet established by law. From this we will focus on the following matters.
- ***Customary laws and courts (art. 34/5 & 78/5)***- Even if official recognition granted to applicability of customary laws(art. 34/5) & customary courts(art. 78/5) that will be determined and established, respectively, by particular law, unlike regular and social courts, they are not created by law according to constitutional promise.

- Hence, traditional systems currently have no jurisdictional or legal relationship with the official system. Besides, customary justice differs based on locality and local traditions & is not codified.
- There are no formal link between links between the traditional formal systems & designated appellate route for traditional courts into formal legal system.
- The authority of these courts stems from tradition & local customs that evolves traditional arbitration committees or elder councils, which do not have legal authority, but carry moral force and still operate widely as primary decision makers in rural areas throughout Ethiopia.

- **Special Interest of Oromia over Addis Abeba (art. 49/5)-**
- Forms of Capital city of Federal government

I. Federal District Model

- a city established under the exclusive jurisdiction of the federal government Eg. USA (Washington D.C.), India (New Delhi), Nigeria(Abuja), Mexico (Mexico City), Australia (Canberra), Venezuela (Caracas), and Pakistan (Islamabad)

Merit

- The center has sole own/p over the city & responsible to the planning and development of the city.
- There is only a central cultural and legal dominance

Shortcomings

- Excessive control over residents of the city (lack of self rule)
- Residents do not have representatives at the center (upper house) & can't influence central decisions that affect their day to day livelihood.
- The city will grow far beyond the original territory in to another regional state will create deadlock

II. City state as Capital city

- The city state is a city that serves as the seat of the federal government and that is also a full fledged state.
- Eg. Vienna (Austria), Berlin (Germany since 1990), Brussels (Belgium) & Moscow (Russia).
- **Merit**
- Self rule (Autonomy) by avoiding any form of subservience to the federal government or any other state
- Appropriate to capital cities that are very large by nature and capitals that also serve as centers of industry

Shortcomings

- A capital city leaves little or no control for the federal government over its own official seat
- The city state may grow beyond its boundaries and create problems on neighboring states. Eg.Brussel into Flemish region & Berlin into Bradenburg
- NB- There are federations containing non-capital city-states (e.g., Bremen and Hamburg in Germany, and St. Petersburg in Russia).

III. Capital City under Regional State-

- The capital city is an integral part and under jurisdiction one regional state.
- The federal gov't has only special interest due to federal city geographically found within the region.
  - Eg. Bern (Bern, Switzerland), Ottawa (Ontario, Canada), Kuala Lumpur (Selangor, Malaysia), Madrid (Madrid Autonomous Community, Spain), Basseterre (St. Kitts, St. Kitts and Nevis), and Abu Dhabi (Abu Dhabi) United Arab Emirates).

- **Advantage**
- The management of the boundaries of the federal capital with the neighboring areas is open to flexibility, and
- Local self-government of residents in such federal capital.
- **Shortcomings**
- The federal government has no control over its own seat
- The language, laws and culture of the state in which the city is located dominates the state of affairs of the city.
- Problem of choosing Federal Working language in the city in diverse Federations.

- **WHAT IS THE STATUS OF ADDIS ABABA AS A CAPITAL CITY OF FEDERAL GOV'T AND CAPITAL OF OROMIA REGIONAL STATE?**
- Historically, Oromia became one of the 14 self-governing States during transitional period. Addis Abeba, like the City of Harar, was also a region in its own right. Oromia's 'special interest' over both cities was first recognized in art. 3(4) of procl. 7/1992 as follow
  - *'The special interests and political right of the Oromo over Region Thirteen [Harari] and Region Fourteen [Addis Abeba] are reserved.'*

- Accordingly, the Oromo has not just a "special interest" but also *a political right* over the two self-government regions.
- The 'special interest' phrase hails not only from the mere fact of geographic location of Addis Abeba in Oromia but also from the implicit recognition of the essentially Oromo identity of the city.

- Later, when the FDRE constitution adopted, the special interest incorporated as follow;
  - *49(5) The special Interest of the State of Oromiya in Addis Abeba, regarding the provision of social services or the utilization of natural resources and other similar matters, as well as joint administrative matters 'arising from the location of Addis Abeba' within the State of Oromia, shall be respected.* ***Particulars shall be determined by law.***

- The articulation of the content of the 'special interest' revolved around four broad phrases:
  - 'Provision of social services'
  - 'Utilization of natural resources'
  - 'Joint administrative matters'
  - 'Other matters' similar to provision of social services or utilization of natural resources
- Unfortunately, the attempt at legislative articulation of the 'Constitutional Special Interest of Oromia over Addis Abeba' remained a draft to date.

10. Claim for making local Vernacular to Federal working language-

- In multi-lingual states, language is not only an instrument of effective communication, but also its an intrinsic element of identity of human person.
- Fishman states *"ethnic identity becomes impoverished without the linguistic dimension."*
- It is also a means to access to resources, employment & even public authority in addition to being a means of preserving one's identity.

- Historically, Ethiopian state was a monolingual, mono-confessional and mono-cultural entity with an extremely multilingual, multi-confessional and multicultural society in the background.
- The FDRE Constitution has given equal state recognition to all Ethiopian language (article 5/ 1) and in art. 25, and
- Members of the federation are empowered to determine their respective working language by law (article 5/3).
- Moreover, article 39/2 gives to every NNP in Ethiopia the right to speak, to write and develop its own language.

- However, there is only one federal working language is recognized, unlike other federation, such as South Africa recognizes 11 national languages.
- Where one linguistic group becomes dominant in the power structure, the allocation of individuals to public function offers the dominant group.
- By choosing one or a few languages over others, a state often signals the dominance of those for whom the official language is their mother tongue.

- This choice can limit the freedom of many non-dominant groups – feeding intergroup tensions.
  - It becomes a way of excluding people from politics, education, access to justice and many other aspects of civil life.
  - It can entrench socio-economic inequalities between groups.
  - Currently, there are claims from different nations to access to public services in federal institution due to expensive translation cost particularly in area of justice.
- In multilingual societies a multiple language policy is the only way to ensure full democratic participation.

CHAPTER 5

- **MAKING & AMENDMENT OF THE CONSTITUTION**

The Making of Constitutions

- Countries make a new constitution when they wish to make a fresh start, mostly for compelling political reasons.
- Usually this involves a significant re-allocation of political or other powers.
- The Constitutional design of a certain country is based up on the nature of political founding and organization.
- Political scientists identify 3 basic models of political founding and organization, those are;-

Hierarchical Polities-

- Founded by conquest in some form, either external or internal (palace revolt, coup d'etat),
- Organized as power pyramids more or less in the manner of military formations.
- The ruler or rulers sit at the apex of the pyramid commanding those below, who are organized into "levels" of authority and power, each level subordinate to the one above it.
- In hierarchy, administration takes precedence over politics.
- Politics takes the form of court politics, i.e., the struggle for the ear and favor of the ruler
- An army is the apotheosis/glorification of this kind of political organization.

- **Organic Polities**-
- Politics which evolved organically out of more limited forms of human organization and which over time concretize power of centers which govern their peripheries.
- The process of constitution making *consisting of a series of acts negotiated among the established bodies that share in the governance of the polity*.
- (Whether medieval states, territorially based groupings or other mediating social and political institutions, which speak for the various segments of society represented in the center), reflect their interests, and can negotiate among themselves to resolve constitutional questions as they arise.

- *The model of the organic polity is that of* ***two concentric circles, center and periphery,*** *with those at the center ruling those in the periphery,* even if the latter have a role in selecting who is in the center.
- Power is concentrated in the center, & those in the center determine the connections b/n center & periphery.
- In the organic model, politics come first but they are the politics of the club.

- Administration flows from those politics and, indeed, the heads of the administration also have to be members of the club.
- The constitution is the traditional body of accepted rules regarding the workings of the club & the administration that is dependent on it.
- The apotheosis of this model is Westminster-style parliamentarism with the parliament sovereign and dominated by those who have been able to enter the club; the administration is also led by club members but subordinate to parliament.

- **Covenant/compact Polities-**
- Polities founded by design through covenant or compute in which power is shared through a matrix of centers formed by the government of the whole, on the basis of federal principles.
- The process of constitution making involves a convention of the partners to the pact, or their representatives. Eg. American and Swiss constitutions bases on covenant model
- The politics that flows from that constitution is a politics of equals based on negotiation and bargaining and designed to be as open as possible, where all the actors will know what is happening.

- Administration is dependent upon constitution for its authority and politics for its powers.
- This system is not hierarchical, even if hierarchies are sometimes organized within it.
- Nor does it have a single center. But, based upon multiple centers, each constitutionally protected.
- Its apotheosis is a ***federal system*** in which the constituent units are represented in the framing government and also preserve their own existence, authority, and powers in those areas which are not delegated to the framing institutions.

Structure of Authority	Hierarchy	Organic/Center-Pheripery/	Covenant/compact Frame & Cells
Mechanism of Governance /in Rank Order/	Administration-Top down bureaucracy	Administration-Center outward	Administration-divided
	Politics- Court	Politics Club-Oligarchy	Politics-open with factions
	Constitution-charter	Constitution-tradition	Constitution-Written
Apotheosis:	Army	Westminster system	Federal system
Excess:	Totalitarian dictatorship	Jacobin state	Anarchy

HOW ARE NEW CONSTITUTIONS MADE?

- New constitutions almost always are written in the wave of crisis or exceptional circumstance of some sort.
- Such crisis/ factors of making new constitution includes:
  - Social and economic crisis, as in the French (1791)or American constitutions(1787),
  - Revolution, regime collapse (like in the Arab uprising),
  - Fear of regime collapse, (as in French constitution of 1958 by De Gaulle, the 1791 Pollish Constitution),
  - Defeat in war- Germany, Japan &Italy after WWII
  - Reconstruction after war, (as in France in 1946),
  - Creation of new state (as in Czechoslovakia and Poland after the WWI, and South Sudan),
  - Liberation from colonial rule, as in U.S in 1776 or many third world countries after 1945.

- Constitutional making process should balance the R/nship of paradoxes of fear and hope:-
  - Fear of what type of government may come to power, and
  - The hope of seeing a bright future in the adoption of the constitution. How we balance such paradoxes during the constitutional making process is a problem.
- Many people say that the USA constitution is highly influenced by fear. One can see clearly set powers and functions of all branches of the government, and at the same time, a very complicated check and balance system which emanates from fear.
- In such division of power, neither the senate nor the congress nor the president has absolute powers independently.

- In Europe, especially before the world wars, the state was manifestation of hope in the sense that people had faith in public institutions.
- As a result, parliaments in Europe enjoyed enormous powers.
- However, these absolute powers led the countries including the world into crisis because of the two world wars.
- After the WWII, the fear took the place and hence, constitutional courts got established. Human rights provisions were also introduced.
  - **What about Ethiopia?**

The paradox between sanity and passion

- Passion and sanity are anthropological elements of constitution making.
- Passion- constitutional making is preceded by crisis, emotions and new hope that former officials will be held accountable when regime changes.
- Sanity- constitutional making is not limited to the existing situation but should also focus on the future.
- It should therefore be made with reasonableness, sanity and calmness. How to strike balance between the existing emotion and the future wish is a critical question in constitutional design.

Waves of Making constitution- Jon Elster

- **1st wave**-1780-1791;- the period of making new written constitution. Such as- USA, Poland, France
- **2nd wave**- 1848- WWI;- industrial revolutions in Europe and scrambling Africa. About 50 countries adopt new constitutions
- **3rd wave**- After WWI-WWII;- Newly created & recreated states of Poland, Czechoslovakia, and the defeated German state makes new constitution.

- **4th wave-** After WWII;- defeated countries Axis power make new constitution under tutelage of the Allied power i.e Germany, Italy, and Japan
- **5th wave-** 1940-1989;- Independence from colony(African countries, Pakistan, India), fall of authoritarian regimes(Portugal, Spain, and Poland). Constitution made during this period usually influenced by cold war ideological conflict between western capitalist and USSR lead Socialist.
- **6th wave-** 1989- Today;- since fall of communism and constitutions made during this period known as *New Generation constitutions* since they are not attached to former ideological conflicts.

AMENDMENT OF CONSTITUTIONS

- An amendment is a change to the constitution of a nation or a state
- Amendment is a process by which constitutions adapt to changing circumstances through perfecting imperfections.
- It includes reduction, modification, and adding/inserting new provisions
- Amendment can differ from revision based on the scope of reform. In earlier, limited, while in later it undertakes large scale of reform
- One of the base for the classification of constitutions based on flexibility/rigidity

- One of mechanisms that makes constitution as a living document across generations.
- In federal system, the amendment procedures require approval of, at least, most states, both lower and upper houses
- Factors of amendments are;-
  - Legal Evolutionary- Due to changes happen within the society
  - Legal Engineering- to create socio-economic and political transformation within a country
- Steps- Initiation- ▭ Deliberation ▭ Adoption ▭ Ratification, but not similar to constitution making process

- A constitution may be modified or amended by means of
  - Formal amendment- legally established procedures
  - Periodic replacement of the entire document- revision eg. 1955 Ethiopian constitution, the 2004 Swiss constitution
  - Judicial interpretation- Eg Privacy right in the case of USA constitution, unconstitutionality of death penalty in case of South Africa, The right to life of Unborn Child in case of Germany, right to secession in case of Canada.
  - Usage and conventions- through usual practice rather than binding legislative mechanisms such as Head of state/kings power deteriorated over time in European constitutional monarchy states.

- Most constitution amendments cannot be enacted unless they have passed a special procedure that is more stringent than that required of ordinary legislation. Examples of such special procedures include
  - Supermajorities in the legislature, or
  - Direct approval by the electorate in a referendum, or
  - Combination of two or more different special procedures. Eg French constitution

- The Degree of Popular involvement institutionalization during making new constitution expressed;-
  - Minimal- proposing amendment such as Catalonia- 300,000 petition signature
  - Medium-ratifying amendment such as Most German lander amend their constitution through referendum
  - Highest- people Initiate and ratify its constitution eg. Swiss- 100,000 sign can initiate and ratification by referendum

- **Inadmissible amendments:-** Some constitutions entrenched clauses inadmissible amendments, usually to protect the democratic form of gov't or the protection of human rights.
  - Eg- Art. 79 (3) of the German Basic Law, modification of the federal nature of the country or abolition or alteration of Article 1 (human dignity, human rights, immediate applicability of fundamental rights as law) or Article 20 (democracy, republicanism, rule of law, and social nature of the state) is forbidden.
- Amendments are often totally forbidden during a state of emergency or martial law for instance as per art. 60/5 of FDRE constitution the caretaker gov't may not enact new law, or repeal or amend the existing law after HPR dissolved before expiry of its term.

Approaches of Constitutional Amendment

- Uni-track approach, the same procedures are used for amending all provisions of the constitution.
- Multi track approach, different amendment procedures are used depending upon the subject matter of a proposed amendment.
  - FDRE constitution follows a multi-track approach (human rights & non human rights provision)
- Stringency of FDRE constitutional Amendment reveals that the framers of the constitution intended to accord special protection for those provisions recognizing fundamental rights and freedoms.

AMENDMENT UNDER FDRE CONSTITUTION

- It has two main phases i.e initiation & Approval stages
- **Initiation**
- By- HPR-2/3rd majority;
- By HOF- 2/3rd majority
- By 1/3rd of state council(3 states)- 50%+1
- Then submitted for discussion and [decision] to the ‘general public’ and to those whom the amendment of the Constitution concerns

- **Initiation of Constitutional Amendment**
- Constitutional amendment proposals may be initiated either by legislatures or directly by the citizens themselves

By legislatures

- USA- the Congress with a two- thirds majority or a convention may initiate constitutional amendments.
- India- amendment can be proposed by either House of the Parliament

By Citizen

- Burkina Faso at least 30,000 citizens petition
- Switzerland -100,000 signatures.

- Ethiopia,
  - the rules on initiation of constitutional amendments are provided under Art. 104
  - But, the organs having the power are not clearly apparent from it.
- Art.104
  - title- initiation of amendments,
  - Content - power to vote on proposals, made by other bodies, for the purpose of submitting them to discussions and further decisions.

- Art. 104 of the Constitution dictates
  - The HPR, the HOF and one-thirds of the state councils have the power to rule on (support or not to support) proposals made by others for the purpose of tabling them for discussion.
- Several scholars argued that the Ethiopian Constitution is silent on defining the bodies who can initiate constitutional amendments
- They concludes that the normal procedures for amending ordinary laws are applicable.

- Hence, the HPR, the HF or one-thirds of state councils of the regional states have the power to rule on initialization of constitutional amendments.
- On the rule of initiation results from the apparent discrepancy between the Amharic and English version of the constitutional provision of art. 104.
  - English version -HPR & HF are listed alternatively, which implies that either the HPR or the HF with a 2/3rd majority vote can initiate amendment proposals.

- Amharic version (final legal authority) uses punctuation (፡) which may substitute the coordinating conjunction ‘and’.
- And consequently, it gives an impression that a cumulative vote of both HPR and HF is required for initiating constitutional amendments.
- Hence, each house has a veto power against the other at the stage of initiation as per Amharic version of the provision.

- **B. Approval**
- There is different procedure for fundamental human right and other provisions, unlike the case of initiation that provides the same procedures
- **Special rule -105/1 (Amending of Chapter 3, Art. 104 and 105)**
  - All State Councils(9) majority vote(50%+1) +
  - HPR – 2/3rd majority vote, {and}
  - HOF- 2/3rd Majority vote
- In other word, unlike initiation, which either of each organ can initiate, approval requires cumulative involvement of all state organs & federal houses.
- *Why art. 104 and 105 amendment requires fulfillment of art. 105/1 procedures?*

- **General Rule-105/2 (Amendment of Other Provisions (art. 1-12, 45-103))**
- Joint Session of HPR and HOF- 2/3rd Majority vote{and}
- 6 states(2/3rd states) – 50%+1 Majority vote
- In general approval of constitution involves participation of both state and federal gov't
- **Tips on FDRE constitutional amendment procedures**
  - Peoples can't directly initiate constitutional amendment, but participate at deliberation
  - No inadmissible amendment including federal system, unlike Germany nor prohibition during state of emergency except art. 60/5

  - In FDRE constitution no different procedure for constitutional revision and amendment
  - State constitutions amended by state council as per art. 50/5. However, all states except Somali includes participation of local gov’ts for initiation and approval with d/t degrees
- The 1931 & 1955 constitution doesn’t provide constitutional amendment procedures, while the 1987 constitution art. 119 requires 3/4th of National shengo members votes for amendment

Vote

- In federation, a majority or super majority of the constituent units' approval is sufficient for a valid constitutional amendment.
- However, the Ethiopian Constitution requires the unanimous consent of all the constituent units of the federal system in order to ratify amendment proposals on Chapter Three of the Constitution and the amending clause itself.
- As Delinger provides, this unanimity requirement is not associated with federal system more closely related with confederacy. Thus, the unanimity requirement gives a con-federal feature for the Ethiopian federal system.

The degree of national popular support

- This is not a critical issue on the process of constitutional amendment in Ethiopia.
  - Eg- an amendment proposal supported by the Amhara, Oromia, &(SNNP) regional state councils, which totally represents more than 75% of the Ethiopian population, will not be approved if it is rejected by Tigray, Somalia and Harari regional state councils, which totally represents less than 25% of the national population.
  - On the contrary, on areas other than Chapter Three of the Constitution, amendment proposals supported by the six less populous regions will be valid even if objected by the Amhara, Oromia and SNNP States that account more than 3/4th of the total population.

- On this point, the Canadian Constitution tries to balance federalism and democracy by requiring the number of provinces which support the amendment to represent in aggregate at least 50% of the Canadian population.
- On the contrary, under the Ethiopian Constitution the principle of federalism is more pronounced on the amendment procedures and therefore, the ratification rules reflect equality of regional states, rather than equality of citizens.

Referendum and Public Participation

- The Ethiopian Constitution under Art. 104 requires a proposed amendment to be submitted for the general public.
  - However, the phrase "… *submitted for the general public for discussion and decision*" is not clear whether it denotes referendum or not.
- From constitutional minutes at the time of constitutional making, implies the role of the people is not giving binding decision in the form of referendum.

- Rather their role is mere consultation and discussion on the proposed amendments so as to contribute significant inputs to the decision making bodies.
- Thus t*he FDRE Constitution has a tendency to invite the people to take part in the progression of constitutional amendment through consultation and discussion*.
- However, *their participation is limited in the sense that they have no power to give binding decisions and veto an amendment proposal.*
- Therefore, a referendum as a means of giving binding decision is not envisaged under the Ethiopian Constitution.

- Although the FDRE Constitution requires the people to be notified and consulted on the amendment proposals, the constitutional provisions as well as the subsequent working procedure regulations does not indicate the means through which discussion and consultation can be set.
  - Who submits it to the general public?
  - How it is submitted?
  - When it is submitted?

Foreign Experience

- The Constitution of Zimbabwe, Zambia and South Africa, for instance, require the text of the proposal to be published in the governmental gazette for public comment for thirty-days before the first reading in the legislature.
- Publicizing the proposed amendments on the official governmental gazette and effectively disseminating it to the public at large is an important means of creating public awareness.
- Moreover, public awareness and consultation can also be created through electronic medias by using indigenous languages.

Publication and Timeline Requirements

- Some constitutions require the amendment proposal to be published in the official governmental gazette, prior to tabling it before the legislature.
- This enables citizens to have knowledge of the proposal and to contribute meaningfully to the discussion on the matter.
- Additionally, some constitutions prescribe a specified timeline which indicates a minimum period between which amendments could be introduced and approved.

- This timeline for carrying out different activities helps to check over hasty constitutional amendments, give enough time & opportunity for the citizens to add their contributions to it.
  - In South Africa, the proposal amending the Constitution may not be put to the vote in the national assembly within 30 day of its introduction
  - In Botswana, bill containing a constitutional amendment may not be put into the parliament before thirty days of its introduction. There should be also a thirty days gap between the first and the second reading.

- The FDRE Constitution does not provide specified time lines for each action that need to be done in the amendment process.
- Besides it does not require the proposal to be published on the official governmental gazette for disseminating it to the general public for discussion and comments.
- As a result, in Ethiopia there is a possibility of making hasty amendments which are beyond the knowledge of the general public.

- Practically, *this was also observed during the first constitutional amendment on article (98) of the Constitution. The process was so speedy that it was completed within two months*.
- Some decisions were made successively without giving enough time for parliamentary members and the public for discussion.
- On the other hand, the second constitutional amendment that is made on article 103(5) of the Constitution relatively took a long period of time which is more than two years.
- Both of these amendments are beyond the knowledge of most of the general public.

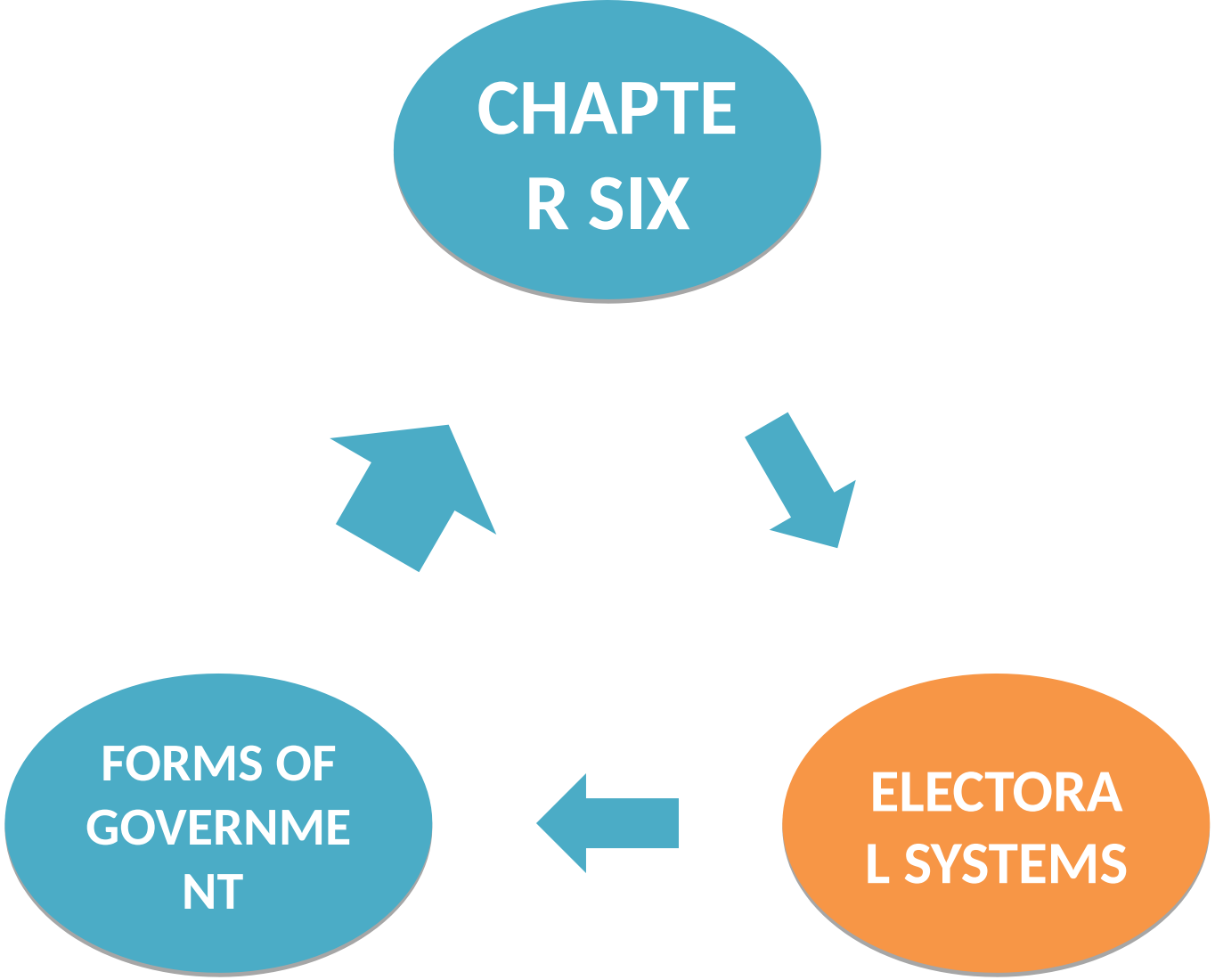
- The Ethiopian Constitution also does not give a timeline for the ratification of the proposed amendment by state councils.
  - The Canadian Constitution - amendments once initiated, it remains open for ratification or dissent of provinces at least for a year.
- This period of time runs from the application of the amendment within the province.
- A proposed amendment will be dropped unless it is not ratified by the required number of provinces' assemblies within three years of its initiation.

Institutions Involved in the Amendment Process

- In Ethiopia, different institutions engage on the process of constitutional amendment.
- The HPR/ HOF/ state council participates on initiation & ratification stages
- In Ethiopia, the HPR, the HF, the state councils, the president and the ad-hoc joint committee are important institutions playing a role in the amendment process.
- Among these, the involvement of HPR, HOF and state councils is so mandatory that failure to comply with it may cause the process to be irregular and unconstitutional.

Reversal of Amendment

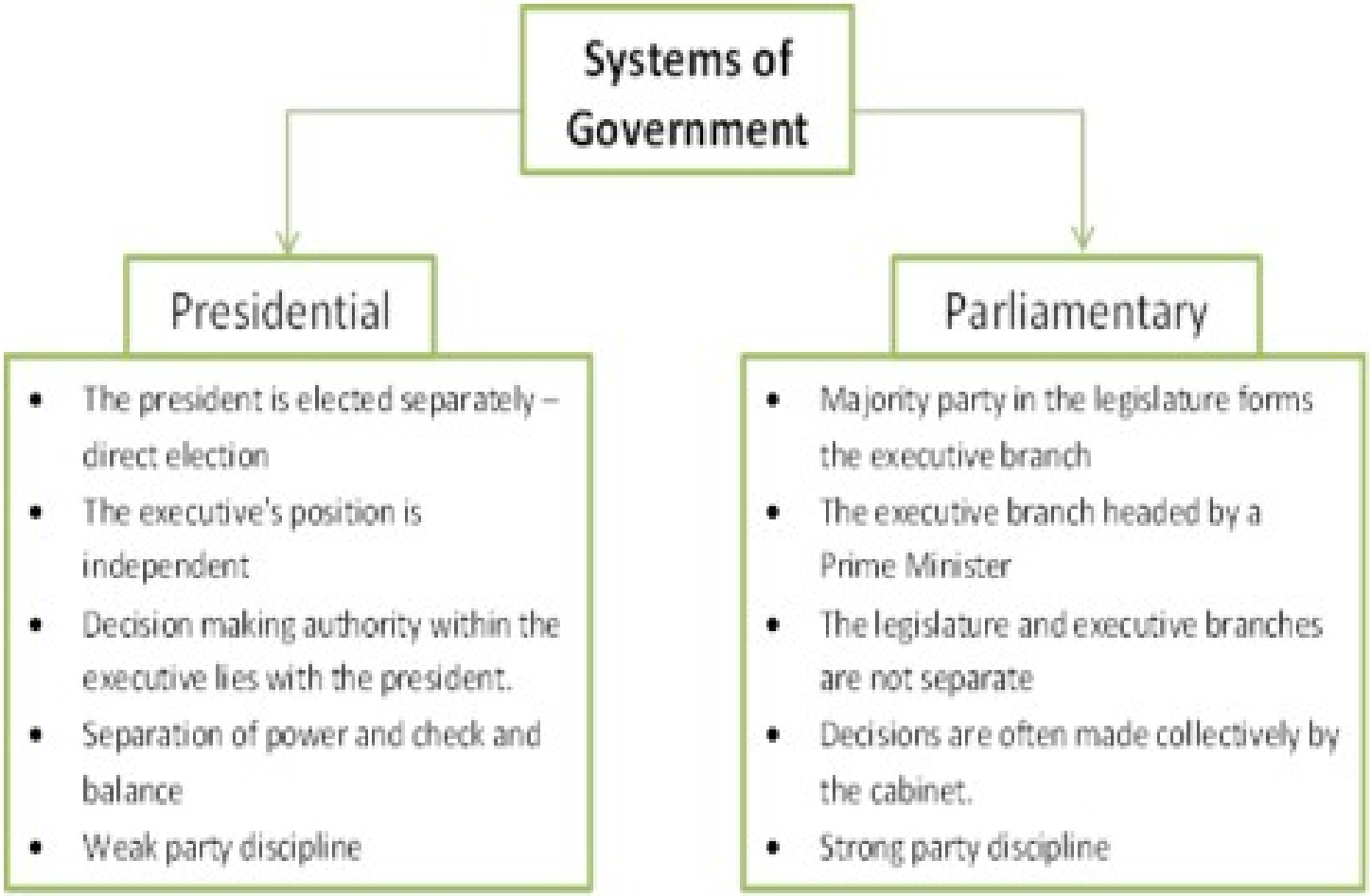
- The amendment procedure is silent and the issue of reversal has not yet been settled under the Ethiopian legal system.
- Consequently, whether regional states are allowed to ratify amendments that they previously rejected and whether they will be able to rescind ratifications still remains controversial.


CHAPTE
R SIX
ELECTORA
L SYSTEMS
FORMS OF
GOVERNME
NT

Comparison between parliamentary and presidential systems

Issues	Parliamentary System	Presidential System
Voting	For the party instead of the individuals The candidate has no his own position rather it is the party's position	Members of legislature are not beholder to their parties at all times.
Efficiency	More flexible (easy to pass laws) because the government is composed to the majority seats.	Relatively not flexible because every party member may oppose their parties proposal as regard to pass laws.
Party performance	The public is relatively y assured to get what it had been promised	Members of legislature may cross party-lines after election and vote with the opposition party after promises had been given to the public.
Stability	More of unstable	Relatively stable
Separation of power	Members of parliament wear two hats; they are both legislatives and executives, therefore, the power of each branch is unchecked in each case.	There is strong basis for check and balance on every level of government.

Systems of government



PRESIDENTIAL SYSTEM ▽

Merits

- Stable Executive b/c- Fixed term
- President directly elected (More democratically elected leadership)
- Strict Separation of power/SOP and check and balance
- Recruit ministers of high competency, even from those who has not political member
- Weak party discipline allows celebration of the innovation and expression of diversified views & ideas
- Fixed term of office open room for young generation to hold positions including Presidential one.

Demerits

- Difficulty of removing unpopular president
- Head of Gov't/HOG(President) has neither the right to participate in legislative deliberation nor dissolve the parliament
- President unable to ensure the approval/ repeal of un/desired laws particularly if parliament & Excve from d/t party
- Authoritarianism tendency since winners takes all(Zero Sum Game)
- No way to reconcile the conflict b/n legre and president
- Blame b/n Excve and Legre confuses public who remain accountable

•PARLIAMENTARY SYSTEM △

MERITS

- Coordination b/n executive & Legve
- Easier to pass legislation b/c PM present and defend his proposal in parliament
- Effective implementation of laws passed by legre
- Inclusiveness of diversity
- Vote of no confidence for incompetent and unpopular Pm
- Flexibility b/c HOG & executive members removed/replaced from position at any time.

Demerits

- Strong party influence to select Prime Minister, rather than people
- Less SOP and Check and balance
- Unstable HOG and executives
- Unlimited term office in developing country tends to destroy notion of democracy.
- Strong party discipline make members less free to express their view & to come up with new idea
- Difficulty of recruiting more competent ministers outside of parliament unless allowed by law.

Semi- Presidential system

- Eg- Finland, France, south Africa, Botswana
- **Parliamentary features**
  - President is a member of parliament
  - Elected by parliament
  - No term limit in some countries
- **Presidential** system feature- act as head of Government and Head of state
- **Merit-** Inclusiveness as it allows power sharing between opposition forces such as president & PM **Demerit-** elected from d/t party
- Intra executive conflict b/n PM and President
- Combine challenge &demerits of parliamentary and presidential system

PARLIAMENTARY FEATURES OF FDRE CONSTITUTION

- **Recognition-** art. 45
- **Historical-** Transplanted
- **Division of power-** fusion of executive and legislature- art. 56 & 73/2
- **After election-** Assembly became parliament (compose executive & parliament)
- **Nature of executive-** Executive divided into PM and President (Art. 70 vs Art. 72)
- **Executive selection-** PM from party having large seat in parliament (Art. 56,73/2 & 74/2)
- **Cabinet Selection-** PM Nominate & HPR appoint (Art. 74/2)
- **Cabinet role-** collective decision making, not advisory body of PM- 72/2 & 77
- **Nature of cabinet-** collective body – Art. 72/2 & 76

- **Ministers & Assembly-** usually member of parliament & Accountable to gov't & constituency– Art. 76/3, 54/4b, 54/7, 12/3
- **Executive responsibility-** responsible to parliament- art. 55/17, 72/2, 76/3, 60
- **Executive power over parliament-** cause dissolution of parliament with consent of HPR- art. 60
- **Parliament over executive-** HPR is highest authority & control executive – Art. 50/3, 55/17-18, 70, 55/7, 55/9,55/13
- **Responsible to electorate-** Art. 54/2, 12/3, 56, 73/2
- **Focus of power-** fusion and parliament is in focus (vote of no confidence)
- **Removal of PM-** 72/3, 55/17-18

ELECTORAL SYSTEM

- **Election and Democracy**
- Africa- Election without Democracy
- Real Democracy- Today majority(ruling party) became tomorrows minority (Opposition party) and vice versa.
- **Democracy- (Direct/ Indirect)**
- **Election** is the act or process of choosing a person for political office, position or membership by voting.
- **Electoral system** is the method used to calculate the number of elected positions in government that individuals and parties are awarded after elections.
- **Voting** (Many countries as a right, while some country considered as duty such as swiss, Turkey, Belgium & Brazil)

Types of Electoral System

- Different countries adopt different electoral system depend on political culture of the country
  - Common law- Plurality and Majority eg. British colonies
  - Continental law- proportional eg. France and Germany

1. Majoritarian Representation

- **Mostly adopted by Common law countries Sub-sects;**
- **i. Plurality-First past post/Relative majority**
  - **The winner take all even if less than majority. Eg. USA election for both chambers**
  - **Eg. A- 30 B-25 C- 27 D- 18%**
- **ii. Majority- Absolute Majority/2nd Ballot (50% +1)**
  - **If no party get majority second election held b/n top two winner parties**

2. Proportionality

- Aimed to create manufactured majority
- Incorporates minorities and representation of all communities
- All parties share power of government proportionate to their vote
- But there is minimum threshold eg. 5% in Germany
- Types- party list and single transfer vote
  - **Party list system-** voters vote for parties

- Party list also categorized into closed party list and open party list
  - Closed PL- parties determine who will fill the position eg. Israel and Germany
  - Open PL- Voters Choice among individuals of the party eg- Italy and Holland
- **Single Transferable Vote –** voters vote for individuals
- Parties forward many candidates and voters rank their preferences among candidates

3. Mixed system- combine two or all of them based on their merit

International Experience

1. **USA- plurality system**

- President and legislature are directly elected

President

- Based on electoral college
- Each state allocated a no. of electoral college electors whose no. is equal to no. of its senators & representation in congress
- Territories are not represented
- Each state design its own method of choosing
- Sometimes popular majority failed to be a president due to electoral system

Electoral College

- Each individual in order to be nominate compete with his party other individual
- After winning party nomination run for general election
- In selecting winner they follow winner takes all (48/50 states)
  - Eg- California (55), Florida (29), Texas (34), New york (31)
- Winning in 11 key states will make a president= 271/540
- Election conducted on Tuesday b/n nov- 2-8

South Africa

- Follow closed list proportional system
- Election- national, provinces & local
- Chambers-
  - National Assembly-400- 5 yrs- by people (lower)
  - National council- 90 – 5yrs- by provinces (upper)

India

- Chambers-
  - Lower- lokh sabha- 5yrs & 545 members
  - Upper- Council of state- 245 members- 6yrs
    - 1/3rd of members retire every two years
- President is elected by state and federal legislature for 5 yrs
- No party allowed to use gov't resource for campaigning
- Electronic voting machines are increased instead of ballot boxes to prevent electoral fraud

History of Election in Ethiopia

- 1931 constitution doesn't recognize popular vote
- 1955 constitution popular election is reserved for house of deputies to choose among nobilities
- 1956- 1st electoral law enacted and election board established
- 1957- 1st election conducted
- 1974-87- country ruled by Derg (PMAC)
- 1987 constitution ratified by referendum

- **1992-** first multi party election
  - 52 political parties participated
  - 12 seat win by OLF & remain by EPRDF
- **1995-** 57 federal/regional political parties
  - 483 EPRDF
  - 53 –opposition and affiliated
  - 10- independent candidates
- **2000-** 65 political parties
  - 481- EPRDF
  - 57 affilated
  - 39- opposition and independent candidates

- 2005- campaign broadcasted by TV and radio (46% for opposition parties)
  - 300 foreign observers participated
  - 39 political parties
  - 170 seats by opposition including Addis
  - based on complaint 31 electoral districts run for re-election & all of them won by EPRDF
  - Post election violence lead to distruction of loss of life, property
- 2010&2015- EPRDF unanimously occupied by ruling party and Affiliated parties

Major problems of Ethiopian Election history

- Lack of trust b/n people, ruling party and opposition
- Short-life span of parties
- Limited representation for small ethnic groups
- Most parties activity limited in Addis & major towns, while majority of people live in rural area
- Incompetency and illiteracy
- Financial constraints
- Security problems

Current Legal and Institutional Framework of Election

- **Legal-** FDRE Constitution Art. 38,54 &102
  - Adopted plurality system
  - Proclamations- Transitional- 11/1992 & 64/1994
  - Current- 532/2007 & other subordinate legislations
- **Institutional-** Art. 102 established election board
  - Member of board appointed by HPR up on recommendation of PM

Election Administration in Ethiopia

- **NEBE-** accountable to HPR
  - Monitors and supervise election process
  - 547 electoral constituencies/districts
  - 43,500 polling stations
- Types of Election
  - General Election (F/S)- 5yrs
  - By- election – filling seat
  - Reelection- due to election problem
  - Local election (nationality zone, city, woreda, & kebele)
  - Referendum- art 39 & 47

Dispute Resolution

- **Denial of Registration & voting Grievance**
  - Polling station grievance hearing committee (24 hrs)- ▭ constituency electoral office- ▭ Woreda court
- **Registration of candidates**
  - Constituency grievance hearing committee- ▭ Regional grievance hearing committee- ▭ Regional supreme court
- **Vote counting and Election result**
- Constituency grievance hearing committee- ▭ Election board ▭ Federal supreme court

Electoral Procedures

1. **Registration of Electors**

- Age- 18 yrs – art.33
- Residency-
  - Geographic- living in political subdivision/ constituency
  - Bonafide- domicile- eg. University student/ military
  - Durational – new resident must live 6 months before registration
- Citizenship- Ethiopian national and foreigner acquire Ethiopian nationality
- Non- felon- in principle, a person serving in prison are not eligible

Regulation of candidacy

- Ways- through political party or privately
- Candidacy driven from citizenship
- Requirements-
  - Education –not criteria
  - Age- 21 years (Art.45/1c)
  - Residency – Geographic & Durational (2 years)
  - Qualified elector- eligibility for voting is a criteria for eligibility of candidacy
  - Citizenship- Ethiopian
  - Language- working language of region/ vernacular language of area

- Petition- signature
  - Private candidate- min 1000 among people of local administration & Certified by local admn.
  - Private candidate for woreda/city admn-200
  - For Kebele- 50 endorsement sign
- Who endorse signature
  - Ethiopian, 18 years, not legally and judicially interdicted & lives 6 month in the area
- Other requirements
  - No simultaneous candidacy- for HPR in one constituency = max 12 candidates
  - Resignation (art. 47)- judge, police, military, shall resign from his position to run for election (privately/ through party)

Campaigning

- Techniques- Campaign advertizing through media, mass meeting, rallies & protests, Social media and distributing leaflets
- Process of campaigning
  - Decide to run - ▭
  - recruited by political party/ interested group ▭
  - public announcement (from date of Candidature ID issued) up to 2 days remain for election

Voting

- “One person, one vote”- political equality
- Polling stations-
  - Not established at military and police station, place of worship, hospital, place alcohol sold, buildings of religious and political institution, residence
- Voting station observers- 5 observers for each station
  - Criteria- independent and resident of the area
- Area- 500 meter radius – no person come up with weapon, drunk, or disturbing peace
- Blind/disabled voters- helped by person of their choice
  - Rqt- 18 years, not candidate or its representative

Stakeholders in Election process

- Political parties, media and Election observers

1. Political Parties

- **Types of party system**
  - **One party** – Communist eg- China, Korea and Singapore
  - **Two dominant-** USA (Republican & Democrat)
  - **Multiparty-** gain gov't power separately or in coalition eg. Germany and Italy
  - **Dominant-** winning election continuously for three and above terms, perhaps because of the satisfaction by its performances. Eg- India from 1950 till 1970s and Japan
  - **Hegemonic-** one party dominance, & repressive measures are taken against opposition political parties, &less willingness to submit power for the other winning party

Financing Political Parties

- Gov't should provide support for political parties having representation at fed. &state legislature for election purpose
- Prohibited sources of financing
  - Foreign national, Foreign government and political party
  - NGOs and Religious organization
  - Prisoners of law
  - Armed groups and terrorist organization
  - Unknown sources

2. Media & Election

- Guaranteeing freedom of expression is a foundation of democratic election process
- Art- 59 & 60- Free air time, Equal access to state owned media (TV, radio, newspaper)

3. Election Observers

- Method of ensuring election transparency
- Requires neutrality and independence
- Types
  - Long term- observe all aspects of election like int'l observers
  - Short term- on polling day
- What observed- respecting of Freedom of mov't, assembly, association, & expression for candidates
- Public observer- impartial resident of polling station elected by people to observe
- Each polling station have 5 public observer

CHAPTER 7

HORIZONTAL & VERTICAL DIVISION OF POWER

The Concept and Development of Separation of Power

Concept

- None of the organs of the government, i.e., the legislative, executive and Judicial should ever exercise the powers of the other.
- It means that the three departments of government are to be separate and distinct
- SOP b/n three gov't organs
- Important for both unitary and federal

- There is check and balance
- Nature of gov't has impact on the extent of SOP
- **Purpose**
  - It is aimed to avoid concentration of power thereby minimizing risk of abuse
  - ***Necessary*** to ensure uniformity & impartiality, in the application of sanctions.
  - SOP seeks to attain the same purpose by dividing gov't power into small institutions
- Goal- to secure right and freedoms of citizens

Development

- The origin of the doctrine is traceable to Aristotle and Plato
- **Plato-**‘Something left to courts of law; others the legislator must decide for himself’-
- The writings of Lock and Montesquieu gave it a base on which modern attempts to distinguish between legislative, executive and judicial power is grounded.
- ***John Lock*-**recognized three power of gov’t, **one** that makes the laws, **another** that carries them out, and a **third** that manages foreign and military affairs.

- The **first** should be separate from the two others, but the **latter** should be headed by one and the same organ, the king. According to him legislative and executive powers should be conferred on d/t organs
- **Montesquieu** describes concentration of power on single person as "*There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals'*

- His SOP theory is a model for the governance for modern state, but tightly.USA constn highly influenced by Montesquieu model

Types of Separation of power

- **Functional**
  - Each of three organs gov't must be entrusted with different function. Legislature enact, executive implement and judiciary interpret
- **Personal /officials**
  - A single person may not be permitted to seat in two or more organs at one time
- **Institutional**
  - Need of separating three organs
  - All three organs should be conferred the power to administer and decide on matters pertaining to their respective power and function

- This can be achieved through;-
  - Giving autonomy on their own matters including *administration and deciding on own internal affair* like budget admn and employees as well as *legal recognition to their independence*

Check and Balance

- It is about maintaining balance of power division among gov't organs/levels
- Aimed to ensure no branch can completely dominate the others branch

Ways

  - Among three organs themselves
  - Other means of checking those organs ;like HRC, Ombudsman & Media, independent CSO, independent Central Bank

Separation of Power (SOP) in Practice

- *Complete separation is found to be not possible* since it is found that authorities of the three organs or departments of the gov't are interrelated.
  - *They are to a large extent dependent upon another. Ministers are politically responsible to parliament, and legally responsible to courts.*
  - A complete separation of powers, in the sense of a distribution of three functions of gov't among three sets of organs, *with no overlapping or co-ordinatio*n, would bring gov't to a standstill.

  - if the doctrine of SOP has been followed rigidly in any country, ***the dev't of modern admve agencies would have been impossible***
- ***Parliamentary*** system- fusion of executive and parliament
- ***Socialist*** constitutions organize gov't on the basis of the unity of gov't power. But most constitution recognize independence of judiciary

- **SOP in Presidential vs Parliamentary System**

Types of Sop	Parliamentary			Presidential		
	Leg. vs Exc	**Leg vs Jud**	**Ex vs Jud**	**Leg vs Ex**	**Le vs Ju**	**Ex vs Ju**
Personnel	No	Yes	Yes	Yes	Yes	Yes
Functional	No (delegation)	Yes/No (Precedent & rule making)	No	No	Yes/No (precedent)	yes
Check & balanc	No ch& bala **(interpellation)**	Yes /No (judicial review)	Yes Executive nominate judges and the judiciary entertain legality of executive acts	Yes	Yes	Yes

SOP under the FDRE constitution

- Based on parliamentary model
- Types-
- **Personal SOP**
  - Legve vs Excve- No SOP, but fusion (Art. 56)
  - Legve vs Jud- Yes (SOP)- Art. 79/3
  - Excve vs Jud- Yes (SOP)- Art. 79/3
  - HPR vs HOF- Yes (SOP)- Art. 68
- **Institutional-** All are Separate- 50/2
- **Functional-**
  - Legve vs Excve- No SOP, but fusion (Art. 77/1, 77/13)
  - Legve vs Jud- Yes (SOP)- Art. 78/1, 79/2
  - Excve vs Jud- Yes (SOP)- Art. 78/1, 79/2

CHECK AND BALANCE AMONG GOV'T ORGANS

- **HOF over HPR-**
  - Art. 84/2 (Declaring unconstitutionality)
- **HPR Over HOF-**
  - Budgetary Control &
  - Defining HOF Power through law making
- **Legve over Excve-**
  - Ratifying proposed laws & signed treaties
  - Determining executive structure
  - Approving state of emergency
  - Interpellation
  - Appointment of officials
  - Vote of no confidence
    - Relevant provisions- Art. 55/8, 55/7, 55/9, 55/12, 55/17-18

- **Excve over Legve-**
  - Dissolving HPR- Art. 60
- **Legve over judiciary-**
  - Appointment-55/13 & 81/1-2
  - Budgetary Control-79/6
- **Judiciary over Legve-**
  - Cassation- 80/3,
  - Constitutional interpretation- 84/2,
  - Liability for failure- 12/2
- **Exve over Jud-**
  - Nomination of Appointment-Art. 81,
  - Pardon- 71/7
- **Jud over Excve-**
  - Constitutional interpretation- 84/2,
  - Liability for failure- 12/2

The Structure, Composition &Functions of gov't Organs under FDRE Constitution

1. Structure

No	Structure	Federal	State
1	Legve	HPR & HOF (Art. 53)	State Council (art. 50/5)
2	**Executive**	**Prime Minister- Art.72ff** **Council of Minister – art.77** **President (Art.70-71)**	**State administration (50/6)**
3	**Judiciary**	**FSC** **FHC** **FFIC**	**SSC** **SHC (Zone)** **SFIC (Woreda)**

Composition of Federal Organs

A. Legislative Organ-5 yrs term office

- **HPR-** directly elected members
  - Elected by plurality system
  - Max- 550 seats & mi. 20 seats reserved for minorities
- **HOF-** Represent NNP- Art. 61
  - Selected by State Council or directly elected
  - 1 NNP represented by 1 person, & for additional 1 million of its population gets 1 representative
  - Accountable to NNP, not to states

S.N	Region /C	Representation in HPR & HOF (2016-2020)		
		HPR	HOF	ETHNIC REPRESENTATION IN HOF
1	Oromia	178	31	Oromo (31)
2	Amhara	138	29	Amhara (24), Argoba(1), Waghimra(1), Hawi(1), Oromo (1), Kimant (1)
3	SNNP	123	67	Sidama(4), Gurage (3), Welayta (3), Kafa(2), Silte (2), Hadiya (2), Gamo (2), Gedeo (2)& Remaining ethnic groups (1*48)
4	Tigray	38	8	Tigraway (6), Kunama (1), Irob (1)
5	Somale	23	6	Somali (6)
6	Afar	8	2	Afar (2)
7	Beni. Gu.	9	5	Berta (1), Gumuz (1), Shinasha (1), Mao (1) & Komo (1)
8	Gambela	3	5	Agnuak (1), Nuer (1), Majanger (1), Upo (1) & Komo (1)
9	Harari	2	1	Harari (1)
10	Addis Ab	23	-	
11	Diredaw	8	-	
	TOTAL	547	153	76 Ethnic groups

B. Executive

- **President-** Ceremonial Head of State, not real executive
  - Nominated by HPR (lower house)
  - Approved by joint session of two houses
  - One renewal six years term of office
- **Prime Minister-** Highest executive power
  - Selected from HPR members
  - No Term limit, but system of Vote of no confidence
- **Council of Ministers-** comprises PM, DPM & other ministers
  - Nominated by PM & Appointed by HPR

C. Judiciary

- **Presid. & VP of FSC-** nominated by PM & appointed by HPR
- **Judges-** Selected by FJAC ▭ Submitted to HPR by PM ▭ appointed by HPR
  - Term Limit- Retirement

Power and functions of Federal Organ

- **Legislative**
- **HPR-** Art. 55
  - Enact laws & codes
  - Determine organization of executives including defense and police force
  - Declare state of emergency and war
  - Approve appointments, budget, country's policy and strategy
  - Ratify international agreements
  - Establish HRC and ombudsman
- Quorum- 50% + 1= 274/547
- Decision making- 50% + 1 among attended members- 138/274= 25% of HPR members

- **HOF-** Art. 62
  - Interpret constitution
  - Decide on issues of nationality
  - Ensure unity in diversity
  - Resolve dispute among states
  - Determine share of revenue of concurrent tax
  - Determine civil laws enacted by HPR
  - Order federal intervention

Executive organs

- **President-** Ceremonial Power
  - See art. 71, 60/2 & 57
- **Prime Minister**
  - Chief executive, Chairman of COM, commander in chief of Army
  - Nominate ministers and various appointments
  - Follow up and supervise implementation of laws and policies

- **DPM-** No multiple DPM
  - Power & fn- art. 75
- **Council of Minister- art. 77**
  - Dual accountability to PM & HPR
  - Follow up and supervise implementation of laws and policies
  - Issue regulation and protect patent & copyrights
  - Provide uniform standard & measurement

Judiciary- 78ff

- Dual structure of courts (F/R)
- Ensure the right of Access to justice – art. 37
- Responsible for interpreting laws
- Exceptionally interpret constitution in their day to day activities(Art. 9/1,13/2, 84/2)



- **FORMS OF DECENTRALIZATION**

1. Devolution- huge power transferred to local gov't
2. De-concentration- some power left to authority
3. Delegation- implement the decision of the centre as an agent
4. Privatization- giving some matter to private sector

- Forms of state can be a Unitary, Federal or confederal

UNITARY

- Characterized by centralized decision making to ensure uniformity
- In 2006- 149 countries adopt this form of state
- Superior subordinate relation b/n centre and local gov't
- It can be single tiered (like Monaco, Singapore city state) or multi tiered (like China, England or Turkey)
- Usually practiced in small and homogeneous countries
- Local gov't are merely creation of the center
- Delegation of power to local gov't is depend on the willingness of centre, local gov't can't claim as a matter of right

FEDERAL FORM OF STATE

- Characterized by
  - Existence of at least two tier of gov't
  - Both tier of gov't has an autonomous and equal power on their respective jurisdictions
  - Supreme written constitution is source of power for federal gov't and regions
  - Federal and state Legislative have limited power
  - In 2006 about 29 countries adopt federal system
  - Central gov't cannot dissolve states except in case of emergency clause

CONFEDERAL

- Most power controlled by regional states
- States retain their whole of their sovereignity
- Confederation organized as a subordinate of the common gov't of states
- Decision making procedure is designed to preserve the sovereignty of state gov'ts requiring either unanimity or qualified majority
- It may exist when several pre-existing polities join together to form common government for certain limited purposes such as foreign relation and defence but
- The common gov't is dependant up on states/ weak central gov't

FEDERALISM; A BRIEF OVERVIEW

- Historically traced back to ancient Israel tribes over 3200 years ago (moses/Musa tribes)
- Dev't of modern federalism emerge from
  - Swiss- 1291- 1798, 1848, USA- 1787,Canada- 1864
- Current status
  - About 29 states adopted federalism (40 % of world population)
  - Encompass about 510 regional states
  - Geography- 8/10 largest countries of world
    - Micro-Federations- (Micronesia, Belau, St. Kitts and Nevis, and Comoros)
  - No. of states- 2-86/country
  - Population- 20,000- above billion/ country

- **Designations**
  - **Federal gov’t**
    - Central- Germany
    - National- Canada & south Africa
    - Federal- USA & Ethiopia
    - Union- India
    - State- Spain
  - **Regional gov’t**
    - Lander- Germany, Austria
    - Canton- Swiss
    - States- USA, Ethiopia
    - Provinces- Canada, South Africa
    - Emirates- UAE

- Several federal countries have state constitution (Such as Ethiopia, USA, Swiss, Germany), while Others not have state constitution (Eg. India, Nigeria, Belgium)
- Some countries not included the term federation, even if they adopt federal form of gov't
  - Eg- Spain- fear of disintegration
  - South Africa- Apartheid rule feeling
- Countries adopt federalism with a view to achieve d/t purposes
  - Administrative Feasibility- Brazil and Germany
  - Creation of Great power- USA
  - Accommodation of diversity- Swiss, Belgium, Russia, India & Ethiopia
- Hence, there is No automatic link b/n federalism and minority rights.

- **Common Features of Federations**
- There is no uniform standard of federal system.
- But there are common features

1. at least two orders of government, exce- 3
   - One for the whole federation and
   - The other for the regional units, each acting directly on its citizens;
2. A formal constitutional distribution of authority & resources
   - Legislative, judicial and executive authority;
   - Allocation of revenue resources between the two orders of government ensuring some areas of genuine autonomy for each order;

3. Provision for the designated representation of distinct regional views within the federal policy-making institutions, usually provided by the particular form of the federal second chamber;
4. a supreme written constitution not unilaterally amendable and requiring the consent for amendments of a significant proportion of the constituent units;
5. an umpire (in the form of courts, provision for referendums, or an upper house with special powers); and eg. HOF, Constitutional Courts

6. processes and institutions to facilitate intergovernmental collaboration for those areas where governmental responsibilities are shared or inevitably overlap.

Allocation of Competences in Federations

- In federal system Powers can be allocated in the form of
  - Exclusive (Federal/ State)
  - Shared (Concurrent/ Framework)
  - Residual

Patterns in the Distribution of some power in Federations (*George Anderson*)

- Currency- Always federal
- Defense- always federal, sometimes states
- Treaty ratification- always federal sometimes states
- External trade- usually federal, occasionally shared power
- Interstate trade- usually federal, occasionally shared power
- Intrastate trade- usually states, occasionally shared

- Major physical infrastructures- usually federal, sometimes shared or by state
- Primary and secondary education- usually state, sometimes shared or federal
- Post-secondary educations and research- No clear pattern
- Income security- mix of federal and shared
- Pension- either federal or shared
- Health care- usually states, sometimes shared power
- Mineral resources- no clear pattern
- Agriculture- no clear pattern

- Environment- usually shared, sometimes states
- Municipal affairs- usually states, sometimes shared
- Court system- usually shared, sometimes federal or states
- Criminal law- no clear pattern
- Police-Usually shared, rarely federal or states
- Custom/excise tax- federal, sometimes shared
- Corporate and personal tax- usually shared, sometimes federal

Nature of Ethiopian Federalism

- Ethiopia adopted ethnic federalism-
  - Preamble (We NNP) & art. 8 (sovereign power)
  - Right to Self-determination guaranteed to NNP (Art. 39 +47)
  - Designation (6/9 designated by ethnic group) and delimitation of regional boundary (Art. 46/2)
  - HOF (upper house & guardian of the constitution) members represents ethnic group, not states

MERIT AND DEMERIT OF ADOPTING ETHNIC FEDERALISM

Merit

- Empowering minority- No country adopted ethnic federalism without ethnic issue raised within society
- Ways of dealing with diversity
  - Positive- Recognition
  - Negative way- Genocide, Ethnic/ religious cleansing, Assimilation.

Demerit

- Undermining national unity &Fear of disintegration
- Ethnic identification/extremism
- Minority tyranny
- Restriction of Freedom of movement

Vertical division of Power

- Federalism signifies division of power b/n central and sub-national gov't
- Division of specific power varies from one federation to another
- However, some issues need uniform regulation eg foreign relation, defense, and monetary
- There are also matters by their nature requires diversity of regulation based on local reality such as provision of social services, and sanitation

Types

i. Exclusive power

- Monopolization over certain power
- Depending on federal system the power may be entrusted to federal or/and states
  - Eg- German landers only enact when expressly provided by law (art. 71 of basic law)
  - India- Central gov't enact laws on states exclusive power

Ethiopia trend

- **Federal Exclusive Power-** aimed to ensure uniformity, needs common concerns of all states, promotes shared rule and unity values
  - FDRE Constitution- art. 51,55,74,77,96 i.e
    - Matters of Common concerns of all federations- currency, defense, immigration, foreign relation… etc
    - Commercial powers- regulating interstate & int'l trade, foreign currency exchange, patent & copy right, regulating commercial and labour laws, transportation link cross regional

- Social & political issues- press law, electoral law, political parties registration
- Enacting civil and criminal laws- 55/5 & 55/6

- **State Exclusive Power-** matters of local importance and requires self-rule or diversity
  - FDRE Constitution- art. 52/2,97
    - Establish state administrations
    - Enact and execute state laws including state constitutions
    - Establish state police forces

2. Shared Power

- Signifies overlap of power
- It is unavoidable in federal system includes concurrent and framework powers
- Reason- to balance power, spillover effect,
  - Serve as a flexible channel to adjust new circumstances
- There are two types namely; concurrent and framework

A. Concurrent powers

- It is the power and function simultaneously exercised by both federal and regional states
- It can appear in three ways
  - Explicitly provided by separate provision in federal constitution like India & Germany
  - Scatterly found within constitution
  - Through practice and convention
    - FDRE Constitution- Enacting criminal code- art. 55/5, & Respecting and enforcing FHR- (Art. 13/1)

B. Framework Powers

- A kind of power provided in federal constitution, which the federal gov't have legislative power and regions specify or implement the law/policy based on federal framework
  - Eg- Land and natural resources- art. 55/2a cum art. 52/2d,
  - Socio-economic policies of the country- (Art. 51 (2-3) & Art. 52/2c)

3. Residual Power

- Power not included in the constitution during its design
- Reason- unnecessary to assign or such power didn't exist at the time
- Such power assigned to states in USA, Ethiopia, Swiss (art. 52/ 1), whereas in Iraq the power entrusted to federal gov't. art. 99 is an exception to art. 52/1



CHAPTER 9:



CONSTITUTIONAL INTERPRETATION / REVIEW

THE CONCEPT OF JUDICIAL/ CONSTITUTIONAL REVIEW

- Constitutional review is the formal power of domestic courts or courts alike body of set aside of strike legislation for incompatibility with the national constitution.
- Constitutional review is technically a sub category of judicial review which also includes the review of administrative action conformity with statute or the constitution.

Bodies assigned to interpret the constitution have different functions or roles to play. Like :

A. **Enforcing the supremacy clause of the constitution**

B. **Adapting the constitution**: its about how the constitution can remain relevant in the changing realities through the passage of time. Ways;-

- amending the constitution;- its complex.
- interpret the constitution;-its about giving meaning to provisions of the constitution through changing realities. Eg.USA- Equality

C. **Umpiring public institutions:** federalism and separation of powers may possibly cause disputes related to division of power between
  - the federal government and the states, or
  - Among the three branches of the government.
- Therefore, the interpreter of the constitution should be given this duty. The assumption is that this interpreter is impartial.

D. **Enforcing human rights:** rights are not empty promises. Rather they are enforceable.

Power & Functions of Constitutional Review organ

- Differs in decentralized &centralized countries

1. **Abstract and Concrete review**

- **Abstract Review-** cases entertained without happening of real cases
  - Serves for non justiciable cases like political question & constitutionality claim on drafted law
  - Abolished in diffused system
- **Concrete Review-** review up on happening of real/incidental to cases
  - Implies existence of dispute and contesting parties

2. Priori and Posteriori Review

- **Priori Review-** reviewing constitutionality of proposed/drafted law Before enacted by legislature or After ratified, but before implemented
  - Aimed at Preventing unconstitutional before laws they cause an actual harm
  - Formally initiated by political organs i.e Legislative and Executive
  - Eg. Art. 61 of French Constitution
  - Priori review is always abstract form of review

- **Posteriori Review-** review of the law after enacted and start implementation
  - It includes both Abstract & concrete review
  - Its claimed by gov't or individual

3. Political & Non-Political questions

- **Non- Political Questions-** they are civil rights and justiciable before any ordinary courts
- **Political questions-** claims involving politically related issues.
  - Its non justiciable cases
  - E.g.- In USA, Matters concerning the 'republican form of the gov't, 'the conduct of foreign affairs,' war power, impeachment, 'presidential powers discretion,' and recognition of foreign gov't reserved for the political branches,& Courts are not actively involve on those issues

- while in centralized countries constitutional courts are empowered to see both political & non political questions
- Eg- in 2012- Egypt Supreme Court nullifies parliamentary election
  - Turkey constitutional court empowered to see the legality of political parties, certify and decides for re-election
  - The 1996 South African constitution certified by constitutional court before enforced
  - Colombia constitutional court rejected the president Alvaro proposition to amend the constitution that allows him to run for 3rd presidential election
  - Sometimes they also determine the constitutionality of int'l treaty obligations

4. Constitutional Complaint

- It's a claim by individuals for the violation of their constitutional rights
- Forms- A. For Private interests-

  B. Actio popularis- public interest like env'ntal activities
- In USA its called Certiorari, while in latin America its called Amparo Proceeding
- In Germany, its also initiated by gov't bodies(like Municipal, lander & Private Parties)
- The complaint has an Objective & Subjective purposes
  - **Subjective-** Aims to serve legal protection of individual rights. It may be terminated by withdrawal of complaint.
  - **Objective-** aimed to preserve general constitutional issue/general interest. If Complainant withdrawn the FCC may continue to render the decision.

5. Advisory Opinion Jurisdiction

- Giving consultative opinion by constitutional interpreting organ to other bodies
  - Eg. Art. 163 (6) of Kenyan constitution
    - "163(6) The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government."
- Usually it's a kind of priori abstract review
- USA supreme court denied such power due to its against principle of Separation of power
- Its rendered in the absence of actual facts/ litigation.
- Mostly it has no binding effect

Models of Constitutional Review

- There are two commonly known models of constitutional interpretation namely diffused decentralized and centralized model
- While other countries follow other approach eg- China, by parliamentary committee, Swiss (by referendum)

1. DIFFUSED SYSTEM

- All regular courts are empowered to resolve constitutional disputes Eg. USA
- 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.

- The supremacy of the Constitution controlled solely by the regular courts in the American model of constitutional adjudication.
- But, the final say on review is Federal supreme court.
- Historically, The USA constitution does not expressly recognize the power of courts to rule constitutionality issues.

- The case b/n Marbury vs Madison case puts a milestone. The summary of case is ;-

  “In final days in office, President Adam appointed some judges loyal to his party. Some of the appointees had already received the letter of appointment(as they call, commission). Some including Marbury didn’t receive the letter during Adams presidency. The incoming president Th. Jefferson ordered Madison, the secretary of state, not to give letter to Marbury. Marbury sued Madison, asking the court for writ of mandamus(the court order instructing a gov’t official to do something, in this case to handover the letter).

- In the end, Supreme court ordered the secretary of state to give Marbury his appointment/ commission to serve as a justice/ judge.
- It reasoned it is emphatically the province and duty of judicial department to say what law is" *this ruling is based on the assumption that the constitution is also a law. And should a conflict arise between the constitution and legislative act, judges must uphold the constitution since it is higher norm.*
- This case gave the birth of constitutional review.

Review system

- Reviewing of the constitution is incidental to case or controversy. If the case does not arise you cannot challenge the constitution.
  - This is judicially invented doctrine from Art. III of the USA Constitution.
- The matter must be justiciable and must not involve 'political questions.'
- By doing so, the system developed the judicial self-restraint doctrine, which the court refrains from entertaining political and abstract questions.
- This also helps to avoid head on clashes with the other branches of the gov't.

- The US abolished abstract review due to
  - Separation of power & Check and balance among gov't organs
  - Life appointees of judges which have no direct accountability to people leads to democratic deficit.
  - As USA is based on judge made law and bringing every controversy to court will make judiciary super power
  - Also, there is a probability of many case filing.

- To minimize active involvement of judiciary in competence of legislative &executive branches

Critics

- Judicial imperialism or judicial activism- a principle that whatever the courts say is the constitution, and binds all branches of the gov't including lawmakers.
- In USA, Supreme Court nine judges appointed for life. So, constitutional review is undemocratic due to it allows few unelected judges who have no political accountability quashed the elected laws.

2. **CENTRALIZED/ CONCENTRATED SYSTEM**

- In centralized system, there is an institution called Constitutional Court.
- The organ is separated from the judicial branch of the state. We cannot categorize it as executive or legislative either.
- It has independent power whose function consists in ensuring the constitutional supremacy.
- Historically, in 1921 Austrian jurist Hans Kelsen fascinated by USA model and also appreciate the diffused model cannot work in Europe.

- He denied judiciary power to void legislation. He proposed one special court(constitutional court), which preserve legislative sovereignty on one hand & ensures constitutional supremacy on other
- Also, in Europe, especially before the world wars, the state was manifestation of hope in the sense that people had faith in public institutions. As a result, parliaments in Europe enjoyed enormous powers and they have given high credit and well respected.

- Though, these absolute powers led the countries including the world into crisis because of the two world wars. After the WWII, fear took the place & hence, constitutional courts got established.

Review System-

- Unlike the decentralized model, constitutional courts entertain both abstract and concrete cases, political and non political question and constitutional complaints.
- In contrast, usually, ordinary courts cannot settle constitutional issues/disputes. Their power is limited to referral.

Ethiopian Approach of Constitutional Review

- HOF is entrusted to interpret constitution (Art. 62) & Council of Constitutional inquiry (CCI) serve as an advisory body of the HOF (Art. 82-84)
- The HOF is structurally upper legislative house & composes the representative of NNP,
- Reason for empowering HOF/CCI;
  - To prevent judicial activism
  - To protect legislative dignity
  - Considered as guardian of the constitution as it composes members representative of NNP, which the constitution empowers them as sovereign power within the country.

- **The CCI composes**
  - The President & V/Pres of the serve as its President & vice President;
  - Six legal experts, appointed by the President on recommendation by the HPR, who shall have proven professional competence and high moral standing;
  - Three persons designated by the HOF from among its members.

Role of Courts an the Dilemma b/n the term Constitutional Dispute & Constitutional Interpretation

- *Constitutional Interpretation= Art. 62(1) & 84(3), 83 (caption)*
- *Constitutional dispute= Art. 83/1 & 84/1*

Article 62

Powers and Functions of the House of the Federation

1. The House has the power to interpret the Constitution.

Article 83

Interpretation of the Constitution

1. All constitutional disputes shall be decided by the House of the Federation.

Article 84

Powers and Functions of the Council of Constitutional Inquiry

- *"2. Where any Federal or State law is contested as being unconstitutional and such a dispute is submitted to it by any court or interested party, the Council shall consider the matter and submit it to the House of the Federation for a final decision."*

1. **Assefa F-** Courts are empowered to interpret constitution (art. 13/1 cum Art.84/2)
   - 84/2--Accordingly, the constitutionality of all laws except federal/regional proclamations are belongs to federal competence of courts
   - 13/1---duty to enforce and respect constitutional provisions
   - Argue procl. 251/2001 is incompatible with constitution.
2. **Ibrahim Idris-** courts are denied both power of interpreting the constitutional provision & handling judicial review of legislative statute.
   - Power of interpreting constitution entirely belongs to power of HOF

3. **L.F.M Besselink-** Art. 62/1- HOF has the power to interpret constitution authoritatively.
   - I.e- HOF is the ultimate interpreter & its decision will be binding & final. This doesn't mean that other organs doesn't interpret constitution.
   - Justify his argument based on art. 9/2, 79/1 & 13/1 i.e duty to respect, enforce, ensure observance through his judicial power. Thus, constitutional interpretation is the shared power b/n HOF/CCI & Courts.
4. **Getachew As.-** Constitutional disputes lead to Constitutional Interpretation and both of them are inseparable

- All constitutional dispute/interpretation power belongs to HOF/CCI

5. **Tsegaye R**. – Ethiopian Courts engage in reviewing constitutionality when norms contradict with the constitution.
6. **Adem K.** – in principle judicial power belongs to courts (art. 79/1)
   - Exceptionally Constitutional Interpretation power belongs to HOF/CCI (Art. 83/1) "All"
   - In effect, Courts have residual power of Constitutionality cases of executive acts & decisions.

- Art. 83- determine the substantive issue on which organ competent to interpret constitution
- Art. 84- outline the power r/nship b/n CCI & HOF & the procedure to be followed to address constitutional issue.
- Hence, the role of courts are limited to referral

Jurisdiction & Power of HOF/CCI to interpret Constitution

1. Concrete & Abstract Review-

A. Concrete Review- Art. 84/2 of the constitution

– Art. 3(1) & 3(2A+ B) procl. 798/2013

3. Principle

1. When the unconstitutionality of any law or customary practice or decision of government organ or decision of government official is submitted in writing to the Council, it shall consider the matter.

2. Issue of constitutional interpretation to be submitted to the Council in accordance with sub-article (1) of this Article shall:

a) if it is justiciable matter of court, when it has been brought to, and heard by, the court having jurisdiction;

b) if it is justiciable matter of administrative organ, when a final decision has been rendered by the competent executive organ with due hierarchy to consider it;

B. Abstract Review- for unjusticiable matter

- Art- 3(2C) of Procl. 798/2013

"Constitutional interpretation on any unjusticiable matter may be submitted to the Council by one-third or more members of the federal or state councils or by federal or state executive organs."

- It can be claimed up on 1/3rd of Federal/state legve or 1/3rd of Federal/ State Executive

- Accordingly Federal CCI& HOF empowered to entertain both political and non political questions through posteriori review system

2. Constitutional Complaints

- FDRE constitution has not clear on the issue
  - Art. 83(1) "all Constitutional dispute"
  - Procl. 798/2013- Art. 5

  (1) Any person who alleges that his fundamental right and freedom provided under the Constitution have been violated due to the final decision rendered by government organ or official may submit his case to the Council for constitutional interpretation.
- Rqt- Exhaustion of local remedy
  - **Court Cases-** FSC at federal level & SSC at State level
  - **Administrative decisions-** final organ (???)
- Critics- doesn't Provide an exceptions for exhaustion of local remedy.
  - Eg- Delay of the case, urgency, No effective remedy

3. Priori & Posteriori Review System

- Only posteriori review system provided/considered
- No clear indication of priori review but some one claim art. 50/5 “drafted state law”
- Accordingly, if states draft unconstitutional law there is possibility of review – art. 50(5) cum art. 62/1

  *50/5. The State Council ….has power to **draft**, adopt and amend the state constitution.*

4. Advisory Opinion

- Art. 4/2 of HOF Procl. 251/2001, HOF is not obliged to give consultative services

  4. Interpretation of the constitution

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

Reviewable matters - (Art. 9/1)

- Art. 9/1, and 84/2 of the Constitution.
- Art. 3 of procl. 798/2013

A. Federal and State laws “any law”
B. Decision of gov’t organ/official
C. Customary practices
D. International agreements

Proceedings to Claim for constitutional interpretation (Art. 4 & 5)

- Before Courts
- Outside courts

Proceeding Before Courts (Art . 84/2)

- Constitutional review claimed either by Court or interested party

i)- **By Court-** up on court initiation or by interested party

  - If the court believe existence constitutionality issue, submit their case to CCI & the court stay proceeding until decides. (Art. 6 of Procl. 798/2013)
  - CCI Power- Remand the case (if no Constitutionality issue) or submit recommendation to HOF(if the issue needs constitutional interpretation)

ii) **By interested party-** if the court rejects their constitutionality claim brought their case within 90 days.

b. **Outside of Courts-** submitted by any person be *who alleges that his FHR provided under the Constitution have been violated due to the final decision rendered by government organ or official may submit his case to the CCI.*

- *The claim should be based on chapter three of FHR*
- *Requires to exhaust local remedy*

Status and Effect of HOF decision on Constitutionality Issue

- **Effect-** Art. 9/1- void ab initio/ null & void
  - Precedent effect (Art. 11)
- In several countries it may have d/t impact
  - Eg- Amending law- Romania
  - Repeal the law- Hungary
- Ethiopia- art. 12 of procl. 251/2001

  12. *Unconstitutional Law*

  If part of a given law is decided that it is unconstitutional unless otherwise found necessary, the effect of the final decision shall remain limited to only that very law.

- Results quashing of the nullified provision, not whole proclamation
- Further requires communication to concerned body to repeal/ amend the nullified provision (Art. 16)

- **Status of interpreted Provision**
  - Not clear but art. 12 indicates it is above nullified provision
  - Some argued its equivalent to constitutional interpretation

Pros and Cons of Ethiopian Constitutional Review Approach

STRENGTHS

A. Prevent judicial dictatorship & protect Legislative dignity
B. Periodical Changeability of members relatively capable to adopt current generation needs
C. Better position than courts to entertain socio-economic rights
D. System ensures harmonious r/nship b/n gov't organs b/c the CCI selection involves all gov't organs contribution
E. Unlike courts, HOF/Several CCI members involves representatives directly elected by people at least for State council.

Deficiencies of Ethiopian Approach

A. Independence & impartiality

- HOF is institutionally a political organ and composes political technocrats rather than professionals.
- Winners of each election constitutes their own constitutional adjudicator
- Term office of HOF/ most CCI Members are the term office of legislature except President & V/Pres. Of the CCI, unlike USA (death), Germany (single 12 yrs or retirement)
- No legal guidance that orders each member to act impartially
- There is neither permanent salary/benefit being a member of constitutional interpreting organ nor entitled to outgoing benefits.

B. **No Mechanism to address conflict of interest**

- Eg. Three designated members of HOF
- Interest on cases- Personal/political/ professional

- Fails to consider the notion of *"no one is judge is his own case"*
  - *Eg- President/vice pres- entertain the case at FSC cassation bench & CCI in case b/n Wedere Tachbele Vs Likke Gurmu*

C. **Not serve as counter majoritarian institution**, rather it is the replica of lower House (HPR). B/c

- party having great seat in HPR also have the same privilege in the HOF
- Members are appointees of state council, not directly elected to be a member of HOF

D. Less Competent Members

- Constitutional interpretation requires high level of expertise due to its complexity. But,
  - Most profile of HOF members are political electorate, not lawyers
  - They lack basic legal knowledge
  - No law requires minimum educational level nor composition of expertise
- CCI- even if it composes legal professional, their advisory opinion can't bind HOF members. Up on their willingness they disregards the recommendation

E. Less considers the internal diversity of largest ethnic groups

F. Participation of HOF in law making (art. 104ff, 55/6), Decision making (Art. 99), and appointments (art. 70) makes the institution less trusted to entertain constitutional claims arise on those issues impartially.

G. Less protects minority rights- the coalition of largest ethnic groups can deteriorates the interest of minorities

H. Separation of Power

- **Members-** Art. 68 prohibit horizontal simultaneous membership b/n HOF & HPR, but not from State Council (vertical). Hence, they act as Legislature at state and constitutional adjudicator at federal tier
  - Selection of 6 legal expert of CCI also not involves incompatible qualification from other organs
- **Functional-** HOF usurped the inherent power of judicial organ.
  - The judiciary can't control the constitutionality of acts of legislature and executive.
  - Conversely, the political organs of HOF controls acts of independent judiciary
- **Institutionally-** HOF is structurally Legislature, functionally Constitutional adjudicator

I. **Less ensures the Right of Access to constitutional Justice**
   - Hearing parties is optional up on the discretion of CCI
   - No exception to exhaustion of local remedy
   - Delay of cases
   - Part-time and periodical work, not regularly dispose each cases
   - Lesser discussion time on the issues

J. Non- representation of Federal cities (Addis Ababa & Dire Dawa) in the HOF b/c members of HOF represents ethnic group, not geography.



CHAPTER 10
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER THE FDRE CONSTITUTION

- Development of Human Rights traced back to more than 2000 years during interaction b/n system of administration b/n society and gov't
- Modern HR started in the 17th C after episode of Westphalia treaty- 1648
- But its debatable across generations on its concept
- This settled since WWII by
  - UN Charter
  - Bill of Rights (UDHR, ICCPR & ICESCR)

CLASSIFICATION OF HUMAN RIGHTS

- There is no universal standard to classify human rights
- UDHR doesn't classified human rights.
- Several scholars classify HR on different basis

1. HR belonging to Everyone Vs HR of Citizens

- **Everyone-** exercised by any person eg- Right to life, liberty, equality & religion
- **Citizen-** voting, association,

2. Civil& Pol. Rights, ECOSOC, & Group Rights

- Partly the result of cold war era ideological conflicts
- **CPR-** individuals are in focus
  - Mostly impose negative obligations
  - Includes the right to life, liberty, property
- **ECOSOCR-** depend on dev't of the country
  - requires positive obligations that
  - Includes the right to education, food, health.
- **Solidarity-** exercised in group/ collectively.
- Includes the right to dev't, env'nt, & self-determination

3. Generation based Classification

- Based on the period of emergence of HR

1st Generation- CPR- 1790s

2nd Generation- ECOSOCR-1850s

3rd Generation- Group/solidarity Rights since 1945

4. Individual Vs Group rights

- **Individual-** exercised by single person.
  - Most human rights framed as individual rights such as right to liberty, privacy, religion & life
- **Group rights-** only exercised by a certain group such as Women, children, association, development, minorities

- *Group rights doesn't exist without recognition of individual rights.*
- Also, the recognition of individual rights is not enough to protect Group rights.
- There is a kind of tension b/n rights
  - **Individual vs Individual rights** eg- the right to privacy vs freedom of expression of religion
  - **Individual vs Group Rights-** eg. The Right to equality vs the Right to Affirmative action

- There is also point of intersection/overlap on rights
  - Eg. Freedom of religion has both individual & collective aspect
- There is also interrelation & interdependence b/n HR
  - Eg- Right to life vs Right to Food
  - Freedom of Expression vs the Right to education

POSITION OF FDRE CONSTITUTION

- Classify into HR & democratic rights
  - HR- (Art. 14-28)- deals about individual rights
  - Democratic Rights- (Art. 29-44)- deals about Group rights
- In Ethiopia, more tendency given to Group rights over individual rights (Morality over Privacy)

FDRE CONSTITUTION & HR

- The only African constitution guarantees the right to secession
- Human right is one of the foundational principles of the constitution (Preamble)
- 1/3rd of the constitution deals about HR including NPPO
- Interpreted in light of IHR instruments adopted by Ethiopia – art. 13/2
- Impliedly recognizes inborn, interdependent, inviolability and inalienability of HR
- Provides more stringent amendment procedures – art. 105/1

- The constitution recognized both vertical and horizontal application of HR
  - Vertical- B/n state & individual-13/1
  - Horizontal- b/n individuals
- Ethiopia incorporates int'l HR instruments through three ways;

1. Expressly providing those rights
2. Making adopted IHR instrument as an integral part of the law of the land
3. Interpret inline of int'lly adopted HR instruments like UDHR, ICCPR & ICESCR, which limited to Ch- 3 provisions

- Accordingly, Derogability of rights are not interpreted according to int'l HR instruments adopted by the country
- Many rights are guaranteed to everyone, whereas several rights are reserved only for Ethiopians such as Art. 33, 38,39, 40, 41 &43
- The FDRE includes HR;
  - CPR- 15-27,29-33,37,38
  - ECOSOC-41,42, NPPO(Art. 85ff)
  - Solidarity Rights- 39,43,44

ENFORCEMENT OF HUMAN RIGHTS

- Int'l Human Rights (IHR) enforced & effective only when they are ratified by state parties
- Ways of including IHR into domestic laws

1. **Adoption-** Int'l treaties become part of domestic law through mere ratification (Art. 9/4)
2. **Incorporation-** Taking further domestic law procedures in addition to ratification
   - Eg- Publicizing all Content of laws in official gazette
   - Translate into domestic language

3. **Transformation-** requires amending of domestic laws or harmonizing existing law inline with IHR instruments

4. **Preference-** member state stipulates which law is prevail in the event of Contradiction eg. Art. 9/1

Ethiopian approach- Adoption, Transformation & Preference

GOV'T OBLIGATIONS TOWARDS HUMAN RIGHTS

1. **Primary level- duty to respect**

- Its about refraining from infringing human rights
- Respect autonomy of individual to exercise his/her rights
- Abstaining from arbitrary intervention
- Impose negative obligation on gov't

2. Secondary level – duty to protect

- Ensure HR from unjust interference by others
- Taking positive steps towards its effective enjoyment of rights. This includes
  - Enact law
  - Create institutional framework to prevent violation
  - Setting min. standards to prevent 3rd parties violation

3. Tertiary level- duty to fulfill

- Positively intervene and assist especially vulnerable groups of society
- Requires active involvement of political authorities
  - Right to housing- building condominium
  - Regulating economy & land
  - Public Health & educational institutions
- ECOSOC rights are primarily requires duty to fulfill, which depend on resource capacity of the country/ progressively realized rights

LIMITATIONS & SUSPENSIONS OF RIGHTS

- Human Rights-
  - Absolute- Art. 18
  - Limited- permanent & temporary /Derogations

Limitations of Human Rights

- Most human rights are not absolute
- Violation of rights are permissible/justifiable under exceptional circumstances
- **Structure of limitations**
  - Generalized- Art. 29/2 of UDHR
  - Individualized to provisions- FDRE constitution
  - Combined approach

- **Types of limitations provided under FDRE constitution**

A. Determined/established by law eg. Art. 15,17 & 19

B. Requires detail & compelling circumstances & specific laws to safeguard public interests
   - Art. 26/3, 27/5, 29/6, 30 &31

C. Silent---- Absolute (Eg. Art. 18) and subject to limitation (Art. 25 & 32)

International Standards/Principles of limitations

- They are cumulative elements

A. Principle of Legality- gov't shouldn't limit arbitrarily, rather by specific laws
B. Principle of legitimacy/necessity- legitimate purpose
C. Principle of Proportionality- refrain from using disproportionate/ excessive forces

- Most FDRE constitution provisions doesn't provide them cumulatively.
- Eg. Art.- 15- neither legitimacy nor proportionality principle

Suspension of Rights

- Deals with Human rights situations during state of emergency
- Most Human rights provisions are temporarily suspended during state of emergency
- **Definitions**
  - It's a situation which affects/may affect the public order or endangers the security of state or may cause the country or any part of the country fall into a state of difficulty
  - In effect it leads to temporary suspension of rights which is called derogation
- Its aimed to strike balance b/n sovereign right of gov't to maintain peace &order and protection of individual rights from abuse by state during such exigencies.

- **Standards set to comply during state of emergency - Art. 4 of ICCPR**
  A. **Exceptional Threat-** Emergency measures can only taken when the life of the nation is threatened
  B. **Declaration-** state of Emergency must officially proclaimed
  C. Measures taken must be **proportional**
  D. **Intelligibility-** No Derogation are made on core rights
  E. Measures Should be **non discriminatory**
  F. **Communication** to other States & UN
  G. The Measure should be **consistent** with other obligation of International Treaties
- Above principles are applicable to both derogable & non-derogable rights

- **Non Derogable Rights Under ICCPR- Art. 4/2**
  A. Right to life- Art. 6
  B. Freedom from torture or cruel inhumane or degrading treatment or pun't- Art. 7
  C. Prohibition against slavery/to be held in servitude- Art-8
  D. Imprisonment for inability to discharge contractual obligation- Art. 11
  E. The Right not to be subjected to retroactive legislation- Art. 15
  F. The right to be recognized as person before the law- art. 16
  G. Freedom of thought, Conscience & religion- art. 18

Key Component elements of State of Emergency

i. **Legal Framework-** Constitutional & legve basis for state of Emergency
ii. **Institutional Framework-** organizational structure and plans dealing with state of Emergency

Which Branch deals with state of Emergency?

A. **Executive Model-** Executive organ declare state of emergency & Inform to parliament Eg. USA
B. **Parliamentary Model-** Declared by legve organ eg. Hungary
C. **Hybrid-** Excve declares State of Emergency, but must be ratified by parliament eg. Germany

ETHIOPIAN APPROACH- ART. 93

- **Grounds**
  A. External invasion
  B. Breakdown of law & order which endanger constitutional order & not controlled by regular enforcement agencies & personnel
  C. Natural disaster
  D. Epidemic occur
- Federal gov't power- declare on A- D
- Regional gov't power- C& D

Branches Declare State of Emergency

- **Federal- Hybrid** of Executive & Parliamentary model b/c COM declare & then approved by parliament (Art. 93/1A cum Art. 55/8 of Fdre Constn)
- **State- Executive Model-** art. 93/1B

C. Non- Derogable Rights

- **Art. 18-***Prohibition against Inhuman Treatment*
- **Art. 25-***Right to Equality*
- **Art. 39 (1&2)-***Rights of Nations, Nationalities, and Peoples*

- But most regional states constitutions non derogable right is consistent with ICCPR
- While some regional states, in contrast, provides lesser protection than FDRE
  - Eg- Afar- art. 39/1 & 2 & Somali constitution (Art. 18 & 25) makes derogable rights, which the FDRE constitution makes them non derogable

- **Problems**

1. Art. 13/2 doesn't apply to art. 93 b/c interpreting of FHR conforming to human right instruments are limited to Chapter three (Art. 13-44)
- Hence, non-derogable rights of ICCPR incorporated into FDRE constn through interpretation.

2. The FDRE constitution doesn't include the SOE pples, particularly;
   - Non discrimination principle
   - Communicate to state parties

ROLE OF D/T INSTITUTIONS DURING STATE EMERGENCY

I) HPR

- Approve/reject Sta. of Emergency (SOE) declared by COM
- Decide on renewal/discontinuance of SOE every four months
- Establish SOE Inquiry board

II) Judiciary Role

- FDRE constitution- Silent
- Other countries, like South Africa &Kenya, judiciary is empowered to review measures of state during state of emergency.
- Such power given to SOE inquiry board in Ethiopia
- Besides, UN General Comment, on SOE, No. 29 para. 14 empowers judiciary to perform normal functions like
  - Trial & Conviction by regular Court
  - Speed Trail before the court

III) Council Of Ministers (COM) Role

- Decree State of Emergency(art 93/1)
- Take all necessary power to protect country's peace and sovereignty and to maintain public security, law, and orders (art. 93/4A).
- Suspend political and democratic rights contained in the constitution to the extent necessary to avert the conditions (93/4B).
- Refrain from suspending or limiting rights provided in art. 1, 18, 25 and 39(1) and (2).

IV) State of Emergency Inquiry Board Function- Art. 93/5

a) To make public within one month the names of all individuals arrested on account of the state of emergency together with the reasons for their arrest.
b) To inspect and follow up that no measure taken during the state of emergency is inhumane.
c) To recommend to the Prime Minister or to the Council of Ministers corrective measures if it finds any case of inhumane treatment.
d) To ensure the prosecution of perpetrators of inhumane acts.
e) To submit its views to the HPR on a request to extend the duration of the state of emergency.

HUMAN RIGHTS INSTITUTIONS

- Deals with Institutions other than gov't organs
- FDRE constitution empowers HPR to establish Human Rights Commission & Ombudsman

1. **Human Rights Commission**

- Art. 55/14 empowers HPR to establish HRC
- HPR established HRC by Procl. 210/2011
- HRC responsible to HPR
- HRC officials are appointed to serve for 5 years with possibility of re-appointment by 2/3rd of HPR vote

Objectives

- To create awareness through public education
- Ensure respect, protection and enforcement of HR
- Take appropriate measures when HR violated

Jurisdiction & Power

- Entertain human right issues occurred in any region
- Ensure observance, & respect for HR of citizen, gov't, political party & Ngos…etc
- Recommend for revision of laws & policies
- Consultancy service on HR matters

- Translate int'l HR instrument into local languages
- In providing remedies, gives priority for Amicable dispute resolution
- Its recommendation is not binding

Contributions

- Promote efficient enforcement of law
- Release some unlawfully detained individuals
- Fund to HR organizations like EWLA
- Reduce burden of courts

Limitation to jurisdictions/ exclusionary rule

- Complaints pending before HOF, HPR & regional Councils
- Complaint pending before courts

Ombudsman

- Its an autonomous institution to address issues of maladministration with the view to bringing good governance.
- Serve as one institutional mechanism for settlement of disputes, using negotiations as one way of resolving problems and attaining win-win settlement of disputes b/n gov't & citizens

Ethiopia

- Art. 55/15 empowers HPR to establish HRC
- Ombudsman established by Procl. 211/2011
- Accountable to HPR

Objective

- Rectify/prevent unjust decisions and orders of Executive organ & their officials
- Ensure individuals easy access to remedies of maladministration
- Bringing high quality, efficient and transparent good governance.

Institutional Framework

- Officials are appointed every five years by 2/3rd majority of HPR with the possibility of reappointments
- Chief ombudsman are accountable to HPR and other officials are accountable to him
- His mandate is limited to entertaining maladministration within executive

Function

- Receive & investigate complaints of maladministration
- Supervise administrative directives & decisions with constitution

Limitations of Functions

  - Not investigate decisions of legive
  - Cases pending before courts
  - Decisions given by security forces & defence in r/n to national security or defence
  - Matters under investigation of auditor general
- In resolving disputes, they give priority to amicable dispute resoltions

Fixing Overlap of Functions with Ombudsman

- Determined by mutual agreement
- Disagree- the entity first received the complaint first proceeds

Failure to Observe HRC & Ombudsman Recommendation

- Fail to comply with report Without reason may entail 3 month- 5 years prison and/or fine.

OTHER HUMAN RIGHTS INSTITUTIONS

1. **Ethiopian Human Rights Council**

- An independent NGO
- Established in 1991 by academicians, professionals & business persons

Objective

  - Strive to promote Democracy, HR & rule of law
  - Do not have political program
- It's the only HR organization monitors HR violations in Ethiopia
- Membership is open to all individuals residing in abroad/ Ethiopia

2. Human Rights & Peace Center

- Established at AAU in 1991
- Aimed to promote HR through;
  - Teaching HR & humanitarian law
  - Prepare & collect teaching materials & publications
  - Training personnel's

3. Inter-Africa Group-1991

- Regional organization working on Horn of African countries of Ethiopia, Eretria, Sudan, Somalia & Djibouti
- Provide humanitarian assistance & relief to victims of civil strife & war in the region.
- Create awareness on HR & democracy issues through various media Means.

4. Charity & society organizations (CSO/NGO) towards ensuring HR in Ethiopia

- Many int'l & regional HR instruments obliged states to create conducive environments for CSO to foster their contribution to social, economic & political governance
- In other countries, CSOs & opposition parties have great contribution to advancement of HR & democracy
- Art. 31 of FDRE constitution guarantees the right to association of everyone for any cause or purpose
- Ethiopia adopted CSO law by procl. 621/2009.

The proclamation Classified NGOs into three

A. Ethiopian CSO

- Only Ethiopian members
- Generates income from Ethiopia
- Wholly controlled by Ethiopians
- Receive less than 10% of their fund from foreigners

B. Ethiopian Residents CSO

- Consist members reside in Ethiopia
- Receive more than 10 % of their fund from abroad sources

C. Foreign CSO

- Formed under the law of foreign country or
- Consist members of foreign national or
- Controlled by foreign national or
- Receive 10% of their fund from abroad sources

- Ethiopian CSO have a wide rights to engage in wide range of activities including HR & good governance issues
- They are denied the right to appeal against CSO agency decisions
- All CSO are required to be registered
- It may be refused by CSO agency
- Formerly accountable to Ministry of Justice

Activities prohibited to Ethiopian Residents CSO or Foreign Charities

  - Advancement of Fundamental Human rights
  - Promotion of equality of NNP, gender & religion
  - Promoting rights of disabled and children
  - Conflict resolution and reconciliation
  - Efficiency of justice & law enforcement services

- Above activities are reserved only to Ethiopian CSO.

- Up to 2012 only two Ethiopian CSO's are work on HR issues namely
  - Prison Fellowship & Justice for all
  - National coalition of Women against HIV/AIDS
- CSO agency have broad role of supervisory oversight such as
  - Notify their meeting to agency
  - Suspend their officials
  - Required to submit statement of accounts, annual activity report & bank accounts

- In general, Most foreign based CSO activity are only limited to dev't al activities set by gov't
- However, many int'l, regional and foreign countries recommends Ethiopia to repeal the law, particularly UND declaration on HR defender states
  - Impose duty on states to refrain from restriction of access to foreign funding
  - Obliges states to facilitate access to funding of CSO's
- Restriction of foreign funding indirectly violates freedom of expressions

Impact of the Law

- EWLA & EHRICO, prominent HR NGOs, obliged to close some of their branches & reduce Human resources due to shortage of fund
- Many NGOs previously work on HR changed their title to dev'tal activities eg. APAP
- In regions, EWLA limited to Voluntary legal aid rather than representing their clients in court
- Constitutional complaint is limited directly to victim, not by representation

- **Opposition political parties**
- They are major actors in constitutional review due to
  - Defend their own direct interest
  - Challenge laws & other decisions violate constitutional provisions
- Ethiopia- vice versa
  - Distrust of HOF
  - Lack of resources



- **Muluken Kassahun, Meu School of Law, 2011 E.C**