

# **Chapter Seven**

## **Horizontal and Vertical Division of Powers in constitutions**

# Introduction

- *"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."* (James Madison, The Federalist Papers No. 51).
- Power Must be distributed! Power concentrated in one organ or person is dangerous for liberty.
- In order to control government constitutions provide for two forms of distribution of powers
- The power division between the three branches of Government (Separation of Powers) and
- Power division between the Federal and Regional/provincial Governments (Distribution of powers)

# The Concept of Separation of Powers

- **Meaning**

- Separation of powers means division of the legislative, executive, and judicial functions of government among separate and independent bodies.
- The three organs of the government—Legislature, Executive and Judiciary— perform the three essential functions of law-making, law-application and law- adjudication.
- It is universally accepted as the best way of organizing the government.
- These three functions are inter-related and inter-dependent. But these are performed by three different organs.

- The **Theory of Separation of Powers** holds that the three organs of government must be separate and independent from one another.
- The intent is to prevent the concentration of power and provide for checks and balances.
- Historically the idea was entertained by Aristotle, John Calvin, John Locke.
- Elaborated more by Montesquieu ( Book, the spirit of the Laws, 1748)
- In practice the incorporation of the idea in the American constitution 1789 by the founding fathers Madison, Hamilton and Jefferson popularized the idea.

- **Pure theory of Separation of Power:**
- According to this concept, in order to retain political freedom, it is necessary to strictly separate the state apparatus into legislative, executive, and judicial branches.
- Each of these powers must be restricted to the performance of its own function and may not be authorized to interfere with the function of any other.
- In Vile's approach, no person may be a member of more than one power.
- the pure theory have never been accepted in legal provisions or political practice.

# • **Criticism of Theory of Separation of Powers**

- Complete Separation is not possible
- Complete Separation is not desirable
- The three Organs of Government are not equal
- Lead to deadlocks and inefficiency
- Liberty does not depend only upon Separation of Powers
- Separation of Functions and not of Powers
- All scholars accept that absolute and rigid separation of powers is neither possible nor desirable.

- **Doctrine of Checks and Balances**

- The Doctrine of Checks and Balances holds that no organ of power should be given unchecked power in its sphere.
- The power of one organ should be restrained and checked with the power of the other two organs.
- In this way a balance should be secured which should prevent any arbitrary use of power by any organ of the government.
- To prevent one branch from becoming supreme, protect the minority from the majority, and to induce the branches to cooperate, government systems that employ a separation of powers need a way to balance each of the branches.

- **Separation of Powers in Parliamentary and Presidential Systems**
- Parliamentary systems are characterized by no clear (cut) separation of powers between the executive and legislative branches.
- Parliamentary systems are typified by a fusion of powers between the legislative and executive branches.
- Consequently, the same individuals serve concurrently as the leadership of the legislative body and of the executive authority.

- Departs from Montesquieu's ideas, but clear differentiation of legislative and executive functions exist.
- Separation of powers: In a presidential system presidents and members of the legislature are separately elected for a given length of time.

# **Separation of Powers under the FDRE Constitution**

- The FDRE Constitution lays down two types of power distribution. Separation of powers and Division of powers.
- **Separation of Powers**
- Under the FDRE we have three branches of government. the Legislative ( HOPR & HOF) , the Executive ( The PM and CM) and the Judiciary ( the Courts).
- **The Legislative**
- The legislative institutions of the federal government are the two federal houses known as house of people representatives and house of federation.

## **The House of Peoples Representatives (HOPR)**

- **Composition**

- Elected for a term of five years by popular vote from each electoral district.
- The house of people's representative (HOPR) is one of the organs placed under the legislature.
- It is the highest authority of the federal government.
- Plays many important roles and functions including financial, deliberative, representative aspects.
- It has legislative power on all matters assigned to the Federal Jurisdiction ( Art 55)

- Its jurisdiction as exhaustively enumerated under Art 51(1-21). Mainly:
- Protection and defense of the constitution;
- Policy formulation in political, economic and social matters etc.
- Formulate Fiscal and monetary policies of the country .
- Approve appointments to different organs:
- Control the executive
  - Call and question the prime minister and other federal officials.
  - Discuss any matter pertaining to the powers of the executive and may take any discussion and measure it thinks necessary.

## **The House of Federation (Non-legislative Second chamber )**

- The House of Federation is the “upper house” of the parliament. Also called the “second chamber”.
- The FDRE constitution fulfills the minimum requirement of having a second chamber but with a totally different function.
- Composition : Composed of the NNPs of Ethiopia
- It is a special body representing the NNP of Ethiopia as a collective organ with specific powers listed under Art 62.

- The Main powers and functions of HOF are:
- **Defense and Protection** of the constitution and constitutional order
- **Constitutional Interpretation** with the support of the council of constitutional inquiry.
- **Promotion of the equality & unity** of NNPs unity with their mutual consent.
- **Financial Power:** Division of funds between the Federal & State governments

- It is not a legislative, executive or a judicial organ.
- The only provisions we can trace legislative functions of the HOF are Article 99, 62(7) and 105.
  - To determine undesignated power of taxation (concurrently with the HOPR)
  - To determine the division of revenues derived from joint Federal and State tax sources, and the subsidies that the Federal government may provide to the States;
  - To amend the constitution.
- All the remaining law making power under the FDRE is monopolized by the lower house the HOPR

## The Executive

- The Executive under FDRE is composed of:
  - The Head of Government ( the Prime Minister)
  - The council of Ministers
  - The office of the President
  - Various administrative organs
- In Ethiopia the highest executive power is vested under the Prime Minister (PM) and the Council of Ministers (CM) (Art. 72(1))

- The Prime Minister
- The Prime Minister is elected by the House of People's Representative from among its member's (art.73(1))
- Different to the president the prime minister is not required to vacate his parliamentary seat on becoming prime minister.
- **Functions**
- Here, the executive responsibilities is assumed by the party of coalition of parties constituting the majority in the house of peoples representatives, the leader ship of prime minister shape the direct and visible linkage between politics and government.

- The constitution also empowered the prime minister with the power to:
- lead and co-ordinate the activities of the council of ministers.
- He ensures the implementations, of laws, policies and directions adopted by the house of people's representatives and by the council of ministers.
- Further he ensures the efficiency of the federal administrative and takes such corrective measures as are necessary.

- **The council of Ministers (Art 76)**
- The council of ministers is the one branch of the executive.
- **Composition**
- Its membership includes the Prime minister, Deputy Minister, Ministers of the federal government and other officials whose membership has been determined by law .
- **Powers:**
- The council of ministers has the power to decide on the organizational structure of all administrative agencies and coordinating their activities and providing leadership.
- Formulation of foreign policies and exercise over all supervision over its implementation,
- The protection of patents and copy rights.
- The providing of uniform standards of measurement and calendar

- The power to **select commissioners**, auditor General, and president and deputy president of the federal Supreme Court (which are part officials of the federal Government) is vested in the prime minister and it is the house of people's representatives, which approve and appoint them.
- Further the constitution gives the prime minister the over all supervision power over the implementation of the countries foreign policy.

- **The Judiciary**

- Court structure in Ethiopia: Federal and State Courts
- The constitution provides for the three layered structure of court system at the federal level; thus are federal supreme court, federal high court and federal first instate courts.
- The constitution gives a power to federal Supreme Court in case of cassation, review and correct any final decision of a basic error of law Including decisions of federal court and state supreme courts.
- There is a doubt that to decision of state Supreme Court may be changed in the case of cassation may result reduction of the strength of the federal system and destroying the power and authority of supreme courts.

## • **Executive-Legislative Relation in Ethiopia**

- Ethiopia has adopted principle parliamentary sovereignty subject to the supremacy of the constitution (Article 9).
- Parliament as ‘the highest authority of the Federal Government’
- The idea that the executive comes from and remains accountable to parliament is expressly provided in the Ethiopian constitution.
- As far as the establishment of the government is concerned, it is stipulated ‘The Prime Minister shall be *elected* from among members of the House of Peoples’ Representatives (HoPR) (Art 73(1))

- According to Art 74 the PM is required to submit nominees for ministerial posts to the HoPR for approval.
- While stating the power of the HoPR, it is stated 'It (HoPR) shall approve the appointment of ... members of the Council of Ministers, Commissioners....' Art 55(13)
- Furthermore the constitution unequivocally states the PM and the Council of Ministers are accountable to the HoPR.

- However in practice Parliament's role as an institution of democracy is highly dependent on intra party democracy.
- If the party is internally authoritarian, the parliament will end up becoming 'rubber stamp' for the executive wing that is often composed of senior leaders of the party.
- The executive will prevail throughout the process.
- As a result, parliament's supremacy is replaced by executive supremacy or cabinet dictatorship that in itself being the result of party autocracy.

- **Independence of the Judiciary**

- Implicit in the notion of separation of powers is the fact that the judiciary has a crucial role in resolving disputes impartially, ensuring the rule of law and in setting limits to power.
- Yet in Ethiopia the legislature has sought to take away power from the courts, placing them in quasi-judicial bodies within the executive.
- The judiciary has also failed to check that the executive is acting within the framework of the law.
- The overall assessment is that the judiciary has not yet defined its role; has not properly interpreted the concept of separation of powers; and has not yet become a key organ for enforcing human rights.
- The judiciary has abdicated its core function of reviewing acts and decisions of the executive and administrative agencies and is in danger of paving the way for arbitrary and unchecked government.

- **The State Government**

- State governments like that of the federal government, have all the three government branches; the legislative, executive and judiciary.
- The powers of the state government are those powers, which are not clearly given to the federal government, are reserved to the state under article 52 (2) of the constitution as the general rule.

# Chapter Eight

## Forms of State

# 8.1. Unitary States, Federations & Confederations

- **Unitary Government**

- In a unitary form of government, all the power rests in a central government.
- The country may be divided into states or other sub-units, but they have no power of their own.
- For example, England depends on its Parliament, a legislative body, to create and enforce the laws in the country.
- The leader of the nation, the Prime Minister, is a member of the Parliament and does not have any more power than its members.

- **Confederation**

- The confederal form of government is an association of independent states.
- The central government gets its authority from the independent states.
- Power rests in each individual state, whose representatives meet to address the needs of the group.
- America tried a confederal system before writing an entirely new constitution.
- This type of plan didn't work for us because the states did not give the central government enough power to do its job.

## Definitions Continued...

- **“Federations:** Compound polities, combining strong constituent units and a strong general government, each possessing powers delegated to it by the people through a constitution, and each empowered to deal directly with the citizens in the exercise of its legislative, administrative and taxing powers, and each with major institutions directly elected by the citizens.” ( R. Watts,2008.p.10)
- A federal form of government splits power between independent states and a central government. The power rests in both places, and each gets its authority from a governing document, like the U.S. Constitution. Independent branches inside the central government may also share power.

# Federations vs. Confederations

- **A Confederation** : is a **union of states in a body politic in** contrast to a federation that is a union of individuals in a body politic, suggesting the unity of one people or nation. (Burgess 2004: 30)
- They occur where several **pre-existing polities** join together to form a common government for **certain limited purposes** : (for foreign affairs, defense or economic purposes)
- The common government:
  - Is **dependent** upon the will of the constituent governments,
  - **Composed of delegates** from the constituent governments,
  - Have only an **indirect electoral and fiscal base**.

### Federal System

Power is shared by a powerful central government and states or provinces that are given considerable self-rule, usually through their own legislatures.

Examples: The United States, Australia, the Federal Republic of Germany.

### Unitary System

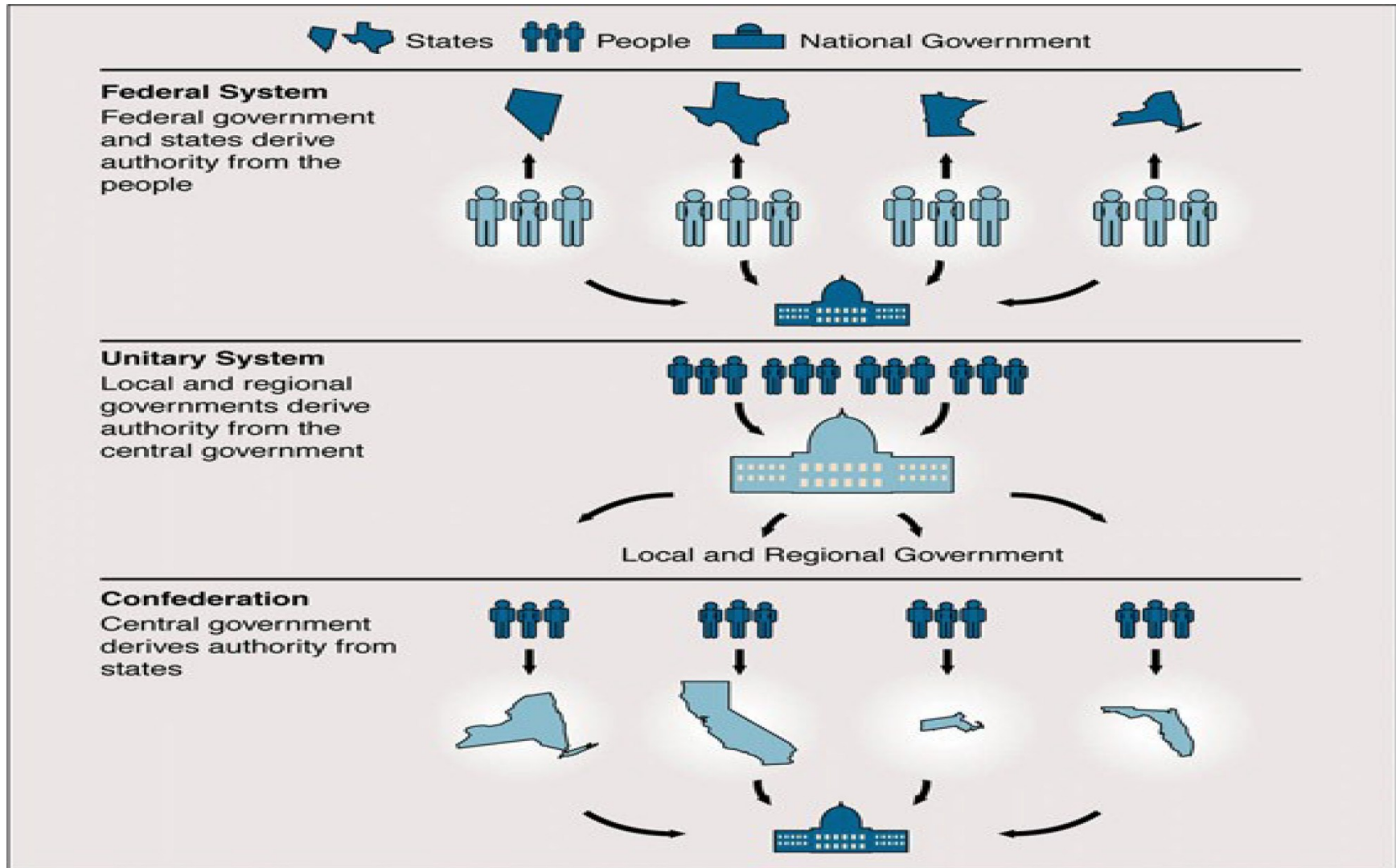
One central government controls weaker states. Power is not shared between states, counties, or provinces.

Examples: China, United Kingdom (although Scotland has been granted self-rule).

### Confederal System

Weak or loose organization of states agrees to follow a powerful central government. Nations can choose to follow or not follow the lead of the weak central government. Examples: The Commonwealth of Independent States (CIS), formerly known as the Soviet Union. Also, Switzerland's canton system and the Confederate States of America (1861-1865).

# The Federal, Confederal and Unitary systems of Governments



# 8.3. Common Features of Federations

- The generally common structural characteristics of federations as a specific form of federal political system are the following:
  - 1. at least **two orders of government**,
    - one for the whole federation and the other for the regional units,
    - each acting directly on its citizens;
  - 2. A formal **constitutional distribution**
    - of legislative and executive authority
    - and allocation of revenue resources between the two orders of government
    - ensuring some areas of genuine autonomy for each order;

## Common Features of Federations Continued...

- 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;

## **Common Features of Federations Continued...**

- **5. An umpire with power to interpret the constitution**
  - (in the form of courts, provision for referendums, or an upper house with special powers);
  - To deal with Constitutional disputes on power
- **6. Processes and institutions to facilitate intergovernmental collaboration**
  - **For policy coordination**
  - In those areas where governmental responsibilities are shared or inevitably overlap.

# Different Types of Federations

- One can differentiate one form of federalism from another on two bases: the first is based on its origin the second is based on its foundation.
- **Centripetal and Centrifugal Federations**
- **Nation state Federations and Multinational federations**
- **Coming together and Holding together Federations**
- **Dualist Federations Vs Cooperative Federalism**

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

- Nation state Federations Vs. Multinational Federations
- **What kind of federal arrangement?**
- Geographic based or Ethnic based? Why?
- Nation-state federations intended to accommodate geographic economic diversity in a homogeneous society.
- States are carved based on administrative convenience. No consideration of self rule for ethnic, religious etc...groups.

## **Relevance of Federalism for Ethiopia**

- Multinational federations intended to accommodate ethnic, linguistic, cultural and religious diversity in extremely diverse society.
- Internal boundaries drawn to reflect internal ethnic, linguistic, etc diversity.
- Based on this what kind of federal system is appropriate for a country like Ethiopia?

## 8.4. Allocation of competence in Federations

- **Who Does What and How?**
- There are two broadly different approaches to distributing powers within federations: the dualist and integrated models. Many countries have elements of both.
- The dualist model typically assigns different jurisdictions to each order of government, which then delivers and administers its own programs.
- The integrated model provides for many shared competences and the constituent-unit governments often administer centrally legislated programs or laws.

# Form and Scope of Distribution of Powers in Federations

- **Two Models for Assigning Legal Powers**
- There are two broadly different approaches to distributing powers within federations:
  - the dualist and integrated models.
- Many countries have elements of both.
- The dualist model typically assigns different jurisdictions to each order of government, which then delivers and administers its own programs.
- The integrated model provides for many shared competences and the Regional governments often administer centrally legislated programs or laws.

## Models for division of Powers

- The federal government's departments are thus present throughout the country.
- In practice, the dualist model does not achieve a neat separation of powers because many different responsibilities of governments are themselves intertwined.
- In all dualist constitutions there are some shared or concurrent powers in which both orders of government can make laws.
- Canada, Brazil, and the United States are examples of largely dualist federations.

## Models for division of Powers

- Under the integrated (or interlocking) model of federalism, most matters are concurrent.
- The governments share roles. While the federal government enacts laws on concurrent matter the administration of the law is left for the states.
- Thus the central government has a small civil service in the regions, largely limited to its areas of exclusive competence. This model is also sometimes called administrative federalism because the principal powers of the constituent units are administrative.
- Germany, Austria, South Africa, and Spain follow the interlocking model.

# **Types of Powers In Federations**

- **Five Categories of Powers**
- **Exclusive Powers**
- **Residual Powers**
- **Concurrent Powers**
- **Framework Powers**
- **Implied Powers**

# Types of Powers

- **Exclusive powers**

- Powers entirely left for the monopoly of one order of government., either the federal or local.
- The assigned order of government can exclusively exercise this power without interference.
- Different approaches Exist:
- Exclusive Federal list and residual power to states. Eg.USA
- Exclusive State list and residual to Federal. E.g. Canada.
- Two list of exclusive to federal and state and concurrent list. E.g. India.

# Types of Powers

- **Residual Powers**

- Those powers which are not included in the exclusive or shared powers between governments.
- Most of the time they are not enumerated because they are unforeseen.
- If residual power assigned to regions it supports their autonomy.
- If assigned to the federal government it strengthens the center.

# Types of Powers

- **Concurrent Powers**

- Are powers shared between the federal and state governments.
- May exist in many ways.
- Separate listing
- Dispersed in the constitution
- Acquired through practice and convention.

# Types of Powers

- **Framework Powers**

- Similar to concurrent powers as both the federal and regional governments play a role in exercising it.
- Are powers enactment of which is by federal legislature and its implementation is left for states.
- Federal legislature makes general policy guide line and states enact specific laws to implement it in their context.
- E.g. Germany, Ethiopia

# Types of Powers

- **Implied Powers**

- Powers which are not specifically listed in the constitution but are implied from the existing exclusive list.
- These are powers which are considered necessary and proper for executing the enumerated powers. i.e. matters incidental to the execution of power.
- Eg. The commerce clause.

# Main Contents of Federal Powers

- 1. Powers necessary for the **continued unified existence** of the federation and hence inherently federal by their nature.
  - E.g. National defense, international or foreign relations, citizenship, immigration and naturalization, and other powers inherently intrinsic to these powers.
- 2. **commercial powers** that are essential for facilitating local as well as international trade.
  - E.g. interstate commerce, postal and telecommunication services, weight and measures, domestic currency coinage and foreign currency usage, and banking, insurance, patents and copyright.

# Main Contents of Federal Powers

- 3. Powers that enables **central government to implement powers** mentioned in the first and the second category.
  - E.g. powers over rail, air, water and road adjoining two or more states transports
- 4. Powers dealing with various **protection of various social and political issues**.
  - E.g. legislations concerning electoral laws, criminal laws and procedures as well as enforcement of laws of political rights such as press, demonstration and registration of political parties

# Main Contents of state Powers

- 1. Powers dealing with public services
  - E.g. Primary/Secondary education, Health care, Municipal affairs,
- 2. Powers dealing with local security and justice
  - E.g. Police, courts etc
- 3. Powers relating to preservation of diversity
  - E.g. Cultural, linguistic issues

# Division of Power under the FDRE

- **Federal Powers**

- Under the FDRE constitution, Art. 51 the federal government is assigned the responsibility on:
- National defense, foreign relations, monetary policies, foreign investment and the establishment and implementation of national standards on health, education, science and technology.

## **Division of Powers under FDRE**

- **State Powers**

- The nine regional states have equal powers and duties.
- Under Art.52 The Regional states are empowered to:
- Establish their own administration with responsibility for the state's civil service, law and order and the state police force.
- Regional states formulate and execute Regional State laws, economic, social, and developmental policies and strategies as well as administer their own budgets.
- Above all, Regional States are empowered to adopt and implement their regional constitution.

## **Division of Powers under FDRE**

- **Concurrent Powers in Ethiopia**

- E.g. Art.98 Concurrent Power of taxation, and on Civil and Criminal laws

- **Framework Powers in Ethiopia**

- Federal government setting standards and principles but implementation left to regions.
- Education, Public health, rural land administration, preservation of culture and history.
- Social, economic & development strategies.

- **Implied Powers in Ethiopia**

- No clear indication but as some federal powers are broadly designed, there is probability of implied powers in the future.

# Division of executive Power in Ethiopia

- In Ethiopia, each government has the power of legislation and execution on matters that fall under its respective jurisdiction.
- Federal laws are, therefore, implemented through the federal executive unless otherwise provided by the Constitution.
- There are cases where the Constitution permits the central government to reserve legislative power for itself and to leave its administration to the states.
- E.g. When the federal government delegates its powers and functions to be administered by the states, as prescribed in Article 50 (9).
- E.g. When the federal government enacts law for the utilization and conservation of land and other natural resources, historical sites and objects, but its administration is reserved for the states.
- E.g. The power to establish national standards concerning public health, education, science and technology is reserved for the centre though the provision of these services is left to the states (Article 51 (3)).

# Important Concepts of Fiscal Federalism

- **The major issues of fiscal federalism are summarized as:**
- **1. Allocation of expenditure responsibilities**, which deals with the issue of which item of power of spending should be carried by which level of government;
- **2. Allocation of revenue raising power**; which deals with the issue of which types of taxes should be levied and non tax revenues should be assumed in which jurisdiction by which level of governments;
- **3. Fiscal imbalance**, deals with the fiscal mismatch between the expenditure responsibility and revenue sources . The imbalance between the tires of government and disparities between them in executing their respective responsibilities; vertical and horizontal imbalances; and
- **4. The intergovernmental financial transfer**; which deals with the issue of financial flows between the federal and the states and among the states; vertical transfer and horizontal transfer in order to adjust the imbalance and keep a viable federal system.

# General Principles of the Division of Taxation Power

- **Economist's Theory for Division of Taxation Power.**

- In relation to taxation, the traditional normative view set out by Musgrave are:
- 1. Taxes suitable for economic stabilization should be central;
- 2. Progressive redistributional taxes should be central;
- 3. Personal taxes with progress rates should be levied by the jurisdictions which are most capable of implementing a tax on global base;
- 4. lower level governments should tax bases with low mobility between jurisdiction;
- 5. Tax bases distributed very unequally between jurisdictions should be centralized; and
- 6. Benefit taxes and urban charges might be appropriately used at all levels.

## Division of Taxation Power

- The method of allocation of revenue in federal systems is theoretically intended to follow the division of the expenditure responsibilities.
- The **allocation of the entire revenue** sources either to the center or the states has different problems in federal system.
- In principle, there should be a framework in which each tier of government can raise its own finances without a conflict between them.
- In practice, the degree of tax autonomy in each level of government is enjoyed demonstrates wide variation in federations.
- The methods employed by federations can be summarized into three:
- Exclusive power of taxation, concurrent power of taxation and shared power of taxation.

## Division of Taxation Power

- In the **exclusive power of taxation**, the constitution assigns several tax sources to the federal government and to the states separately, allowing each to have exclusive tax power within its sphere.
- **Concurrent power** exist when the constitution allows both levels of government to exercise the power to levy, collect and apportion in relation to some or all taxes.
- The federal and state governments have equal constitutional authority to levy the same kind of tax with respect to the same category of persons, businesses or particular things.
- This overlapping of specific types of taxes may lead to competition and conflict between them.
- **Shared power of taxation** means the constitutional reservation of the power to levy taxes to the federal level, but it guarantees the states' right to some or all of the proceeds from specific taxes

# **The Structure of Taxation Power in Ethiopia**

- The FDRE Constitution divides the taxation power into three categories, namely:
  - ‘the federal power of taxation’,
  - ‘the state power taxation’ and
  - ‘the concurrent power of taxation’.
- **I. Federal Power of Taxation**
- The FDRE Constitution under Article 96 enumerates the exclusive revenue sources of the federal government.

# The Structure of Taxation Power in Ethiopia

- **1. Import and Export taxes and Customs duties**
- **2. Income Tax**
- Except customs duties and import and export taxes other revenue sources from income tax, sales and excise tax, property taxes and charges and fees are assigned to tiers of governments.
- The exclusive domain of each government is not the tax base but the tax source. Hence, it does not result in taxing the same tax source by both levels of governments.
- Personal Income Tax from employees of federal government, income from rail, air, and sea transport etc

# The Structure of Taxation Power in Ethiopia

- **3. Sales and Excise Taxes** from public enterprises owned by the Federal Government
- **4. Fees and Charges** and stamp duties for services provided by federal organs
- **5. Other Revenues** from Federal Enterprises and Properties.
- **II. State Power of Taxation**
- The lists under **Article 97** entitled 'state power of taxation' enumerates those tax bases shared from the federal tax competence based on different category of taxpayers or particular things.
- Therefore, except custom duties, all tax bases are also the source of state revenue.

# The Structure of Taxation Power in Ethiopia

- **1. Income Tax of states,**
- Income from employees of the states; Profits of the state owned public enterprises, small business activities and sole proprietorships; Income from individual farmers or cooperative association; Income from water and transport services ;Rental income from properties owned by the state.
- **2. Sales and Excise Taxes from** public enterprises owned by them and individual traders within their jurisdiction.
- **3. Property Taxes** On houses which are privately owned, land which is used by *usufructuaries* and royalties from the use of forests royalties on small-scale mining activities, land lease payment from investors
- **4. Fees and Charges** on license issued and services rendered by different organs of the state.

# **The Structure of Taxation Power in Ethiopia**

## **• III. Concurrent Power of Taxation**

- The FDRE Constitution provides the source of concurrent taxes under Article 98. These sources are:
  - Profit, sales, excise and personal income taxes on enterprises they ( state and Federal) jointly establish,
  - Taxes on profits of companies and on dividends due to shareholders, and
  - Taxes on incomes derived from large-scale mining and all petroleum and gas operations and royalties on such operations.
- Mobility and Redistribution Factors seem to be considered here.

# **Chapter Nine**

## **Constitutional Interpretation**

- **Meaning**
- **Constitutional interpretation** also called **constitutional construction**,
- Is 'the activity aimed at extracting from a written constitution the general normative content and specific meaning of its provisions'.
- It is not however only assigning certain meaning to the constitutional text. It has a lot to do with maintaining the supremacy of the constitution.
- Is the process by which legal decisions are made that are justified by a constitution.
- Constitutional controversies are about whether an official act is consistent with, and authorized by, a constitution or constitutional statute or court decision.

# Methods of Constitutional Interpretation

- Since a constitution is a law, and the supreme law within its domain, and authorizes statutes and other official acts which have a textual expression, the principles of constitutional interpretation are essentially the same as the principles of statutory or judicial interpretation.
- Most legal scholars recognize *seven main methods* of interpretation:
- Textual, historical, functional, doctrinal, prudential, equitable, and natural.
- Although they may differ on what each includes, and there is some overlap among them.

- **1.Textual (also Called Literalism)**

- Decision based on the actual words of the written law, if the meaning of the words is unambiguous.
- Since a law is a command, then it must mean what it meant to the lawgiver.
- If the meaning of the words used in it have changed since it was issued, then textual analysis must be of the **words as understood by the lawgiver**, which for a constitution would be the understanding of the ratifying convention or, if that is unclear, of the drafters.
- Some Latin maxims: A verbis legis non est recedendum. From the words of the law there is not any departure.
- Meaning of words may be ascertained by associated words.

- Just read the words: All answers found in the wording of the Constitution. No external sources as support required.
- Complete belief in Constitution's ability to provide answers.
- **Advantage:**
  - Removes judge's predisposition: Follow the law, not what the judge wants the law to say.
- **Problems with Literalism:**
  - Seemingly inconsistent outcomes: Seem at odds.
  - Ambiguity in Constitution: Sometimes seem intended by framers to provide flexible document.
  - Lack of precision in language itself: Words have different meanings and contexts.
  - Some values in Constitution are at odds with each other, but the literalist approach offers no guidelines for resolving the differences.

- **2. Historical Original Intent:  
intent/motives of framers**

- Decision based on the understanding revealed by analysis of the history of the drafting and ratification of the law, for constitutions and statutes, sometimes called its legislative history.
- It arises out of such Latin maxims as *Animus hominis est anima scripti*. Intention is the soul of an instrument.
- What is the law supposed to mean? Purpose of Law?
- What the framers intended the Constitution to mean.

- **Advantage:**

- To deviate from intent is to change the nature of the Constitution.
- Law doesn't change according to interpretations of judges.
- Starting point when faced with unanticipated circumstances: Derive principles and apply to circumstances.

- **Disadvantages:**

- Lack of complete record: No transcript of Convention debate.
- Whose intention to follow? Whom do we mean by framers?
- Demands that judge know something that is in some sense unknowable: How do you truly know true intent?

- **3.Functional(Also called structural)**

- Decision based on analysis of the structures the law constituted and how they are apparently intended to function as a coherent, harmonious system.
- A Latin maxim is *Nemo aliquam partem recte intelligere potest antequam totum perlegit.*
- No one can properly understand a part until he has read the whole.
- **Problems:**
  - More abstract approach means less accurate.
  - More chances of multiple interpretations.
  - Subjective

- **4.Doctrinal**

- Decision based on the prevailing practices or opinions of legal professionals, mainly legislative, executive, or judicial precedents, according to the meta-doctrine of ***stare decisis***, which treats the principles according to which court decisions have been made as not merely advisory but as normative.
- Some Latin maxims are: *Argumentum à simili valet in lege*. An argument from a case avails in law.
- *Res judicata pro veritate accipitur*. A thing adjudicated is received as true.

- Principle of *Stare de cisis*: "Let the decision stand"
  - New cases should be decided the same way as old cases.
  - Follow precedents if similar facts in previous cases.
  - Makes laws stable and predictable so people know what to expect because judges follow previous decisions.
- **Advantages:**
  - Adopt principle and apply to cases with similar circumstances: Attempts internal consistency by judges in decisions.
  - Consistency and continuity in law.
- **Disadvantages:**
  - Size & diversity of cases/rulings: Always find precedent for either side.
  - Most common approach, but it's used by judges in both majority and minority opinions.
  - Justices can always decide facts of case are different from precedent: No guidelines for following precedent.

- **5.Prudential: Competing Interests (Balance one interest against another)**
- Decision based on **factors external to the law** or interests of the parties in the case, such as the convenience of overburdened officials, efficiency of governmental operations, avoidance of stimulating more cases, or response to political pressure.
- One such consideration, avoidance of disturbing a stable body of practices, is also the main motivation for the doctrinal method.
- It also includes such considerations as whether a case is "ripe" for decision, or whether lesser or administrative remedies have first been exhausted.
- A Latin maxim is ***Boni judicis est lites dirimere***. The duty of a good judge is to prevent litigation.

- Which outcome is most sensible? Practical application of what judge believes he or she ought to do.
- Which value deserves more protection?
- Concerned with deciding on case-by-case basis: What makes the most sense for those circumstances?
- Recognizes implications of the decision.
- **Problems:**
  - Fails to ensure consistency: Less weight to precedents. Depends on what judge thinks.
  - No standard means of making a decision: Judges have to weigh criteria on their own. Should be a standard under which any judge could come to same conclusion.
  - Subjective opinion of judge.
- **Difference between Prudential and Precedent:**
  - Prudential = particulars of case over legal principle
  - Precedent = principle over particulars of case

- **6.Equitable (Also called ethical)**

- Decision based on an innate sense of justice, balancing the interests of the parties, and what is right and wrong, regardless of what the written law might provide.
- Often resorted to in cases in which the facts were not adequately anticipated or provided for by the lawgivers.
- Some scholars put various balancing tests of interests and values in the prudential category.
- But it works better to distinguish between **prudential** as balancing the interests and values of the legal system from **equitable** as balancing the interests and values of the parties.
- It arises out of the Latin maxim, *Æquitas est perfecta quædam ratio quæ jus scriptum interpretatur et emendat; nulla scriptura comprehensa, sed sola ratione consistens.*
- Equity is a sort of perfect reason which interprets and amends written law; comprehended in no code, but consistent with reason alone.

- **7.Natural**

- Decision based on what is required or advised by the laws of nature, or perhaps of human nature, and on what is physically or economically possible or practical, or on what is actually likely to occur.
- This has its origin in such ancient Latin maxims as: *Jura naturæ sunt immutabilia*. The laws of nature are unchangeable.
- *Impossibilium nulla obligatio est*. There is no obligation to do impossible things.
- *Lex non cogit ad impossibilia*. The law does not compel the impossible. *Lex neminem cogit ad vana seu inutilia peragenda*. The law requires no one to do vain or useless things.
- *Legibus sumptis desinentibus, lege naturæ utendum est*. Laws of the state failing, we must act by the law of nature.

# Principles of constitutional Interpretation

- The Constitution is the written document.
- The authority for provisions of the Constitution is the ratifications and state admissions.
- Provisions of the Constitution are mutually consistent.
- None of the words are without force and effect, except those superseded by amendments, unless such amendments are repealed.
- Rights and powers are complementary
- There are no redundancies within the original unamended Constitution.
- The Constitution was intended to define a functionally complete and harmonious system.
- Original "intent" is functional, not motivational.

- The ratification debates are the best evidence of original understanding.
- Powers are narrow, rights broad.
- Delegated powers cannot be sub delegated.
- The power to regulate is not the power to prohibit all modalities of something.
- Implied powers are only to "carry into Execution" an expressed power and not to do whatever is necessary to achieve the intent for which a power might be exercised.
- There can be no common law crimes.
- Rights may not be disabled or unduly burdened by legislative or executive process.
- There is no right without a remedy.

# Sources for Interpretation

- There are five sources that have guided interpretation of the Constitution:
- (1) the text and structure of the Constitution,
- (2) intentions of those who drafted, voted to propose, or voted to ratify the provision in question,
- (3) prior precedents (usually judicial),
- (4) the social, political, and economic consequences of alternative interpretations, and
- (5) natural law.
- There is general agreement that the first three of these sources are appropriate guides to interpretation, but considerable disagreement as to the relative weight that should be given to the three sources when they point in different directions.

- Many interpreters of the Constitution have suggested that the consequences of alternative interpretations are never relevant, even when all other considerations are evenly balanced.
- Natural law (higher law, God's law) is now only infrequently suggested as an interpretive guide, even though many of the framers of the Constitution recognized its appropriateness.
- Persons who favor heavy reliance on originalist sources (text and intentions) are commonly called "**originalists.**"
- Persons who favor giving a more substantial weighting to precedent, consequences, or natural law are called "**non-originalists.**" or **Pragmatists**
- In practice, disagreement between originalists and non-originalists often concerns whether to apply heightened judicial scrutiny to certain "fundamental rights" that are not explicitly protected in the text of the Constitution.

# Organs of Constitutional Interpretation

- Broadly speaking, one can see **two patterns** regarding the institutions empowered to adjudicate constitutional issues.
- Many federal systems have vested this important power either in their ordinary courts or separate constitutional courts.
- Accordingly, these courts not only have the power to interpret the constitution, but are also and even more importantly entitled to decide on the conformity of the laws with the constitution

# Centralized & Decentralized Systems of Interpretation

- **Centralized system (Also called the American-system)**
- Accords every branch of the judiciary the right to review the constitutionality of laws.
- In principle any court has the power to declare any law or decision of an executive body unconstitutional, if such a law or decision violates the constitution, final appeal being reserved to the federal Supreme Court.
- Justice John Marshal of the US in Marbury v. Madison<sup>12</sup> in 1803.
- US, Switzerland, India follow this system.

- What characterizes the decentralized system of judicial review in the US is the requirement of the presence of ***'real controversy and adverse parties'*** for the Court to decide the constitutional question.
- Besides the US Supreme Court would insist that the matter must be justiciable and must not involve ***'political questions.'*** ***No abstract review.***
- The ordinary courts decide constitutional issues in the process of disposing their routine function and review of constitutionality is, therefore, something that comes to the courts incidental to the case.
- The logic of the decentralized system in a nutshell is that it is the duty of the judges to apply and interpret the law and in so doing if the judges find contradiction and inconsistency between two laws of different hierarchies, it is the duty of the judges to apply the higher law.

- **The centralized system**

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

- The manner of appointment as well as some of its powers, according to some authorities, give the Constitutional Court a hybrid role: political and legal.
- Distinct from and independent of the ordinary courts, the Constitutional Court serves as a watchdog for the enforcement of the supremacy of the constitution.
- The Court as such does not involve itself in the ordinary settlement of disputes unless the case relates to a constitutional question.
- However, it does not restrict itself to constitutional issues emanating from specific cases.
- It can also decide differences of opinion or doubts on the compatibility of federal or state law with the Basic Law upon the request of a few public bodies

# The House of Federation: The Ethiopian Choice

- According to the 1995 Ethiopian Constitution, the authority to interpret the Constitution is vested in the second chamber, the House of Federation.
- Articles 62 and 83 of the Constitution not only empower the HoF to decide constitutional disputes, but also to interpret the constitution.
- The rationale for vesting the power of interpreting the Constitution in the HoF, and not in the regular judiciary or a constitutional court, as can be gathered from the minutes of the Constitutional Assembly, emanate from two sources.
- **Historical and ideological**

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

- The second reason is related to the first. The framers were well aware of the fact that empowering the judiciary or a constitutional court may result in unnecessary ‘judicial adventurism’ or what some prefer to call **‘judicial activism’** in which the judges would in the process of interpreting vague clauses of the Constitution put their own preferences and policy choices in the first place.
- Thus the framers argued, this might result in hijacking the very document that contains the ‘compact between the nationalities’ to fit the judges’ own personal philosophies.
- It is not difficult to understand the fears and concerns of the framers in light of the fact that the judiciary in Ethiopia has not yet won ‘the hearts and minds’ of the ordinary citizen.

- **The Council of Constitutional Inquiry (CCI)**

- The framers of the Constitution, however, recognized the fact that interpretation involves legal technicalities.
- The Council of Constitutional Inquiry, established under Article 82 of the Constitution, hears the first level of constitutional matters before submission to the Council of the Federation (Article 84 of the FDRE Constitution and Article 3 of Proclamation No.798/2013).
- As a result, the HoF is assisted by the Council of Constitutional Inquiry (CCT), consisting of eleven members that among others comprise the Chief Justice and his deputy of the Federal Supreme Court, who also serve respectively as chairman and vice chairman of the CCT.
- Six other legal experts are appointed by the President of the Republic with the recommendation of the lower house, as a matter of practice coming from different constituent states, and three persons are designated by the HoF from among its members.

- The CCT has the power to investigate constitutional disputes.
- The investigation may result in a prima facie case calling for interpreting the Constitution, in which case the CCT is required to 'submit its recommendations' to the HoF or remand the case and render a 'decision' if it finds there is no need for constitutional interpretation.
- In the latter case, the party dissatisfied with the decision of the CCT may appeal to the HoF.
- Thus it is clear that the CCT is merely an advisory body to the HoF, lacking the competence to give a binding decision.
- The HoF as well has been at liberty to disregard the CCT's opinions in some cases.

## **The Role of Courts and Other Institutions in Constitutional Interpretation**

- As far as the role courts in constitutional interpretation is concerned, their role is only limited to referring the case to CCI when encountered with constitutional disputes (Article 84 (2) of the FDRE Constitution).
- Though there are contradicting views about the role of courts in interpreting the constitution, a cumulative reading of Article 61(2) and Article 83(1) of the constitution is explicit in demarcating the sole mandate of HoF in constitutional interpretation.
- Where Article 62(1) mandates the HoF to interpret the Constitution and Article 83(1) stipulates that 'all constitutional disputes' to be decided by the HoF only.

- The fact that the HoF is composed of representatives of nationalities indirectly elected by the electorate at regional level seems to give the HoF the profile of a political organ than a judicial one.
- HoF is in a way becoming a part time House. Unless extraordinary circumstances dictate, records so far indicate that it (in reality) meets only twice a year.
- Apparently, the Constitution (Article 83) imposes a duty on the HoF to decide cases within thirty days of receipt of opinion from the CCI, while it actually holds its regular session once in six months. Under such circumstances and in view of the magnitude of cases that involve competing inter-regional government interests, the House certainly needs to be more active and efficient commensurate to its functions.
- It is thus suggested that HoF should in the long run aim at having its own permanent members.
- In relation to the jurisdiction of courts, the new laws and the recent case seem to leave no room for the judiciary as far as the adjudication of constitutional matters is concerned.

- The Ethiopian approach to methods of constitutional interpretation lacks predictability even in some cases experiences inconsistencies in the decisions of HoF in similar cases.
- The lack of and/or unable to develop a method of constitutional interpretation added to the existing problems.
- Moreover, the reasoning of the CCI/HoF, in almost all cases, is very brief and lack proper explanation and argumentation to reach at conclusions which clearly show lack of workable methodology.
- Lack of proper methodology of constitutional interpretation is also evident when constitutional rights are limited or suspended.

- Moreover, the HoF failed to uphold its own laws with regard to giving final decisions within two years' time from accepting the case and also relinquishes its mandate after it has been presented before it.
- Its institutional incompetence is exacerbated by the fact that its large number of gathering has hindered a thorough and in-depth debate over constitutional values and principles pertinent to the case.
- Furthermore, the parties trust towards the CCI has been questioned by the fact that in certain cases, appellants often lodge a complaint over some members of the CCI not to sit over their case as they have already seen the case as FSC judge capacity.

# **Chapter Ten**

## **Fundamental Rights and Freedoms under the FDRE Constitution**

- **Introduction**

- Ethiopia had three written constitutions (in 1931, 1955 and 1987) before the 1995 FDRE Constitution.
- The 1931 Constitution does not have significant relevance for the human rights discourse as it was primarily designed to reaffirm and fortify the absolute power of Emperor Haile Selassie I.
- Although the 1955 Constitution recognized a handful of rights, their relevance was vastly compromised due to the absolute power of the Emperor, and the absence of an organ empowered to interpret and apply the Constitution.
- Besides, most of the rights were entangled with claw-back clauses.

- The 1987 Constitution highly accentuates economic, social and cultural rights due mainly to the socialist tendency of the regime.
- It was nonetheless a regime beset by fear and there was no fertile ground to foster the recognition and exercise of human rights.
- The current 1995 FDRE Constitution represents a major breakthrough in terms of human rights.
- The Constitution devotes more than one third of its content to provisions on fundamental human and people's rights.
- The Constitution imposes a responsibility and duty to the respect and enforcement of fundamental rights and freedoms at all levels of the federal and state legislative, executive and judicial bodies.

- The relevance accorded to human rights is reflected from the outset by the preamble of the FDRE Constitution which emphatically affirms “the full respect for individual and people’s fundamental rights” as a condition precedent and foundational principles for the success of this sparkling ambition.
- The Constitution further elevates the horizon of human rights through reference to international and regional human rights instruments as thresholds for the interpretation of its human rights provisions.(Art 13(2))

- Another prominent feature is the implicit recognition of the independence, interrelatedness and indivisibility of all generations of human rights by incorporating them on equal footing without any difference in consequence.
- In terms of substantive guarantees, the Ethiopian Constitution is the only one in Africa to recognize the right to self-determination of “nations, nationalities and peoples”.
- The Constitution also establishes separate procedures for the amendment of the human rights and fundamental freedoms. (Art 105 (1)& (2))
- To avoid any possible regression and safeguard the gains, a more stringent and rigorous procedure is required to amend the provisions relating to the fundamental rights and freedoms than the remaining parts of the Constitution.
- The Constitution fortifies these features through the supremacy clause under Article 9(1).

- **Individual and Group Rights**

- The FDRE Constitution incorporates several human rights.
- The recognition ranges from traditional civil and political rights to socio-economic and group or solidarity rights.
- The rights are generally guaranteed for everyone with some exceptions.
- Art. 33 (the right to nationality),
- Art. 38 (the right to vote and be voted for),
- Art 39 (the right to self-determination),
- Art. 40 (the right to property), and
- Art. 41 (economic, social and cultural rights),
- Art. 43 (the right to development to the totality of the peoples of Ethiopia, and to nationals) all establish rights only to Ethiopians.
- Hence, foreigners cannot as a right claim the benefits flowing from these rights.

# Civil and Political rights

- The Constitution embodies several civil and political rights most of which are adopted from the provisions of the UDHR
- The list includes:
- The right to life (which forbids deprivation of life except as punishment for a serious offence determined by law) Art.
- Right to security of the person, to liberty (which prohibits arbitrary arrest and deprivation of liberty), protection against cruel, inhuman, or degrading treatment or punishment including the banning of slavery and trafficking in human beings for whatever reason, and forced or compulsory labor.

- The Constitution further guarantees the right to equality and equal protection of the law (Article 25); the right to privacy which may only be limited if “compelling circumstances” exist in accordance with law (Article 26).
- The freedom of religion, belief and opinion (Article 27); freedom of thought and expression including access to information of public interest;
- The right of assembly, demonstration and petition; the right to association for any cause or purpose (Article 31);
- Freedom of movement including the right to reside anywhere within the national territory as well as the right to leave and return to Ethiopia (Article 32);
- The right to nationality, to change it at one’s will, and not to lose it for the mere reason of marriage to a foreign national are also recognized.

- The right to vote and be elected is guaranteed to all Ethiopians of age (Article 38); similarly, the right to property is embodied under Article 40.
- Moreover, the Constitution includes guarantees pertinent to the criminal justice system. The right of arrested persons to remain silent; to be promptly informed, in a language she/he understands, of the reasons for their arrest; to be brought before a judge in 48 hours, and *habeaus corpus*.
- It also excludes confession or admission obtained through coercion; and establishes the right to bail.
- Accused persons have the right to a public trial in an ordinary court within a reasonable time; to be informed with the particulars of the charge; the privilege against self-incrimination and the presumption of innocence until proven guilty; access to and the right to challenge evidence presented against them and to adduce evidence on their behalf; the right to be represented by legal counsel of their choice

- Marital, personal and family rights with equal rights for both sexes while entering or during marriage, or at the time of divorce; the rights of women to equality, protection from harmful customary and religious practices, right to maternity leave, right to acquire property, equal employment opportunities
- This is further supplemented by the right to affirmative action.
- The rights of children to name and nationality, and to be free from corporal punishment or cruel and inhuman treatment in schools and other institutions responsible for the care of children is also stipulated; the best interest of the child is the primary guiding principle; juvenile offenders must be detained separately from adults; children born in and out of wedlock enjoy equal rights.

## **Economic, social and cultural rights (ESC Rights)**

- The Ethiopian Constitution incorporates various EsC rights.
- Every Ethiopian has the right to freely engage in economic activities; to choose his/her means of livelihood, occupation and profession; and
- equal access to publicly funded services.
- it further requires the state to allocate ever-increasing resources to provide social services;
- provide funds for the rehabilitation of persons with disabilities,

- The Constitution also guarantees several labour rights.
- These rights include the right to association including the right to form trade unions for collective bargaining purposes; the right to strike; equal pay for equal work; paid leaves; reasonable limits to working hours; and a healthy and safe work environment.

- The ESC rights under the Ethiopian Constitution have some variation from the UDHR and ICESCR. One major difference from most civil and political rights in the Constitution is that ESC rights are guaranteed only for the benefit of Ethiopians.
- Moreover, the provisions create government obligations, rather than individual or collective rights, in a manner similar to the state policy principles and objectives. The general and duty-based formulation makes it difficult to determine whether these rights are justiciable.
- Since the Constitution does not indicate their non-justiciability, it can be argued that these rights are in fact justiciable, at least in the House of Federation.
- The Constitution also guarantees several socio-economic rights as part of the National Policy Principles and Objectives

# Group or solidarity rights

- One essential feature of the Ethiopian Constitution is the recognition of what are called third generation or group or solidarity rights.
- The right to self determination up to secession, the right to development and the right to a clean and healthy environment are clearly enshrined.
- The right to development is recognized as a benefit of the peoples of Ethiopia as a whole, and in the form of a right to participation.
- The right to clean and healthy environment similarly recognizes the right for the benefit of all persons; as such it appears more like a guarantee which accrues to each individual.

- The right of “nations, nationalities and peoples” to self-determination, up to secession includes the right to speak, write, develop their language; to express, promote and develop their culture; preserve their history; and to self government and equitable representation in the regional state and federal governments.
- The preconditions for secession are listed under Article 39.
- In conclusion, the Ethiopian Constitution embodies a progressive list of rights compared to its predecessors.
- The special features of the Constitution include the recognition given to the ethnic diversity and the willingness to accommodate it through the right to self-determination.
- However, the provisions concerning ESC rights are insufficient and there is a need to re-formulate them in tune with the ICESCR and other relevant instruments ratified by Ethiopia.

## **The distinction between ‘human rights’ and ‘democratic rights’**

- The Ethiopian Constitution unduly classifies the provisions on fundamental rights and freedoms into *human rights* (Articles 14-28), and *democratic rights* (Articles 29-44).
- Article 10, which deals about Human and Democratic Rights, as one of the fundamental principles of the Constitution breaks the whole notion into two categories: Human Rights and Democratic Rights.
- “1. Human rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable.” (Emphasis added.)  
“2. Human and democratic rights of citizens and peoples shall be respected.” (Emphasis added.)

- Both are mandatory, but their tones are different; i.e. that of the first is strict, while that of the second is loose.
- The difference in the tones reminds us of the deep division between the Western approach and that of the collective approach of “the socialist camp of the Third World”, during the time of signature of UDHR and thereafter.
- Article 10 of the Constitution creates the impression that human rights are those that emanate from the nature of mankind, and democratic rights as those inherent in democracies.
- The preparatory work of the Constitution moreover suggests that human rights are those rights that a person is entitled merely because he or she is a human being, and democratic rights are those conferred only on citizens.

- Thus the right to vote and be elected, ESC Rights, right to nationality, right to property, and the right to development are clearly granted to Ethiopians.
- Freedom of expression and the right to association are, however, granted to the benefit of everyone though they are placed in the part dealing with democratic rights.
- Limiting the application of rights to citizens will be inconsistent with international human rights instruments adopted by Ethiopia.
- The ICCPR for instance applies to all persons within the territory or jurisdiction of ratifying states. 9Art 2(1) ICCPR.)
- Hence, no substantive distinction should be made merely on the ground of whether a right appears under the 'human rights' or 'democratic rights' section.

# **Limitation of Rights under the Ethiopian Constitution**

- Most human rights are not absolute. There may therefore be certain limits to the exercise of rights.
- Limitations refer to infringements or encroachments on guaranteed rights under narrowly contoured permissible circumstances.
- There are different approaches to limitation of rights in constitutions: some constitutions and international instruments include internal individualized limitation clauses within each particular right in different details;
- others have adopted general limitation clauses whose application cuts across all provisions.
- Still others adopt a combined approach because in addition to a general limitation clause they may include their own internal limitations.

- The Ethiopian Constitution only contains claw-back clauses within most of the protected rights. Some of the internal limitations simply refer to those limitations determined or established by law;<sup>86</sup>
- while others are more detailed and require compelling circumstances and specific laws necessary to safeguard public security, peace, the prevention of crimes, public morality, and the protection of the rights and freedoms of others.<sup>87</sup>
- There are therefore different standards depending on which right the Constitution seeks to limit.
- The problem is exacerbated by the absence of a more sweeping general limitation clause in the Constitution that would have ensured uniformity of standards in scrutinizing the conformity of limitations of rights with the basic tenets of the Constitution.

- The absence of a general limitations clause may have advantages as it leaves some rights, which do not have internal limitations, beyond limitations.
- For instance, the protection against torture and inhuman treatment or punishment in the Ethiopian Constitution may not in any way be limited.
- Hence, in the absence of a general limitation clause, it is possible to have a right that may not be limited in any way, if there is no internal limitation to that effect.
- However, lack of a general limitation clause can have its downsides, as it might invite arbitrary, limitless limitations.

























