Micky Smart Short Note Center

Constitutional law Book II short note

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Chapter I

Development of Documentary Constitution

What re the major constitutional documents of Ethiopia in ancient and medieval period?

- ✓ the major constitutional document of Ethiopia are;
  - **a. The Ser'ata Mengist**: The Ser'ata Mangist can hardly be considered to be a document of Constitutional Law in its widest sense. Nonetheless, as it is the first document known to have been used for allocating power among the Crown, its dignitaries and the Church, and tried to lay out a pattern of succession to power.
  - **b. The Fetha Nagast:** Law of the Kings', is a collection of laws which in use in Christian Ethiopia for many centuries. "Ibn al-'Assal divided his work into two distinct parts.
    - i. The first dealt with religious matters (relied largely on the Old and New Testaments, and the
    - ii. Secular matters
  - **c. The Classical Gada System:** in this system "a society that is stratified into two cross-cutting systems of peer-group structures. One... on the basis of chronological age [the harriya system].. [t]he other.. On the basis of genealogical ties [gada system]. .. Both sets of groups pass from one stage of development to the next every eight years.[, while] newly born infant boy always enters the system of grades exactly forty years behind the father, regardless of the age of the father." So, from the point view of social-structural, and historical approaches, the Gada system serving as framework of power allocation (most earliest attribute of Constitution).

Chapter II

Dimensions in respect of Nation, Nationality and Peoples of Ethiopia

What was the status of state failure in Ethiopia?

- ✓ One of the most contested issues in the public discourse of Ethiopian politics remains the ***difficulty one gets in interpreting State failure, and cause of that failure in the twentieth century. Some attribute it to 'Beherawi Chekona' or 'national oppression'***.
- ✓ Actually, a broader and more comprehensive approach is necessary. State failure should be analyzed in terms of failing to build a multi-cultural State from the whole diversity that the modern state has brought together during the second half of the 19th Century.

What was the root causes of the prolonged war in Ethiopia according to Instrumentalists?

- ✓ The underlying factor in exacerbating the prolonged war in Ethiopia in the 20th Century, was the result of over centralization of power and economic resources by the 'dominant' group from Showa, which defined itself and the State along its narrow line and marginalized the others, which led to too strong feelings of ethnicity.

Discuss in brief on the state formation process in Ethiopia?

- ✓ Emperor Menilik II established the modern Ethiopian State (1889-1913) at the turn of the 20th Century due to confluence of domestic and external forces.
- ✓ He, thus, incorporated a whole variety of ethno-linguistic and religious groups into His direct administration, thereby imposing and instituting the *Gebar* system with its prescribed 'classes of manner' and the 'Neftegna' on the newly incorporated areas in the South and Southwest; the imposition of the Amharic language and Christian Religion on the indigenous people.
- ✓ The propagation of what may be called state nationalism in the guise of national integration or nation building was one political initiative taken by ruling groups in an attempt to reinforce the shallow foundation of the state as opposed to a pluralistic approach
- ✓ Finally, the 1974 Revolution that destroyed the old monarchy by expropriating land from the land lords, instilled in its place Marxism-Leninism. It also dis-legitimized and abolished the right to '*divine rule'* paving the way for the leftist ideology to step in.

What are the Major conflict interpretation approach in Ethiopia?

a. **Instrumentalist's approach:** The instrumentalist's approach (or *statist version of nationalism*), which among other things ***states that ethnicity is fluid in constant flux and has no objective existence.***
b. **(Abyssinian) 'colonial',**
c. **'Greater Ethiopia' (**or *Nation Builders)* and
d. '**National oppression'**

How the question of nationality is addressed under FDRE constitution?

- ✓ In the Preamble of the Constitution, we read:
  - "‥ Further convinced by continuing to live with our rich and proud cultural legacies in territories we have long inhabited have, through continuous interaction on various levels

and forms of life, built up common interests and have also contributed to the emergence of a common outlook

- "Fully cognizant that our common destiny can best be served by rectifying historically unjust relationships and by further promoting our shared interests;"

What is the difference between ethnicity and nations?

- ✓ Ethnicity is a state of mind emanating from feeling of separate identity, based, more importantly on the myth of common descent. Here, one group claims that ethnicity is an aspect of human nature, while others claim otherwise. The latter ones claim that ethnicity gets shaped and reshaped through interaction with others and point out that ethnicity can change at both individual and collective levels.
- ✓ Nations, on the other hand, are more inclusive as they are supposed to be culturally or politically defined. In this respect, nationalism combines shared common identity, feeling of distinctness from other nationals, concerted political action to these ends. It also has the objective of attaining some level of statehood.

What is the Position of FDRE Constitution of Nation Nationality and Peoples?

- ✓ "From the text of the Constitution, the right of Nations, Nationalities and Peoples seem to occupy a central place.
- ✓ the opening words of the Preamble read 'We, the Nations, Nationalities and Peoples of Ethiopia ...' The Preamble identifies the Nations, Nationalities and Peoples of Ethiopia as the authors of the Constitution.
- ✓ In addition, the provisions of the Constitution dealing with the rights of Nations, Nationalities and Peoples of Ethiopia are made difficult to amend and even during a state of emergency these rights may not be suspended, although many other rights can be.
- ✓ Arts 8(1) and 39(1) of the Constitution continue the pretense that the Ethiopian federal arrangement was the outcome of a contract between sovereign Nations, Nationalities and Peoples of Ethiopia.

National Minorities in Ethiopia

Who are minorities under the international law?

- ✓ The term 'minority' in its legal sense disdained in Art. 27 of the International Covenant on Civil and Political Rights (ICCPR) and it is the first internationally accepted and binding rule

for the protection of minorities. Art. 27 of the ICCPR which gave different authors a framework in dealing with the notion of 'minority.

- ✓ "Art. 27 of the ICCPR provides that***, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.***

Who are peoples?

- ✓ the term 'peoples' may possibly refer to the entire population of a sovereign state or it may apply to the entire population of political dependency or, in the case of multinational or multiethnic states and dependencies; it may apply to the national or ethnic subdivisions.
- ✓ In the broader sense, the term 'peoples' seems to include the term 'minorities'.

If so, does it mean minorities are the beneficiary of self-determination as people?

- ✓ "If 'minorities' are considered to be 'peoples', they become full beneficiaries of the right to self-determination as provided under Art. 1 of the ICCPR.
- ✓ "When looked at, the intention of the signatories of the ICCPR seems to favor those who argue that 'minorities' and 'peoples' are different.
- ✓ Surely, the fact that the two Covenants (ICCPR & ICESCR) each have provisions regarding minority rights separate from provisions regarding self-determination indicates that the States had the intention to exclude minorities from being the beneficiaries of the right to self-determination.
- ✓ But still, in the absence of a clear definition of the term 'peoples', it is possible for ethno-nationalists to widen their claim to the right to self-determination including to secession.

Who are minorities and the conditions to call minority?

- ✓ a minority is a group numerically inferior to the rest of the population of a state – possess ethnic, religious or linguistic characteristics differing from the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, tradition, religion or language
- ✓ ***To be a minority, a group's members are required to be nationals of a state.*** In addition to that, ***to be a minority, essentially, members of a group should posses the common distinguishing characteristics***. Obviously, this definition seems to exclude non-nationals,

immigrants, refugees and sexual groups like gay men, lesbians, and many others who do not satisfy the specified conditions.

- ✓ "Another definition, a minority ***refers to (a) group of citizens of a state, constituting a numerical minority and in a non-dominant position in that state, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated if only implicitly by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.***
- ✓ The major elements of minority are:
  a. **Small in number**: the numerical factor, non-dominant position from the general public.
  b. **Possession of distinguishing characteristics**
  c. **Being nationals of the given state** and
  d. **Sense of solidarity**

What are the different forms of minority?

- ✓ As the term ethnic refers to all biological, cultural and historical characteristics, it is wider than the term 'racial' which seems to be limited to inherited physical characteristics. Thus, after 1950, the term 'ethnic' came to replace the term 'racial'. the major types of minorities are;
  a. **Ethnic minority** ***is a group having its own language, culture or history. Such group has to be a self-conscious group 'whose members want to uphold its particularities'.*** "As used in the text of Art. 27, the term 'ethnic minority' should be seen so as 'to cover the concept of national as well as racial origins'.
  b. **Religious minority:** are a group of persons who manifest (profess) religious thoughts which differ from a State religion; differs from the religion manifested by the majority of a people, which is in opposition to an atheistic behavior of the majority of a population in particular if there is not complete freedom of religious tolerance in a given country and if the members of the religious group want to uphold their religion.
  c. **Linguistic minority**: "According to Art. 27 of the ICCPR, a linguistic group shall not be denied the right to use its own language in private or in public, in community with other members of the group. A linguistic minority differs from the rest of the population in the language it uses, which it wants to be recognized and protected.

- ✓ '**National minority'** are a group of persons in a State who (a) ***reside on the territory of that State and are citizens thereof;*** (b) ***maintain longstanding, firm and lasting ties with that State;*** (c) ***display distinctive ethnic, cultural, religious or linguistic characteristics***; (d) ***are sufficiently representative although smaller in number than the rest of the population of the state;*** (e) ***are motivated by the concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion and their language.***'

Who are indigenous peoples?

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

Does ICCPR incorporates the rights of indigenous peoples?

- ✓ "Neither Art. 1 nor Art. 27 of the ICCPR has included the notion of indigenous people because it was believed that the protection of minority groups was sufficient to protect indigenous groups.
- ✓ However it was decided later on that indigenous groups should be given special protection as well.

Does the protections of minorities shall be extended to non-nationals?

- ✓ "Generally, non-nationals consist of a number of categories including migrant workers, refugees and stateless persons.
- ✓ The general Comment No. 23 provides that "the terms used in Art. 27 indicate that the individuals designed to be protected need not be citizens of the state party. The persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language."

- ✓ "Here, the reference is made in respect of the term "Persons", not to citizens. And, if that is the case, in so far as aliens are also persons, and as a group, with some characteristics of minorities, then, it seems, that protections applied to minorities should, likewise, be extended to them.

How different governments responses to the right of nations?

- ✓ There are basically two forms of governance in certain national states
  - A. **Policies of assimilation** – often involving outright suppression of the identities of ethnic, religious or linguistic groups – try to erode the cultural variations between groups. Policies of integration seek to assert a single national identity an attempting to eliminate ethno-national and cultural differences from the public and political arena, while allowing them in the private domain. Both sets of policies attempt to form a singular national identity.
  - B. **Integration**:

What are the common forms assimilation and integration policies?

- ✓ Assimilationist and integrationist strategies try to establish singular national identities through various interventions.
  - a. **Centralization of political power**, eliminating forms of local sovereignty or autonomy historically enjoyed by minority groups, so that all important decisions are made in forums where the dominant group constitutes a majority.
  - b. **Construction of a unified legal and judicial system**, operating in the dominant group's language and using its legal traditions, and the abolition of any pre-existing legal systems used by minority groups.
  - c. **Adoption of official-language laws**, which define the dominant group's language as the only official national language to be used in/at each levels of the bureaucracy, courts, public services, the army, higher education and other official institutions.
  - d. **Construction of a nationalized system of compulsory education** promoting standardized curricula and teaching the dominant group's language, literature and history (favoring the dominant group's wishes) and defining them as the 'national' language, literature and history (,accordingly).
  - e. **Diffusion of the dominant group's language and culture** in particular through national, cultural institutions, including state-run media and public museums.

f. **Adoption of state symbols celebrating the dominant group's history**, heroes and culture; reflected through preferential treatment on such things as choice of national holidays or the naming of streets, buildings and geographic characteristics.

g. **Seizure of lands, forests and fisheries from minority groups** and indigenous people and declaring them 'national' resources.

- **Adoption of settlement policies** encouraging members of the dominant national group to settle in areas where minority groups historically resided.
- **Adoption of immigration/emigration/ policies** that give preference to immigrants/emigrants/ who share the same language, religion or ethnicity as the dominant group.

How states are integrating cultural recognition into their human development strategies?

✓ through the following five ways;

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

✓ see Article 46- States of the Federation

✓ Many minorities and other historically marginalized groups are excluded from real political power, and so feel alienated from the state. In some cases, the exclusion is due to lack of democracy or a denial of their political rights.

✓ Considered here are two broad categories of democratic arrangements in which culturally diverse groups and minorities can share power within political processes and state institutions.

a. **Federalism**: sharing power territorially through federalism and its various forms. Federal arrangements involve establishing territorial subunits within a state for minorities to exercise considerable autonomy. Some other important distinctions are:

i. **Coming together or Bonding together***:* - is when the regions choose to form a single federal polity. In "holding together" arrangements, the central government devolved political authority to the regions to maintain a single unified state.

ii. **One identity or many: -** "Mono-national" or "national" federations assert a single national identity, "Multi-national" federation, constitutionally recognize multiple identities. Other states combine the two.

iii. **Symmetric or Asymmetric**:- In symmetric federalism the constituent units have identical, that is symmetric, powers, relations and obligations relative to the central authority and each other. In asymmetric federalism some provinces enjoy different powers. This allows greater flexibility to respond to distinct demands and to accommodate diversity. These special measures enable territorially concentrated group distinctions to politically coexist with the central authority, thereby reducing violent clashes and demands for secession.

b. **Consociations;** i.e. using a series of instruments to ensure the participation of culturally diverse groups dispersed throughout the country. These arrangements address claims made by groups that are not territorially concentrated or do not demand autonomy or self-rule. Consociations are based on the principle of proportionality: the ethnic or cultural composition of the state. Achieving proportionality requires specific mechanisms and polices. Electoral arrangements such as proportional representation can better reflect group composition, as can the use of reserved seats and quotas in the executive and legislature.

B. Policies on Religion and Religious Practices

✓ see Article 11-Separation of State and Religion

What are the possible policies of non-secular states?

✓ *A non-secular state* extends official recognition to specific religions and can assume different forms depending on its formal and substantive links with religious authority.

- **A state governed by divine law** – that is, a theocracy
- **As when one religion benefits from a formal alliance with the government** – that is, having an "established" religion.

- **A state that has an established church or religion**, but that nonetheless respects more than one religion, that recognizes and perhaps attempts to nurture all religions without any preferences of one over the other. Such states may levy a religious tax on all citizens and yet grant them the freedom to remit the tax money to religious organizations of their choice.

Who are Anti-Religious, Secular State?

✓ The state excludes religion from its own affairs without excluding itself from the affairs of religion. In such a state the right to religious freedom is very limited, and often the state intervenes to restrict religious freedoms and practice. Communist regimes in China and

former communist governments of the former Soviet Union and Eastern Europe were examples.

Who are Neutral or Disengaged States?

- ✓ There are two ways of expressing this kind of neutrality. The state may profess policy of "mutual exclusion", or the "Strict separation of religion and state".
- ✓ This means that not only does the state prevent religious authorities from intervening in the affairs of state, but the state also avoids interfering in the internal affairs of religious groups.
- ✓ One consequence of this mutual exclusion is that the state may be unable or unwilling to interfere in practices designated as "religious", even when they threaten individual rights and democratic values. Or the sate may have a policy of neutrality towards all religions.

Who are Secular States Asserting Equal Respect and Principled Distance?

- ✓ The state is secular, in the sense that it does not have an established Church and does not promote one religion over others, but rather accords equal respect to all religions (and to non-believers).
- ✓ However, it is willing to defend universal principles of Human Rights and equal citizenship and is able to intervene in the internal affairs of religious groups in what can be called "principled distance".
- ✓ This engagement may take the form of even-handed support for religions (such as public funding of religious schools or state recognition of religious personal law) or even of intervention to monitor and reform religious practices that contradict Human Rights (such as regulating religious schools or reforming personal laws to ensure gender equality).
- ✓ Whatever the historical links with religion, states have a responsibility to protect rights and secure freedoms for all their members and not discriminate (for or against) on grounds of religion.

If so, what are the major obligations of nondiscriminatory states?

- ✓ non-discriminatory states should protect three dimensions of religious freedom and individual choice:
  - Every individual or sect within a religious group should have the right to criticize, revise or challenge the dominance of a particular interpretation of core beliefs. All religions have numerous interpretations and practices – they are multifocal – and no single interpretation should be sponsored by the state. Clergy or other religious hierarchies

should have the same status as other citizens and should not claim greater political or societal privilege.

- States must give space to all religions for interfaith discussion and, within limits, for critiques. People of one religion must be allowed to be responsibly critical of the practices and beliefs of other religions.
- Individuals must be free not only to criticize the religion into which they are born, but to reject it for another or to remain without one.

C. Policies on Customary Law and Legal Pluralism

- ✓ see Article 91(Sub 1)-Cultural objectives
- ✓ Accommodating Customary Law can help protect the rights of indigenous people and ensure a fairer application of the rule of law.

D. Policies on the use of Multiple Languages

- ✓ see Article 5- Languages
- ✓ Choosing one or a few languages over others becomes a way of excluding people from politics, education, and access to justice and many other aspects of civil life. It can entrench socio-economic inequalities between groups.
- ✓ Plural language policies safeguard the parallel use of two or more languages by stating *"Let us each retain our own language in certain spheres, such as schools and universities, but let us also have a common language for joint activities, especially in civil life."*
- ✓ Language conflicts can be managed by providing some spheres in which minority languages are used freely and by giving incentives to learn other languages, especially a national or official language.

Is there the right to language at the international level?

- ✓ There is no universal "right to language". But there are Human Rights with an implicit linguistic content that multilingual states must acknowledge in order to comply with their international obligations under such instruments as the International Covenant on Civil and Political Rights.
- ✓ Especially important are the rights to Freedom of Expression and Equality. Freedom of Expression and the use of a language are inseparable.

What are the different forms of language policies in the world?

- ✓ Very often what multilingual countries need is a three language formula that gives public recognition to the use of three languages:
  - **One international language** – in former colonial countries this is often the official language of administration. In this era of globalization all countries need to be proficient in an international language to participate in the global economy and networks.
  - **One lingua franca** – a local link language facilitates communication between different linguistic groups such as Swahili in East African countries, where many other languages are also spoken.
  - **Mother tongue –** people want and need to be able to use their mother tongue when it is neither the lingua franca nor the international language.

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

E. Polices for Redressing Socio-Economic Exclusion

- ✓ see art 35 (3), 89(4)
- ✓ Redressing that exclusion requires a combination of policies, including:
  - Addressing unequal social investments to achieve equality of opportunity;
  - Recognizing legitimate collective claims to land and livelihoods and
  - Taking affirmative action in favor of disadvantaged groups

Chapter III

Typologies of Federations

What is federalism and its origin?

- ✓ The term *"federal"* derived the term from the Latin word *foedus* (covenant).
- ✓ The real meaning of *"federalism"* can be deduced from this and it refers to an alliance, a treaty, or an oath of allegiance and, by implication, emphasizes the right of those who share in the covenant to make their own decisions.
- ✓ From some of these definitions it is clear, and from others it can be deduced that the communities or states which form a federation are striving towards unity rather than uniformity.

What is constitution in the federal setup?

- ✓ The constitution, is in reality a "contract" which is entered into by the federating units and can only be altered by a prescribed procedure. This "contract" makes provision for the

exercise of all governmental functions, either by the central authorities or the group authorities. Internal as well as external sovereignty is maintained and, taken as a whole; the association is thus a fully-blown state in which the supreme authority rests upon the constitution.

- ✓ In cases where the constitution or "contract" is broken, an impartial arbiter, the courts can put decisions by both the central government and the domestic authorities to a constitutional test and it he worst comes to worst them null and void.

What are the major Prerequisites for Federal Associations?

- ✓ When separate states or communities want to unit on a federal bases, there are two basic considerations,
  a. There must be a strong need and desire to shoulder common interests jointly.
  b. There must be an equally strong need and desire to shoulder domestic interests separately.
- ✓ These two factors are so basic that if the first does not exist, an association will not arise, and if the second does not exist, something other than a federation (most probably a centralized union) will come about.

What are the major criteria's to identify the types of federations?

- ✓ One can differentiate one form of federalism from another on two bases:
  a. based on is origin
  b. Based on its foundation.

What are the major forms federal state formations?

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

What are the foundations of federal units?

- ✓ Federal states can be created on different foundations. They usually have a territorial basis, but can also have other bases.

a. **Territorial Units**

- ✓ Here, it is territorial area that serves as unit of the federation.
- ✓ These areas can again be subdivided into two kinds,
  - i. **City-states** In cases where city-states serve as units of a federation, the municipal and middle-tier authorities usually combine, which amounts to both typically municipal and certain other broader functions being carried out by these authorities.
  - ii. **States** however the more general phenomenon is that states constitute the basic units of a federation. A clear distinction is drawn between municipal and middle-tier authorities and governmental systems consisting of at least three in which the tiers are usually encountered

b. **Corporate Units**

- ✓ In this case the federal units are not territorially bound so that what is at issue is a type of federalism in which various groups or communities inhabit the same region and attend to their own domestic interests in accordance with the subsidiary principle, but naturally co-operate with each other on matters of common concern.
- ✓ As far as the composition of the central legislative body is concerned, the various communities themselves compose the constituent parts or corporations. The departure point is that a state such as this does not consist merely to a collection of individuals but of whole which consists of various collectivities.

c. **Person Oriented Units**

- ✓ The principle of person oriented units is closely related to the principle of corporatism; both relate to various communities which inhabit one and the same country.
- ✓ In the latter case (corporate units) the various communities live in separate regions (or municipalities) of the same country while in the former case, they are completely mixed. Consequently the only method of achieving a degree of differentiation in a society such as this is to base the functions of the authorities on the particular needs (or characteristics) of the people. This situation is encountered in Belgium.

d. **Associated Units**

- ✓ This applies to members, which according to international law are independent (of the federation) but according to constitutional law are never the less members of a federal state.

e. **Other Modalities**

I. **Nation Centered Federalism:** *"the national government is the government of all, its powers are delegated by all, it represents all and acts for all"*. It was the court's decision in this case that became the source of the "doctrine of implied powers

II. **State Centered Federalism:** The theory asserts that the Constitution was a result of state action. The states should vigilantly guard themselves against the national power.

III. **Dual Federalism** (separatist theory of federalism) this called for the carving out of separate fields of authority, for the federal and the state governments. Put simply, its intention was to distribute power equally between the national and state governments.

IV. **Cooperative Federalism*:*** The American federal system doest not comprise of independent layers of government but is cooperative in nature, under this scheme, both collaborate to meet certain ends. Rather than remaining as aloof as possible, they consider the possibilities of mutual aid. The most important device of cooperative federalism is that of providing grants-in-aid to the states,

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

VI. **New Federalism /of Richard Nixon/:** This, in content, is much similar to creative federalism, and involves a responsible decentralization, whereby the states and local authorities would receive a larger share of powers. The thrust of 'new federalism' is to de-emphasize the national government's role in the partnership of governments and to strengthen that of the state and local governments.

Division of Functions between Levels of Authority

What is the principle of power division in federations?

✓ It should be pointed out that there was a time when the definition of functions was very general.

- ✓ Sometimes the functions were defined very broadly (for examples with reference to trade, property and rights of citizenship), while others again were defined very specifically (for example in relation to beacons and light-houses). When functional authorities are described in this way, it should be possible to bestow responsibilities to particular domain, i.e. federal/state; either exclusively at one level, or jointly on several levels of authority, depending, which level is best equipped for the particular function.
- ✓ In their turn, the Courts can be empowered to rule on certain doubtful cases, seeing that the general rationale concerning the division of the functions will be clear.

What are the techniques of power allocations in federation?

- ✓ There are three possibilities exist.
  a. **Defining the functions of the central authority and to leave the rest** (whatever this may include) to the middle-tier authorities as in the USA, Australia and Switzerland. This method is used to limit the powers of the central authority, to give the individual states or communities more freedom and to bring about a localized federal state.
  b. **Defining the functions of the middle-tier authorities and to leave the rest to the central authority**, as in Canada. This method is used to limit the states or communities, to strengthen the central authority and to set up a centralized federal State.
  c. **Defining the functions of both the central and the middle-tier authority** and then to compile still another list of functions which both authorities decided about as in India. This method places the State in either category and even brings an end to its federal character, if the list of matters over which both levels have authority is extended to such an extent that there is no terrain over which a single level remains autonomous.

FDRE Constitution: Vertical and Horizontal Division of Power (HPR)
Form and Scope of Distribution of Powers

What are the major forms of legislative power allocations under FDRE constitution?

- ✓ The constitutional allocation of legislative power is defined on the basis of three categories;

A. Exclusive Powers

- ✓ This refers to the powers to be distributed in federal systems falling to one of two main categories: Exclusive powers and non-exclusive powers.
- ✓ Exclusive powers refers to the powers for which the federal constitution has created a monopoly, which either is in the hands of the federation or of the states. In theory the

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

Discuss on the exclusive powers under our constitution?

- ✓ According to Article 50(2) the federal government and the states shall have legislative, executive and judicial powers. We have earlier noted the point that the Ethiopian federal system appears to reflect some aspects of coming together as well as holding together.
- ✓ It is the states that hold residual powers as per Article 52(1), excepting the power of taxation, for undesignated powers of taxation are as per Article 99 left to the determination of HPR and HoF.
- ✓ Thus Article 99 should logically be treated as an exception to Article 52(1). The Constitution also comprises a brief account of some state powers under Article 52(2) in addition to reserve power, which should only be understood as illustrations of the powers bestowed to states in general terms, as referred to above; i.e. Article 51(1).
- ✓ It is worth noting that the powers granted to the federal government are not limited to the list under Article 51. It might appear that by virtue of the reserve clause, any power not mentioned under article 51 belongs to the states
- ✓ But other provisions of the Constitution also indicate additional powers entrusted to the federal government .as can be gathered from the Minutes of the Constitutional Assembly. In general it appears that Article 51 was intended to cover a whole list of powers conferred on the federal government, while others were meant to allocate these lists of power to each federal departments of the federal government and other bodies akin to it like that of the Office of the President.
- ✓ Yet, what appeared as final product did not reflect this intention, for we find powers seem to be additional; i.e. under Article 55, 74 and 77, for instance.
- ✓ It is also worth noting that the Ethiopian Constitution provides neither for the 'necessary and proper' clause nor for any express comprehensive list of shared powers.

B. Shared Legislative Powers

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

Why shared power is necessary in federations?

- ✓ Experience has shown that;
  a. There are certain matters which cannot be allocated exclusively either to the federal government or the states. It may be desirable that the states should legislate on some matters but it is also necessary that the federal government should also legislate to enable it in some cases to secure uniformity across the nation.
  b. The fact that the federal government may need to guide and encourage state efforts and more importantly some measure taken by the states may have spill-over effects and for this reason the federal government may need to intervene.
  c. Shared powers as well avoid the necessity of enumerating complicated minute subdivisions of individual functions to be assigned exclusively to one area of government or the other, thus serving as a flexible channel for adjustment to new circumstances.

What types of issues fall under the categories of shared power?

- ✓ In terms of the field of coverage it can be stated broadly that for the most part the social and economic spheres fall into this category.
  a. **Economic affairs** (that include regulation of trade and commerce, industries and labor and economic planning) raise issues because both levels of government have a lot of vested interest in these spheres of activities.
  b. **Social services** cover education, health protection and welfare of citizens, insurance, and assistance for old age, unemployment, accident, and worker's compensation.

What are the forms of shared power?

- ✓ Experience so far indicates that one can distinguish at least two types of shared powers:

I. Framework of Power

- ✓ When framework legislation has been prescribed for the exercise of a power, a special type of shared power exists that, in principle, grants the federal government the competence to issue general legislation in a specific policy field.
- ✓ This federal legislation is subject to strict conditions because it has to leave substantial room for the states to issue their own legislation within the limits set by the federation.

- ✓ The federal government may use framework legislation to regulate federation wide standards while leaving the states room to legislate the details and to deliver the services in a manner adaptable to local situations.
- ✓ The states under this category of powers are allowed to fill in the gaps with more detailed laws. Unlike the concurrent powers in which the federal government has the potential competence to absorb, federal frame-work legislation indicates an interesting compromise that requires significant decentralization of policy-making authority without sacrificing uniformity where it is needs.
- ✓ Especially in the social services the federal government may legislate to secure a basic national uniformity and to guide regional legislation while leaving the states with the initiative for details and for adaptation to local circumstance.
- ✓ ***Framework powers not only preserve the right of the states to legislate but also positively presuppose future state legislation. Federal government may not in principle exhaust the subject.***

Discuss on the shared power allocations under FDRE constitution?

- ✓ By virtue of Article 55(6) the HPR is empowered to enact Civil Laws, which the HoF deems *"necessary to establish and sustain one economic community"*
- ✓ In principle by virtue of Article 52, Civil Law is a matter reserved to the states. However, as a matter of exception the federal government may enact civil laws when the HoF states that it is necessary to enact such laws to establish and sustain one economic community.
- ✓ This is a clear departure from the general clause under Article 52(1). The last clause states that whatever is not expressly given to the federal government alone or concurrently with states remains with the states. But here the approach is whatever is not expressly given from the Civil Law to the federal government is not necessarily with the state. It points out that federal government may legislate even in areas of Civil Law.
- ✓ Another area of relevance in the field of framework legislation refers to land law. Articles 52(2d), 55(2a), and 52(5) stipulate in theory parallel powers between the federal government and the states.
- ✓ Both entities are given different aspects of the same subject matter. Federal government, by virtue of Article 51(5) is empowered to enact laws for the utilization and conservation of

land, while the states are empowered to administer land and other natural resources in accordance with federal laws 52(2).

- ✓ In theory, it appears legislation is a federal matter while the administration of land and natural resources belongs to the states. However, constitutional practice differs from theory.

Comment on the following important case?

- ✓ In the case of Biyadglegn Meles and et al vs the Amhara Regional State, the applicants requested the CCI to declare that the state's land law and regulations issued subsequently to implement the laws contravene the Federal Constitution on the ground that it is the power of the federal government, not the state's government, to enact comprehensive land legislation, and as a result, the state law is unconstitutional. However, through another development, the HPR has enacted Proclamation 89/1997128 that stipulates that the regional government may proclaim laws on rural land and lays the general framework for them. Furthermore, this means that the federal law retroactively endorses state laws that were enacted before its promulgation as the law in question was enacted prior to the Federal Proclamation. The CCI ruled that the law is constitutional by stating the following two grounds: as it is part of the residual power of the states and also because it has been retroactively endorsed by the Federal Proclamation.
- ✓ One may raise interesting issues here. Can the Federal Parliament confer this kind of power on itself? Why should the Federal Parliament retroactively endorse the state law if it falls within the power of the states? More interestingly, if the HPR finds out that the states lack such power; could such law be saved by retroactive endorsement? Because such an arrangement can easily be manipulated to disturb the formal division without going through the amendment process.
- ✓ It seems that when the HPR decided to retroactively endorse the state law, it had doubts on its constitutionality. Yet in line with the definition of concurrent power it became possible to somehow construe that the state law is valid even if it were enacted prior to the federal law. After all it is usually the case that federal law comes at a later stage when there is a need for securing uniformity among diverse state practices.

II. Concurrent Powers

- ✓ Concurrent powers refer to powers attributed to both entities. However, one of the entities – often a times, the states – are allowed to exercise this power until the federal government steps in to legislate on such powers.
- ✓ The states continue to regulate in some fields until the former occupies the field and the part of the concurrent power which has not yet been occupied by the federal government, may still remain confined within the states.
- ✓ Concurrent powers provide an element of flexibility in the distribution of power enabling the federal government to postpone the exercise of potential authority in a particular field until it becomes a matter of federal importance. They enable both governments to exercise their respective powers depending on whether the matter remains of regional or of national importance.

Discuss on the position of FDRE constitution on concurrent power?

- ✓ In Ethiopia, the general thinking about shared powers has been that Article 52(1), which, among other things, states *"all powers not given expressly to the federal government alone or concurrently to the federal government and the state…."* is without much significance, as the Constitution nowhere indicates such concurrent powers, excepting tax-matters.
- ✓ However, it is still possible to argue that even in other non-tax-matters there are concurrent powers. The Constitution has in one way or another made mention of concurrent powers, albeit not explicitly. Nonetheless, it is only that the framers have not expressly made it so as suggested by Article 52(1). Yet, one may arrive at a number of concurrent powers if on follows the following approaches, for instance.

Illustrations:

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

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

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

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

C. Residual Powers

- ✓ Residual powers represent those powers not listed or partly listed by the Constitution and assigned to either unit of government. This is crucial because such an approach settles tensions between those who urge for greater centralization and those who may urge for greater state power.
- ✓ The United States, Switzerland, Germany, and Ethiopian Constitutions have preferred to leave residual powers with the states while in India such powers belong to the center.

Fiscal Federalism: A General Description

What is fiscal federalism?

- ✓ When several layers of government are established to exercise their powers and functions in the same territory, there is logically a question concerning ***the allocation among them of public tasks and their financing. This requires a constitutional distribution of tasks (expenditure responsibilities) and revenue sources.***
- ✓ ***Generally, fiscal federalism focus on the allocation of expenditure responsibilities, revenue raising powers and adjusting vertical and horizontal imbalances through intergovernmental fiscal transfers.***
- ✓ In brief, fiscal federalism encompasses: principles of fiscal relations between central and sub national levels of government that is the command over resources by the various levels of government and the direction and size of inter governmental fiscal flows.
- ✓ This includes the divisions of tax powers and the means through which resources are adjusted to match expenditure responsibilities for central and sub national levels of government.

What are the essential issues covered under fiscal federalism?

a. **Allocation of expenditure responsibilities**: deals with the issue as to which functions should be carried out and by which level of government. From the economic point of view, sever economists strongly argued for fiscal decentralization on the grounds of efficiency, of manageability, of autonomy and of accountability. In any case, the expenditure requirement of each level of government is dependent on the responsibilities devolved.

How should be the expenditure responsibilities should be determined?

- ✓ Legally speaking, this can be determined by the constitutional structure which deals with the legislative and administrative jurisdictions of each order of government. And it shall include and take in to consideration;

- Economic considerations and might revolve on political, social and historical considerations that are entwined with manifestations of diversities in a federation.
- How the allocation of expenditure responsibility secures states' autonomy, and, on the other hand, on how it ensures the freer movement of goods, labour and services between and among the states of the federation.
- The extent of intergovernmental collaboration and the administration of federal laws in the states, if there are any, also come into consideration, here.

b. **The allocation of revenue raising power**. It is concomitant to basis for desiring devolved expenditure responsibilities. It constrains governments in exercising their constitutionally assigned legislative and expenditure responsibilities. As with the case of distribution of expenditure responsibilities, there is also a need for serious consideration of the reasons for which revenue sources are retained by the centre and which should be assigned to the states.

c. **The process of intergovernmental revenue transfers:** which embraces financial flows between the federal and regional governments as a whole (vertical transfer) and the horizontal distribution – between the states. The instruments used to correct the imbalances should, in general, have the objective of increasing the financial capacity of the states to match their expenditure needs and to narrow down the revenue capacity disparity of the respective states.

What are the methods for establishing tax jurisdiction?

✓ In international transactions, adopting either of these two principles may not suffice, since a conflict may arise resulting in double taxation. So, international agreements may be called for.]

✓ In developing tax legislation, tax jurisdictions must be established. There are two principles in establishing tax jurisdiction.

a. **"Territoriality principle"** (source method); i.e. has taxing power on activities carried out within a country and that produce tax base.

b. **"Personality principle**" (also called the "world wide income method"), enables it to have the legal right to tax its nationals or permanent residents of other citizenship, irrespective of the place where the income is derived.

What are the major principles in allocation of tax jurisdictions?

- ✓ The different perspectives appear to have arrived at similar conclusions with respect to the assignment of specific taxes. As a whole, the general approach is to give the central government power over sources that can help to redistribute income and to stabilize the economy, whereas those immobile taxes which primarily provide a benefit to the local government are to be left to the respective state governments.
- ✓ To be more specific, they proposed taxes such as corporation income taxes and VAT to be assigned to centre, whereas those taxes such as personal income taxes and retail sales are to be left to the states.
- ✓ This classification mainly fits the mobility/immobility factors of tax bases. The theories also proposed that although some are immobile, they might be assigned to the centre because they are unevenly distributed between the various states of the federation and may substantially result in horizontal inequities (such as tax on natural resources).

What are the major constitutional methods in allocation of taxation powers?

- ✓ If a Constitution prescribes complete authority over all aspects of taxation power to the states (constituent states), they will be required to transfer part of their revenue to the central government through the 'upward revenue sharing' (others call it 'reverse revenue sharing') system.
- ✓ This option is challenged since it does not facilitate the principal functions of the central government, such as income redistribution through the tax system, its stabilizing role and tax harmonization policies.
- ✓ If, on the other hand, the entire revenue sources are retained by the centre, state governments become fully dependent on revenue transfer mechanisms. This option challenges the very principle of devolution of powers and responsibilities to regional state governments; one of the prerequisites of federalism.
- ✓ Therefore, the usual trend followed by most federal systems is to divide the revenue sources between the federal and states governments.
- ✓ In practice, however, the degree of tax autonomy enjoyed by the state governments demonstrates wide variations. This can be attributed to the allocation of powers as envisaged by varying Constitutions. Accordingly, three methods can be distinguished.
- ✓ thus, in general there are three constitutional taxation methods;
    a. exclusive

b. concurrent and

c. residual taxation power

What are the major Structure of Allocation of Taxation Power in Ethiopia?

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

A. The Exclusive Power of Taxation of Federal and Regional State Governments

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

What is the position of FDRE constitution on the power of the states to alter tax rate and tax bases?

- ✓ The FDRE Constitution does not explicitly limit the power of the states to alter tax rates or to influence the tax bases.
- ✓ In Article 100 it only provides general “directives on taxation”; i.e. conditions they must consider prior to exercising their powers taxation. Both the states and the federal governments have the obligation to ensure that any tax is related to those revenue sources specified to them by law.
- ✓ They should also ensure that the tax is determined with proper consideration and that the tax imposed by them does not adversely affect their relationships.
- ✓ If any tax imposed by a state affects interstate commerce, the central government intervenes, as this power is reserved for central government. This being the case, in practice, however, tax legislation is uniform throughout the country.

What is the base of our constitution to allocate exclusive powers?

- ✓ The FDRE Constitution provides exclusive revenue sources under the title “federal power of taxation” and “state power of taxation”.

- ✓ In general, the division of revenue-raising power in Ethiopia is mainly structured according to the categories of taxpayers or particular things considered as sources of revenue. The exclusive domain of each level of government is not the tax base but the tax source.
- ✓ Thus, both levels of government do and should not levy tax on the same income, transaction or thing. Customs duties including import/export taxes are exclusively reserved for the centre. The revenue sources assigned by Constitution to the Federal Government, thus, are import/export taxes, income tax, sales and excise tax, property taxes and charges and fees.

B. Concurrent Power of Taxation

- ✓ Conventionally, concurrency of power signifies that the centre as well as each state has the right to enact laws concerning the subject-matter under its jurisdiction.
- ✓ This occurs when a general power of taxation is conferred on each jurisdiction, while the actual assignment of particular taxes is left to each jurisdiction to be sorted out in practice. This system follows the general division of legislative power including the division of broad and general tax powers between the federal government and the states.
- ✓ Article 98 of the Constitution states that regional states shall jointly levy and collect revenue.

What legislative powers are included in concurrent taxation?

- ✓ The power of taxation comprises of two specific powers: ***the power to set a tax rate and the power to collect the tax paid.*** The Federal Government and the states exercise independent powers to determine the rate and to collect the tax paid in areas exclusively assigned to each level of government.
- ✓ If we pursue this principle, a concurrent power of taxation likewise presupposes the determination of the rate and collection of taxes to be decided independently by the Federal Government and the state concerned. This could have led to tax competition between the two

Which law prevails?

- ✓ The literal interpretation of the provision (Article 98) *"the federal government and the states shall jointly levy and collect"* would mean that legislation would be enacted by a joint meeting/agreement of the federal and state legislatures.
- ✓ Meaning, agreements would be reached with each regional state according to the specific circumstance of the regional state concerned.
- ✓ Likewise, as long as the same tax source is subject of both levels of government, close cooperation and adequate information exchange should be in place so as to avoid tax evasion.

How mobile companies shall be levied?

- ✓ Taxes imposed upon mobile companies working in several regions, diverse economic activities ... all can involve a multitude of factors from different jurisdictions. That is, factors of production (capital, labour, land) may be used from several states and products and sales are going back to these and other regional states. In such cases, power of taxation seems appropriate if assigned to the centre.
- ✓

Does sale taxes and excise taxes are included under art 98(2)?

- ✓ According to Article 98(2) of the Ethiopian Constitution *"the profits of companies and dividends due to shareholders' are sources of concurrent taxes."* The English version of this Article only specifically refers to revenue from company profit tax and tax on dividends due to shareholders.
- ✓ The Amharic version, however, includes sales tax; as the latter prevails over the former version it is consistent with the practice. Excise tax is not mentioned in both versions, but is actually levied on products or the sale of companies.
- ✓ The exclusion of excise taxes seems to be "a slip of pen" as there can not be any reason to exclude the imposition of excise taxes on some products locally produced or sold by private companies.

What is the base of allocation of concurrent tax?

- ✓ The allocation of company tax is basically seen from the mobility factor of the economic activities of the companies. Usually they operate in more than one state.
- ✓ But in Ethiopia, it is not mobility that primarily distinguishes this issue. Rather it is the type of the enterprise that matters, irrespective of its mobility.
- ✓ Except for sole proprietorship, private enterprises such as a partnership and private limited companies are taxed by the Federal Government.

Which level of the government has the power to take tax on mining?

- ✓ In Ethiopia, revenue from incomes generated from large-scale mining such as gold, petroleum, gas, etc.., and the mechanisms by which royalties collected from these operations are transferred from the coffer of the Federal Government to that of the corresponding regional state.

- ✓ Mining operations of these kinds are qualified as large-scale, while small-scale, low-income generating operations are left to the regional states; i.e. land rentals and income taxes of the latter ones are left to the states, as these have been designated as mining activities of small-scale by the Minister of Mines and Energy.

C. Residual Taxes

- ✓ Article 99 of the Ethiopian Constitution An interesting aspect of this provision is the distinction it creates with residual power of legislation.
- ✓ As per Article 52 of the Constitution, all powers not exclusively given to the Federal Government alone or concurrently with the states are reserved for the states.
- ✓ The former provision is specific to taxation while the latter refers to all powers and functions of both levels of governments.
- ✓ Therefore, it implies that states necessarily have a residual power concerning matters other than taxation. With regard to exercising residual tax, either level of government can only acquire the power of taxation after a decision is reached by the joint meeting of the two Houses of Federation.

What issues the joint session of the two houses determine?

- ✓ It has to be noted that the joint session of both Houses is to determine which level of government can exercise the power of taxation.
- ✓ The Constitution allocates independent powers of taxation to the states and the centre, and taxes shared by both levels of governments.
- ✓ The joint session, therefore, determines the residual tax to be shared by both levels of governments or to be assigned to either of them. Therefore, one can argue that the power over residual taxes is not linked to residual powers of legislation.

Federal and State Relation

What is intergovernmental relations?

- ✓ Intergovernmental relation refers to a broad concept by which the federal and state governments interact on common programs.
- ✓ Executive co-operative-federalisms also refers to the two levels of governments, but differ from one another in that executive federalism is restricted to cooperation between and among the executives, while co-operative federalism encompasses both presidential and parliamentary federations.

- ✓ The FDRE Constitution states that *"[t]he federal government and the states shall have legislative, executive and judicial powers."* , it seems that both levels of executive organs will have two parallel (not overlapping) functions; i.e. each implementing that which it is entitled to perform by law.
- ✓ Partly because of this and partly because the FDRE Constitution assigns residual powers to the states without making any reference that states are obliged to execute federal laws and administer accordingly in their respective territories, there is an apparent gap in enforcing federal laws in the respective states, this automatically leads the two levels of government to organize and set-up their respective executive organs, institutions and assign to the other level of government.
- ✓ Whether the federalism under consideration is a dual or executive (functional) type, intergovernmental relations (vertical and horizontal) become either 'competitive' or 'co-operative'.

What is the notions of competitive and cooperative federalism?

- ✓ Generally speaking, competitive federalism is an indicator of the fact that it is inherent in the development of constitutional governance and the federal and constituent states compete for one can only gain power at the expense of the other.
- ✓ In order to make co-operative federalism functional efforts at all three, executive (policy-making), law-making and adjudication (interpretation included), should be directed, in particular towards the following points of discussion.

Discuss on the requirement of Territorial Nexus on taxation?

- ✓ In India the power to make a law having extra-territorial operation is conferred only on Parliament and not on the state legislatures; in the Ethiopian case – by the Federal State Council.
- ✓ This means that a state law is not invalid so long as there is a sufficient nexus or connection between the state making a law and the subject-matter of legislation.
- ✓ Broadly speaking and in other words: although the object to which the law applies may not physically be located within the territorial limits of the state, yet the state law will be valid if there exist a commotion or nexus between the state and that object.

Does this situation work in Ethiopian case? How, when, under which circumstan-ces?

- ✓ If there is a territorial nexus or connection between the person sought to be charged, and the state seeking to tax him, the taxing statute is upheld. But the connection must be sufficient. Sufficiency of the territorial connection involves a consideration of two elements, namely:
    - i) Connection must be real and not illusory , and
    - ii) The liability sought to be imposed must be pertinent to that connection.

What is sufficiency nexus?

- ✓ ***The most important consideration for invoking the doctrine is that the connection between the state and the subject-matter of the law must be real and not illusory***. Thus, if you are allowed to tax a dog, it must be within the territorial limits of your taxable jurisdiction.
- ✓ You cannot tax it if it is born elsewhere and remains there simply because its mother was with you at some point of time during the period of gestation.
- ✓ ***Secondly, the territorial nexus is not sufficient unless the law selects some formidable fact which provides some relation or connection with the state and adopts that as the ground for its interference.*** If the connection is not the reason for applying the law to persons or things outside the state, there is no sufficiency of territorial connection.

When there exist delegated legislation?

- ✓ In one sense, delegated legislation means the exercise of power of rule-making delegated to the executive by the legislature.
- ✓ In the other sense, it means the output of the exercise of that power; viz, rules, regulations, orders etc... The expression is used here in both the sense: where the emphasis is on the limits or constitutionality of the exercise of such power, the term is used in the first sense; where the emphasis is on the out put of concrete rules, the term is employed in the second sense.

Why delegation is necessary?

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

b) Many rules which have to be made to effectuate the policy of the act are of **technical nature and require the consultation of experts**.

c) The need for amplifying the main provisions of social legislation **to meet unforeseen contingencies or to facilitate adjustments to new circumstances** arise all too frequently:

and while the parliamentary process involves delays, delegated legislation offers rapid machinery for amendment.

d) In some cases, such as changes in rationing schemes or imposition of import duty or exchange control, public interest requires that the provisions of the law should not be known until it comes into operation.

e) **An emergency** may arise on account of war, insurrection floods, epidemics, economic depression and the like, against which the executive must have power that may be used instantly.

Can the legislature delegate its legislation power?

- ✓ The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law intends to make its own action depend.

What are the different forms delegation?

- ✓ there are two types;
  - **a. Contingent legislation**: "a statute that provides control but specifies that they are to come into effect only when a given administrative authority finds the existence of conditions defined in the statute." In contingent or conditional legislation the delegation is of fact finding
  - **b. Subordinate legislation:** the process consists of a discretionary elaboration of rules and regulations. The distinction between the two types is said to be based on the point of discretion. In subordinate legislation it is of discretion; i.e. the delegate completes the legislation by supplying details with in the limits prescribed by the statute.

What is the limits on legislation?

- ✓ The limit is that, essential powers of legislation cannot be delegated.
- ✓ The essential legislative power consists of the determination or choice of the legislative policy and of formally enacting that policy into a binding rule of conduct.
- ✓ The legislature, therefore, may not delegate its function of laying down legislative policy to an outside authority in respect of a measure and its formulation as a rule of conduct.
- ✓ So long as a policy is laid down and a standard or limit established by statute no unconstitutional delegation of legislative power is involved in leaving to the executive the

making of subordinator rules within the prescribed limits and the determination of facts to which the legislation is to apply.

Does the delegation in Ethiopia give emphasis to these limits?

- ✓ It is a fundamental principle of constitutional law that every thing necessary to the exercise of a power is included in the grant of power. A legislature cannot certainly strip itself of its essential legislative functions, and vest the same in an extraneous authority.
- ✓ The primary duty of law-making has to be discharged by the legislature itself, but delegation may be resorted to as a subsidiary or an ancillary measure.

How do you see the delegation under Art 50(9) of the Ethiopian Constitution in light of this justification of delegation?

- ✓ When we see the Ethiopian Constitution, there is a delegation of power at the federal level under Art 77(13), which stipulates that the Council of Ministers shall enact regulations pursuant to powers vested in it by the House of Peoples' Representatives.

Chapter II

Federations and Second Chambers: HoF

The power of second chambers

Does the upper houses has a legislative power?

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

Does Ethiopia has the upper house?

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

Does HF has the legislative power?

- ✓ The power and responsibilities of the House of Federation according the constitution and the proclamation consolidation the powers and responsibilities of the HF are mostly related to non-legislative power of the second camper.
- ✓ Legislative powers and responsibilities, of HF the only provisions we can trace legislative functions are Article 99, 62(7) and 105.
    - To determine undesignated power of taxation (concurrently with the House of People's Representative)
    - To determine the division of revenues derived from joint Federal and State tax sources, and the subsidies that the Federal government may provide to the States;
    - To amend the constitution.
- ✓ All the remaining powers are not related to the law making process and it is possible to conclude that the law making process of the FDRE is monopolized by the lower house the House of People's Representative.

If so, does it mean Ethiopia followed the bicameral camper?

- ✓ In the strict sense, the Ethiopian parliament is unicameral as the HPR is the only law making organs. Article 55(1) of the constitution, in black and white, stipulates the exclusive control of the House of people's Representative in the law making process.

What are the demerits the monopoly power of legislation by HPR?

- ✓ The accumulation of law making power in a lower house where the basic principle is majority rule, seriously endanger the concept of federalism. Since the constitution fails to ensure the constituent unit's proper place in the institutions of power sharing as well as in the process of policy making at the federal level and by doing so betrays the federal idea significantly.
- ✓ As the power to legislate is exclusively given to the (HPR) organized on a proportionality principle (majority rule), there is no mechanism for smaller states to check the HPR.
- ✓ This is a self-contradiction in the constitution itself as it creates a room to entertain the tyranny of the majority. We can illustrate the danger created by the HPR monopolizing the federal law making power. From the 550 seats of the HPR, the most populous nations (the Oromo and Amhara) occupy 304 seats Therefore, the Oromo's and Amhara's will form a quorum and their combined vote will suffice to pass legislations to the prejudice of other nations and nationalities.

Discuss on the Composition HF?

- ✓ The constitution states that "Each Nation, Nationality and people shall be represented in the House of the Federation by at least one member. Each Nation or Nationality shall be represented by one additional representative for each one million of its population.
- ✓ The representation of one million persons by one person is undermining the chance of the minorities to influence the upper house and they are submitted to the majority as in lower houses. The House of Federation composition is closer to the proportionality principle which is a main characteristic of lower houses.

Does HF provides a privilege to the persons who have exceptional talents?

- ✓ The experience of other countries accommodate Additional members are incorporated in second chambers. Men of exceptional talent who contributed a lot to their country are given special privilege and few seats are allotted to them in the upper house.
- ✓ They are generally members of the upper house not of the popularly elected lower house. These elites or 'aristocrats of success', will be available to offer their wise counsel and throw valuable light on matters which have relevance to the country.
- ✓ The Ethiopian house of federation didn't accommodate such persons of exceptional talent. Despite the representative of nation's nationalities and peoples, these distinguished personalities are well informed and more mature; the debates may bring to light defects in the legislations.
- ✓ Moreover, since the residents of the capital city Addis Ababa and free city Dire Dawa have no representative in the House, the researcher suggests few seats should be allocated to these men on behalf of them.

What is the period of Tenure in HF?

- ✓ Under the Ethiopian constitution, the House of Federation as the house of people's Representative is dissolved every five years. Furthermore, the election year for both the HPR and HF is congruent.
- ✓ As type of government is parliamentary democracy, the executive will also leave office and the ceremonial president is the only individual holding office between parliamentary elections.

Constitutional Interpreter

Why we need for constitutional interpretation?

- ✓ **To safeguard the supremacy of the constitution**, a special organ checking the constitutionality of laws is indispensable. The assertion that the constitution is a supreme law would have no meaning unless there is some authority to safeguard the constitution against violation.
- ✓ **The very nature of constitutional texts itself,** which is of very general nature dealing with fundamental blocs of interests and values of a given society. Stated otherwise, a Constitution – due largely to its generality and subject matter – invites interpretation.

How countries setup constitutional interpreters?

- ✓ Constitutions have adopted different mechanisms for reviewing the constitutionality of laws. There are four different scenarios:
    - US, India, Australia….. the ordinary courts
    - European countries….. a special court
    - China …….. the legislature national people congress
    - Switzerland …… referendum.
- ✓ The FDRE constitution is peculiar to this four trends as it has empowered the House a Federation, a non legislative but yet a political chamber, to resolve constitutional dispute and to interpret the constitution.

A. Judicial review by ordinary judiciary

What is the principle of interpretation of constitution by ordinary courts?

- ✓ Judicial review is the power of courts to pass judgment upon the constitutionality of the legislative acts which fall within their normal jurisdiction. Courts can refuse to enforce a legislative which are unconstitutional and hence void.
- ✓ Judicial review was first introduced in the US. There is no express provision empowering the court to adjuster constitutional issues in the US constitution.
- ✓ The underlying principle of judicial review is that a constitution is part of the law and it therefore falls within the power of the judge to interpret it. It is the duty of the judges to apply and interpret the law and in doing so if a judge finds contradiction and inconsistency between two laws of different hierarchies, it is the duty of the judge to apply the higher law. Judges decide the meaning not only of the rule of ordinary law by t also of the law of the constitution.

B. HoF: Its Role in the Interpretation of Constitution

What are the fundamental principles for interpretation incorporated under FDRE constitution?

a) **The principle of the supremacy of the Constitution:** this means that the Constitution is the paramount law and overrides all other laws or regulations. Article 13(2) an exception to this principle and what is stipulated under Article 9(4) of FDRE Constitution.

b) **Principle of proportionality:** this principle means that the limitation of a right guaranteed by the Constitution must be placed on a plane compatible with the values that the limitations are meant to protect; and also the Principle of the priority of freedoms over equality rights: or natural rights over group and collective rights.

c) Principle of Practical Concordance: This principle explains how to proceed in cases in which two values are found conflicting, as for instance the interest of property and the interest of labour (workers). A good example for practical concordance is given by our Constitution itself is the one provided by Article 41(8) - i.e. that "fair price" is none other than the result of a harmonization between labour, property and market.

d) Unity of the Constitution: This principle means that – in general – provisions of the Constitution have the same value and legal quality.

Who is empowered to interpret FDRE constitution?

- ✓ Regarding as to who can authoritatively interpret, it seems to be there are various indications in some of the articles of the Constitution.
- ✓ Article 13 of the Constitution states that *"[a]ll Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this Chapter." (*Chapter III of the Constitution) It seems too clear that the very obligation of enforcing the rights and freedoms in the Constitution is imposed upon all the three government branches, at both, State and Federal levels.
- ✓ On the other hand we observe that it is the CCI which is empowered to develop and implement principles of constitutional interpretation that it believes to be helpful to investigate and decide on constitutional matters submitted to it.
- ✓ The Constitution, Proclamations No. 250/2001/ and 251/2001. The Constitution uses different terms to address this problem. Under Article 62 of the Constitution it is provided

that *"[t]he House has the power to interpret the Constitution,"* while under Article 83 it is prescribed that *"[a]ll constitutional disputes shall be decided by the House of the Federation."* And further still, under 84(2) it reads *"[w]here any Federal or State law is contested as being unconstitutional …"*

- ✓ So, from these three provisions of the Constitution, we have two different concepts; i.e. constitutional disputes and constitutional interpretation.
- ✓ Concerning this issue, Article 84(2) seems to be pinpointing at what exactly can be the subject matter of constitutional adjudication, namely, the Federal Laws and the States' Laws.
- ✓ It is interesting to note in this connection that the Amharic version (which is a controlling version) of Article 84(2) of the Constitution holds that it is only the laws of the legislature of both the Federal and State governments that can be subject matters of constitutional adjudication.
- ✓ (Probably Article 9(1) of the same may be employed to counter this) This specification in the Constitution has resulted in the line of interpretation by some scholars who are trying to understand the issues of constitutional interpretation in Ethiopia than other cases of constitutional interpretation, like laws by both Federal and State executive organs, can be settled by Courts of Federal and Regional States.
- ✓ See also art 6 and 17, 18 of proc. 250/2001.

Who are the parties before CCI?

- ✓ One should see it from two perspectives: a) the justiciability, and b) non-justiciability of the matter involved. Regarding this matter the Proclamation holds that it is ***"..any interested party..",*** or ***any person who alleges that his fundamental rights and freedoms have been violated by the final decision of any government institution or official*** are the ones that can be parties to a case on constitutional interpretation before the CCI.

Does the party required to exhaust all local remedies?

- ✓ The requirement of exhaustion of local remedies that is mandatorily required of the person who alleges violation of his or her fundamental rights and freedoms is likely to frustrate the entire scheme of remedy made available, concerning which some questions are in order; i.e.
  - What if the violator (government institution or official) refuses to allow the victim to proceed in any meaningful way to exhaust the local remedies?

- What if the hostility between the victim and the violator is such that it is practically impossible for the victim to deal with the officials?

Can parties summit non justiciable matter to CCI?

✓ Coming to the issue of parties with standing in the case of non-justifiable matters, Article 23(4) provides that a third of members of the federal or state councils, or the federal or state executive bodies can submit a case which may not be handled by Courts to the CCI if any one of these organs believe that a constitutional interpretation is required in the matter.

✓ Therefore, HPR and the HoF, where a third of their members of either House elect to do so, can bring non-justifiable matter for constitutional interpretation to the CCI.

What happens if there is a difference in opinion between the Court and a party or both parties to the case on whether a case has to be referred to the CCI or not?

✓ According to Article 22 of the Proclamation, any party to the case pending who believes that there is a need for constitutional interpretation can submit the same to the CCI.

✓ The same Article also makes in mandatory that the party presents the request first to the court handling the case, and that it is only after such a court refuses to entertain the claims of the disputant that the latter submits the case to the CCI.

✓ Once the disputant party chooses to pursue the last option, the CCI no doubt would order the Court seeing the case to halt its consideration.

C. HF Role in Fiscal Matters

What are the roles of HF in fiscal matters?

✓ The role of HoF is

a. Determine the criteria for the allocation of concurrent tax (Art.98), and
b. Determine the subsidies that the regional states receive from the federal government is of crucial importance, the fact that its composition is more or less similar with the HoPR creates a problem in the decision-making process.

What are other powers of HF?

c. Deciding issues related to self-determination;
d. Promoting the equality of the peoples;
e. Exercising concurrent powers together with the HoPR like residual power on tax, election of the federal president and the constitutional amendment under Articles 104 and 105;

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

Office of the Presidency

Who is the presedant?

✓ "The President is;
- "The President of the Democratic Republic of Ethiopia is the Head of State. (art 69)
- "Nomination and Appointment of the President (art 70)
  - ❖ "The House of Peoples' Representatives shall nominate the candidate for President.
  - ❖ The nominee shall be elected President if a joint session of the House of the Federation approves his candidacy by a two-thirds majority vote.

What are the powers of the president?

✓ As prescribed by the FDRE Constitution, major functions of the President are essentially of ceremonial nature. See art 71 (2) cum 57; see art 71(3, 4, 6, 7) see also art 82 (2) (c) and see art 60 (2).

What is the difference between pardon, clemency and amnesty?

a. **Pardon:** [a]n executive action that mitigates or sets aside punishment for a crime. An act of grace from government power which mitigates the punishment the law demands for the offense and restores the rights and privileges forfeited on account of the offense. A pardon releases offender from entire punishment prescribed for offense and disabilities consequent on his condition; it reinstates his civil liberties. The power to pardon for non-federal cries is power to pardon for federal offense. .. .
b. **Clemency** is "[k]indness, mercy, forgiveness, leniency; usually relating to criminal acts. Used e.g. to describe at of governor of state when he commutes death sentenced to life imprisonment or grants pardon."
c. **Amnesty** is "[a] sovereign at of forgiveness for past acts granted by a government to all persons (or to certain lass of persons) who have been guilty of rime or delict, generally political offense – treason, sedition, rebellion, draft evasion – and often conditioned upon

their return to obedience and duty within a prescribed time. . . Amnesty is the abolition and forgetfulness of the offence; pardon is forgiveness."

The Head of Government (the Executive) – the OPM and the CoM

How the head of government relate to his government members?

- ✓ Parliamentary systems are all power-sharing systems. Power sharing admits a very great variance. Still some order can be brought into this maze by looking into the core authority structure in which a chief executive, a prime minister is empowered to perform.
- ✓ From this standpoint the head of government may relate to the members of his government as:
    a. **A first above un-equals:** is a chief executive that is the party leader, that can hardly be unseated by a parliamentary vote, and that appoints and changes cabinet ministers at his or her pleasure. So, this 'first' rules over its Ministers and, indeed, over-rules them.
    b. **A first among un-equals:** may not be the official party leader, and, yet, cannot be unseated by a mere no confidence parliamentary vote and is expected to remain in office even when his cabinet members change. So, this 'first' can unseat its ministers but cannot be unseated by them or the Parliament
    c. A first among-equal: is a prime minister that falls with his cabinet; that generally must embark on the governmental team - 'imposed Ministers' – and that has little control over the team (better described as a non-team whose untouchables play their own game).

The Office of the Prime Minister

Who is the prime minister?

- ✓ "The prime minister is the chief executive, the chairman of the Council of Minister, and the commander-in-chief of the National Armed Forces. See art 74(1).
- ✓ The Office of the Prime Minister (PM) occupies a position of great importance as the real executive.
- ✓ It is his relationship with the Council of Ministers (CoM), party in Parliament, the HPR, the public and the world at large, which have the potential to influence the course of events in

FDRE government. While the OPM is the steering wheel of the ship of the state, while it is the PM who is the steering man**.**

From which house the PM is appointed?

- ✓ The prime minister shall be elected from among members of the House of Peoples' Representatives. See art 60.
- ✓ see art 77, 74

What are the major functions of the executive?

- ✓ the major functions of the executive are:
  - implementation of laws and decisions;
  - Organizational structures and status of administrational agencies such as Ministries, Commissions, Authorities, etc…;
  - Formulation and execution of policies; i.e. economic-, financial-, political-, foreign-, .. policies;
  - ensuring order and peace; i.e. commanding the army, the Federal Police and the Security Office;
  - provision of public goods and service like provision of essential commodities, services such as telecommunications, water supply, …, minting coins and monitoring currency and transactions, etc..;
  - declaration of emergency;
  - Effecting intervention as per the FDRE Constitution and the Proclamation shown hereunder. see art 74

Who has the power to administer national defenses?

- ✓ The power to establish and administer national defense, public security forces as well as federal police force is given to the Federal Government. So is the deployment of federal forces to arrest deterioration of security in a state,
- ✓ But with the request of the state in question or with the instruction of the House of Federation. Drawing-up, approving and administration of federal budget are also parts of the federal jurisdiction.

How the government control the national defense?

I. **Direct Control:** it includes;

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

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

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

d. **Enforcing Political Neutrality** Under chapter ten, Article 87(2)(4) and (5), captioned as on National Policy and Objectives.

e. **International Relation** the House of Representatives, as per Article 55 (12) has the power to ratify international treaty.

f. **Human Right Infringement** under Article 55(7), it is provided that if the conduct of the forces infringe upon human rights, the House of Representatives shall carry out investigation and take the necessary measures.

g. **The use of Defense in time of War and Peace** the House of Representatives has the power to: - As Commander-in-Chief of the Army, the Prime Minster leads the operational aspect of defense matters. The General Chief of Staff is directly under him.

h. **The Council of Ministers** determines on the implementation of the laws and decisions adopted by the House of Representatives;

II. **Peripheral Control Mechanisms**

a. **The House of Federation/Council of Constitutional Inquires: -** by interpreting the Constitution.

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

c. Human Rights Commission and Ombudsman

d. **Auditor General and the Ministry of Finance** Conducting auditing annually and inspecting budget performance: fiscal and asset auditing; regulating disbursement and purchasing of goods and services.

Charter III

The Judiciary and Other Organs of Control

Discuss on various forms of judicial powers?

A. Exclusive Power

- ✓ The Ethiopian Constitution gives some hint about the organization of the judiciary the Constitution states that supreme federal judicial authority is vested in the Federal Supreme Court and reserves for the HoPR to decide by a two-third majority vote to establish inferior Federal Courts as it deems necessary, nationwide or in some parts of the Country.
- ✓ There is only one federal Supreme Court with nationwide jurisdiction and, until very recently, the Federal High Court and First Instance Courts were limited to Addis Ababa and Dire Dawa.
- ✓ As a result the Ethiopian judicial system, theoretically speaking, is organized on a dual basis in which there are two parallel court systems, the federal courts and the state courts with their own independent structures and administrations.

B. Shared Judicial Power

- ✓ There are two views as far as the Ethiopian court structure of shared judicial power is concerned.
  a. On the one hand there are those who hold that the dual court structure is strictly taken both under the constitution and the proclamations issued and as a result contend that civil or criminal cases fall either before an exclusively federal court or an exclusively state court; hence there is no case of shared/concurrent judicial power. One indication of this is the fact that Proclamation 25/96 has not openly provided for the existence of shared judicial powers.
  b. The other view, which this author holds, holds that despite the law's silence there still remains a concurrent judicial power. For instance, labor cases are mentioned nowhere in

the proclamation as federal cases but we know for certain from Article 55(3) of the Constitution that it is federal law matter. The Commercial Code too is a federal law by virtue of Article 55(4) of the Constitution and the same holds true for the Penal Code (Article 55(5)). We know also for certain that the State Courts do adjudicate criminal cases in the regular discharge of judicial duties, not in their delegated powers. The fact that the federal Supreme Court does also review state cases when it discovers errors of law also suggests the existence of shared judicial powers. As a result despite the apparent parallel existence of courts, like other powers, there are shared judicial powers.

- ✓ Besides, the federal and state Constitutions incorporate a huge number of rights and freedoms. It is declared that *"[a]ll federal and state legislature, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this chapter (chapter three)."*

Jurisdiction

- ✓ The Ethiopian judicial system, compared to other federations, stands constrained in its jurisdiction. Even within the limited powers conferred by the Constitution, several internal as well as external factors seem to be at play to maintain the judiciary's low profile.
  a. **Judicial powers are being taken away from the regular judiciary to special other tribunals whose constitutional status remains controversial.** When there is legislative leeway for intervention, governments often decide to 'strip' Courts of their jurisdiction to adjudicate matters in which the government of the day has vital interests or they may transfer jurisdiction over such matters from the Regular Courts to tribunals whose decision-makers often lack the security of tenure or expertise enjoyed by the judiciary. For instance, in Ethiopia despite the constitutional clause under Article 78(4) stipulates that *"special or ad hoc courts which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and which do not follow legally prescribed procedures shall not be established"* there are controversial tribunals introduced from time to time by the federal legislature and they do seem to dismantle the courts' jurisdiction.
  b. Although the judiciary arguably has power to interpret the Constitution, it has no power of reviewing the constitutionality of laws as this power has been expressly granted to the HoF.

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

Some important points on Proc. 25/96

- ✓ In the Ethiopian case, worst of all is Proclamation No. 25/96 which is supposed to define federal and state judicial powers, but has left so many things unresolved and making the Federal Courts to review by way of appeal matters granted to states as regards exclusive federal matters, but are to be allowed to review the bulk of shared judicial powers.
- ✓ A state Supreme Court decision on a federal matter, not exclusive, could be final and binding without resort to the Federal Supreme Court except by way of cassation.

What are the common jurisdictions of federal courts?

- ✓ As per this proclamation the common jurisdiction of federal courts is stipulated as follows:
  a. Federal laws and international treaties.
  b. over parties specified in federal courts shall have jurisdiction over the following cases, making the parties more specific: 'cases to which a federal government organ is a party;
  c. suits between persons permanently residing in different regional;
  d. Cases regarding the liability of officials or employees of the federal government in connection with their official responsibilities or duties;
  e. Cases to which a foreign national is a party.'
  f. The federal courts also have jurisdiction over place specified in the constitution or in federal laws.
  g. Article 3(3) specifies that federal courts shall have judicial power in places specified in the constitution or in federal laws and traditionally all cases arising in Addis Ababa and Dire Dawa fall into this category.

What are the basis of judicial jurisdiction allocation for federal courts?

- ✓ The proclamation allocates subject matter jurisdiction to federal courts on the basis of there grounds;
  a. laws,
  b. parties and
  c. Places.

What federal laws constitute?

- ✓ The phrase 'federal laws' is given a very wide definition under Article 2(3) of Proclamation 25/96 as "*laws of the federal government include all previous laws in force which are not inconsistent with the constitution and relating to matters that fall within the competence of the federal government as specified in the constitution.*"

- ✓ Accordingly, all laws enacted by virtue of Article 55 of the federal Constitution by the HoPR are federal laws. Besides all other laws enacted by previous regimes that are not repealed or inconsistent and so long as they fall within the competence of the federal government, are also by virtue of Article 2(3) of Proclamation No. 25/96 federal laws.
- ✓ As a result, the penal law remains federal law. The Labor Code as well as the Commercial Code are also federal laws.

Whether what is defined under Proclamation No. 25/96 is only exclusive federal jurisdiction and as to whether there is a shared/concurrent judicial power between Federal and State Courts?

If so, do State Courts have jurisdiction to try federal cases as a result of this concurrent jurisdiction and can those cases be appealed before the Federal Supreme Court?

- ✓ The point, however, is that it is difficult to think federal courts are prohibited from adjudicating what is inherently their subject matter.
- ✓ Not every case arising from federal law, as the Constitution suggests, is within the jurisdiction of Federal Courts. While what is stated in the proclamation constitutes exclusive federal powers, , rules out what bulk of federal cases adjudicated by State Courts as shared, not as exclusive state matter and what is defined by Proclamation 25/96 is the exclusive federal matter.

Whether the State Courts, in doing so, undertake a delegated function, or is it a shared jurisdiction as suggested above?

- ✓ The constitutional provision adds-up the confusion in this regard. The Constitution delegates to State Supreme Courts and State High Courts the function of federal High Court and Federal First Instance Court respectively.
- ✓ That is, the Constitution speaks of delegation until the HoPR decides to set up lower federal courts across the Country, implying the revocable position of the delegated power.

- ✓ The Amharic version, however, is less explicit implying a given authority, not necessarily a delegated one. On the other hand, Article 79(7) speaks of concurrent power rather than a delegated one, and the same term is employed under Article 80 which outlines rather more the concept stipulated under Article 78(2)

- ✓ The delegated function of State Courts is restricted to exclusive federal matters rather than to shared federal powers.
- ✓ ***But state courts have concurrent/shared, not delegated power over federal matters not mentioned under the proclamation. As far as shared power is concerned they do not need any delegation. The proclamation has not exhaustively listed all federal matters and whatever is not included in the proclamation belongs to state courts and in doing so they exercise shared judicial power with Federal Courts.***

Discuss on the possibilities of appeal from state court to federal Supreme Court?

- ✓ The trouble once again, however, is that a decision of a state supreme court on such shared, not delegated powers, as a matter of practice cannot be appealed before the federal supreme court and the latter does not seem to have realized that it is divested from reviewing all federal cases arising from federal laws.
- ✓ the appellate power of the Federal Supreme court is explicitly stated under Article 80(6) *"decision rendered by a State supreme court on federal matters are appeasable to the federal supreme court"* and appeal cases from state courts exercising delegated federal jurisdiction to a higher court in the hierarchy are stipulated under Article 80(4)and (5).
- ✓ There is then a bit of confusion between what is stated under the Constitution, the proclamation 25/96 in which appeal to the Federal Supreme Court is expressly permitted?
- ✓ The Proclamation does not exhaustively define federal matters and even if defined the state courts continue to adjudicate federal matters. These powers should be viewed as part of the shared judicial power between federal and state courts and because on federal matters, not limited to exclusive federal ones, the federal Supreme Court has the highest judicial power (Article 80(1)) appeal should be allowed when there are grounds of appeal.
- ✓ Note that the Supreme Court's appellate power is not restricted to exclusive federal matters. It is quite difficult to understand why the Supreme Court's power is restricted in practice only to Cassation, in all cases other than exclusive federal matters.

- ✓ The Constitution provides that the decisions of State High Courts exercising jurisdiction of Federal First Instance are appealable to Federal Supreme Court. This gives the Federal Supreme Court a final appellate judicial authority over federal matters. However, first of all the final appellate jurisdiction of the Federal Supreme Court has been limited to federal cases that are originally decided by State Supreme Courts in their appellate (delegated) jurisdiction in variation of State High Court decisions.
- ✓ That is, the Federal Supreme Court is excluded from reviewing appeal federal matters; that is, the Federal Supreme Court, as a matter of practice, has also no power to review federal matters decided by State High Courts and affirmed by state Supreme Courts.
- ✓ The Federal Supreme Court, as a matter of practice, has also no power to review federal matters decided by State Courts in the exercise of shared judicial powers. The only way for the Federal Supreme Court is cassation as not limited to federal matters. As indicated below, it even extends to cases arising from state matters, so long as there is a fundamental error of law.

The Power of Cassation

Which judicial organ has the power of cassation?

- ✓ Accordingly, the Federal Supreme Court shall have the highest and final judicial power over federal matters, whereas the State Supreme Court shall have the highest and final judicial power over state matters.
- ✓ In this regard, it appears, as far as state matters are concerned, there is no appeal from State Courts to Federal Courts. However, the assertion of matters within each respective state is not without difficulty. The Federal Supreme Court has found ways and means of reviewing State Supreme Court of last resort for appeals in civil and criminal cases. As noted already, if a case does not involve federal law, then the State Supreme Court issues the final and determinative ruling in the case.

Is there a possibility whereby federal caseation bench review the decision of state courts on state matters?

- ✓ The relevant provisions state ‘notwithstanding’ the provision of sub-articles 1 and 2 of the article:
  a. The Federal Supreme Court has a power of cassation over any final court decision containing a basic error of law.

b. The State Supreme Court has power of cassation over any final court decision on state matters which contain a basic error of law.

- ✓ (b) Does not specify the federal Supreme Court's cassation power to federal matters. It simply says' over any final court decision. The introductory paragraph of Article 80 sub 3 and the omission seem to suggest that although appeal from a state supreme court on state matters is not allowed as matter of right, the federal supreme court can review state supreme court decisions by way of cassation, if such decisions, contain a basic error of law.
- ✓ It gives one the impression that the federal Supreme Court has the power to review all final decisions rendered by any court throughout the country. After all, Article 80(3a) provides *"notwithstanding the pro-visions of sub-articles one and two"* the Federal Supreme Court has the power of cassation over any final court decision.
- ✓ Which again could be construed to mean that the State Supreme Courts have a final say over state matters, although by way of exception; i.e. the federal Supreme Court may review by way of cassation decisions of State Courts, state matters.
- ✓ The minutes of the Constitutional Assembly also suggest that the federal supreme court has the power of cassation not only over federal matters but also on state matters and even more interestingly the federal Supreme Court reviews state matters in which the state supreme Court has rendered a final decision by way of cassation.

What should be the solution to maintain the uniformity?

- ✓ As can be seen from the experience of other Federal Supreme Courts there is a need for guaranteeing uniformity regarding some cases and that function can only be guaranteed through the Federal Supreme Court. However, as noted previously, the function of guaranteeing uniformity is often limited to federal laws.
- ✓ This important qualification is missing in the Ethiopian situation, but the Supreme Court has somehow found a way out to discharge this role, extending its scope beyond what is desired. That is to say, the power of cassation of the Federal Supreme Court, which, actually, should have been limited to only federal matter, goes further to incorporate even state matters. Otherwise the Ethiopian Supreme Court stands to be the weakest in terms of jurisdiction, except for cassation power

What are the Power of other Organs of Control?

- ✓ Under the FDRE Constitution there are certain entities established under and by the HPR, which, *stricto senso*, do not fall under the executive; i.e. rather these organs are controlling systems set against the executive in particular and their arms of control may even extend to checking at least certain spheres of operations of organs like the HoF, HPR itself and the Office of the Presidency. Organs of Control constitute the following:
- ✓ The Institution of the Ombudsman;
- ✓ The Human Rights Commission;
- ✓ Auditor General;
- ✓ The House of Federation together with CCI, as interpreters of the Constitution,

Chapter III

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

Which organs of government shall interpreted the constitution and which interpretation method shall be employed?

- ✓ This task is given by the Constitution to two organs, namely to The Council of Constitutional Inquiry (CCI) and the House of the Federation
- ✓ According to Article 7 of this Proclamation, the House of Federation is required to identify and implement principles of constitutional interpretation, which it believes help to examine and decide constitutional cases submitted to it.
- ✓ A similar provision is contained in Article 20 of Proclamation No. 250/2001. Naturally these Articles do not refer to different bodies of principles of constitutional interpretation, because the principles applied by the Council and by the House of Federation are identical.
- ✓ Article 31 of Proclamation 250/2001 similarly requires the rulings of the House of Federation to set out details of the constitutional issue and the justification of the ruling.

Shall the parties be informed on the methods of interpretation?

- ✓ the parties to a court case, who have the right to approach the Council, or disputants outside the court case, must also be made aware how the Constitution should be applied and how the law must be interpreted. Article 23 of Proclamation 250/2001 will also be of particular importance in that it controls acts of the administration.

What are the relevant provision of the constitution in interpretation?

- ✓ Articles 82–84 of the FDRE Constitution deal with constitutional interpretation or constitutional disputes, which are to be entertained by the House of the Federation.
- ✓ However, in court cases, in which a dispute concerning the Constitution or its interpretation arises, Article 84 No. 2 provides a specific procedure under which the Courts must first submit the matter to the CCI before the final decision is given by the House of Federation.

Which laws are subject to interpretations under art 84(2)?

- ✓ With regard to the concept of Law, it must be considered that law in Article 84 No. 2 seems only to refer to formal enactments of Parliament, but as per Article 2 (2) of Proclamation No. 251/01 Regulation, the respective commanding Ministries or Agencies, which are based on an empowerment by Parliament, have the status of formulating laws as well; which are, accordingly, not excluded for constitutional review by CIC and HOF.

The general rules of legal interpretation must therefore be first explained. This explanation will, however, be combined with the principles of constitutional interpretation. The Constitution itself – as well – is in form a law at the highest hierarchical level (Supreme Law). While interpreting the Constitution, it often will be necessary to interpret the law; i.e. the conformity of the law vis-à-vis the Constitution must be controlled.

Which category of constitutional interpretation that Ethiopia followed?

- ✓ Ethiopia belongs to a category of Countries which have codified law (Civil Law), and – therefore – belongs to those Countries of the European Continent such as France, Germany and Italy; i.e. Countries which have codes, in different legal fields (Civil Code, Penal Code and so on) – **the so-called Statutory Law**
- ✓ On the other hand, there is the so-called family of Common Law, to which Great Britain, Canada, Australia, and New Zealand and to a certain extent also the USA belong. So **called (judge-made or) case-made law**.

What is the difference in civil law and common law interpretation systems?

- ✓ The Common Law Countries still prefer a strict interpretation of statutory law, while Countries of Codified Law apply, as a matter of principle of legal interpretation, *the Intentional/the purposive or the Systematic Interpretation* as to what regards to statutes. This principle that statutory law has to be interpreted in a strict or literal way is not – therefore – applicable to the Ethiopian Law.

What is authentic interpretation?

- ✓ When the legislator himself decides by definition or amendment how the law should be applied (authentic interpretation). Provided that in Ethiopia, the ordinary Court is not entitled to give judicial interpretation which is transferred by Articles 82-84 to the CCI and the House of the Federation.
- ✓ In addition to the Courts, there is the so called authentic interpretation by the law-giver Proclamations 250-259/2000 are also instances of authentic interpretation.

Does the interpretation of the CCI and HF is binding in other cases?

- ✓ As Ethiopia belongs to those Countries with codified law, even decisions of the Federal Supreme Court of Ethiopia are only binding between the parties involved. Moreover, Ethiopian court cases are only exceptionally published and have, therefore, little influence outside the Courts.
- ✓ Ethiopian law has consequently introduced a rule to make decisions of the House of the Federation in cases of constitutional interpretation binding and to require the decisions to be published as pen.
    a. The final decision of the House on constitutional interpretation shall have general effect which therefore shall have applicability on similar constitutional matters that may arise in the future.
    b. The House shall publicize the decision in a special publication to be issued for this purpose

What is judicial interpretation?

- ✓ "Judicial interpretation is that which emanates from a court when in order to decide a case it applies a law whose meaning is discussed before it. Such interpretations are called quasi-judicial when emanating from an administrative organ in adversary proceedings.

There are basically four main groups of theories or methods of interpretation: the literal, intentional, systematic and teleological.

When it is desired to establish how the Constitution controls state activity in a particular field, it is necessary first to ascertain the meaning of the relevant constitutional norms. To do this, the following criteria of interpretation, the so-called canons of interpretation, are traditionally applied: verbal meaning, grammatical construction, statutory context, intention of the original legislator and teleological aspects.

Additional aspects of constitutional interpretation generally required are "*the unity of rule of the Constitution", "practical coherence"* and *"appropriate working"*.

Other methods of interpretation, which are less closely directed to the norm in question, have been changed to supplement the traditional canons of interpretation. New directions in constitutional interpretation demand:

Legislative interpretation is therefore three-dimensional in character. The legal context is embodied in the internal and external elements, which can be used as instruments of interpretation. Words can never have a legal meaning devoid of their context. Legal interpretation involves an evaluation of both linguistic and non-linguistic considerations to ascertain the meaning of words through a process of understanding.

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

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

It is regrettable that the law to introduce the Civil Code, which would have contained rules of interpretation, was not enacted because those rules could also have become legal principles for constitutional interpretation.

Literal Theory

- ✓ This rule must be applied from the simple interpretation of laws (legal interpretation) as well as for the constitutional interpretation. However, there is a very specific problem for the application of this rule in Ethiopia.
- ✓ The problem of language and law in Ethiopia was already discussed by Ethiopian and foreign legal experts at an early stage. In some cases the literal interpretation of the Amharic-version could lead to the question whether the Amharic word really covers in full the meaning expressed by the English word.
- ✓ This is of special importance for constitutional interpretation based on Chapter Three of the FDRE Constitution 1995, where the fundamental rights and freedoms are guaranteed. With regard to Chapter 3, Article 13 (2)
- ✓ Thus words should be given their ordinary, grammatically natural meaning at the first step of the interpretation process. However at the second step, the context of the statute has to be taken in to consideration, and it may be necessary to continue the interpretation process by having regard to the intention of the law-giver, the purpose of the law or the aim (*Telos*) of the statute.

Intentional or Subjective Theory

- ✓ This theory and its method have to be applied when there is a discrepancy between the will of the law-giver and wording it uses. Here, it would be appropriate to ask: - "Shall the interpreter (the Court) go back to the real intent of the law-giver?
- ✓ In such cases, the context, as an outside element (external resource), might also be helpful. The intent of the law-giver might sometimes be sought from the internal elements and quite often from external elements; i.e. like drafts, parliamentary discussions, and the like.

The Purposive Theory

- ✓ The purposive theory does not seek to identify either the literal meaning of a provision or the intent of the law-giver, but rather to discover the purpose of the ruling.
- ✓ Contrary to the subjective theory, the purposive theory can be said objective and much more general with regard to the interpretation of a rule or regulation.
- ✓ This theory does not look at the always doubtful intention of the law-giver, but at the objectives of the law as a whole rather than at the specific rule which is to be applied. The purposive theory looks beyond the manifested intention

Does FDRE constitution involves purposive interpretation?

- ✓ When we come to the Ethiopian case, present circumstances demand an interpretative adaptation of the provisions of the Constitution to the demands of the situation. This in turn implies that the CCI and Hof have to be constructive and creative in their interpretation with the view to explore the potential meaning of the broadly phrased texts of FDRE Constitution.
- ✓ Ethiopia's Codes have been drafted on the basis of Continental Law (mainly French and Swiss Law); i.e. the purposive method of interpretation seems more relevant in this respect.

Teleological Theory

- ✓ (*Telos*: Greek word meaning goal, aim or sense). The judges tried to find the spirit or the letters of the law. This method is not identical with the purposive method because the teleological theory is based on equity.
- ✓ The idea that laws have to be softened or tempered by equity can already be found in antiquity. This teleological method is clearly value oriented; which means that in an equitable approach such basic values like freedom and equality, fairness and due process by means of interpretation of the law and the Constitution should be given effect to.
- ✓ Teleological evaluation requires not merely knowledge of rules and principles but also a judicious co-ordination of them. The coordination inherent in teleological evaluation is essentially a skill to be mastered; not a series of rules to be learned

Systematic or Comparative Theory

- ✓ It involves some elements of the intentional theory, the purposive theory and the teleological theory are put together in this method.
- ✓ This results from the fact that Continental Law is generally based on codified law; i.e. on an organized and logical system of rules.
- ✓ The purpose of a law or regulation can therefore often be found in other parts of the same enactment. In the same way, the so called contextual aids or elements, which are used by the intentional theory, also form a systematic order and belong, therefore, to the systematic method of interpretation.
- ✓ In Ethiopia the comparative method should play an important role with regard to the ordinary law, because law enactments such as the Civil Code or the Commercial Code are acquired from French, Swiss and English models. To understand a particular provision it might be

useful to compare it with rules in the other legal systems from which the Ethiopian Law were initially derived from.

What is the role of comparative theory for constitutional interpretation in Ethiopia?

- ✓ Comparative interpretation will soon become a very important and frequently used method of constitutional interpretation, partly because circumstances might necessitate comparison of current provisions with those of previously enacted.
- ✓ Comparative interpretation will also be very important in view partly of (and perhaps more likely) the internationalization of human rights issues. The same is true for the systematic interpretation, because in accordance with Article 9(4) and Article 13(2) International Charters, Conventions and Declarations of Human Rights are incorporated into Ethiopian Law (as these get ratified by the Ethiopian Parliament).

Objective Theory or Delegation Theory

- ✓ Once legislation has been promulgated, the legislature's task is complete and the text acquires an existence of its own.
- ✓ This theory believes that the words of a regulation are just a delegation to the Court; one that gives it the competence for its own interpretation. Therefore the more imprecise the regulation would be, the more authority would be transferred to the Court to decide.

Is it practicable in Ethiopia the objective or delegation theory?

- ✓ In Ethiopia, applying this theory would lead to entitling the House of Federation assume – more or less – the function of a lawgiver. Whether that could be made compatible under current conditions depends upon
  a. the Ethiopian Constitution has given this role more or less to the House of Representatives,
  b. The provisions of the Ethiopian Constitution, especially those chapters on Human Rights are very broad, and, to a certain extent, not precise.

Some Important Points on Emergency Defenses

- ✓ Emergency as a state power should be treated along with the powers of the PM and the CoM along with that of HPR.
- ✓ The next section will attempt to explore the Article 93 of FDRE Constitution and other major limitations prescribed by some articles of Chapter 3 of the Constitution.

What should be the role of the courts?

- ✓ in upholding emergency powers even on the ground of necessity, the Courts would insist on three conditions,

a. The emergency measures are directed to and reasonably required for the orderly running of the State;

b. They do not impair the rights of the citizens under the previous lawful Constitution;

c. They do not run counter to the previous lawful Constitution, and are not intended to strengthen the usurper.

What is the central notions of the doctrine of necessity?

- ✓ "The doctrine of necessity has also been applied where there is a valid written Constitution but it does not provide for any situation of emergency, and a temporary law passed by the Legislature would not be inconsistent with the Constitution.
- ✓ ".. The need for such 'derogation' of the guarantee of human rights is acknowledged by the International Charters on human rights, such as the International Covenant (Art.4) and the European Convention (Art.15)

What public Emergency or National emergency means?

- ✓ The European Court has defined public emergency in this context as ***'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed.'***
- ✓ "The word 'exceptional' means that the situation is such that 'the normal measures permitted by the Convention for the maintenance of public safety, health and order ate plainly inadequate'.
- ✓ "Combining the above observations, a 'public emergency', which authorizes extraordinary measures derogating from human rights, nay be defined as –
  - An exceptional situation
  - Which threatens the organized life of the whole community,
  - Which calls for extraordinary measures, and
  - Which are not permitted by the normal machinery of the administration.
  - "Another test is that the situation of public crisis calling for emergency powers must be of a temporary nature, on the termination of which the normal machinery of the State will be restored, free from the derogation. There cannot be any constitutional Government where emergency powers are perpetuated.

What can be the Causes of public emergency?

- ✓ “Apart from the war or external aggression by a foreign State, or a domestic armed rebellion, an emergency calling for a departure from the normal order may be caused by act for terrorism and subversion by reason of which the very existence of the State itself is at stake; or by natural catastrophes or economic crises which threaten ‘the life of the nation as a whole’. ..”

This is yours….