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**THE CONSTITUTIONALITY OF ENACTING MEDIA
LAW OF NATIONAL APPLICATION BY THE
FEDERAL LEGISLATURE IN ETHIOPIA**

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A Thesis Presented in Partial Fulfillment of the Requirements for
the LL.M Degree (in Constitutional and Public Law)

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Declaration

I, the undersigned, declare that this thesis is my original work, and has not been presented for a degree in this and any other University, and that all source of materials used for the thesis have been fully acknowledged.

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This is to certify that the thesis prepared by Hanan Maregion, entitled: *The Constitutionality of Enacting Media Law of National Application by the Federal Legislature in Ethiopia* and submitted in partial fulfillment of the requirements for the degree of Masters (LL.M in Constitutional and Public law) complies with the regulations of the University and meets the accepted standards with respect to originality and quality.

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Acronyms and Abbreviations

FDRE	Federal Democratic Republic of Ethiopia
HPR	House of People Representatives
HOF	House of Federation
Proc.	Proclamation
Art/s	Article/s
No.	Number
Ed.	Editor/Edition
Neg.Gaz .	Negarit Gazette
E.C.	Ethiopian Calendar
Para.	Paragraph
P/PP.	Page/s

Abstract

Division of legislative power of the state between the federal government and the constituent states is one of the essential aspects in the Ethiopian federal arrangement. This thesis investigates the legislative constitutional competence of the federal legislature for enacting Media laws of national application in Ethiopia. The issue at the heart of the thesis is that the constitution has not clearly assigned the legislative jurisdiction in relation to media laws. The FDRE Constitution has provided enumerated and limited powers to the federal government and bestowed residual power to the constituent states. Some of the enumerated powers, however, are stated in a general fashion. This creates ambivalence as to the legislative jurisdiction of media laws in Ethiopia. This thesis attempts to examine the locus of jurisdiction of media law in view of the legislative division of power in the Ethiopian constitution. To this end, it employs tools of legal review, doctrinal analysis and qualitative data obtained from interviews and Archival documents. Looking in retrospect the constitutionality of enacting broadcasting laws of national application by the federal legislature in Ethiopia appears to be justified in three fundamental aspects. Firstly, the federal legislature has the power to legislate a law pertaining to natural resources and limited radio wave is considered as one amongst them. Though digital media is replacing traditional radio wave broadcasting technology, it is still beneficial when mixed with the new. Secondly, the feature of broadcasting media has trans-regional as well as trans-national impact which calls for federal regulation. Thirdly, the federal legislature can enact laws on inter-state commerce and inter-state trade and broadcasting media has trans-state commercial aspect which demands federal regulation. Finally, the paper argues that media laws as part of the legal regime for the enforcement of freedom of expression rights recognized in the constitution falls within the concurrent jurisdictions of federal and state governments which entitles the federal legislature to pass mass media laws.

Key Words: Federal legislature, Constitutionality, FDRE Constitution, Media law, Constituent states, Ethiopia, National application.

CHAPTER ONE

1. Introduction

1.1. Background of the Study

Since the restructuring of the Ethiopian state into a federation in May 1991, the Country has opted for parliamentary system as a form of government and a federal set up as a state structure.¹ This is a fundamental shift in the system of government by principally changing the unitary system to federal state structure and also by recognizing rights of peoples for self-determination.² This choice is believed to come up with a solution to the long standing nationality question that had been denied for the last many years.

The design of Ethiopian federalism was based on the recognition of the ethnic diversity of the population. To put it differently, it is a unity based up on the recognition of and the respect for diversity.³ The emphasis on unity in diversity was legally expressed in the recognition of a right to self-determination to all the nations, nationalities and peoples of Ethiopia.⁴ This right extends to creating regional states within the federal state and can even extend up to secession from the federation under the conditions stated in the constitution.⁵ Thus, the current constitution seems to stabilize the rival interests through the instrumentality of balanced power managed carefully by introducing federal system.

With a view to overcoming the cause of the state crisis, the establishment of the federal system planned to decentralize power and resources. The decentralization of power based on a federal formula is devolution of power from the center to the constituent states.⁶ The constituent states are constitutionally empowered to make decisions in their own

¹Asnake Kefale and Assefa Fiseha (Eds.) *Federalism and Local Government in Ethiopia*: Ababa University press,(2015), p.1

²Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia, A Comparative Study*: 2nd.revised ed. Artistic printing press, (2007), p.293 [here after, Assefa, federalism and accommodation of diversity in Ethiopia]

³ Christophe Van der Beken, 'Ethiopia: Constitutional Protection of Ethnic Minorities at the Regional Level', *Africa Focus*, (2007), vol.20, Nr.1-2, pp.105-151, at p.106

⁴ The Constitution of the Federal Democratic Republic of Ethiopia, 1995, *federal_Neg. Gaz.* proclamation No.1, 1st year, No.1, art.39(1) [here in after, FDRE Constitution, Proc.No.1/1995]

⁵Mizane Abate, Ethiopian Human rights system, compiled material, Addis Ababa University, School of Law, (2016/17), [unpublished] p.6

⁶ Merera Gudina, *Ethiopian Competing Ethnic Nationalism and the Quest for Democracy*, 1960-2000: shaker publishing, (2002), p.139

affairs.⁷ Doing so, it purportedly resolves the ‘nationality question’ through accommodating the country’s various ethnic groups in the state machineries.⁸ Conventionally, federalism focuses on division of state power between the federal government and the constituent states.⁹ Accordingly, the Constitution of the Federal Democratic Republic of Ethiopia [the FDRE Constitution or the constitution] provides that the federal government and the constituent states have legislative, executive, and judicial powers.¹⁰ This study confines itself to the legislative aspect.

At the federal level, the House of Peoples’ Representatives [HoPR] has the highest decision making power and the same goes to the constituent states legislature at constituent states level. The FDRE constitution also puts that both the federal government and the constituent states are autonomous with respect to powers granted to each of them and are required to respect the jurisdiction of each other in the course of exercising their constitutionally given power.¹¹

The theme of the study is to explore the constitutionality of enacting media laws of national application by the federal legislature in Ethiopia. More specifically, the study deals with ascertainment of jurisdiction of both Freedom of the Mass Media and Access to Information Proclamation No.590/2008 and the Broadcasting Service Proclamation No.533/2007. In connection to this, our media laws do not always make a distinction between the terms ‘Press’ and ‘Media’.¹² Art.2 (1) of Proc.No.590/2008 states “mass media” means printed matter that includes periodicals and broadcasters. This provision implies that the two terms of press and media have the same meaning and can be used interchangeably.¹³

On the other side, the FDRE Constitution appears to distinguish between ‘press’ and ‘media’ as per Art.29 (3) of the same. The phrase ‘Freedom of the press and other mass media’ suggests that the press is distinct from media. This in turn creates a degree of confusion as to the essence and the scope of media and press.¹⁴ Be that as it may, the present thesis takes that media laws include both the print and the electronic media. Thus, the term media is used

⁷ Ibid.

⁸ Assefa Fiseha, ‘Ethiopia’s Experiment in Accommodating Diversity: A Twenty Years Balance Sheet’, *Ethiopian Journal of Federal Studies*, (2013), vol.1, No.1, pp.103-153 at p.119

⁹ Ibid.

¹⁰ The FDRE Constitution proc. No.1/1995, art.50(2)

¹¹ FDRE Constitution, pro. No.1/1995, art.50(8)

¹² Andargachew Tiruneh, ‘the State Media in Ethiopia: An Investigation into whether or not it is a Public Service Media’, *Wonber*, (2013), Alemayehu Haile Memorial foundation’s Bulletin, pp.50-74, at p.51

¹³ Ibid.

¹⁴ Ibid.

across the thesis to mean both the press and the broadcasting media. The researcher is concerned with assessing whether or not the power of enacting media laws of national application by the federal government falls within the constitutional competence of the federal government. The study does not deal with the content of the rights in the proclamations.

1.2. Statement of the Problem

The FDRE Constitution has provided enumerated powers to the federal government and with respect to the constituent states, it has opted for the residual power doctrine with a view to giving more power to them across the federation.¹⁵ It also provides certain concurrent and framework powers shared between the two orders of government up on matters that are clearly provided for in the constitution.¹⁶

It would be practically impossible for the drafters to enumerate exhaustively the possible powers and functions of both orders of government and one mechanism of avoiding potential dispute between the federal government and the constituent states is through the instrumentality of residual power doctrine.¹⁷ Although the constitution mentions certain powers bestowed upon the constituent states, it has in principle adopted residual power doctrine. Residual powers are given to the constituent states so as to enable them to exercise wider powers and to accommodate specific matters which were unforeseen by the drafters at the time of the making of the constitution.¹⁸

The central issue of the research is that the legislative jurisdiction of media law is not clearly stated in the FDRE constitution. The issue of media legislation is not stated explicitly either as a shared power or as an exclusive power of the two orders of government. The constitution grants residual powers to the constituent states.¹⁹ However, matters not expressly listed in the constitution do not automatically fall under the jurisdiction of the constituent states. Since the mere absence of express provision may not be a bar for the federal government to pass a valid

¹⁵ The FDRE Constitution proc.No.1/1995, arts.51 and 52

¹⁶Endalkachew Geremew, the Legislative Competency of the Federal Parliament on Matters Uncovered under FDRE Constitution, based on Empirical Appraisal of Laws, LL.M thesis, Addis Ababa University, school of law, (2010) [unpublished, available at law library] p.4 [here after, Endalkachew, the legislative competence of the federal parliament]

¹⁷ Solomon Nugsie, *Fiscal Federalism in Ethiopian Ethnic based Federal System*: Wolf Publisher, Netherland, (2008), pp. 61-62 [here in after, Solomon, Fiscal federalism in Ethiopia]

¹⁸ Ibid.

¹⁹ The FDRE Constitution, Proc.1/1995, art.52(2)

legislation. Hence, to say a certain matter is residual power, one must first deduct all powers granted to the federal government via the FDRE constitution. Nor, it is clear whether or not power of issuing media law falls under concurrent jurisdiction of both entities. So, whose power is it? Which provision of the constitution gives power for the federal legislature to enact media laws of national application? These are the basic questions that one must confront in assessing the constitutionality of the federal legislation of media laws of national application in Ethiopian federal arrangement.

The federal legislature has enacted both Freedom of the Mass Media and Access to Information Proclamation No.590/2008 and the Broadcasting Service Proclamation No.533/2007 without unequivocal constitutional basis. There is no express constitutional limit that serves as a parameter to test whether there is legislative encroachment or not. In a democratic system, the wishes and the whims of the people are reflected via the constitution as it is the expression of the wills of every nation, nationalities and the people of Ethiopia.²⁰ The federal legislature's power to enact laws is delegated by the people and it is only constitutional where its power is exercised within its scope given by the FDRE constitution. It is, therefore, the constitution through listing and limiting the powers and the functions of the federal legislature that protects the will of the people by granting a certain matter within its scope and other matters out of its scope.²¹

1.3. Objectives of the Study

1.3.1. General Objective

The main objective of this study is assessing the constitutionality or otherwise of the legislative jurisdiction of enacting media law under the current federal set up of Ethiopia.

1.3.2. Specific Objectives

The study sets out the following specific objectives:

- To look into the legislative constitutional competence of the federal legislature to enact media laws of national application.

²⁰ Id, art.8

²¹ See Endalkachew, the legislative competence of the federal parliament, cited above, note 16, at p.7

- To examine whether enacting media laws of national application falls under concurrent power allocation in the framework of the FDRE constitution.
- To explore the possibilities that could be used by the federal government to enact media legislation.

1.4. Research Questions

The thesis aims at addressing the following research questions:

- Is the power of enacting media laws of national application by the federal legislature constitutionally founded?
- Does the power of enactment of media laws for the constituent states' application by the federal legislature fall under concurrent power?
- What justifications could be adduced to the federal legislature to have a say pertaining to media legislation?

1.5. Significance of the Study

The findings of this study will give conceptual clarity as to the constitutional competency of the federal legislature in enacting media laws of national application. The study attempted to show the constitutionality or otherwise of enacting media law by the federal legislature for the states' application. Most of the studies of media law in the Ethiopian setting have focused on the study of the subject from the perspective of freedom of expression.

However, this study looks at media laws from the angle of legislative jurisdiction. The dearth of the research in the area of jurisdiction of enacting media law in Ethiopia makes it necessary to investigate the legislative jurisdiction of media laws. The thesis will be important in making modest evaluation and clear determination of legislative competencies having to do with media.

1.6. The Scope of the Study

The scope of the thesis is limited to investigating the legislative jurisdiction of media laws in Ethiopia. It scrutinizes the constitutional basis of enacting both Freedom of the Mass Media and Access to Information Proclamation No.590/2008 and the Broadcasting Service Proclamation No.533/2007 by the federal legislature for the states' application in Ethiopia. This study does not, however, deal with the content of the rights in both proclamations unless that is necessary for determining the legislative competencies.

1.7. Limitation of the Study

The researcher had encountered some unwillingness from key persons in authority in the HoPR in an attempt to have their respective views about the constitutionality of enacting media laws of national application by the federal legislature in Ethiopia. But the limitation was solved by directing the interviews with those who were volunteer to give the information they have and by using archival documents. Furthermore, the dearth of relevant literature on the subject was a challenge for the researcher in the context of Ethiopia. It had also been overcome by referring relevant foreign experience.

1.8. Research Methodology and Methods

The study employs qualitative approach. The research will be qualitative for it essentially focuses on legal review and analysis, justifications, benchmarked countries experiences, collection of various pertinent literature on the subject. To this end, both primary and secondary sources of information and data were consulted in order to examine the power of issuing media law in the FDRE constitution. Some countries' experiences are selected systematically based on similar features with Ethiopia in different context. Germany, Switzerland and Nigeria were countries selected based on their federal system of arrangement and the adoption of residual doctrine of allocation of power for sub-national states. It also made use of interviews. Unstructured interviews were directed to key persons in authority and experts in the HoPR.

1.9. Organization of the Study

The paper is organized into four chapters and each with several sections and subsections. Accordingly, the first chapter overviews the federal system of arrangement in Ethiopia, it highlights some points from the perspective of shared rule and self-rule with particular focus on legislative power pertaining to media laws. It tries to make a general overview as to the constitutionality of enacting media laws of national application by the federal legislature. It also discusses the scope of media and media laws that the study covers.

The second chapter examines the allocation of legislative powers under selected Countries which adhere to a system of federalism followed by a brief account of the Ethiopian legal system's scheme of allocating legislative power. It also examines the legislative experience of enacting media laws in some federal Countries as examples.

The third chapter presents the legislative jurisdiction of media laws in Ethiopia. It deals with federalism principles such as subsidiarity, the doctrine of commercial clause and the territoriality principle as a yardstick for determining the constitutionality of enacting media laws of national application by the federal legislature in Ethiopia. It also deals with legislative jurisdiction based on other natural resources and implied power. It explains whether the nature of media legislation is a concurrent power under FDRE constitution or not. Chapter four is devoted to summary and conclusion based on the findings of the study.

CHAPTER TWO

2. The Allocation of Legislative Power under Federal Systems

2.1. Introduction

This chapter attempts to explore methods or techniques of allocation of legislative powers in federal systems by using some federal systems as example. A number of scholars have defined federalism differently. Despite the differences, however, almost all scholars have agreed that federalism creates at least two levels of government.²² According to Riker, 'federalism is a state structure in which two levels of government rule the same land and people, each levels has at least one area of action in which it is autonomous, and there is some constitutional guarantee of the autonomy of each government in its own sphere.'²³ Elazar defines federalism as a combination of self-rule and shared rule.²⁴ So, federalism is a system of government or a method in which a written constitution divides powers of government on territorial basis. The division is made between federal government and constituent states that each level of government has its own area of powers.²⁵

The method of division of legislative power employed in federal constitutions is by reference to subject matter.²⁶ For instance, the United States and Swiss constitutions allocate specific power to the federal government either exclusively or concurrently, leaving unspecified residual power to the constituent states.²⁷ However, the division of powers in federations differs greatly in that some federations are highly centralized by giving more powers to the federal government, while others are decentralized with extensive autonomy of the constituent states.²⁸ The substance of vertical power division differs from one federation to

²² Zerihun Yimer, *Federalism: Principles, Processes and Practices*, Compiled Reader, Comparative Federalism Module, 2015, p.1[unpublished, available at institute of federalism and legal studies, Ethiopian civil service University]

²³ Cited in Mikhail, Filippov et al, *Designing Federalism: A theory of Self-sustainable Federal Institution*: Cambridge University Press, New York, (2004), p.5

²⁴ Daniel J. Elazar, 'Federalism and the Way to Peace', Reflection paper No.13, Queens' University, Canada, (1994), p.21 [here in after, Elazar, Federalism and the way to peace]

²⁵ Federalism and the Division of Power, (2015), p.74 [available at <http://www.thhs.qc.edu/ourpages/auto/2015/11/5/47162296/Federalism%20HW%2016.pdf>, last Visited 5/2/17]

²⁶ Cheryl Saunders, 'Constitutional Arrangements in Federal Systems', *Oxford Journals*, (1995), vol.25, No.2, pp.61-79, at p.69 [here in after, Saunders, Constitutional arrangements in Federal systems]

²⁷ Ibid.

²⁸ George Anderson, *Federalism: An Introduction*: Oxford university press, Canada, (2008), p.3 [here in after, Anderson, Federalism: an introduction]

another depending on such factors as history, culture and legal tradition.²⁹ In any federation, there are also common features of having a powerful motives to be united for certain purposes on the one hand and deep-rooted motives for autonomous regional governments for other purposes, on the other, that has an implication on the distribution of power.³⁰

2.2. The Form and Scope of Allocation of Legislative Powers in Federations

Countries which adhere to federal system have provisions in their constitution that stipulate the allocation of powers between the federal government and the constituent states.³¹ When we say form of distribution of power, it refers to the technique of allocation of powers between the federal government and the constituent states whereas the scope of legislative powers stands for the areas and the amounts of jurisdiction assigned to each of them.³² Though there are differences in how federations fashion the distribution of powers, there are some common features as well. The allocation of legislative power is usually based on the vague concept that matters of national importance should be given to the federal government while matters of regional importance should devolve to the constituent states. This principle, however, does not tell us which specific power should go to the federal and which one stays with the constituent states.³³

A general trend or technique for the division of legislative power in federal constitutions is the use of enumerated powers and assignment of residual powers.³⁴ There are different ways by which legislative powers are assigned through enumeration. First is to have only one list containing subject matters upon which either the federal government or the constituent states exercise legislative competence and at this time, the other government will be assigned residual powers.³⁵ U.S. constitution is an example of containing one list of powers exercised by the federal government. The Congress is a body of limited governmental authority while

²⁹ Ronald L. Watts, *Comparing Federal systems*: 3rd ed., (Montreal and Kingston: McGill- Queen's University press), London, (2008), p.83. [here in after, Watts, Comparing federalism]

³⁰ Ibid.

³¹ Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia, A Comparative Perspective*: 3rd revised ed., Eclipse printing press, (2010), [here in after, Assefa, federalism and accommodation of diversity in Ethiopia] p.256

³² Ibid.

³³ Ibid.

³⁴ J.O.Arowosegbe, 'Techniques for Division of Legislative Powers under Federal Constitutions', (2014), *Journal of Law, Policy and Globalization*, pp.127-134, at p.130[here in after, Arowosegbe, Techniques for division of legislative powers under federal constitutions]

³⁵ Ibid.

the constituent states retain all residual governmental powers.³⁶ A basic principle in the U.S. Constitution is that the Congress may act only if there is express or implied power to act in the constitution; states, however, may act unless the Constitution prohibits the action.³⁷ The second way of allocation of power is to have two lists; one exclusive list and concurrent list.³⁸ The federal republic of Nigeria constitution could be an example of this category.

In Germany and Ethiopia, the exclusive legislative jurisdiction assigned to the federal legislature is more extensive.³⁹ The potential of this technique for achieving national standards while leaving some flexibility in their implementation and administration at constituent states' level is some of the interests of federalism.⁴⁰ A federal constitution may also contain three legislative lists like the Canadian and Indian constitutions. First is an exclusive list of the power of the federal government, second, the exclusive lists of power of the constituent states and the third lists of concurrent powers of the federal government and constituent states and give residual power to the federal government.⁴¹

What is common in U.S., Germany and Ethiopia is that they grant enumerated powers to the federal government and residual powers to the constituent states. The constitution of the United States of America makes provisions that the federal government has certain enumerated powers which are spelled out in the constitution. In addition, the constitution gives the federal government, the implied powers to pass any law 'necessary and proper' for the execution of its express powers.⁴² The Basic Law of Germany also granted the exclusive legislative powers to the federal government and concurrent legislative powers that are shared in common between the federal government and the Lander.⁴³ With respect to matters that are subject to concurrent legislative powers, the Lander have the power to legislate to the extent

³⁶ Kevin W. Saunders and Michael A. Lawrence, *Constitutional Law*: Oxford University Press, United states of America, (2013), p.17

³⁷ Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, 3rd ed., ASPEN publisher, New York, (2006), p.233 (here in after, Chemerinsky, 'Constitutional law')

³⁸ See Arowosegbe, techniques for division of legislative powers under federal constitutions, cited above, note 34, p.130

³⁹ See Wattes, comparing federalism, cited above, note 29, at p.87

⁴⁰ See Saunders, Constitutional arrangements in Federal systems cited above, note 26, pp.70-71

⁴¹ See Arowosegbe, techniques for division of legislative powers under federal constitutions, cited above, note 34, p.130

⁴² See cited above, note 25 ,at p.75

⁴³ Devolution of powers in Germany, Legal Lemorandum, (2013), p.7 [available at <http://www.mreza-mira.net/wp-content/uploads/Devolution-of-Powers-in-Germany-August-2013.pdf>, last visited 2/5/2017]

the federal government has not exercised its legislative powers.⁴⁴ In addition, the Lander can legislate on all other matters not reserved for federal government.⁴⁵ If there is a conflict between the law of the Lander and a federal law, the federal law supersedes.⁴⁶

2.3. An Overview of the Allocation of Legislative Powers under the FDRE Constitution

As mentioned earlier, the German and the U.S. federations provide the power of the federal government specifically enumerated and allow the residual powers to the sub-national states. The FDRE constitution in general follows the United States model of distribution of powers. Because it provides the limited and defined powers to the federal government and leaves the residual ones to the constituent states. As all federations have at least two orders of government, each of which has a measure of autonomy that is protected by the federal constitution,⁴⁷ the same goes to the Ethiopian constitution.

The FDRE constitution establishes the key political institutions, defines their powers and indicates some limits on their powers.⁴⁸ It provides that the federal and the constituent states have legislative, executive, and judicial powers.⁴⁹ The federal government appears to be one with enumerated and limited powers and the constituent states hold residual powers.⁵⁰ The constitution also consists of a list of some state powers besides the residual powers. The federal government is entitled to delegate its power to the states.⁵¹ However, the constitution does not provide for the delegation of state power to the federal government though there is no express prohibition in this regard.⁵²

⁴⁴ The Basic Law for the Federal Republic of Germany as last amended on (23 December 2014), art.72(1) [here in after, the Basic law of Germany]

⁴⁵ The Basic Law of Germany, art.70(1)

⁴⁶ The Basic Law of Germany, art.31

⁴⁷ Cheryl Saunders, 'the Constitutional Credentials of State Constitutions', *Rutgers Law Journal*, (2011), vol. 42, pp. 853-880, at P. 856

⁴⁸ Assefa Fiseha, 'Separation of Powers and its Implication for the Judiciary In Ethiopia', *Journal of East African Studies*, (2011), vol.5, no.4, pp.702-715, at p.705

⁴⁹ FDRE Constitution, pro.No.1/1995, art.50(2)

⁵⁰ See Assefa , Federalism and accommodation of diversity in Ethiopia, cited above, note 31, at p.263

⁵¹ FDRE Constitution proc. No.1/1995, art.50(9)

⁵² An express clause permitting the states to delegate their powers to the federal government was included in the draft of the constitution, however, it was rejected on the basis that the powers and the functions of the states needs to be protected and with the view to encouraging states to perform by their own capacity [see minutes of the constitutional assembly, vol.4 Hidar 14-20, 1987, E.C. Discussion on art.50]

2.3.1. Exclusive Power

The notion of exclusive power refers to the powers the federal constitution has assigned exclusively either to the federal government or the constituent states.⁵³ The competence lies only with either order of government that is constitutionally entrusted with the power unless lawfully delegated and the other level of government is prohibited from exercising and interfering into such powers.⁵⁴ K.C. Wheare puts the existence of exclusive power is decisive to a federation. 'There must be some matter, even if only one matter, which comes under the exclusive control of the federation and likewise under the states' because shared power can in the end be absorbed, at least potentially, into the exclusive list to the extent that the federal government chooses to regulate it.⁵⁵ Besides, the assignment of responsibility exclusively to one government or another reinforces the autonomy of that government and it makes clear which government is accountable for policy in that area.⁵⁶ Constitutional jurisdiction over certain subject matter should thus be specifically assigned to one order of government to the exclusion of the other.

As mentioned above, the FDRE constitution confers enumerated and limited powers and responsibilities upon the federal government and also comprises some lists of powers of the constituent states in addition to the reserved powers. The exclusive powers of the federal government, inter alia, are national defense, foreign relation, monetary policies, foreign investment, the establishment and implementation of national standards on health, education, science and technology.⁵⁷ The constituent states are also empowered to establish their own administration including the power to enact and enforce laws on the states civil services, the state police force, and formulate and execute state constitutions and other laws, economic, social and development policies, strategies and plans, administer land and natural resources under federal laws.⁵⁸

It needs to be noted that the power of the Ethiopian federal government is not limited to what is listed under art.51 of the constitution. Other provisions, chiefly those of article 55 entrust

⁵³ See Assefa, federalism and accommodation of diversity in Ethiopia, cited above, note 31, at p.257

⁵⁴ Muluneh Yitages, Supervisory of power of the center to regions in South Africa and Ethiopia: A comparative Analysis, LL.M thesis, University of Western cape, 2009,[unpublished],p.8

⁵⁵ K.C. Wheare, *Federal Government*: 4th ed., Oxford University press: London, (1963), p.79

⁵⁶ Ronald L. Watts, *Comparing Federal Systems in the 1990s*: Queen's University Press, Canada, 1996, p.33 [here in after, Watts, comparing federal systems of the 1990's]

⁵⁷ The FDRE Constitution, proc.No.1/1995, art.51

⁵⁸ Id. At art.52

additional powers to it. Hence, residual power of the state only applies after discounting all powers of the federal government distributed throughout the constitution.⁵⁹

Nonetheless, some of the powers of the federal government do not seem exclusive. For instance, the power of the federal government to formulate and implement the country's policies, strategies and plans in respect of overall economic, social and development matters seems to be an overlap of power with the power of the states. Because the same constitution also empowers the constituent states, among other things 'to formulate and execute economic, social and development policies, strategies and plans for the states.'⁶⁰ This may create potential conflict in case of diverse legislation between the federal government and the constituent states unless it is to be interpreted as a framework power.

2.3.2. Framework Power

Prior to the 2006 constitutional reform, in Germany, there was a special constitutional category of jurisdiction specifying a federal power to enact framework legislation in certain fields, leaving the Lander to fill out these areas with more detailed laws.⁶¹ This special category of power grants the federal government the competence to issue general legislation in a specific policy field and leave substantial room for the constituent states to issue their own legislation within the limits set by the federal government.⁶² This framework legislation includes like land distribution, management of water resources and nature conservation.⁶³ This power is considered as the shared responsibilities of the federal government and the lander. In practice, however, the federal government has often laid down such detailed regulation for the lander that they could only implement federal regulations.⁶⁴ The constitution of Ethiopia does not explicitly mention framework legislation like that of the German Basic Law before the reform made. However, we can argue the application of the principle of framework legislation in the federal constitution of Ethiopia, too.⁶⁵

Van der Beken argues that 'art.51 does not categorize the federal powers but the study of constitutional provisions show that in fact art.51 allocates two category of powers to the

⁵⁹ See Assefa, federalism and accommodation of diversity in Ethiopia, cited above, note 31, at p.263

⁶⁰ The FDRE Constitution, proc. No.1/1995, art.52(2)(c)

⁶¹ See Watts, Comparing federalism, cited above, note 29, at p.88

⁶² Ibid.

⁶³ The Basic law of Germany, art.75(Prior to the 2006 constitutional reform)

⁶⁴ Hans-peter Schneider, 'the Federal Republic of Germany' in Akhtar Majeed et al(eds.) *Distribution of powers and Responsibilities in Federal Countries*: McGill –queen's University press, (2006), p.131

⁶⁵ See Solomon, Fiscal Federalism in Ethiopia, cited above, note 17, at p.66

federal government; exclusive powers and framework powers.’⁶⁶ For the purpose of a systematic understanding of the power of the federal government, it seems plausible to categorize the federal powers in art.51 into exclusive and framework powers based on the wording of the provisions of the constitution.⁶⁷ There are some provisions dealing with framework powers. For instance, the constitution provides that the federal government has the power to establish national standards and basic policy criteria for public health, education as well as for the protection and preservation of cultural and historical legacies.⁶⁸ The provision entitles the federal government to design a countrywide policy on overall economic, social and developmental matters. However, the constituent states play great role in the provision of education, public health and the protection of cultural and historical legacies. These areas require general federal legislation and detailed constituent states legislation.⁶⁹

Furthermore, as stated above, both the federal government and the constituent states have the power to formulate social, economic, and development strategies and policies for the country and the constituent states respectively.⁷⁰ In this regard, there is no clear demarcation between the federal government’s power and the constituent states’ power. Federal power could be construed as framework power though not expressly recognized.

2.3.3. Concurrent Power

The unavailability of overlaps of powers and the need for shared jurisdiction in many areas has led to the extensive allocation of concurrent powers in federal constitutions.⁷¹ In this case, both orders of government can make laws in a defined area. Concurrent powers, however, are not held and exercised jointly by the two orders of government rather they are held and exercised separately in the defined area of legislative competence.⁷² To put it differently, concurrent powers are those powers that do not belong exclusively to the federal government and at the same time, are not denied to the constituent states.⁷³

⁶⁶ Christophe Van der Beken, *Unity in Diversity-Federalism as a Mechanism to Accommodate Ethnic Diversity: the case of Ethiopia: law and politics in Africa*, vol.10, 2012, p.164[available at Ethiopian civil service University, institute of federalism and legal studies library]

⁶⁷ Ibid.

⁶⁸ The FDRE Constitution proc. No.1/1995, art.51(3)

⁶⁹ See Solomon, *Fiscal Federalism in Ethiopia*, cited above, note 17, at pp.66-67

⁷⁰ Id, art.51(2) and art.52(2)(c)

⁷¹ See Watts, comparing federal systems of the 1990’s, cited above, note 56, at p.34

⁷² See federalism and division of power, cited above, note 25, at p.78

⁷³ Ibid.

Aalen argues that ‘the states do also have concurrent powers that are given to the federal and the state governments or the powers that are not given exclusively to the federal government alone (art.52.1). But there is no express constitutional list of such powers.’⁷⁴ This implies the existence of concurrent powers of both the federal and state governments though it contains no separate list of concurrent powers except the issue of tax. It needs to be noted that art. 98 which deals with concurrent power of tax was amended in 1997 to the effect that the federal government to levy and collect the taxes.⁷⁵ This was done on two grounds: Firstly, the activities are related to inter-state commerce and hence, it would have spillover effect and secondly, it is difficult to legislate as the two legislative bodies don’t sit together to make a law.⁷⁶

Dr. Fiseha Haftetsion argues that ‘additional concurrent powers that are not expressly referred to as concurrent by the constitution are available. Among the concurrent powers that are not referred to as concurrent by the constitution is security including police power as per arts.51(1), (6) and 52(2)(9) of the constitution.’⁷⁷ Both orders of government are entitled to have role to play in the area of security. For example, the two levels of government are empowered to establish police institutions.⁷⁸ The constitution also indicates that the constituent states may enact criminal laws on matters that are not specifically covered by the federal criminal legislation. It appears to be that this is more of a concurrent power than a framework power.⁷⁹

In case of concurrent power there is a possibility of inconsistency of laws enacted by the two orders of government but the Ethiopian constitution does say nothing pertaining to the issue of regulating the relationship between federal and the constituent states laws in general and in relation to concurrent powers in particular. The constitutional assembly which has made the constitution disregards the concept of federal paramountancy principle but it might fear that it

⁷⁴ Lovis Aalen, *Ethnic Federalism in a dominant Party State: The Ethiopian Experience* : 1991-2000, Bergen:Chr. Michelsen institute, 2002, pp.55-56

⁷⁵ Assefa Fiseha and the Zemelak Ayele, ‘Concurrent Powers in the Ethiopian Federal System’ in Nico sytetler (ed) *Concurrent powers in Federal Systems Meaning, Making and Managing*: Brill Nijhoff, Leiden, Boston:2017, p.246 [here in after, Assefa and Zemelak, concurrent power in Ethiopia]

⁷⁶ Ibid.

⁷⁷ Fiseha Haftetsion, the State of Vertical Division of Political Power in Ethiopian Federation, PhD dissertation, Addis Ababa University, center for federal studies, 2017 [Unpublished, available at center for federal studies library], p.173

⁷⁸ Ibid.

⁷⁹ The FDRE Constitution, Pro.No.1/1995, art.55(5)

undermines the supremacy of nations, nationalities and peoples of Ethiopia.⁸⁰ However, states' constitution and legislation which enacted after the constitution affirmed that all laws and practices should not go against the federal constitution and other federal laws. For instance, the constitution of Amhara national regional state provides that 'the regional council issues various laws in accordance with the federal constitution and other laws thereto.'⁸¹ The constitution of the national regional state of Tigray did say the same that 'the regional council shall enact provisions and specific laws without contradicting constitution of the federal democratic republic of Ethiopia.'⁸² In the case *Biyadglegn Meles, and et al v. the Amhara national state*, the council of constitutional inquiry (CCI) ruled that any law enacted by the constituent states pertaining to land administration shall be off no effect if it goes against the federal rural land administration.⁸³

2.3.4. Residual Power

The residual power refers to the power which is assigned by the constitution over those matters not listed in the constitution.⁸⁴ This power is usually held by the constituent states in federal systems. The assignment of residual power to the constituent states was intended to ensure the autonomy of the units and the limited nature of powers assigned to the federal government.⁸⁵ The reason for adopting residual power doctrine is that every possible policy area cannot be provided for in the constitution; hence, constitution must also specify which order of government should exercise the residual or unspecified power. The essence of residual powers come to force when we realize that no matter how detailed enumeration is, some matters will be omitted either due to oversight or currently envisaged by no one from practical and experiential point of view.⁸⁶ In so called coming together federation, residual powers are typically retained by the constituent states like the United States. The U.S. constitution states that all powers not granted to the federal government nor specifically denied to the constituent states are to be the powers of the constituent states themselves.⁸⁷

⁸⁰ See Solomon Fiscal Federalism in Ethiopia, cited above, note 17, at p.65

⁸¹ The Revised Constitution of the Amhara National Regional State, 2001, *Zikire Hig*, proc.59, 7th year, No.2, art.49(3.1)

⁸² The Constitution of the National Regional State of Tigray, 1998, proc.98, 14th year, No.5, art.49(3)(a)

⁸³ See Assefa, federalism and accommodation of diversity in Ethiopia, cited above, note 31, p.286

⁸⁴ See Watts, Comparing federalism, cited above, note 29, at p. 89

⁸⁵ Ibid.

⁸⁶ See Arowosegbe, techniques for division of legislative powers under federal constitutions, cited above, note 34, p.132

⁸⁷ Thorsten V. Kalijarvi, 'the Distribution of Functions in our Federal System of Government', *National tax association*, (1943), vol.29, No.2, pp.44-47 at p.44

While in a holding together federations, they are usually vested in the federal government as is the case for example the Indian federation.⁸⁸

The FDRE constitution also reserves residual power to the constituent states. The relevant provision goes as follows: “All powers not given expressly to the federal government alone or concurrent to the federal government and the states are reserved to the states.”⁸⁹ As a result, the scope of powers and responsibilities of the constituent states is likely to expand by virtue of its mandate to deal with the residuary matters, not listed by the constitution.⁹⁰ The extent of the actual residual power depends on the coverage of exclusive and concurrent powers of the two orders of government i.e. the more enumeration of exclusive and concurrent powers the lesser the importance of the residual power. From this angle, Kalkidan argues that ‘the federal government exhausts most of the areas of legislation and by the virtue of the theory of reserve powers; the constituent states are left with some administration like power than policy making prerogatives.’⁹¹ Of course, the exclusive power of the federal government is more extensive and the significance of residual power in Ethiopia is questionable. However, this does not mean that there are no powers which are unspecified.⁹² Though the federal government is entitled with the major policy making roles and in the most substantial affairs of the Country; there are still rooms for the constituent states to make legislation upon matters undesignated in the constitution.

There are two exceptions to the general rule on residual powers of the constituent states. These are art.55 (6) and art.99 of the constitution. With regard to the residual powers of taxation, the constitution has another saving clause that does not automatically allocate it to the constituent states. It is to be decided by the joint meeting of both federal houses.⁹³ It might be decided to be given either to the federal government or the constituent states. The federal government is also empowered to make law on civil matters when deemed necessary by the HoF to establish and sustain one economic community.⁹⁴ Taddese argues that ‘the

⁸⁸ Ibid.

⁸⁹ The FDRE Constitution, pro.No.1/1995, art.52

⁹⁰ Muhammad Habib, ‘the Ethiopian Federal System: the Formative Stage’, 2011, p.14 [available at <http://library.fes.de/pdf-files/bueros/aethiopien/07945.pdf>, last visited, 7/9/2017]

⁹¹ Kalkidan Kassaye, ‘Looking at the Constitutional Distribution of Powers Seriously: Does it matter to keep the Federal Balance of Powers in Ethiopia’, 2010, para. two, [available at http://www.aigaforum.com/articles/looking_at_constitution.php, last visited, 7/9/2017]

⁹² Abdi Gurmessa, Criminal Jurisdiction of State Courts under the Constitution of Ethiopia, LL.M thesis, Addis Ababa University, 2014,[unpublished, available at law library],p.57

⁹³ The FDRE constitution, proc. No.1/1995, art.99

⁹⁴ Id,art.55(6)

assignment formula of power adopted by the constitution creates a tension between what was politically and historically desirable at the time of the adoption of the constitution and what transpires in the future, particularly because of unusual specificity in this regard.⁹⁵ Since the power of the federal government is not limited to what are listed in the constitution and also makes some lists of power of the constituent states while residual power is given to them. Generally, reserved powers do not automatically fall under the jurisdiction of the constituent states. First there should be deduction of power of the federal government indicated elsewhere in the constitution.

2.4. Legislative Power of Media Law in Germany

2.4.1. Broadcasting Media

Germany is a federal state with 16 constituent states called Lander. The German constitution, also called the Basic law, sets forth the framework of the allocation of powers between the federal government and the Lander. Residual power is devolved to the Lander.⁹⁶ The Basic law stipulates that state authority is the rule and federal power the exception. 'Except when otherwise provided or permitted by this Basic law, the exercise of powers and the discharge of state functions is a matter for the states,'⁹⁷ More specifically the same principle is bestowed on legislative matters. 'The states shall have the right to legislate in so far as this Basic law does not confer legislative power on the federation.'⁹⁸ The legislative jurisdiction of broadcasting media law is not expressly provided in the Basic law. However, literature in this area explains broadcasting law as the legislative competence of the Lander. There is a distinction between broadcasting law and press law as regards their regulation by Lander and federal law. Accordingly, under the German federal set up, the legislative jurisdiction of broadcasting law is the exclusive jurisdiction of the individual states.⁹⁹ Erk argues that 'media policy are considered as the part of cultural sovereignty of the Lander as stated by art.30 of the Basic law.'¹⁰⁰ That is to say, the Lander legislates and oversees media law as it is intertwined with their culture. Lander government, however, have worked towards a

⁹⁵ Taddese Lencho, 'Income Tax Assignment under the Ethiopian Constitution: Issues to Worry about', *Mizan Law Review*, (2010), vol.4, No.1, pp.31-51, at p.32

⁹⁶ Devolution of power in Germany, Legal Memorandum, (2013) [available at <http://www.mreza-mira.net/wp-content/uploads/Devolution-of-Powers-in-Germany-August-2013.pdf> last visited 8/5/2017]

⁹⁷ The Basic Law of Germany, art.30

⁹⁸ Id, art.70(1)

⁹⁹ Id, art.30

¹⁰⁰ Jan Erk, 'federalism and Media Policy in Germany', (2003), pp. 110-111

nationwide media policy by standardizing their broadcasting regulations.¹⁰¹ This was largely attained through the workings of the system, in particular through devising nationwide public policy even in an area where the Lander enjoyed exclusive constitutional competence.¹⁰²

There is also interstate broadcasting agreement developed cooperatively by all constituent states is one of the important aspect of broadcasting law in Germany¹⁰³ The agreement establishes general and specific rules for public and commercial broadcasters. Among these is the establishment of general principles such as respect for human dignity, regulation on the supervision of public broadcasters and the license process for commercial broadcasters.¹⁰⁴ This shows that the regulation of broadcasting law under the Germany federal system is left to the Lander.

2.4.2. Print Media

Before the 2006 constitutional reform of Germany, the federal government had the power to enact framework legislation for the Lander with regard to those subjects listed under art.75, such as, legal education, land distribution, management of water resources, the general legal status of the press and nature conservation. So, press law was a framework power in Germany. This allowed for the establishment and maintenance of a harmonized legal system in the federal republic of Germany by providing an essential contribution to the legal uniformity across the federation.¹⁰⁵ According to the Basic law of Germany, freedom of the press is only limited by general legislation or German state press laws as well as legal provisions protecting youth and personal dignity.¹⁰⁶ That means it is the federal government which has the authority to put in place the standards of limitation of the press. As with the broadcasting law, the individual German states had jurisdiction over press legislation.¹⁰⁷ However, after the 2006 constitutional reform of Germany, art.75 which contained a list of areas subject to framework division of legislative power was eliminated and the respective field of competence were transferred to the remaining competence catalogue i.e. exclusive

¹⁰¹ Ibid.

¹⁰² Id, p.107

¹⁰³ Andreas Oldag, 'Freedom of the Press and Media Regulation in Cambodia', 2015, p.18[here in after, Oldag, freedom of press and media regulation]

¹⁰⁴ Ibid.

¹⁰⁵ Jan Erk, Examining Federal System, State, Society and Congruence in Austria, Belgium, Canada, Germany, and Switzerland, *Routledge Series in Federal Studies*, (2008), p.61 [here in after, Erk, examining federal system]

¹⁰⁶ The German Basic Law, art.5(2)

¹⁰⁷ See Oldag, freedom of the press and media regulation, cited above, note 119, at p.18

federal legislative power, exclusive Lander legislative power and concurrent legislative power.¹⁰⁸ The Legislative power of print Media is not clearly stated either as exclusive legislative power or concurrent power after the 2006 constitutional reform of Germany.

2.5. Legislative Power of Media Law in Switzerland

2.5.1. The Broadcasting Media

The Swiss federation comprises 26 constituent states called Cantons. The distribution of power under the Switzerland constitution reflects a “bottom up” construction of the federation and residual powers is given to the Cantons.¹⁰⁹ The Cantons are declared sovereign so long as the federal constitution does not limit their sovereignty.¹¹⁰ This means that the field in which the federal government is competent to legislate must be defined in the constitution and that the federation is able to intervene and legislate in a particular domain only if empowered to do so by the constitution.¹¹¹ The legislative power of the federal government and the cantons is found dispersed over various articles throughout the constitution and it is not easy to single out which powers are exclusively federal and which are not.¹¹²

The federal constitution of Switzerland contains a number of important provisions for protection and promotion of fundamental rights and freedoms which directly purport to protect the media.¹¹³ According to the Switzerland federal constitution, the confederation is responsible for legislation on radio and television.¹¹⁴ It is just the contrary to the German Basic law that gives the power to the Lander for legislation on broadcasting media.

¹⁰⁸ Francesco Palermo, ‘What is wrong with Concurrency? Comparative reflections Based on Constitutional reforms in Germany and Italy’ in Nico steytler (ed), *Concurrent powers in Federal Systems Meaning, Making and Managing*: Brill Nijhoff, Leiden, Boston: (2017), p.76

¹⁰⁹ Thomas Fleiner, ‘the Swiss- Confederation’, p.1[available at <http://www.thomasfleiner.ch/files/categories/Belgrade/Switzerland.pdf>, last visited 8/5/2017]

¹¹⁰ The Federal Constitution of the Swiss Confederation of April 18, 1999, (status as of 1 January 2016), art.3 [here after the Federal Constitution of the Swiss Confederation]

¹¹¹ See Assefa, Federalism and accommodation of diversity in Ethiopia, cited above, note 31, pp.261-262

¹¹² Ibid.

¹¹³ The Federal Constitution of the Swiss Confederation, art.17

¹¹⁴ Id., at art.93(1)

2.5.2. Print Media

Regarding the print media, the federal constitution does not clearly put as to which orders of government has constitutional jurisdiction in this field. The print media are strictly divided between Linguistic groups which function independently of the structure set up by cantonal demarcations.¹¹⁵ Media that are not understood have no effect. Media consumption lies first and foremost in the mother tongue.¹¹⁶ There are no national media in Switzerland; this statement sums up the principal characteristics of the field of the Swiss media.¹¹⁷ In a nutshell, the legislative jurisdiction of media laws in Switzerland constitution is unlike to the Germany's Basic law.

2.6. Legislative Power of Media law in Nigeria

2.6.1. Broadcasting Media

Nigeria is considered as one of ethno-linguistically divers African Countries and a factor largely attributable to its colonial legacy. It is also a federal country consisting of 36 states and dividing powers between the federal government and the sub-national states.¹¹⁸ Division of power as per the 1999 constitution is a fundamental constitutional principle which spells out the roles and the duties of the three arms of government.¹¹⁹ The constitution of Nigeria provides two lists of powers, one exclusive to the federal government and the other concurrent to both the federal and the constituent states government.¹²⁰ The constitution guarantees that an unlisted residuary power is to be exercised exclusively by the constituent states.¹²¹

The issue of media is stated in the fundamental objectives and directive principles of state policy set out in chapter two of the constitution.¹²² The broadcasting legislation or the national broadcasting act is made by the federal government to regulate and control the

¹¹⁵ See Erk, examining federal systems, cited above, note105, pp.79-80

¹¹⁶ Ibid

¹¹⁷ Ibid.

¹¹⁸ Ides Mildred Aziegbe, *Federalism in Nigeria: Accommodating Diversity and Promoting stability*, thesis, Central European University, 2014, [unpublished] p.28

¹¹⁹ Ogoloma, Fineface, 'The theory of separation of power in Nigeria: An assessment' 2012, vol.6, No.26, *African research review*, (2012) pp.127-134, at p.131

¹²⁰ The Constitution of the Federal Republic of Nigeria (1999), section,4(2) [here in after, the constitution of Nigeria]

¹²¹ Id. Section, 4(7)(a)

¹²² Id. Section, 22

broadcasting industry.¹²³ The constitution expressly vests under the exclusive jurisdiction of the federal government that ‘wireless, broadcasting and television other than broadcasting and television provided by the federal government of a state; allocation of wave-lengths for wireless, broadcasting and television transmission.’¹²⁴ Wave-length spectrum is considered as the common property of the people of Nigeria.¹²⁵

2.6.2. Print Media

The constitution provides for the bill of rights which guarantees a set of civil and political liberties including the right to freedom of expression and the press.¹²⁶ It provides ‘every person shall be entitled to freedom of expression, including freedom to hold opinion and to receive and impart ideas and information without interference.’¹²⁷ The print media regulation act is a federal act for the regulation of printing presses, books and news papers printed in Nigeria.¹²⁸ There is no specific constitutional provision which states the legislative jurisdiction of the print media but practically it is the federal government which enacts it. The constitution states that the federal government has the authority to enact a law ‘to promote and enforce the observance of fundamental objectives and directive principles contained in this constitution.’¹²⁹ The press is found under this section and the legislation of press by the federal government is constitutionally defensible. Pertaining to the press, it appears to be similar to the Ethiopian case. Generally, Countries have different approach as they have different history, culture and legal tradition. These experience insights are drawn from the above Countries as examples to explain the propriety and the legitimacy of enacting media law of national application by the federal legislature in Ethiopia. With this in mind, the following chapter will try to determine the legislative jurisdiction of media laws in Ethiopia.

¹²³ Ayoolenrewaju, ‘the Law and the Media in Nigeria, Media Foundation for West Africa’, 2012, p.6[here in after, Ayoolenrewaju, the law and the media in Nigeria]

¹²⁴ The Constitution of Nigeria, Schedule two, section, 66

¹²⁵ Uzoma Chukwemeka.Okugo, ‘Broadcasting Regulation and Broadcasting in Nigeria: An Overview of the Approaches’, *research on social science and humanities*, (2013),vol.3, No.2, pp.12-19, at p.15

¹²⁶ Id. at p.14

¹²⁷ The Constitution of Nigeria, section 39(1)

¹²⁸ See Ayoolenrewaju, the law and the media in Nigeria, cited above, note 123, p.7

¹²⁹ The constitution of Nigeria, section, 60(a)

CHAPTER THREE

3. Legislative Jurisdiction of Media laws in Ethiopia

3.1. Introduction

Media is an all-encompassing term referring to the presentation and transmission of information by a multiplicity of outlets.¹³⁰ That means it includes both the print and the electronic media. Modern society is nearly unimaginable without the media.¹³¹ Both the print and electronic media is operating as the most effective watch-dog of all democratic systems.¹³² It is considered as a fourth branch of government which operates within the framework of the provision of the constitution and statutes to act in public and national interest.¹³³

International legal frameworks put freedom of expression as one of the important principles of international Human rights law.¹³⁴ The international Convention on Civil and Political Rights guarantees freedom of expression as follows: 'Everyone shall have the right to freedom of expression and this right shall include freedom to seek, receive and impart information and ideas of all kind regardless of frontiers.'¹³⁵ The same goes to Ethiopian constitution which provides freedom of the press and mass media by ensuring the opportunity for access to information to the public.¹³⁶ The constitution also guarantees the media's right to institutional independence and legal protection to enable the accommodation of different ideas necessary to a democratic society.¹³⁷

The issue at the heart of this study is ascertaining the legislative jurisdiction on media laws under the current federal set up of Ethiopia. As the underlying exercise is examining the locus of jurisdiction of Media Law in view of division of legislative power in the federal constitution, the study does not aim at dealing with the contents of the right of freedom of expression. This being the case, the study aims at uncovering the underlining principles for

¹³⁰ Eddy Ania, 'Regulatory Framework for Media Institutions In Nigeria: Licensing and Broadcasting in Nigeria', p.5

¹³¹ Ibid

¹³² Madabhushi Sridhor (ed), 'Media Law Review', *Media Law Journal*, (2010), vol. 1, pp.1-176, at p.1

¹³³ Ibid

¹³⁴ Mesenbet A. Tadege, 'Freedom of Expression and the Media Landscape in Ethiopia: Contemporary Challenges', *Journal of Media and Ethics*, (2016), pp. 1-29, at p.8

¹³⁵ International Convention on Civil and Political Rights, (1966), art.19 (3)

¹³⁶ Tracy J. Ross, 'A test of Democracy: Ethiopia's Mass Media and Freedom of Information Proclamation', *Penn State Law Review*, (2010), vol. 114:3, pp.1047-1066, at p.1050

¹³⁷ The FDRE Constitution, Proc. No.1/1995, art.29(4)

allocation of legislative power in the FDRE constitution or the distribution of vertical legislative power between the national and sub national governments. Hence, the legislative jurisdiction on media laws is examined from the perspective of different federalism principles. Though the constitution does not expressly provide the legislative jurisdiction of media law, the paper has argued that the enactment of media law falls under the federal government legislative constitutional competence based on federalism principles such as subsidiarity principle, territoriality principle, commercial clause, and also the argument based on other natural resources and implied law making power. They are complementary and will be presented in turn. Such principles are useful for constitutional interpretation pertaining to division of legislative power when powers are not exclusively provided to the federal government. They are as developed in different federal constitutions like in the German Basic law and U.S. constitution; the paper will argue that the aforementioned federalism principles are reflected in the FDRE constitution in different context. Hence, they can be used as a parameter for determining legislative jurisdiction of media laws under FDRE constitution.

3.2. The Subsidiarity Principle and Division of Powers

Countries which adhere to federal system of arrangement across the world are generally designed based up on the principle of subsidiarity.¹³⁸ The principle of subsidiarity advocates that the federal government in one way or another should play only a supporting role in governance, only when the constituent states of government are in capable of acting on their own.¹³⁹ The concept of subsidiarity was developed by the European Union to determine matters pertaining to division of power between the Union and the member state that the general aim of the principle of subsidiarity is to guarantee a degree of independence for a lower authority in relation to central government.¹⁴⁰ According to the principle, powers at the European Union level should not be exercised unless the objectives of an action can be better achieved at Union level because of wide in scope and effects of the proposed action.¹⁴¹

¹³⁸ Daniel Halberstam, 'Federal powers and principle of Subsidiarity' in Vikram David Amar and Mark V. Tushnet (eds.) *Global Perspectives in Constitutional Law*; Oxford University press, New York, (2009), p.34

¹³⁹ Ibid.

¹⁴⁰ The Principle of Subsidiarity, Fact Sheet on the European Union, 2017, p.2 [available at http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.2.pdf last visited 8/5 /2017]

¹⁴¹ Id, p.1

This principle serves as an appropriate mechanism for determining which, between federal government and constituent states government should possess and exercise a certain power.¹⁴² Omergie also puts the theme of the subsidiarity principle that:

*'the powers of government should be exercised by sub-national units because they possess more competence in solving problems which confront government daily and that the federal government should only exercise power in respect of those matters in which the constituent units are incapable of achieving result acting on their own because such matters are wide in scope, complex in nature or are of broad national effect.'*¹⁴³

Hence, the principle of subsidiarity regulates the legislative division of power of the two levels of government within the federal arrangement, particularly when the power is not expressly provided for the federal government. It directs the powers or the tasks should rest in the hands of the constituent states unless shifting the power to the federal government would ensure higher comparative efficiency or effectiveness.¹⁴⁴

At this juncture, it is much relevant to look into whether or not the principle of subsidiarity anchored in the constitution of Ethiopia for addressing the division of power between the federal government and the constituent states. Solomon argues that 'the FDRE constitution seems to have included the value of the principle of subsidiarity in its provisions by imposing an obligation on the states to establish local administrations and to devolve power next to the hierarchy of the administration at state level.'¹⁴⁵ The constitution provides that 'the state government shall be established at state and other administrative levels that they find necessary. Adequate power shall be granted to the lowest level of government to enable the people to participate directly in the administration of such units.'¹⁴⁶ Pursuant to this provision, states are free to determine the number of levels of administration at the state level. The purpose of subsidiarity principle is to ensure that powers are exercised as close to the citizen and stay considerable power at lowest level so far as it could be done effectively.¹⁴⁷ So, the principle could be constructed through interpretation of the provision though not clearly recognized.

¹⁴² Edoba Bright Omergie, 'the Subsidiarity Principle and Federalism fissures in Nigeria', *Ethiopian Journal of Federal Studies*, (2014), vol.1 No.2, pp.197-212, at p.197

¹⁴³ Id. at p. 199

¹⁴⁴ Andreas Follesdal, 'Survey Article: Subsidiarity', *the Journal of Political Philosophy*, (1998), vol.6, No.2, pp.190--218, at p. 190

¹⁴⁵ See Solomon, Fiscal federalism in Ethiopia, cited above, note 17, at p.79

¹⁴⁶ FDRE Constitution proc. No.1/1995, art.50(4)

¹⁴⁷ See the principle of subsidiarity, cited above, note 140, at p.1

When we examine the legislative jurisdiction of broadcasting media laws by the federal legislature of Ethiopia from the standpoint of the subsidiarity principle, as it is implied by the constitution, it is possible to argue that the federal legislature has a constitutional room for enacting broadcasting media laws for national application by claiming better efficiency because of its wide national impacts. In concluding this part, subsidiarity principle potentially indicates the constitutionality of enacting broadcasting media by the federal legislature under the FDRE constitution. According to subsidiarity principle, one of the reasons for the federal government to legislate is the wide scope of the matter proposed. Broadcasting media is an activity which can have wide scope and impact across the Country which demands federal regulation.

As I have made an interview with Ato Beminet Mehamed as to the legislative jurisdiction of media law; he replied that the issue of legislative jurisdiction of media law was not raised in the legislation process, he added that let alone the issue of media which is a minor issue but also in other cases, “there is a practical tendency of the federal government considering the constituent states as incapable to perform tasks.”¹⁴⁸ That means the right to self-determination of the constituent states in critical areas is not that much full-fledged let alone media legislation.¹⁴⁹ Of course, the federal government has better resources and expertise to enact media laws of national application.

As I have made an interview with Ato Teshome Eshetu about the issue of constitutionality of enacting media laws of national application by the federal legislature; he replied that the issue of constitutionality of media is not a problem in Ethiopia because any matters whether expressly given to the federal government or not so far as it has a nationwide impact and needs national standard; it is the power of the federal government to legislate media law to put in place nationwide standards. He added that ‘the constitution cannot be a dictionary to list anything.’¹⁵⁰ According to his view, the issue to be underlined is whether media legislation needs national standard or not. Anything that needs national standard is the jurisdiction of the federal government. However, he did not mention his constitutional basis to say that enactment of media law is one of the standard setting activities. The statement rendered by the government official does not seem plausible because if the federal

¹⁴⁸ Interview with Ato Beminet Mehamed, the House of Peoples’ Representatives, Legal Advisory and Expert, (April 23, 2017)

¹⁴⁹ Ibid.

¹⁵⁰ Interview with Ato Teshome Eshetu, the House of Peoples’ Representatives, the Legal and Administration Affairs Standing Committee, Deputy Head, (April 26, 2017)

government enact a law in any matter listed or unlisted by claiming that matters need national standard, it may defeat the essence of division of power. In a federal system, basic policies are made and implemented through negotiation in some form so that both the federal government and the constituent states can share in the decision making and executing process.¹⁵¹

3.3. The Doctrine of Commercial clause

In the United States constitution, the Congress (federal government) is provided powers that are almost indisputably necessary for the preservation of the federal government are found in the commercial clause.¹⁵² The commerce clause gives the federal government legislative power over all commercial activities.¹⁵³ Any activity that would substantially impact interstate commerce calls for the federal legislature to legislate a law pertaining to the commerce.¹⁵⁴ The objective of this clause is to create economic unity and prevent economic warfare among the constituent states which was considered as a threat for the federal union.¹⁵⁵ The state sovereignty rights are protected when the federal government enacts interstate commerce legislation on commercial matters that cross the constituent states' boundaries.¹⁵⁶ It is, therefore, the matter that had to cross the constituent states border through commercial intercourse that would be the power of the federal government to regulate it.

Commercial clause is also recognized under the FDRE constitution; as it is clear from the constitution that 'the federal government shall regulate inter-state and foreign commerce.'¹⁵⁷ The paper argues that legislation of broadcasting media has commercial aspect which entitles the federal government to legislate a law having to do with commerce. Broadcasting activities covers a wide range of services, such as advertising and programming services.¹⁵⁸ The broadcasting media through the instrumentality of advertisement plays an important role in the economic, social and political development of the Country by influencing the activity of

¹⁵¹ See Elazar, Federalism and the way to peace, cited above, note 24, at p.21

¹⁵² Jacqueline R. Kanoitz, *Constitutional Law*: Anderson publishing, United States, 12th ed.(2010), p.12

¹⁵³ Ibid.

¹⁵⁴ Ryan R. wilmering, 'Federalism, the Commercial Clause, and the Constitutionality of Violence act of 2004', *Indiana Law Journal*, (2005), vol. 80, issue 4, Article 8, pp.1190-1213, at pp. 1191-1192

¹⁵⁵ Ibid.

¹⁵⁶ James Hinshaw, 'the Dormant Commerce Clause After Garcia: An Application of Interstate Commerce of Sanitary Land fill Space', *Indiana law Journal*, (1992), vol.67, Issue 2, Article 11, pp.511-547, at pp. 512-20

¹⁵⁷ The FDRE Constitution proc.No.1/1995, art.51(12) and art.55(2)(b)

¹⁵⁸ Voorburg Group Meeting on services, 29th Sector paper: Programming and Broadcasting activities, Dublin, Ireland, September 22-26, 2016, p.1

the public in commodity exchange or service rendering.¹⁵⁹ It makes significant contribution in establishing healthy market competition in the market-led economic system of the Country.¹⁶⁰ Through advertisement, the industry provides consumers with critical economic data on the price and features of the products and services.¹⁶¹ This has substantial relation with interstate commerce and thus, federal legislation of broadcasting media might be justified on the ground of commercial clause. To adduce the possibilities that the broadcast law involves in interstate matter, the private media that impacts more than one regional state may be cited as an example. The federally regulated activity based on commercial clause should have an impact beyond the boundaries of the constituent states.¹⁶² Not only that but also the matter should have an economic nature.¹⁶³ And thus, the issue of broadcasting media meets the criteria and calls for federal regulation.

3.4. The Territoriality Principle and Division of Powers

Elazar defines division of power on the basis of territoriality that 'territoriality is the real division of power which is the most common and successful in federalism. Apparently only a territorial division of power can accommodate the two forms of power necessary for a successful polity.'¹⁶⁴ The notion of territoriality principle is that an activity which has an impact beyond the constituent states should shift towards the federal government to regulate it. It is only the federal government which has the authority over the whole territory of the Country where as the constituent states have the jurisdiction with respect to their own territory.¹⁶⁵ Federalism as a system of government allows the powers of the state is divided on territorial basis.¹⁶⁶ This means that the federal government may directly legislate on a matter that affects beyond the territory of the constituent states and automatically become the

¹⁵⁹ The Federal Democratic Republic of Ethiopia Advertisement proclamation, 2012, *Federal Neg.Gaz.* proc.No.759, 27th year, para. one

¹⁶⁰ Id, para. two

¹⁶¹ Woods and Poole, 'An analysis of the Importance of Commercial Local Radio and Television Broadcasting to the United States Economy', 2017, p.1 [available at http://www.nab.org/documents/newsRoom/pdfs/062011_economic_analysis.pdf, last visited 8/5/2017]

¹⁶² Assefa Fisseha and the Zemelak Ayele, 'Who is the boss?' Questioning the Constitutional Authority of Federal Regulation of Local Government, (2017), p.13 [found in the hands of the authors, here in after, Assefa and Zemelak, who is the boss in regulating local government]

¹⁶³ Ib. p.12

¹⁶⁴ Daniel J.Elazar, *Federalism an overview*, HSRC publisher, Pretoria, 1995,p.17

¹⁶⁵ See Erk, examining federal systems, cited above, note 106, at p.61

¹⁶⁶ See federalism and division of power, cited above, note 25, at p.74

jurisdiction of the federal government.¹⁶⁷ As can be gathered from the minutes of constitutional assembly, the division of legislative power between the federal government and the constituent states was based upon the feature of matters. Matters of wide scope are given to the federal government because it is the federal government that can satisfy the people of Ethiopia as a whole. If such a matter is to be provided for the constituent states, it will create problems.¹⁶⁸ The division of powers between the federal government and the constituent states on the basis of territoriality is one important mechanism where the federal government can provide guarantee to self- rule. This relates both to the area of competence and scope of power granted to the constituent states.

At this point, it would be important to scrutinize whether or not the territoriality principle occupies a place in the FDRE constitution. The constitution of Ethiopia following the territorial principle, it has entitled the federal legislature to pass a law over matters that involve the territories of more than one constituent state. These include the following such as interstate commerce, utilization of land and other natural resources.¹⁶⁹ The study of the constitutional provisions reveals that the power of the federal government is stated among others with reference to territoriality principle. Briefly, the territoriality principle is evident in the manner in which a number of competencies are divided between the federal government and the constituent states.¹⁷⁰ For instance, the federal government is authorized ‘to determine and administer the utilization of the waters of rivers and lakes linking two or more states.’¹⁷¹ Waters of rivers and lakes that begin and end within the territory of the constituent states are by implication the competence of the constituent states. The purpose of this technique of allocation of power is for achieving national standards by leaving some flexibility in their implementation and enforcement at constituent states level.¹⁷² Yonatan argues that ‘any activity that has an impact more than one constituent states; it immediately calls for federal regulation.’¹⁷³ The territoriality principle circumscribes the nature and scope of federal legislation by suggesting that only matters that cannot be fully regulated by the constituent

¹⁶⁷ Ibid.

¹⁶⁸ The Recorded Debates of Ye Ethiopia Hige-Mengist Gubae Kale Gubae v.4 (Minutes of Constitutional Assembly), Hidar 14-20, (1987 E.C) Discussion on art.51[available at HPR library]

¹⁶⁹ The FDRE Constitution Proc. No.1/1995, art.55(2)(b) and art.51(12)

¹⁷⁰ See Assefa and Zemelak, who is the boss in regulating local government, cited above, note 162, at p.9

¹⁷¹ The FDRE Constitution proc.No.1/1995, art.51(11)

¹⁷² See Saunders, Constitutional arrangements in Federal Systems, cited above, note 26, at p.7

¹⁷³ Yonatan Tesfaye, *Institutional Recognition and Accommodation of Ethnic Diversity: Federalism in South Africa and Ethiopia*: University of the Western Cape, (2008), p. 432

states must be the subject matter of the federal government.¹⁷⁴ Thus, in pursuant to such principle, the federal government may have the constitutional power to enact a law on a particular matter affecting the entire territory of the Country. The territoriality principle could be adduced as a justification for the federal legislature to pass broadcasting media laws of national application in Ethiopia as it does have trans-regional and transnational impact.

As can be gathered from the minutes of freedom of the mass media and access to information proclamation where the proposed distribution to publish a periodical goes beyond one regional state; it is the federal government which registers and the constituent states where the proposed distribution of published periodicals is limited to one regional state. There was also an argument raised in the drafting history of the proclamation that the distribution can be made beyond one regional state though the registration is limited to one regional state but rejected¹⁷⁵ The final outcome of the proclamation states that ‘anyone who desires to publish a periodical shall register from ministry of information where the proposed distribution of periodicals goes beyond one regional state or from the information bureau of the region where the proposed distribution of periodicals is restricted to one regional state.’¹⁷⁶ This is also a clear manifestation to the adherence to the principle of territoriality. However, by implication, it seems that a periodical registered in one regional state cannot be read outside the region. This may not be the intention of the law as it is difficult to control it. In any way, this should not be taken as a ground for limitation. Restricting distribution of periodicals in one regional state seems to be a problem that needs rethinking.

3.5. Argument based on ‘Other Natural Resources’

The paper also argues that the power of the federal government pertaining to the term ‘other natural resources’ is broad enough to include the broadcasting media regulation and the broadcasting media can be considered as one of the natural resources. The constitution provides that ‘the federal legislature shall enact specific laws on utilization of land and other natural resources, of rivers and lakes crossing the boundaries of the national territorial

¹⁷⁴ See Assefa and Zemelak, who is the boss in regulating local government, cited above, note 162, at p.9

¹⁷⁵ Federal Democratic Republic of Ethiopia, Public Deliberation and Decision on freedom of the Mass Media and Access to Information Proclamation, HoRP 3rd term, 2nd year, vol.4, (2000 E.C.)p.166 [available at HPR library]

¹⁷⁶ The Federal Democratic Republic of Ethiopia Proclamation to provide for Freedom of the Mass Media and Access to Information, (2008), *Federal Neg.Gaz. proc.* No.509, 14th year, No.64, art.9 [here after, mass media proclamation,no.509/2008]

jurisdiction or linking two or more states.¹⁷⁷ The phrase other natural resources are left undefined in the constitution as to what matters included under it.

Christian et al define 'radio wave as a natural and common property resource which makes modern communication and communication development possible.'¹⁷⁸ It is a part of the natural environment of the earth and the space around it.¹⁷⁹ Levin also defines 'radio wave as a natural resource closely associated with the capability of communicating information by electromagnetic energy in the form of radio or light waves.'¹⁸⁰ A radio wave propagation permits radio and television transmission with moving vehicles on Land, at Sea and in the air.¹⁸¹ The European parliament also endorsed 'Radio spectrum is a finite natural resource that needs to be managed to realize the maximum economic and social benefits.'¹⁸²

In the same fashion, the Broadcasting Service Proclamation states in its preamble that 'it is essential to ensure proper and fair utilization of the limited radio wave wealth of the Country.'¹⁸³ Even though the digital media is replacing radio wave broadcasting technology nowadays, it has still has the upper hand for many applications.¹⁸⁴ As discussed earlier under chapter two, the federal government in Nigeria has enacted a law on wave-length of broadcasting as it is common property of the people of Nigeria. It is, thus, the federal legislature that has a constitutional prerogative to enact broadcasting media law of national application in Nigeria.

3.6. Implied Power of Law making

The federal government in America has specifically listed powers in the constitution. The scope of power of the federal government, however, can be expanded through the mechanism of judicial interpretation.¹⁸⁵ The meaning of the 'necessary and proper clause' was brought

¹⁷⁷The FDRE Constitution proc. No.1/1995, art.55(2)(a)

¹⁷⁸Christian A. et al, 'the Electromagnetic Wave Spectrum: A Critical Natural Resources', *Natural Resources Journal*, (1985), vol.25, No.3, pp.651-663 at p.651

¹⁷⁹ Ibid.

¹⁸⁰ Harvey J. Levin, 'the Radio Spectrum Resource', *the Journal of Law and Economics*, (1968) ,vol.11, no.2, pp.433-501 , at p.433

¹⁸¹ Ibid.

¹⁸² European Parliament, 'Radio Spectrum, A key Resource for the Digital Spectrum', p.1(available at, <http://www.europarl.europa.eu/EPRS/EPRS-Briefing-554170-Radio-Spectrum-FINAL.pdf>, last visited 27/3/2017

¹⁸³ The Broadcasting Proc. No.533/2007, para. three of the preamble

¹⁸⁴ Comparing and Contrasting Analog and Digital Two-Way Radios, (2010) [available at <http://bearcom.com/wp-content/uploads/BearComAnalogVsDigitalWhitePaper.pdf> last visited 2/19/2018],

¹⁸⁵ See Assefa, Federalism and accommodation of diversity in Ethiopia, cited above, note 31, at p.259

into picture when the federal government passed a law establishing, Bank of the United States that was disputed in the famous case *McCulloch v. Maryland*.¹⁸⁶ Chief Justice John Marshall constructed the necessary and proper clause as follows: 'the framers of the constitution could not list all the federal government powers in the constitution. Instead, it uses the necessary and proper clause of the constitution to give the Congress to pass laws required to implement its expressed powers.'¹⁸⁷ This implies that the Congress may choose any means, not prohibited by the constitution to carry out its express power.

A provision is made in a constitution, intended to endure for ages to come and to be adapted to various human affairs.¹⁸⁸ So, establishing a Bank is an implied power arising from constitutionally enumerated power to levy tax and to regulate trade. Now-a-days implied power is a well-recognized principle in American constitutional law that the Congress has all powers not forbidden to it by the federal constitution or by the constitution of a particular constituent state.¹⁸⁹ Implied powers are not specifically mentioned in the Constitution but they are necessarily interconnected with those specifically mentioned powers of the federal government and enforced by constitutional interpretation.¹⁹⁰ The necessary and the proper clause has served as the basis of the doctrine of implied power.

Pertaining to implied power, there are no cases of constitutional adjudication that have dealt with the application of implied power in the constitution of Ethiopia.¹⁹¹ However, Dr. Solomon argues that 'due to the fact that some of the powers are provided in general statements, there exists a higher possibility for the development of implied powers'.¹⁹² For instance, the issue of insurance has not been specifically mentioned in the constitution as the power of the federal government but it appears to be the legislative competence of the federal government because it is interconnected with interstate trade and could be considered as one of the implied power of the federal government.¹⁹³

¹⁸⁶ Ibid.

¹⁸⁷ *McCulloch V. Maryland*, 'What are the Limits on the implied power of Congress', (Great Supreme Court decision), 1819, pp.100-101 (available at <http://mrwaddell.com/government/mccullochvmaryland.pdf> lasted visited 5/2/2017)

¹⁸⁸ See Chemerinsky, Constitutional law, cited above, note 37, at p.240

¹⁸⁹ W.F. Dodd, 'Implied Powers and Implied Limits in Constitutional law', *the Yale Law Journal*, (1919), vol.29, No.2, pp.137-162, at p.137

¹⁹⁰ Ibid.

¹⁹¹ See Solomon, Fiscal Federalism in Ethiopia, cited above, note 17, at pp.67-68

¹⁹² Ibid.

¹⁹³ Id, p.69

Returning to the issue of constitutionality of enacting media laws of national application by the federal legislature, the possible ground that could be claimed as a justification to enact media laws is that both the print and electronic media is dependent on technology in which regulation of technology is the jurisdiction of the federal government.¹⁹⁴ As it is interconnected with the specifically mentioned power of the federal government and could be construed as implied legislative competence of the federal government. A treaty ratified may require media legislation which establishes implied law making power.¹⁹⁵ Hence, it is possible to argue that the federal legislature has a constitutional room to enact media laws of national application by the reason of implied power.

In addition to the above, the preamble of the broadcasting service proclamation puts the justification for the enactment of the proclamation as follows: "broadcasting service plays a significant role in the political, economic and social development of the country by providing information, education and entertainment to the public; it plays a major role in exercising the basic constitutional rights such as freedom of expression, access to information and the right to elect and to be elected."¹⁹⁶ It seems that the federal legislature enacts media laws thinking that doing so is necessary to exercise its exclusive power like that of the U.S. the 'necessary and proper clause' which gives Congress the power to pass laws that are necessary and proper for carrying out its express power.

Thus, implied power can serve as a means to make the constitution responsive with the changing circumstance without the need to amend the constitution.¹⁹⁷ However, it should be noted that mere reference elsewhere in the constitution does not entitle the federal government implied law making power rather there should be a need and justified constitutional ground.¹⁹⁸ For claiming implied power, there should be some relationship to a specifically enumerated power in the constitutional text.¹⁹⁹

¹⁹⁴ The FDRE Constitution, proc. No.1/1995, arts. 51 (3)

¹⁹⁵ The FDRE constitution, Proc.No.1/1995, art.55(12)

¹⁹⁶ The Federal Democratic Republic of Ethiopia a Proclamation on Broadcasting Services, (2007), *Federal Neg. Gaz.* Proclamation No. 533, 13th year, No.39, para, one and two,[here in after, the broadcasting proc.533/2007]

¹⁹⁷ See Endalkachew, the legislative competence of the federal government, cited above, note 16, at p.82

¹⁹⁸ *Id.*, p.83

¹⁹⁹ Jerome A. Barron and C. Thomas Dienes, *Constitutional Law in a Nutshell*; 3rd ed., West publishing,(1995), p.57

3.7. The Power to Enact Media Legislation as Part of Concurrent Power under the FDRE Constitution

As discussed in chapter two, the notion of concurrent power is that both the federal legislature and the constituent states legislature may pass legislation that fits into these functional areas.²⁰⁰ Concurrency is conferred in a way that enables each sphere of government to legislate on the same subject matter, in certain conditions separately but not at the same time.²⁰¹ It is considered as an attractive compromise where there is disagreement or uncertainty about which sphere of government is best placed to act in a particular area of legislative competence.²⁰²

The issue at the heart of this part is to scrutinize whether enacting media law is a concurrent power or not. Though the constitution does not provide much concurrent power explicitly except the issue of tax, it is possible to argue that the FDRE constitution provides other concurrent powers that are not expressly referred to as concurrent by the constitution which are available implicitly in several sections of the constitution. The paper argues among the concurrent powers that are not expressly referred to as concurrent by the constitution is press law.

There are four types of concurrent powers under the FDRE constitution as identified by Dr. Assefa and Dr. Zemelak; the first one is enumerated concurrent power like the German Basic law that contains a clear list of concurrent powers that are explicitly provided for the two orders of government.²⁰³ The second type of concurrent power emanates from framework legislation in which the constitution provides the federal government to set general standards and basic policy criteria by leaving enough space to the constituent states to regulate their own.²⁰⁴ Those authors argue that it is paramount in case of socio-economic powers that cannot be given exclusively to either levels of government. Concurrency may be also viewed as a means to give effect to particular federal principles, including subsidiarity and co-operation.²⁰⁵

²⁰⁰ Victoria Bronstein, *Legislative Competence*, 2nd ed. *Original Service*, 2004, p 15-20

²⁰¹ Anna Dziedzic and Cheryl Saunders, 'the Meanings of Concurrency' in Nico Steytler (ed.) *Concurrent Powers in Federal Systems Meaning, Making and Managing*: Brill Nijhoff, Leiden, Boston, (2017), p.2[here in after, Dziedzic and Saunder, the meaning of concurrency]

²⁰² Ibid.

²⁰³ Assefa and Zemelak, concurrent powers in Ethiopia, cited above, note 75, at p.243

²⁰⁴ Id. P. 244

²⁰⁵ See Dziedzic and Saunder, the meaning of concurrency, cited above, note 201, pp.3-5

The third type of concurrency is where law making and execution power are separated. In this case, the federal government makes law and the constituent states execute it. The final type of concurrency is, according to those authors generic concurrency. In this case, the power is not listed as a concurrent power.²⁰⁶

Coming back to the issue of media, the legitimate ground to claim the concurrency of media legislation is that of chapter three of the constitution i.e. the bill of rights chapter which empowers both the federal government and the constituent states to enact enforcing laws. Media law as part of the legal regime for the enforcement of freedom of expression rights guaranteed in the constitution falls within the concurrent legislative competence of both orders of government which enables the federal legislature to enact press law.²⁰⁷ The constitution provides that 'All federal and state legislative, executive and judicial organs at all levels shall have the responsibility and the duty to respect and enforce the provisions of this chapter.'²⁰⁸ The presentation of the discussion is confined to the legislative aspect. The term legislative refers to both the federal and the state legislatures. The legislature's primary constitutional mandate is making law. This is obvious that the availability of specific national legislation plays a major role in the implementation and realization of human rights at the country level.²⁰⁹

Rakeb argues that 'in fulfilling its duty to fill in the gap and bring the constitutional principle in to reality, the legislature has enacted specific laws, such as the press law, the broadcasting law.'²¹⁰ Because the constitutional duty of legislature's to enforce the bill of rights implies to pass a law as every small measures of enforcement an avoidably involves some kind of legislation.²¹¹ The paper argues that the domain of media law is found in chapter three of the constitution in which both the federal government and the constituent states have the duty to enforce freedom of expression rights recognized in the constitution. The duty to enforce freedom of expression rights involves taking positive measures that includes legislation of enforcing laws like press law. Media legislation has substantially national as well as international content which demands uniform standards across the country. As discussed

²⁰⁶ Ibid.

²⁰⁷ FDRE Constitution Proc.No.1/1995, art.29

²⁰⁸ Id. art.13(1)

²⁰⁹ Rakeb Messele, *Enforcement of Human Rights in Ethiopia*, Research Subcontracted by Action Professionals' Association for the People, 2002, p.23

²¹⁰ Ibid.

²¹¹ Adem Kassie, 'Human rights under the Ethiopian Constitution: A Descriptive Overview', *Mizan Law Review*, (2011), v.5, No.1, pp.42-71, at p.66

somewhere above, it is the federal government which has the primary responsibility to put in place nationwide standards of media and it is economically wise to do so. The duty to enforce freedom of expression rights of this chapter by making specific laws applies to the constituent states as well. Thus, the duty to enforce freedom of expression rights of the chapter can be interpreted as concurrent powers of the two orders of government.²¹²

Besides, Ethiopia is a member to major human rights treaties, being a member of these treaties imposes three types of duties, the duty to respect, protect and fulfill.²¹³ For the implementation of the rights recognized in the treaties, Ethiopia is duty bound to take all appropriate legislative, administrative and other measures.²¹⁴ The duty to protect is profoundly relevant for realization of bills of rights that can encompass the passing of laws such as press law. In conclusion, enforcement of bill of rights are stated in generic terms, the constitution does not provide any further details as to the specific roles of each level of government but both level of government are empowered to act and press law is a typical example of generic concurrency.

3.8. Counter Argument from the angle of Residual Power of Media under the FDRE Constitution

If the law is interpreted literally, media law could be said as residual powers of the constituent states. The constitution does not clearly specify whose power the legislative competence of media should be. But in such case, the constitution grants residual powers to the constituent states and it is the will of the people of Ethiopia to give residual powers to the constituent states.²¹⁵ From this angle, enacting media law could be one of them. But it is not really residual power of the constituent states. As argued earlier, the mere absence of express provision there in the constitution pertaining to media is not a bar for the federal government to pass a valid media legislation of national application in the federal arrangement of Ethiopia. There are possibilities that could be used by the federal government for enacting media laws of national application. The federal government has substantial concern over the media as it demands nationwide standard though the constitution does not expressly list

²¹² Baye Yimam et al, 'the Protection of Human Rights in Federal Systems' in the Proceeding International Conference for Ethiopian Studies, Addis Ababa, 6-11, 2000, vol.3, p.11

²¹³ Mizane Abate, 'Transnational Corporate Liability for Human Rights Abuses: A Cursory Review of the Legal Framework', *Mekelle University Law Journal*, (2012), vol.4 pp.1-37 at p.6

²¹⁴ Ibid.

²¹⁵ The FDRE constitution Proc.No.1/1995, art.52(1)

media as one of standard setting activities. As it is evident from the manner of state vertical division of political power, the federal government has power over matters that are the concern of the state as a whole whereas the constituent states are empowered on matters which are not primarily common interest and which are considered as relevant to the expression of regional identity.²¹⁶ The case in point is matter of national concern.

In case of the family law issue, when HoF was asked its advisory opinion whether or not HoPR has the legislative competence to enact a federal family code applicable across the federation, CCI suggested that enacting a family code is the constituent states power on two grounds; first the enactment of a family code has cultural, traditional and religious attachment of society. This area needs diverse legislation for the expression of regional identity, second reserve powers is vested to the constituent states and such power is not expressly given to the federal government so that this belongs to the constituent states.²¹⁷ The worthy point to note here is the nature of family law or the issue of family law is different from the issue of media law even though both of them not clearly mentioned in the constitution. As family law has something to do with the culture, tradition and religion of society, we expect diverse legislation from the constituent states and one of the essential aspect of federalism is to accommodate such type of diverse interests. They should enact a law that fits with their socio-economic and cultural context. Whereas the issue of media is substantially national and international content that demands uniform application across the federation and no need of diverse legislation. There also relevant words and phrases in the constitution that legitimize the acts of the federal government even if the issue of media not expressly mentioned. So, as mentioned repeatedly, to say a certain power residual or not, one has to look into those powers given expressly or impliedly to the federal government in several sections of the constitution.

²¹⁶ Zelalem Eshetu, 'Decentralizing Treaty making Power of the Federal Government under the Ethiopian Federal System: In search of better Safeguarding Mechanisms', *the International Journal of Ethiopian Legal Studies*, (2015), vol.1, No.1, pp.4-33, at p.5

²¹⁷ See Assefa, federalism and Accommodation of Diversity in Ethiopia, cited above, note 31, at p.293 and see the Ruling of the council of Constitutional Inquiry (CCI) Miazia 26/1992 E.C.[unpublished]

CHAPTER FOUR

4. Summary and Conclusion

4.1. Summary

Though the enactment of media laws of national application by the federal legislature is not unequivocally provided for in the FDRE constitution, it is found out to be defensible. The absence of an express provision pertaining to media might not be a bar for the federal government to enact nationally applicable media laws. Needless to say, the constitution is formulated broadly so as to accommodate various affairs of the state including the media. When we look into those powers given expressly or implicitly to the federal government in several sections of the constitution, we can adduce relevant words and phrases in the FDRE constitution that potentially indicate the constitutional legislative competence of the federal government to enact media laws of national application in Ethiopia.

The allocation of legislative competencies between the federal government and the constituent states is primarily elaborated in arts.51 and 52 of the constitution. However, it has to be noted that several other provisions which are scattered over the text of the constitution also allocate legislative competencies. It might appear that by virtue of the reserve clause, any power not mentioned under art.51 belongs to the constituent states but the latter's power is determined after discounting all powers of the federal government distributed throughout the constitution and of the concurrent powers accorded to both entities.

Most of all, the phraseology of the constitution regarding the power of the federal government to enact laws over 'other natural resources' as provided for in art.55 (2) (a) is broad enough that may include the enactment of broadcasting media legislation. The paper has argued that a natural resource includes both renewable and nonrenewable resources. The broadcasting media is a limited radio wave wealth of the country. So, it can be considered as one of the renewable natural resources of the country. The federal government's enactment of broadcasting law of national application could therefore be justified on account of ensuring proper and fair utilization of the limited radio wave wealth of the country. The advent of digital media seems to diminish the importance of radio wave as a scarce resource, though it has still importance in many applications to date.

Apart from the above, the territoriality principle has been identified as another point of relevance. Our constitution following the territoriality principle that is evident in the manner in which a number of competencies are divided between the federal government and the constituent states, it confers on the federal government powers over matters that involve the territories of more than one constituent state. Accordingly, an activity which has an impact beyond the constituent states' boundaries calls for federal regulation. It follows that the broadcasting media can be taken as an activity having an impact across the federation as it is frontier less.

Finally, one of the commonality of both the print and electronic media is their dependency on technology. More importantly, legislation pertaining to technology is the jurisdiction of the federal government. Thus, the issue of media legislation is interconnected to the enumerated power of the federal government and it could be construed as an implied power of the federal government. The broadcasting media has also commercial aspect that demands federal legislation.

The paper has also argued that although the FDRE constitution does not provide a comprehensive list of concurrent power except the issue of tax, the study finds out that the print media legislation is a typical generic concurrency. Media law as the part of the legal regime for the enforcement of freedom of expression rights recognized in art.29 of the constitution falls within the concurrent legislative competence of the two orders of government which enables the federal government to make press law. The manifestation of concurrency of print media legislation is chapter three of the constitution i.e. the bill of rights chapter which imposes duty both in the federal government and the constituent states to enact press law for the enforcement of freedom of expression rights. The domain of media or freedom of expression whatever we call is found in chapter three of the constitution. As per art.13 (1) of the constitution, the enforcement of freedom expression rights calls upon the constitutional responsibility of both the federal government and the constituent states. The duty to enforce implies to take positive measures for realization of freedom of expression rights, such as enforcing laws of press. Thus, the press law is considered as generic concurrent legislative power of both the federal government and the constituent states.

4.2. Conclusion

The thesis has examined the enactment of media law of national application by the federal government and it is found constitutionally justifiable. Though it is constitutionally

defensible, the study implies that there is some unclarity or ambivalence having to do with media that needs clear determination. In the future, it is hoped that the HoF will consider it when it faces such type of case in making modest evaluation and clear determination of legislative competencies having to do with media.

The study further shows that the press legislation is a concurrent power that the federal government has dominated. Although it is theoretically fine that either the federal government or the constituent states can exhaustively enact in case of concurrent power of press law, the presence of unscrupulous practice on the side of the federal government impedes prospects of genuine law making power of the constituent states that fit their local context. The power to legislate press law should not invariably fall under the umbrella of concurrent power because the federal government has the potential to absorb it. The way to tackle it may be re-visiting the wording of the constitutional provisions towards framework power and by so doing; the federal government is obliged to leave substantial room to the constituent states of the federation to enact media law on their respective constituencies or creating the opportunity for the constituent states to have a say pertaining to concurrent powers of press law that are legislated by the federal government. As a federal law applicable throughout the country and governs the polity as a whole; the forming bricks of the federation should have a say on these generally applicable legislation or policy guideline. This can be done by either the direct participation of the constituent states or by ensuring the HoF to have law making power.

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