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College Of Law and Governance
Center for Federalism and Governance Studies

Criminal Justice Systems in Federal Polities: Ethiopia in the Comparative Perspective

By: Abdi Gurmessa Amenu

A Dissertation submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy to the Center for Federalism and Governance Studies, College of Law and Governance Studies, Addis Ababa University

Supervisor: Professor Assefa Fiseha

June, 2024
Addis Ababa
Ethiopia

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Acknowledgement

I praise God for His bountiful mercy and the extra chance to pursue my PhD studies following the failed assassination attempt for the cause of justice and reform based judicial leadership. Indeed, I fought the good fight of justice that cost me a lot. Thank you my Lord for standing by my side and shepherding me all the time!

I would like to extend my sincere gratitude to Professor Assefa Fiseha for his constructive and unfettered supervision and mentorship on the long PhD journey. The fruition of this dissertation is attributed to him. He moulded my dissertation from discrete silhouette into this splendid form. Thank you, Professor, for your precious time and intellectual support!

My wife, Tolashi A., has paid a lot of costs and efforts of bearing all family responsibilities alone in order to help me advance my PhD studies. Without your support, I could not have completed this long study. I love you unstintingly! My kids—nicknamed Bingo and Bella—deserve love and hug for their patience while I was grappling with the long journey of PhD.

I would like to thank Professor Tania Groppi, my supervisor, during my stay at the University of Sienna, and Professor Giammaria Milani, Dr. Valentina Carlino, Dr. Chiara Cerbone, Dr. Candida Carlos, Professor Pier Lorenzo, and Professor Valeria Piergigli. Special gratitude goes to Professor Tania and Professor Valeria for offering me the chance to publish an article in the Italian Journal of Federalism on the Constitutional Crisis in the Horn of Africa.

Precious classmates—Adane, Gedion, Melese, and Nigusie—are always missed for the prolific discussions and debates in and outside the classes on the contemporary Ethiopian political development. I also thank Jetu Edossa, my long-time friend, for his mentorship.

I am grateful to the PhD class instructors: Dr.Zemelak, Dr.Solomon, Dr.Dereje, Dr.Firdisa, Dr.Desalegn, Professor Nico Steytler, Professor Eva, and Dr.Firehiwot; the Chair of the Center, Dr. Ketema, the PhD Programme coordinator, Dr. Regasa, and staff members Fikirte, Lidiya, and Feben for their administrative support during the study of the PhD programme.

Last, but not the least, I would like to extend my gratitude to Obbo Hika Ararso (Judge at the Supreme Court of Oromia) and Melkamu Dirbaba for their supports related with stationeries such as papers, CDs, pens, and day-to-day moral encouragement during the study of my PhD.

Dedication

I would like to dedicate my dissertation to my mother, *Likkiishee Hangasaa,* who labored much for bringing me up and educating me at her cost but departed without enjoying the fruits of her toil.

Abstract

The question "who does what" in the criminal justice administration under the overall Ethiopian federal arrangement remains debatable viewed from a variety of perspectives. The FDRE Constitution mainly empowers the federal government to make a criminal law, on the one hand, and establishes a dual institutional structure, on the other. Such a monist-dualist binary approach to the criminal justice administration results in the complication of identifying the clear jurisdiction of the federal and state justice organs for tracing accountability and budgetary issues from among other things. This problem is compounded by the inadequate regulatory statutes of the federal government in delineating the specific jurisdiction of the state justice institutions. Consequently, it has become blurred whether the state justice sectors are administering the criminal laws made by the federal government in an exclusive, concurrent, or delegated mandate. Moreover, as both the federal and state governments engage in making criminal statutes albeit in different magnitudes, there have emerged contradictory provisions which need to be resolved. However, the FDRE Constitution keeps silent as to which law should prevail in inconsistent instances. While this is a major problem inherent in the Constitution, some approaches developed by the legislature, executive, and judiciary which prioritize the supremacy of the federal law over the state counterpart has become another challenge. In addition to the constitutionality question of the development of such practices, an empirical assessment on the subject suggests that the supremacy of the federal laws is sustained in all cases which may compromise the essence of federalism in general and legal pluralism in particular. These and other problems which could be attributed to the Constitution and relevant statutes are convoluted with the absence of conceptual and theoretical advancements of the subject of criminal justice within the wide spectrum of federalism, distribution of powers, and comparative perspectives. To this end, there is a scant literature which is dedicated to the conceptualization and theorization of criminal justice in the Ethiopian federal experimentation.

Therefore, the objective of this dissertation is to explore and critically appraise the Ethiopian federal approach to the criminal justice matters by putting it in the conceptual, theoretical, and comparative perspectives. More specifically, the study aims at exploring the correlation between federalism and criminal justice policy; collocating the subject of the criminal justice policy with the rationales, principles, and factors of the doctrine of distribution of powers; exploring approaches adopted by different federal systems and comparing with the Ethiopian counterpart; critically exploring the specific approaches to the division of criminal matters adopted under the Ethiopian federal practice; assessing the methods of allocating criminal jurisdiction between the federal and state justice institutions; and reappraising the inter-and intra-governmental criminal justice systems cooperation. In order to bring these objectives into fruition, a qualitative research method, and a doctrinal approach was specifically and dominantly used in the study. Descriptive, exploratory, case study, and comparative approaches were also employed as a research design. In this regard, the argument goes the policy and legislative aspect of the criminal justice under the Ethiopian federal and constitutional design is centralized, hence monist, top-down, or 'one-size-fits-all' approach. This approach to the criminal justice in the cultural diversity and legal pluralism may be subjected to critical evaluation from the principles and values of federalism such as local policy innovation, and the principles and factors that affect the distribution of powers, from among others. By contrast, an institutional design portrays a dual approach which assumes the federal-state matters dichotomy. Such a dualist approach stands at an odd with the monist approach thereby putting the jurisdiction of the criminal administrative spheres of the state justice organs in the dark. A close look into the statutes made by the federal and state governments for defining the criminal jurisdiction of their respective justice institutions reveals the evolution of the third approach which could be designated as a progressive dichotomization. This approach is found again to be defective on many grounds. As a whole, there is a mismatch between the legislative mandate and institutional design over criminal matters that predispose the study of criminal justice under the Ethiopian federal system to be lacking in the systematic and linear approach. Therefore, it is recommended that criminal justice should be reconceptualised from the concepts, principles, and values of federalism, the principles, factors, and rationales of the distribution of powers, and comparative perspectives. To this end, the specific constitutional provision which deals with the legislative power of the criminal law (Art.55(5) of the FDRE Constitution) should be amended or interpreted by the HOF so that it could be aligned with the above-mentioned federal perspectives. In this respect, it would be suggested that the progressive dichotomization approach to the criminal justice be constitutionalized. The power to enact the code of criminal procedure should be left to the states. Federal laws which define the criminal jurisdiction should stipulate the clear mandate of the state justice institutions. Last but not least, prospective researchers are recommended to push the study of criminal justice forward.

Declaration of Originality

I hereby declare that this PhD dissertation entitled **“Criminal Justice Systems in Federal Polities: Ethiopia in Comparative Perspective”** is my own original work which has not been presented for any degree or examination in any university and the sources used have been duly acknowledged and cited.

Acronyms

AU	African Union
BPR	Business Process Reengineering
CCI	The Council of Constitutional Inquiry
CJS	Criminal Justice System
CPREC	The Draft Criminal Procedure and Rules of Evidence Code
EACC	Ethics and Anti-Corruption Commission
EC	Ethiopian Calendar
ENDF	Ethiopia National Defence Forces
EPRDF	Ethiopian People’s Revolutionary Democratic Front
FAG	Federal Attorney General
FCP	Federal Courts Proclamation
FDCA	The Federal Food, Drug and Cosmetic Act
FDRE	Federal Democratic Republic of Ethiopia
HOF	The House of the Federation
HPR	The House of Peoples’ Representatives
IGR	Intergovernmental Relations
NJRF	National Judicial Relations Forum
PP	Prosperity Party
SNNPRS	Southern Nations, Nationalities and Peoples Regional State
SWEPRS	The South West Ethiopian Peoples Regional State

Table of Contents

PART ONE

FEDERALISM AND CRIMINAL JUSTICE SYSTEM

Chapter One

Introduction

1.1. Background of the study

The subject of criminal justice constitutes one element of the distribution of powers which in turn is one of the fundamental principles and underlying characteristics of federalism as a distinguishing marker from a unitary system. As much as there are various approaches and forms of the distribution of powers, so is the division of the criminal justice matters. Different federal systems adopt different models and approaches of the administration of criminal justice based on their internal political and historical factors. While some of them adopt a decentralized criminal justice, others follow a centralized one in the legislative, administrative and adjudicative spheres of the criminal justice matters. As each model has its own merits and demerits, the commonality across the federal systems is that their constitutions and other laws made by the law making organs make it clear that the division of the criminal justice matters and related fields are decentralized and/or centralized wholly or partially. In light of this view, when the criminal justice matters are decentralized, one could envisage the principles, values and ideals of federalism. On the other hand, where the subject is centralized, the inverse may be true. However, the allocation of mandates related to criminal justice in the Ethiopian federal and constitutional design is not as simple as presented above. There is a circumstance whereby an aspect of the field is centralized in one way and could be decentralized in another way.

There are principles and values of federalism such as the doctrine of distribution of powers, self-rule and shared rule, accommodation of diversity and preservation of unity, experimentation, local policy innovation, morality, and democratic precepts which have a direct bearing on the matters of criminal justice administration as a subtheme of the division of competences among different orders of government. What is more, the doctrine of distribution of powers in federal systems is affected by various factors, guided by many principles, and needed for justified rationales. These parameters have also a profound relevance to the study of criminal justice in federalism. In the meantime, it is equally important to bear in mind that the aspects of the division of powers in federal systems pertains to legislative, executive, judicial, and fiscal competences which in turn have significance for the approach to the allocation of powers in criminal justice. As briefly described in the foregoing paragraph, different federal systems adopt different approaches to the administration of criminal justice within the whole gamut of the federal arrangement.

Under the Ethiopian Constitutional (hereinafter the FDRE Constitution or simply the Constitution) and federal architecture, the four aspects of powers—legislative, executive, judicial, and fiscal competences—are divided between the federal government and the states. As a specific subject matter, criminal matters are divided between the two tiers of government in a way amenable to different interpretations. While the federal government is conferred with a dominant power leaving the states with marginal scope, it has created confusions and problems in the areas of legislation, execution, and adjudication. To this end, there are no clear theories and approaches that can guide the regulation of the criminal justice in general and the division of criminal matters in particular under the federal arrangement. As a result, this study unravels the controversies in the division of the criminal justice matters and cognate issues in Ethiopia by putting it in the conceptual, theoretical, normative, and comparative perspectives.

1.2. Statement of the problem

The administration of criminal justice and that of the division of powers and jurisdictions in all its aspects—legislative, executive, and adjudicative—has been a subject of debate under the Ethiopian federal and constitutional design. In the main, issues related with the allocation of criminal jurisdictions have become controversial among scholars and practitioners of law and federalism. Given the dual federal structure adopted by the FDRE Constitution, both the federal government and the states have their own government institutions (legislative, executive and judicial organs). From this proposition, it could be safely deduced with the dominant assumption that the government institutions are destined and meant to make, implement and adjudicate laws of their respective realms as per the powers and functions distributed by the Constitution. On the contrary, the federal government is empowered to have a predominant position in making criminal laws.

Nonetheless, it is noticed with the rule of thumb that the federal government might not be able to enforce the criminal laws and justice policy by its justice sectors alone. As a result, the involvement of the state justice sectors would be inevitable in the administration of criminal laws in the areas of prevention, investigation, prosecution, adjudication, and prison administration. On the other hand, it is witnessed that the states have apparently engaged in making statutes containing penalty clauses which contradict the federal counterpart on similar subject matters.

The following problems are assumed to be the major and basic ones with regard to the discourse of criminal justice matters in Ethiopia under the dual federal structure, which will be tackled in this dissertation. At an outset, the problems in this regard bear on conceptual, theoretical, constitutional, legal, and practical facets each of which will be illuminated in order as follows.

The first problem and challenge in relation to the criminal justice matters under the Ethiopian dual federal setup pertains to the question of mandate. There are conceptual deficiencies and misunderstandings of who owns a criminal law and justice policy: the federal government, the States, or both. Some policy makers, scholars of law and federalism, and practitioners of law usually assert that criminal law and justice policy exclusively belongs to the federal government based merely on the constitutional provision dealing with the criminal legislative authority. In other words, this assertion would lead to the conclusion that the States are devoid of mandates on criminal laws in any of its entirety. However, it is unclear what these assertions and arguments refer to. For instance, does it mean that the federal government entirely has a monopoly on all aspects of criminal regimes (legislation, execution (prevention, investigation, and prosecution), adjudication, and prison administration)? If so what are the roles and functions of the States, and what role do they have in criminal laws and justice policy enforcement? And how could be such a trend seen in light of the principles of federalism and distribution of powers? In fact, these and other questions will be presented in the research questions and answered accordingly throughout the research processes.

The second problem is linked with the theoretical challenges and deficiencies that the criminal justice matters under the Ethiopian federal experimentation has been facing. Issues related with the criminal matters including jurisdictional aspect in its legislative, executive and adjudicative features is not well investigated and assessed in light of the principles underlying the distribution of powers in particular and federalism in general. The distribution of powers in federal systems is underpinned by such principles and postulations as subsidiarity, the nature of the matter and its significance (i.e., federal/central/common/general features and regional or local features), and other factors as propounded by federalism scholarship.

That is to say, powers and responsibilities are not haphazardly divided between and among various levels of government. With regard to the principles of federalism, the distribution of powers is influenced *inter alia* by such precepts as self-rule and shared rule, autonomy, and federal comity. There is no reason why these tenets do not operate for the determination of distribution of powers and functions on criminal matters between the federal government and the states notwithstanding other factors that affect the subject such as the specific type of federalism formally adopted by a constitution. For example, the US model is dual, whereas the German and Swiss approach is administrative or integrated type of federalism. In light of these and other precepts and postulations, it is problematic to specify the particular locus of criminal justice matters in Ethiopia as a result of which theoretical rethinking and revisiting is an expedient intellectual need in this research.

Thirdly, the specific constitutional provision which concentrates on the criminal legislative power does not seem to be satisfactory to address problems and conflicts arising in relation to criminal jurisdiction in the domain of the distribution of powers and the overall ideals of the Constitution. Art.55(5) of the Constitution provides that *the House of Peoples' Representatives shall enact a penal code. The States may, however, enact penal laws on matters that are not specifically covered by Federal penal legislation*. This very constitutional stipulation in turn has posed many complications and challenges in the criminal justice administration viewed from other underlying and associated tenets. For example, as per this provision, does it mean that the federal government can make criminal laws in violation of the regional autonomy which may be revealed in criminalizing State matters? Why do the States not make criminal laws on their own matters constitutionally bestowed thereupon? Does the provision mean that the States can enact criminal statutes which are not covered by the federal government over matters conferred on the latter? What purposes are meant and achieved by the fact that the federal government is empowered to make criminal laws over matters which lack federal/national features and significance and full of regional and local character? Complications are also created on the subject of the mutual respect of powers and non-interference with one another's powers and internal affairs as enshrined by the Constitution (Art.50 (8)). The whole idea is that the Constitution itself does not address the problems arising from criminal legislative power in the realm of the distribution of powers. Rather it has become the part of the problem.

At this critical juncture, it is crucial to address issues related with a concurrent power implied by the Constitution in relation to the allocation of criminal matters between the federal government and the states. Apparently, the criminal legislative power is concurrently granted to the two levels of government. However, a closer look at the text of the Constitution reveals that the scope of the state authority in making a criminal law is dependent on the federal government, not entrenched in the constitution. This in turn raises the issue of constitutional entrenchment of the division of criminal matters as one principle of the distribution of powers in federalism. Furthermore, the concepts of legislative concurrency and administrative concurrency should be treated differently in this respect of criminal matters in Ethiopia. As regards the first form of concurrency, it is highly likely that the federal government is empowered to have an overwhelming legislative authority which is also stipulated by the Constitution. An empirical assessment also testifies to the domination of criminal justice by the federal government. Besides, case studies in other federal systems demonstrate that concurrency gives great latitude to the federal government thereby enhancing centralized tendencies. The problem lies where administrative (executive and adjudicative) concurrency in relation to criminal justice administration might not correspond with the legislative concurrency due to the dual institutional mechanisms designed by the Constitution. This problem will be broadly addressed in the explanations that follow.

In connection with this, it has been a subject of debate among both the policy makers and scholars as to whose power it is (of the federal government or of the States) to enact a criminal procedure and evidentiary code. Despite the divergent views, the federal government appears to have finalized the draft bill and submitted to the House of Peoples' Representatives (hereinafter referred as HPR) for approval. This is also a problem in the discourse of criminal jurisdiction under the Ethiopian federal structure which will be critically analysed in the whole process of the research through the looking glass of the principles mentioned in the preceding paragraphs and the text and spirit of the Constitution *per se*.

The fourth problem and challenge is associated with the laws or statutes issued by the HPR at federal level and State Councils at the State levels in the course of determining the criminal jurisdiction of their respective justice sectors. On the one hand, the HPR, as empowered by the Constitution, issued a great deal of criminal laws in addition to the FDRE Criminal Code which entitles the federal government to assume and claim the mandate of these laws and is accordingly responsible for the enforcement thereof through its justice institutions by its own budgets unless expressly delegates same to the State justice institutions. On the other hand, statutes enacted to define the jurisdiction of the federal and state justice institutions appear to have come up with the dichotomy of “federal criminal matters” and “state criminal matters” the concept which needs to be deeply and critically scrutinized.

For instance, Proclamation No.1234/2021(the Federal Courts Proclamation) provides for the criminal jurisdiction of the federal courts on the basis of the nature of law, place and parties as a general approach to determination and specification of the competences of the federal courts. Moreover, it enumerates few criminal matters over which the federal courts shall assume jurisdiction. Proclamation No.943/2016 (the Federal Attorney General) and Proclamation No.720/2012 (the Federal Police Commission) also deal with the criminal jurisdiction of the Attorney General and Police Commission respectively. From the reading of these and other pieces of legislation which are issued to define the criminal jurisdiction of the federal justice institutions, we can comprehend that these laws appear to have created the notion of “federal criminal matters” by leaving the rest of the criminal matters to fall under the jurisdiction of the state justice institutions. This could be understood from the laws of the states (for instance, Proclamation No.216/2018 (the Regional Courts Establishment), Proclamation No.214/2018 (the Regional Attorney General Establishment), and Proclamation No.242/2022 (the Regional Police Commission, within the overall executive organs) of the Oromia National Regional State.

However, such a trend of the dichotomization of criminal matters in the centralized criminal legislation and justice policy has in turn resulted in the upsurge of many controversies and questions. Firstly, it is a self-defeating or paradoxical postulation to dichotomize criminal matters as “federal and state” which already belongs to the federal government. Secondly, the statutes or proclamations are not clear enough in employing the parameters used for dividing criminal matters as federal and state matters in the determination of the criminal jurisdiction of justice institutions both at federal and state levels. This abridgment of criminal jurisdiction in the ocean of other criminal matters issued by the federal government provokes the question of jurisdiction over a raft of crimes which are not mentioned to fall under federal justice institutions. In such a case, it becomes a bit difficult to assert the original jurisdiction of the state justice sectors over the remaining criminal matters because federal statutes which delineate the jurisdiction of federal justice institutions keep silent on the remainders. Furthermore, it is controversial to identify the specific criminal jurisdiction of the state justice institutions which they enforce: with original and exclusive, concurrent and/or delegated powers. All these three jurisdictional aspects have different constitutional and legal bases and consequences. As a result, they should be treated and discussed differently.

Problems are also manifested in the determination of adjudicative criminal authority in connection with the notions of concurrency, exclusive and delegation on the basis of the Constitution (both the FDRE and the States), federal and state statutes dealing with the criminal jurisdiction of their respective courts amidst the comprehensive and monopolized criminal legislative and justice policy powers by the federal government.

The fifth problem is related with the federal supremacy clause and jurisdictional conflicts which are practical challenges in the enforcement of criminal laws and justice policy under the Ethiopian federal structure. Some federal and state laws are overtly inconsistent in some respects on issues related to criminal matters. For instance, Forest laws, Land Laws, Coffee Laws, Tax Laws, and Court Establishment Laws *inter alia* provide for contradictory provisions in dealing with penalty clauses and determination of the jurisdiction of courts over criminal matters.

On the contrary, the Constitution is silent as to which law should take precedence in cases of discrepancies between the federal laws and state laws. While this gap should have been filled by the constitutional amendment or an interpretation passed by the House of the Federation (hereinafter referred to as HOF), unconstitutional measures have been taken by the federal government and the states through a legislative mechanism (whereby the federal government declares the federal supremacy clause in some statutes), executive measures (whereby the federal officials dictate the "hierarchical line offices" to drop the state laws and apply the federal one, and judicial measures (whereby the both the Federal and State Supreme Courts Cassation divisions handed down binding judgments in that the federal laws should have a final applicability in cases of inconsistencies). The irony is that, setting aside the arguments and counterarguments to the [un]constitutionality of these measures as a "gap-filling" of the federal supremacy clause, there are some judges who are punished by disciplinary offences for applying federal laws instead of the state one by reasoning that the former favours the rights of the defendant.

The problem in relation to the conflict of jurisdiction over criminal matters is a rampant challenge which pertains both to theoretical and practical aspects. Conflict of jurisdiction with regard to the enforcement of criminal matters under the Ethiopian federal dualism pervades vertically, between the federal and state justice sectors, horizontally between and among the states, and perhaps internally within the intra-state justice sectors. Nonetheless, the resolution mechanisms of such a conflict of jurisdiction have received no or little attention which will be reconsidered and analysed under the umbrella of intergovernmental justice sectors relations and cooperation.

Despite the centralized criminal legislation, practical evolutions on the basis of statutes determining the jurisdiction of the federal and state justice institutions suggest, as described hereinabove, the notion of "federal criminal matters" and "state criminal matters" the analogous instance of the US model. This has confounded the subject of criminal justice matters on at least two grounds: the dual federal structure and the centralized criminal legislative authority under the monopoly of the federal government. The two are the antithesis of one another. Thus, it is hard to assert that the states have an original jurisdiction over criminal matters issued by the federal government, at least formally speaking. This leads us to theoretically and logically argue that if the federal government organizes its courts and other justice sectors in all states and insist on claiming the mandate of the criminal laws, the authority of the state justice institutions may turn to be dubious in the criminal enforcement regime. But this is far from reality and calls for a better arrangement in the division of the criminal justice matters.

In the administration of the criminal justice, the allocation of jurisdiction in general and that of the executive (prevention, investigation and prosecution) in particular in the states and the approach adopted in the determination thereof demonstrate varying practical and statutory arrangements. Particularly, criminal jurisdiction in the two chartered City Administrations—Addis Ababa and Dire Dawa—and how their justice institutions discharge the functions and responsibilities in the enforcement of criminal laws and justice policy remains one of the controversial and yet debatable subject under the Ethiopian federal structure. The trifurcation of criminal jurisdiction in Addis Ababa (the case in which the Federal Government, the Oromia National Regional State and the Addis Ababa City Government) have an interest which necessitates for the assumption of their respective government organs of criminal jurisdiction is an important issue to expound.

It has become a profoundly relevant subject especially at the present when the Oromia National Regional State has established and organized a *woreda* (district) court in the City as its Capital to empower the exercise of criminal jurisdiction over cases in connection with the Region. This trifurcated criminal jurisdiction in Addis Ababa aroused resentments from those who object to the connection between the Oromia National Regional State and its Capital City, as officially designated as *Finfinnee* by the Constitution of the State. Criminal authority in the Dire Dawa City Administration is another focus of discussion in which criminal authority is bifurcated between the Federal Government and the City Administration unlike the Addis Ababa counterpart.

Statutes issued from time to time by the federal government and the states in defining the criminal jurisdiction of their justice institutions appear to have ended in exacerbating the problems and complications instead of alleviating the challenges arising there from which are perhaps traceable to the Constitution as well.

Finally, due to its inherent nature, the administration of criminal justice cannot be achieved by the one organ. Unlike that of the civil justice administration, the criminal justice administration requires multiple institutions as issues related with criminal law would mainly involve a public interest. Consequently, justice sectors such as police, prosecution, courts, prisons, and other related bodies are necessarily required for the effective and efficient delivery of justice in a coordinated, cooperative and collaborative mechanism. Such an institutional cooperation and collaboration among the justice institutions found at federal and state levels could be viewed within the general notions of IGR. Hence, this facet of IGR in the administration of criminal justice applies to the federal and state agencies (vertical IGR), between various states (horizontal IGR), and intrastate (between and among different justice sectors of the states or the federal government). In this regard, there is few or no comprehensive policy and strategy that guide the collaboration and cooperation of such justice organs based on the principles that should be taken into account for the internal administrative autonomy, professional independence, neutrality and impartiality on the one hand, and collective effort for the effective delivery of criminal justice services on the other.

Generally, the problems connected with the Constitution in providing for the centralized legislative and policy mandate on criminal matters and a dual institutional setup for the administration thereof which apparently stand at odd; the dearth of adequate conceptual and theoretical advancements in unearthing the criminal justice within the notion of federalism, distribution of powers, and experiences of other federal systems; inadequacies and ambiguities found in the federal statutes that define the criminal jurisdiction of the federal justice institutions; and the absence of the supremacy clause in the Constitution which will be tackled by the dissertation.

1.3. Research questions

The dissertation aims to answer some questions related with the criminal justice matters in the Ethiopian federal experimentation from a variety of perspectives. These questions are:

1) What are the conceptual and theoretical correlations and nexuses between the principles and values of federalism and the criminal justice matters in federal systems?
2) What rationales necessitating for, principles guiding, and factors affecting the distribution of powers in federal systems are relevant in the regime of the division of the criminal justice matters?
3) How do federal systems allocate competences with respect to criminal matters? What are the approaches, models and experiences in relation to regulating criminal justice matters in general and the division of the field in particular that has contribution and relevance for the study of the Ethiopian counterpart?
4) What is the scope of the legislative and policy mandate of the federal government and the states with regard to the criminal justice matters? How could the Ethiopian federal approach in this regard be evaluated from the perspectives of the values and principles of federalism, rationales, principles, and factors of the doctrine of distribution of powers, and comparative review?
5) How are the criminal executive and adjudicative powers allocated between the federal and state justice organs under the centralized legislation and justice policy? What approaches are used in this respect? Which criminal matters are exclusive, concurrent and/or delegated to the state justice institutions and which are not?
6) How do the various justice institutions both at federal and state levels on one hand and in each level on the other coordinate, cooperate and collaborate for the effective and efficient delivery of the criminal justice services?

1.4. Objectives of the study

The study has two objectives: general and specific. The general objective is to explore the Ethiopian federal approach to the criminal justice matters by putting it in the conceptual, theoretical, normative, and comparative perspectives. In association with this, the specific objectives are to:

1) Explore and describe the correlational analysis between the principles and values of federalism and the criminal justice matters.
2) Juxtapose the rationales, principles, and factors of the distribution of powers with the matters of criminal justice.
3) Explore approaches adopted by different federal systems in relation to the subject of criminal justice matters.
4) Discover the Ethiopian federal approach to the criminal legislative and justice policy mandate and critically assess from a variety of parameters.
5) Analyse the approaches used to compartmentalize the criminal jurisdictions in the federal and state justice institutions in the administration and adjudication of criminal justice matters.
6) Reappraise the intergovernmental criminal justice systems relations from vertical and horizontal aspects under the Ethiopian federal setup.

1.5. Review of related literature

There are few comprehensive documents or researches conducted that provide for the detailed account of the administration of criminal justice under the Ethiopian federal and constitutional architecture. The discourse on criminal justice matters within the spectrum of federalism and its fundamental principles has been rarely researched, studied and investigated both in Ethiopia and beyond. Thus, there is a scarcity of literature on the theme in federal systems in general and the legislative, executive and adjudicative powers of the federal government and the states under Ethiopian federal structure in particular. In the first place, this dissertation aims to fill this gap by producing an in-depth analysis of the criminal justice administration by placing an utmost attention and space to the division of criminal matters between the federal government and the states juxtaposing it against a variety of parameters which are connected with federalism.

One of the most comprehensive and latest research work conducted on criminal justice system in Ethiopia is the one carried out under the auspices of the Federal Attorney General.[1] As understood from the Foreword message and Introduction delivered by the Chair of the Working Group, the research was meant to fill the pre-existing gaps and rectify the defects of criminal justice system and other related issues such as the rule of law, institution building,

[1] Diagnostic Study of the Ethiopian Criminal Justice System, Federal Attorney General, Legal and Justice Affairs Advisory Council, Criminal Justice System Working Group, March 2021, Addis Ababa, Ethiopia

human rights, democracy, and federalism. Moreover, it is mentioned in the research output that the previous criminal justice system suffered from lack of public and expert participation and this should be improved by involving intellectual and popular participation in the study for a better administration of criminal justice system.

However, the scope of the research is limited to the study of the criminal justice system at the federal level undermining the one at the state counterpart. Nevertheless, criminal justice administration cannot be effective without the simultaneous treatment of both levels on equal footing. In fact, this is a sharp contrast to one of the parameters—federalism—with which the Working Group would have conducted its study. As noticed from the message of the Chair, he conveyed his hope that the Regional States would emulate the reforms made by the federal government in this respect. But what should be urged is not to emulate, rather innovate better explorations in relation to the criminal justice administration by taking advantage of regional autonomy and self-rule. From this assertion, it could be comprehended that the research group overlooked the notion of the decentralized criminal justice system by promoting a top-down approach instead of a bottom-up model. As will be delineated in the discussions that follow, the Ethiopian criminal justice system has suffered from such a unitary and centralized mind-set. In fact, the research has been taken as one aspect of the political reform alleged to be undertaken in the wake of the dissolution of the Ethiopian People's Revolutionary Democratic Front (EPRDF) which morphed into Prosperity Party. For all practical, legal and constitutional reasons, the reform at the federal level necessitates for the reform at the state levels which is overtly missing in the research conducted by the Working Group on criminal justice system. Unless the restoration of the previous unitary and centralized system of government has been fomented in the minds of the ruling party, justice reform, if any, at the federal level alone cannot guarantee the one at the state level.

Moreover, the research conducted by the Working Group did not consider the whole gamut of criminal jurisdiction—legislative, executive and adjudicative aspects—which constitutes one of the debatable themes under the Ethiopian federal experimentation. In addition, since the study was limited to the criminal justice reform at the federal government alone, the notions of intergovernmental justice sectors have not been fully studied as underpinned by the principles of federalism. In relation to police and prosecution (sections two and three of the research document), an attempt has been made by the authors to delineate and show some gaps regarding cooperation among justice institutions. But their finding and recommendation does not encompass a cooperative mechanism that pools together the vertical and horizontal intergovernmental relations regarding justice sectors of the federal government and the states. While a mere cooperation and IGR are two interrelated concepts, there is a difference between them in the language of federalism especially where the various tiers of government undergo interactions.

Consequently, this dissertation will be meant to fill the gaps revealed by the research conducted by the Working Group on criminal justice reform in this regard by providing and illuminating the whole breadth of the subject of criminal justice matters. In light of this, the legislative, executive and adjudicative powers of the police, prosecutors, courts, and anti-corruption commissions of the federal government and the states will be expounded through the looking glasses of the principles of federalism, the FDRE and State Constitutions, and relevant statutes.

Abera discusses the interplay between legal pluralism and the monist or centralized Ethiopian criminal justice system.[2] Based on his investigation, the finding was that Ethiopian criminal justice policy is so monist that it does not have any room for the restorative justice avenues as an alternative to the formal or state justice institutions amid the pluralistic societies in the country. However, his study does not deal with the other spheres of the criminal justice matters such as the division of powers and intergovernmental criminal justice system relations from among other things.

Wondossen examines the scope of the criminal legislative power of the federal government and the states in such a way that what the constitutional provision is and what it ought to be.[3] His contribution in this regard is so incidental that the principal theme of his study focuses on the commentary of the existing Ethiopian Criminal Procedure which is more than half a century old. As such, he did not deal with the whole array of the criminal justice matters under the Ethiopian federal system which is the central aim of this dissertation.

Assefa clarifies the criminal legislative power as one aspect of concurrency and asserts that the state criminal legislative power so provided for by the Constitution is not a mere paper power.[4] His approach to the explanation of the criminal jurisdiction is incidental to the

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[2] Abera Degefa, "Legal Pluralism in Multicultural Setting: Legal Appraisal of Ethiopia's Monist Criminal Justice System". *in* Elias N. Stebek and Muradu Abdo (eds.), *Law and Development, and Legal Pluralism in Ethiopia*, Justice and Legal Systems Research Institute, 2013, Addis Ababa, Pp. 141-155

[3] Wondossen Demissie Kassa, *Ethiopian Criminal Procedure*, Addis Ababa University, School of Law, 2012, Addis Ababa

[4] Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, Revised Edition, Wolf Legal Publishers, Nijmegen: the Netherlands, 2010, p.284

discussion of the division of legislative power in some federal states and Ethiopia. Solomon also maintains a similar approach and viewpoint.[5] The two authors did not provide a detailed explanation of criminal justice matters and related issues on areas of legislation, execution and adjudication of criminal matters by the federal and state justice institutions. Moreover, in the division of criminal matters under the Ethiopian federalism, legislative concurrency and administrative (executive and adjudicative) concurrency have different implications and consequences viewed from the constitutional, statutory, and practical point of views. The legislative power is dominated by the federal government without however envisioning the administrative sphere of the criminal law across the country within the separate institutional design. Thus, the dissertation strives to make an in-depth and critical analysis of the matters of criminal justice in its fullest aspects as juxtaposed with the principles of federalism and comparative perspectives.

Donovan and Getachew have tried to place the Ethiopian criminal legislative jurisdiction somewhere in between the German model and the Canadian model.[6] However, their methodology of comparative approach is not clearly enunciated. That is to say, their conclusion is not plausibly supported by strong arguments and premises in the article. As a result, this methodological deficit in the comparative approach will be remedied by scrutinizing the Ethiopian federal approach to the division of the criminal legislative power alongside some federal systems which have adopted different approaches to the study of the subject of criminal justice matters. In order to broaden the comparative view, approaches and models of different federal systems will be investigated to evaluate the Ethiopian experience in a carefully selected methodology.

Abebe made a strong endeavour to delineate the scope and mode of the criminal jurisdiction of the Federal and State Courts by making the FDRE Constitution and Proclamation No.25/96 reference points.[7] However, he did not consider the State Constitutions and statutes which deal with the criminal jurisdiction of the state courts for the relative analysis under the centralized criminal legislative and justice policy norm and practice. Moreover, taking into

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[5] Solomon Nigussie, *Fiscal Federalism in the Ethiopian Ethnic-based Federal System*, Revised Edition, Wolf Legal Publishers, 2008, P.64-65

[6] Donovan, Dolores A. and Getachew Assefa, "Homicide in Ethiopia: Human Rights, Federalism, and Legal Pluralism", *American Journal of Comparative Law*, Summer 2003

[7] Abebe Mulatu, The Court System and Questions of Jurisdiction under the FDRE Constitution and Proclamation No.25/96, Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution, Organized by the Faculty of Law, Ethiopian Civil Service College and United States Agency for International Development (USAID), Volume I, 2000, Addis Ababa

account the timeline of the study, it is now more than two decades which is too long. Since then, many changes have taken place, including the repeal of Proclamation No.25/96 by replacing it with Proclamation No.1234/2021 with regard to the allocation of the criminal jurisdiction of the Federal Courts. Abebe's investigation is limited to the criminal adjudicative power. He did not expound on the legislative and executive powers of the federal and state justice institutions in relation to criminal matters which is helpful to understand the full range of the subject of criminal justice under the Ethiopian federal arrangement. All these gaps and inadequacies are assumed to be filled by the dissertation.

1.6. Methodology of the study

In order to carry out the inquiry on the subject of criminal justice in federal political governance, a qualitative research approach was used. Particularly, a doctrinal research method was chiefly employed in analysing the rules, principles and/or provisions of the Constitutions, substantive and procedural laws, and regulations issued by the federal government and the states in relation to criminal justice matters in any aspects. This is so relevant especially in areas connected with the constitutional legislative power, determination of criminal jurisdiction and allocation among various tiers of justice sectors in the administration and adjudication of criminal cases.

A document analysis was used as data collection technique on some issues related with criminal jurisdictions. This is relevant with regard to the enforcement of criminal laws and justice policy by the justice sectors of the federal government and the states. Accordingly, an attempt was made to empirically analyze as to how the two levels of governments manage to enforce the criminal laws under the federal structure and how and in what circumstances the federal government delegates the latter on certain criminal matters through exchanging letters and circulars.

As a research design, a descriptive, case study, comparative and exploratory approaches to the study of the criminal justice matters was used. A thorough and thoughtful consideration was paid to the descriptive analysis of the subject of criminal justice within the whole gamut of federalism and its cognate tenets such as definitions, meanings, classifications, principles, and values. Relevant cases were closely analyzed in the operation of criminal justice *vis-à-vis* federalism in Ethiopia and beyond. As to a comparative approach, an in-depth analysis was made between and among federal systems as to how criminal matters are divided between the levels of government mostly between the federal government and the states.

To this effect, some selected federal systems including USA, Germany, and India were closely investigated. The purpose of the comparison is to explore and locate the particular case of Ethiopia with regard to criminal justice matters in the operation of the federal experiment. From the comparative perspective, these federal polities are assumed to be relevant for the study of the Ethiopian criminal justice in federal arrangement in many respects. First, they are relatively stable and successful federations. In terms of scholarly and theoretical advancement in the areas of criminal justice in federalism, the US experience has much to share for Ethiopia. Secondly, in the three federations, the approach used for dividing criminal matters through their constitutions is systematic and linear which is hugely influenced by the mode of the distribution of powers. Thirdly, Ethiopia shares many features with these federal polities. For example, as a dual federation, specifically in terms of an institution design, it resembles the US type. As a multinational/ethnic federation, it shares many things with India. Germany is an administrative federation. However, the role of the second chamber is crucial unlike that of the Ethiopian counterpart in influencing the laws and policies made at the centre including criminal laws. Finally, concurrency of a criminal law being a common feature of these federations, including Ethiopia, a comparative scrutiny reveals different approaches. While difference of approach is expected, the Ethiopian approach to the division of criminal matters is at odd within the comparative purview.

On the other hand, a comparative look at was made with respect to the allocation of criminal jurisdiction of the justice sectors (police, public prosecutors, courts, anticorruption institutions) of the federal government and the states (vertical view), among the states (interstate or horizontal view), and within each state (intrastate view). In order to achieve this interstate and intrastate comparative inquiry, not all states were taken as a result of which samples of some or few of them are enquired in a greater depth subject to the availability and accessibility of the laws and relevant documents to be sought and found from the state. In any case, the case of Oromia National Regional State was selected purposively and conveniently.

An exploratory research design was also employed, especially in the discovery of the Ethiopia's approach to the division of criminal matters in the federal experimentation from the legislative, executive, and adjudicative spheres. A critical intellectual effort was made to unearth approaches to the study of criminal jurisdictions due to the lack of well-developed theories to that end. Accordingly, different conceptual and theoretical underpinnings of federalism and distribution of powers, constitutions, statutes, and cases were closely investigated.

In general, primary and secondary, and in few instances and cases, tertiary data sources were employed during the study. Furthermore, as a legal practitioner in the Oromia Regional criminal justice system, I used my personal observation in the inquiry.

1.7. Significance of the study

The relevance of the study on criminal justice under the Ethiopian federal and constitutional arrangement is deemed to be multidimensional and useful for multifarious individuals and public institutions. More particularly, it is supposed to be significant for those who are engaged in the making and enforcement of criminal laws and justice policy, teaching federalism, constitutional and criminal laws (substantive and procedures). Accordingly, the study is deemed helpful for scholars and students of law, federalism and constitutional law, criminal law and procedures as a text book, a guide and important reference regarding criminal jurisdiction in the Ethiopian federal system and other federal states and devolved systems thereby paving a wide gate for prospective researchers on the theme.

It is also believed to be an important resource for the policy makers and legislatures (the HPR and the State Councils) with regard to criminal legislative powers thereof. Specfically, it may be used as an instrumental tip to make a harmonious criminal legislation subject to the principles embodied by the Constitution. Practitioners of criminal laws both at federal and state levels, namely, the police, public prosecutors, judges, and experts of anti-corruption commissions, are the primary beneficiaries of the dissertation in applying, implementing and interpreting issues arising out of and in relation to criminal justice matters under the Ethiopian federal structure.

The research is also conceived to be a useful material for research and higher educational institutions for advancing further thematic studies regarding criminal matters in federal systems including Ethiopia. In general, the research will have a theoretical and practical relevance for all concerned individuals and institutions who are engaged in research and teaching activities, policy and law making mandates, implementing criminal laws through preventing and investigating crimes, prosecuting and lodging criminal charges, and adjudicating or disposing criminal cases in Ethiopia under the federal arrangement.

1.8. Scope of the study

As the title of the dissertation suggests, the study concentrates on the criminal justice in federal systems by placing a substantial emphasis on the case of Ethiopia. As such, the three aspects of criminal jurisdiction—legislative, executive and adjudicative powers—will be areas of interest. As a normative standard and comparative perspective, the experiences of some selected federal countries were enunciated. In the study of the Ethiopian criminal justice, a comparative survey was made as to how some regional states allocate the jurisdiction of criminal matters among their justice institutions. In such a case, the laws of the states which are available online were explored. However, due to my legal experience and availability of statutes, I have included the case of Oromia Regional State repeatedly even though it may not necessarily represent the other states in the country.

The study does not delve into the substances and objects of the criminal law and procedure and evidentiary laws. It is rather limited to the investigation of the jurisdiction of criminal justice policy, legislative, executive and adjudicative power between the federal and state justice institutions. To this effect, the normative standards will be the notions and values of federalism and its guiding principles in general and the distribution of powers, self-rule and shared rule, the subsidiarity principles, local policy innovation, and others. To this effect, the centre stage of the study is the FDRE Constitution.

Finally, whilst there are political, economic and legal approaches to the study of federalism, my emphasis will be on the last approach that concentrates on the legal and constitutional scrutiny of the criminal justice under the Ethiopian federal experimentation. It is for this reason that the doctrinal approach was considered preferable under the qualitative research method during the inquiry.

1.9. Limitations of the study

As the title of the dissertation submits, the themes to be enquired and studied with respect to matters of criminal justice are very broad and wide because it includes a comparative analysis both inter-jurisdictional (between the case of Ethiopia and other federal systems) and intra-jurisdictional (within the Ethiopian federal experience, vertically between the Federal Government and the States, and horizontally, among the States). There are many federal systems around the globe and more than ten States in Ethiopia which would basically be the objects of the investigation. However, due to time and resource constraints, it would be unfeasible to reach out all these cases. Thus, time and resource, especially financial support for the conduct of the study through collecting necessary data from all states was the greatest problem and limitation of the study.

1.10. Organization/structure of the study

For the sake of systematic convenience, the dissertation is organized into three major parts, nine chapters, and a multitude of sections and subsections. Part One includes chapters which range from One to Four which are dedicated to providing the ground rules for studying and evaluating the Ethiopian criminal justice matters and approaches adopted by the Constitution, statutes and practices at federal and/or state levels. This Part is basically dedicated to the presentation and description of the conceptual, theoretical, and comparative backgrounds. Part Two comprises Chapters Five through Eight which are exclusively devoted to the analysis of the allocation and cognate issues in relation the criminal justice matters in the Ethiopian constitutional and federal architecture. It also assesses the approaches adopted by Ethiopia against the ground rules set out in Part One. Thus, this Part could be termed as a discussion part. Part Three includes the Summaries, Conclusions and Recommendations which is also the subject area of Chapter Nine. Bibliography is also listed in this Part.

In light of this general outline, Chapter One provides introductory issues which is the proposal of the thesis. Chapter Two concentrates on the conceptual and theoretical nexuses between federalism and the subject of criminal justice. To this effect, the definition, meaning, significance, taxonomy, principles, and values of federalism will be articulated. The correlation between the values of federalism and the administration of criminal justice system will also be considered in this Chapter.

Chapter Three focuses on the rationales that justify, principles that guide and factors that affect the distribution of powers in federal systems. An attempt was made to put the subject of the division of matters of criminal justice at the core of the inquiry within these normative perspectives. In this Chapter, an overview of the forms of the distribution of powers in general and that of Ethiopia as a specific case was discussed in its legislative, executive, and judicial spheres and the concomitant potential and practical challenges and problems thereto. Chapter Four provides a comparative survey of the models, approaches and experiences of the selected federal systems which will be used as a looking glass for the appraisal of the Ethiopia's experience in the division of criminal matters. This Chapter will shed some light on the different approaches adopted by different federal systems as categorized under different taxonomical approaches.

Chapter Five delves deep into the criminal justice policy and legislative mandate under the Ethiopian constitutional and federal design. In this Chapter, an utmost attention and space will be allocated to the critical analysis of the division of criminal justice matters. Hence, approaches adopted by the Constitution, statutes, and practices will be explored and critically assessed. It is in this very Chapter that the yardsticks set out in Chapters Two, Three, and Four are used and applied in order to put the case of Ethiopia in the normative and comparative perspectives. Chapter Six will provide an articulation for describing the criminal executive powers, particularly the analysis of the allocation of criminal enforcement mandates such as prevention, investigation, and prosecution as between the dual justice institutional setup. In this Chapter an attempt will be made to explore the exact powers of the federal and state justice sectors and the potential and practical conundrums entailed as a result of the centralized legislative mandate on the one hand and the dually structured institutions on the other. Chapter Seven provides explanations for the criminal adjudicative competences of the federal and state courts in detail. In this regard, the approaches adopted by the Constitution, and laws made by the federal government and the states will be analyzed as to how the criminal adjudicative authority is allocated between the federal courts and state courts.

Chapter Eight will be devoted to the intergovernmental criminal justice systems and synchronization. It will be articulated how the criminal justice organs at federal and state levels coordinate, cooperate, and collaborate as a vertical aspect of intergovernmental relations and each justice sector at the same level of government work together as intra-governmental relations. This is an indispensable area of the study in the centralized criminal justice policy with the decentralized justice administration in which the legal and institutional *modus operandi* should be explored for the effective, efficient, accountable, accessible, transparent, participatory, and innovative criminal justice administration in the federal arrangement.

The final chapter, Chapter Nine, wraps up the study by providing a summary, conclusions, and recommendations for the inquiry on the criminal justice matters.

Chapter Two

Federalism and Criminal Justice: The Conceptual and Theoretical Nexuses

2.1. Introduction

As a specific field of study, the subject of criminal justice in federal systems should be studied and conceptualized within the perspective of federalism and its allied themes. It is by doing so that one can establish the conceptual and theoretical nexuses between federalism and criminal justice system. The operation of the criminal justice administration in general and the allocation of powers and jurisdictions among various levels of government and other related issues such as the intergovernmental criminal justice systems relations in particular has yet received less attention in the academic circles. As a result, it is noteworthy to explore and enunciate the conceptual, philosophical, theoretical and practical association of federalism and criminal justice policy, and the correlations subsisting between the duos. In the general sphere of distribution of powers within federal states, criminal justice policy calls for an academic and practical inquiry for the purpose of bringing some contentious issues into light and finding scholarly and methodological solutions for problems attached thereto.

While we can find out academic and practical discourses concentrating on the operation of criminal justice system in federal systems, the subject has been studied and put into scholarly circles by a hairsbreadth as far as the Ethiopian experience is concerned. Before commencing the analysis of criminal justice system operation and the allocation of all forms of criminal matters between the federal government and the states under the Ethiopian federal experimentation, it is a quintessential state of affairs to discover how the notions of federalism and criminal justice are coupled as generic concepts and a variety of conceptual, philosophical, theoretical and practical foundations underlying them.

Thus, this chapter is devoted to the subjects regarding the interplay between federalism and criminal justice policy as a major theme, and the gamut of federalism such as definition, essence, principles, theories and typologies and the conceptualization and theorization of criminal authority in the operation of a federal system. Accordingly, the chapter is organized into two major sections and various subsections in the exploration of the interplay between federalism and criminal justice. Section one is dedicated to the notions related with federalism as an icebreaker of an explication of the whole study. Accordingly, the definition, significance, principles, typologies and theories of federalism have been discoursed in different subsections. Section two emphasizes the juxtaposition of federalism and criminal justice. As such, how federalism and its values and principles are allied with the administration of criminal justice in federal systems and theories of criminal authority are illuminated under different subsections.

2.2. Federalism: definition, significance, principles, and typologies

A painstaking explanation of the whole range of federalism is supposed to offer an in-depth insight into the interrelationships between federalism and criminal justice system in general and the allocation of authority over criminal matters in particular. How federalism is defined, etymologized, conceptualized, philosophized, theorized, classified, and propounded in terms of its significance directly or indirectly plays a great role and occupies a profound part in appreciating the operation of criminal justice system in a federal polity.

Explanations provided in this section are thus intended to juxtapose federalism and criminal jurisdiction. In particular, in order to have a full comprehension of how criminal justice system operates in federal countries and how criminal authority is allotted between and among various levels of government would be underpinned in the prior understanding of federalism and notions connected therewith. This sounds worthwhile especially for federal countries which are nascent and allegedly lacking adequate and mature theorization on matters related to the operation of criminal justice system like Ethiopia. Thus, by focusing on the definitions, values, significance, principles, theories, and typologies of federalism, theorizing and conceptualizing criminal justice policy will be elucidated.

2.2.1. Definition and meaning of federalism

To date, there is no a universally accepted and agreed upon definition for the word "federalism". The debate on the effort to proffer a definition for federalism continues with the lack of consensus among scholars. This does not, however, mean that federalism does not have a definition or meaning. There are scholars who have attempted to define and describe federalism from a variety of perspectives.

For instance, Watts has approached the definition of federalism from the normative point of view, by comparing federal political systems. In his normative approach, federalism is the advocacy of multi-tiered government combining elements of shared rule and regional self-rule, which is based on the presumed value and validity of combining unity and diversity i.e., accommodating, preserving and promoting distinct identities within a larger political union.[8] From among the genus of political organizations which are categorized as "federal political systems" in his vernacular, federations are designated and characterized by a particular species in which neither the federal nor the constituent units of government are constitutionally subordinate to the other. In other words, each has sovereign powers derived from the constitution, rather than from another level of government in which each is empowered to deal directly with its citizens in the exercise of its legislative, executive and taxing powers, and each is directly elected by its citizens.[9]

Federalism could also be defined from the perspective of one of its underlying attributes—the distribution of powers—as it is a constitutional mechanism for dividing powers between different levels of government, such that federated units can enjoy substantial, constitutionally guaranteed autonomy over certain policy areas while sharing power in accordance with agreed rules over other policy areas.[10] It is because of this that Kincaid defines federalism as a divided power, even if minimal.[11] More explanations on the distribution of powers will be proffered in chapter three as it has a direct and close link with the subject of criminal justice in federal systems.

Elazar has approached the definition of federalism from the covenantal viewpoint. In his view, the term "federal" is derived from the Latin word "*foedus*" which, like the Hebrew term *brit*, means covenant.[12] He maintains that the federal idea rests on the principle that political and social institutions and relationships are best established through covenants, compacts, or other contractual arrangements, rather than or in addition to, simply growing organically. Stated otherwise, humans are able to make constitutional choices.[13] By virtue of Elazar's perspective, the covenantal theory of federalism encompasses many essential concepts of modern political societies such as natural law and justice, human rights, constitution, free will (liberty), equality, autonomy, and communality which should be heeded in forming a polity. Hence, he argues that through its covenantal foundations, federalism is an idea whose

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[8] Watts, R., *Comparing Federal Systems*, 3rd ed. Queen's University Press, London,2008, p.8
[9] Watts, id, p.9
[10] Bulmer, E., *Federalism*, International Institute for Democracy and Electoral Assistance (IDEA),Constitution-Building Primer 12, May 2015
[11] Kincaid, John, "Distribution of Powers in Federal Systems: Federalism's Heart", *in* Kincaid, John and J. Wesley Leckrone (eds.), *Teaching Federalism: Multidimensional Approaches,* Edward Elgar Publishing, Cheltenham, UK, Northampton, MA, USA, 2023, p. 45
[12] Elazar, D., *Exploring Federalism*, Alabama University Press, 1987, p.5
[13] Elazar, id, p.33

importance is akin to natural law in defining justice and to natural right in delineating the origins and proper constitution of political society.[14] Covenantal foundations emphasize the deliberate coming together of humans as equals to establish bodies politic in such a way that all reaffirm their fundamental equality and retain their basic rights.[15]

In this respect, given the three forms of state formation—conquest, accident, and covenant—Elazar propounds that polities whose origins are covenantal reflect the exercise of constitutional choice and broad-based participation in constitutional design. Polities founded by covenant are essentially federal in character, in the original meaning of the term, whether or not they are federal in structure. That is, each polity is a matrix of compounded of equal confederates who come together freely and retain their respective integrities even as they are bound in a common whole. Such polities are republican by definition, and power within them must be diffused among many centres or the various cells within the matrix.[16] As a result, the covenantal perspective of federalism in its definition signals the popular participation, constitutional design, division of powers, and autonomous existence.

Elazar has also described federalism in light of the principles and ingredients thereof. In view of this line of argument, he asserts that federal principles are concerned with the combination of self-rule and shared rule. In its broadest sense, federalism involves the linking of individuals, groups, and polities in lasting but limited union in such a way as to provide for the energetic pursuit of common ends while maintaining the respective integrities of all parties. As briefly described above, federalism as a political principle, has to do with the constitutional diffusion of power so that the constituent elements in a federal arrangement share in the processes of common policy-making and administration by right, while the activities of the common government are conducted in such a way as to maintain their respective integrities.[17] He has made an attempt to define federalism around these principles by stating that the simplest possible definition of federalism is that it is a self-rule plus shared rule. Federalism thus defined involves some kind of contractual linkage of presumably permanent character that: 1) provides for power, 2) cuts around the issue of sovereignty, 3) supplements but does not seek to replace or diminish prior organic ties where they exist.[18]

[14] Elazar , id, p.1
[15] Elazar, id, p.4
[16] Ibid
[17] Elazar, id, p.6
[18] Elazar, id, p.12

Federalism is a division of sovereignty which implies that federalism permits enormous variability as to how policy responsibilities are divided. This implies that what all federal systems have in common is that each level of government possesses at least some sovereignty or autonomy. In light of this assertion, lower levels of government are not mere instruments created by national government to assist in the implementation of policies, nor are the national government merely the product of the states acting together.[19]

The matrix model of federalism is polycentric by design, and political integration on the matrix model is very different from integration around a common centre.[20] Dereje adds more clarification holding that federalism is characterized by its polycentrism, a structure of governance that contains elements of each of the three forms of government i.e. central, state, and local governments. The term "polycentrism" comes from "poly" which means 'multiple' or 'many' and "centric" refers to centres or locations of authority. Polycentrism is a structure of governance made up of multiple, overlapping jurisdictions of varying geographic scope.[21]

Wheare's approach to the definition of federalism is geared around the US federal experience which is entrenched in the Constitution.[22] According to him, the [US] federalism is an association of states in which powers are divided between the general and state governments, both operate directly upon the people. Each citizen is subject to two governments. The two governments are not subordinate but co-ordinate to each other. Another factor which might produce the desire for separation is dissimilarity of social and political institutions. This undoubtedly operated in Canada when Quebec designed to be separate in order that it might safeguard its own peculiar system of civil law. It had its effects in the United States where slave-states and free-states were anxious to keep their control decisions about the future of the institution of slavery within their own borders.[23]

In any attempts to define federalism by all scholars, the whole idea runs in the continuum of unity and diversity which requires different yet interdependent and interrelated political institutions and arrangements. There is no clearly specified institution for federalism to

[19] Dereje T. Gemechu, *Policy Mandates and Practices in Federal System: The Case of Oromia National Regional State*, Lambert Academic Publishing, 2017, p.18

[20] The three classic models of political organization delineated by Elazar are 1) the pyramidal model which ultimately derives from a conquest or hierarchical theory of polity, 2) the center-periphery model ultimately deriving from the organic theory, and 3) the matrix model which ultimately derives from the covenant or federal theory (p.14).

[21] Dereje, supra note at 19, p. 18

[22] Wheare, K.C., *Federal Government,* 4th ed. 1963, Oxford University Press, Amen House, London E.C , p.2

[23] Wheare, id, p.41

[re]discover. It is each and every polity that should institutionalize federalism according to its own local contexts. That is why Elazar maintains that the essence of federalism is not to be found in a particular set of institutions but in the institutionalization of particular relationships among the participants in political life.[24] In support of this claim, Assefa and Watts share similar assertions that federalism might mean different things to different people depending on historical and cultural context.[25]

Riker defines federalism from the perspective of the sovereign and ultimate decision making authority of the two levels of government. In his view, federalism is a system in which the activities of government are divided between regional governments and a central government in such a way that each kind of government has some activities on which it makes final decisions.[26] This approach to the definition of federalism recalls that the decision of one level of government is not subject to review by the other one and each is accountable to its electorates.

2.2.2. Significance: why federalism?

Federalism, as a political governance choice, has been adopted by various countries due to a variety of justifications and merits as a result of which the federal choice is a country-specific. Whereas different polities adopt a federal system according to their internal contextual reasons, the bottom line is that there is some significance in introducing federalism within their territory. Consequently, advantages and values that are assumed to be generated from federalism may prompt any state to turn a unitary and centralized system into a federal

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[24] Elazar, supra note at 12, p.12

[25] Assefa (supra note at 4, p.101) figures out about four contextual meanings and definitions of federalism which is country-specific. There are about four contextual meanings for federalism. The first dimension of the contextual definition of the term 'federalism' pertains to the context of the older federations (the USA, Switzerland, Germany) in which federalism might mean the joining together of some semi-autonomous units for some goals. For these countries, federalism is the coming together of the previously independent states to form one sovereign government for the promotion or preservation of unity.The second dimension of the contextual definition of federalism is viewed from the perspective of the context of the EU in which it might refer to the coming together of the bulk of European States and the emergence of new institutions combining confederal as well as federal features. The third dimension of the contextual definition of federalism has a strong connection with that of the former communist federations according to which federalism may mean the existence of some features associated with the division of powers in constitutional form rather than operational reality. This view of contextual definition of federalism denies the practical constitutional application which is set forth from the beginning at the time of entering into federalism. To this end, Anderson asserts that the communist Soviet Union, Czechoslovakia, and Yugoslavia all had nominally federal constitutions, but were in reality centrally controlled by one-party regimes. The fourth dimension of the contextual definition of federalism may be seen from the African context in which the colonial experience of divide and rule may imply the political ideology of federalism.

[26] Riker, William H., *Federalism: Origin, Operation, and Significance*, 1975, Little, Brown and Company, p. 101

structure or cobbling together the previously independent ones under a sovereign state. Many scholars have pointed out the significance, advantages and values of federalism that necessitate the introduction of a federal system within a polity. It is for this reason that Elazar argues that peoples and states throughout the world are looking for federal solutions to the problems of political integration within a democratic framework.[27]

Riker studies the significance of federalism adopted by the USA from the utility perspective of military and diplomatic aggrandizement that brought together the former colonies of England.[28] Elazar has explored the interplay between the concept of peace and federalism, how the federal arrangement and introduction has an impact on building peace and security upon the fulfilment of the required conditions.[29] In support of this view, Kincaid also asserts that the most common reason historically to form a federal polity is to establish peace and security.[30] Subscribing to Elazar's assertion, Assefa also approaches the advantage of federalism from the viewpoint of ethnic conflict resolution stating that although it is at times difficult to pursue it with a lot of force, federalism is getting popular because it is employed as a means of resolving ethnic conflicts as it has the potential to allow national minorities some measure of self-government within the contours of existing states.[31]

This is because as it is asserted one of the main benefits of federalism is that it provides a framework for the recognition of ethnic, religious, linguistic or other cultural communities, reflecting their desire to be recognized as a people with a distinct identity and particular interests.[32] This implies that these recognized entities would manage to form and establish their government by using their self-rule right. That is why it is argued that by guaranteeing substantial autonomy to such groups, federalism can allow them to exercise partial self-government through state, provincial or regional institutions while still sharing certain functions with other communities through federal or national institutions. By satisfying demands for autonomy and recognition, a federal constitution may protect minorities, prevent

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[27] Elazar, supra note at 12, p.2. In support and as a premise to this conclusion, Elazar argues that federalism is resurfacing as a political force because it serves well the principle that there are no simple majorities or minorities but that all the majorities are compounded of congeries of groups and the corollary principle of minority rights, which not only protects the possibility for minorities to preserve themselves, but forces majorities to be compound rather than artificially simple.
[28] Riker, supra note at 26
[29] Elazar, Daniel J. *Federalism and the Way to Peace,* Reflections Paper no.13, Institute of Intergovernmental Relations, Queen's University Kingston, Ontario, Canada
[30] Kincaid, John , "Editor's Introduction: Federalism as a Mode of Governance, *in* John Kincaid (ed.), *Federalism: Historical and Theoretical Foundations of Federalism, Volume I,* SAGE, Los Angeles, London, 2011, p.xxixv
[31] Assefa, supra note at 4, p.90
[32] Bulmer, supra note at 10, p.3

conflict, increase the legitimacy of democratic institutions and reduce pressure for secession.[33] As a result, federalism is a means of ensuring peace, stability and mutual accommodation in countries that have territorially concentrated differences of identity, ethnicity, religion or language. Federalism, especially in large or diverse countries, can also improve service delivery and democratic resilience, ensure decisions are made at the most appropriate level, protect against the over-concentration of power and resources, and create more opportunities for democratic participation.[34]

Economic reason is another justification and significance of federalism in that it establishes a large common market or free-trade zone that fosters economic development and prosperity by eliminating trade and tax barriers between the states that make up the union.[35] This view is shared by the proponents of federalism due to the fact that it is claimed that federalism promotes economic development and efficiency. In strengthening this view, Filipov *et al* identified the two major justifications of federalism: economic and political.[36]

A prevalent and contemporary reason to form a federal polity is uniting diverse, territorially based national, racial, ethnic, religious, and/or linguistic communities into one nation-state.[37] It is also claimed that liberties and individual and group rights are more protected in a federal system under the tenet of 'double security' in which powers are divided between the federal government and states first, and divided among the three branches of government (the separation of powers), next.[38] Moreover, it is contended that the rights and liberties of the constituent units are preserved and protected under the federal state structure under the spectrum of self-governance in order for the minorities not to be outvoted and dominated by the majority or to survive the tyranny of the majority. The typical instance of this justification is the Quebecois case (the French-speaking Canadians) not to be dominated and outvoted by the English-speaking Canadians. In view of this lens of significance, one could easily glean how federalism maintains the institutions of each constituent unit in respect of social, political, cultural and economic affairs while at the same time being united for the common goods of the whole sovereign country. This should be underscored as a reason that justifies the need for a federal system against the other political organizational alternatives.

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[33] Bulmer, id, p.10
[34] Bulmer, id, p.3
[35] Kincaid, supra note at 30
[36] Filippov, Mikhail, *et al, Designing Federalism: A Theory of Self-Sustainable Federal Institutions*, Cambridge University Press, 2004, p.1
[37] Kincaid, supra note at 30
[38] Federalist paper no.51

In a complementary stance, Watts expounds three major sets of factors necessitating federalism as catalysts of political integration.[39] The first factor is the influence of the background conditions which also includes:(a) the degree of spill-over from pre-existing national, economic and social links or integration among the constituent units, (b) the geographical proximity of the constituent units, (c) the relative size and bargaining power of the constituent units, and (d) the affinities between their elites. The second factor is the strength of the integrative motives surrounding: (a) the desire for security from external or internal threats, (b) the desire for economic benefits from the larger market or complementary products, (c) the desire for greater international influence, and (d) the desire for a common identity. And the third factor is the character of the integration process itself in terms of: (a) the character of the bargaining process, (b) the role of political leaders, (c) the role of external governments or, in the case of colonial federations, the imperial government, and (d) the timing and sequence of steps in the process of negotiation and unification.

Rodden's view of the relevance of federalism from the perspective of restraining the Leviathan is also an instrumental insight. He contends that federalism is a means of constraining Leviathan constitutionally and often serves by providing checks and balances on central policymakers, thus preventing them from reneging on their macroeconomic commitments.[40] Federalism, by creating credible restrictions on governmental policy choice, provided the basis for the rule of law and hence political underpinnings of economic freedoms. Both the public sector and the welfare state tend to be smaller in federal and non-federal states.[41] This is because in this libertarian tradition of thought, the uncontrollable Leviathan might abuse not only its military and police authority, but also its ability to tax, borrow, and spend as a result of which federalism—by creating a limited central government and dividing sovereignty among multiple governments—provides a solution.[42] He continues approaching the significance of federalism from the political and economic viewpoints as quoted as follows:

> *"The promise of federalism is a straightforward proposition that has shown up time and again in political and economic theory from Montesquieu to James Madison to Richard Musgrave: in heterogeneous societies, government policy is most likely to be aligned with the*

[39] Watts, supra note at 8, p.66
[40] Rodden, Jonathan A., *Hamilton's Paradox: The Promise and Peril of Fiscal Federalism*, Cambridge University Press, 2006, p.23
[41] Wachendorfer-Schmidt, Ute, "Introduction", *in* Wachendorfer-Schmidt, Ute (ed.), *Federalism and Political Performance*, Routledge, London, 2000, P.4
[42] Rodden, supra note at 40 p.21

preferences of citizens in the presence of multiple layers of government, each charged with different responsibilities. Higher-level governments can provide federation-wide collective goods like common defense and free trade, while lower-level governments can provide goods like trash collection and religious education that will be consumed locally. If each layer of government stays within its bounds and respects the authority of the other, citizens can hold each layer of government separately accountable for its activities. While a single sovereign might be tempted to abuse its authority, federalism provides a valuable protection by dividing power among multiple, competing sovereigns. Political scientists view such divided sovereignty as a path to stability and peace in societies divided by strong linguistic or ethnic cleavages. Economists extol the virtues of preference revelation, information, and the benefits of intergovernmental competition. Both views boil down to increased responsiveness and accountability; decentralized, multi-tiered systems of government are likely to give citizens more of what they want from government at lower cost than more centralized alternatives.'[43]

It is also held that such important concepts as power-sharing, pluralism, innovative and pragmatic approaches to policy development, unburdening central authorities, resource sharing, development of capacities and democratic responsibilities could be generated from federalism.[44] Innovative and pragmatic approach to governance, in this sense, may pertain to an improved and sophisticated criminal justice administration in a federal system thereby reducing criminal behaviour, enhancing socio-economic development and prosperity in the nation. As will be discussed in the following sections and subsections, these values and advantages or significance of federalism has a direct correlation with criminal justice system in federalism as a general notion and allocation of criminal authority among various tiers of government as a specific theme. A particular area where federalism is increasingly prescribed is the accommodation of territorial divisions and the management of ethno-linguistic conflict. It is especially marketed as a palliative to secessionist conflict. Stated otherwise, federalism has come to be seen as a way to accommodate territorially based ethnic, cultural and linguistic differences in divided societies, while maintaining the territorial integrity of existing states.[45] It is argued that federalism is intricately related to notions of pluralism and plural societies, in particular pluralistic democratic societies. The assertion that holds that federalism is in some sense either a form or sub-category of pluralism is commonplace among political scientists.[46] One scholar states that federalism is in the first instance an

[43] Rodden, id, p.5

[44] Bulmer, supra note at 10, p.12 *et seq*.

[45] Erk, Jan and Anderson, Lawrence, "The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions?" *Regional and Federal Studies* Vol. 19, No. 2, 191–202, May 2009, p.2

[46] Chen, Paul, "Federalism and Rights: A Neglected Relationship", *South Texas Law Review,* vol.40, no. 845, 1999, P.853

organizational response to the pluralist nature and group structure of society.[47] Elazar also summarizes the significance of federalism as follows:

> *"One of the most promising vehicles for addressing all three—people's minds, their culture and institutions—is the federal idea. While federalism is normally understood as having to do with political structures, in fact, the federal idea speaks principally to the character of human relationships. With its roots in the biblical idea of covenant, it understands humans as autonomous equals capable of entering into covenants to establish the rules and institutions of their self-government, who form civil societies and polities through covenanting with one another on the basis of mutual consent to advance human cooperation in such a way that all partners preserve their respective integrities, even as they build a common framework, or common frameworks, to cooperate to secure common ends."*[48]

2.2.3. Fundamental principles of federalism

There are some mandatory requirements, characteristics, or attributes which are altogether known to be the fundamental principles which distinguish federal systems from other political governance schemes such as unitary or confederal forms of state. Different scholars write these principles in a variety of ways yet similar standpoint in the necessity thereof for the formation, operation and success of a federal polity. In view of Watts, these principles are described as common structural characteristics of federations.[49] It should be noted in the meantime also that these principles and characteristics of federalism are cumulative requirements for a successful and effective federation. The absence of one or more of the principles may render a federation to be defective and unworkable. Since it requires the co-existence of several national characteristics which are not often found together in the world, and which should be perceived more distinctly than they often are, federal government is rare as its requirements are many.[50] In Kincaid's view, these principles stand against both anarchy and tyranny, and can be adopted to create a variety of modes of governance.[51] In fact, he approaches an inquiry of federalism from the perspective of these principles rather than attaching same to an ideological stance. He states that federalism is not an ideology but rather a set of principles rooted in such notions as voluntary cohabitation, self-rule and shared rule, and diversity in unity.

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[47] Ibid
[48] Elazar, supra note at 29
[49] Watts, supra note at 8, p.9
[50] Wheare, supra note at 22, p.35
[51] Kincaid, supra note at 30

In connection with the requisites of federal systems, Elazar enunciates them by dividing into essential and supplementary.[52] Accordingly, the three essential prerequisites include written constitution, noncentralization, and areal division of powers. Other requirements and principles advanced by some authors would be subsumed into the vital and supplementary categories of federal attributes. Elazar contends that federal principles are concerned with the combination of self-rule and shared rule, an assertion that can lead us to the deduction that the principles of federalism are the continuum of these shared rule and self-rule canons.[53] He also acknowledges the prerequisites suggested by Lijphart in that the following are articulated as will be shortly elaborated separately.[54] These are a written constitution which specifies the division of powers and guarantees to both the central and regional governments that their allotted powers cannot be taken away; a bicameral legislature in which one chamber represents the people at large and the other the component units of the federation; overrepresentation of the smaller component units in the federal chamber of the bicameral legislature; and the right of the component units to be involved in the process of amending the federal constitution but to change their own constitutions unilaterally.

2.2.3.1. Federal constitution

One of the fundamental features of a federation is a written, rigid, and supreme federal constitution that commands any level of government. Both the general and regional governments are the subordinates of the constitution.[55] The rigidity of a constitution resides in the fact that the supreme written constitution is not subject to unilateral amendment and requires the consent of a significant proportion of the constituent units for amendments.[56] The participation and involvement of the constituent units in the amendment of the federal constitution defines and determines a true federal operation in a country which claims to be federal. The point is generally well taken that unless the constituent polities have substantial influence over the formal or informal constitutional amendment processes, the federal character of the system is open to question.[57]

Such important and qualifying terms as “federal”, “written”, and “rigid” in the expression of the specific kind of constitution required for a federal state are momentously instrumental in

[52] Elazar, supra note at 12, p.157
[53] Elazar, id, p.5
[54] Elazar, id, p.22
[55] Wheare, supra note at 22, p.16
[56] Watts, supra note at 8, p.9
[57] Elazar, supra note at 12, p.173

the functioning of federalism. In this regard, Wheare articulates these descriptions in terms of institutions. He contends that these two institutions—the supreme constitution and the written constitution—are the essential institutions to a federal government. In his view, the supreme constitution is essential if a government is to be federal and the written constitution is essential if a federal government is to work.[58] Moreover, written and rigid constitutions in federal systems are quite different from other constitutions in their multifarious involvement of concerned bodies. Juridically, federal constitutions are distinctive in that they are not simply compacts between the rulers and the ruled but involve the people, the general government, and the polities constituting the federal union.[59]As a social pact, the constitution is supposed to create a commonwealth on the basis of covenantal or consensual basis which subscribes to the choice approach to state creation as opposed to the conquest (force) and organic (accidental) theories to coming into existence of polities. The written constitution is a product of federalism, invented as a political artefact to make possible the constitution or reconstitution of polities on a federal basis through regularized processes of constitutional choice.[60]

The federal written constitution is interlinked with the notion of the constitutional supremacy, entrenchment, and a guarantee for recognition, status, powers, rights and prerogatives of the constituent units. Accordingly, the constitutional supremacy (the juridical superiority of a constitution over ordinary laws) and constitutional entrenchment (the fact that it is more difficult to amend a constitution compared to ordinary laws) are necessarily associated with federalism because they provide guarantees to the sub-national units that their existence, status and powers will be recognized and their autonomy respected.[61] If these guarantees are breached, the sub-national units will usually have recourse to a supreme or constitutional court, and without such protection there can be no truly federal sharing of sovereignty and no clear guarantee of autonomy against majorities at the centre.[62] Anderson also argues that effective federal governance must be based on a written constitution and the rule of law as the constitution sets the basic framework and principles of the federation. A constitution can be symbolically important in fostering unity or discord within the country.[63]

[58] Wheare, supra note at 22, p.55
[59] Elazar, supra note at 12, p.157
[60] Id, p. 158
[61] Bulmer, supra note at 10, p.36
[62] Ibid
[63] Anderson, George, *Federalism: An Introduction*, Forum of Federation, Oxford University Press, 2008, P.55

2.2.3.2. Two or more orders of government

Federalism is characterized by two spheres of government, national and state, operating in the one political entity according to a defined arrangement for sharing powers so that neither is sovereign over the other.[64] As far as nomenclature of various levels of government is concerned, while the federal level may be known as a 'national', 'central' 'general' or 'union' government, constituent units may be designated by a variety of names, including 'states' (Australia, Malaysia, USA, Ethiopia), 'provinces' (Argentina, Canada, South Africa),'regions'(Belgium, Italy),'cantons' (Switzerland), 'autonomous communities' (Spain) or 'Länder' (Austria, Germany).[65] In this study, these terms are used interchangeably.

A federation is distinguishable from other forms of political governance systems in that there are constitutionally entrenched orders of government at the centre and regional level. In some federal experiences, local government is taken to be the third tier of government level. It is for this reason that it is asserted that federalism is known for its multiple centres of power, and none has authority to centralize or decentralize the system.[66] Each order of government acts directly with the citizens.[67] This feature distinguishes a federation from a league or confederation in that the latter acts upon the people indirectly through the constituent units.[68]

Although both the federal and regional governments operate directly upon the people, there is a limit for either of them provided for by the constitution. In doing so, each level of government is restricted to its own sphere, and within that sphere, should be autonomous from the other.[69] In other words, each tier of government is autonomous within its realm of powers constitutionally granted to it. No level of government is either super-ordinate or subordinate to the other. Since the constitution is supposed to be the source of powers, no tier of government would assume authority from the other which is underpinned by the principle of co-equality. The co-equality and autonomy principles presuppose the mutual non-encroachment of each level of government into one another's delimited powers by virtue of the constitution. In support of this view, Elazar asserts by noting that non-centralization ensures that no matter how certain powers may be shared by the general and constituent

[64] Galligan, Brian, Chapter 14, Comparative Federalism, P.4
[65]Bulmer, supra note at 10, p.11
[66] Kincaid, supra note at 30 and Elazar, supra note at 12
[67] Watts, supra note at 9, p.9
[68]Wheare, supra note at 22, p.13
[69] Id, p.14

governments at any particular time, the authority to participate in exercising them cannot be taken away from either without their mutual consent.[70]

While the political autonomy of the constituent units is limited to those spheres assigned to them by the constitution, unlike decentralized unitary systems these are fully safeguarded by a supreme constitution not unilaterally amendable by the federal government.[71] Thus, the interrelation between the levels of government is assumed to be a partnered modality. Constituent polities in federal systems are able to participate as partners in national governmental activities and to act unilaterally with a high degree of autonomy in areas constitutionally open to them. In addition, on some crucial questions and even, to varying degrees, in opposition to national policies, they possess effectively irrevocable powers.[72] The autonomy of the constituent units is supposed to enable them for flexible response to the regional and local preferences and problems in areas of social, political, economic, and development matters.

2.2.3.3. Self-Rule and shared rule

Highly intertwined with the above principle is the very essence and conception of federalism underpinned in the fact there are some areas of matters that should fall under self-rule reserved exclusively for the constituent units and common areas destined for joint and shared action at the centre. Thus, both the elements of self-rule for constituent units and shared-rule through common institutions, a combination that characterizes federal political systems, are essential to their long-run effectiveness in combining unity and diversity.[73] It is useful to justify here that the notion of self-rule reinforces local policy innovation, flexibility, adaptation, and ease of accessibility. It also enhances democratic principles such as accountability, transparency, popular participation, and citizen engagement.

What is more, the concept of self-rule is considered the antithesis of centralization. That is why Elazar argues that legal systems of some constituent units continue to subsist either in a separate sphere or in mixture with the national systems.[74] In a few very important cases, non-centralization is both reflected and supported through the constitutionally guaranteed

[70] Elazar, supra note at 12, p.166
[71] Watts, supra note at 8, p.18
[72] Elazar, supra note at 12, p.166
[73] Watts, supra note at 8, p.23
[74] Elazar, supra note at 12, p.171-72

existence of different systems of law in the constituent polities.[75] This may be substantiated with the typical cases of the United States whereby the State's legal system stems directly from English law while federal law occupies an interstitial position, binding the systems of the fifty states together insofar as necessary.[76] The resulting mixture of laws keeps the administration of justice even in federal courts substantially non-centralized. In Canada, the existence of common law and civil law systems side by side is one constitutional guarantee for the French-Canadian cultural survival. Non-centralized legal systems are a particularly Anglo-American device, often used in legislative as well as federal unions (the Scots, for example, have preserved their own legal system in Scotland under the terms of the Act of Union). More common is the provision for modification of national legal codes by the sub-national governments to meet special local needs, as in Switzerland.[77]

Shared rule is reflected in various ways. Non-centralization is strengthened in all federal systems by giving the constituent polities guaranteed representation in the federal legislature and often by giving them a guaranteed role in the federal political process.[78] Second federal chambers in which the constituent units are represented are another device for maintaining federalism, offering the opportunity to protect constituent state interests and also give the states an effective role in the federal government.[79] In many or nearly all federal countries, second chambers are predestined to protect and defend the regional interests in the central law making and policy processes.[80]

Ethiopian Constitution enshrines the concepts of self-rule and shared rule in many provisions.[81] Federal powers are performed by the federal institutions which are the components drawn from the regional states as an end to the tenet of shared rule. However, as

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[75] Ibid

[76] Ibid

[77] Ibid

[78] Elazar, supra note at 12, p.173

[79] Id, p.184

[80] With regard to the participation of subnational units in national legislation and policymaking is concerned, it typically takes place through the upper house of a bicameral legislature, the members of which may be directly elected by the people of the states, provinces or regions (Argentina, Australia, Kenya), indirectly appointed or elected by subnational legislatures (Austria, Germany, Pakistan) or selected by some combination of these means (Spain) (For more information, see the International IDEA Constitution-Building Primer No. 2, Bicameralism).

[81] Particularly, Art.39 of the FDRE Constitution provides for a bundle of rights that each State enjoy with regard to self-rule. As such, it is recognized that every Nation, Nationality and People in Ethiopia has the right to speak, to write and to develop its own language; to express, to develop and to promote its culture; and to preserve its history. It goes on to state that every Nation, Nationality and People in Ethiopia has the right to a full measure of self-government which includes the right to establish institutions of government in the territory that it inhabits and to equitable representation in state and Federal governments.

regards shared rule, regional representation in the federal policy making institutions is so dubious to pinpoint from the Constitution for a couple of reasons. Firstly, the building blocks of the general or federal government are the States.[82] Incongruously, the bundle of rights related with self-rule and constitutional ownership resides in the Nations, Nationalities and Peoples.[83] Secondly, the Ethiopian parliamentary model is not bicameral, at least from the functionalist point of view.[84] Consequently, Ethiopian federal tradition witnesses a centralized legislative approach. The States are not involved in the federal law making and policy formulation processes. This has also been intensified by the centralized party system which dominated every walk of lives in the society.

On the other hand, the Constitution provides for the establishment of regional institutions that should defer to self-government.[85] The state constitutions also reaffirm the self-rule principle of the states on various matters including human rights catalogue, the fundamental principles of their constitutions, state sovereignty, regional policy objectives and directives, governmental structures, and constitutional adjudicatory mechanisms.

2.2.3.4. Constitutional adjudication system

There must be an organ which is entrusted with resolving conflicts which may arise out of the federal experimentation which may be manifested in the constitutional adjudication. Equally important in a federation is the presence of a body that umpires disputes concerning the

[82] Art.46 of the FDRE Constitution provides that the Federal Democratic Republic shall comprise of States which shall be delimited on the basis of the settlement patterns, language, identity and consent of the people concerned.

[83] The Preamble attests that the Constitution belongs to the Nations, Nationalities and Peoples of Ethiopia. All sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia. This Constitution is an expression of their sovereignty (Art.8(1,2). Under Art.39 of the Constitution, a bundle of rights are recognized which includes at its maximum limit of the right of secession under some procedural requirements. Every Nation, Nationality and People in Ethiopia has the right to speak, to write and to develop its own language; to express, to develop and to promote its culture; and to preserve its history. Every Nation, Nationality and People in Ethiopia has the right to a full measure of self-government which includes the right to establish institutions of government in the territory that it inhabits and to equitable representation in state and Federal governments. The terms “ Nations, Nationalities and Peoples” have been defined by the Constitution as “a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory (Art.39(5).

[84] Textually, Art.53 provides that there shall be two Federal Houses: The House of Peoples' Representatives and the House of the Federation. From the functional perspective, however, the House of the Federation is mandated to get involved in non-legislative and functions and powers (Art.62).

[85] Art.52(2) of the Constitution mandates the States *inter alia* to establish a State administration that best advances self-government, a democratic order based on the rule of law; to protect and defend the Federal Constitution.

constitutionality of laws in general and the division of powers in particular.[86] In this regard, unlike Elazar's essential *versus* supplementary prerequisites, as described hereinabove, and constitutional umpiring is categorized under the latter, Assefa asserts that it is an indispensible element. He maintains that an impartial body, independent of the federation and the states, that decides on the meaning of the contested provisions concerning the division of powers is essential for a federation.[87] This is by now essential. There is no federalism without the rule of law. The federal pact assumes whoever violates the pact has to face consequences; otherwise the violation implies either centralization or fragmentation. There should be a body to check and enforce whether the federal deal is respected and enforced. Ethiopia is a living example of a federation without the rule of law. Federal government (centralization) or regional states violation of minority rights has no legal consequence as a result of which there is a prevailing reign of anarchy.

Such an umpire may exist in the form and structure of courts, provision for referendums, or an upper house with special powers.[88] Moreover, constitutional courts are permanent institutions in many federal systems, serving as devices for maintaining both union and non-centralization.[89] The United States Supreme Court, the Australian Supreme Court, the German Constitutional Court, and the Canadian Supreme Court have played a pivotal and decisive role in shaping and advancing the operation of federalism within their respective systems. In Ethiopia, the power to resolve constitutional disputes is conferred upon the House of the Federation, the second chamber.[90]

2.2.3.5. Intergovernmental relations

Although powers and responsibilities are divided among various tiers of government, no one of them could be accomplished in isolation from one another. All levels of government are presumably required for the successful operation of federal system under a clearly set of standards and principles which should take a due account of the tenets of autonomy and federal comity from among others. Thus, any federal system needs processes and institutions to facilitate intergovernmental collaboration for those areas where governmental

[86] Assefa, supra note at 4, p.112
[87] Id, p.113
[88] Watts, supra note at 8, p.9
[89] Elazar, supra note at 12, p.183
[90] Art.61 and 62 cum Art.83 and 84 of the FDRE Constitution

responsibilities are shared or inevitably overlap.[91] When federal and state governments concurrently exercise certain powers or functions, the need arises to put in place appropriate institutions and mechanisms of coordination which may exist in an informal and/or formal forum of intergovernmental relations (IGR).[92] They are of little value in areas where a federal constitution assigns exclusive powers to either level of government.[93]

The institutions and processes for intergovernmental collaboration serve two important functions: conflict resolution and a means of adapting to changing circumstances.[94]As described in the foregoing discussions, the different orders of government are supposed to act like partners in the areas of consultation, coordination, cooperation, communication, or deliberation. There are two aspects of intergovernmental relations: vertical and horizontal. Vertical intergovernmental relations refer to that of relations between the federal and unit governments, whereas horizontal one is that of inter-unit relations, both of which are indispensable for the success and survival of a federation.[95]

2.2.3.6. Division of powers

The division of powers which is entrenched in the constitution is an important and defining principle and feature of federalism. Federalism is about the territorial division of power; a sharing of the state's policy-making power between two or more levels. In a unitary state the central government has the ultimate decision-making power within all policy areas; not so in a federation.[96] A formal constitutional distribution of legislative and executive authority and allocation of revenue resources between the two orders of government ensure some areas of genuine autonomy for each order.[97] Federations—unlike other forms of political organization—are based on the constitutionally guaranteed division of powers in which each level of government is empowered to exercise its competences autonomously.[98] Soren strongly holds that it only makes sense to talk of a federation if at least one policy area is

[91] Watts, supra note at 8, p.9
[92] Assefa Fiseha and Zemelak Ayele, "Concurrent Powers in the Ethiopian Federal System", *in* Steytler, Nico (ed.), *Concurrent Powers in Federal Systems: Meaning, Making, Managing,* Leiden; Boston: Brill Nijhoff, 2017, p.267
[93] Ibid
[94] Watts, supra note at 8, p.117
[95] Ibid
[96] Dosenrode, Soren, "Federalism", *in* Dosenrode, Soren (ed.), *Approaching the EUropean Federation?* ASHGATE Publishing Limited, Gower House: England, , 2007, p.7
[97] Id, p.9
[98] Assefa and Zemelak, supra note at 92

under the sole control of either the federal government or the member states.[99] If this is not the case one has either a unitary state or a confederation. Hence, each level has to have certain powers of their own in which no other level of government may intervene. And this is why a constitution is so central to a federation. The concept of divided powers in its pure sense implies that both levels issue laws which are directly applicable to the citizens. As will be dealt with in detail in the next chapter, the division of powers includes legislative, executive, judicial and fiscal powers which also include the allocation of criminal authority within this general theme.

2.2.4. Taxonomy of federalism

A taxonomic approach to the study of federalism is believed to have a direct relationship with the approach and modality of the distribution of powers in general and criminal authority in particular among various tiers of government.[100] Federal systems are categorized into various groups based on a number of factors and circumstances. In what follows, I shall make an attempt to present various typologies of federalism alongside the benchmarks of the classification.

2.2.4.1. Coming together versus holding together

Federal systems are classified as coming together and holding together or hybrid on the basis of how they are created or formed. Historically, small states that were confronted by common enemies or existential challenges would sometimes come together in unions, leagues or confederations that were bound together by a treaty or founding agreement.[101] This would enable these states, without sacrificing autonomy in most aspects of domestic policy, to share certain powers and functions, particularly in relation to foreign affairs, defence and trade.[102] In light of this typology, Watts notes that federations have been created in three different ways.[103] The first one is an aggregation or coming together federalism in which the previously sovereign and independent states are brought together to form one independent polity. US, Australia and Switzerland may be instantiated as typical examples. The second classification is the devolutionary process or holding together in which the previously unitary

[99] Dosenrode, supra note at 96, p.7
[100] Theme II Template, The Distribution of Powers and Responsibilities in Federal Countries, available at http://www.forumfed.org> Theme II Template
[101] Bulmer, supra note at 10, P.7
[102] Ibid
[103] Watts, supra note at 8, p.65

and centralized state system is devolved into semi-sovereign regional entities. Belgium, Germany, Nigeria and Spain are typical examples of holding together federations.

The third pattern or hybrid model is that there are some federations created through the amalgamation of the processes of aggregation and devolution. For instance, the creation of the Canadian federation involved a devolution to two new provinces (Ontario and Quebec) from what had previously been a single unitary Province of Canada, and also the addition of two previously separate colonies (New Brunswick and Nova Scotia) as provinces of the new federation. Likewise, the Union of India established by the 1950 constitution included devolution to states that had previously been provinces and the incorporation of the previously separate princely states into the new federation.[104]

According to Belser, while in the coming together (first wave) federalism, sub-national units are pre-existing in which the formerly independent states transfer power and part of their sovereignty to a newly established federal states, in the keeping together or holding together (second and third wave) federalism, sub-national units are designed or strengthened thereby the formerly unitary states share power and sovereignty with units.[105] There is also putting together (imposed) type of federalism.

The Ethiopian federal system appears to reflect some aspects of coming together as well as holding together.[106] The Constitution proclaims the “Nations, Nationalities, and Peoples of Ethiopia” as the sovereign constituent powers who came together to enter into a covenant and form the Federal Democratic Republic of Ethiopia. This enables the legal and political propositions to give Ethiopia’s federal system the appearance of a coming together federalism in which sovereign Nations, Nationalities, and Peoples came together to form the federation while, in reality, federalism was adopted as a means of holding together a country that was on the brink of disintegration.[107]

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[104] Ibid

[105] Professor Eva Maria Belser, PhD Seminar, Center For Federalism and Governance Studies University of Addis Ababa, PowerPoint notes

[106] Assefa, supra note at 4, p.262

[107] Gedion T. Hessebon and Abduletif K. Idris, “The Supreme Court of Ethiopia: Federalism’s Bystander”, *in* Aroney, Nicholas and Kincaid, John (eds.), *Courts in Federal Countries: Federalists or Unitarists?* University of Toronto Press, 2017, p.170, by citing Assefa’s book on the subject

2.2.4.2. Dual versus integrated

The second taxonomical approach to federalism depends on how and what scope of powers are allocated among the various levels of government, institutions are designed, and state autonomy is contemplated. In this point of view, federalism is categorized into dual and integrated. A dualist system allocates powers in a way that emphasizes the ability of the various orders of government to function rather independently of each other and to operate within largely independent spheres of action (example, the USA).[108] By contrast, an integrated system ordinarily allocates powers in a way that makes the general government that makes responsible for most overall policy-making for the country, while the constituent units are vested with the responsibility of executing those policies (example, Germany). Usually, the expectation is that the general government will enact the "framework" policies, thereby leaving the constituent governments with more or less flexibility and discretion to implement those policies.[109] In support of the type of integrated federalism, Elazar argues that if a federal bureaucracy were to be created to perform federal functions, it would overwhelm the constituent units.[110]

In a dualist system the bulk of state powers are divided between the two orders as neatly and watertight as possible, each with a clear set of exclusive functions which resemble Grodzins's layer cake, whereas in an integrated system, concurrency of powers dominates, reflected in Grodzins's marble cake of intertwined federal and regional powers.[111] Saunders also claims that in the dualist federations, each sphere of government is expected to execute its own legislation and in integrated federations, a significant proportion of central legislation is executed by other sphere, with all other federal-type systems ranged somewhere between the two, each with variations on the theme of their own.[112] This implies that there is no an extreme instance which demonstrates purely dual and purely integrated approach. Although formal and institutional structures are dually designed, various factors could necessitate the

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[108] Kincaid, supra note at 30, p. xxvii
[109] Ibid
[110] Elazar, supra note at 12, p.173
[111] Steytler, Nico, "Concurrency of Powers: The Zebra in the Room", *in* Steytler, Nico (ed.), *Concurrent Powers in Federal Systems: Meaning, Making, and Managing,* Leiden; Boston: Brill Nijhoff, 2017, p. 303
[112] Cheryl Saunders, Executive Power in Federations, available at https://juspoliticum.com/article/Executive-Power-in-Federations-1126.html

integrated approach in order to accomplish a certain public affair. That is why a dual federalism is said an old school.[113]

An integrated federalism can also be called administrative federalism because while the central government makes laws and policies, the constituent units are empowered to administer such laws and policies. At this juncture, it is worthwhile to distinguish between executive federalism and administrative federalism. As such, the difference between the institutional settings of executive federalism and administrative federalism is that while in the former the federal balance is largely determined by the relationship between the executives of each level of government, in the latter 'central government is the key policy-maker and provincial government is charged with the responsibility for the details of policy implementation.[114] And it is held that executive federal arrangements provide a better accommodation of diversity than administrative ones. Fabre expounds the dual and administrative federalism in a rather broader and clearer sense. He distinguishes between the two types of federalism as:

> *"In a dual federal system, the federal and regional levels are quite independent from one another. Dual (or jurisdictional) federalism means that each level has a clearly identifiable set of legislative, executive and fiscal responsibilities. Each level tends to be exclusively responsible for the areas over which it has competence (even though some level of overlap, however small, is always bound to occur) and the machinery of government tends to be replicated at each level. Because of the low level of policy sharing, intergovernmental relations at the executive level are generally limited. A complete separation of fields of competence is impossible, and areas of shared (or concurrent) competence always exist, so that both federal and regional governments have the possibility to legislate over a particular matter or over different aspects of the same policy area. The more competences are shared between the levels, the more cooperative the federal system becomes. In contrast to dual federations, joint-decision (or functional, integrative) federations display a strong fusion of competences between the central and regional levels of government. Joint-decision federal systems are characterised by a division of labour–rather than areas of competence–between the federal and regional governments. The classic example of a joint-decision federation is Germany, where the federal level is responsible for legislation and the Länder have responsibility over policy implementation and tax collection. Federal legislation moreover requires co-operation between the federal and Land governments because of the nature of the second federal chamber, the Bundesrat, which is composed of representatives of the Land governments. As a result, the levels are highly interdependent and co-operation becomes a necessity of efficient government. Intergovernmental relations are strongly developed and the regions are involved in the central decision-making process in order to ensure that their*

[113] A.P Government, Federalism, How the circle and the squares get along, available at: https://slideplayer.com/slide/7374705/

[114] Kavaliski, Emilian and Zolkos, Makdalena, "Approaching the Phenomenon of Federal Failure", *in* Kavaliski, Emilian and Zolkos, Makdalena (eds.), *Defunct Federalisms: Critical Perspectives on Federal Failures*, ASHGATE, 2008, p.9

> *interests are properly taken into account and that they do not become mere administrative appendages of the federal government.'*'[115]

At this juncture, one could discern the pros and cons of the dual-integrated divide of federalism. Saunders argues that orders of government in a dualist system have a high level of autonomy, which flows from the logic of the federal design, whereas governments in integrated federations necessarily are interdependent to a greater degree again, as a matter of design.[116] The search for greater dualism is certainly worthwhile in the quest for regional autonomy, political accountability and efficiency.[117] According to Watts, there are several reasons for favouring such a dualist arrangement. First, it reinforces the autonomy of the legislative bodies. Second, it assures to each government the authority to implement its own legislation which might otherwise prove meaningless.[118]

A familiar distinction in federal design is between federations that provide for an extensive degree of integration and those that are largely dualist. The former divide legislative and administrative powers so that in some, many or most circumstances the regions administer a central law. Administration for this purpose may include, for example, 'the establishment of authorities and the regulation of administrative procedures'. Dualist federations, on the other hand, assume that each sphere of government administers its own laws to the point where, in some cases, conferral of the administrative authority of one sphere of government on institutions of the other is constitutionally restricted.[119] In this regard, one could mention the anti-commandeering principle of the US federal model where the state institutions are not compelled to enforce the laws issued by the federal government without their consent and financial entailment.

Dziedzic and Saunders maintain that in dualist federations, all central legislation typically is administered centrally, irrespective of the type of legislative power on which it relies, whereas in integrated federations the situation varies, but some, at least, recognize no correlation between concurrent power and the regional administration of central laws.[120]

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[115] Fabre, Elodie, *Belgian Federalism in A Comparative Perspective*, Vives Discussion Paper 5, July 2009, p.6
[116] Saunders, Cheryl, "Financial Autonomy vs. Solidarity: A Dialogue between Two Complementary Opposites', *in* Valdesalici, Alice and Palermo, Francesco (eds.), *Comparing fiscal federalism,* Brill Nijhoff, Leiden, Boston, 2018, p.41

[117] Steytler, supra note 111, p.337
[118] Watts, supra note at 8, p.86
[119] Dziedzic, Anna and Saunders, Cheryl, "The Meanings of Concurrency", ", *in* Steytler, Nico (ed.), *Concurrent Powers in Federal Systems: Meaning, Making, and Managing,* Leiden; Boston: Brill Nijhoff, 2017, p. 24
[120] Dziedzic and Saunders, id, p.25

While Germany is a case in point, the default principle in the German federation is that the Länder execute federal statutes in their own right unless the constitution provides otherwise. To this effect, provision is made to the contrary in a series of articles that allow for either direct federal administration or for Land administration as agents of the federation on specified matters, which include, for example, the Foreign Service, federal finance administration and aviation administration.[121]

Likewise, Kincaid stresses on the difference between dual and integrated federalisms from the perspective of the mode of the distribution of powers whereby legislative, executive, and judicial powers over most policy fields can be separated and assigned to different orders of government.[122] He argues that there is a major power-distribution difference between dual and integrated (or cooperative) federations in that in a dual system, such as Brazil, Canada, and the United States, specific powers belong to each order of government. Each level of government has legislative, executive, and sometimes judicial authority to exercise its powers. By contrast, in an integrated system, such as Austria, Germany, and South Africa, most powers are shared in that most authority to make laws (i.e., legislate) is allocated to the federation government while the power to implement (i.e., execute) those laws is delegated to the constituent governments.

The classification of federalism along the dual *versus* integrated spheres could also be termed as and explained through a jurisdictional federalism *versus* functional federalism. According to Chandler, while the former is concerned with the division of jurisdictions, the latter is connected with the division of labour.[123] Hence, in those federal regimes organized primarily in terms of jurisdictional principles, the object is to create two levels of authority, each with its own well-defined policy sectors, operating semi-autonomously. The entire machinery of governments tends to be duplicated at each level, and there is a presumption that each level can and should manage its own affairs. Jurisdictional federalism encourages a stable tension between the reality of interdependence and the ideal of disentanglement.[124] The fact that political actors at each level possess a complete policy making apparatus means that in the face of intractable conflicts, unilateral action remains a political option.

[121] Id, p.25
[122] Kincaid, supra note at 11, p. 49

[123] Chandler, M. William, "Challenges to Federalism: Comparative Themes", *in* Chandler, M. William and Zollner, W. Christian, *Challenges to Federalism: Policy Making In Canada and the Federal Republic of Germany,* Institute of Intergovernmental Relations, Queen's University, Kingston, Ontario: Canada, 1988, P.11
[124] Chandler, ibid

The alternative involves a concept of federalism based on a division of labour and the sharing of power as the essence of federation. This arrangement does not produce the replica of the machinery of government at each level. Instead, within a given policy sector, subsets of the decision-making process are accorded to one level or the other. Thus, as in the Federal Republic of Germany, the central government may be predominantly concerned with policy initiation, formulation, and legislation, while regional units may be heavily weighted in favour of policy implementation and administration.[125] Functional federalism assumes a high degree of interdependence and cooperation, both politically and administratively. It tends to spawn electorate patterns of consultation and bargaining, for neither level will succeed in resolving conflicts without the help of the other. There is, then, a strong institutional impetus towards a complex meshing of political and bureaucratic interests. To the extent that functional federalism does not allocate policy fields to a single level of government, the regional distinctiveness of policy packages will be less than under jurisdictional federalism.

2.2.4.3. Symmetrical versus asymmetrical

The powers of the constituent governments in a federal country can be symmetrical or asymmetrical. Powers are said to be symmetrical when all the constituent governments are on an equal footing and have the same constitutional powers of self-government and same rights *vis-à-vis* the federal government (example, the fifty states in the United States). On the other hand, powers are asymmetrical when different constituent governments possess different degrees of constitutional powers of self-government and different rights *vis-à-vis* the federal government (example, Russia and Spain).[126] Asymmetrical federalism is a form of federalism in which different parts of a country's territory have different degrees of autonomy which can be contrasted with symmetrical federalism, in which all sub-national units have equal juridical status and powers.[127] The concept of asymmetric federalism was introduced by Tarlton (1965) to describe the differences in the relationships between (some) component

[125] Chandler, ibid
[126] Kincaid, supra note at 30, p. xxvii
[127] Bulmer, supra note at 10, p.24

units and the central government in federal systems.[128] The concept was avoided because asymmetry was considered a disintegrating factor.[129]

Asymmetry is usually—although not necessarily—a product of 'holding together' federalism. When independent states are coming together to form a federation, they usually do so on equal terms, but when an existing country is dividing itself into federalized components in order to accommodate desires for autonomy, it often has to accommodate different parts of the country to different extents, depending on the different intensities of separate identity or interest, rooted in cultural, historical or geographic particularities.[130]

In this connection, Fabre further enunciates and distinguishes between an institutional (*de jure*) asymmetry and *de facto* asymmetry.[131] In this view, while the former refers to constitutionally embedded differences between the legal status and prerogatives of different subunits within the same federation whereby some regions enjoy more self-government than others, the latter relates to non-institutional geographical diversity, based on economic, social and cultural differences between the regions. Watts also articulates two types of asymmetries: political and constitutional.[132] According to him, political asymmetry which also applies to all constituent units arises from the impact of cultural, economic, social and political conditions affecting the relative power, influence and relations of different regional units with each other and with the federal government. Constitutional asymmetry, which exists in some but not all federations, refers specifically to the degree to which powers assigned to regional units by the constitution of the federation are not uniform.

Constitutional or *de jure* asymmetries are political asymmetries that are embedded in constitutional and legal texts and, as such, produce differences in status (through recognition, representation, participation, veto in the federation institutions), distribution of powers (through allocation, specific types, opt-in and opt-out), and fiscal autonomy (through raising taxes and revenues, discretion on rates and bases, reliance on transfers).[133] For example, three of nine judges on Canada's Supreme Court are from Quebec; Indonesia's province of Aceh is

[128] Sahadžić, Maja, "Asymmetric vs. Symmetric Federalism: Equity vs. Equality", *in* Kincaid, John and J. Wesley Leckrone (eds.), *Teaching Federalism: Multidimensional Approaches,* Edward Elgar Publishing, Cheltenham, UK, Northampton, MA, USA, 2023, p.165

[129] Maja, ibid

[130] Bulmer, supra note at 10

[131] Fabre, supra note at 115, p.6

[132] Watts, supra note at 8, p.125

[133] Maja, supra note at 128, p.166

authorized to apply Islamic Law; and the Basque Country and Navarre have different fiscal agreements than Spain's other autonomous communities. Importantly, the asymmetric status indicates the power of the unit to define its position within the system, enabling, at the same time, the system to hold together.[134] This is because the primary force behind asymmetries is identity differences that seek accommodation in respect of nationality, ethnic, racial, linguistic, and religious groups which attempt to preserve their identity by demanding accommodation of their individuality.

The primary force behind asymmetries is identity differences that seek accommodation. Different nationality, ethnic, racial, linguistic, and religious groups attempt to preserve their identity by demanding accommodation of their individuality.[135] To this end, population, territorial size, economic character, and resources and wealth among the regional units are some of the major factors for the political asymmetry. Watts pins down three approaches to establishing constitutional asymmetry in the distribution of powers within federal systems.[136] The first approach is to increase from the norm the federal authority (i.e., to reduce regional autonomy) in particular member states for certain specified functions within the federal system. The second approach has been to increase from the norm the jurisdiction of particular member states (i.e., to increase regional autonomy); and the third constitutional approach is the one in which the constitution is formally symmetrical in giving all the member states the same jurisdiction, but includes provisions that permit member states in certain cases to "opt in" or "opt out" of these assignments because in some federations it appears that the recognition of constitutional asymmetry has proved an unavoidable way of accommodating major differences between constituent units in the relative pressures for autonomy.[137] Owing to the inevitability of asymmetrical stance in any federal policy, Burgess argues that there is no doubt that asymmetry has now become a prominent feature of the language and discourse of federalism and federation.[138].

Burgess also stresses the advantages of both *de facto* or political asymmetry and de *jure* or constitutional asymmetry to suggest flexibility in federations in the general search for

[134] Maja, ibid
[135] Maja, supra note at 128
[136] Watts, supra note at 8, p.127
[137] Watts, ibid
[138] Burgess, Michael , *Comparative Federalism: Theory and Practice*, Routledge London and New York , first published in 2006, p.209

consensus among political elites and mass publics.[139] In his view, asymmetrical relations have enormous significance for federal polities especially with regard to legitimacy, individual citizen and collective group participation and governmental stability, leading ultimately to overall system maintenance. It has proved successful in some federations by accommodating diverse interests. For instance, Quebec in Canada; Jura in Switzerland; the Danish minority in Schleswig-Holstein and the cultural identity of the Sorbs in Brandenburg in Germany; and the constitutional entrenchment of the regions and communities in the new federation of Belgium enabling the tiny German-speaking linguistic community of Eupen and Malmedy to find its own institutional and policy spaces while the special arrangements for the bilingual Brussels Capital Region combining territorial and non-territorial federal elements.

2.2.4.4. Cooperative versus competitive

Classifying federal systems as cooperative and competitive divide more or less resembles the typology of federalism along dual and administrative/integrated lines. The consensus reached by scholars is that both cooperative and competitive federalism is a common element of any federal system with varying degrees. In competitive federal systems, national and sub-national institutions regard themselves as fundamentally distinct institutions, overlapping in territorial jurisdiction but occupying separate legal spheres. In principle, each gets on with its own business while ignoring the other. Cooperative federalism is the practice and principle of modern federalism whereby the levels of government work together to coordinate policy design and delivery, which does not necessarily entail an equality of power and resources between the two sides.[140]

In cooperative federal systems, national and sub-national institutions regard themselves as partners in government by sharing powers for the common good. The states or provinces have extensive involvement in the formulation of federal policies, on the one hand, while the federal government relies on the states for the implementation of its policies, on the other.[141] A typical instrument of cooperative federalism, for example, is the framework law, whereby the federal legislature lays down basic goals and principles for a policy area and then allows the states to implement same in their own ways. However, while there are important

[139] Id, p.222
[140] Chattopadhyay , Rupak and Karos, Abigail O., *A Global Dialogue on Federalism*, booklet Series, Volume 7, Dialogues on Diversity and Unity in Federal Countries, Forum of Federations, 2008, p.50
[141] Bulmer, supra note at 10, p.23

structural and constitutional differences between these types, the differences should not be exaggerated. As shown above, forms of informal cooperation exist even in competitive federal systems, while competition over powers and resources is found even in cooperative federal systems.[142]

As described in the preceding discussions, due to an inextricable relationship between the dual-integrated and competitive-cooperative taxonomy of federal systems, some present the dualist approach as an old school of thought because federal and state governments remain dominant in their separate spheres of influence, and the cooperative federalism as a new school because state and federal governments work together to solve complex problems.[143] Cooperative approach to the success of federal operation is an imperative and a norm for any federal system. Cooperative federalism is both advantageous and disadvantageous. As such, it contributes to the reduction of conflict and enables coordination, but when it becomes interlocking federalism, to the extent experienced for example in Germany, it may lead to the "joint decision trap" which reduces the autonomy and freedom of action of governments at both levels.[144] In order to strike balance between the excessive intrusion into the autonomy of the constituent units in the name of cooperation and unhealthy vertical and horizontal competition, the fundamental federal and constitutional principles should be observed.

On the other hand, cooperative federalism could be contrasted with coercive federalism. Kincaid expounds on the vital contribution of cooperative federalism in US in tackling the policy challenges of market failure, post-war affluence, racism, urban poverty, environmentalism, and individual rights.[145] However, the cooperative federalism was turned into coercive one as time progressed. The possible grounds for the evolution of coercive federalism proffered by Kincaid are the fact that the U.S. Constitution no longer posed many barriers to federal action, and the pragmatic approach to federalism offered few guidelines for limiting federal power.[146]

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[142] Bulmer, Ibid

[143] A.P Government, Federalism, How the circle and the squares get along, available at: https://slideplayer.com/slide/7374705/

[144] Watts, supra note at 8, p.122

[145] Kincaid, John, "From Cooperative to Coercive Federalism", *The Annals of the American Academy of Political and Social Science,* May, 1990, Vol. 509, American Federalism: The Third Century (May, 1990), pp. 139-152

[146] Kincaid, id, p.12

2.3. Federalism and Criminal Justice System: Rethinking the Interplay

In the preceding discussions, an attempt has been made to navigate the notions connected with federalism. In this section, it is noteworthy to explore how federalism and criminal justice are interlinked and operate between different tiers of government. Hence, first, the meaning and contents of criminal justice will be articulated followed by the values of federalism in the administration of criminal justice.

2.3.1. The criminal justice system

Criminal justice and law enforcement are oftentimes used interchangeably in the literature though the latter is not limited only to criminal law enforcement. Criminal justice refers to the network of systems determining the guiding policies and procedures used to address and prevent crime.[147] The three primary branches that make up the criminal justice system are: law enforcement, courts and corrections which are entrusted with identifying criminal behaviour, arrest crime suspects and penalize offenders accordingly.[148] Law enforcement is the system responsible for enforcing the law and overseeing, managing and maintaining public safety.[149] Law making mandate in the regime of criminal justice would also be envisaged. Criminal justice could also be defined as the methods by which a society deals with those who are accused of having committed crimes, and is the field of study pursued by those seeking to enter law enforcement as a profession.[150] Criminal justice system which is related with the above concept is also defined as the collective institutions through which an accused offender passes until the accusations have been disposed of or the assessed punishment concluded in which the system typically has three components: law enforcement (police, sheriffs, marshals), the judicial process (judges, prosecutors, defense lawyers), and corrections (prison officials, probation officers, and parole officers).[151] It is also termed as a law-enforcement system. From a governmental perspective, criminal justice is often

[147] John, Mariah St., *What Is Criminal Justice, and How Do You Choose A Career in the Field?* Forbes Advisor, March 2023, available at: https://www.forbes.com/advisor/education/what-is-criminal-justice/

[148] Ibid

[149] Ibid

[150] Garner, Bryan A., Black's Law Dictionary, Eighth Edition, 2004, p.1131

[151] Ibid

conceived as a system with component parts, in which cases flow from one part, say the police, onto prosecution, then the courts and finally, for some, probation or prisons.[152]

Definitions of criminal justice lead us to the concept of criminal law which in turn seeks a definition. Accordingly, criminal law is the body of law defining offenses against the community at large, regulating how suspects are investigated, charged, and tried, and establishing punishments for convicted offenders. Often the term 'criminal law' is used to include all that is involved in 'the administration of criminal justice' in the broadest sense. As so employed, it embraces three different fields, known to the lawyer as (1) the substantive criminal law, (2) criminal procedure, and (3) special problems in the administration and enforcement of criminal justice. The phrase 'criminal law' is more commonly used to include only that part of the general field known as the substantive criminal law.[153]

In the meantime, it is important to note the purpose of the criminal justice. Hence, the purpose of the criminal justice system is to protect the society, punish offenders and rehabilitate criminals. Garside maintains that the purpose of the criminal justice system is to deliver justice for all, by convicting and punishing the guilty and helping them to stop offending, while protecting the innocent.[154] He also claims that the central purpose of the criminal justice system is to deliver an efficient, effective, accountable and fair justice process for the public.

While this is a few words about the criminal justice system in any form of state structure, the one in a federal system would seek a careful consideration as powers and responsibilities are distributed at different tiers of government. On the one hand, the institutions, purposes, and contents of the criminal justice should be effective and strong enough to deliver justice to the society. On the other hand, there should be principles and standards that define which level of government takes over which part of the criminal justice for the sake of efficiency, effectiveness, accessibility, accountability, transparency, public participation, and significance of the matter whether it characterizes international, national, regional, or local features. In this regard, values that federalism is to supposedly yield are of paramount

[152] Garside, Richard and Grimsha, Roger, Criminal *justice systems in the UK: Governance, inspection, complaints and accountability*, Centre for Crime and Justice Studies, August 2022 ISBN: 978-1-906003-80-7
[153] Garner, supra note at 150, p.1131
[154] Garside, Richard, *The Purpose of the Criminal Justice System, Center for Crime and Justice Studies*, Monday, 17 March 2008, available at https://www.crimeandjustice.org.uk/resources/purpose-criminal-justice-system

importance in linking federalism and the criminal justice administration which will be explained as follows.

2.3.2. Values of federalism and criminal justice administration

The administration of criminal justice in federal systems cannot lie outside of the values and advantages of federalism. The two notions coincide in a number of ways. The general values to be generated by the federal system of governance may have a direct impact on the proper, transparent, accountable, effective and efficient administration of criminal justice. Regarding this subject, Fissell has made an interesting inquiry grounding his synthesis in the cases resolved by the US Supreme Court.[155]Accordingly, the six generally accepted values of federalism spelt out are: maximization of individual liberty through checks on government power (the principal benefit); experimentation and innovation across jurisdictions; responsiveness to geographic diversity; democratic participation; competition for citizens; and inherent sovereignty.[156] This does not, however, mean that all these values work linearly in all federal systems as there is a wide range of differences, for example, on the maximization of individual rights and liberties.

In all federal systems, criminal authority is allocated either in a centralized or decentralized approach by taking into account the roles to be played by the local, regional, and national governments in the proper administration of criminal justice system. The values of federalism have a direct bearing on the criminal justice system. In order to respond to a certain criminal affairs, what should come first is whether it requires a local solution for local problems and a national solution for national problem. In this regard, the issue of self-rule and shared rule tenets of federalism will come into play.

In view of Fissell, the abovementioned values of federalism *vis-à-vis* criminal justice in federal systems, particularly in the US federal experimentation, are analysed under the following six federalism arguments.

[155] Fissell, Brenner M., "Federalism and Constitutional Criminal Law", Hofstra Law Review, Vol. 46, Issue 2 [2017], Art. 6
[156] Fissel, id, p.34

2.3.2.1. Experimentation

The efficiency of federalism is discerned through experimentation on various subjects including criminal justice administration at different levels of government on the basis of their merits. In this regard, the efficiency of federalism seems to have two sub-parts: (1) it is more efficient to allow different jurisdictions to experiment with different approaches than to impose a uniform rule; and (2) localities better understand their own problems, and therefore can tailor legal solutions more effectively.[157] In support of this view, Kincaid has added the following:

> *"Multiple governments give rise to policy diversity. In the United States, for instance, 38 States permit capital punishment while twelve States prohibit the death penalty. Hence, another common federal system is an agreement to disagree. When agreement cannot be reached on a particular national policy, the constituent states may be able to enact different policies that reflect their citizens' preferences. Federalism, therefore, also permits policy experimentation. As US Supreme Court Justice Louis Brandeis argued in the New State Ice Co. v. Liebmann (1932), it is one of the happy accidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country. Current examples are Oregon and Washington—the only US States that permit physician-assisted suicide."*[158]

Local and indigenous knowledge is another factor that justifies experimentation federalism *vis-à-vis* criminal justice. Experimentation federalism is the argument that localized legal decision making is beneficial because it allows for inter-jurisdictional experimentation with respect to the means of achieving shared goals; and it places authority in the jurisdiction that has superior knowledge by virtue of its size because decentralized experimentation is seen as more efficient than the imposition of a uniform national rule.[159] Flexible, dynamic, contextualized and accessible justice delivery and system innovation may be more legitimate and lively that the one which is crafted by the higher and distant body which may not fit into all units. This argument emanates from the fact that the "one-size-fits-all" approach may not be workable across the board.

Experimentation federalism is also associated with the exercise of self-rule which lies at the heart of the essence of federalism. In other words, the exercise of criminal authority could be manifested in and by the exercise of the right of self-government or self-administration. By implication, federalism less self-government on areas related with public security and safety including criminal justice may not be termed as a meaningful federal system. The most

[157] Ibid
[158] Kincaid, supra note at 30, p. xxix
[159] Fissel, supra note at 155, P.35

important feature of the state "laboratory" is the ability to make substantive determinations of what is and is not criminalized so as to reduce socially harmful conduct.[160]

In the development of the nationalisation of state laws, the states are seen as laboratories of democracy whereby successful or politically popular policy experiments in one or several states are not only emulated by other states but also adopted by the federal government for the entire country.[161] As former President Bill Clinton put it in 1999: 'If something is working in a state, I try to steal it, put it into federal law' because 'very often we don't have time to wait for every state to agree that that's the answer. So, we try to jump-start the federalist experience by looking for ideas that are working and then embodying them in federal legislation' applicable to all the states.[162]

Laboratory or experimentation federalism entails innovation, another related value of federalism. Policy innovation which is adopted and developed by each constituent unit in general public affairs and criminal justice administration as a particular subject may be diffused horizontally to sister states or upward to the central government. The latter versions of policy diffusion is usually designated as open method of coordination which is popular in the European Union by fostering mutual learning about successful policies and promote policy transfer by identifying best practices and recommending them.[163] In this regard, Shipan and Volden identified four mechanisms of policy diffusion that are theoretically and empirically tested.[164] These are learning, economic competition, imitation, and coercion. Learning is the process that leads states to be called laboratories of democracy because by observing the politics of policy adoption and the impact of those policies, policymakers can learn from the experiences of other governments. When confronted with a problem, decision makers simplify the task of finding a solution by choosing an alternative that has proven successful elsewhere.[165] Most generally, learning involves a determination of whether a policy adopted elsewhere has been successful; and if the policy is deemed to be successful, then a state is more likely to adopt it.

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[160] Fissel, id, p.4
[161] Kincaid, John, "From Dualistic Autonomous Concurrency to Marbleized Permissive In American Federalism", *in* Steytler, Nico (ed.), *Concurrent Powers In Federal Systems: Meaning, Making, and Managing*, Leiden; Boston: Brill Nijhoff, 2017, p. 47
[162] Kincaid, Ibid
[163] Kerber, Wolfgang and Eckardt, Martina *Policy Learning in Europe: The 'Open Method of Coordination' and Laboratory Federalism*, Working Paper No.48, 2005
[164] Shipan, Charles R., and Volden, Craig, "The Mechanisms of Policy Diffusion", *American Journal of Political Science,* Vol.52, No.4, 2008, pp.840-859
[165] Shipan and Volden, id, p.842

The policy diffusion from an economic competition point of view assumes that the likelihood of a state adopting a policy decreases when there are negative economic spill overs from that adoption to nearby states and increases with positive spill overs from nearby states. Economic competition can lead to the diffusion of policies with economic spill overs across jurisdictions. Imitation or emulation involves copying the actions of another in order to look like that other.[166] The nature of imitation can be understood in contrast to learning. In learning, policymakers focus on the policy itself—how it was adopted, whether it was effective and what its political consequences were. In contrast, imitation involves a focus on the other government—what that government did and how to appear to be the same. The crucial distinction is that learning focuses on the action (i.e., the policy being adopted by another government), while imitation focuses on the actor (i.e., the other government that is adopting the policy).[167]

Coercion as a policy diffusion mechanism was such a major concern to the founders of the U.S. Constitution that they established the commerce clause to minimize trade barriers and other coercive mechanisms across the state.[168] Although horizontal coercion across states or localities in the American federal system is therefore limited, vertical (or top-down) coercion is still quite possible mostly through grants and preemptive policies.

2.3.2.2. Morality

The morality test in the criminal justice system and federalism concentrates on the diverse societal culture on what is crime and what is not; what is punishable and what is not punishable. This version of federalism holds that law-making should reflect a community's moral consensus, and that therefore the more tightly a legal jurisdiction can map onto a moral community, the better.[169] In this connection, Powell contends that federalism in criminal law is valuable because of the constantly shifting adjustment of the tension between the evolving aims of the criminal law and the changing religious, moral, philosophical, and medical views of the nature of man.[170] On the other hand, criminalization should be observed within the perspective of the moral portrayal of each constituent unit without however affecting issues which cut across all or some of them. In the wording of Klein, such kind of value-laden

[166] Shipan and Volden, id, p.843
[167] Ibid
[168] Ibid
[169] Fissell, supra note at 155
[170] Fissel, Ibid

federalism helps fostering a community's expression of morality.[171] Cultural diversity as a value of federalism in the regime of criminal justice may also be justified because it may not be included or accommodated at the centre.

The morality approach to federalism and criminal authority reminds us the supposed value of federalism in terms of accommodating diversity, especially in this context, the cultural diversity. Accommodation of communal diversity in plural societies is, thus, one of the values of federalism.[172] In general, the morality federalism advocates the assumption that a functional criminal legal system must reflect the morality of the society which corresponds with the sociological theory of law. This negates a mere enactment of criminal laws which are not in conformity with the concrete lives of the society which may also be seen internally with peoples celebrating a plethora of cultural diversity. Diversity also exists in the rights and procedures marking state criminal justice systems. No modern legislation which does not have its roots in the customs of those whom it governs can have a strong foundation.[173] While the Constitution's Supremacy Clause requires that states, at a minimum, provide their citizens with rights prescribed by federal law, the states of course are free to extend more protections and otherwise operate their criminal justice systems largely free of federal dictate.[174]

2.3.2.3. Liberty

As explained elsewhere in this study, federalism enhances liberty of individuals in that it is protected by the dual sovereignty accorded to tiers of government. Government will reduce the risk of tyranny and abuse from either front because power is almost always the rival of power, and that if the people's rights are invaded by either government, they can make use of the other as the instrument of redress.[175]Accordingly, liberty federalism is the argument that creating competing vehicles of political will empowers the citizenry in controlling those institutions, and prevents one from becoming preeminent and overweening.[176]

[171] Klein, Martha, *Morality and Justice in Kant*, Ration (New Series), volume, III, 1990
[172] Kincaid, John, "Values and Value Tradeoffs in Federalism", *in* Kincaid, John (ed.), *Federalism, Volume I, Historical and Theoretical Foundation of Federalism,* Sage Publications Ltd, 2011, p.242
[173] Fisher, Stanley Z., "Traditional Criminal Procedure in Ethiopia"*, The American Journal of comparative law*, Vol. 19, No. 4,1971, P.709
[174] Logan, Wayne A., "Horizontal Federalism in an Age of Criminal Justice Interconnectedness", *University of Pennsylvania Law Review*, Vol. 154, December 2005, No. 2, p.5
[175] Fissell, supra note at 155, p.39
[176] Fissell, ibid

However, there is a divergence of views as to the liberty federalism with regard to the regional diversity on the one hand and universal human rights tenet on the other. The widely held view is that liberty federalism presumes that states and the federal government will act in tension, and not in concert, when it comes to personal freedoms.[177]As a way out to this conundrum, the notion of the new judicial federalism mushrooms an important version of liberty protection that encourages the states to provide a better guarantee for human rights. Accordingly, it is claimed that the State courts and legislatures may afford their citizens greater protections under their constitution's declaration of rights than the US Supreme Court or the Congress is willing to recognize under the US Constitution's Bill of Rights.[178]

Kincaid also advances his contention that the reviewability of the decisions rendered by the State Supreme Court by the US Federal Supreme Court is tested through the better protection mirror. He maintains that if rights-enhancing decision by a State Supreme Court is based on independent and adequate state constitutional grounds, it is immune from the US Supreme Court review. In effect, the federal government is now understood as establishing a floor of minimum rights protection nationwide, while each state is free to exceed any minimum federal rights standard. States also are free to protect rights not protected under the federal constitution and to recognize new rights as well. Consequently, peaks and valleys have appeared on the rights landscape as some states cling to the federal floor while others build up from it.[179] In a nutshell, the relationship between federalism and liberty is complex and such complexity can be regulated by ensuring minimum and uniform protection through Federal Supreme Court and that regional states can broaden, not narrow down, federally protected rights.

2.3.2.4. Democratic participation

Democracy as a value of federalism *vis-à-vis* criminal justice administration is all about the popular participation, accountability, and transparency of the delivery of public goods and services as a result of which Fissell deduces that participation federalism makes the values of federalism synonymous with the values of democracy. By virtue of this proposition, federalism creates a smaller government which increases opportunity for citizen involvement

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[177] Fissell, Ibid
[178] Kincaid, supra note at 172, p.251
[179] Kincaid, id, p.252

in democratic processes.[180] It trains citizens in the techniques of democracy, fosters accountability among elected representatives, and enhances voter confidence in the democratic process.[181] Furthermore, the founders saw federalism as enhancing an essential "public spiritedness," since "participation in deliberation over the public good" was more accessible in states than in a remote central government.[182] What we can call "Participation Federalism," then, is the argument that for multiple reasons it is beneficial for citizens in a democracy to be engaged in political processes, and that this is facilitated by smaller units of law-making.[183]

The administration of criminal justice requires democratic principles mentioned hereinabove for the functioning of effective and efficient rule of law and order. This may exist in substantive and procedural aspects in the areas of legislating, executing, and adjudicating criminal laws and justice policies. By the democratic rules, criminal justice delivery should be transparent, accountable, accessible and participatory. In order to achieve these principles, it is first needed to locate who does what in the criminal justice system as per the constitutional and federal arrangements put in place.

2.3.2.5. Mobility

Citizen mobility for business and investment purposes requires an effective and efficient justice policy and the rule of law. Mobile investors and a state in which they move are mutually reinforcing each other. Mobility federalism is predicated on a number of assumptions, though, most important being (1) the ability of citizens to actually move; and (2) that states are incentivized to compete for larger populations, and will shape their policies accordingly.[184] In light of these propositions, if the criminal justice policy of a certain state is not trustworthy, mobile investors lose hope and trust. As a result, they opt to what is called “voting with one's feet.” Fissell holds that mobility federalism in the context of criminal law is an attractive theory. For instance, citizens wishing to leave a state with objectionable criminal laws can escape their application by re-locating; citizens wishing to live in a place where certain conduct is punished, for whatever reason, can do the same.[185] A contemporary example of exodus from an undesirable legal regime can be seen in the move away from

[180] Fissell, supra note at 155
[181] Fissell, ibid
[182] Fissell, ibid
[183] Fissell, id, p.41
[184] Fissell, supra note at 155, p.42
[185] Ibid

jurisdictions that criminalize marijuana possession and use into those that have legalized it.[186] Conversely, mobility due to the attractiveness of criminalization is likely illustrated by citizens seeking out places that are more "tough on crime" to feel safer.[187]

The mobility federalism has a direct and indirect correlation with economic development and prosperity for a particular state and a country as a whole as a result of which suitable criminal justice policy should be a functioning tenet. This may be depicted in a number of ways taking into consideration the national, regional and local contexts of the country. Economic and criminal justice policies should be able to be fine-tuned in such as a way that the socio-economic problems of the different levels of government are alleviated by taking advantage of the mobility as a value of federalism. In this case, competition is an unavoidable factor. Consequently, if there is a competition toward reducing criminal activities through a better local system as a result of which the rule of law and peace and security prevails; and inter- and intra-jurisdictional economic and investment mobility will increase. On the other hand, competition alone may not be a sufficient ground for economic development and there should be a cooperative relationship between each level of government, both vertically and horizontally in bringing about an effective and efficient criminal justice system.

2.3.2.6. Regional state autonomy

One of the values of federalism is regional autonomy. In Fissell's phraseology, inherent sovereignty refers to autonomy of the states which federalism is purported to foster as a value. As a coming together federalism, this is the theory that the historic fact of state sovereignty, altered only by the ratification of the US Constitution, but largely preserved by the Tenth Amendment, is itself a reason for federalism.[188] This argument is strengthened by the assertion that the allocation of powers in US federal system preserves the integrity, dignity, and residual sovereignty of the States in which the federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right.[189]

The principle of inherent sovereignty or state autonomy under the US federalism in the context of criminal justice is discerned by the fact that the police power is granted to the states a residual power. This includes the core of the police power which has been described

[186] Ibid
[187] Ibid
[188] Fissell, supra note at 155, p.45
[189] Ibid

as the promotion of safety of persons and property; the power to protect people and things which further implies the power to prohibit and punish conduct.

2.4. Conclusion

There are lot of conceptual nexuses between federalism and criminal justice partly because the latter should be considered within the whole range of the former in a federal system as one sphere of the subject matter. While federalism is defined differently by different scholars, the universal and all-encompassing definition which is the working one is that it is the advocacy of multi-tiered government combining elements of shared rule and regional self-rule, which is based on the presumed value and validity of combining unity and diversity. Federalism is significantly advantageous for many purposes. It is characterized by having some fundamental principles which are capable of distinguishing federalism from other forms of political governance such as a unitary state and a confederation. Hence, the federal constitution which is written, supreme, and rigid; the existence of two or more tiers of government which are constitutionally entrenched; self-rule and shared rule; constitutional adjudication system; intergovernmental relations, and division of powers are the principles that federalism is ought to possess as a peculiar system of political governance.

Federalism could be classified into many ways based on different factors and parameters. For example, on the basis of how a federation came into existence, federalism can be categorized as coming together, holding together, a combination of the two, putting together, and even forced together federalism. The difference of the mode of coming into existence of federal systems is caused by international, regional and domestic factors that pushed a federation to have been formed. Federal systems could also be classified as dual *versus* administrative or integrated federalism on the basis of the institutional or structural organization of the government from among other things. In this light, the orders of government have their own legislative, executive, and judicial organs in a dual federalism. By contrast, in the administrative federalism, while the federal government is basically entrusted with the making of policies and laws as a general mandate, the constituent units are there to implement such laws in their local contexts with their institutions. In other words, federal laws and policies are executed by the institutions of the constituent units. In fact, the observation reveals that there are rare instances where sharp divides of dual *versus* administrative federalism could occur for theoretical and practical pressures. The classification of federalism into symmetrical *versus* asymmetrical divides is grounded in the constitutional treatment of the constituent units on equal footing or preferential manner with respect to the division of powers, rights and privileges. In view of this taxonomical approach, symmetrical federal systems are those in which all the constituent units have equal powers and rights which rarely exist in the world. On the other hand, asymmetrical federalism is the one in which the constituent units are treated differently and preferentially for some compelling reasons. Majority of the world federal systems falls under his category.

There are many values that federalism is supposed to generate like experimentation, morality, liberty, democratic principles, and sovereignty or autonomy which have direct correlations with the administration of criminal justice in a federal system. Accordingly, experimentation enables the constituent units to be a locus of laboratory for the diverse interests thereof. By taking advantage of the self-rule right, the constituent units are empowered to apply local or indigenous knowledge in solving the problems related with the criminal justice and the rule of law in maintaining the peace and security of their vicinity. Local knowledge in this sense of more advantageous, dynamic and flexible than the central regulation of criminal justice as it is tailored with the local problems and preferences. This helps the society to advance solving local problems with local or indigenous knowledge. The “one-size-fits-all” may not fit into the diverse local needs in the criminal justice administration.

Democratic principle as a value of federalism also plays a pivotal role in ensuring the peace and security and the rule of law through the guidance of the criminal justice administration on the basis of public participation, transparency, accountability, and accessibility. Citizens who are not satisfied with the rendition of the criminal justice may hold accountable the concerned organs that are closer to them than the one more distant from them. Moreover, the proximity of the criminal justice enables the community to take part in the administration by owning it. Morality as a value of federalism is crucial in detecting a criminal law whether it is in line with or against the culture of the society. Given the universal position of the human rights on one hand and the relativity of diverse culture that should also be tested in the eyes of the constitution which is the supreme law of the land, a criminal law is better to be adjustable to the diverse society for its effective application. If a law is not tuned into the daily lives of a society and the society practises other ways than the law, attention should be given so that there should compliance between the two.

Chapter Three

The Distribution of Powers and Criminal Justice Matters

3.1. Introduction

As hinted out in the preceding chapter, the doctrine of distribution of powers constitutes the very essence of federalism and is one of the characteristic attributes thereof that is capable of distinguishing same from other forms of political governance. In other words, federalism cannot be thought of in the absence of the distribution of powers between and among various tiers of government. On the other hand, powers and functions, including that of criminal matters, are not allocated haphazardly or randomly. There are rationales that justify and necessitate the division of powers between different levels of government. Accordingly, when powers and functions are divided between the federal government and constituent units, such a task is underpinned by various rationales. Moreover, powers and functions so allocated between such tiers of government are guided by some principles. In light of this assertion, the principles of the division of powers are assumed to align specific power and function with the competent level of government based on different parameters in as much effective and efficient manner as possible. To this end, there several factors that affect the distribution of powers. The logic here is that the rationales, principles, and factors that are instrumental as parameters for the distribution of powers are also relevant for the division of criminal matters.

With these normative assumptions in mind, different federal countries adopt various yet related approaches to the division of powers including criminal authority. This mode of distribution of powers may be predicated on the specific historical, political, social and cultural contexts of each of country. The common and widely accepted forms and approaches of the division of powers are: exclusive, concurrent, and residual powers.

In this chapter, thus, the aspectual issues of the distribution of powers such as the rationales that justify, principles that guide and factors that can affect the distribution of powers will be discussed. Moreover, the aspects of the distribution of powers such as legislative, executive, and judicial powers, by taking into account the case of Ethiopia, will be enunciated under a separate section. An attempt will also be made to expound the three common forms of division of powers: exclusive, concurrent, and residual which are used for lubricating the conditions for the discussion of the criminal justice mandates in Ethiopia and beyond.

In this connection, as the powers and functions so allocated are carried out by various governmental organs which are set up at federal and state levels, an institutional arrangement under the Ethiopian federal and constitutional design will be elucidated. An emphasis will also be given to the criminal authority and its aspects as a precursor to the next chapters which are dedicated solely to the articulation of the criminal jurisdiction in Ethiopia. To this end, a comparative survey of the allocation of criminal authority will be made with reference to some selected federal countries.

3.2. The distribution of powers

The distribution (or assignment) of powers (or competences or responsibilities) is a necessary feature of federal systems.[190] A power is the authority granted to or acquired by a public or a private body to legislate, regulate and/or to have a general capacity to act in particular areas or domains, which is broad enough to encompass the privatization of powers that had been in the public arena as well as the socialization of previously private powers.[191] In such a case, powers and functions are divided between the federal and the states on the basis of various principles. As briefly described in the introduction, there are also rationales that justify the need for the division of powers between the constitutionally recognized tiers of government. Moreover, many factors can be alluded to that can affect the distribution of powers and its application as per the constitutional structure. In what follows, an attempt will be made to delve into the illumination of these themes in relation to the distribution of powers in federal states in general and Ethiopia in particular.

3.2.1. Rationales, principles and factors

There are rationales, principles and factors that the distribution of powers is justified, guided and affected by, which Kincaid designates altogether as distribution criteria.[192] According to him, there is no ideal way to distribute powers. Different federations do it differently and for

[190] Kincaid, supra note at 11, p. 45
[191] Bosire, Conrad M., Devolution for Development, Conflict Resolution, and Limiting Central Power: An analysis of the Constitution of Kenya 2010, a thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy (Law) in the Faculty of Law, University of the Western Cape, p.88
[192] Kincaid, supra note at 11, p.46

different reasons. It should be borne in mind that the issue of the ownership of power has become the contentious matters in federal systems as contrast to other forms of political governance. In unitary states, all powers are ultimately owned by the central government, in confederal states they are owned by associated members, and in federal states some powers belong to the centre and some to sub-units.[193] Such contentions may be alleviated through referencing to the significance of the distribution of powers for each level of government; principled approach to allocate powers between levels of government; and factors affecting the distribution of powers. In the following paragraphs, I shall expound these underlying themes of the distribution of powers which may have a direct relation with the distribution of criminal authority between the federal government and the states.

3.2.1.1. Rationales

In federal systems, politics involve contentious questions of which orders of government get what powers and when and how they can exercise those powers, and for whose benefit.[194] Power lies at the centre of political science, and the distribution of powers lies at the centre of federal systems. The principal foundation for the distribution of powers is the fact that it is inextricably anchored with federalism. As discussed in the previous chapter, the definition of federalism cannot exist without the presence of the distribution of powers. Moreover, the distribution of powers in federal systems can rectify the defects of the previous relations of the tiers of government.[195] Because of the handicaps of the Articles of Confederation, the Constitutional convention was required as a result of which power was divided, checked, and balanced. The transformation of the Article of Confederation to the US Constitution was necessitated by the forms and scope of powers between the central government and the states, from among other justifications.

The distribution of powers is also used in conflict management, resolution, and prevention. This is advanced especially by post-conflict federal countries in which dividing powers and resources among various groups who struggle for equality and justice may benefit from this

[193] Bosire, supra note at 191, P.89
[194] Kincaid, supra note at 11, p. 51

[195] The Principles of Democracy, (United States chapter 3), p.5

precept.[196] To this end, Horowitz notes that the skillful division of authority between regions or states and a centre has the potential to reduce conflict.[197]

It is also used in viable and strong federal systems such as the US. For more than 200 years, the claims of the federal government and that of the state governments have always existed in tension with each other. Resolving this tension requires constant attention to the role of government and continual reassessment concerning the proper distribution of power between the two levels of government. This shifting balance, more often creative than not, rests on the principle of popular sovereignty, so the disputes surrounding federalism are about which government, state or national, best expresses the people's will. They are also about which values will prevail in the market of political ideas. There will never be final answers to these questions, and the tension inherent in federalism will never disappear.[198]

Moreover, it is argued that the distribution of powers is one of the key features of federal constitutional arrangements.[199] That is why federalism in itself is defined within the narrower notion of the distribution of powers. As such, federalism is a system of government that establishes a constitutionally specified division of powers between different levels of government.[200] The principle of distribution of power may also be used as a marker of the relationship and disparities between the various levels of government. In this view, Ghai maintains that the relationship between the centre and the region is influenced not only by the division of powers and responsibilities but also the structure of institutions at both levels; for example, how democratic and inclusive they are, the role of political parties and the ability to negotiate binding settlements.[201]

The Tenth Amendment under the US constitutional and federal system conveys important rationales of the distribution of the powers. Accordingly, there are three key principles underlying the Tenth Amendment jurisprudence.[202] First, it helps to ensure that federalism remains a structural protection on individual liberty. In this view, the Constitution divides

[196] Choudhry, Sujit and Hume, Nathan, *Federalism, Devolution, Secession: From Classical to Post-Conflict Federalism* (book chapter)
[197] Horowitz, Donald, *Ethnic Groups in Conflict*, University of California Press, 1985, p.602
[198] Dereje, supra note at 19, p.6
[199] Saunders, Cheryl , Constitutional Arrangements of Federal Systems, Publius, Vol. 25, No. 2 (Spring, 1995), pp. 61-79, p.4 & 9
[200] Bulmer, supra note at 10, p.3
[201] Ghai, Yash, *Introduction: Nature and origins of autonomy*, pp. 1-31, Chapter DOI: http://dx.doi.org/10.1017/CBO9781139088206.001,Cambridge University Press, p.32
[202] Partlett, William, "Criminal Law and Cooperative Federalism", *American Criminal Law Review*, Vol. 56:1663, 2019, p.23

authority between federal and state governments for the protection of individuals and this reduces the risk of tyranny and abuse from either front. A judicious distribution of powers among governments, along with separation of powers within governments, can provide, as Madison contended in Federalist 51, a 'double security' for 'the rights of the people'.[203] To this end, it is strongly argued by the Supreme Court, that the Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities. Second, the Tenth Amendment is meant to ensure clear political accountability. Third, the Tenth Amendment prevents Congress from shifting the costs of regulation to the States. In light of this tenet, it is asserted that if Congress enacts a law and requires enforcement by the Executive Branch, it must appropriate the funds needed to administer the program.

In a nutshell, Kincaid summarizes the rationales for the study of the distribution of powers as follows:

> *"Studying federalist distributions of powers provides unique insights into the ways we can think about structuring power, especially to ensure unity and preserve diversity, protect democracy against autocracy, and ensure freedom against tyranny. Issues of power distribution illustrate the kinds of power struggles that occur in political systems; the reasons why actors zealously want, or hold onto, particular powers; the challenges of limiting powers to preserve democracy and freedom while still providing robust governance; the techniques of cooperating and coordinating exercises of power; the different political, administrative, and fiscal requisites of exercising different powers; the social-justice consequences of different power distributions; and the kinds of powers needed for the operation of any political system. ...Studying power distribution also implicates key cost–benefit questions about centralization, decentralization, and non-centralization in political systems because the distribution can accentuate one or the other. Some critics contend that too decentralized or non-centralized a distribution of powers in a federation can produce duplication, fragmentation, inefficiency, and lower social welfare. Other critics contend that centralization can be inefficient, bureaucratically lethargic, oppressive of minorities, and ignorant of the diverse needs and capacities of regional and local communities."*[204]

3.2.1.2. Principles

In the allocation of powers and functions, there are principles guiding the task so that it would not be an unsystematic business. These principles may be assumed at theoretical level in some cases, and are also explicitly embodied in the constitutions of some federal states. To discover the best principle for the distribution of authority is of greater importance, possibly, under a democratic system, where officials serve many masters, than under others where they

[203] Kincaid, supra note at 11, p. 50

[204] Kincaid, supra note at 11, p. 50-51

serve but a few.[205] The question remains, however, that what is the best formula to divide powers and responsibilities between tiers of government. While some constitutions of federal countries embody principles that guide the distribution of powers, others simply embark on such the task without mentioning them.

Some scholars expound the principles that are used in the allocation of powers and responsibilities in federal systems. For instance, Breton asserts that powers should be assigned: (a) in such a way that the span of public goods—the number of persons to whom the benefits of a public good accrue or are made available in equal amount–should match as closely as possible the spatial boundaries of jurisdictions; (b) on the basis of subsidiarity; (c) so as to encourage experimentation and innovation by more junior and consequently smaller governments, thus reducing the risks of larger cost failures when experiments are undertaken by more senior and consequently larger governments; (d) in such a way as to preserve diversity; and (e) so as to guarantee a maximum of individual political and economic liberty and, as a complement, to give minorities a maximum of protection.[206] In what follows, an attempt will be made to shed light on these and other related principles that are used for guiding the division of powers in federal systems.

3.2.1.2.1. Constitutional entrenchment

Powers and responsibilities that are divided between the federal government and the states should be constitutionally embedded so that both levels of government derive their respective authority from the constitution, not from either tier of government. As will be described in the subsequent sections, the powers and functions on each aspect of the specific subject matters are also expected to be enumerated in a listing method or provided in a schedule technique. Different federal systems use different approaches as entrenched in their constitutions. The constitutional entrenchment of the distribution of powers in turn is supplemented and guaranteed by other ancillary tenets which give an impetus to the implementation of the distribution of powers as embodied by the constitution. These may include, but not limited to, the co-equality of the federal government and the states, mutual respect and non-encroachment, autonomy, symmetry, and the self-rule right.

[205] Wilson, Woodrow, "The Study of Administration", *the Political Science Quarterly*, Vol.2, No.2, (Jun, 1887), Pp.197-222, p.18

[206] Breton, Albert, "Modelling Vertical Competition", in Ahmad, Ehtisham and Brosio, Giorgio, (eds.), *Fiscal Federalism Handbook,* 2006, p.86

Powers are ordinarily distributed through a written constitution because power distribution lies at the core of federalism and requires fundamental agreement among the federating parties.[207] Despite a constitutional entrenchment, according to Kincaid, some federations also distribute some powers through post-constitutional laws or bilateral agreements to be made between the federation and particular constituent governments. However, such a trend may not be easy and smooth in maintaining the constitutional and federal principles and values that may be susceptible to violation with the predominance of the federal government over the constituent units. Power distribution is often contentious because constitution writers disagree on which government should do what. When establishing unity with diversity, tensions arise between allocating powers sufficient to maintain federation unit through shared rule and sufficient, as well, to maintain constituent self-rule for diversity.

It is important in the meantime to ponder the necessity and significance of the constitutional entrenchment of the distribution of powers. In this regard, Bulmer argues that the supremacy and entrenchment of the constitution provide guarantees to the sub-national units that their existence, status and powers will be recognized and their autonomy respected. If these guarantees are breached, the sub-national units will usually have recourse to a supreme or constitutional court.[208] Without such protection, Bulmer contends, there can be no truly federal sharing of sovereignty and no clear guarantee of autonomy against majorities at the centre.

In this regard, the Ethiopian Constitution encompasses these principles unambiguously. Both the federal government and the states shall derive their powers from the Constitution and these powers are defined by the same Constitution.[209] In exercising the powers and functions assigned to each, the mutual respect and non-intrusion should also be observed.[210] One can easily comprehend that the co-equality of the federal government and the states is ingrained in this constitutional principle in relation to the distribution of powers. What is more, both tiers of government are empowered to devise their respective governmental structures.[211]

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[207] Kincaid, supra note at 11, p. 47

[208] Bulmer, supra note at 10, P.33

[209] Art.50(8) first paragraph of the FDRE Constitution declares that Federal and State powers are defined by this Constitution.

[210] Art.50(8) second paragraph of the FDRE Constitution states that the States shall respect the powers of the Federal Government. The Federal Government shall likewise respect the powers of the States

[211] Art.50(2) of the FDRE Constitution provides that the Federal Government and the States shall have legislative, executive and judicial powers.

Accordingly, while the House of Peoples' Representatives is the highest authority of the Federal Government and is responsible to the people, the state council is the highest organ of the state authority, which is responsible to the people of the state concerned.[212] And whilst the state council has the power of legislation on matters falling under the state jurisdiction,[213] the House of Peoples' Representatives shall have the power of legislation in all matters assigned by the Constitution to federal jurisdiction.[214] Likewise, the state administration constitutes the highest organ of executive power,[215] whereas the highest executive powers of the Federal Government are vested in the Prime Minister and the Council of Ministers.[216] As will be shortly explained, the state judicial power is vested in its courts,[217] and the supreme federal judicial authority is vested in the Federal Supreme Court.[218] The Federal Supreme Court shall have the highest and final judicial power over federal matters; whereas the State Supreme Courts shall have the highest and final judicial power over state matters.[219]

The principle of symmetry is also guaranteed by the FDRE Constitution. In this manner, all the states recognized by the Constitution shall have equal powers and rights regardless of their population and geographic sizes and any other factors.[220] However, despite the explicit constitutional symmetry of the States, there are some exceptional circumstances whereby they are treated asymmetrically which is inbuilt in the Constitution itself.[221] In addition, the Constitution stipulates for the affirmative action provisions for the disadvantaged Nations, Nationalities, and Peoples,[222] which demonstrates the asymmetrical nature of the States as a special instance.

[212] Art.50(3) of the FDRE Constitution
[213] (Art.50(5) of the FDRE Constitution
[214] Art.55(1) of the FDRE Constitution
[215] Art.50(6) of the FDRE Constitution
[216] Art.72(1) of the FDRE Constitution
[217] Art.50(7) of the FDRE Constitution
[218] Art.78(2) of the FDRE Constitution
[219] Art.80(1, 2) of the FDRE Constitution
[220] Art.47(4) of the FDRE Constitution provides that Member States of the Federal Democratic Republic of Ethiopia shall have equal rights and powers.
[221] For example, as per Art.49(5) of the FDRE Constitution, the Oromia National Regional State has a special right over the Capital of the country—Addis Ababa—which the rest of the States do not have. The full text of the provision reads as: The special interest of the State of Oromia in Addis Ababa, regarding the provision of social services or the utilization of natural resources and other similar matters, as well as joint administrative matters arising from the location of Addis Ababa within the State of Oromia, shall be respected. Particulars shall be determined by law.
[222] Art.89(4) of the FDRE Constitution

3.2.1.2.2. The subsidiarity principle

One principle for determining the relationship among the levels of government is the principle of subsidiarity: decisions should be made by the lowest level of government that can competently make them.[223] Subsidiarity is treated as a strictly devolutionary principle compelling the reallocation of social functions from higher to lower government bodies, or from government to non-government entities.[224] It is the devolution of responsibility to smaller political units in the context of a federal system.[225] The advantage of subsidiarity is that it prevents central government entities from becoming too powerful. On the other hand, the subsidiarity principle helps to prevent confusion in decision-making and duplication of the same functions at different levels of government, as all levels of public governance are integral parts of public governance systems.[226]

Subsidiarity principle plays a great and decisive role in allocating powers and functions between various levels of government. Breton pins down the three distinguishing features of the subsidiarity principle.[227] These are: 1) nothing should be done at a higher level that can be done well or better at a lower level; 2) a community of a higher order should not interfere in the internal life and community of a lower order; 3) powers should be assigned on the basis of subsidiarity—the principle which calls for assigning powers, to the extent possible, to governments that are closest to the people. According to Deem, there are three basic elements of the subsidiarity principle. These are decentralism, non-absorption, and support.[228]

The Swiss Constitution expressly provides for the subsidiarity principle in a separate provision with an explicit caption.[229] In support of this, the principle of dividing powers and responsibilities is also stipulated. It is stated that the Confederation only undertakes tasks that the Cantons are unable to perform or which require uniform regulation by the

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[223] Lehning, Percy, (ed.), *Theories of Secession*, London and New York,2005, p.45

[224] Vischer, Robert K., "Subsidiarity as a Principle of Governance: Beyond Devolution", *Indiana Law Review*, Vol. 35:103, p.4

[225] Froomkin, A. Michael, " Of Governments and Governance", *Berkeley Technology Law Journal*, Vol. 14:617, 1999

[226] Gawłowski, Robert, et al, Subsidiarity *Principle—Its Realization in Self-Government in Lithuania and Poland,* Adm. Sci. 2020, 10, 14; doi:10.3390/admsci10010014, www.mdpi.com/journal/admsci

[227] Breton, supra note at 206

[228] Deem, Jacob, "*Rethinking Decentralization: Mapping the Meaning of Subsidiarity in Federal Political Culture,* McGill-Queen's University Press, Montreal & Kingston, 2023, P.53

[229] Art.5 of the Swiss Constitution states that the principle of subsidiarity must be observed in the allocation and performance of state tasks.

Confederation.[230] The Constitution explicitly introduces the principle of subsidiarity and insists on its importance to limit or slow down the process of centralization.[231] In addition, in the US federal experience, there is an assertion that subsidiarity is portrayed as a component of the Tenth Amendment, whereby the centralization or federalization of government functions is disfavoured.[232]

Although the subsidiarity principle is not explicitly mentioned under the Ethiopian Constitution, Ghebrehiwet has made an attempt to pin down some provisions which incorporate the principle which is impliedly used to allocate the powers and functions between the federal government and the states.[233] In view of that, the popular sovereignty principle (Art.8), the transfer of power to the lowest unit of administration (Art.50(4)), the locus of residual powers (Art.52(1)), and democratic principles and self-rule right (Art.88(1)) are some instances of the subsidiarity principle which are implicitly provided in the Constitution.

3.2.1.2.3. Interdependence

Although powers and responsibilities are divided between tiers of government, they cannot be accomplished without interdependent relationships of the governments. This principle is required more in a dual federal design than that of the integrated one that is already built in a cooperative system. To this effect, South African cooperative government and German interlocking system could be mentioned as an instance.[234]

In addition, even though powers and responsibilities are divided among various tiers of government, the practice may not go smoothly. In this regard, Saunders describes the practical complexity and the need for the involvement of all orders of government in areas related to natural resources, health, and education from among others. In view of this, natural

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[230] Art.43a of the Swiss Constitution

[231] Besler, Eva M., "Concurrent Powers as Doors to Legislative Innovation, Conditional Powers as Gates to the Blind Alley: Some Swiss Illustrations", *in* Steytler, Nico (ed.), *Concurrent Powers in Federal Systems: Meaning, Making, Managing*, Brill Nijhoff, Leiden: Boston, 2017, p.53

[232] Vischer, supra note at 217, p.4

[233] Ghebrehiwet Tesfai Baraki, The Practice of Fiscal Federalism in Ethiopia: A Critical Assessment 1991-2012 An Institutional Approach, Doctoral Thesis Presented to the Faculty of Economics and Social Science at the University of Fribourg (Switzerland), in fulfilment of the requirements for the degree of Doctor of Economic and Social Sciences, 2015, p.171

[234] Alber, Elisabeth and de Visser, Jaap, "Distribution of Competences and Accommodation of Minorities", *in* Bühler, Hanns et al (eds.), *Federalism and Conflict Management,* International Munich Federalism Days 2017, p.30

resources (oil, gas, timber) can be developed by the constituent unit in which the resources are found, but distribution and export may require support from the central level of government; education is primarily a local service, but a central government may have a legitimate interest in raising the skill levels of the people as a whole. Health can also be seen as a local issue, but the cost of providing hospitals and doctors may demand national planning to achieve economies of scale. These and a host of similar issues show that co-ordination of some kind will always be necessary between the centre and the constituent units, and between the constituent units themselves, whatever form the division of powers takes.[235]

3.2.1.2.4. Democracy argument

A democracy criterion holds that power distribution should maximize the ability of citizens to vote for the kinds and levels of public goods they want, bearing both the benefits and costs of their choices.[236] The democracy argument is closely linked with the subsidiarity principle which upholds Abraham Lincoln's idea of "government for the people, of the people and by the people “in which the distribution of powers serves the purpose of taking decisions as closest as possible to the citizens.[237] While there are a lot of similarities between the two tenets, the difference pinned down by Alber and Visser is that the democracy argument enhances bringing governance down to the people; and the subsidiarity principle on the other hand brings the authority down to the interest group so that they could solve their problems.[238] In either case, it is argued that transferring powers to the lower order of government allows for accommodating diversities and minorities, responding to the different needs of the state's constituent units adequately which in other way encourages the unity in diversity argument.[239]

Saunders makes an attempt to establish the correlation between the two principles as the duo is indistinguishable at times. In her view, according to the subsidiarity principle, powers should be assigned to the lowest level of government at which they can effectively be exercised so that the process of governing takes place as closely as possible to the people

[235] Saunders, Cheryl, Options for Decentralizing Power: Federalism to Decentralization, p.14
[236] Kincaid, supra note at 11, p. 47
[237] Alber and Visser, supra note at 234, p.30
[238] Alber and Visser, ibid
[239] Ibid

affected by it, in the interest of responsive and effective decision-making. Responsive and effective decisions, in turn, foster democracy and attract public engagement and support.[240]

In the meantime, it is noteworthy to extend the democracy argument to the some sections of society whose interests should be considered within the task of the distribution of powers from the perspective of social justice. As Kincaid expounds the social justice view in the division of powers, federalism is concerned simultaneously with the diffusion of political power in the name of liberty and its concentration on behalf of unity or energetic government which should embrace women, LGBTQ people, and other historically marginalized groups.[241] Accordingly, it is worth posing a question as to how a particular distribution of powers would advantage or disadvantage such groups. This is a pertinent question as there are reasonable grounds of fear, for instance, assigning family-law powers to traditionalistic constituent governments can foster women's oppression.

3.2.1.2.5. Efficiency argument

As the doctrine of the distribution of powers and functions is the centre-stage of decentralization, especially when required for development purposes such as organized by some development agencies, including the World Bank, the question 'who does what' should be forethought painstakingly. With respect to this concern, Bosire has conducted an extensive study on the Kenyan experience. The gist of his study is that the World Bank was so cautious about how to design the allocation of the functions and responsibilities for the effective operation of the devolved governance under the New Constitution because state experience with decentralisation reveals that poorly allocated functions may lead to a fiscal crisis, even the collapse of a country's financial system. Accordingly, he asserts that functions should be allocated optimally, and following this principle, the World Bank lists functions that should ideally be performed by the centre and those that should be decentralised.[242]

Ultimately, the assignment of powers in a federation and the optimal policies undertaken by each level of government depend on the same efficiency and equity considerations that determine the rationale for government intervention in the first place.[243]

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[240] Saunders, Cheryl, *The Division of Powers in Federations, Constitution* Brief, IDEA, August 2019, p.2
[241] Kincaid, supra note at 11, p. 47
[242] Bosire, supra note at 191, p.26
[243] Boadway, Robin and Shah, Anwar, *Fiscal Federalism: Principles and Practice of Multilevel Governance,* Cambridge University Press, 2009 p.29

3.2.1.2.6. Finance-follows-function

The principle "finance-follows-function" reminds us the fact that powers and responsibilities should not be assigned in the vacuum as a result of which the financial capacity of the specific unit of government must be taken into consideration. Without this principle, the order of government that is in charge of a certain power and function may face various troubles in the proper enforcement of its duties. Sequencing of assignment of powers and functions alongside revenues and expenditures has got its own techniques and forms. First, the constitutional and legal mandates of each level of government should be clearly identified. Then, the assignment of expenditure responsibility should come which is attended by the assignment of revenue responsibility.[244] In view of Bahl, this is an important rule for two reasons. The first is that the central government must establish expenditure needs for each level of government before tackling the question of revenue assignment, and the second is that the economically efficient assignment of revenues requires knowledge of expenditure assignment.[245]

Powers and responsibilities assigned to each level of government are necessarily and inherently linked with the funds required for the exercise and performance thereof. While there is no uniformity as regards the allocation of revenues among the tiers of government, the scenario may be little fund, underfund, proportional fund or unfunded mandate at all. In this regard, Kincaid remarks that in some federal countries, the national government may require the constituent governments to perform certain functions and provide certain services without providing any funds or only insufficient funds to carry out those functions because underfunded mandates and unfunded mandates can be a way for the national government to make policy without enduring the pain of raising taxes to pay for it. Instead, the costs are passed on to the constituent governments.[246]

Closely related to the efficiency argument, Kincaid's cost-benefit internalization or decentralization theorem and fiscal equivalence is taken to be a principle which guides the division of powers between the federal government and constituent units. In light of this principle, thus:

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[244] Bahl, Roy, *Implementation Rules For Fiscal Decentralization*, International Studies Program School of Policy Studies, Georgia State University, Atlanta, Georgia, January 1999, p.7
[245] Ibid
[246] Kincaid, supra at 30, p.18

> *"Constituent governments may be best assigned powers for which the costs and benefits of exercising those powers can be contained within constituent boundaries. Exercises of powers that generate negative externalities or spill overs (e.g., air pollution), positive externalities (e.g., poverty alleviation), or free riders (who benefit from services they do not pay for) may be better assigned to the federation government, which can more nearly internalize the costs and benefits of legislating on such matters as pollution and welfare redistribution. Federation provision of such services can also foster more equity among citizens living in different constituent jurisdictions. A challenge of cost–benefit internalization is that, in principle, it requires a different geographic jurisdiction for virtually every public service and, thus, numerous overlapping jurisdictions. A related criterion is administrative costs. Are the administrative costs efficient and roughly equivalent to a power assignment, or is more or less centralized administration more or less efficient and cost-effective? A corollary is whether an order of government has the administrative capacity to execute a power that might be assigned to it.*[247]

3.2.1.3. Factors

Closely associated with the principles that are used to guide the allocation of powers and functions are the factors that can affect the distribution of powers between various tiers of government. Distributing powers affects, and is affected by, culture and values as a result of which understanding federalism requires understanding the nature and purposes of distributing powers among multiple governments.[248] Tracing back to the inherent essence of federalism that being united for common affairs and remain separate for individual matters under one polity calls for an appropriate formula of allocation of authority between the federal government and the states. This has expressed itself in the design of federations by the distribution of powers between those assigned to the federal government for the purposes shared in common and those assigned to the regional units of government for the purposes related to the expression of regional identity.[249]

To this end, Watts points out some factors that affect and determine how authority should be constitutionally allocated. Accordingly, the allocation is influenced and determined by geographical, historical, economic, ecological, security, linguistic, cultural, intellectual, demographic and international factors. In this regard, his argument thus goes the more the degree of homogeneity within a society the greater the powers that have been allocated to the federal government and the more the degree of diversity the greater the powers that have been assigned to the constituent units of government.

[247] Kincaid, supra note at 11, p. 46
[248] Kincaid, id, p. 51

[249] Watts, supra note at 8, p.83

The process by which federations are established may also affect the character of the distribution of powers. In light of this view, the way powers and responsibilities are allocated in aggregated and devolved federations differs. According to Watts, then, in the former case, the emphasis has usually been upon specifying a limited set of exclusive and concurrent federal powers with the residual (usually unspecified) powers remaining with the constituent units.[250] For instance, the US, Switzerland, and Australia may be exemplified in this case. In devolved systems, however, the powers of regional units have been specified and the residual authority has remained with the federal government, Belgium and Spain being examples. The third model is the combination of the two methods in which the federations have listed specifically exclusive federal, exclusive provincial and concurrent powers with the residual authority assigned to the federal government which could be illustrated by Canada and India.

Periodization of the constitution is the other factor that affects the mode of distribution of powers. In Watts' assertion, the eighteenth-and nineteenth-century constitutions of the US, Switzerland and Canada distributed powers in fairly general terms, while the newer federal constitutions of the latter half of the twentieth or early twenty-first centuries have often included minutely detailed lists of powers and extensive provisions for intergovernmental institutions and processes. Moreover, the distribution of powers is affected by the character of the legislative and executive institutions which may be reflected in presidential-congressional in form (as in the United States, the Latin American federations and some others) or essentially parliamentary in form (as in most of the other federations) affects the diffused or fused way in which the assigned legislative powers are handled within each level of government and therefore the character of interactions between governments.

The crude assumptions used to divide powers between central government and constituent units are the nature and significance of the matters; whether national and common on one hand, and regional and local, on the other.[251] However, according to Assefa, this method of dividing powers turns to be a vague expression.[252] Bosire also shares the national-regional divide of the character of the specific power to be divided between the centre and the states. He argues that the guiding principle in the allocation of functions is that a function which is national in nature and cuts across decentralised units is best performed by the centre due to

[250] Watts, ibid
[251] Davis, Rufus, "The "Federal Principle" Reconsidered", *in* Kincaid, John (ed.), *Federalism*, Vol. I, *Historical and Theoretical Foundations of Federalism*, Sage Library of Political Science, Pp.293-317
[252] Assefa, supra note at 4, p.257

the economies of scale attached to such an approach.[253] Reinforcing this argument, Kincaid also holds that economy of scale as a criterion of the distribution of powers assumes that powers with large economies of scale (e.g., defense) may be best allocated to the federation, whereas those with small economies of scale (e.g., primary education) may be best assigned to regional or local governments.[254]

Although it may be difficult to clearly identify what constitutes a national and regional/local matter, the whole idea here is that the character of a specific subject matter is a determinant factor to divide power along a federal, regional or local pattern. In order to figure out which level of government is conferred with an exclusive legislative power over a certain matter is a point worthy of elucidation. For instance, the power which covers the entire territory of the federation and applies equally to all member states and citizens usually falls under the exclusive jurisdiction of the federal government.[255] On the opposite side, if a certain matter characterizes a regional, local or private feature, the assumption goes the states have an exclusive legislative power. This is overtly inbuilt in the Constitution Act of Canada.[256] Kincaid designates such concepts as the scope and status of the specific policy field or subject matter as factors that affect the distribution of powers between different levels of government. Regarding scope, in his view, as Madison noted in Federalist 10, powers affecting 'the great and aggregate interests' of the whole country can be assigned to the federation government while 'the local and particular' are reserved 'to the state legislatures'. Matters of scope, however, may require compromise to accommodate cultural, political, or economic status demands of constituent polities.[257]

Saunders also maintains that the particular powers that a constitution assigns to each level of government in a federation vary and the choice depends, for example, on the local context, local preferences, the overall design of the federation, and the purpose of structuring the state as a federation. For example, in her illustration, she holds that in Australia, general criminal law is a state power, while in Canada and Malaysia it lies with the union. In the United States, marriage and divorce are state powers, while in Australia these are union-level

[253] Bosire, supra note at 191, p.27
[254] Kincaid, supra note at 11, p. 46

[255] B.M Sharma and L.P. Choudhry, *Federal Polity* (London, Asia Publishing House, 1967, p.394), as referenced by Assefa (p.257)
[256] Art.92(16) states that the legislature of the province shall have an exclusive legislative jurisdiction over all matters of a merely local or private nature in the province.
[257] Kincaid, supra note at 11, p. 46

matters. In Germany, most legislative powers lie with the union, but the federation is organized in a way that enables the states and regions to exercise union power during the legislative process. In Germany, the states also have the constitutional right to administer most federal legislation. In Canada, the regions have power over 'civil law', which enables Quebec to retain its civil law legal system in what otherwise is a common law country.[258] It is because of this that Farooq maintains that there is no uniform method for the distribution of powers as a result of which the general and the basic principle is that matters of local importance are given to the provinces and that of national importance to the federal government.[259]

Another matter is whether to distribute power symmetrically, whereby all the constituent governments have equal powers and are on an equal footing with each other and the federation government, or asymmetrically, whereby constituent governments have unequal powers and footings.[260] The symmetry-asymmetry divide of a federal system as a factor of the distribution of powers assumes that powers are equally divided in symmetric federations, and unequally or preferentially in asymmetrical federal systems. As explained in the preceding chapter, majority of federal systems fall under the asymmetric forms of federalism which may exist in *de facto* (political practice) or *de jure* (constitutional recognition).

Furthermore, the distribution of powers could be affected by political and cultural factors influence. From the political point of view, if national unity is an imperative, more powers might be assigned to the federation government than constituent governments.[261] In addition, while preferences for a planned economy favour more federation powers, the preferences of a market economy will limit federation and favours constituent-government powers. Likewise, in post-conflict federations, mistrust might limit federation powers and make the allocation of law enforcement and security powers contentious. In multinational federations, certain constituent polities demand substantial authority over such matters as culture, religion, education, and language.[262]

[258] Saunders, supra note at 240, p.2
[259] Umar Farooq, Characteristics of Federalism
[260] Kincaid, supra note at 11, p. 47
[261] Kincaid, ibid
[262] Kincaid, supra note at 11, p. 47

3.2.2. Aspects of and approaches to the distribution of powers

Once it is assumed that the distribution of powers is inbuilt in some principles, rationales, and factors, it is worthwhile to enunciate what aspect of powers should be divided between levels of government. What is more, it is equally important to explain what approaches and forms are employed by different federal systems as to how such powers are divided. Thus, the two major themes will be dealt with separately as follows under different headings.

3.2.2.1. Aspects of distribution of powers: A Conspectus

It is repeatedly described in this thesis that federalism is distinguished by dividing powers between different tiers of government. The next question that will be the subject of discussion is what aspect of powers and responsibilities is divided. The readily available response to this question is thus all the four spheres of powers—legislative, executive, judicial and fiscal—would be allocated between various levels of government. In support of this assertion, Kincaid holds that three types of powers require distribution: legislative, executive (including administrative), and judicial, within which the legislative and executive fields lie fiscal, allocative (or distributive), regulatory, and redistributive powers.[263] Whatever the magnitude and forms, what is apparently true in any federal system is this pattern of division of authority. As enunciated in greater depth in the previous chapter, the way these spheres of powers and responsibilities would be allotted may follow either a dual or integrative or the blend of the two major methods.

Different federal and quasi-federal countries pursue different models of exercising the four aspects of powers that ranges between highly decentralized and highly centralized systems. In some federations, policy and legislative mandates are centralized with decentralized enforcement jurisdiction. In other cases, both the legislative and enforcement powers are dually designed whereby both the federal and state governments take part equally on the basis of the constitutional division of powers and nature of the specific subject matter.

3.2.2.2. Approaches

As there is no an ideal federation that can be taken as the best model or the worst model, one could safely assert that there may be as many approaches as the number of federal systems as

[263] Kincaid, id, p. 45

regards the forms of the distribution of powers. In other words, there is no universally agreed approach to the division of powers which suits all federal systems and is influenced by the specific internal contexts of each. Scholars also have expounded the approaches in their own words yet in a much related manner. For example, Saunders suggests three approaches to the options of division of powers in federal systems.[264] One approach is to list the powers of the centre, leaving the rest to the constituent units. In this vein, a decision needs to be made about whether some or all of these powers are exclusive to the centre, or whether they are 'concurrent' powers, in the sense that they can also be exercised by the constituent units. A second approach is to provide two lists of (generally) exclusive powers, for the centre and the constituent units respectively. In light of this scheme, the core powers of each level of government have some protection from encroachment by the other. A third approach is to have three lists of powers, two of them identifying exclusive powers and the third comprising concurrent matters, exercisable by either the centre or the constituent units.

While this approach has been incorporated by constitutions of some federations and shared by many scholars, the Constitution of Nepal, in contrast, sets out a longer list approach to the distribution of powers. Hence, the approach follows the pattern that divides powers as exclusive federal,[265] exclusive state,[266] concurrent powers of the federal and state governments,[267] local level powers,[268] concurrent powers of the federal, state, and local level governments,[269] and the residual powers.[270] In a nutshell, there are about three forms of and approaches to the distribution of powers in federal systems. These are exclusive, concurrent, and residual powers. In what follows, a detailed explanation is provided for each approach and form of the distribution of powers.

3.2.2.2.1. Exclusive powers

Exclusive or explicit exclusive powers refer to those constitutionally allocated powers the federal government or the constituent units exercise in a particular policy area to the

[264] Saunders, supra note at 235, p.14
[265] Schedule 5
[266] Schedule 6
[267] Schedule 7
[268] Schedule 8
[269] Schedule 9
[270] Art.58 of the Nepalese Constitution grants the residual powers to the federation.

exclusion of the other order of government.[271] Explicit exclusive powers are those in relation to a list of subject matters in which either central government or the autonomous communities have the exclusive authority both to pass legislation and to execute or implement it, to the exclusion of the other order of government.[272] From this definition, it could be readily understood that the essence of the enumeration of the exclusive power is to keep out the other level of government from usurping such listed powers. The exclusive legislative jurisdiction may be enumerated to the federal government, to the constituent units, and/or to both as there are variations among federal systems as to how powers are distributed between the two or three levels of government. And this sort of assignment of authority, as described in the foregoing section, is assumed to be affected by various factors; guided by different principles; and necessitated by some rationales. Where exclusive powers are assigned to either one or both of the orders of government, some variations do exist. For example, in cases where the federal exclusive powers are constitutionally enumerated, either they are limited or broad in degree and content.

Accordingly, while the allocation of exclusive federal jurisdiction is relatively limited in the United States and Australia, with most federal powers being identified as shared or concurrent powers, in federations like Austria, Germany, India, Malaysia, Argentina, Brazil, Mexico, Nigeria, Russia and Ethiopia, the exclusive jurisdiction assigned to the federal legislature is more extensive, though the distribution of powers in these federations also includes large areas of concurrent jurisdiction.[273] With regard to the exclusive powers of the constituent units, in some federations, notably Switzerland, Canada, Belgium, India, Malaysia, South Africa and the United Arab Emirates, fields of exclusive jurisdiction of the constituent units are constitutionally defined, but in most other federations the exclusive legislative powers of the constituent units are left undefined as residual powers.[274]

Belser expounds the exclusive power of the federal government in relation to the Swiss federal experience. Hence, she argues that exclusive federal competences have an originally derogative effect on cantonal competences. Accordingly, the moment an exclusive

[271] Steytler, Nico, "The Currency of Concurrent Powers in Federal Systems", *in* Steytler, Nico (ed.), *Concurrent Powers in federal Systems: Meaning, Making, Managing,* Leiden; Boston: Brill Nijhoff, 2017, Series: Studies in Territorial and Cultural Diversity Governance; Volume 8, p.8

[272] Pi-Sunyer, Carles V. and Torrens, Mercè C., "De Facto Concurrency in Spain", *in* Steytler, Nico (ed.), *Concurrent Powers in Federal Systems: Meaning, Making, Managing*, Brill Nijhoff, Leiden: Boston, 2017, p.115
[273] Watts, supra note at 8, p. 87
[274] Watts, ibid

competence enters into force, all cantonal power in the field is extinguished and all existing cantonal laws are void.[275] As result, exclusive federal competences are rare because they risk creating legal voids between the point at which the exclusive competence is transferred to the Confederation (and cantonal law ceases to exist) and the point at which a federal law is adopted there is no law at all.

Any conflict between national and sub-national legislation in the realm of exclusive powers is resolved by determining whether one or the other order of government acted either consistently or inconsistently with the constitution as a result of which if one order of government has acted *ultra vires* the constitution, its legislation is invalid.[276] This proposition could conceptually be contrasted with the question of the supremacy clause which is the case in concurrency. As will be described in detail in chapter eight, thus, the resolution mechanisms of inconsistent laws made by the federal government and the constituent units are to be treated differently in the regimes of exclusive powers and concurrent powers.

3.2.2.2.2. Concurrent powers

Concurrency is the most important concept in the study of the division of powers in federal systems in general and that of the criminal matters in particular in Ethiopia and beyond. As Steytler argues, even federations which started with a dualist system have drifted to form an integrated system where concurrency is a dominant characteristic.[277] The theme of the criminal justice system, especially that of the legislative authority under the Ethiopian federal and constitutional architecture, being apparently a concurrent scheme, necessitates for the elucidation of the theories of concurrency in a rather wide and broad manner in this subsection. Consequently, it is useful to describe the meanings, significances, manifestations, classifications, and consequences of concurrency.

Concurrent powers are powers that are shared by the states and federal governments. This means that the states and federal governments can both pass laws that serve their purposes. The word “concurrent or concurrency” could be defined in a variety of ways yet connoting similar meanings. For example, it is defined by Black’s Law Dictionary as the quality or fact of being concurrent in jurisdiction; joint right or authority; operating at the same time; covering the same matters (concurrent interests); having authority on the same matters

[275] Belser, supra note at 231 p.58
[276] Steytler, supra note at 271, p.8
[277] Steytler, supra note at 111, p. 306

(concurrent jurisdiction).[278] We speak of concurrent powers, generally, when the federal government and constituent units may or do operate in the same policy fields.[279] In terms of scope, concurrency refers to practices where the term is explicitly used in constitution and captured in a list of 'concurrent powers', or merely by implication, and also covers the practice where the centre makes the laws and the constituent units implement them.[280] Moreover, the term 'concurrent powers' usually refers to explicit concurrent powers which are present when both the federal government and constituent units are competent to make laws with regard to the same list of subject matters, referred to as a list of concurrent (joint or common) competences.[281] In a nutshell, 'concurrency' refers to the situation in which both the central government and the constituent units or autonomous communities can simultaneously perform the same type of legislative and executive authority over the same matters and within the same territory.[282]

Concurrency is significant in the distribution of powers between the federal government and constituent units in many respects. Concurrent legislation is especially significant in, and common to, those federal systems that are based on the assumption not of the existence of separate, parallel spheres of government but rather of the constitutionally mandated interrelation between them, an assumption which is typical of the European approach to federalism.[283] In this regard, Palermo makes an attempt to create a blend between the shared rule and self-rule formula in making sense of concurrency based on Elazar's definition if federalism. He holds that the definition of federalism that Elazar famously summarised in the formula 'self-rule plus shared rule' points to the necessary existence of areas of coordination in the division of powers between levels of government, a relevant instance of which is concurrency in legislation.[284]

For that reason, there are some justifications that necessitate for the need of concurrency in the regime of the division of powers in federal systems. Although powers may be divided along exclusive and residual forms which bestow some authority in either the federal

[278] Garner, supra note at 150, p.879
[279] Steytler, supra note at 271, p.1

[280] Steytler, id, p.2
[281] Steytler, id, p.9
[282] Pi-Sunyer and Torrens, supra note at 272, p.113
[283] Palermo, Francesco, "What's wrong with Concurrency? Comparative Reflections Based on Constitutional Reforms in Germany and Italy", *in* Steytler, Nico (ed.), *Concurrent Powers in Federal Systems: Meaning, Making, Managing*, Brill Nijhoff, Leiden: Boston, 2017, p.70
[284] Palermo, ibid

government or constituent units based on the constitutional design, some fields require the involvement of both levels of government in similar or different aspects of exercising the power. A dualist federalism which aims at dividing the powers of each tier of government in an impermeable compartmentalization has become a myth for all practical purposes. As a result, the federal world looks very different from a model of 'dualist' or 'divided' federalism where each order of government exercises a set of exclusive powers.[285] Hence, the recognition of the inevitability of overlaps in many areas has led to extensive areas of concurrent legislative jurisdictions in some federal systems.[286] It is for this reason that Kincaid maintains that concurrent powers were invented as a practical solution to a practical problem. The later transformation of those powers was also deemed a practical solution to practical problems in which dualistic autonomous concurrent powers were judged to be anachronistic and obstructive of expansive federal policy-making believed necessary to solve modern urban-industrial problems and advance human rights.[287]

As discussed in the preceding section, interdependence is one among the principles of the distribution of powers. In this sense, some policy fields require different levels of government with similar or different competencies for accomplishment. As a result, some posit that in many, if not most, federal systems, key functional areas of governance, such as economic development and social policy, are subject to the concurrent jurisdiction of the federal government and constituent units.[288] In this regard, it is argued that the prevalence of concurrent jurisdictions in most federal systems is usually attributed to the complexity and cross-cutting nature of social problems that the different orders of government face and the difficulty of squeezing policy areas into watertight compartments of exclusive lists.[289] From the practical point of view as well, it is difficult to maintain such an exclusive watertight compartments as political forces shift power distributions over time and distance has grown between the constitutional distribution of powers and the operational distribution due to rising centralization in most federations and to more interdependent than independent exercises of specific powers.[290]

[285] Steytler, supra note at 271, p.1
[286] Watts, supra note at 8, p.87
[287] John Kincaid, supra note at 161, p.32
[288] Steytler, supra note at 271, p.1

[289] Steytler, id, p.3
[290] Kincaid, supra note at 11,, p. 49

Inescapable overlaps and recurrent interactions between the different levels of government followed by lack of a neat demarcation of mandates results in the evolution of concurrency. In this regard, Assefa and Zemelak trace the rise of the concurrent powers back to the fact that the dividing lines between the competences of federal and state governments are never clear, even though many federal constitutions attempt to divide functional competences and powers neatly between the two levels of government.[291] As a result, they argue, there often remain deliberate and/or unintended intersections in the powers and functions of the two levels of government, which are referred to as concurrent functions and powers, the latter represent the meeting point of the two levels of government that otherwise exercise exclusive powers.

Dziedzic and Saunders expound on the logics behind concurrency suggesting that whether express or implied, concurrency is a feature of the scheme for the organisation of legislative power in most federations for a variety of reasons.[292] In this vein, they contend that concurrency can be 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. In this connection, there are some advantages that could potentially be generated from concurrency. For example, according to Watts, concurrency provides an element of flexibility in the distribution of powers, enabling the federal government to postpone the exercise of potential authority in a particular field until it becomes a matter of federal importance, in which the constituent governments can be left in the meantime to pursue their own initiatives.[293] In addition, the concurrent jurisdiction helps the federal legislature to legislate federation-wide standards while giving regional governments a room to legislate on the details and to deliver the services in a manner sensitive to local circumstances. Concurrency is also useful for avoiding the necessity of enumerating complicated minute subdivisions of individual functions to be assigned exclusively to one area of government or the other, and reduce the likelihood that such minute subdivisions will over time become obsolete in changing circumstances.[294]

Concurrency also enables the federal government and the constituent units to exercise their respective powers depending on whether the matter remains of regional or of national

[291] Assefa and Zemelak, supra note at 92, p.241
[292] Dziedzic and Saunders, supra note at 119, p.13
[293] Watts, supra note at 8, p.88
[294] Watts, supra note at 8, p.88

importance.[295] Belser also maintains that concurrency is helpful in promoting legislative innovation and easing flexible implementation of laws.[296] In her view, with executive concurrencies being the rule in Switzerland, cantons have a large impact on the way shared rules are enforced in their territory, because the sub-national units are the ones bound to implement federal laws as well as to complement them by cantonal legislation (and, at least partially, to carry the costs of implementation), as they are inescapable and powerful actors in the field of federal law.[297]

Another point worth noting concerning concurrency is how it could be manifested and classified in the sphere of the distribution of powers. There is no uniform approach to the classification and manifestation of concurrency in federal systems as a result of which there are as many variants as the federal systems do exist. Hence, different federal systems adopt concurrent powers in different ways. Some of them adopt expressly by mentioning and listing the concurrent powers, whereas other federal systems provide for concurrency implicitly in their constitutions. Broadly, Steytler classifies the concurrency of legislative authority into implicit, explicit, and shared.[298] For example, concurrency as found in the constitutions of the United States and Australia entails the enumeration of federal competences without expressly excluding them from the states' plenary powers, commonly designated as implicit concurrent powers.[299] The federal government is impliedly allowed to make laws over matters and powers reserved for the states. In such cases, where the federal government chooses to enter the field, state authority over the field is pre-empted (displaced).

Accordingly, there are two possibilities as to how the states could exercise their powers: either a state's authority in the concurrent areas is contingent on the absence of federal law or, if there is federal law, on such law permitting state action in the field. In any case, in theory, a federal law in the concurrent field does not invalidate a pre-existing state law; rather the latter becomes inoperative only for the duration of the federal government's entry into

[295] Assefa, supra note at 4, p.278
[296] Belser, supra note at 231, p.60
[297] Belser, id, p.62, she argues that Cantons have such a strong interest in the design of federal rules and the prevention of costly, ineffective or contradictory rules that they are increasingly seeking to make a direct impact on law-making processes at the federal level. The various inter-cantonal conferences have been united recently in a prestigious building in the capital, the House of Cantons, from where they influence federal law-making. Inter-cantonal conferences, most notably the conference of the cantonal governments, have started to play an important role in the capital to the extent that some have begun interpreting their actions as the emergence of a third chamber.
[298] Steytler, supra note at 111, p.304
[299] Steytler, supra note at 271, p.2, 8

the field.[300] The magnitude of the implicit form of concurrency depends on the scope that judicial interpretation gives to federal powers upon controversies. In light of this proposition, if the wide and broad interpretation is opted by the [constitutional] court, the scope of the state matters, commonly residual powers, will be watered down. Implicit concurrency is thus as wide as the courts will interpret federal powers—at the widest interpretation, almost nothing is left of the states' exclusive domain which is the most recurring themes in many federations.[301]

Explicit concurrent legislative powers are listed or enumerated concurrencies in the constitutions. For instance, Canada and India are best examples in this respect. It is argued that listing concurrent powers does not necessarily give two orders of government the same legislative authority over policy areas as a result of which distinctions can be drawn between 'pure' concurrency, conditional concurrency, complementary concurrency, and a catch-all group of 'other concurrency' manifestations.[302] These forms of concurrencies under the explicit manifestation require further clarification. Such explicit concurrent powers are identified on different grounds: for one thing, one of the two levels of government, often the states, is allowed to exercise this power until the federal government steps in to legislate on such functions; and States continue to regulate aspects of concurrent functions that have not been assumed by the federal government.[303] To this effect, listed concurrent functions and powers provide an element of flexibility in the distribution of power, enabling the federal government to postpone exercising authority in a particular field until it becomes a matter of federal importance. On the other hand, concurrencies enable both governments to exercise their respective powers depending on whether the matter is of state or national importance.[304]

'Pure' concurrency occurs when both orders of government have full authority (both legislative and executive) over the same policy fields in the same geographical area.[305] Pure or complete concurrency, contrary to the conditional or complementary one, refers to the mode of the distribution of powers where both orders of government have the same

[300] Steytler, supra note at 111, p.304
[301] Steytler, id, p.305
[302] Steytler, id, p.307
[303] Assefa and Zemelak, supra note at 92, p.243
[304] Assefa and Zemelka, id, p.244
[305] Steytler, supra note at 111, p.307

legislative and administrative powers over the same subject matters, at the same time and in the same territory.[306]

Conditional concurrent powers refer to the circumstance whereby conditions are set for the federal government to exercise its power over matters and powers concurrently granted to it and constituent units. As a corrective to a ‘pure’ concurrent list with no limits for federal intrusion, a conditional type of concurrency imposes restrictions on the federal intervention: only if certain conditions are met is the federal government permitted to legislate in the common policy fields.[307] The scope of the federal government’s access is, thus, premised on how difficult or easy it is to meet those conditions and on whether strict compliance with the conditions can be, and is, enforced by the courts. The typical example in this case is the 2006 German federal reforms which divided federal concurrency powers into three categories: ‘need’, ‘essential’ and derogable’ competences. In terms of the ‘need’ competences, the federal government may legislate ‘if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interests’ (Art. 72(2) Basic Law).

Complementary powers or framework concurrency is the second type of limitation on a federal government’s entry into the concurrent policy field in that while the federal law may go no further than providing a framework, general principles, or minimum norms and standards, the constituent units must then complement the framework legislation with detailed legislation of their own to fit the circumstances of their respective regions.[308] As far as the framework concurrencies are concerned, in some constitutions, distinctions are drawn between the extents to which each order of government may operate in a common functional area. In this sense, the federal government may be limited to passing framework legislation only, with the constituent units being allowed to fill in the details. On the other hand, constituent units in turn may be restricted to the implementation of national legislation in common functional areas.[309] The framework concurrency may serve different purposes in different federal systems. For example, it may be used as harmonization of legislation by setting general principles, guidelines or minimum standards. Moreover, concurrency in the form of federal framework legislation and policy is an interesting compromise that requires significant decentralization of policy-making authority without sacrificing uniformity where

[306] Steytler, supra note at 271, p.9
[307] Steytler, supra note at 111, p.308
[308] Steytler, id, p.310
[309] Steytler, supa note at 271, P.2

it is needed.[310] Another way of expressing framework legislation is to restrict interventions by the centre to 'national policy' in the common functional areas.[311] A recurring critique of framework legislation is that it is seldom limited to general principles, norms and standards but routinely covers the field in totality.[312] In addition to the abovementioned forms of explicit concurrencies, there are a number of other types which could be designated variously.

The other form of concurrency is a manifestation of concurrent powers with split authority whereby legislative authority falls under the jurisdiction of the federal government and executive authority under that of the constituent units.[313] This is a common trend in administrative or integrated federalism in which the central and sub-national governments' authority with regard to a concurrent policy field may be split between legislative and executive authority. The federal government has the legislative authority while the sub-national governments have the authority to implement federal legislation.[314] There are two major versions of the legislative-executive split form of concurrency. These are narrow and broad versions. In the narrow version, the constituent units are entitled to implement federal legislation only in the explicitly listed policy fields of concurrency. Examples of the narrow version of this type of executive federalism are India and South Africa: where the constituent units' right to implement the Union or national law is limited to those laws in the concurrent functional areas. In the light of central legislative dominance in these areas, the devolution of administrative authority is seen as a sop thrown to the regions because of their *de facto* denuded legislative authority.[315] In the broader version, on the other hand, there is no link between concurrent policy fields in the constituent unit's implementation role. The latter is tasked with implementing most federal legislation, even in the area of exclusive federal jurisdiction, Switzerland and Germany being examples of this form of executive federalism.[316] In light of the broader version of the legislative-executive split concurrency, it is possible to observe from the federal and constitutional design of these two federal countries that in most cases, while the federal government is empowered to make laws, the constituent

[310] Assefa and Zemelak, supra note 92, p.244
[311] Steytler, supra note at 111, p.311
[312] Ibid
[313] Pi-Sunyer and Torrens, supra note at 272, p.116
[314] Steytler, supra note 271, p.10
[315] Steytler, supra note at 111, p.318
[316] Steytler, supra note at 111, p.318

units are authorized to implement such laws in accordance with their regional and local contexts without, however, contradicting the federal legislation.

However, the central government has developed *de facto* pure concurrency by a variety of mechanisms in some federal systems like Spain. First, it extended the legislative scope of its 'framework powers' into detailed legislation and implemented such legislation, as it considers these executive powers a part of the meaning of 'framework'. Secondly, it applied the principles of supra-territoriality and the 'national interest' to some public projects as a means to ascribe them to the powers of central government when *a priori* they would have fallen under the jurisdiction of the autonomous communities.[317] Instead of limiting its legislative power to the establishment of principles, general rules and minimum standards, the central government issues detailed norms which are often extraordinarily specific by extending its power far and beyond its real objective. Even more importantly, regarding the subject matters on which the framework powers are exerted, widespread overlap occurs because quite frequently these norms end up regulating all or most of the field covered by the general subject matter, up to and including the most insignificant sub-matters.[318] In the light of this functional and material expansion of the framework legislation, the autonomous communities have only two choices: either to give up exercising their power or to duplicate the central government legislation and thereby pave the way for the concurrency of powers.[319] From the Spanish experience, thus, one could easily fathom that the framework concurrency has been turned into pure or complete concurrency where the central government makes laws and executes same with its institutions and consequent budgets in the territories of the constituent units. In such a trend, it may be a bit difficult to draw distinctions between a unitary and federal or quasi-federal state.

There is also a *de facto* form of concurrency which could be manifested in three facets, according to Steytler.[320] The first and normative form of *de facto* concurrency manifests itself where the federal government has strayed into the constituent units' constitutionally allocated exclusive space. The source of such a concurrent power of the federal government may emanate from the decisions handed down by the constitutional court despite the decision might go against the constitution. As a final arbiter of constitutional litigation, the court may render a decision that may disrupt the distribution of powers already set out by the

[317] Pi-Sunyer and Torrens, supra note at 272, p.118
[318] Pi-Sunyer and Torrens, id, p.119
[319] Pi-Sunyer and Torrens, id, p.119
[320] Steytler, supra note 271, p.10

constitution in the guise of reviewing or interpreting the constitution. In such a case, the decision would become binding not because it is constitutional but because it was passed by the ultimate arbiter that it does not have any further recourse thereafter. The unconstitutional usurpation of power acted by the federal government would be validated by the constitutional court.

The second form of concurrency refers to the situation where the federal government's actions hover on the brink of legality. There is no judicial sanction of the federal intrusion in the exclusive regional space, but such forays are politically tolerated and not challenged in court. Such a form of *de facto* concurrency would be maintained just because it has not been challenged before the constitutional court followed by a political forbearance. The constituent units may opt out to challenge the federal intrusion into their powers and perhaps the *vice versa* for different reasons when their respective constitutional power is violated implicitly or explicitly. At theoretical and formal level, it could be discerned with the rule of thumb that such a trend is an unconstitutional practice. Mostly, the federal government may perpetuate encroaching upon the state powers under the silence of the latter unless challenged before the [constitutional] court.

The third form is a diametrical opposite of the first and second form of concurrency. It is clearly an illegal and unconstitutional conduct by the federal government. Despite what the law and the courts say, the federal government has disregarded the formal rules regarding the distribution of competences. The effect in all three facets is that the federal government's intrusion in the exclusive sub-national domain has rendered those powers *de facto* concurrent.[321] As a whole, *de facto* concurrency in all its forms and manifestations is an unconstitutional practice perpetuated by the federal government in violation of the constitutional principles of the distribution of powers.

Furthermore, Dowling classifies concurrent powers into as many as ten categories which are closely intertwined with suggested meanings on concurrency related with the Eighteenth Amendment.[322] These are joint power, divided power, action with different areas, substitute action, more drastic displacing less drastic action, concurrent action, united action, united administrative action, separate and independent action-Congressional supremacy, and

[321] Steytler, supra note at 271, p.10

[322] Dowling, Noel T., "Concurrent Power under the Eighteenth Amendment", *Minnesota Law Review*, 2014, p.5, available at https://scholarship.law.umn.edu/mlr/2014

separate and independent action. Although these classificatory terms of concurrency are many in number, there are lots of closeness and similarities in essence among them.

Accordingly, joint power under the Eighteenth Amendment assumes that the effectiveness of the Congressional legislation shall be subject to the approval and sanction of the several states. In other words, the states shall approve the legislation made by the Congress for effectiveness of the legislation. Divided power occurs when the power to enforce the amendment is divided between Congress and the several states along the lines which separate and distinguish foreign and interstate commerce from intrastate affairs. Action within different areas as a type of concurrency shows that the concurrent powers are to be exerted in different areas (called "historical fields of jurisdiction"), and consequently cannot conflict each with the other. In substitute action, an equal power is given to Congress and the states, not, however, to be concurrently exercised, but separately exercised, the inactivity of one to be supplied by the activity of the other. More drastic displacing less drastic action refers to a circumstance where Congress and the states may both legislate under the amendment and whatever legislation, congressional or state, "is the most prohibitive, subserves best" and "displaces less restrictive legislation and becomes paramount." In the concurrent action aspect, it is assumed that the concurrent action of Congress and the several states is necessary to enforce the prohibition, and that in the absence of such concurrent action no enforcing legislation can exist; congressional legislation not effective unless concurred in by state, and *vice versa*.

United action as a form of concurrency refers to a situation where there must be a united action between Congress and the states, or at any rate concordant and harmonious action. United administrative action, on the other hand, shows that the national and state administrative agencies are united in giving effect to the amendment and the legislation of Congress enacted to make it completely operative; in other words, concurrent power to enforce the amendment as the amendment is "defined and sanctioned" by Congress. Separate and Independent Action-Congressional Supremacy is a kind of concurrency in which the concurrent action is not necessary, but Congress and the states may act separately and independently, the congressional action to be supreme over the state action in the event of conflict between the two. In Separate and Independent Action concurrency, the concurrent power may be exerted by Congress or the states independently of each other, the validity of the action of one to be tested under the amendment without regard to the action of the other.

Shared or fragmented competences may also be classified under concurrent powers. This type of concurrency occurs where exclusive powers are allocated to two or more orders of government in the same broad policy fields producing overlaps as it is virtually impossible to define watertight compartments.[323] In a nutshell, with regard to the typologies, forms, and manifestations of concurrent powers, there is a great deal of variants in different federal systems across jurisdictions and even in a constitution of a single federal system.

At this juncture, it is imperative to elucidate the consequences of concurrency from different perspectives. There are both positive and negative consequences that concurrency may produce. According to Steytler, the challenges posed by concurrency circle around four main concerns: facilitating centralization; political entanglement; conflict generation; and ineffective and inefficient governance.[324] From the outset, the first and paramount negative consequence that may spring from concurrency is centralization. It is held that the three distinct dimensions of 'concurrency'—doing something at the same place and time, doing so in agreement or jointly, and competing—capture the essence and problematic nature of concurrent powers in federal systems.[325] At the most basic level, two orders of government—the centre and the regions—are running together, side by side, in the same functional areas that gives priority to the former. Although the principle is that they should coordinate their respective activities towards the goal of cooperative governance, which is the handmaiden of concurrency, it is concurrency as competition that really speaks to practice: the running together is often a race characterized by conflict, with the central government most often the winner, having had the inside lane with superior tax resources, facing low constitutional hurdles, and finding pliant track judges when it steps outside its lane.[326] Consequently, concurrency is designated by some as a "creeping centralization".[327]

As Steytler contends, concurrency of powers, in whatever form, most often facilitates the centralization of power as a result of which exclusive regional powers are insignificant while big-ticket functions are subject to the concurrent jurisdiction of the central government.[328] This result is precisely what unitarists want: control stays at the centre. In this manner, it

[323] Steytler, supra note at 111, p.316
[324] Steytler, id, p.334
[325] Steytler, id, p.300
[326] Ibid
[327] Belser, supra note at 231, p.60
[328] Steytler, Nico, "Concurrency of Powers in Deeply Divided Countries: The Case of Yemen's Draft Constitution of 2015", *in* Steytler, Nico (ed.), *Concurrent Powers in Federal Systems: Meaning, Making, Managing*, Brill Nijhoff, Leiden: Boston, 2017, p. 297

appears to have gained a consensus among scholars that concurrency inexorably promotes centralization and unitary trends. To this end, Watts asserts that normally where concurrent jurisdiction is specified, the constitution has specified that in cases of conflict between federal law and unit law the federal law prevails as a result of which areas of concurrent jurisdiction are potentially areas where federal legislation may predominate.[329] The federal supremacy clause is an instance of centralization where the federal law takes precedence over the laws of the constituent units. In all forms of concurrency, in one way or another, the centre has largely taken over the areas delineated as concurrent powers.[330] Thus, concurrency, as it has frequently been observed, leads to an inevitable centralisation of power, given that federal governments are prone to occupy the common space.[331] In this connection, it is contended that in the case of framework legislation, the experience has been that of increased federal intrusion through detailed legislation. It has even been suggested that centralisation was indeed the very purpose of concurrent lists, as seen in South Africa and elsewhere in Africa.[332] It is in fact a problem in other countries which are both fully fledged federations and quasi-federal systems. Pi-Sunyer and Torrens hold that *de facto* concurrency occurs in Spain despite and beyond the formal provisions of the Spanish Constitution which resulted in the evolution of a unitary and centralised form.[333]

In concurrency, the use of the federal power has a derogative effect on cantons.[334] Most observers conclude that constitutional amendments transferring powers to the Confederation and the extensive use of concurrent and fragmentary powers in all their forms will lead to further centralisation as a result of which the cantonal self-rule is in retreat.[335] As Steytler rightly argues, concurrency is a practice that challenges classical concepts of federalism—the self-rule, shared-rule paradigm. What is more, concurrency not only poses challenges to the essential federal character of the federations concerned, but gives rise to significant political and practical challenges of governance.[336] The shared-rule component has focused largely on how constituent units participate in federal law-making, while the real practice of 'shared rule' comes to the fore when both orders of government share, in a broad sense, the same

[329] Watts, supra note at 8, p.88
[330] Dziedzic and Saunders, supra note at 119, p.31
[331] Steytler, supra note at 271, p.4
[332] Ibid
[333] Pi-Sunyer and Torrens, supra note at 272, p.113
[334] Belser, supra note at 231, p.58
[335] Belser, id, p.69
[336] Steytler, supra note at 111, p.333

policy fields the result of which is that the very notion of self-rule is increasingly diminished by the ever-expanding domain of federal governments.[337]

In US, the federal government has expanded the domain of concurrent powers by entering policy fields previously under exclusive state jurisdiction through conditional grants-in-aid, mandates, nationalisations of rights and criminal laws, and federal court actions. With these mechanisms, the federal government enters domains of power historically reserved to the states, thereby establishing an expansive statutory concurrency not necessarily envisioned in the original scheme of constitutional concurrency.[338] Consequently, dualistic autonomous concurrent powers have been reduced to dwarves while the domain of concurrency has ballooned as the federal government has employed legislation, grants, mandates, judicial actions and other tools to enter virtually all policy fields previously under exclusive state jurisdiction. The federal system, therefore, is now characterised by marbleised concurrency with high levels of intergovernmental bureaucratic interaction wherein state action in concurrent fields is increasingly based on federal permission rather than independent state sovereignty.[339] In relation to criminal justice, this practice gave rise to the evolution of the three schools of thoughts developed by the Supreme Court, the scholars, and *amici* curiae which will be discussed in the following chapter in detail.

In order to curb the highly expanding federal power in the name of concurrency, some principles may be devised as a safeguard to the self-rule right of the constituent units. For example, in Switzerland, concurrent federal power replaces cantonal power only at the time and to the extent the federal legislator effectively makes use of its power. In this vein, the cantons remain competent to leave legislation in place or to pass new legislation whenever the Confederation has not exhaustively regulated an issue.[340] The 2006 German federal reform was also stimulated by the unlimited scope of the concurrent powers. The concurrent legislative power of the federal government along with its extent as decided by the Federal Constitutional Court that extended the federal power to be discretionary and unjusticiable, has been assumed to be a Trojan Horse of centralization, given that the federation made use of its legislative power in all areas of concurrent legislation while the Länder could not even challenge these decisions.[341] The other main area of reform is intergovernmental relations,

[337] Steytler, supra note at 271, p.11
[338] Kincaid, supra note at 161, p.43
[339] Kincaid, id, p.48
[340] Belser, supra note at 231, p.60
[341] Palermo, supra note at 283, p.78

involving the development of a more cooperative way of managing the tensions inherent in concurrent jurisdictions.

The second negative consequence of concurrency is the intergovernmental relations gridlock. Where a particular functional area falls in a common jurisdiction, necessitating intense intergovernmental relations to manage such concurrency, it may result in the entanglement of governmental decision-making, with deleterious effects on service delivery such as poor services, unclear role, duplication, service gaps, and burden-shifting between orders of government.[342] Where co-governance is required in areas of common jurisdiction, a joint-decision trap can arise. These consequences of the 'entanglement' of jurisdictions in Germany prompted the federal reforms of 2006, which, among other things, resulted in the reduction of joint tasks, additional areas of exclusive Länder jurisdiction, greater role-definition, and the abolition of federal framework legislation.[343]

The third negative consequence of concurrency is the evolution of democratic deficits in public administration. As no clear role allocations are made and decision-making (or the lack thereof) is mired in opaque intergovernmental processes, a democratic deficit emerges in which neither federal nor sub-national governments can readily be held accountable for poor services.[344] In the foregoing section, it has been described that democratic principles in general and accountability in particular is taken as a guiding tenet of the distribution of powers in federal systems. What is more, accountability is the rationale that necessitates for the design of the division of powers between different levels of government. In the regime of concurrent powers where the federal government and the constituent units take part in the same subject matter, it becomes more complicated as far as ensuring and tracing accountability is concerned. Consequently, as the German federal reforms of 2006 illustrate, one approach to the problems of concurrent powers is to demarcate clearer boundaries for the division of powers which was also advised by the Organisation for Economic and Co-operative Development (OECD) with regard to regulatory regimes in multilevel governments: a clear definition of roles and responsibilities is seen as crucial to avoiding overlaps and duplication.[345]

[342] Steytler, supra note at 271, p.4
[343] Ibid
[344] Ibid
[345] Steytler, supra note at 271, p.4

At this juncture, it is equally crucial to consider the fact that there are important subjects that should be contemplated in the exercise of concurrent powers between the federal government and constituent units. These are issues connected with intergovernmental relations which could be expressed through the role of the second chamber in law-making processes at the central level, executive intergovernmental processes and institutions, and conflict resolution mechanisms as regards the distribution of powers in general and that of concurrent one in particular.[346] As described in chapter two, second chambers in federal systems represent the constituent units at the centre and protect and defend the regional interests during the processes of law-making and policy formulations. Concurrent powers are the playgrounds where the regional interests are at high stake as the federal government is granted a great leeway to exercise its law-making discretion even at the cost of regional autonomy. In such a case, the role of the second chamber is vital in countering the federal intrusion and/or keeping the balance of the constitutional powers of the two levels of government at equilibrium.

Failing this, it is highly likely that the federal government may turn the federal system into unitary and centralized one with making laws in a sweeping manner. In view of Steytler, in African countries like South Africa, Ethiopia and Kenya, concurrency of powers featured strongly as a *via media* between strong centrist interests and regional claims of self-rule.[347] With regard to executive intergovernmental relations, especially in a dual system, there should be an effective institutional mechanism of facilitating the administration of the concurrent powers. The express provision of concurrent powers has entailed extensive and intensive intergovernmental processes and institutions that seek to coordinate actions and perform joint tasks.[348] Concurrent powers are hence unique, since the two levels of government exercise them simultaneously. Nevertheless, these levels of government do not sit together while exercising concurrent powers. Institutional mechanisms for coordinating the exercise of such jointly assigned functions and powers are thus required.[349]

The incidence of conflicting laws made by the federal government and constituent units may be high as a result of which institutions and mechanisms of resolving such conflict is a mandatory element for the management of concurrency. Federal systems around the globe have devised different institutional mechanisms of resolving such conflicts. The resolution

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[346] Steytler, id, p.6
[347] Steytler, id, p.7
[348] Steytler, id, p.3
[349] Available at: https://www.google.com/search?client=firefox-b-d&q=concurrent+powers#ip=1, visited on 08/12/2023 at 2:20 pm.

mechanism of inconsistent federal and state laws in relation to the notion of the supremacy clause will be discussed in chapter eight at length. Thus, the exercise of shared rule in the legislative and policy spheres with the involvement and participation of the second chamber, intergovernmental relations, and conflict resolution through a competent body are the facets of concurrency.

3.2.2.2.3. Residual powers

Residual powers are those powers over policy fields, where there are explicit lists of exclusive and/or concurrent powers for one or both orders of government, which remain unlisted and are attributed exclusively to one of the orders of government.[350] Hence, residual powers would become an exclusive power of either level of government by default. The residual authority represents assignment by the constitution of jurisdiction over those matters not otherwise listed in the constitution.[351]

According to Watts, the locus of residual powers differs from federation to federation based on how they came into existence or formed. For example, in most federations, those created by a process of aggregating previously separate units (although also in some others), the residual power has been retained by the unit governments, examples being the USA, Switzerland, Australia, Germany, Malaysia, Argentina, Brazil, Mexico, Nigeria, Russia, Pakistan and the United Arab Emirates. On the other hand, in some federations such as Canada, India, the Federation of Malaya before it was expanded into Malaysia, South Africa and Belgium, usually where devolution from a more centralized unitary regime characterized the process of federal formation, the residual powers have been left with the federal government. The Spanish and Venezuelan models reveal a unique approach to residuary.[352] Accordingly, under the 1978 Spanish constitution, 5 of the 17 Autonomous Communities were assigned the residual authority, but for the others it remains with the central government, whereas the residual authority in Venezuela is retained by the states, but the 1999 constitution limited this power by granting the federal government a parallel residual competency in taxation. Thus, there is no uniform approach to the assignment of residual powers in federal systems.

[350] Steytler, supra note at 271, p.8
[351] Watts, supra note at 8, p.89
[352] Ibid

The magnitude and significance of the residual power is highly linked to and dependent on the degree, number and comprehensiveness of the exclusive powers so enumerated by the constitution. In view of this, it is held that the greater the enumeration of powers, the less the scope of the residual power. Consequently, in federations such as India, Malaysia, South Africa, and to a lesser extent Canada, where the constitutions set out three exhaustive and comprehensive lists of exclusive federal, exclusive provincial and concurrent legislative powers, the residual power has been relatively less significant.[353] By contrast, in federations such as the USA, Australia, Germany, Brazil, Mexico, Nigeria, Russia and Pakistan, where the state powers were not enumerated but simply covered by a substantial unspecified residual power, the scope of the residual authority can be highly significant, although in some cases like Nigeria, Russia, Pakistan, Brazil and Mexico the extensiveness of the federal exclusive and concurrent lists of authority has actually left little room for exclusive constituent unit legislation.[354] As the unlisted residual powers fall under the exclusive domain of the constituent units, their scope is then a function of the reach of the federal powers—be they exclusive or concurrent; both the number of listed federal powers as well as the open-endedness of their formulation may leave only scraps to the regions, as is the case in Russia, Ethiopia and Nigeria.[355] This has created grudges in some federal systems. For example, a recurrent complaint (in Brazil, Ethiopia, and Russia) is thus that the combination of the two sources of federal powers (exclusive and concurrent) leaves precious little to the exclusive residual powers of states.[356] In relation to the case of Ethiopia, it will be shortly discussed in the following section.

Although the assignment of residual power to the states was intended to underline their autonomy and the limited nature of powers assigned to the federal government, in practice there has been a tendency in these federations for the courts to read the maximum "implied powers" into the specified federal authority at the expense of the scope of the undefined residual state powers, thus producing a tendency over time towards the progressive centralization of government powers.[357] However, this may not hold true for some federations where the power of the federal government is limited by the interpretation rendered by courts. For example, in some federations such as Canada, India and Malaysia, where the centralist

[353] Ibid
[354] Ibid
[355] Steytler, supra note at 111, p.302
[356] Ibid
[357] Watts, supra note at 8, p.90

founders enumerated what were intended to be limited specific provincial powers, there has been a tendency for the courts to read those powers broadly, thus tempering the expansion of federal authority.[358]

3.3. Distribution of Powers and Institutional Design under Ethiopian Federalism

The FDRE Constitution allocates all aspects of powers between the federal government and the states with varying degrees. While the legislative, executive, judicial and fiscal powers are divided between the two tiers of government, I shall limit my discussion to the first three spheres as they have a direct and principal correlation with the central theme of this study. At times, the powers and functions are described in terms of their respective institutions that necessitate for the discussion by juxtaposing the allocation of powers alongside institutional structures which will be dealt with under different as follows. From the outset, it should be borne in mind that the Constitution empowers the two levels of government to exercise all political (legislative and executive) and judicial powers on matters within their respective exclusive competences.[359]

In what follows, an attempt will be made to expound the forms of the distribution of powers and institutional design under the FDRE Constitution, and problems and challenges connected therewith. An in-depth description will be offered to elucidate the exclusive, concurrent, and residual forms of the division of powers followed by formal and practical challenges.

3.3.1. The Distribution of powers

As briefly described hereinabove, the legislative, executive, and judicial powers are divided between the federal government and the states under the Ethiopian constitutional and federal structures. The discussion on these spheres of the powers has a direct bearing on the analysis of the criminal justice mandates which will be presented in the subsequent chapters. Thus, it is important to explain each under different subsections for detailed insights. The principles, rationales, and factors which are expounded in the preceding sections are assumed to applicable for the distribution of powers in the case of Ethiopia. Setting aside the width and

[358] Ibid
[359] Assefa and Zemelak, supra note at 92, p.243

breadth which may be an area of study for future researchers, as briefly described in some sections of chapter two and this very chapter, the fundamental principles and values of federalism, rationales, factors and principles of the distribution of powers are explicitly and implicitly incorporated in the FDRE Constitution. To begin with the values and attributes of federalism, the Constitution unequivocally provides for the rigid, written, and supreme federal constitution; the establishment and recognition of the two levels of government: the federal government and the states, each accountable to their own respective electorates; the division of powers between the two levels of government; shared rule and self-rule; and a unique constitutional adjudication system by the second chamber. With regard to the shared rule tenet, as the role of the second chamber, the HOF, is limited to extra law making and policy processes at the centre, it could be possible to foresee the deficiency in this respect. This is one of the peculiar features of Ethiopian federalism compared with other federal systems. Moreover, IGR is missing in the Constitution until recently where it was regulated by a law made by the HPR.

In addition, from reading various provisions of the Constitution, it could be possible to discover the values of federalism which include *inter alia* experimentation, human rights and fundamental freedoms, regional autonomy, local policy innovation, accommodation of diversity and preservation of unity in terms of culture, identity, history, language, religion, ethnicity, nationality, etc.

With specific regard to the principles, rationales, and factors that affect the distribution of powers, the Constitution clearly provides for stringent guidelines. For example, the powers granted to each or both levels of government are constitutionally entrenched in two major ways. On one hand, the powers and functions of the federal government and the states are distinguished by the rigid and written constitution; there is no other source of power. On the other, either order of government is prohibited from encroaching upon the delimited powers of the other's which is commonly known as comity principle or mutual forbearance (Art.50(8)). The democratic and subsidiarity principles are also explicitly stipulated.[360] The principle of symmetry is also spelt out.[361] As a whole, the rationales that forced for the establishment for the federal systems in general and the division of powers and resources in particular are indicated in the Preamble of the Constitution from a variety of angles.

[360] Art.12, 50(4), and 88 of the FDRE Constitution

[361] Art.47(4) of the FDRE Constitution provides that Member States of the Federal Democratic Republic of Ethiopia shall have equal rights and powers.

For the present discussion, an attempt will be made to provide adequate descriptions of the division of legislative, executive, and adjudicative powers of the two levels of governments in order under the FDRE Constitution.

3.3.1.1. Legislative authority

The distribution of legislative powers among various levels of government is a key feature of federalism.[362] The FDRE Constitution provides for three forms of the division of legislative authority. These are exclusive, concurrent, and residual legislative powers. Each of them will be explicated in detail as follows one by one.

3.3.1.1.1. Exclusive powers

From the reading of the Constitution, it is readily understandable that both the federal government and the states have their own exclusive legislative powers. The federal legislative powers are enshrined in general and specific approaches. As a general modus, the federal government is empowered to make laws over all matters assigned by the Constitution to Federal jurisdiction.[363] This is a general provision because in order to grasp and pinpoint the exact scope of the legislative powers of the federal government, one needs to navigate through the provisions of the Constitution as regards the federal jurisdiction. As a specific approach to locating the exclusive federal legislative powers, the Constitution enumerates the specific areas of exercising such a mandate.[364]

Accordingly, the legislative organ of the federal government (HPR) shall have the power of legislation over: land and other natural resources; inter-state and foreign trade; transports such as air, rail, water and sea and interstate roads, postal and telecommunications services; political and electoral laws; nationality and immigration and cognate issues such as passport, exit from and entry into the country, and refugees and asylum rights; uniform standards of measurement and calendar; patents and copyrights; the possession and bearing of arms; codified laws such as labour, criminal, and commercial codes; security forces such as national defence, public security, and national police forces; state of emergency; a state of war; economic issues such as currency, banking, and foreign exchange; approval of general

[362] Brideau, Isabelle and Brosseau, Laurence, *The Distribution of Legislative Powers: An Overview*, Publication No.2019-35-E, 16 October 2019, p.4

[363] Art.55(1) of the FDRE Constitution

[364] Art.55 (2-19) of the FDRE Constitution enumerates the legislative powers of the House of Peoples' Representatives.

policies and strategies of economic, social and development, and fiscal and monetary policy of the country; ratification of international agreements; establishment of a Human Rights Commission and the institution of the Ombudsman.

The Constitution also empowers the states to have exclusive legislative competences on certain matters. Art.52(2) of the FDRE Constitution and the respective state constitutions deal with the state powers and responsibilities. Hence, the states shall have the powers and functions to: establish a State administration that best advances self-government, a democratic order based on the rule of law; protect and defend the Federal Constitution; enact and execute the State constitution and other laws; formulate and execute economic, social and development policies, strategies and plans of the State; administer land and other natural resources in accordance with Federal laws; levy and collect taxes and duties on revenue sources reserved to the States and to draw up and administer the State budget; enact and enforce laws on the State civil service and their condition of work by approximating national standards on educational, training and experience requirements for any job, title or position; establish and administer a state police force, and maintain public order and peace within the State.

Once the residual power is reserved to the states which could also be considered as their exclusive powers, one may question the relevance of providing for the separate enumeration of the state exclusive powers. And it is debatable as well if it is necessary to list the exclusive powers of the states in addition to the reserve powers. In some federations where the both the exclusive federal and state powers are explicitly enumerated, residual powers are granted to the federal government, an example being India. Thus, some argue that it is redundant and dangerous as well.[365] It is redundant because all powers lying outside all exclusive federal and concurrent powers are reserved to the states which obviate the illustration of such powers. It is dangerous because in time of conflict and crisis, the question may be provoked as to what would be those matters which are not illustrated as 'exclusive state powers'. Thus, although the constitutional approach to the enumeration of exclusive state powers in addition to the assignment of the reserve power seems peculiar as compared with the other federal systems, its significance and implication is dubious and serves little more than a mere illustration of such reserved powers.

[365] Assefa, supra note at 4, p.294

3.3.1.1.2. Concurrent powers

Like any other federal systems, concurrent powers are found in the FDRE Constitution in multifaceted forms both explicitly and implicitly. According to Assefa and Zemelak, such concurrencies could be classified as: listed concurrent powers, framework concurrent powers, legislative-executive split concurrent powers, and generic concurrent powers.[366] With regard to the explicit/listed concurrent powers, even though there is a constitutional inference to that end, no enumeration of concurrencies has been provided in the Constitution.[367] Thus, it is argued that the general thinking about listed concurrent powers, as far as the Constitution is concerned, has been that article 52(1) is of little significance.[368] In other circumstances, although the Constitution is captioned as concurrent judicial powers under Art.80, the contents deal with other issues than concurrencies. As regards issues connected with judicial powers in relation to delegation and concurrency and the surrounding controversies, a detailed explanation will be provided in chapter eight.

Probably, the enumeration of concurrent power is explicitly provided in the taxation power of the federal government and the states.[369] Accordingly, the federal government and the States shall jointly levy and collect profit, sales, excise and personal income taxes on enterprises they jointly establish; taxes on the profits of companies and on dividends due to shareholders; and taxes on incomes derived from large-scale mining and all petroleum and gas operations, and royalties on such operations. Nevertheless, this article was 'unofficially' amended in 1997 to the effect that the federal government would levy the taxes and that the proceeds would be divided between the federal government and the state from whose jurisdiction the taxes are collected.[370] The practice is therefore that, in accordance with the unofficial amendment, concurrent taxes are levied and administered (collected) by the federal government and the relevant state takes its share from the revenue so collected based on the fiscal formula carried out by the HOF.

As far as the framework concurrent powers are concerned, the Constitution contains some important provisions which are connected with the social, economic, and development matters. It is discerned from the language of the Constitution that such powers are

[366] Assefa and Zemelak, supra note at 92, p.245-254
[367] Art.52(1) of the FDRE Constitution provides that all powers not given expressly to the Federal Government alone, or ***concurrently*** to the Federal Government and the States are reserved to the States.
[368] Assefa and Zemelak, supra note at 92, p.245
[369] Art.98 of the FDRE Constitution
[370] Assefa and Zemelak, supra note at 92, p.246

concurrently granted to the federal government and the states with different scope of authority. For example, the federal government is empowered to formulate and implement the country's policies, strategies, and plans in respect of the overall economic, social and development matters.[371] In addition, the federal government is authorized to establish and implement national standards and basic policy criteria for public health, education, science and technology as well as for the protection and preservation of cultural and historical legacies.[372] On the other hand, the states are entrusted with formulating and executing economic, social and development policies, strategies and plans of the State.[373] The states are also empowered to legislate on civil service issues by complying with the standards set by the federal government.[374] In all these circumstances, the states are mandated—as part of the constitutional right to self-rule—to design their own policies that fit their local context within the broadly stated nation-wide federal policies and a general framework set by the federal government, providing the most comprehensive basis of framework power between the two levels of governments.[375]

Like in any federal systems which are true for concurrencies in which the dominant role of the federal government is evident, in Ethiopia, too, despite the constitutional indication of the federal-state framework concurrencies, practice reveals the predominant role of the federal government. There is a clear tendency on the part of the federal government to occupy all the space in these functional areas, contrary to what is constitutionally envisaged regarding the exercise of powers with respect to social and economic matters which relegated the states to play a marginal role in this respect.[376] There are three possible explanations for such centralized tendencies explored by Assefa and Zemelak. The first reason is the language used by the Constitution. In light of this argument, the scope of the powers of the federal and state governments in the functional areas of social and economic matters is not clearly defined; the breadth and depth of the policies that are supposed to be formulated and adopted by the federal government on these matters remain unclear as the powers of the federal government is this respect is widely cast. Furthermore, the Constitution does not put a limit on the policy-

[371] Art.51(2) of the FDRE Constitution
[372] Art.51(3) of the FDRE Constitution
[373] Art.52(2)(c) of the FDRE Constitution
[374] Art.52(2)(f) of the FDRE Constitution declares that the state shall have the power to enact and enforce laws on the State civil service and their condition of work; in the implementation of this responsibility it shall ensure that educational; training and experience requirements for any job, title or position approximate national standards.

[375] Assefa and Zemelak, supra note at 92, p.248
[376] Ibid

making power of the federal government on these matters, and so it is not clear what is to be left for the states. This is so despite the fact that it is implicit in the aforementioned provisions that it is not constitutionally permissible for the federal government to cover the entire policy area and that it must leave adequate space for the states to exercise their respective policy-making and legislative powers.[377]

To this effect, even though the linguistic problem could be provided to justify the federal domination at the expense of state powers and self-rule rights, it could be challenged before the HOF which is the ultimate arbiter of constitutional issues. The fact that the Constitution grants the socio-economic matters concurrently to the federal government and the states shows the basic assumption that the two levels of government should be able to exercise same in line with the text and spirit of the Constitution by keeping the balance of shared rule and self-rule. Furthermore, there are qualifying terms used by the Constitution in contemplating the scope of the powers of the federal government which implicitly empowers the state to exercise such a power based on the magnitude left to them. For example, in relation to public health, education, science and technology and the protection and preservation of cultural and historical legacies, the federal government is limited to the establishment and implementation of national standards and basic policy criteria. From this qualification, it could be discerned that the federal government cannot go beyond setting such national standards that can be used for the states to make detailed laws in accordance therewith. This assertion could also reinforced by the power of the federal government in relation to the formulation and implementation of the country's policies, strategies and plans in respect of overall economic, social and development matters which signifies its role to be limited to ensuring the harmonization, but not unification, of the polices and laws which gives a wide room for the states to innovate socio-economic matters based on their regional and local preferences. However, this mode of normative interpretation requires a robust constitutional adjudicative system which is capable of keeping the equilibrium of the powers of the federal government and the states by guarding the constitutional supremacy and entrenchment.

This line of argument should also be considered from the principles of distribution of powers enshrined by the Constitution such as the mutual respect of the two levels of government. In this specific case, the federal government while exercising concurrent powers should respect

[377] Assefa and Zemelak, id, p.250

the powers of the state by limiting itself to the general and national principles, standards, and policy criteria thereby letting the states to fill the gaps by making detailed laws. The typical example, in this regard, as explained in the preceding section, is the 2006 German federal reform that took measures including dispersing the shared or concurrent powers into exclusive schemes. Otherwise, it may be difficult to make distinctions between federalism and unitarism in the framework concurrent powers in the long run.

The second justification is connected with the holding together type of the federalism in which the states were newly established, and in some cases, especially low land or emerging regions faced acute skilled human resource shortage that prevented them exercising their powers. This expert gap seems to have provided the federal government with an opportunity to cover the entire policy area relating to social services and economic development if it has not been compelled do so.[378] At the formative stage of the federal structure, this justification may partly hold water, but it is observable that the practice continues to the present day unabated. What is more, such centralized tendencies are perpetuated not only in emerging states, but also for all states which are deemed ‘developed’. Thus, in terms of time, the early phase of the federal structure and three decades after the experimentation of the federalism, there is little or no change but the continuity of the centralized system. In terms of the type of states—developed *versus* underdeveloped/developing/emerging/low land—there is no preferential treatment as far as the usurpation of power by the federal government is concerned.

The third and most important justification relates to the extremely centralized party structure and mode of operation that controls the political and administrative institutions of both the federal and state governments.[379] The federal policy documents originate from the party leadership: they are discussed and approved in party meetings and issued as official documents through the federal Minister of Information. In theory, the policies are issued with a view to creating uniformity and building consensus, and the states are allowed to adapt these policies according to their specific circumstances. In practice, though, such policies leave little policy space for adaptation.[380] More explanation will be provided shortly in relation this problem in the federal and constitutional experimentation. Anyways, the danger

[378] Ibid
[379] Ibid
[380] Ibid

is that such a centrist approach undermines the states' initiatives to address social and economic issues specific to their local context and priorities.[381]

The other form of concurrency recognized under the FDRE Constitution is the split of the legislative and administrative powers over the same subject matter. In this regard, the typical example is land and other natural resources. Accordingly, while the federal government is empowered to enact laws for the utilization and conservation of land and other natural resources, historical sites and objects, the states are authorized to administer land and other natural resources in accordance with Federal laws.[382] Hence, the Constitution divides the legislative and administrative aspects of the use of land and natural resource management between the two levels of government, in so doing creating concurrency of powers between them.[383] This form of concurrency is also as problematic as the framework concurrent powers described hereinabove. First, it is unclear where the legislative power of the federal government ends and the administrative power of the states begins with respect to land and natural resources. Second, what is meant by and constitutes 'legislative' and 'administrative' spheres of such a concurrency is another dubiety which is not spelt out by the Constitution and subsequent statutes; and how such a divide may be feasible to compartmentalize for each tier of government or a parallel assignment is the other facet of the problem. Third, given the literal meaning of the specific provision, whether the states just implement the laws made by the federal government or make laws of their own in accordance with the general law made by the federal government is not clear. Viewed from the framework scheme, the latter is common in some federal systems like Germany. If the states are allowed to make their detailed laws as such, what kind of law they should enact: proclamation, regulation or other bylaws is another point to be explored. Finally, it may also be controversial as to what constitutes and not the phrase "natural resources" as stipulated in the Constitution. While all these issues require a further inquiry, the practice demonstrates that both the federal government and states have been making proclamations on land and other natural resources such as forest.

The fourth type of concurrent power implied in the FDRE Constitution is generic concurrency. Such form of concurrency constitutes certain loosely defined functional areas, which, as a rule, are either an exclusive federal competence or exclusive state competence,

[381] Assefa and Zemelak, id, p.249
[382] Arts.51(5), 55(2a) and 52(2d) of the FDRE Constitution
[383] Assefa and Zemelak, supra note at 92, p.251

which relates to criminal and civil matters.[384] As such, while the criminal legislative power belongs exclusively to the federal government, civil matters belong to the states by the residual assignment of powers. Concurrency in respect of civil matters occurs where the federal government is empowered to make laws for the sake of creating and sustaining one economic and political community.[385] As Assefa and Zemelak argue, the need to create economic union, which is an implicit and often even explicitly stated objective of a federal project, calls for a constitutional clause empowering the federal government to legislate on economic matters which provide federal governments with leeway to enter into the exclusive terrain of sub-national units. As such, it can be argued that almost all functional competences of the regional state with respect to civil matters can be considered the concurrent competences of the federal government to the extent that their regulation by the latter is necessary for sustaining the economic union of the Ethiopian federation.[386]

Nevertheless, the provision dealing with the concurrent power of the federal government and the states over civil matters is problematic on many grounds. In the first place, the phrase "one economic and political community" is a vague concept which is tersely incorporated with no clear and adequate definition either by the Constitution or subsequent laws. From the onset, it is declared in the preamble of the Constitution that the Nations, Nationalities and Peoples have pledged to live as one economic community.[387] From the concurrent point of view, the HOF may label a certain civil matter to be used to forge and perpetuate one economic community and forward same to the HPR to act on it. The question is how and in what procedure should the HOF determine such matters and refer to the HPR for enactment? This question has not been satisfactorily addressed in the subsequent law which defines the powers and functions of the HOF.[388] At any rate, the discretion has been granted to the HOF to draw up a draft bill and refer to the HPR on its own initiative or on the basis of information

[384] Assefa and Zemelak, id, p.254

[385] Art.55(6) of the FDRE Constitution states that the HPRs hall enact civil laws which the House of the Federation deems necessary to establish and sustain one economic community.

[386] Assefa and Zemelak, supra note at 92, p.255

[387] The fifth paragraph of the Preamble of the FDRE Constitution declares that "We, the Nations, Nationalities and Peoples of Ethiopia are convinced that to live as one economic community is necessary in order to create sustainable and mutually supportive conditions for ensuring respect for our rights and freedoms and for the collective promotion of our interests.

[388] Art 34 of Proclamation no.251/2001 (Consolidation of the House of the Federation and the Definition of Its Powers and Responsibilities Proclamation) states that: 1) The House shall determine civil matters that require the enactment of laws to establish and sustain one economic community and refers to the Federal Legislative body. 2) The House may determine civil matters that are essential to create and sustain one economic community on its own initiatives or based on opinions and information submitted to it by other pertinent government institutions.3) The House may prepare and submit a draft bill to the House of Peoples' Representatives if it is convinced of the case.

and opinion obtained from other relevant government institutions. The practice demonstrates that the Federal Justice and Legal System Research Institute tends to take over the task of researching and proposing some areas of civil matters which the HPR should make laws.[389] It is not clear whether the Institute has been doing such a job based on permission or delegation granted from the HOF or on its own initiative. It is argued that the Institute is in charge of this business by persuading the HOF for the sake of creating uniformity in the civil laws.[390]

On the one hand, it provokes the constitutionality issue of the extent of the power of the Institute *versus* the HOF in this regard. On the other, one may not be able to draw a line where such a practice could stop as it may run against the residual powers of the states which may in turn negatively affect the self-rule rights thereof. The issue of how far the Federal Justice and Legal Research Institute, HOF, and HPR go in the initiation, determination and enactment of civil laws continues to remain debatable. It has become blurred whether the "one economic community" phrase should be interpreted to mean legal monism at the cost of legal pluralism which is built in the Ethiopian constitutional and federal design. Anyhow, this constitutional provision is an exception to the principle that civil laws, as a form of residual powers, belong to the Regional States. Thus, being an exceptional provision, it should be construed narrowly. Accordingly, there are some cautions to be taken. First, it can be assumed that the federally regulated civil matter should have an economic impact beyond a regional state's boundaries. Second, the HOF also has an implicit obligation to provide adequate reasons for why it deems the federal government's regulation of a certain activity to be relevant for the economic unity of the country. Hence, it is not sufficient for it merely to state that a certain civil matter has an impact on the economic unity of the country entailing a federal regulatory framework.[391] This is because as some argue, the intention of reserving residual power to the States is to guarantee wider legislative, political and cultural powers to the States though the States are not as strong as the Federal Constitution stipulates to assert

[389] So far the Federal Justice and Legal System Research Institute has conducted researches that are meant for the amendment of several areas of civil laws (possibly to be made and amended by the HPR). For instance, laws of contract, succession, property and persons may be mentioned from among others.

[390] Assefa (supra note at 4, p.275) holds that the Justice and Legal System Research Institute in its bid to convince the HoF to direct the HoPR to enact a nationwide Notaries Act which among others aimed at regulating agency, authentication, registration of contracts concerning immovables, some movables, sale of share certificates, registration of contracts of marriage, lease contracts, registration of Memorandum of Association and authentication of documents made by Embassies abroad. According to him, the Institute argued these are vital instruments that may affect freedom of trade and commerce if states are allowed to issue different laws, consequently, the federal government issued the law.

[391] Assefa and Zemelak, supra note at 92, p.255

their power.[392] In this vein, harmonious understanding of the text and spirit of the Constitution must be taken heed in that the power to initiate civil laws and refer to the legislature is to be considered within the scope of the power of the HOF in promoting and consolidating the equality and unity of the Peoples of Ethiopia based on their mutual consent.[393]

So far, the Council of Constitutional Inquiry (CCI) has received a petition from the Prime Minister's Office seeking for advice from the HOF as to whether the HPR has a power to enact a national family code.[394] The recommendation of the CCI went straight harmoniously with the text and spirit of the Constitution. Hence, it argued that the legislative power of the family code belongs to the States on two grounds: 1) the family issue is directly intertwined with the culture, tradition, and religion of the society hence an aspect of diversity that requires regional protection; 2) the family issue is not a specific power which the Constitution expressly grants to the centre.[395]

In support of this proposition, Assefa opines that "creating one political and economic community" and developmental state is used as a means to design mega-development policies without taking into account the federal principle of a constituent unit's autonomy to self-rule and coordination of joint development plans among concerned federal and state institutions.[396] The developmental state paradigm launched by the government targeted at centralizing laws and policies on land and other natural resources, and other civil laws it found necessary for the accomplishment of the development purported. This could be taken as an instance where the 'one economic community' is abused. In addition, owing to its vagueness, the phrase has been misused by statesmen in relation to the developmental state pursued by the government.[397] Accordingly, as regional powers are taken over by the federal

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[392] Ghebrehiwet, supra note at 233, p.179

[393] Art.62(4) of the FDRE Constitution

[394] Assefa Fiseha, "Theory versus Practice in the Implementation of Ethiopia's Ethnic Federalism", *in* Turton, David (ed.), *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective*, 2006, James Curry Ltd, p.140

[395] Ibid

[396] Assefa Fiseha, "Federalism, Development and the Changing Political Dynamics in Ethiopia*", Oxford University Press and New York University School of Law*, 2019, Vol.17, no.1, 151-176, p.27

[397] When the Addis Ababa integrated master plan was fiercely resisted by the Oromo people, a senior official and former President of the Oromia National Regional State and former Addis Ababa City Mayor, Obbo Kuma Dammaqsaa, told on the regional state television that the development plan between Addis Ababa City and the Oromia towns around it is envisaged by the constitutional 'one economic community' clause. Thus, he argued, the so called the Master Plan is constitutional. He added that in the development plan of the government, the City was intended to be expanded to the 100km radius towards the four directions connecting such towns as Ambo (in the west), Waliso (in the south west), Assalla (in the east), and Fiche (in the

government in the name of the ‘one economic community” clause for various reasons, regional autonomy and the right to self-rule has been diminishing. Usurpation of powers which is unconstitutional on the one hand, and lack of effective constitutional adjudicative system that guards the constitutionality of laws, acts and policies on the other, has risked the federal system seriously.

There is yet a related understanding of what is meant by ‘one economic and political community’ as envisaged by the Constitution. Leulseged opines it from a cooperative federalism as pledged by the Nations, Nationalities and Peoples to live together.[398] He asserts that it is impossible to build a common political and economic community without cooperation, and although federalism values autonomy, it cannot function without solidarity. In this regard, he used the word one and common economic community interchangeably. On the other hand, Assefa hints that the post-1991 expansion of development areas such as health, education, electricity, roads and other infrastructures may be taken as important preconditions to build one economic community.[399] His clue as regards the ‘one economic community’ phrase is also alluded to by the government publication as to what it means or refer to under the constitutional and federal arrangement of the country.[400]

The generic concurrency is also manifested in relation to criminal legislative authority. The power to enact criminal laws falls within the exclusive competence of the federal government. The Constitution, however, allows states to enact penal laws on any criminal matter that the federal penal legislation has not covered. This also creates a generic concurrency on unspecified criminal matters between the federal and state governments.[401] More about the scope of the criminal legislative, executive, and adjudicative powers of the federal and state governments will be provided in the subsequent part particularly in chapters five, six and seven consecutively. Specifically, attention will be given to making distinctions between legislative concurrency as contrasted with executive and adjudicative spheres of criminal authority, and problems and challenges of the constitutional text.

north). But despite such an argument from the government, the development plan in terms of the Master Plan did not succeed due to the public protest and revolution. It failed because it lacked legitimacy from the people.

[398] Leulseged Tadesse, “Can Diversity be Accommodated? The Case of Ethiopia”, *in* Kincaid, John and Rupak Chattopadhyay (eds.), *Unity in Diversity: Learning From Each Other*, Volume 5, Policy Issues in Federalism International Perspectives, Forum of Federations, Viva Books Private Limited, 2008, p.3-11

[399] Assefa Fiseha, “Ethiopia's Experiment in Accommodating Diversity: 20 Years’ Balance Sheet”, *Regional and Federal Studies*, Vol. 22, No. 4, 435–473, October–December 2012, p.17

[400] The FDRE Industrial Development Strategy, Published by the Information Minister, Press and Audio-visual Department, 1994 Ethiopian Calendar (Amharic)

[401] Assefa and Zemelak, supra note at 92, p.256

3.3.1.1.3. Residual powers

Residual powers are reserved to the states under the Constitution.[402] In order to appreciate the scope and items to be found in the residuary, it is necessary to look into the exclusive powers enumerated for the federal government in different provisions of the Constitution. As described in the preceding section, the magnitude and significance of the residual power is directly connected with the comprehensiveness or otherwise of the exclusive powers granted to the federal government. In this vein, as the exclusive powers of the federal government are listed in Art.51, 55, 74, 77, 78-80 of the Constitution, one could navigate these provisions and explore those powers which are left to remain with the states as a residuary. In this case, due to the comprehensiveness of the federal matters listed under Art.51 and 55, the reserve powers are apparently meagre.

On the other hand, the degree of the residuary to be exercised by the states is hinged upon the concurrent powers that are exercised by either level of government. As is true in other federal systems, the dominance of the federal government in concurrent powers is evident in Ethiopia, too. In addition to the comprehensive enumeration of the exclusive powers of the federal government which has a diminutive effect on the residual power of the states, the concurrency worsens such reserve powers which still empowers the federal government over the state powers. Accordingly, in all forms and types of concurrencies mentioned above—listed concurrencies, framework concurrencies, legislative-executive split concurrence, and generic concurrencies—the upper hand of the federal government is revealed leading the federal system to the centralized and unitary tendencies. In other words, the principles of federalism in general and that of the self-rule right and regional autonomy of the states in particular would be jeopardized. From these propositions, it could be easily understood that the discussion on the residual power is directly linked with the discussions on the exclusive federal and concurrent powers. Therefore, in the presence of such unlimited intrusive mechanisms of the federal government which seem to have been grounded even in the constitution with general terms, it is barely possible to assert that the residual powers reserved to the states are meaningful for all practical purposes. Although the states may be exercising such a power, it is overtly under threat of the federal intrusion and at times usurpation in the camouflage of the rules of concurrencies.

[402] By virtue of Art.52(1) of the FDRE Constitution, all powers not given expressly to the Federal Government alone, or concurrently to the Federal Government and the States are reserved to the States.

3.3.1.2. Executive authority

As described in the typologies of federalism, there are basically two major methods of dividing executive power. As Saunders argues, the design of a federation determines of the locus of the enforcement authority of laws and policies.[403] Hence, there is a pronounced distinction between dualist federations, in which each sphere of government is expected to execute its own legislation (the US model) and integrated federations, in which a significant proportion of central legislation is executed by other spheres (the German model).

There is a raft of controversies concerning the delineation of an executive authority of the federal government and of the states given the dual federal structure designed by the Ethiopian Constitution. There are inconsistent provisions between the FDRE and State Constitutions as regards the enunciation and determination of administrative mandates. The former is clear in providing that federal laws and policies are executed by the federal agencies,[404] whereas those of the states are administered by their respective agencies.[405] On the contrast, the State Constitutions have incorporated an obligation to execute federal laws without however mentioning the budgetary issues. By virtue of the FDRE Constitution, the States cannot claim federal [executive] powers in the dual sense of the system apart from obtaining same through delegation as entailed by financial assistance to carry out such tasks. Moreover, strictly and theoretically speaking, such self-imposed mandate may be taken as an extra duty especially from the perspective of the principles of the allocation of powers.

The unequivocality of the FDRE Constitution in dualism is also portrayed in the fact that an exception to this rule has been expressly provided in the regime of land and other natural resources whereby the federal government makes a law and the states administer same accordingly. As explained in the foregoing discussions, the legislative-administrative split concurrency, with a particular reference to land and other natural resources, while the federal government enacts laws, the states are authorized to administer same by the laws made by the former. Hence, the mandate of the states is to administer land and natural resources laws as of

[403] Saunders, Cheryl, *Executive Power in Federations*

[404] It is clearly provided in Art.72 of the FDRE Constitution the highest executive powers of the Federal Government are vested in the Prime Minister and in the Council of Ministers. The Prime Minister and the Council of Ministers are responsible to the House of Peoples' Representatives. In the exercise of State functions, members of the Council of Ministers are collectively responsible for all decisions they make as a body. Accordingly, pursuant to Art.74 and 77, the Prime Minister and the Council of Ministers are entrusted with the obligation to oversee and ensure the administration and implementation of federal laws and policies.

[405] Art.50(6) of the FDRE Constitution and the respective State Constitutions provide for the State Administrative Councils that are beholden with the implementation of the state laws.

right and in their local context without claiming extra budget for that specific issue as it is their inherent administrative authority.

According to Assefa, the federal government has found at least three mechanisms for influencing the state government and thereby facilitating the enforcement of federal laws and programmes:1) through the former *Kili GudayZerf* and the present Ministry of Federal Affairs (which is currently not existing); 2) through the party structure; and 3) through the process of policy making.[406] This reveals that there is a marked discrepancy between the Constitution and the practice with regard to the enforcement of federal laws in and by the states.

Executive organs and institutions which are entrusted with implementing the federal and state laws and policies are also organized by primary statutes. For example, while the federal executive organs with respective powers and functions are defined and organized with Proclamation No.1263/2021,[407] those of the states' such as that of the Oromia State executive organs are [re]established by Proclamation No.213/2013, currently repealed by Proclamation No.242/2022.[408]

Although the dualist approach has been adopted by the Constitution, a variety of approaches appears to have been pursued to enable the enforcement of the federal laws and policies in and by the state institutions. For instance, as described hereinabove, the state constitutions provide for the duty of the state government organs to implement federal laws, regulation and directives. This provision should be construed in line with the Federal Constitution which stipulates the method(s) of the implementation of federal laws by the state governments. In this vein, as discerned from Art.50(9) *cum* Art.51 and other relevant proclamations, the federal government can delegate some of its powers including administrative power to the states. From this proposition, it could be deduced that the specific method provided by the state constitutions in relation to the administration of federal laws by the state governments is delegation.

Secondly, some federal laws dictate both federal and state institutions to enforce the specific federal matter. For instance, labour proclamation provides for the organization of the federal and state executive and judicial institutions for the enforcement of the labour matters and

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[406] Assefa, supra note at 394, p.153
[407] Proclamation No. 1263/2021 (Definition of Powers and Duties of the Executive Organs Proclamation)
[408] Proclamation No. 213/2018 (A Proclamation Enacted to the Reorganization and Redefinition of the Powers and Duties of Executive Organs of Oromia National Regional State Proclamation)

disputes.[409] Thirdly, even if the federal law is silent as to whether the state institutions should administer or not, the laws made by the latter stipulate that they should enforce the federal laws and policies. Criminal laws made by the federal government may be mentioned from among the others which are the major and central theme of this thesis. Particularly, institutions which are directly linked with the administration of criminal justice are structured both at the federal and state levels. Setting aside who does what in the enforcement of criminal laws and policies under the federal system, which is the focus of interest in the next part of the study, police,[410]prosecutions,[411]anticorruption commissions,[412]and prison administrations[413]are dually organized.

3.3.1.3. Judicial powers and court structures

Like any other branches of government, courts are structured at federal and state government levels hence judicial dualism. This is clearly stipulated in the Constitution as a general principle along an institutional dualism under Ethiopian federalism and establishing courts of three tiers at federal and regional levels.[414] Accordingly, both orders of government have their own first instance court, high court, and Supreme Court. At federal level, while the Federal Supreme Court is directly established by the Constitution, the High and First Instance Courts would be established upon the fulfilment of certain requirements so specified by the Constitution.[415] That is to say, it is the HPR with these yardsticks that decides the

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[409] Proclamation No.1156/2019 (Labour Proclamation), Arts.137-156) deal with the federal and state executive and judicial institutions which are in charge of enforcing the labour disputes and matters. However, as per Art.55(3) of the FDRE Constitution and the preamble of the Labour Proclamation, it is understood that the power to enact a labour code has been conferred upon the federal government.

[410] While the Federal Police Commission is organized by a separate act of the legislature (proclamation No.720/2011), some state police commissions such as that of the Oromia state, are structured under an enactment that is meant to define the state executive organs and their powers and functions (Art.45 of Proclamation No.213/2018, A Proclamation Enacted to Reorganize and Redefine the Powers and Duties of Executive Organs of Oromia National Regional State)

[411] Proclamation No.943/2016 at the Federal level, and Proclamation No.2014/2018 at the Oromia State level

[412] Proclamation No.1236/2021 (the Federal Ethics and Anti-Corruption Commission), proclamation No.197/2016 (the Oromia Ethics and Anti-Corruption Commission)

[413] Proclamation No. 1174/2019 (Federal Prison Proclamation), Art.46 of Proclamation No.213/2018, A Proclamation Enacted to Reorganize and Redefine the Powers and Duties of Executive Organs of Oromia National Regional State

[414] Art.50(2) of the FDRE Constitution provides for the circumstance whereby the both the federal government and the states have their own respective courts. Particularly, pursuant to sub-article (2) of this Article, States shall establish State Supreme, High and First Instance Courts whose particulars shall be determined by law. Hence, the state constitutions and laws have organized the regional courts and defined their respective jurisdictions.

[415] Paragraph 2 of Art.78(2) of the FDRE Constitution, states that the House of Peoples' Representatives may, by two-thirds majority vote, establish nationwide or in some parts of the country only, the Federal High Court and First-Instance Courts it deems necessary.

establishment or otherwise of the Federal High Court and First Instance Courts across the country or in some regional states as the case may be. In light of this, to date, the Federal High Court is established in five regions *viz*. Afar, Benishangul, Gambella, Somali and Southern Nations Nationalities and Peoples.[416] This resembles the US court structure where the Federal Supreme Court is straight established by the constitution and other inferior courts are left for the Congress.[417] Unlike that of the Ethiopian case, the US Congress is not subject to conditions for the establishment of the Federal District and Appellate Courts. Similarly, the Australian experience shows that the Federal Supreme Court is directly established and other inferior courts are created by an act issued by the Parliament.[418]

The basic assumption behind the duality of the organizational structure of the judicial system under the Ethiopian federal setting is that while the federal courts enforce federal laws, the state courts are entrusted with applying and interpreting laws made by state legislative and quasi-legislative bodies. If one takes the federal principle of division of powers strictly, not only are legislative and executive functions divided between the federal government and the states, but judicial authority too is divided.[419] The FDRE Constitution confirms this proposition in a terse provision stating that the Federal Supreme Court shall have the highest and final judicial power over federal matters; and the State Supreme Courts shall have the highest and final judicial power over state matters.[420] What constitutes federal matters and state matters may be explored going through the FDRE Constitution and other laws issued by competent bodies in accordance and compliance therewith. The benchmark is, however, that powers and matters of the federal government and the states are defined by the Constitution and each level of government is obliged to respect the powers of the other. For the convenience of enforcement, these federal matters and state matters which are define by the FDRE and State Constitutions are specified by statutes made by each law making organ at either level of government. However, these statutes cannot defined and demarcate what constitute federal matters and state matters. Instead, they just provide for the details of the respective matters so singled out by the Constitution. This is one of the principles of the distribution of powers specifically the rule of constitutional entrenchment. It also reminds us

[416] Proclamation No.322/2003, Federal High Court Establishment Proclamation, *Federal Negarit Gazette,* 9th Year No. 42, Addis Ababa 8th April,2003

[417] Article III, Section 1 enshrines that the judicial power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish.

[418] Art.71 of the Australian Constitution

[419] Assefa, supra note at 4, p.349

[420] Art.80(1,2) of the FDRE Constitution

that the ultimate source of power is the supreme, written, and rigid federal constitution which is common to the different levels of government, not the federal government nor the states.

There are basically two approaches to the structure of court system in federal systems: dual and integrated approaches. While some federal countries like the US adopt a dual courts system, others such as Germany establish an integrated court structure. Both types have their own merits and demerits. Saunders contends that while the option of dual court system deepens local autonomy further and may also assist to accommodate differences in legal systems between constituent units, it adds to the complexity of the judicial system, in ways that may be inconvenient to litigants, unless there is considerable co-operation between court systems.[421]

As far as the division of judicial powers is concerned, different federal systems adopt different approaches to the division of judicial powers. While some of them incorporate judicial powers in their constitutions wholly or partially, others make cross reference to laws to be made by a law-making organ. For example, according to the US Constitution, judicial powers extend to all cases in law and equity arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority; to all cases affecting Ambassadors, other public Ministers and Consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States will be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State.[422] While these subjects are general jurisdictions that fall under the US courts of different hierarchical levels, the Federal Supreme Court shall exercise a first instance and appellate jurisdiction over some of them as the case may be. Accordingly, it is plainly stipulated that in all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original jurisdiction whereas in all the other cases, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such Regulations as the Congress shall make.

[421] Saunders, supra note at 235, p.15
[422] Article III, Section II of the US Constitution

The Argentine Constitution sets out the judicial powers of federal courts in a similar method with the US counterpart.[423] In these cases, the Federal Supreme Court shall exercise an original and appellate jurisdiction. Accordingly, while the appellate jurisdiction, thereof, is determined by a law made by the Congress, it has an original and exclusive jurisdiction over cases arising from all matters concerning foreign ambassadors, ministers and consuls, and in those in which a province shall be a party.

The Australian Constitution defines the original and appellate jurisdiction of the Federal Supreme Court in two ways: directly constitutionally determining some specified cases and empowering the Parliament to prescribe on other particular matters. There are about five cases which the Supreme Court constitutionally exercises a first instance jurisdiction, accordingly.[424] These are cases arising under any treaty; affecting consuls or other representatives of other countries; in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party; between States, or between residents of different States, or between a State and a resident of another State; and in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. There are four cases where the Parliament makes laws conferring an original jurisdiction on the Supreme Court *viz*. cases arising under the Constitution, or involving its interpretation; cases arising under any laws made by the Parliament; cases of admiralty and maritime jurisdiction; and cases relating to the same subject-matter claimed under the laws of different States. The Supreme Court exercises an appellate jurisdiction over decisions of any Justice or Justices exercising the original jurisdiction of the Supreme Court; of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council; and of the Inter-State Commission, but as to questions of law only.[425] In other circumstances, the Parliament is authorized to regulate by making a law on such issues as defining the jurisdiction of any federal court other than the Supreme Court; defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States; and investing any court of a State with federal

[423] Pursuant to Sections 116-118 of the Argentine Constitution, the federal courts shall have a jurisdiction on all cases arising under the Constitution and the laws of the Nation, and under the treaties made with foreign nations; all cases concerning ambassadors, public ministers and foreign consuls; cases related to admiralty and maritime jurisdiction; matters in which the Nation shall be a party; actions arising between two or more provinces, between one province and the inhabitants of another province, between the inhabitants of different provinces, and between one province or the inhabitants thereof against a foreign state or citizen.
[424] Art.75 of the Australian Constitution
[425] Art.73 of the Australian Constitution

jurisdiction. Moreover, it is stipulated that the Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.[426]

The Ethiopian federal approach to the division of judicial powers differs from other federal systems mentioned hereinabove. Unlike that of the legislative and executive powers which are more or less described with precision in the regime of the distribution of powers, judicial powers are divided between the federal and state courts with general terms. The Constitution simply provides that Supreme Federal judicial authority is vested in the Federal Supreme Court; the Federal Supreme Court shall have the highest and final judicial power over Federal matters.[427] On the other hand, it is stated that the State Supreme Courts shall have the highest and final judicial power over State matters. The Chapter dedicated to the judicial powers under the Ethiopian Constitution deals more with other issues than the division of judicial authority between the courts of the orders of government with a clear sense. As a result, many do not understand the exact powers of the federal and state courts under the federal structure. This particular Chapter is devoted to the fact that judicial powers are vested in the courts; judicial independence; delegation and concurrency of judicial authority and their financial consequences; and other related issues. All gleaned from the constitutional approach which is too general and remote to explain the division of judicial powers of the federal and state courts is that while the former are destined to adjudicate federal matters, the latter are assumed to adjudicate state matters in addition to federal matters delegated to them.

Due to its generality, imprecision and ambiguities, a constitutional approach proves insufficient to tell more about what each level of courts exercises and which and how many of the matters or cases. Consequently, as indicated in the Constitution, much information would be gained from the statutory approach to the allocation of judicial powers between the federal and state courts on one hand and among the courts of each tier of government, on the other. As will be explicated in the following sections, the determination of the power of courts by laws made by the legislature is also defective in many ways, especially in relation to matters dealing with criminal adjudicative jurisdiction. For the interest of this study, the constitutional approach which provides that federal courts decide on federal matters and the state courts on state matters notwithstanding the delegation clause has been taken as a

[426] Art.77-78 of the Australian Constitution
[427] Art.78(2) and 80(1) of the FDRE Constitution

workable postulation that may be used as a steppingstone to the analysis of the statutory approach in the allocation of judicial powers particularly in the criminal justice.

In addition to the above-mentioned regular courts, the duality of courts is also manifested in the religious, customary, and constitutional arbiters/courts. The religious and customary courts may be established by the HPR (at federal level) and the State councils (at regional levels).[428] As such, while the Sharia Courts are established both at Federal and State levels, to date, it is recent historical evidence that the Oromia State established customary courts after more than two decades of the constitutional and federal experimentation.[429]

In general, as compared with the legislative and executive powers, the division of judicial powers under the Ethiopian federal and constitutional design is more general as a result of which a careful consideration should be given when the statutory approach is resorted to in defining the jurisdiction of courts at federal and state levels. As the constitutional approach to the division of judicial powers sticks to the federal matters *versus* state matters dichotomy, an attention should be paid to the relevant provisions of the Constitution as to which constitute these matters at least to minimize usurpation of powers and other conflicting interests.

3.3.2. Challenges and practical problems

In addition to some problems momentarily mentioned in the preceding section dealing with the concurrent powers, there are many challenges and problems connected with the distribution of powers and its application in the federal experimentation. These challenges may pertain to all forms and approaches of the division of powers, namely legislative, executive, and adjudicative aspects on the one hand and exclusive, concurrent, and residual forms of the division of powers, on the other. Additionally, the challenges may be attributable to those problems which are allied with the constitutional design and those which are revealed in practice.

Although the FDRE Constitution incorporates important principles of the distribution of powers such as constitutional entrenchment, mutual respect, and democratic principles, it appears to have suffered from some downsides that have contributed to the problems manifested in the application of the doctrine of the distribution of powers between the Federal

[428] Art.78(5) of the FDRE Constitution
[429] Proclamation No 240/2021 (a proclamation to provide for the establishment and recognition of Oromia region Customary Courts)

government and the states. They may be found in the form of constitutional loopholes, ambiguities, and vagueness. The first difficulty pertains to the sweeping silence of the Constitution on the federal supremacy clause. The Constitution only provides for the constitutional supremacy and bypasses the legislative one. Due to this void, challenges have been unfolded as to which law should prevail in cases of inconsistencies between the federal and state piece of legislation. This has become a big problem in courts while deciding and resolving controversies, and executive organs especially criminal justice institutions such as police and public prosecution in the accomplishment of crime investigation and prosecution. The disarrayed consequence is that in order to fill this vacuum and alleviate the difficulties created thereby many measures have been taken both at the federal and state levels. For instance, the State Constitutions unequivocally provide for the federal supremacy clause in a contradictory manner to the FDRE Constitution. Some piece of legislations enacted by the federal government also declares that in cases of contradictions between the federal and state laws, the former should prevail. As will be broadly discussed in chapter eight, both the Federal and State Supreme Court Cassation divisions have also passed precedents that uphold the supremacy clause.

The second challenge bears on the dual federal arrangement designed by the Constitution on the one hand and the question of funded and unfunded mandates in enforcement of federal laws in and by the state organs and institutions. The Constitution is so strict and clear that both the federal government and the states have their own governmental organs which are entrusted with making, executing and adjudicating their respective laws. An exception to this principle is the delegation rule. Delegation envisaged by the Constitution, on the other hand, signals a solely funded mandate. This urges us to posit two questions. One, how states are enforcing federal laws in their territories: as an original jurisdiction or delegation? In this connection, if one argues in line of original mandate, then the constitutionality question comes into picture. If one argues that it is by delegation, the issue of funded mandate in that the federal government should reimburse the costs expended for the enforcement of the federal laws comes into play. Such a disorganized and unsystematic exercise of federal powers by the states raises very important constitutional and democratic questions in areas of mutual respect and non-encroachment, usurpation of powers, accountability, budgetary issues, and legitimacy crisis. Besides, this problem may be complicated by the incomplete enumeration of powers by the Constitution which gives more emphasis to the legislative sphere which is dual in form, and less attention to the executive and judicial powers. The subsequent laws issued in order to alleviate this gap and which are meant to define the jurisdictions of justice institutions appear to have taken over such a task thereby creating further questions and problems, instead of solving the original one.

The third challenge pertains to the operation of the party system *versus* the federal and constitutional milestones. Despite the constitutionally devolved system, shared rule and self-rule rights, autonomy, distribution of powers, and diversity of constitutionalism adopted in the federal structure, the ruling party—the then EPRDF and currently the Prosperity Party—has dominated all sectors and has consequently thwarted these fundamental principles. Political dogma and decisions made by the ruling party have taken over the constitutional and federal principles. Priority has been given to the political positions instead of the constitutional supremacy. The constitution and its foundational pillars become an issue only in cases of demand from the regime. As a result of the centralized party operation, especially under the banner of democratic centralism and developmental state mantra, centralization has become a norm at the cost of constitutionalism and federalism. The states have been rendered dormant and threatened to assert their autonomy. Policy and legislative centralization has permeated all economic, social, cultural and technological spheres. To this effect, Assefa argues that the party structure and its decision-making procedures undermine the federal division of power and subordinate the regional governments to the centre.[430] Gedion and Abduletif also hold that regardless of the distribution of powers in the Constitution, senior leaders of the ruling party who control the federal government can use the party channel to circumvent or when necessary, ignore the constitutional allocation of powers.[431] The consequence is that the ruling party and its affiliates have absolute control over both regional and federal governments, so the trend so far is that neither the states nor the federal government jealously guard their competences and seem to accept in equanimity acts of the other that could be seen as deviations from the constitutional allocation of power.[432] Abera concurs with these scholars arguing that with vital resources under effective control of the central government and the EPRDF controlling the Regions through its party structure, in practice, there is a centralized federal state which almost operates as a unitary state under the guise of a Federal Democratic Republic.[433]

[430] Assefa, supra note at 399, p. 26
[431] Gedion and Abduletif, supra note at 107, P.176
[432] Ibid
[433] Abera, supra note at 2, p. 21 citing Allen Lovice, Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000 (Bergen: Cgr. Michelsen Institute, 2002).

The previous centralized trends are also more intensified under the Prosperity Party which is the offspring of the EPRDF. The party being a single one across the country under the name of each regional state ostensibly as branch offices, has perpetuated the *de facto* centralization practices despite the constitutional ideals. Given the merger between party and state at federal and regional state level, Prosperity Party at the centre has turned previous coalition and affiliate members to branches and subsequently autonomous sub-unit branches of Addis Ababa. Assefa explores the significant markers of the rise of the authoritarian centralist elite under the Prosperity Party.[434] These are the removal and change of the regional presidents against their will and the self-rule right of the states which is inbuilt in the Constitution; the ideological push of the think tank of the ruling party in restoring the country from federalism to the unitary and centralized state under the nation-state building project which was proven unsuccessful; and newly emerging policies that aim at centralizing powers under the federal government by snatching from the states. The best example in this instance is the [policy] document that urges the dissolution of the regional special police forces and weakening the regular police institutions by subduing them under the control of the federal police; unconstitutional assignment on some bodies such as the identity and administrative boundaries commission which covertly took over the power of the House of Federation.

The laws made by the federal government following the political reform under the name of legal and justice reform shows that powers which are divided between the federal and state governments are centralized under the former. Constitutional and federal principles which are clearly spelt out are not observed in the policy and legislative mandate the federal government is undertaking since recently. Thus, the unconstitutional centralization of powers which began during the EPRDF is being worsened under the Prosperity Party. In connection with these propositions, it is worth quoting what Schnabel maintains with regard to the unilateral appropriation of powers and its adverse consequences:

> *"In federal countries, changes to the distribution of power require the consent of both levels of government. When policy problems affect several governments of a federation but individual governments decide on policy unilaterally, i.e. without consulting the other governments, this fundamental principle of federalism can be violated. The reason is that unilateral policy making potentially limits the other governments' autonomy without them consenting to such (often informal and implicit) changes in the federal balance of power.– changes which are often informal and implicit….Because it impinges on the autonomy of other governments, unilateralism destabilizes the federal balance of power. In day-to-day*

[434] Assefa Fiseha, "Tigray: A Nation in Search of Statehood?" *International Journal on Minority and Group Rights,* pp. 1–47, 2023, p.10-17

policy making unilateralism mainly affects governments' autonomy with respect to their scope of action, though it may also lead to authority losses. Whether federal instabilities are major or minor, the implications they have for the system depends on the number of policy areas in which unilateralism occurs and the significance of the policy issues at stake." [435]

In view of Schnabel, there are about three forms of unilateralism: individual policies, federal imposition, and non-compliance.[436] The individual policies happen where governments solve policy problems unilaterally if they establish their own policies (or policy programs) to solve a policy problem that concerns several of them without consulting the other governments namely the constituent units in matters that affect their interests. On the other hand, federal imposition is a unilateral policy making whereby the federal government forces the constituent units to agree to a policy that it conceived; especially if it depends on the constituent units and their expertise to implement a policy, the federal government is likely to try to coordinate policy making with the constituent governments and to enact a joint policy solution but then impose its own specific priorities on them. Non-compliance with a jointly-adopted policy solution is another instance of unilateral policy-making especially when it reverses changes to the power balance that all governments have endorsed.[437]

Fourth, precedents developed by the Federal and State Supreme Court Cassation divisions have their shares in negating and aborting the proper application of the distribution of powers between the federal government and the states. The Federal Cassation has apparently nullified pieces of legislation or some provisions proclaimed by the states. This is against the principle of the separation of powers on the one hand and the sovereignty of the states on the other. Laws made by the state councils which are the representatives of the people of their region should not be subject to nullification or repeal by unelected judiciary. The Federal Cassation has not been in a position to accommodate diversity and legal pluralism. An attempt thus far made by the federal precedent is keeping the state laws to conform to the federal counterpart. In doing so, the implication is that the cassation promotes a unified and centralized legal system instead of upholding legal pluralism. As a result, some argue that after more than two decades of federalism, Ethiopia has very little federalism case law, and

[435] Schnabel, Johanna, *Intergovernmental Councils and the Coordination of Public Policy Making*, Forum of Federations, Occasional Paper Series, Number 45, ISSN: 1922-558X (online ISSN 1922-5598), 2020, p.9
[436] Ibid
[437] Ibid

the federal and state judiciaries have had virtually no role in shaping the development of Ethiopian federalism.[438]

Last but not the least, the federal intervention in the states is also another area of practical challenge and problem in the proper application of the division of powers. In this regard, Assefa maintains that federal intervention may become an avenue through which the federal authority is encouraged, or authorized, to cross the federal-state division and to limit or suspend temporarily the autonomy of the states in the name of safeguarding constitutional order.[439]

3.4. Conclusion

There are a lot of conclusions drawn and lessons learned from this chapter which are very important and relevant notions for the analysis of matters of criminal justice in federal systems including Ethiopia in the forthcoming chapters. The doctrine of the distribution of powers, being one of the fundamental principles and characteristics of federalism, is not divided haphazardly between different orders of government. Hence, there are principles that guide, factors that affect and rationales that necessitate for the distribution of powers in federal systems. Accordingly, rectifying the past wrongs; the management and transformation of conflict; structural protection of group and individual liberty; and double security for human rights protection are some of the rationales that urge for the incorporation of the principle of the distribution of powers in a federal constitution.

On the other hand, there are principles which guide how and in what manner powers are divided between different orders of government for the sake of many purposes. These principles are: constitutional entrenchment, the principle which concentrates on the source of power to be a federal constitution in that any tier of government derives their powers from the constitution alone, not from a law made by different levels of government; the subsidiarity principle which promotes flow of powers and functions from a bottom up, not top down which increases the effectiveness, efficiency, accessibility, transparency, accountability and public participation for the delivery of public services and goods. The subsidiarity principle is explicitly incorporated in constitutions of some federal systems and implicitly in others'.

[438] Gedion and Abduletif, supra note at 107, P.166
[439] Assefa, supra note at 294, p.149, proclamation no 359/2003

Interdependence is the other principle that guides the distribution of powers in a federal system. Although federal systems are categorized into various ways based on different parameters, it could be rarely possible to avoid conflict and overlap of powers and functions that calls for an interdependent working system without, however, compromising the fundamental principles of federalism. In light of this tenet, powers granted to one tier of government cannot be fully implemented without the healthy cooperation and collaboration of the other. The democracy argument which is more or less related with the subsidiarity principle also takes the leading role in guiding the distribution of powers. It enhances the accountable, transparent, responsive and participatory government. From this, it could be deduced that powers granted to a level of government makes it accountable and responsive for that particular power, be transparent in rendering services and decision-making, and engage the public in the exercise of the power over the subject matter. Efficiency takes a central position as a principle of the distribution of powers. Before allocating a certain matter to fall under a federal government or constituent units, attention should be given to the locus of efficiency of performance by either level of government. The finance-follows-function principle is also an important tenet in which powers and functions conferred upon different tiers of government should be backed up and implemented by adequate budgets to be reimbursed presumably by the respective government.

Furthermore, powers and functions are allocated based on a variety of factors that affect the task. These factors may be the mode of the coming into existence of the federal system, the degree of homogeneity (unity) *versus* heterogeneity (diversity), the significance of the subject matter (whether it is of national/federal, regional, or local importance), and the timing within which the federation was formed. While these are normative assumptions, whether and how many of the world federal systems have exhibited and incorporated all these principles, factors, and rationales is an area of an independent and separate inquiry for future researchers.

As far as the aspects of the distribution of powers are concerned, an observation from the experiences of different federal systems reveals that the legislative, executive, judicial, and fiscal powers are divided between various levels of government with different approaches adopted by different federations. Accordingly, the common approach to the formal division of powers is exclusive, concurrent, and residual powers. Each of these three forms also differs from one federal system to the other in scope, assignment, and design. For example, residual powers are reserved to the constituent units in some federations and to the federal government in others.

Concurrent powers are found explicitly and implicitly in constitutions of the federal systems. It can be manifested in the forms of framework, complementary, conditional, fragmentary, split of the legislative and administrative and *de facto*. Concurrent powers are the most pervasive and complex form of the distribution of powers. As they are both advantageous and disadvantageous, they could be termed as "a necessary evil". They are useful for flexibility and innovation from among other things. By contrast, concurrencies promote centralization, conflict, inefficiency, and democratic deficits. In order to curb such negative consequences of concurrencies, different federal systems made various reform initiates and constitutional litigation thereby minimizing the challenges and problems and limiting the intrusive federal acts.

In Ethiopia too, the three spheres of powers—legislative, executive, and judicial powers in addition to the fiscal powers—are divided between the federal and state governments. As to the approach to the division of powers, the three common forms are provided in the FDRE Constitution: exclusive, concurrent, and residual. While the Constitution explicitly enumerates the exclusive federal powers, and reserves the residual powers to the states, it tends to provide for the exclusive state powers whose relevance and significance remains to be controversial. The Constitution deals with concurrent powers in a variety of ways as compared with other federal systems. From the outset, there is no clear mention and enumeration of concurrent powers in the Constitution except on taxation powers. In other circumstances, although there is a constitutional conjecture towards concurrencies, for example, as regards judicial concurrency, the caption and the contents provide different things. A proper concurrency exists in relation to the framework (in relation to a large area of socio-economic matters), legislative-executive split (specifically as regards land and other natural resources) and generic concurrency (especially criminal and civil matters). Given the constitutional phraseologies, as will be dealt with in-depth in the following part (Part II), the generic concurrency regarding the criminal matters is the weakest of all forms of concurrencies. The problems and challenges of concurrencies which are common in other federal systems are the equally the same in Ethiopia too. The lack of power boundaries between the federal government and the states that gives a wide and broad gateway to the former thereby perpetuating centralization, democratic deficits, and inefficacies are some of the difficulties ensued from concurrencies.

Furthermore, despite the formal and constitutional distribution of powers, there are many challenges and problems which are inherent in the Constitution and grew from practices in the Ethiopian federal experimentation. The supremacy clause and its absence in the constitution, the incongruence between the dual institutional set up and the large areas of powers exercised by the federal government in legislative and policy mandates on one hand and inadequate workability of the delegation power, and the authoritarian centralist political tendency against the constitutional and federal principles are some of the challenges and problems what have been plaguing the smooth and proper application of the constitutional distribution of powers.

Comparatively, the legislative and executive mandates are divided by the Constitution in a clearer manner than that of the judicial powers which are stipulated in general wordings. In this regard, attention should be paid to the fact that the Ethiopian constitution designs a dual institutional set up whereby both tiers of government have their own legislative, executive, and judicial organs which are assumed to be in charge of making, implementing, and adjudicating their respective laws and policies. Thus, the HPR and the state councils enact laws and formulate policies over matters specifically granted to the federal government and the states respectively, whereas the Council of Ministers and the Prime Minister and the regional administrative council are entrusted with the duty of executing the laws made by the HPR and state councils. Correspondingly, whilst the federal courts are empowered to decide on federal matters, the state courts shall decide on state matters. The exception to this rule as a dual structural or institutional design is the delegation clause whereby the federal government may delegate some of its powers to the states hence downward delegation system. Some of such judicial powers which fall under the jurisdiction of the Federal High and First Instance Courts are constitutionally delegated to the State Supreme and High Courts respectively.

As far as the delineation of the jurisdiction of courts is concerned, an observation from the experiences of some federal systems reveals that there are two approaches: constitutional and statutory. In light of the former approach, the jurisdiction of some level of courts is defined by the constitution wholly or partially. This holds true especially for some federal and quasi-federal countries which specify the jurisdiction of the Federal Supreme Court. In the latter approach, as the constitution simply establishes courts and empowers the legislature to define their powers, detailed accounts of the jurisdiction of courts are found in the statutes to be issued in accordance therewith. Ethiopia is the typical example in this sense because the

Constitution provides for the jurisdiction of the federal courts and the state courts in a general term in which particulars would be complemented with the primary laws.

While these are the backdrops that can be used for the analysis of the distribution of criminal justice matters in the next chapters, an attempt will be made with the contemplation of this subject in some federal systems which could be taken as a comparative steppingstone towards a critical view of the Ethiopian criminal justice matters.

Chapter Four

The Division of Criminal Matters in Some Federal Systems

4.1. An Overview

In the foregoing chapters, an attempt was made to explore the conceptual and theoretical nexuses between the principles and values of federalism and the rationales, principles and factors of the distribution of powers and the matters of criminal justice. In this chapter, an attempt will be made to navigate the experiences of some selected federal systems in relation to the criminal justice matters in general and that of the division of criminal authority in particular in a comparative survey.

Just like that of the distribution of powers in form and scope, there is no one and universally accepted approach to the division of criminal matters in federal practices. Federal systems around the globe adopt a variety of approaches to the division of powers in general and criminal and security matters in particular within the broader spectrum of the administration of criminal justice between different orders of government. While some of them adopt a decentralized legislation and administration of criminal matters, others follow a centralized policy and legislation with decentralized administrative aspects. It is also evident that in some systems, criminal justice administration is centralized both legislatively and administratively each having its own advantages and drawbacks.

It has been described in chapter two that federal systems can exist and be classified into dual *versus* integrated, coming together *versus* holding together, symmetrical *versus* asymmetrical, and cooperative *versus* competitive based on different yardsticks. There are also other categories of federal systems such as ethnic federalism, multinational federalism, intercultural federalism, or pluri-national federalism whose taxonomical approach and basis is ethnic, national, linguistic, cultural, and religious and other forms of cleavages. In this regard, it should be borne in mind that a single federal system may comprise more benchmarks of classification. For example, a multinational federation could be a coming together, or asymmetrical, integrated or competitive simultaneously.

While this is a broad approach to the classification of federations, in this chapter, an attempt will be made to provide a comparative analysis of the division of criminal matters in few federations for a methodological convenience. Accordingly, USA, Germany, and India which respectively represent dual, integrated, and multinational federations were selected. The experiences of these federations have a direct and indirect comparative resemblance with the Ethiopian federalism as regards the division of powers followed by institutional design in general and criminal matters as a particular subject.

Before embarking on the discussion of the selected federal polities as regards the division of criminal and security matters, it is better to have a general overview of the approaches, models and alternatives pursued by different federal systems. Accordingly, with specific reference to the division of police power under a sphere of criminal justice administration, Assefa explores about four approaches in federal and devolved systems.[440] The first approach is a centralized and unitary policy system. In countries where such a unified police system is designed, there is only a national police force which should operate across the nation without the need for establishing regional or provincial police forces. Nigeria and South Africa are best examples for this approach. In the Nigerian experience, it is unequivocally declared that there shall be a police force for Nigeria, which shall be known as the Nigeria Police Force, and subject to the provisions of this section no other police force shall be established for the Federation or any part thereof.[441] From this provision, it could be readily understood that it is prohibited to establish regional or provincial police forces alongside the national single one. Though the constitution envisages the possibility of opening branches in the states, even then it is not a state police but the national Nigerian police force in the states.[442]

Likewise, the South African Constitution establishes a unitary police in which it is clearly stated that the security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution;… and the national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.[443] This centralized police system is also recognized by the fact that it is the national legislation that specifies the powers and functions of the police system and enables the police service to discharge its responsibilities effectively, taking into consideration the requirements of the provinces, which implicitly prohibits the provincial legislature to take up such a power at regional level. Thus, there is only one police which is nationwide in South Africa.

[440] Assefa Fiseha, "Federalism and Security: The Special Police in Ethiopia", *Journal of Autonomy and Security Studies*, Vol. 6 Issue 2 (2022), p.122
[441] Art.214(1) of the Nigerian Constitution
[442] Assefa, supra note at 440, p.122
[443] Arts.199(1) and 205 of the South African Constitution

There are some justifications and advantages of the unitary policy design in devolved systems. The first advantage is that it is simple and straightforward and does not give rise to complication of service delivery unlike that of the dual one. Moreover, it is very economical, as there is only one system operating throughout the country with little or no duplication of resources.[444] There is also an underlying assumption for the organization of such a unitary and centralized police system in both countries. As Assefa holds, this approach to organizing the police is a consequence of the overall federal design that aims to integrate the sub-units and focuses more on national unity than on empowering the sub-units. The major ethno-national groups in both countries are, for example, divided into several states to make sure they do not become a nation that may in the end threaten the country as a result of which the focus is thus more on unity and national integration, hence integrationist approach, not on accommodation and empowering the sub units.[445]

The second approach is an administrative approach to the division of police power which is the reflection of the integrated or administrative or 'executive' type of federalism, where the federal level of government has just about all the constitutional powers to make security legislation, but the administration and enforcement of that legislation tends to fall under the purview of the constituent units. Under this arrangement, the federal government tends to have only very limited enforcement abilities, including a federal criminal police, a border police, an immigration police and a security police dealing specifically with threats against the state.[446] This alternative is mostly pursued and adopted by the German federalism, where the states largely administer and enforce both federal and state law. India also resembles the German system, in which police power is divided between the union and state governments, and yet both levels are integrated through several mechanisms.[447] Accordingly, although the principle is that there are union and state police systems, the senior level police positions in the states are filled in by appointments made through the union government; and the recruitment and training process of such senior police positions is also made by the union government to ensure standards and uniformity in the police system.[448]

The third approach is when there is a clear division of mandates between the federal government and the constituent units, also called the dual model, as in Ethiopia, but as

[444] Assefa, supra note at 440, p.123
[445] Ibid
[446] Ibid
[447] Ibid
[448] Art 355 of the Indian Constitution and seventh schedule

explained with significant overlapping mandates.[449] The logic of the dual model is however very clear: in as much as legislative, executive and judicial powers are divided between the federal and state governments, by the same logic, police power is also divided between the two levels of governments but again with some overlaps.[450] This approach will be critically explicated at length in chapter five.

The fourth approach refers to federations that allocate wide police power to states with only limited powers reserved to the federal government which could typically be represented by the United States of America, in which the federal police power is limited, most of it being left for states. Furthermore, federal police power is distributed in several special agents. Federal law enforcement focuses mostly on interstate and international crime. The U.S. Department of Justice regulates different federal law enforcement agencies such as the Immigration and Naturalization Services, the Federal Bureau of Prisons, the Drug Enforcement Administration, the Federal Bureau of Investigation, and the U.S. Marshals Services.[451] However, a close look at the overall formal and empirical evidences on criminal justice administration, as will be expounded in the following section, the US approach is as dual as that of the Ethiopian counterpart.

While this is all about the general overview of the approaches followed by various federal systems (both full-fledged federations and quasi-federal or devolved systems), in what follows, an attempt will be made to explicate the deep experiences of some selected federal polities which may have a direct and indirect comparative relevance for the study of the division of criminal matters in Ethiopia. Thus, this chapter comprises three major sections. Section one provides a brief introductory statement and an overview of alternative approaches to the division of police powers in federal and devolved systems as a prologue. Section two specifically explores the approaches, theories, and experiences of the three federations—the USA, Germany, and India—in relation to the division of criminal matters one by one. The last section provides important lessons that could be learned from the models and approaches of these federations as regards the study of criminal justice in general and the division of criminal matters in particular within the whole gamut of federalism. It also provides a conclusion for the chapter.

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[449] Assefa, supra note at 440, p.124
[450] Ibid
[451] Ibid

4.2. The Division of Criminal Matters in Some Selected Federal Polities

As briefly described in the above section, different federal systems adopt different approaches to the division of criminal matters, particularly influenced by the principles and values of federalism and distribution of powers highlighted in the preceding chapters. Accordingly, the selected federations, namely USA, Germany, and India have different approaches to the division of criminal matters which will be explained as follows one by one in detail. There are a lot of similarities and dissimilarities between these federations alongside the Ethiopian counterpart that can be used and taken for comparing and contrasting the approaches to the division of criminal matters as a specific policy field in the general distribution of powers.

4.2.1. *The United States of America*

USA is a typically dual federation in which the correspondence between the legislative-executive-judicial spheres of governmental operation between the federal and the state governments in relation to their respective laws may be taken as an instance of dualism. It is usual for the distribution of executive powers to mirror the distribution of legislative powers, such that the federal executive is responsible for administering programmes and enforcing laws that are enacted by the federal legislature, while sub-national executives are responsible for administering and enforcing laws enacted by sub-national legislatures.[452] Although this proposition appears to be limited to legislative and executive spheres of the distribution of powers, it may also be applicable and relevant to the division of judicial or adjudicative authority. Thus, with all such rules, in the dualist approach the tiers of governments are assumed to make, implement, and adjudicate laws and policies over their respective matters and powers granted to each by the constitution notwithstanding other ancillary principles such as concurrencies, intergovernmental relations and delegation which are used for bridging the two or more levels of government for effective and proper implementation of laws.

According to Watts, USA, Canada, and Australia are examples of dual federations whereby the legislative and executive aspects of powers coexist.[453] In these federations, each level of government has executive power to enact its own legislation, for which it needs public service agencies, and the public service of each level of government is accountable to the

[452] Bulmer, supra note at 10, P.15
[453] Watts, supra note 8, p.86

government and legislature of that level and its constituents.[454] The US represents a typical example of dual federation in which laws made by the federal government is administered by its agencies as a result of which the states are not compelled to implement same.[455] This proposition emanates from the postulate that the US citizens would be subject to two overlapping authorities—the federal and the state governments—each having direct legislative power in their respective constitutionally prescribed spheres of competence.[456] Consequently, the federal government may neither issue directives requiring the states to address particular problems nor command the states officers or those of their political subdivisions to administer or enforce federal regulatory programs.[457] Both orders of government have their own constitutionally embedded legislature, executive, and judiciary that are beholden with making, administering and adjudicating the federal and state laws respectively. This was also reaffirmed in the *New York v United States*, that it is unconstitutional for an act of the Congress to command the state legislature (anti-commandeering principle) to regulate its powers and duties.[458] As a way out, the federal government may be able to induce the states to administer federal programs by careful use of spending power or in exchange for financial rewards but it cannot compel states to administer such programs without their consent.[459] However, there are some scholars who argue that the US dualistic approach has been transformed into the permissible marbleized concurrency in which the authority of states to legislate concurrently by virtue of federal permission in a highly interdependent system where all policy fields are now intergovernmental in one way or another.[460]

Compared with other federal systems, the subject of criminal jurisdiction has been widely studied and debated by scholars and practitioners under the US federal experimentation. As to the form of division of powers, the federal government is conferred with some enumerated powers with residuary to remain with the states. Criminal justice constitutes one among these residual powers which are reserved to the states. The Constitution vests the federal government with relatively little responsibility for punishing crime, and it specifies expressly only three infractions that Congress has authority to punish: counterfeiting the securities and

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[454] Saunders, supra note at 240, p.5
[455] Printz v United States
[456] Bulmer, supra note at 10, P.8
[457] Assefa, supra note at 4, p.289
[458] New York v United States
[459] Assefa, supra note at 4, p.289
[460] Kincaid, supra note at 161

current coin of the United States, piracies and felonies committed on the high seas, and treason against the US.[461]Apart from this, criminal justice primarily belongs to the states.

Criminal justice administration was a subject of debate among the Founders of the US federalism during the early days of the federal genesis. While at the time of the Founding, Anti-federalists had expressed fear that the new Constitution would permit the national government to supplant the states' responsibility over criminal law, proponents of ratification insisted that the role of the federal government in this area was necessarily limited. Hence, the ordinary administration of criminal and civil justice was the one transcendent advantage belonging to the province of the State governments.[462] Likewise, in response to Patrick Henry's warning that Congress would intrude in responsibilities properly belonging to the states, Delegate George Nicholas of Virginia insisted that Congress lacked the competence to define or prescribe the punishment of any other crime not provided for expressly without violating the Constitution.[463]

Nevertheless, the division of criminal matters under the US federalism is not an easy task especially in practice when Congress is alleged to have exceeded its powers in the name of regulating interstate commerce.[464] Regarding the trend of over centralization of criminal laws, Barkow holds that:

> *"Over the last several decades, federal criminal law has mushroomed beyond recognition. The number of federal criminal laws now hovers somewhere over 4,000, with roughly 40% of the laws passed after the Civil War coming in the 25-year period between 1970 and 1998. Many of these laws are written in sweepingly broad terms, overlap with one another, and cover ground already addressed by state law, including violent crimes. Often, new federal laws are passed or existing laws are expanded in the wake of a highly publicized crime, with little analysis of whether there is an actual need for federal involvement. The result is a*

[461] U.S. Constitution Art. I, § 8, III, § 3. Murray Rojas (petitioner) v the United States of America (Respondent), Supreme Court of the United States, 20-1594, ON Petition For Writ Of Certiorari To The U.S. Court Of Appeals For The Third Circuit, Brief Of the American Conservative Union Foundation And The Cato Institute As Amici Curiae In Support Of Petitioner, p.15

[462] Federalist Number 17, Alexander Hamilton

[463] Thomas B. McAffee et al., Powers Reserved for the People and the States: A History of the Ninth and Tenth Amendments 71 (2006) (quoting 4 The Debates in the Several States on the Adoption of the Federal Constitution 451 (J. Elliot ed. 1836))

[464] Althouse contends that the interstate commerce clause has passed through some specified period of time in relaxing and restraining the usage and interpretation of the doctrine. For instance, since 1937, commerce clause doctrine has allowed Congress to regulate matters that have a "substantial effect" on interstate commerce, and, until 1995, this doctrine had worked to accommodate every single matter Congress saw fit to regulate. For a brief period between 1976 and 1985, the Court had experimented with a doctrine that excepted "traditional state governmental functions" from this broadly expansive congressional power– Congress could, for example, impose a national minimum wage, but the state as an employer would be able to make some of its own wage decisions free of that federal mandate (Ann Althouse, Inside The Federalism Cases: Concern About The Federal Courts, 574 Annals Am. Acad. Pol. & Soc. Sci. 132 (2001).

> *federal prison population that is now larger than the prison population of any single jurisdiction and a federal docket of almost 70,000 criminal cases annually, roughly double the figure from 25 years earlier. The number of drug cases in particular has exploded, rising approximately 300% in the stretch from 1980 to 1990 and another 45% from 1990 to 2000.*"[465]

Moreover, Kincaid explores some areas where the federal government extended its reach in the pretext of exercising concurrent powers. Accordingly, he holds that the federal government has expanded the domain of concurrent powers by entering policy fields previously under exclusive state jurisdiction through conditional grants-in-aid, mandates, nationalizations of rights and criminal laws, and federal court actions.[466] With these mechanisms, the federal government enters domains of power historically reserved to the states, thereby establishing an expansive statutory concurrency not necessarily envisioned in the original scheme of constitutional concurrency. With particular regard to the criminal authority, the nationalization of criminal law entails enactments of federal criminal laws that duplicate or parallel state criminal laws on the same subjects. Hence, although historically, criminal law was overwhelmingly the domain of state governments, and the U.S. Constitution mentions four federal crimes (namely, treason, counterfeiting securities and currency, piracies and felonies committed on the high seas, and offenses against the law of nations), today, there are more than 4,500 federal criminal statutes, including about 50 that provide for the death penalty.[467]

Federal criminal law rests mainly on two constitutional grounds: (1) the interstate commerce clause, and (2) criminal offenses that arise from the enactment of non-criminal statutes, such as regulatory laws, pursuant to Congress's delegated powers. Consequently, the marked expansion of federal power since the early 1960s has also produced an expansion of federal criminal law. Owing to such a congressional excess in federalizing/centralizing criminal matters, three theories have been developed. These are doctrinal, normative, and the dual sovereignty doctrines.[468] They are not mutually exclusive theories as there are a lot of

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[465] Barkow, Rachel E., "Federalism and Criminal Law: What the Feds can Learn from the States", *Michigan Law Review,* Vol.109, No.4, February 2011, p.7

[466] Kincaid, supra note at 161, p.43

[467] Kincaid, id, p.46 held that the growing body of federal criminal law stemmed initially from a rising crime rate during the 1960s and a spate of race riots in big cities. A major legislative foundation was laid with the enactment of the Omnibus Safe Streets and Crime Control Act of 1968. Presidents and members of Congress then quickly realized that 'fighting crime' is popular with voters. Even a chief justice of the U.S. Supreme Court, Warren Burger, publicly inveighed against the 'reign of terror in American cities'.

[468] Barkow, supra note at 465

crosscutting and common elements among them. Each of these schools of thought is enunciated as follows in order.

4.2.1.1. *The doctrinal school of thought*

The doctrinal school of thought takes into account and heavily relies on the doctrinal approach to federalism, school of analysis, the constitutional text, history and theory. It is otherwise called the constitutional perspective, which is developed by the United States Supreme Court, which entirely focuses on the division of powers between the federal and state governments in resolving controversies arising out of the compartmentalization of criminal authority. A judicial approach to questions of federal-state relations sometimes termed "process federalism" emerged on the Court.[469] Process federalism has been described as a device to retain some legally enforceable federalism limits upon the legislative powers of the Congress when the Congress uses those powers to invade the processes of state governance. It is both recognition of the Court's preference for the national political process as the primary determinant of the scope of federal legislative power and the Court's hesitancy to abandon all judicial control over the functioning of that process.[470]

The school has been particularly developed by and from the Rehnquist Court's decisions which would constitute a part of a larger federalism revolution.[471]The Supreme Court has thus far handed down a lot of cases involving disputes of criminal jurisdictional conflict between the federal government and the states. In resolving such controversies as to what should be the scope of the criminal legislative powers of Congress in relation to the primary criminal authority of the states, the US Supreme Court has interpreted the Constitution in the spirit and text of the doctrine of distribution of powers. In the period where Congress was omnipresent, the Court reminded Congress of the old view that the Constitution and the federal system are premised on the existence of the states as meaningfully independent entities.[472]While Congress is generally the appropriate body to determine the relative allocation of powers between the national and state governments, the Court stated that

[469] Palmer, Kenneth T., and Laverty, Edward B., "The Impact of United States v. Lopez on Intergovernmental Relations: A Preliminary Assessment", *Publius* , Summer, 1996, Vol. 26, No. 3, The State of American Federalism, 1995-1996 (Summer, 1996), pp. 109-126, Oxford University Press
[470] Massey, Calvin R., "Etiquette Tips: Some Implications of 'Process Federalism", *Harvard Journal of Law and Public Policy* 18 (Fall 1994):195
[471] Id, p.11
[472] Assefa, supra note at 4, p.288

recognition in the states of a constitutional right to survive as more than an empty form necessary implies certain substantive and/or structural limits on the powers of Congress.[473]

In the *United States v. Lopez (1995)*, the Supreme Court pronounced a judgment that limits the power of Congress over criminal matters under the guise of commerce clause. This was the first time that the Court struck down a law passed under Congress's commerce power since the New Deal Revolution of 1937.[474] It was a complete reversal of the conventional wisdom that federalism in general and the rights of the states in particular provided no judicially enforceable limits to Congressional power.[475] In the end, the Court used *Lopez* to push back against some of the broadest assertions of congressional power under the Commerce Clause—reaffirming that the Constitution creates a national government with limited powers. In this particular case, the Congress enacted a Gun-Free-School Zones Act of 1990. A high school senior student Alfonso Lopez walked into school carrying a concealed weapon, and then charged with violating a Texas law that banned firearms in schools. The next day, the state charges against him were dismissed after he was charged with violating a federal law: the Gun Free School Zones Act.[476] Lopez challenged his conviction, arguing that the Act was an unconstitutional exercise of Congress's power because schools were controlled by state and local governments and were not under the authority of the federal government.

The Court annulled the criminal statute arguing that the Constitution creates a Federal Government of enumerated powers by citing James Madison's word that the powers delegated by the proposed Constitution to the federal government are few and defined, whereas those which are to remain in the States are numerous and indefinite. In this respect, Chief Justice Rehnquist emphatically argued that to uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. He ardently held, especially by departing from the previous precedents, that admittedly, some of the prior cases have taken long steps down that road, giving great deference to congressional action as the broad language in these opinions has

[473] Ibid

[474] United States v. Lopez (1995), available at https://billofrightsinstitute.org/e-lessons/united-states-v-lopez-1995, visited on 17/05/2023 at 3:30 pm

[475] Assefa, supra note at 4, p.288

[476] United States v. Lopez, supra note at 334, the Gun-Free-School Zones Act made it a federal offense "for any individual knowingly to possess a firearm [in] a school zone.

suggested the possibility of additional expansion, but we decline here to proceed any further because to do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated and that there never will be a distinction between what is truly national and what is truly local. It seems at this time that the need for the distinction of the national and local significance of criminal matters has started to flourish in the US federalism by the doctrinal school of thought.

The Supreme Court used three major litmus tests in order to ascertain the concrete power of the Congress on the specific criminal statute under the commerce clause. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce. Viewed from these all angles, it was argued by the Court that the Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. The Court also held that the Act contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce and which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce. Thus, the Court held the possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce because the Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce. As a result, the Act exceeds the authority of Congress to regulate Commerce among the several States.[477]

The minority argued in favour of the congressional commerce clause in enacting the criminal statute *viz.* the Gun-Free-School Zones Act. Three principles of the commerce clause and counterarguments against the majority have been propelled in reaching a conclusion.[478] Hence, according to the minority, first, the power to regulate Commerce among the several States encompasses the power to regulate local activities insofar as they significantly affect

[477] Ibid

[478] The National Constitution Centre, Supreme Court Case, United States v. Lopez (1995), available at https://constitutioncenter.org/the-constitution/supreme-court-case-library/united-states-v-lopez, visited on 17/05/2023 at 3:30 pm

interstate commerce. Second, in determining whether a local activity will likely have a significant effect upon interstate commerce, a court must consider, not the effect of an individual act (a single instance of gun possession), but rather the cumulative effect of all similar instances (i. e., the effect of all guns possessed in or near schools). Third, the Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove. In light of this, Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce. This argument in the opinion of the minority is supported by the postulation that the Constitution delegates the commerce power directly to Congress and the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy.

Moreover, the minority argued against the majority’s holding that it creates three serious legal problems. First, the holding runs contrary to modern Supreme Court cases that have upheld congressional actions despite connections to interstate or foreign commerce that are less significant than the effect of school violence. The second legal problem the Court creates comes from its apparent belief that it can reconcile its holding with earlier cases by making a critical distinction between ‘commercial’ and ‘non-commercial ‘transactions. The third legal problem created by the Court’s holding is that it threatens legal uncertainty in an area of law that, until this case, seemed reasonably well settled.

It follows, therefore, that there is no consensus between the conservative justices and liberal justices as to the locus of criminal matters *vis-à-vis* the exact scope of the Congressional commerce power. Conflicting interpretations are employed by the two groups of justices. In the case at hand, for example, according to the conservative majority, it would transform Congress's limited powers into unlimited powers, and enable Congress to act wherever it chose and make it especially easy to reach the very areas that tend to be mentioned first when attempting to identify matters traditionally left to the states: education, family, marriage, and street-level violence.[479]Likewise, while the liberal justices tolerate the added caseload that comes from letting Congress decide when federal torts and crimes should be created because they are committed to preserving congressional power to overcome the bad choices that they worry the states will make, the conservative justices have no conflict at all because they favour the diversity and decentralization of state and local law and doubt the ability of

[479] Althouse, Ann, “Inside The Federalism Cases: Concern About The Federal Courts”, *574 Annals Am. Acad. Pol. & Soc. Sci.* 132 (2001)†, p.6

Congress to do better, they can rid the federal courts of the new caseload without a sense of sacrifice.[480] Soronen specifies the names of the conservative justices and liberal justices in the US Supreme Court.[481] From this, we could deduce that the conservative justices employ a strict method of interpretation that limits the mandate of the federal government, whereas the liberal justices apply a liberal or broad interpretational technique in the criminal justice matters that extend federal government's mandate.

4.2.1.2. *The normative school of thought*

The normative perspective of dealing with the relationship between federalism and criminal jurisdiction in general and the allocation of authority of criminal enforcement responsibility among various levels of government in particular, is advanced and developed by scholars. The advocates of the normative school of thought argue that the question where should criminal jurisdiction rest between the federal government and the states is determined by a variety of factors. The focus is not just on the constitutional question of where power can or must reside, but on the normative question of where power should reside. They tend to emphasize arguments grounded in the political economy of the different governmental institutions that make up the criminal justice system, and analyse the incentives of officials at the different levels of government given voter and interest-group demands.[482]

The normative approach takes into account a variety of considerations and principles as to the effective allocation of criminal authority. Accordingly, the utilitarian perspective is one of the approaches that advocate that the best avenue and locus of the criminal enforcement responsibility is the local actors as compared with the federal counterpart. In this respect, one could easily comprehend that the subsidiarity principle to the criminal justice approach is an underlying tenet to the allocation thereof between the federal and state governments. The utilitarian approach to the normative school is revealed in the assertions of the opponents of increased federal involvement in matters traditionally left to local prosecutors that often look to judicial resources, typically observing that the size and structure of the federal judiciary is not suited for taking on a larger share of criminal matters.[483]

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480 Ibid

481 Lisa Soronen, American Court System, State and Local Legal Centre, while the Conservative Justices include Chief Justice Roberts, Kennedy, Thomas, Alito, and Gorsuch, the Liberal Justices are Ginsburg, Breyer, Sotomayor, and Kagan.

482 Barkow, supra note at 465, p.14

483 Id, p.15

By virtue of the normative school, in the course of developing the theories of the conceptual interplay between federalism and criminal jurisdiction, the United States scholars have made a discourse not only the jurisdictional correlation between the federal and state governments, they also have analysed the criminal jurisdictional relations between the states and local governments perhaps as a subsidiarity principle. The question of how much control local actors should have over criminal law enforcement is not unique to federalism and the issue of national power. Just like the federal government, states, too, must ask when local prosecutors should retain authority over prosecutions and when a centralized, state-wide prosecutor should assume responsibility for an area of criminal law or otherwise intervene in a local action.[484]

Consequently, localism is not to be downplayed in the enunciation of federalism and criminal authority in federal systems. Barkow notes the interrelationships between localism and federalism in the discourse of criminal jurisdiction as follows:

> *"There is ample scholarship discussing the relevance of localism (that is, the relationship between states and their local governments) to questions of federalism (that is, the relationship between the federal government and the states and their localities). In both contexts, the values of centralization are weighed against the virtues of decentralization. Thus, local-government law scholars have recognized the "natural points of connection" between federalism and localism, and that the normative questions—and answers—of localism and federalism therefore often go hand-in-hand. Indeed, as Richard Briffault has noted, "[T]he 'intellectual case for federalism' often converges with the case for decentralization, or localism. The normative argument for federalism rests on values such as democratic political participation, increased representation of diverse interests, and innovation—all of which are also hallmarks of localism."*[485]

As delineated in the above discussions, even the Court has emphasized the value of local authority instead of speaking exclusively about state sovereignty when discussing federalism. For example, the Court in *Lopez* worried about an interpretation of the Commerce Clause that would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.[486] Thus, the two major schools of thought—the doctrinal and normative—would converge on the two important notions of federalism and localism in criminal jurisdiction.

[484] Ibid
[485] Id, p.16
[486] Ibid

Because of the fact that the values of federalism which include the closeness of government bodies to their constituents [and] the preservation of the ability of local and state governments to experiment in social policy, neither the Constitution nor debates among the Framers suggest that the federal government was to have a significant role in prosecuting crimes affecting the local community and that there are sound policy reasons for a limited federal role, including the fact that most crime is local in nature, and consequently, the local community feels the brunt of the offense.[487]This proposition may also be supported from the viewpoint of the accessible, accountable, transparent, and participatory criminal justice system from the bottom-up approach.

4.2.1.3. *The dual sovereignty doctrine*

The state sovereignty is manifested through the assignment of residual powers to the states which on the other hand is the consequence of the limited list of powers granted to the federal government.[488] The residual power of the states in the United States is often called the ‘police power’ referring to the residual prerogatives of sovereignty which the states had not surrendered to the federal government because federalism in the United States was the result of a political compromise between unitary and confederal forces, and in its early stage was understood as dual polity implying sovereign states, not states with limited autonomy.[489]

In relation to the criminal authority, the dual sovereignty doctrine reserves to each state the ability to independently determine what shall be an offense against its authority, and to punish such offenses.[490] This doctrine has mostly been propelled by the *amici curiae* of the United States[491] with regard to concrete cases resolved by the various hierarchical levels of courts in relation to disputes arising out of the scope of criminal authority between the federal government and the states. Of course, the intellectual advancements and scholarly discourse

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487 Id, P.17
488 Assefa, supra note at 4, p.287
489 Ibid
490 Barkow, supra note at 465, p.17
491 Amici’s members include a diverse group of state and local governments, active prosecutors, law enforcement personnel, and elected officials, each of whom has an acute interest in ensuring that the long-entrenched dual sovereignty doctrine remains intact. The Council includes the National Association of Counties (NACo) is the only national organization that represents county governments in the United States; the National League of Cities (NLC) is dedicated to helping city leaders build better communities; the U.S. Conference of Mayors (USCM); The International City/County Management Association (ICMA) is a non-profit professional and educational organization; the International Municipal Lawyers Association (IMLA) that has been an advocate and resource for local government attorneys; the National District Attorneys Association (NDAA); the National Sheriffs’ Association (NSA)

on the theme has overtly originated from the practical cases handed down by the hierarchical courts—the Supreme Court at the apex—as a means of constitutional review mechanism.

The *amici* have aired their views on the need for non-centralization of criminal justice administration from the perspective of the dual sovereignty in many cases. In *Gamble V United States,*[492] the proponents of the dual sovereignty doctrine critically appraise the benefits of the presence and adverse consequences of the absence or elimination of the dual sovereignty in terms of criminal justice between the federal government and the states. Hence, some of the advantages and premises of the dual sovereignty doctrine are the fact that it arises from the recognition that states possess primary authority over matters of criminal justice; it ensures that states can guarantee to their citizens the benefits of federalism; it safeguards the states' ability to secure their citizens' liberty from crime; and actually ensures greater double jeopardy protections.

The exponents of the dual sovereignty doctrine also predicate their arguments on the Tenth Amendment which provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people in which lies criminal justice. There are divergent views as to how the Tenth Amendment should be considered in the United States federalism and constitutional discourse. The first argument holds that the Tenth Amendment is an independent source of state powers reassuring the duality of the United Stated federalism.[493] According to this view, the Tenth Amendment is not a mere restatement or reaffirmation of the enumerated powers of Congress which are delineated in the Constitution, and holds that Congress cannot exceed its limited powers and encroach upon the sovereignty of the states. The second argument maintains that the Tenth Amendment is a simple reaffirmation of the limited powers of Congress.[494] By virtue of this contention, neither federalism nor the doctrine of states' rights provides limits on Congress' power to enact. The third line of argument which seems more plausible and submitted by the *amici* is that the Tenth Amendment was necessitated for

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[492] Terance Martez Gamble (Petitioner) v United States Of America (Respondent), The Supreme Court of the United States of America, No. 17-646, On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, Brief of Amici Curiae National Association of Counties, National League of Cities, United States Conference of Mayors, International City/County Management Association, International Municipal Lawyers Association, National District Attorneys Association, and National Sheriffs' Association in Support of Respondent
[493] Assefa, supra note at 4, p.287
[494] Ibid

assuaging fears of the Anti-Federalists that Congress would usurp state power.[495]As briefly described in the foregoing discussions, there was a fear and doubt from the side of the Anti-Federalists for centralization and usurpation of power by the Congress. This doubt, in view of the *amici*, was cleared by the Tenth Amendment.

Moreover, it is contended that the dual sovereignty doctrine further ensures that one sovereign can obtain justice for victims where another sovereign's institutional failures or lack of political will has prevented it from doing so. By dividing power between two distinct governments, a double security arises to the rights of the people. The governments will control each other at the same time that each will be controlled by itself.[496] In addition, it is claimed that the dual sovereignty fosters coordination among federal, state, and local officials in ways that serve individual liberty. Coordination among sovereigns is recognition of the reality that the Framers designed a system in which the State and Federal Governments would exercise concurrent authority over the people.[497] And coordination between local, state and federal prosecutors continues to be conventional practice between the two sets of prosecutors for effective administration of criminal justice.

To the contrary, the adverse consequences of elimination of the dual sovereignty approach in the administration of criminal justice may be that: it could frustrate cooperative federalism and an outsized impact on local government such as prevention of state efforts to foster liberty through innovation and experimentation, impediment of state and federal cooperative efforts toward a double jeopardy regime that is more protective of individual liberty. And as described in the following case, the lines between state and federal criminal authority is blurred in ways that undermine accountability; exacerbating turf wars among the states and the federal government and thereby leading to a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines.[498]

In *Rojas V United States*,[499] the submission of the *amici* is that the Federal Food, Drug and Cosmetic Act (FDCA) is alleged to have incorporated a longstanding distinction between the

[495] Murray Rojas (petitioner) v the USA (Respondent), Supreme Court of the United States, 20-1594, ON Petition For Writ Of Certiorari To The U.S. Court Of Appeals For The Third Circuit, Brief Of the American Conservative Union Foundation And The Cato Institute As Amici Curiae In Support Of Petitioner, p.26
[496] The Federalist No. 51, James Madison
[497] Printz v United States, 521 U.S. 898, 919–20 (1997)
[498] Ibid
[499] Rojas v the USA, supra note at 355, p.1. The amici advance their arguments on the approach and theory of criminal authority, for example, through the American Conservative Union Foundation, a tax-exempt organization, dedicated to advancing conservative solutions to issues facing Americans of every race, creed,

federally regulated "dispensing" of drugs in interstate commerce and the traditional state authority over the purely local "administering" of medicine. It is maintained that the government's theory of the case—which prevailed at trial—was that Petitioner violated 21 U.S.C. §§ 331(k), 353(f), and 333(a), specifically because she violated Title 58, § 163.302(a)(2) of the Pennsylvania Code by administering drugs to a horse within twenty-four hours of a race. Despite the federal prosecution, Pennsylvania typically does not seek criminal penalties for such an infraction, as evidenced by the state administrative rulings that the government relied on at trial. In making Petitioner's alleged violation of § 163.302(a)(2) a federal felony, however, the government effectively hijacked Pennsylvania law, repurposing it in a manner never intended by the state's legislature.[500]

The key arguments against this federal prosecutorial excess presented by the *amici* for review by the Supreme Court are thus: first, the traditional balance of power between the federal government and states on matters of criminal enforcement was upheld in such an ambiguous issue. As the federal government is conferred with only few criminal matters, Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States.[501] The federal Constitution vests Congress with little authority to legislate upon the subject of crimes which means Congress is not entrusted with a general power over these subjects, but a few offences are selected from the great mass of crimes. All felonies and offences committed upon land, in all cases not expressly enumerated, being reserved to the states respectively.[502]The *amici* demanded the narrow and strict interpretation as a curbing mechanism of an unjustified federal encroachment into the state prerogatives on criminal justice. Likewise, in *Scheidler v. National Organization for Women*, the Court rejected an expansive interpretation of the Hobbs Act because it would federalize much ordinary criminal behaviour, ranging from simple assault to murder, a behaviour that typically is the subject of

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and ideology. Especially, Nolan Center for Justice focuses on criminal-justice policies that strengthen public safety, advance human dignity, and improve government accountability, which opposes the increasing application of federal law to matters that are more appropriately addressed by state and local authorities; and firmly believes that the rule of law requires that statutes be strictly construed to ensure due process, particularly for criminal defendants who face the potential forfeiture of their liberty if convicted. The Cato Institute was established in 1977 as a nonpartisan public-policy foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the limited constitutional government that is the foundation of liberty.

[500] Ibid

[501] Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))

[502] St. George Tucker, Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia App.269 (1803)

state, not federal prosecution.[503] A crime of arson (setting fire to a private residence was denied to be construed by the Court to be a federal offence because it was traditionally a local criminal conduct.[504] In all these and other similar cases, in the view of the *amici*, a broad interpretation of an ambiguous federal criminal statute may be characterized as a 'rule of harshness' and 'a rule of anti-federalism'. Absent an unequivocal command by Congress that it intends to disrupt the traditional balance prescribed by the Constitution, federalism demands that courts construe ambiguous criminal statutes in a manner that does not aggrandize federal power.[505]

Second, the remedial canon employed by the Third Circuit cannot be reconciled with the court's federalism clear-statement rule.[506]The expansive and liberal construal adopted by the Third Circuit of the FDCA automatically abrogated Pennsylvania's prerogative to regulate the administration of drugs within its jurisdiction. As hinted out hereinabove, regulating the administration of drugs has been a responsibility traditionally left to the states,[507] and the regulation of health and safety matters is primarily, and historically, a matter of local concern.[508]Although Congress confirmed the distinction embraced previously by the Harrison Act between distribution, which is federally regulated, and administration, which historically has been left to the states, the FDCA contains no indication that Congress sought to upset this framework as a result of which the Third Circuit lacked the necessary "clear statement" from Congress to justify its interpretation of the statute, an interpretation that would allow federal prosecutors free rein in an area traditionally regulated by Pennsylvania.[509]

The third line of argument advanced by the *amici* in opposing the federal intrusion in the criminal justice administration is that the lower court's liberal construction will exacerbate the problem of overly federalizing criminal law.[510] From this viewpoint, the *amici* strongly argue that The Third Circuit's application of a remedial canon in a criminal FDCA case will lead to harmful public-policy consequences, compounding the problems inherent in expanding the scope of federal criminal law to encompass a host of statutory and regulatory trespasses embedded within the modern administrative state. The result is that from three

[503] Ibid
[504] Jones v. United States
[505] Ibid
[506] Murray Rojas v the USA, supra note at 355, p.28
[507] Hillsborough Cnty., Fla. v. Automated Med. Lab'ys, Inc., 471 U.S. 707, 719 (1985)
[508] Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985)
[509] Rojas v the USA, supra note at 355
[510] Id, p.31

enumerated crimes at the Founding, the number of federal crimes today is too high to count although one report from the early 1990s estimates that “there are over 300,000 federal regulations that may be enforced criminally.[511]

In this regard, three adverse consequences of the unjustified and unnecessary federalization of criminal law are pinpointed by the *amici*. First, it causes local criminal enforcement regimes to atrophy because it reduces the agency of state officials, limiting their ability to craft public policy. It is held that a federal program which targeted crime caused local authorities to abdicate their responsibility to the federal government thereby lowering citizens’ expectations of the Commonwealth’s public servants.[512]For instance, in the federal corruption statutes, it is contended that the expansion of federal criminal law deprives states of their fundamental prerogative to regulate the permissible scope of interactions between state officials and their constituents.[513]

Moreover, granting federal officials greater prosecutorial authority allows the federal government to use the criminal law to enforce its views in broad swaths of state and local policymaking as the power to prosecute necessarily entails the power to set policy.[514]A greater federal role in law enforcement diminishes the ability of states to determine their own policies—a direct affront to the substantial state sovereign powers under the constitutional scheme.[515]Besides, as stated above, the over-federalization of criminal law undermines and blurs lines of political accountability. Unlike federal officials, state governments remain responsive to the local electorate’s preferences,[516] as the Constitution contemplates that a State’s government will represent and remain accountable to its own citizens. With local officials in control, voters know whom to blame when crime increases or when prosecutions are mishandled.[517]Local control of the criminal law preserves the ability of voters to hold public officials to task—a prerequisite for democratic governance. This has its side implications in that transferring authority to federal officials prevents voters from holding prosecutors accountable. When that occurs, voters have no state or local official to challenge if prosecutorial policies prove ineffective. Additionally, because federal prosecutors are

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[511] John C. Coffee, Jr., Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U.L. Rev. 193, 216 (1991)
[512] United States v. Jones, 36 F. Supp. 2d 304, 313-14 (E.D. Va. 1999)
[513] McDonnell v. United States, 136 S. Ct. 2355, 2373 (2016)
[514] Kelly v. United States, 140 S. Ct. 1565, 1574 (2020)
[515] ” Gregory v. Ashcroft, 501 U.S. 452, 461 (1991)
[516] New York v. United States, 505 U.S. 144, 168 (1992); see Printz v. United States, 521 U.S. 898, 920 (1997)
[517] Barkow, supra note at 465

accountable to national leadership, they tend to focus on national rather than local priorities. As a result, they are less likely to consider the local causes of crime and the costs of their decisions to communities.[518]And when federal prosecutors act as they did in this case—incorporating elements of state law into federal charging decisions—lines of political accountability become particularly blurred, making it challenging for citizens to know what level of the federal system to hold accountable for overreach.

In order to clear such an indistinct relationship in the criminal justice system, it is claimed that in 1789, the American constitutional founders restructured federalism, strengthening central government through making its key offices independent of the member states and directly responsible to the people (federalist Papers, Numbers 9 and 10.[519] This grounding of federalism on dual citizenship, that is membership of the new national union and continuing membership of the older and smaller state unions, was a major innovation not only in institutional design but also in popular government. Indeed the two are inextricably linked with the two spheres of government being independently based in popular sovereignty.[520]

4.2.2. *Germany*

Germany is a representative of administrative or integrated federation in which basically powers are divided between the federal government and the Lander in such a way that the former makes laws and the latter implements same in accordance with their regional circumstances. The Basic Law of Germany provides for the enumeration of the exclusive federal powers, concurrent powers with the federal predominance, reserving residual powers to the states. The general rule is that a power not expressly granted to the federal government (expressed in Articles 70, 71 and 73 of the *Grundgesetz*) is retained by the state, making the states relatively autonomous.[521] The point is that by looking at the enumeration of exclusive federal powers and comprehensive concurrent powers one may doubt if the reserve power has any meaning as there is no great deal of legislative activity left to the states.[522]

As far as the self-rule rights is concerned, the state actors are limited to the areas of culture, education, electronic media, museums, hospitals, police, and local government, and more

[518] Partlett, supra note at 202
[519] Galligan, Chapter 14 Comparative Federalism, supra note at 61, P.4
[520] Galligan, supra note at 64, P.4
[521] Aronowitz, Alexis A., *World Factbook of Criminal Justice Systems,* Netherlands Ministry of Justice, Grant No. 90-BJ-CX-0002, the Bureau of Justice Statistics, the State University of New York at Albany, p.1
[522] Assefa, supra note at 4, p.291

importantly the power of adapting federal laws when there is a leeway.[523] A notable characteristic of the German federation is the interlocked relationship of the federal and the state governments although the tightness of the interlocking arrangements has come under some criticism and review.[524] The only compensation to the continual diminishing of states' legislative power that the Germans contend with is through *Bundesrat* and through the execution of federal law.[525] It is due to this reason that Watts holds that a significant difference in the German federation is that the Länder governments are more directly involved in the federal government decision-making process through the representation of their first ministers and designated cabinet ministers in the federal second chamber, which possesses a veto on all federal legislation affecting the Länder.[526] In this regard, although the federal government has a very broad range of exclusive, concurrent and framework legislative powers, the Länder have a mandatory constitutional responsibility for applying and administering a large portion of these laws.[527]

With this backdrop, the division of criminal justice matters is influenced by the interlocked federal design in the German federal system. In this vein, unless constitutionally prohibited to do so, the Länder are entrusted with administering federal laws in their own right including criminal laws.[528] It is clearly stipulated that if a Lander fails to comply with its obligations under this Basic Law or other federal laws, the Federal Government, with the consent of the *Bundesrat*, may take the necessary steps to compel the Lander to comply with its duties.[529] From this proposition, it is comprehensible that administering federal laws and policies is both a power and responsibility constitutionally devolved to the Lander. In other words, the federal government cannot take back the administrative powers from the Lander.

In the regime of the distribution of powers, criminal law is categorized under the concurrent powers.[530] In this sense, the Länder shall have power to legislate so long as and to the extent

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[523] Ibid
[524] Watts, supra note at 8, p.35
[525] Assefa, supra note at 4, p.291
[526] Watts, supra note at 8, p.35
[527] Ibid
[528] Art.83 of the German Basic Law provides that the Länder shall execute federal laws in their own right insofar as this Basic Law does not otherwise provide or permit.
[529] Art.37 of the German Basic Law
[530] Basic Law of Germany, Art.74(1) provides that the concurrent powers exercised by the federal government and the Lander shall extend to civil law, criminal law, court organisation and procedure (except for the correctional law of pre-trial detention), the legal profession, notaries, and the provision of legal advice.

that the Federation has not exercised its legislative power by enacting a law.[531] Stated otherwise, precedence is given to the federal government. Moreover, federal supremacy clause is provided by the Basic Law whereby the federal law prevails over the Lander ones in cases of inconsistencies. Thus, the federal government has the overriding power over criminal legislation for establishing equivalent living conditions throughout the federal territory, and the maintenance of legal or economic unity for the purpose of national interest. As explained hereinabove, when laws are made, there is a huge participation of the Second Chamber wherein the Lander would participate in the criminal legislation at federal level which helps to maintain the regional interests at the center.[532]

Although criminal legislative power is centralized in the above context, the administration of criminal justice is devolved to the Lander justice institutions as it is argued that the administration of justice lies chiefly with the federal states.[533] Accordingly, while the Penal Code (*Strafgesetzbuch*) and the Code of Criminal Procedure (*Strafprozeordnung*) are federal codes, making their application consistent nationwide, the administration of the criminal justice system (police, courts and correctional institutions) are matters left to the individual states.[534]

As it does in other subject matters, the federal government makes framework guidelines for the Lander in the implementation of criminal laws. That is why Aronowitz maintains that federal laws establish a framework for the individual Lander, an instance being the federal law concerning the correctional system and its administration (*Strafvollzugsgesetz*) serving as a model to the Lander.[535] The Lander may adopt their internal laws dealing with the correctional system subject to the federal supremacy clause.[536] In other words, the Lander that have not adopted their own correctional law use the federal law as their guideline in the administration of criminal justice. Moreover, there is a circumstance whereby special state laws govern the regulation of police matters as well as the prosecution of cases. The

[531] Art.72(1) of the German Basic Law
[532] Art.50 of the German Basic Law

[533] Findl, Richard, *Brief Overview of the German Criminal Justice System: The German Legislative Response to Corruption Crime*, 161st International Training Course Visiting Expert's Paper, Resource Material Series No. 98, p.103
[534] Aronowitz, supra note at 521, p.2
[535] Ibid
[536] Aronowitz, id, p.2 argues that Germany's Federal Constitutional Court, the highest court on constitutional matters, has held that the States have limited sovereign powers of their own that are not derived from the powers of the constitution.

appointment of judges also differs from state to state, keeping within the concept of state autonomy in regards to criminal and juvenile justice administration.

With regard to the police power and structure, it is maintained that Germany has an extremely limited federal police force as basically all police functions are the responsibility of the state police departments.[537] The police regulatory power is under the State Ministry of the Interior. While the federal constitution provides for mutual assistance between the federal and regional police, the Federal Minister of the Interior and the chief executive of the Federal police, may not issue instructions to the state Ministers of the Interior.[538] The criminal jurisdiction of the police in terms of prevention and investigation is exercised autonomously and divided across local levels.

As to the structure of courts in Germany, there are four levels that deal with criminal matters. These are local courts (*Amtsgerichte*), regional courts (*Landgerichte*), higher regional courts (*Oberlandesgerichte*), and the Federal High Court (*Bundesgerichtshof*). The local courts exercise jurisdiction on all criminal matters where a punishment of not more than 3 years imprisonment can be imposed. Regional courts which are courts of first instance jurisdiction may serve as court of general appeal (*Berufung*) along with the higher regional courts. The regional higher courts receive appeals from the local courts and regional courts in addition to exercising first instance jurisdiction in relation some criminal matters. The Federal High Court hears appeals on questions of law. The Federal Constitutional Court is the highest court in the land and considers only cases involving violations of constitutional law. It serves both as a court of first instance and a court of appeal.

Some criminal matters which ought to be inherently adjudicated by federal courts may be delegated to the courts of the Lander based on the consent of the *Bundesrat*.[539] These crimes are genocide, crimes against humanity under international criminal law, war crimes, and other acts tending to and undertaken with the intent to disturb the peaceful relations between nations, and state security. In the German criminal justice administration, prisons are

[537] Aronowitz, id, p.10 the Federal Police consist of l)the Railway Police; 2)the Federal Border Police and a special federal anti-terrorist group (GSG 9)15; 3)the Police of the administrative departments of the Federal Parliament; 4)Customs officers and the Customs Investigative Branch (under the jurisdiction of the Federal Minister of Finance); and 5)the Federal Crime Investigation Office. On the other hand, the each Lander has the following police components: l)uniformed police, including special emergency units such as those for crowd or riot control, as well as marine police units responsible for policing rivers, harbors and coastal areas;2)Detective Branch or Criminal Police; and 3) a Police Academy.10

[538] Ibid

[539] Art.96(5) of the German Basic Law

administered at the state level. As a result, there are neither federal prisons nor private prisons in Germany.[540]

4.2.3. *India*

India is a multinational federation. Unity in Diversity articulates the sentiment that India can be a strong and unified country while simultaneously affirming its cultural diversity as cultural homogeneity is not seen as a necessary condition for forging a political identity as a nation state.[541] India is also characterized by a consociational democracy.[542] In contrast with Mill's and Harrison's thinking, power-sharing theory holds that democracy is possible in deeply divided societies but only if their type of democracy is consociational, that is, characterized by (1) grand coalition governments that include representatives of all major linguistic and religious groups, (2) cultural autonomy for these groups, (3) proportionality in political representation and civil service appointments, and (4) a minority veto with regard to vital minority rights and autonomy.[543]

The Indian Constitution provides for three lists in the regime of the distribution of powers: the Union List (97 subjects), the State List (66 subjects), and the Concurrent List (47 subjects). With regard to the allocation of criminal matters, the Indian criminal justice has four subsystems which include the Legislature (Parliament), enforcement (police), adjudication (courts), and corrections (prisons, community facilities).[544] Criminal matters are divided between the Union Government and the States. There are areas where either order of government has an exclusive power whereas, some other modalities fall under the concurrent jurisdiction. In this regard, the criminal authority of the Union Government is contemplated

[540] Aronowitz, supra note at 521, P.23
[541] Mahajan, Gurpreet, *Negotiating Cultural Diversity and Minority Rights in India*, Democracy, Conflict and Human Security: Further Readings, International IDEA, Centre for Political Studies, Jawaharlal Nehru University, New Delhi, India, p.112
[542] Lijphart, Arend, "The Puzzle of Indian Democracy: A Consociational Interpretation", *American Political Science Review,* Vol. 90, No. 2 June 1996
[543] Ibid, Lijphart argues that India has long been a puzzle for students of comparative democratic politics. Its success in maintaining democratic rule since independence in 1947 (excluding the brief authoritarian interlude of the 1975-77 Emergency) in the world's largest and most heterogeneous democracy runs counter to John Stuart Mill's (1958, 230) proposition that democracy is "next to impossible" in multiethnic societies and completely impossible in linguistically divided countries.' And it confounds Selig S. Harrison's prediction (1960, 338), in line with Mill's argument, of India's democratic failure and/or territorial disintegration: "The odds are almost wholly against the survival of freedom and the issue is, in fact, whether any Indian state can survive at all." The Indian puzzle is even more troublesome for consociational (power-sharing) theory.

[544] Raghavan, R.K., *World Factbook Of Criminal Justice Systems*, India, Indian Police Service, Bureau of Justice Statistics grant No. 90-BJ-CX-0002, the State University of New York at Albany, P.2

in two approaches: general and specific. Generally, it shall exercise an exclusive jurisdiction over offences against laws with respect to any of the matters in the Union List.[545] In addition, it has been conferred with a power over such specific crimes as piracies and crimes committed on the high seas or in the air; offences against the law of nations committed on land or the high seas or in the air.[546]

Likewise, the States are empowered to exercise an exclusive criminal jurisdiction over offences against laws with respect to any of the matters in the State List.[547] They are also granted with some powers in relation to the administration of criminal justice on issues related with police, prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein; arrangements with other States for the use of prisons and other institutions. These are important institutions in the enforcement of criminal laws within the states. Apart from the above mentioned form of division of criminal matters, the Constitution provides for the concurrent criminal jurisdiction of both levels of government over criminal law (penal code) and criminal procedure code. These codes are those which are in force at the commencement of the constitution. Moreover, administration of justice and constituting and organizing courts are also powers which are concurrently granted to both tiers of government.

In general, enumeration of concurrent powers represents a more integrated and flexible model of federalism, in which there are shared competences. It allows for pragmatic variation in the actual distribution of functions and powers between different levels of government, since the federal or central government can legislate for a particular area of policy without denying the right of the state or provincial level to legislate in that area to the extent that it is practicable and convenient to do so.[548]

In the three common list-approach, the mode of division of powers follows the notion that the Union government is empowered to make laws over those matters which are required for the common interest to the whole Union whereby uniformity of legislation is sought, whereas the

[545] Art.246(93) seventh Schedule , the Union List
[546] Art.246(21) seventh Schedule, the Union List
[547] Seventh schedule , State List
[548] Bulmer, supra note at 10, P.14

states are authorized to have mandates over matters which are of purely local interest such as public order; police, public health and sanitation; local government; education, etc.[549]

Although the Constitution is so generous in sharing criminal matters between the Union and the States, there are centralization tendencies in which the power of the states may be amenable to be watering down. First, Parliament has power to make laws with respect to any matter.[550] Second, Parliament shall, while a Proclamation of Emergency is in operation, have power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List.[551] Third, the Constitution provides for the federal supremacy clause. Nevertheless, this clause is qualifiedly stipulated in providing for situations in which the state law is not subject to federal supersedence.[552] Nayaran claims that this is a novel provision which is not present in other federal constitution; and it affords the Union Government an opportunity to examine the need felt by a State to legislate in a manner repugnant to Union legislation and to validate the repugnancy if there is sufficient justification for it in the light of the peculiar local conditions prevailing in that State.[553] However, this clause does not preclude Parliament from enacting at any time any law with respect to the same.[554] Finally, residual power is vested in the Union Government. That is why Watts maintains that given the vast, populous and variegated nature of India and concerns with the threat of insecurity and disintegration, the Constituent Assembly concluded that the soundest framework was “a federation with a strong Centre”.[555]

4.3. Conclusion

To conclude this chapter, there are a number of lessons that could be learned from the comparative analysis of the approaches adopted by each federation with regard to the allocation of criminal matters as specific subject matter. As such, the US approach which in principle is a dual model, demonstrates that while the federal government is conferred with a

[549] Rao, T.S.Nayara, “Distribution of Legislative Powers in the Constitution of India”, *The Indian Journal of Political Science* , October-December 1950, Vol. 11, No. 4, (October-December 1950), pp. 43-47,p.43
[550] Art.246(4) of the Indian Constitution
[551] Art.250(1) of the Constitution of India
[552] Art.254(2) provides that where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State.
[553] Nayaran, supra note at 549, p.44
[554] Art.254(2) of the Constitution of India
[555] Watts, supra note at 8, p.36

limited criminal jurisdiction on few subject matters, probably not more than four items, the constitution basically grants the states with the police power as a residual scheme. This is assumed to be the marker of the "dual sovereignty" or regional autonomy of the states which was not surrendered during the formative stage of the federalism by an aggregation. As a dual federation, both the federal government and the states have their own governmental institutions—legislature, executive, and judicial organs—which are respectively entrusted with enacting, implementing and adjudicating laws over their powers delimited by the constitution hence monitored by the anti-commandeering principle. However, from the bottom-up view, there is a circumstance whereby the state courts adjudicate federal matters as they are not explicitly prohibited from deciding such cases by the constitution.

Although a plethora of criminal justice matters are granted to the states by the constitution, the federal government encroached upon the state jurisdiction by using the concurrency gateways which could be done in two ways: the inter-state commerce clause and regulatory affairs. In light of these veins, the federal government centralized many areas of criminal laws using such mechanisms as conditional grants-in-aid, mandates, nationalizations of rights and criminal laws, and federal court actions. As a reaction to these centralizing trends, three theories are developed as regards the allocation of criminal jurisdiction: the doctrinal, normative, and dual sovereignty which are respectively advanced by the Supreme Court, scholars, and *amici curiae*.

In contrast to the US model, the German system follows an integrated model whereby the legislative and administrative authority of matters in general and that of the criminal justice in particular is allocated between the federal government and the Lander. As the federal government is empowered to make laws and Lander executes same, there is no need for setting up dual institutional mechanisms unlike that of the US counterpart. As a result, there is a limited number of federal police, and no federal and private prisons in Germany. As a general rule, the Lander administer and adjudicate laws including criminal laws as part of their regional laws which is also the source of their right to self-rule and autonomy. Even though the legislative power is centralized, there is no potential fear of the compromise of the regional interests at the centre as the *Bundesrat*, the second chamber, protects and defends their interest.

What is more, the role of the second chamber in protecting the regional interests also extends to the facilitation and smoothening of the implementation of federal laws by the Lander. As a specific rule, the criminal law and procedure code is a concurrent power of the federal and state government under the German Basic Law. This concurrency also adds some value to the regional power over the criminal matters in addition to the administrative authority over federal matters. Subject to the rules of concurrency such as the fact that the federal government would be limited to making general and national or framework laws and policies leaving much to be detailed by the Lander; that they continue to make criminal laws and its procedure until it becomes of federal importance; and the federal government is empowered to consider the economic and legal uniformity while exercising such a power, enables to the Lander to have a room for exercising criminal authority.

The Indian experience in relation to the allocation of criminal matters is quite different from the US and German models. First, the criminal authority is found in the three common lists of powers: the Union List, the State List, and the Concurrent List. As far as the Union and State List are concerned, both the federal government and the states have the power make laws on offences committed on the subject matters enumerated for each. Stated otherwise, both levels of government have an exclusive power over making and unmaking criminal laws over such fields. The federal government and the States are empowered to make offences and impose punishments with regard to matters exclusively granted to them under the Union List and State List respectively. This reveals the exclusive perspective of the criminal authority for each order of government. Second, few criminal matters are enumerated to fall under the federal government in addition to the abovementioned aspect of criminal power. These are piracies and crimes committed on the high seas or in the air; offences against the law of nations committed on land or the high seas or in the air. Third, the federal government and the states have concurrent power over the enactment of criminal code and criminal procedure code. Despite the centralized nature of the Indian federalism which gives predominant and upper hand for the centre, the criminal authority is divided between the two levels of government. In such a case, although the federal supremacy clause is one of the centralizing tools which is also constitutionally designed, there is a small window which preserves the diversity by maintaining the state laws in times of inconsistencies subject to other conditions.

PART TWO

CRIMINAL JUSTICE SYSTEM IN ETHIOPIA

Chapter Five

The Criminal Justice Policy and Legislative Power

5.1. Introduction

In part one of this studies, the conceptual and theoretical nexuses of the division of criminal justice matters in light of principles and values of federalism, rationales, factors, and principles of the distribution of powers, and experiences of other federal systems have been explored extensively. As a sequel, this part will be devoted to an inquiry into the Ethiopian federal approaches to the division of criminal matters in relation to legislative, executive, and adjudicative aspects under different chapters. Ethiopia's approach to the division of criminal and security matters is peculiar in many respects as compared with the federal systems discussed in the previous chapter. The way the criminal legislative and administrative jurisdictions are allocated between the federal government and the states from the constitutional, statutory, and practical point of view exhibit unique features.

This chapter dwells on the policy and legislative mandate of criminal matters under the Ethiopian constitutional and federal system. To that effect, the chapter is organized into three major sections and several subsections. This section provides brief introductory statements about the prelude and contents of the chapter. Section two deals at length with the approaches of the division of criminal matters under the Ethiopian constitutional, legal and practical perspectives. Hence, the dualist, the monist, and the progressive dichotomization approaches and their respective drawbacks and criticisms will be analysed critically. In this connection, an attempt will be made as to how an institutional structure is constitutionally organized and the criminal justice is centralized in its policy and legislative aspects. It is in this chapter that the Ethiopia's approach to the division of criminal justice matters is critically contrasted with a variety of principles such as federalism, distribution of powers, and theoretical and comparative perspectives. An attempt will also be made to critically review whether the criminal acts issued by the states are an excess of power or exercise of the self-rule right. Finally, a conclusion and lessons that could be drawn from the chapter will be presented under the conclusion.

5.2. Approaches to the Study of Criminal Justice Matters

Like other fields, matters of criminal justice are divided between the federal government and the states in the Ethiopian federal system. However, the way the spheres of criminal matters are divided demonstrates the lack of linearity as regards how a criminal law is enacted, implemented and adjudicated. A closer look at the constitutional, statutory, and practical evidences of the operation of the Ethiopian criminal justice system in general and that of the division of criminal and security matters between the federal government and the states in particular reveals that there are three approaches as regards its discourse in the federal and constitutional design. These are dualist, monist, and progressive dichotomization approaches. In what follows, an in-depth elucidation will be proffered under separate subsections.

5.2.1. The dualist approach

It has been hinted out in the previous chapter that Ethiopia's approach to the division of criminal matters is dual. The dualist approach to the study of the division of criminal and security matters focuses on the institutional-structural arrangement designed by the Constitution. The Constitution establishes a dual federalism whereby both the federal government and the states have their respective legislature, executive, and judiciary.[556] In light of this dualist institutionalism, while the House of People's Representatives is the highest political authority of the Federal Government and responsible to the people, the State council is the highest political organ of the State authority, and responsible to the people of the State concerned. Both orders of legislative organs have their own jurisdictionally defined powers and responsibilities. Thus, the State Council has the power of legislation on matters falling under the State jurisdiction, and the House of People's Representatives shall have the power of legislation in all matters assigned by the Constitution to the federal jurisdiction.[557] Likewise, the federal and state governments institute executive organs which are primarily destined to carry out the administration of laws and policies. In this vein, the State administration constitutes the highest organ of executive power, whereas the highest executive powers of the Federal Government are vested in the Prime Minister and the Council of Ministers.

[556] Art.50(2) of the FDRE Constitution
[557] Art.55(1) of the FDRE Constitution

With regard to judicial powers as well, it is clearly provided that the State judicial power is vested in its courts, and the Supreme Federal judicial authority is vested in the Federal Supreme Court. The Federal Supreme Court shall have the highest and final judicial power over Federal matters, whereas the State Supreme Courts shall have the highest and final judicial power over State matters. From this logic, it is tenable to claim that the institutional/structural dualism is clearly observed from the legislative, executive, and judicial organs.

This structural dualism has got much to do with police and security institutions as well.[558] The Constitution provides for an institutional design whereby justice and security sectors are organizationally divided between the federal government and the states. In view of that, the federal government is conferred with the power of regulating the national defence, public security and federal police institutions. On the other hand, the States have the power to establish a State administration that best advances self-government, a democratic order based on the rule of law; to protect and defend the Federal Constitution, enact and execute the State constitution and other laws, establish and administer a state police force, and to maintain public order and peace within the State.[559] The underlying assumption behind such a dual institutional set up and structure is that while the federal justice and security institutions carry out the administration of laws made by the federal government, the state ones are beholden with implementing laws of the states without prejudice to the delegation clause purported by the Constitution. This assumption could be applicable to criminal laws as well.

Despite such a dualist structure designed by the Constitution, this approach may be confronted on at least two grounds.[560] On the one hand, the State Constitutions unequivocally impose upon the state institutions to execute federal laws which is not stipulated by the Federal Constitution unless the one regarding delegation. Delegation in its turn entails budgetary consequences in which the federal government should reimburse the expenditures required for the administration of federal laws by the states. On the other hand, some federal laws such as criminal matters cannot be wholly administrated by the federal institutions alone under the dual approach as a result of which the involvement of the state agencies has

[558] Assefa, supra note at 440, p.29
[559] Art.52(2a,b,g) of the FDRE Constitution
[560] Abdi Gurmessa, *Powers and Responsibilities of Multi-Level Governments in Ethiopia: Constitutional Guarantees and Practical Challenges*, a paper presented on the Fourth Ethiopian Public Administration Conference, under the theme " Resolving the Grand Public Administration Challenges for Sustainable Development in Ethiopia," Addis Ababa University, 20-22 July 2022 (unpublished)

become a state of necessity viewed from day-to-day practice. In this case, even though the federal government centralizes the legislative mandate of criminal matters, it could not reach out the whole territory of the country for all crimes so enacted for administration and adjudication as a result of which state justice institutions are carrying out such responsibilities in addition to the federal counterpart. The question in this respect is, thus, how and in what form of decentralized arrangements that state justice organs get involved in the federal criminal laws and justice policies. In this regard, Steytler argues that although the institutions are distinct, their respective areas of operation are not: who polices what in the common space? The distinction between the national, regional and local dimension is not, however, always an easy one to draw. Clear a *priori* cut-off points between the respective powers are hard to draw, making overlaps unavoidable.[561]

5.2.2. The monist approach

The monist approach concentrates on how the criminal justice policy and legislative power is allocated between the federal and state governments. It could also be known as the [criminal] legislative approach. The monist approach makes a critical appraisal as to how the federal government has got an upper hand in exercising an overwhelming portion of the criminal justice policy and legislation by virtue of the constitutional mandate bestowed upon it. Given the centralized approach to the exercise of the criminal justice policy and legislation, a painstaking and critical assessment has been made in this subsection on the width and breadth of the power of the federal government. In the following subsections, an attempt will be made to navigate the predominant power of the federal government in centralizing a criminal law in its substantive, procedural, evidentiary, and policy spheres.

5.2.2.1. The criminal justice policy

Criminal justice policy is a subfield of public policy that concentrates on how criminal justice administration best works. Criminal justice policy can be widely defined as a law or practice that is used to provide guidance to justice officials.[562] As a subfield of public policy, criminal justice policy must be studied and theorized within the general spectrum of the former. Hence, it is expedient to begin with an overview of public policy and its cognate notions such as meaning, definition, classification, theories, and design.

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[561] Steyter, supra note at 228, p.291
[562] Chapter 6, Criminal Justice Policy, p.4

Accordingly, public policy is defined by various scholars yet in very close and related ways. The broad definition provided for the term public policy which is agreed upon by a number of academics is that it is whatever the government chooses to do or not to do, or the relationship of governmental unit to its environment.[563] In light of this broad definition, policy is a long series of more or less related activities and their consequences for those concerned, rather than as a discrete or separate decision. In the definition of public policy are included actors who are involved in different phases of design on one hand and implementation of the policy itself on the other.

Based on this background about the meaning of public policy, Anderson expounds the underlying notions which are deemed essential in the definition and essence of the term.[564] First, the very definition of public policy is inherently connected with a purpose or a goal. In this regard, public policy is considered a purposive or goal-oriented action rather than a random behaviour or chances. As such, public policy is intended to yield some result. Second, policies consist of courses of action or patterns of action taken over time by government officials rather than their separate decisions. By virtue of this contention, a policy includes not only the decision to adopt a law or make a rule on some topic but also to enforce or implement the law or rule. In other words, an unenforceable policy or law is no policy at all. Third, public policies emerge in response to policy demands. As a result, public officials make policy decisions that give content and direction to public policy which may include enacting statutes, issuing executive orders or edicts, promulgating administrative rules, or making judicial interpretations of laws.[565] Fourth, policy involves what governments actually do, not what they intend to do or what they are going to do to. Fifth, public policy may be either positive which may involve some form of overt governmental action to deal with a problem on which an action was demanded, or negative which may involve a decision by governmental officials to do nothing on some matter on which government involvement was sought, which is commonly called the a policy of *laissez faire* or hands off policy. Lastly, public policy is based on law and is authoritative. Public policy has an authoritative, legally coercive quality.

[563] Anderson, James E., *Public Policy Making: An Introduction*, Houghton Mifflin Company, 1990, p.4

[564] Ibid

[565] Anderson,id, p.6. The way public policy is communicated to the large public is called policy statements. Policy statements are the formal expression or articulations of public policy, and include legislative statutes, executive orders and decrees, administrative rules and regulations, and court opinions, as well as statements and speeches by public officials indicating the intentions and goals of government and what will be done to realize them.

Public policies may be classified based upon several yardsticks. To this end, Anderson classifies public policies on the basis of an issue area, institution-based, and time period.[566] According to him, depending upon issue specificity, a public policy may exist in the form of labour, welfare, civil rights, and foreign affairs. From an institutional approach, a policy of a particular governmental organization would be taken into consideration (for example, legislative policies, judicial policies, and departmental policies). With regard to the typology of the public policies in terms of time period, one could proffer an instance of New Deal era, post-WWII, and late 19th century. In Anderson's taxonomical approach to public policy in such a way, there are some defects subsequently discovered on issues related with the basic characteristics and contents of policies as a result of which he came up with another yet related version of classification.[567] Hence, policies may be categorized as substantive and procedural policies, distributive, regulatory, self-regulatory, and redistributive policies, material and symbolic policies, and liberal and conservative policies.

With regard to the theoretical perspective, like any other field of study, public policy has been underpinned by some theoretical approaches and foundations. There are five theories, accordingly. These are political systems theory, group theory, elite theory, institutionalism, and rational choice theory.[568]

Policy design involves an effort to more or less systematically develop efficient and effective policies through the application of knowledge about policy means gained from experience, and reason, to the development and adoption of courses of action that are likely to succeed in attaining their desired goals or aims within specific policy contexts.[569] Policy design passes through a series of processes and activities such as agenda-setting, policy formulation, decision-making, policy implementation, and policy evaluation. Policymaking in a federal system is the complex power relationship between the national, regional, and local governments which may be seen in the whole spectrum of the distribution of competences.[570]As some scholars assert on the thematic interplay between the notions of federalism and public policy, modern system of governance is characterized by the multi-policy venues where the federal, sub-national, and local governments and organizations carry

[566] Anderson, id, p.8
[567] Ibid
[568] Id, p.25
[569] Howlett, Michael, *Policy Design: What, Who, How and Why*? Research Gate, January 2014
[570] Portz, John, *Policymaking in a Federal System: The U.S. Experience in Education and Health Care,* Desigualdade & Diversidade Revista de CiênciasSociais da PUC-Rio, nº 9, ago/dez, 2011, pp. 31-48

out different public policies in which the concept of polycentrism (many centres for policy experimentation) is developed.[571] Public policy to be developed by each tier of government differs in a variety of ways depending on the magnitude of powers granted to them while the common ground is that they all have the policy responsibility. As a result, government policymakers and bureaucrats at different levels of the federal system—national, state and local—often have quite different interests and perspectives on how particular policies should be developed and implemented which on the other hand necessitates for a high degree of interdependence.[572] For example, national policymakers may have the major responsibility to design a particular policy, but they might rely upon state and local officials for the actual delivery of that service. This interdependence has been characterized by some as "picket fence" federalism in which officials at the three levels of government are connected together, similar to the vertical pieces of a picket fence.[573]

It is contended that this interdependence may be a cooperative, competitive, or conflictive relationship. That is to say, government officials at the three levels might work together with a common goal and in a cooperative manner, but in other instances they might see themselves as competitors or obstacles to successful policymaking and delivery.[574] For example, superintendents and principals in local school districts sometimes view state and national education officials as supporters and helpful guides in the development of education policy, but in other cases, those officials at ´higher´ levels are seen as intruders or obstacles to the local delivery of a quality education system. Consequently, Port's conclusion is that policymaking in a federal system is often fraught with debate and tension among government officials at the three levels because at each level, officials develop strategies to ´work the system´ in order to achieve their goals.

There are different approaches to public policy-making processes in federal systems. The two major ones are top-down and bottom-up approaches. Dereje argues that the top-down public policy-making comes into picture where lower levels of government are assumed to be ill-equipped to deal with policy problems; the problem is nationwide and should involve the national government in terms of finance and other resources in order solve them; cross-border issues; and vertical and horizontal equity oversight that calls for the intervention of the

[571] Dereje, supra note at 19, p.18
[572] Portz, supra note at 570, p.3
[573] Id, p.6
[574] Ibid

central government due its inherent powers in such circumstances.[575] In view of this argument, despite such advantages as uniformity and swift response to huge national problems which may be obtained from the top-down approach, the question of efficiency, effectiveness and other principles remains intact.

Moreover, the remaining matters related to local and regional issues which could not fall under the ambit of the federal jurisdiction and the issues bearing on effectiveness, efficiency and local innovation through laboratory federalism on the flip side call for the bottom-up approach. To that effect, Dereje contends that the matter of choosing between the top-down and bottom-up approaches is determined and affected by three factors: capacity, equity, and efficiency.[576] Even so, these factors should not be a compromise to the constitutional division of powers and responsibilities within the spectrum of which each level of government is supposed to exercise its jurisdiction through policy experimentation. In this regard, Saunders approach to the analysis of policy making processes in federal systems is worth taking a heed.[577] She claims that one of the problems to be alleviated by decentralization is the stagnation in approaches to the government and policy development. In light of her argument, by creating alternative sources of governing authority, decentralization accepts diversity, enables policy competition and encourages policy experimentation, by enabling it to take place on a smaller scale.

At this juncture, it is important to provide a bird's-eye-view of the policy powers under Ethiopian federalism as a starting point into the analysis of criminal justice policy power. Based on an inextricable relationship between federalism, distribution of powers, and policy mandates, the latter could not be seen in isolation from the former two concepts. To put it in simpler words, the allocation of public policy occupies the centre stage of federalism and distribution of powers. In a broader sense, what is divided between levels of government may constitute and amount to a division of policy mandates. Thus, as concisely described in chapter three, Ethiopian Constitution divides powers and responsibilities between the federal government and the states as a general principle and policy areas as a specific mandate by expressly mentioning the particular subjects over which each order of government has a policy monopoly or jointly exercise in collaboration with the other otherwise designated as concurrent power.

[575] Dereje, supra note at 19
[576] Id, p.20
[577] Saunders, supra note at 235, p.5

Accordingly, the federal government is conferred with the power of formulation and implementation of national policies, strategies and plans in respect of overall economic, social and development matters, public health, education, science and technology, cultural and historical legacies, financial, monetary and foreign investment, and foreign affairs.[578] On the other hand, the Constitution stipulates that the States shall have the power to formulate and execute economic, social and development policies, strategies, and plans of the State.[579] From these provisions of the Constitution, setting aside the scope of the policy mandates of the two tiers of government, it is unambiguously comprehended that they are shared between the two tiers of government on certain areas so mentioned. It remains controversial as regards where the policy making power of the federal government ends and that of the states begins with regard to the economic, social, and development matters. This controversy is discussed in chapter three under the section dealing with the challenges and problems of the distribution of powers under the constitutional and federal arrangement.

What is more, a separate constitutional space has also been devoted to the regulation of the national public policy principles and objectives.[580] In this light, it is recognizably provided that any organs of the Federal and State Governments are obliged to implement the provisions of the Constitution, laws made and public policies formulated by competent bodies, shall be guided by the policy principles embodied in the Constitution.[581] While this is the public policy objectives expressly enshrined by the Constitution, there are partial lists of the national policy principles and their respective objectives in respect of external relations, national defence, political, economic, social, cultural, and environmental objectives.[582] With the same fashion but different scope and context, the State Constitutions incorporate the policy principles and objectives given the specific asymmetrical situations of their own jurisdictions.[583] This demonstrates that as far as the public policy principles and objectives

[578] Art.51(2, 3,4,8), art.55(1, 10), Art.74(3, 5,6), Art.77(4,6,8) of the FDRE Constitution

[579] Art.52(2c) of the FDRE Constitution which is also incorporated in the respective State Constitutions (Art.45(2a), Art.56(3), Art.59(3c), 83(1a) of the Afar State Constitution, Art.47(2(1), Art.60(3c) of the Amhara State Constitution, Art.47(2(1), Art.61(3c) of the Benishangul Gumuz State Constitution, Art.49(2)1(11), Art.61(5) of the Gambella Peoples State Constitution, Art.47(4)(1), Art.62(1) of the Harari People State Constitution, Art.47(2a), Art.49(3i), Art.55(4), Art.57(3b) of the Oromia State Constitution, Art.47(2a), Art.49(3h), Art.59(5) of the Somali State Constitution, Art.47(2a), Art.66(4) of the SNNPR State Constitution, Art.47(2a), Art.54(4), Art.56(3) of the Tigray State Constitution

[580] Chapter Ten of the FDRE Constitution is devoted to the National Public Policy Principles and Objectives

[581] Art.85 of the FDRE Constitution

[582] Art.86-92 of the FDRE Constitution

[583] Chapter ten of the Afar, Somali, and Tigray State Constitutions; chapter eleven of the Oromia, Amhara, Benishangul Gumuz, and SNNPR State Constitutions, chapter twelve of the Gambella Peoples State

under the Ethiopian federal design are concerned, it could be safely argued that they are shared between the Federal Government and the States and no single tier of government may claim the policy monopoly except on matters falling under the exclusive jurisdiction of one. For instance, as is easily discerned from the Constitution, the foreign relations and national defence policy mandates belong exclusively to the Federal Government.

From the above-described propositions, we could easily grasp that there is a diversity of policy powers which are shared between the federal government and the states and between the latter and local governments as well which is assumed to enhance the fundamental value of federalism—local innovation—through the exercise of laboratory or experimental federalism. Local socio-economic and political problems may be solved through the specific innovation developed by that particular people and community.

Whilst these are all about the normative standards set out by the Constitution, the practice proves otherwise. Studies conducted thus far suggest that policy formulation in the Ethiopian federal practice is known for its centralization, monist, and top-down approach, which clings to the previous monarchical and dictatorial form of government in perpetuating the "one-size-fits-all" model. To this effect, Assefa argues that despite the wide powers granted to the States, the federal system is operating under a widely centralized party system and centralized policy-making which is not inherent in the Constitution.[584] This, according to him, emanates from the fact that the sense of federal partnership that is expected to exist between the federal government and the states has not yet taken roots; and Regional officers view themselves as functionaries of the national government and the EPRDF rather than genuine representatives of state governments; still appears to be a unitary syndrome.[585] He further opines that "creating one political and economic community" and developmental state is used as a means to design mega-development policies without taking into account the federal principle of a constituent unit's autonomy to self-rule and coordination of joint development plans among concerned federal and state institutions.[586] This condition has continued unabated under the PP-led regime which has intensified centralization and unitary system.

In addition, a quantitative and qualitative empirical research findings reveal the existence of other factors such as the lack of or deficient policy knowledge and awareness, initiative, and

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Constitution and Art.77 of the Harari State Constitution which cross refers the Regional public policy principles and objectives to chapter ten of the Federal Constitution.

[584] Assefa, supra note at 4, p.251,255

[585] Ibid

[586] Assefa, supra note at 396, p.27

capacity from the side of both the federal and state government experts and officials which have contributed to the top-down and centralized policy formulation in the federal system and pluralistic and diverse needs, society and systems.[587] In consonance with these contentions, Nigusie also found out that the policy making autonomy is negatively affected by longstanding centralized mentality of officials at the state and the centre, single party dominance and absence of other competitive parties, low awareness level of constitutional rights, low level of knowledge about policy making process and federalism.[588] Thus, there is a discrepancy between the constitutional devolution on the one hand and the practical centralization on the other with regard to the exercise of policy powers.

The federal government apparently centralized through a unified policy document on criminal matters.[589] The Ministry of Justice designed a comprehensive document which deals with criminal justice policy.[590] The policy document contains about seven sections which consecutively deals with the basic objectives, goals, principles, strategies, scope of application, and duty bearers of enforcement responsibilities of the policy; prevention of crimes; investigation of crimes by the public prosecutors; improving the effectiveness of the criminal justice system processes; improving the effectiveness and fairness of the criminal punishment; criminalizing attacks mounted on collective rights and interests and the handling mechanisms of the victims of the crimes; and miscellaneous issues and future directions. As far as the scope of application of the Criminal Justice Policy is concerned, it dictates both the federal and state justice institutions to implement same as per instructions given by the Federal Attorney General. The policy document appears to be devised and adopted at national level in which the Federal and state justice sectors are duty bound to comply with it. It means the single and unified criminal justice policy document which is formulated by the Federal Government is supposed to be the only criminal justice policy document across the country.

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[587] Dereje, supra note at 19, p.30-36

[588] Nigusie Dhaba, the Practice of Public Policy Making at Sub-national level in Ethiopia: the case of Oromia Regional State, A thesis submitted to the School of Graduate Studies of Addis Ababa University in partial fulfilment of the requirements for the Degree of Master of Arts in Public Management and Policy (MPMP) in the Department of Public Administration and Development Management, Addis Ababa University, 2017

[589] The FDRE Criminal Justice Policy, Ministry of Justice, 2011 (*Amharic version*), The policy document contains about seven sections which consecutively deals with the basic objectives, goals, principles, strategies, scope of application, and duty bearers of enforcement responsibilities of the policy; prevention of crimes; investigation of crimes by the public prosecutors; improving the effectiveness of the criminal justice system processes; improving the effectiveness and fairness of the criminal punishment; criminalizing attacks mounted on collective rights and interests and the handling mechanisms of the victims of the crimes; and miscellaneous issues and future directions.

[590] Pursuant to Art.6(1) of Proclamation no.943/2016 (the Federal Attorney General Establishment Proclamation), the Federal Attorney General shall have the power and duty to prepare criminal justice policy by coordinating relevant bodies; coordinate, follows up and ensures its implementation when adopted.

5.2.2.2. The criminal legislative authority

Under the monist approach, the Constitution confers the federal government with a power to enact a criminal code and other pieces of legislation that deal with matters of criminal justice.[591] Consequently, some appear to have reached a conclusion that criminal law belongs to the federal government, hence a federal law.[592] Setting aside the normative assessment of this constitutional provision from various perspectives which will be discussed in the sections that follow, the federal government is empowered to exercise an exclusive criminal legislative power. Given the predominant federal power as such, it could be observed that the criminal authority of the states is at the total mercy and benevolence of the federal government as they should follow the footsteps of the latter in order to make a criminal law on the basis of the literal interpretation of the Constitution on the specific subject.

To date, the federal government has made a plethora of criminal statutes in addition to the comprehensive criminal code for the administration of the criminal justice across the country. Each sort of criminal statute will be explicated as follows in order.

5.2.2.2.1. The FDRE Criminal Code

The HPR enacted a codified criminal law[593] in reaction to drastic changes made in contrast to the previous penal code which worked for almost half a century.[594] The rationales which necessitated for the birth of the FDRE Criminal Code are mentioned in the preamble of the Code. On the one hand, the hitherto working penal code had been issued during the monarchical regime which would rarely be applicable to the current federal state structure and decentralized governance system.[595] On the other hand, several changes have taken place with regard to human rights and fundamental freedoms which are recognized by the

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[591] Art.55(5) of the FDRE Constitution

[592] Mehari Reddea, "The Double Cassation and Its Legal Basis in the Contemporary Ethiopia" (As translated from Amharic), *In* Muradu Abdo (ed.), *the Cassation Question in Ethiopia,* Papers Presented at the Symposium Organized in Commemoration of the 50th Anniversary of the Founding of the School Of Law, Addis Ababa University, 2014, p.56

[593] Proclamation No.414/2004, the FDRE Criminal Code, 9th May, 2005, Addis Ababa

[594] Proclamation No.158/1957, the Penal Code of the Empire of Ethiopia, Negarit Gazeta, Gazette Extraordinary, 16th year, no.1, 23rd July 1957, Addis Ababa

[595] Overall, it is easily understood from the preface to the Criminal Code that radical political, economic and social changes which are manifested in light of Human Rights protection as recognized by the Constitution and international agreements, for both individual persons and groups, such as equality of religions and NNPs, certain crimes born out of technological advancements such as hijacking of aircraft, computer crimes, and money laundering, corruption offences and drugs, harmful traditional practices committed against women and children *inter alia* necessitated the revision of the penal code.

Constitution and international human rights instruments which are ratified by Ethiopia, being the integral part of the law of the Country.[596]

Structurally, the Criminal Code is organized into general part[597] and special part. The special part, in turn, is organized into crimes and petty offences.[598] Due to its comprehensive and centralized design, some are troubled to label the Criminal Code to be federal law or state law or both in common. For instance, Wondossen asserts that the Code is composed of provisions protecting federal as well as state interests, which logically leads to the conclusion that the Code is both a federal and state law.[599] This is utterly a wrong argument. There is no such a category in which a law becomes of a federal and state one simultaneously. If it is a state matter, the assumption is that it would be enacted by the state council, and if a federal matter, it should be issued by the HPR. Although the Code was drafted and deliberated by immensely lawyers drawn from Federal and regional justice institutions, and was conducted in Addis Ababa and in regions, the issue of criminal legislative jurisdiction between the two tiers of governments did not seem to be questioned.[600] The opinions of legal scholars and the laws and experiences of foreign countries have also been consulted to enrich the content of the Code.[601] The Criminal Code incorporates criminal matters which are of federal and state significance. A cursory look at the provisions of the Code in the special part, both the crimes and petty offences, demonstrates that all matters of the federal government and the states are included in the Criminal Code.[602] That is why a monist approach is one among the others to study the division of criminal matters under Ethiopian federal design.

In addition to the Criminal Code, there are a lot of statutes enacted by the federal government in order to regulate subject matters falling under its realms per the Constitution. These

[596] Chapter Three of the FDRE Constitution which is dedicated to the Human Rights protection and Art.9(4) which states that all international agreements ratified by Ethiopia are an integral part of the law of the land.
[597] Arts.1-237 of the Criminal Code (the general part) deals with the overall principles by which criminal law and proceedings are guided and an input for the full implementation and application of the criminal procedure laws.
[598] Arts.238-733 of the Criminal Code deal with crimes proper, whereas Arts.734-865 of the Code dwells on petty offences
[599] Wondossen, Supra note at 3, p.284
[600] The FDRE Criminal Code was drafted by the Ministry of Justice in collaboration with the Justice and Legal System Research Institute, and deliberated by legal and medical professionals, psychiatrists, different institutions of higher education and professional associations.
[601] Read paragraph five of the preface to the Criminal Code.
[602] For instance, state constitutional crimes, crimes against the state flags, officials, employees, offices, etc, are provided for in the Code. But the power to regulate and govern all these matters is granted to the States by the Constitution. There are also a myriad of other criminal matters of state importance which are made of Federal significance in the Code.

criminal enactments may exist in the form of primary and incidental aspects. In its primary facet, the statutes are meant to deal with criminal matters of a certain field in a special manner and incidental when the statute regulates the subject and incorporates a penalty clause as a means of imposing a criminal sanction for the accomplishment of the specific law. These enactments are backed up by Art.3 of the Criminal Code which provides that regulations and special laws of a criminal nature, so far as they are complied with the general principles of the Code, are prescribed.

According to some inquiries, the criminal law in Ethiopia is classified into primary and secondary criminal law. The primary criminal law includes those rules adopted by the House of Peoples' Representatives or those other rules sanctioned by rules adopted by the House.[603] The consequence for violation of primary criminal law is imprisonment and fine; but in few cases, there is also the death penalty. On the other hand, secondary criminal laws are contraventions and those rules adopted and enforced by administrative agencies whose consequence is mere fine.[604] This sort of classification of criminal law may be untenable to accept as the latter types appear to be administrative measures to be taken by executive organs which are primarily meant for administering laws. To that end, the executive organs are not empowered to make a criminal law but implement those enacted by the legislative wing. In what follows, an attempt will be made to elucidate the primary and incidental statutes in relation to regulating some fields falling under the federal jurisdiction.

5.2.2.2.2. The primary criminal statutes

These kinds of enactments, under the Ethiopian criminal legislative discourse, are designated as primary because they are principally intended for the concentration of the criminal aspects of the subject matter in view in its entirety. The federal government, with its legislative wing, the HPR, has enacted other criminal laws which deal with crimes of different types over various matters in a special way and addition to the comprehensive Criminal Code. There may be many circumstances that could justify the enactment of primary criminal bills. One reason may pertain to the fact that the Criminal Code may not have been able to cover the area *in toto* or prescribed the subject in an inadequate manner. In order to fill such a gap or make the subject matter fully comprehensive in its criminal sphere for more protection, a special and separate criminal legislation would be an available alternative.

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[603] Supra note at 1, p.2
[604] Ibid

The primary criminal rules are as important as the Criminal Code, and unless a special provision is stipulated therein otherwise, the general part of the latter will be applicable as a gap filling tool where necessary. Like the arguments propounded in relation to the Criminal Code together with its contents *vis-à-vis* the constitutional envisagement, the same would hold here that the federal government is supposed to exercise its power over primary criminal legislation over those matters that are granted to it by the Constitution. While there are much such pieces of primary criminal legislation which have been enacted by the federal government, the following are some of them.

The prevention and suppression of terrorism crimes proclamation[605]was issued for various reasons. As clearly set forth in the preamble, the inadequacy of the existing criminal laws in fighting terrorism criminal offences is one of the justifications purported by the law. Incorporation and adoption of new mechanisms and procedures in preventing, controlling, and foiling terrorism is the other reason of the enactment of the Proclamation in a separate instrument. The Aviation criminal legislation deals with the offences against the safety of aviation which are treated under a separate primary criminal statute.[606] Crimes related to the safety of aviation have a strong connection with international conventions to which Ethiopia is a state party. Consequently, the criminal legislative power belongs to the federal government as per the Constitution.[607]

With regard to a law dealing with corruption, prior to the comprehensive proclamation devoted to corruption offences issued by the federal government, the provisions of the Criminal Code were applicable on areas relating to them.[608] Based on and due to several justifications so provided in the new proclamation, corruption offences are treated in a separate legislation.[609] The new corruption crimes legislation primarily concentrates on

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[605] Proclamation no.1176/2020, the prevention and suppression of terrorism crimes proclamation

[606] Proclamation No.31/1996, Offences against the Safety of Aviation Proclamation, Federal *Negarit Gazeta*, 2nd year No.19, 22nd February, 1996, Addis Ababa

[607] By virtue of Art.51(9) and 55(2c) of the FDRE Constitution, the power to regulate air transport is conferred on the federal government.

[608] Proclamation No.434/2005, art.2(1), the Anti-Corruption Special Procedure and Rules of Procedure, as amended by Proclamation No.882/2015

[609] Proclamation No.881/2015, Corruption Crimes Proclamation, Federal Negarit Gazeta, 21st year, no.36, 3rd April, 2015, the preamble lays down the rationales justifying enactment of the separate corruption crimes legislation. These justifications are: 1) the need for clarification and amendment of some provisions of the FDRE Criminal Code relating to corruption crimes which are observed as unclear during their application, 2) the need for the inclusion of similar acts committed by the private sector particularly by those who administer funds collected from the public or collected for public purposes in the category of corruption offence, 3) the

crimes related with acts committed by public and/or private officials in connection with their official responsibilities in a separate instrument as a special criminal law. To this effect, the corruption crimes are dealt with in a wider content than that was in the Criminal Code.

Consequently, the powers and duties of the Federal EACC in relation to corruption crimes are supposed to widen its functional horizon in accordance with the new proclamation.[610] One of the controversial issues in relation to scope of the criminal legislative authority, like that of the Criminal Code, is whether the power to enact a comprehensive corruption crimes rule which includes both federal and state public affairs, is granted solely to the federal government. A closer look at the contents of the federal corruption crimes law reveals that it incorporates offences pertaining to corruption acts in which both the public officials and employees of the federal government and of the states, including private sectors and public enterprises owned by and controlled under them are held responsible due to their official responsibilities. As a result, the dilemma of the corruption crimes statute which is comprehensively enacted by the federal government comes into picture whether it is a federal law or state law. The same word that is said on the contents of the Criminal Code will be repeated here, in the determination of the corruption crimes law on the basis of its scope of application and legislative jurisdiction *vis-à-vis* the distribution of powers so delineated by the Constitution. In fact, this will be the subject of discussion under the third approach to the division of criminal matters in the subsection that follows.

The Telecom Fraud Offences Proclamation also corresponds with the specific constitutional power of the federal government over telecommunication services.[611] Thus, the HPR issued a law which governs offences committed against telecommunications in a separate legal instrument.[612] The rationales for the issuance of this legislation in a separate text are

necessity of categorization of corruption acts of bribery, embezzlement and other similar acts committed by the private sector as the UN Convention Against Corruption and African Union Convention on Preventing and Combating Corruption which are ratified by Ethiopia impose such obligations on member states, 4) the need for rectification of practical problems observed by enacting comprehensive legislation to strengthen the fight against corruption and to enable Ethiopia so as to discharge its continental and global obligations, and 5) the necessity of addressing corruption offences in a separate proclamation rather than make them part of the Criminal Code due to fast changing nature of the offences.

610 Proclamation No.433/2005, Revised Federal Ethics and Anti-Corruption Commission, Federal *Negarit Gazeta*, 11th year, No.18, 2nd February, 2005, as amended by Proclamation No.883/2015.

611 Art.55(2,C) of the FDRE Constitution

612 Proclamation No.761/2012, Telecom Fraud Offence Proclamation, Federal Negarit Gazeta, 8th year, no.61, 4th September, Addis Ababa. This Proclamation repealed proclamations no.49/96 and 281/2002 which governed telecommunication services.

enunciated in the preamble of the proclamation *viz.* counteracting wide-spreading telecom fraud offences in order to ensure peace, democratization, and development programs through telecom industry; that telecom fraud is a serious threat to the national security beyond economic losses; and above all, the fact that the relevant laws in force are found inadequate in prevention and controlling of telecom fraud.[613] There are also other statutes such as the Hate Speech and Disinformation Prevention and Suppression Proclamation No.1185/2020, Vagrancy Control Proclamation No 384/2004, Computer Crimes Proclamation No 958/2016, Prevention and Suppression of Trafficking in Persons and Smuggling of Persons Proclamation No 1178/2015, Prevention and Suppression of Money Laundering and Financing of Terrorism Proclamation No 657/2009. These are only illustrations of the primary criminal laws in addition to the Criminal Code that demonstrates the wide-ranging power of the federal government in the subject.

5.2.2.2.3. The incidental criminal statutes

Incidental criminal statutes do not principally concentrate on criminal spheres *in toto* but incorporate penalty clauses for the effective execution of the subject matter they are destined for. In view of such incidental rules, the failure to act in accordance with the duties enumerated or acting what is prohibited under a certain provisions of the laws would result in criminal liability and entail punishments which are set forth therein. In most of the incidental criminal acts, the penalty clauses are given a separate caption to that end. Several pieces of legislation or proclamations issued by the HPR on various subject matters contain penalty clauses.

A close look at the incidental criminal acts enacted so far discloses that there are various modalities. While there are some laws which make an explicit cross-reference of the penalties directly to the Criminal Code, a majority of them prescribe prohibited acts together with the consequential penalties in the same instrument. With regard to the first categories, it is easily observed from the substances of the captions stipulating the penalties that they are unequivocally cross-referenced to the FDRE Criminal Code and other relevant laws.[614] The

[613] Prior to the enactment of Telecom Fraud Offence proclamation, proclamations no.49/1996 and 281/2002 were in operation but could not cover all areas of telecommunication services viewed from various angles. Moreover, the most apparently comprehensive FDRE Criminal Code also barely incorporates crimes committed against telecommunication services (Art.505, 506).

[614] For instance, readers are recommended to consult Art.108 of Proclamation No.532/2007 (the Electoral Proclamation), Art.36 of Proclamation No.922/2015 (the Authentication and Registration of Documents

second groups of acts provide for the criminal offences together with their penalties independent of and/or in conjunction with the FDRE Criminal Code and other relevant laws.

Instead of illustrating such incidental statutes which contain penalty clauses one by one, it is better to describe them in a bundle. Accordingly, business and cognate enactments such as the Commercial Registration and Licensing proclamation;[615] Trade Competition and Consumers Protection Proclamation;[616] Petroleum and Petroleum Products Supply Operation Proclamation;[617] Raw Hides and Skins Marketing Proclamation;[618] statutes issued by the Federal Government regarding vehicle insurance against third party risks;[619] and vehicle identification, inspection and registration;[620]banking business[621] and the very establishment of the National Bank of Ethiopia;[622]coffee quality control and marketing proclamation;[623] the Ethiopian Building Proclamation[624]and other enactments incorporate penalty clauses. This is perhaps so because the constitution confers such a power upon the federal government.[625] In the course of regulating the inter-state and foreign commercial activities, the federal government appears to have made various business and related laws which contain penalty clauses to effectively achieve the objectives of each law.

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proclamation), and Art. 19 of Proclamation No.456/2005 (the FDRE Rural land Administration and Use Proclamation)

[615] Proclamation no.980/2016, the Commercial Registration and Licensing Proclamation, Federal Negarit Gazeta, 22nd year, no.101, 5th August 2016, Addis Ababa, Art.49. This proclamation repealed proclamation no.686/2010 on the same subject matter. One needs to read the whole criminal acts and consequential punishments from the legislation in case found necessary. Time and space would not allow dealing with every offence so prescribed in each legislation.

[616] Proclamation no.813/2013, the Trade Competition and Consumers Protection Proclamation, Federal Negarit Gazeta, 20th year, no.28, 21st March 2013, Addis Ababa. This proclamation repealed proclamation no.685/2010 designated as Trade Practice and Consumers' Protection.

[617] Proclamation no.834/2014, the Petroleum and Petroleum Products Supply Operation Proclamation, Federal Negarit Gazeta, 20th year, no.64, 15th August, 2014, Addis Ababa. Read Art.30.

[618] Proclamation no.814/2014, the Raw Hides and Skins Marketing Proclamation, Federal Negarit Gazeta, 20th year, no.29, 25th March 2014, Addis Ababa, art.14. this proclamation repealed proclamation no.457/2005 (Raw Hide and Skin Marketing System Proclamation)

[619] Read art.30 of proclamation no.799/2013, Vehicle Insurance against Third Party Risks, Federal Negarit Gazeta, 19th year, no.53, 23rd July, 2013, Addis Ababa.

[620] Read art. 48 of proclamation no.681/2010, Vehicle Identification, Inspection and Registration Proclamation, Federal Negarit Gazeta, 16th year, no.46, 11th August, 2010, Addis Ababa.

[621]Proclamation No.592/2008, Banking Business, Federal Negarit Gazeta, 14th, no.57, 25th August, 2008, Addis Ababa, Art.58

[622] Proclamation No.591/2008, the Establishment of the National bank of Ethiopia, Federal Negarit Gazeta, 14th, no.50, 11th August, 2008, Addis Ababa, art.26

[623]Proclamation no.602/2010, Coffee Quality Control and Marketing Proclamation, Federal Negarit Gazeta, 14th year, no.61, 25th August 2010, Addis Ababa, Art.15

[624] Proclamation No.624/2009, the Ethiopian Building Proclamation, Federal Negarit Gazeta, 15th year, no.31, 6th May 2009, Addis Ababa, part six of the Proclamation

[625] Art.51(12), Art.55(2,b), (4) of the FDRE Constitution

There are pieces of legislation that spell out penalties in respect of land and other natural resources regulation. One could argue in favor of this authority from the constitutional point of view that allows for the federal government to make laws on land and other natural resources.[626] It is because of these constitutional bases that the federal government enacted criminal acts dealing with land[627]and other natural resources,[628] and the Landholding Registration Proclamation.[629] On the other hand, the FDRE Rural Land Administration and Use Proclamation make a clear cross-reference to the applicable criminal law.[630] Probably, as an extension of the phrase ‘other natural resources,’ the federal government issued a legislation dealing forest development and conservation which as the same time incorporates a criminal sanction.[631] Unlike the Rural Land Use and Administration Proclamation which cross references the penalty to the Criminal Code, the law dealing with urban lands lease holding provides for criminal sanctions in the legislation.[632]The Energy Proclamation also incorporates a series of criminal offences in relation to energy transactions.[633] Criminal offences with their respective punishments are stipulated in the Environmental Pollution Control Proclamation.[634] Furthermore, the federal government issued a law which parenthetically touches upon penalty clauses on affairs related with wildlife conservation.[635] The Promotion and Regulation of Precious Minerals incorporate criminal sanctions.[636] The

[626] Art.51(5) and 55(2)(a) of the FDRE Constitution
[627] Read Proclamation No.721/2011 (the Urban Lands Lease Holding Proclamation) Art. 35
[628] Read Proclamation No.542/2007 (Forest Development, Conservation and Utilization Proclamation), Art.20. Even though neither the Constitution nor the Proclamation does define or enumerate what is meant by and constitutes the phrase “other natural resources”, the author assumed forests as one of the natural resources so envisaged by the Constitution.

[629] Proclamation No.818/2014, the Urban Landholding Registration Proclamation, Federal Negarit Gazeta, 20th year, no.25, 21st February, 2014, Addis Ababa, Art.48
[630] Proclamation no.456/2005, the FDRE Rural Land Administration and Use Proclamation, Federal Negarit Gazeta, 11th year, no.44, 5th July 2005, Addis Ababa. While Art.19 of the Proclamation cross references to the applicable criminal law, one would assume that as far as criminal acts with respect to the rural land use and administration are concerned, the relevant provisions of the FDRE Criminal Code would be applicable. Accordingly, Arts.685-688 of the Criminal Code would be applicable in the implementation of the Proclamation.
[631] Proclamation no.542/2007, Forest Development, Conservation and Utilization Proclamation, Federal Negarit Gazeta, 13th year, no.56, 5th September 2007, Addis Ababa, Art. 20
[632] Proclamation no.721/2011, Urban Lands Lease Holding Proclamation, Federal Negarit Gazeta, 18th year, no.4, 28th November 2011, Addis Ababa, Art.35
[633] Proclamation No.810/2013, the Energy Proclamation, Federal Negarit Gazeta, 20th year, no.12, 27th January 2013, Addis Ababa. Read arts.24-33 of the Proclamation.
[634] Proclamation no.300/2002, the Environmental Pollution Control proclamation, 9th year, no.12, 3rd December 2002, Addis Ababa, Arts.12-17
[635] Proclamation No.541/2007, Development, Conservation and Utilization of wildlife Proclamation, Federal Negarit Gazeta, 13th year, no.51, 21st August 2007, Addis Ababa, Art.16
[636] Proclamation No.651/2009, the Promotion and Regulation of Precious Minerals Transactions Proclamation, Federal Negarit Gazeta, Art.28

Agriculture Resources Development and Protection, which was also issued by the federal government provides for a penalty clause.[637]

Tax legislation is another area of enactments containing penalty clauses. Until the new statute which unified criminal sanctions in one instrument was issued by the HPR recently, criminal offences intended for the proper enforcement of tax laws were stipulated under each specific tax laws. The Constitution divides the taxation power between the federal government and the states in order for them to exercise the levying and collecting authority specifically given to each.[638] Both tiers of government are supposed to enact tax criminal legislation on the areas constitutionally granted to them for the fully intended self-governance purposes.[639] For this reason, it seems, the federal government has, to date, enacted several tax incidental criminal statutes on the areas which are reserved to it by the Constitution.[640] The tax penalty clauses stipulated for tax administration which was hitherto scattered here and there in various tax laws are now pooled together in one instrument.[641] The Customs Proclamation includes a series of criminal acts which entail respective penalties.[642] One of the types of taxation power vested in the federal government is related to the one that transcends a border both at international and inter-state levels. Viewed from viewpoint, the HPR issued this proclamation on the basis of the constitutional provisions which state that the federal government shall levy taxes and collect duties on revenue sources reserved to it.[643]And Art.96 (1) of the Constitution clearly provides that the federal government shall levy and

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[637] Proclamation No.660/2009, The Agriculture Resources Development and Protection Proclamation, Federal Negarit Gazeta, 16th year, no.6, 24th December 2009, Addis Ababa, Art.8

[638] Art.96 and 97 of the FDRE Constitution enumerate the respective exclusive taxation powers of the Federal Government and the States respectively. And Arts.98 and 99 provides for the concurrent and undesignated power of taxation respectively.

[639]Art.51 (10) and 55(11)of the FDRE Constitution states that the Federal Government shall levy taxes and collect duties on revenue sources reserved to it (*emphasis added*). On the other hand, Art.52 (2) (e) provides that the States shall have the power to levy and collect taxes and duties on revenue sources reserved to them *(emphasis added).*

[640] For instance, Proclamation No.286/2002 (the Federal Income Tax Proclamation) Arts.94—103, Proclamation No.285/2002 (the VAT Proclamation) Arts.48—59, Proclamation No.308/2002 (the Federal TOT Proclamation) Arts.25—35, Proclamation No.307/2002 (the Federal Excise Tax Proclamation) Arts.22—32, Proclamation No.110/98 (the Federal Stamp Duty Proclamation) Art.12, Proclamation No.859/2014 (the Customs Proclamation) Art.166—174

[641] Proclamation No. 983/2016, the Federal Tax Administration Proclamation, Federal Negarit Gazeta, 22nd year, no.103, 20th August 2016, Addis Ababa, Arts.116-133

[642] Proclamation no.859/2014, the Customs Proclamation, Federal Negarit Gazeta, 20th year, no.82, 9th December 2014, Addis Ababa. Chapter two of the Proclamation is devoted to the customs criminal offences

[643]Art.51(10) of the FDRE Constitution

collect customs duties and other charges on imports and exports. The Export Trade Duty Incentive Scheme proclamation[644] also stipulates criminal sanctions.

In addition to the above mentioned bunch of laws, there are other incidental criminal rules which incorporate penalty clauses. The following pieces of legislation are some of them to mention here. Pursuant to Art.51(3) of the FDRE Constitution, the federal government is conferred with the power to protect and preserve cultural and historical legacies as a result of which it enacted a detailed law which also incorporates penalties for the violation of the rights and interests endowed therefrom.[645] It also issued a legislation which contains a penalty regarding the freedom of mass media and access to information.[646] The violation of the flag law results in a criminal offence and entails a punishment which is set forth in the legislation.[647] An incidental criminal legislation is also found in the protection of witnesses and whistleblowers of proclamation;[648] the Federal Attorney General Establishment proclamation which imposes criminal sanctions on the violation of the law itself in general and the professional independence of the public prosecutors in particular;[649] the registration of vital events and national identity card proclamation;[650] for the proper and effective regulation of advocacy services rendered by the practicing advocates at the federal level, as licensing and registration and renewal thereof *inter alia* has become the ultimate criteria the failing of which results in criminal liabilities.[651] In general, as some research finding

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[644] Proclamation No.768/2012, the Export Trade Duty Incentive Scheme proclamation, Federal Negarit Gazeta, 18th year, no.62, 4th September 2012, Addis Ababa, Art.29

[645] Proclamation No.209/2000, the Research and Conservation of Cultural Heritage Proclamation, Federal Negarit Gazeta, 6th year, no.39, 27th June 2000, Addis Ababa, Art.45

[646] Proclamation No.590/2008, the Freedom of Mass Media and Access to Information Proclamation, Federal Negarit Gazeta, 14th year, no.64, December 2008, Addis Ababa, Art.45

[647] Proclamation No.654/2009, the Flag Proclamation, Federal Negarit Gazeta, 15th year, no.58, 28th August 2009, Addis Ababa, Art.24

[648] Proclamation No.699/2010 , the Protection of Witnesses and Whistle-blowers of Criminal Offences Proclamation, Federal Negarit Gazeta, 17th year, no.16, 11th February 2011, Addis Ababa, Art.29

[649] Proclamation No.943/2016, the Federal Attorney General Establishment Proclamation, Federal Negarit Gazeta, 22nd year, no.62, 2nd may 2016, Addis Ababa, Art.24

[650] Proclamation No.760/2012, Registration of Vital Events and National Identity Card Proclamation, Federal Negarit Gazeta, 18th year, no.58, 22nd August 2012, Addis Ababa, Art.66

[651] Proclamation No.199/2000, Federal Courts Advocates Licensing and Registration Proclamation, Federal Negarit Gazeta, 6th year, no.27, 9th March 2000, Addis Ababa. Art.31 states that unless the provisions of the Penal code provide a more severe penalty, any person who renders or attempts to render advocacy services without having obtained a license or renewing his license in accordance with this Proclamation shall be punished with a fine not less than 2,000 birr and not exceeding 10,000 birr or imprisonment not less than 6 months and not exceeding 2 years.

suggests, there are more than 120 proclamations containing penal provisions which were enacted by the federal government either principally or incidentally.[652]

In addition, as a perpetuation of the centralization of criminal legislation and justice policy formulation, the Federal Attorney General issued a directive dealing with criminal arbitration procedure and process.[653]

5.2.2.3. The criminal procedure legislative mandate: whose power is it?

As an adjective law, the law of criminal procedure and evidentiary code has its own purposes and objects. With regard to the purpose of criminal procedure law, it establishes a framework for preventing wrongful convictions, discovering the truth, striving for justice, investigating crimes and addressing victims' rights.[654] The object of the criminal procedure code is to ensure that an accused person gets a full and fair trial along certain well established and well understood lines that accord with notions of natural justice.[655] Some federal systems distinguish between the substantive criminal law and procedural and evidentiary codes as far as the division of the criminal matters are concerned between different orders of government. Accordingly, in some federations such as India and Switzerland, the power to enact a criminal code (substantive criminal law) and criminal procedure code has been treated differently. In this light, in the former, the power of enacting both laws is concurrently granted to the Union Government and the States, whereas in the latter case, it is exclusively given to the federal government.

In Ethiopia, no such distinction is made expressly and the federal government is only empowered to make a criminal code and other federal penal legislation. Thus, no doubt it is a residual power reserved to the states specifically as regards the matters falling under their jurisdiction. Nevertheless, the federal government is creeping towards centralizing and unifying the criminal procedure and evidence law.[656] The Draft contains all objects and subjects of the criminal justice system which include defining the jurisdiction of federal and

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[652] Supra note at 1, p.2

[653] The Criminal Arbitration Directive No.1/2020, Federal Attorney General

[654] What Is the Purpose of Criminal Procedure Law? www.ehow.com/facts_5825245_purpose-criminal-procedure-law_.html, Accessed on 21/10/2023 at 2:27 PM

[655] What Is the Object and Purpose of the code Of Criminal Procedure, 1898?, Munir Ahmad Mughal,www.academia.edu/1261803/What_is_the_Object_and_Purpose_of_the criminal procedure law, Accessed on 21/10/2023 at 2:31 PM

[656] The FDRE Draft Criminal Procedure and Rules of Evidence Code

state courts over criminal matters. In such a legal unification, the consequence will be that the state councils will be debarred from determining the criminal jurisdiction of their respective courts.

The explanation on the Draft Code suggests that the FDRE Constitution incorporates criminal procedural and evidentiary issues.[657] This proposition does not hold water as it is not specifically mentioned in the Constitution. Thus, unless one could deduce it by implication that exists between the substantive and procedural criminal matters, the federal government cannot claim power over enacting a criminal procedure and evidence code. The explanatory document on the Draft also states that the power of the federal government in making a unified criminal procedure and evidentiary code is a part and parcel of the 2011 criminal justice policy and 2004 Criminal Code issued thereby.[658] A close look at the preamble of the Draft Code also traces the authority of the federal government to make such a law to Art.55(1) and (5) of the FDRE Constitution which equates the federal power of criminal (substantive) code with criminal procedure and evidentiary code.

When the earlier version of the Draft was submitted and circulated for deliberation among the States' justice sectors professionals, a fierce objection was met from the Oromia National Regional State Government against the highly centralized, intrusive and allegedly unconstitutional draft criminal procedure code. Ideas were exchanged between the Federal Government and the Oromia State Government in a form of official letter communication which resulted in an issuance of a circular by the latter. From the side of the State Government of Oromia, as a feedback to the deliberation on the Draft, signed by the then Capacity Building Bureau Head, was addressed to the then FDRE Ministry of the Capacity Building (presently designated as the Ministry of Public Service and Human Resource Development).[659] The letter was entitled as '*The Content of the FDRE Draft Criminal Procedure Code and the Need for Inclusion of Common Affairs of Our Region'* (translation mine). Three major questions and issues have been posed in the letter that put the constitutionality of the Draft at the top of discourse of the criminal procedure law in the

[657] A short explanation on the FDRE Draft Criminal Procedure and Rules of Evidence Code (*translation mine*), P.4
[658] Id, P.5
[659] An official letter written from the Oromia Regional State Capacity Building Bureau to the Ministry of Capacity Building, no.03/Dh-/4, dated 06/09/2002 EC (unpublished)

federal setting. Owing to its paramount relevance for this study, it is important to mention and discuss the points raised by the Regional Government.

The first question posed relates to the power of the federal government to issue criminal procedure law. In this view, the Regional Government emphatically questioned whether the Federal Government has constitutional power to enact a unified criminal procedure code, and steadfastly argued that as per Art.52(1) of the Constitution such a power is reserved to the States. Even if the Federal Government enacts same, it has only to do so for its courts, not for the state courts. A point was also raised as to the fact that the States have unduly delayed to enact their criminal procedure code that the Federal Government intervened to fill such a gap with a unified criminal procedure law. The Regional Government reacted to this pretext substantiating that there are many criminal procedure laws issued by the Region in various pieces of legislation, and alleged that the argument is invalid outright.

In this regard, one must take a heed that, virtually, there are many laws on civil matters which are constitutionally granted to the States, but not yet adopted and enacted by each state government. For instance, the civil procedure code, on the one hand, and the laws of property, contract, succession, and the like which are contained in the Civil Code on the other, are all state matters which fall under the state jurisdiction. But they are still laws made during the reign of the Monarch. Thus, the fact that the States have not adopted in accordance with the power granted to them by the Constitution does not necessarily lead to the conclusion that such laws be taken away from the States and given to the federal government. Constitutionally speaking, the States are at their disposal to enact the civil procedure code of their own, and other laws mentioned hereinabove, unless there is a political pressure that restricts and prevents such a practice, as a party discipline is more audible and compulsive than the constitution in Ethiopia. In other words, the practical impediments cannot be invoked as the grounds of the waiver of powers and rights of the states.

The second question addressed in the letter has got much to do with the Business Process Reengineering (BPR) and other reform tools entrenched in the Region *versus* the Draft. There are many changes that have resulted from justice system reforms in the Region that include courts, public prosecution and police among other things. The unified Draft criminal procedure does not accommodate such reforms. It was underscored in the letter, that the unified draft criminal procedure code will automatically dismantle the justice reform that gained ground in the Region. Moreover, it was stated that the Draft negates the justice reform motions which was designed at national level to be implemented by the Regions in their own context.

The third question is strongly connected with values and culture of the society *versus* the Draft. In relation to this point, indigenous conflict resolution mechanisms that are peculiar to the Oromo Nation were not included. An indigenous conflict resolution mechanism is highly intertwined with the deep-seated values, cultures and traditions of our society, which is constitutionally safeguarded. In sum, it was stated in the letter that if a unified criminal procedure code is approved which is applicable nationwide, a serious perversion of justice administration will result, unless it is to be considered politically instead of technicality.

Impressed by the feedback, the Federal Government, through the then Ministry of Capacity Building circulated a certain directive to all the Regional States, and the Addis Ababa and Dire Dawa City Administrations so that they could enact a criminal procedure code of their own.[660] The reasons brought forward by the Ministry were so clear, sound and valid in their content. The four notable justifications were: a) As per Art.52(1) of the Constitution, the power to legislate a criminal procedure code has been vested in the Regional States as a residual power. b) The Constitution does not expressly empower the Federal Government to enact a criminal procedure code. c) Pursuant to Art.55(5) of the Constitution, the Federal Government is only granted to enact a criminal code, and not a criminal procedure code. And the two matters are different things. d) Additionally, matters associated with criminal procedure issues such as organization of police, public prosecutors, and courts belong to the States. It is clearly stated in the letter that even if the Federal Government enacts a criminal procedure code, its scope of applicability will be limited to the Federal justice institutions. Based on this directive, the Oromia State Government made an attempt and motion to enact the criminal procedure code of its own.[661] However, it remained a mere draft, and the Federal Government appeared to have regretted and moving towards enacting a unified criminal procedure code.

The above ideas exchanged between the two tiers of governments have a considerable implication just for the sake of reflection. This instance is a test of exercising residual powers

[660] An official Letter written from the Ministry of Capacity Building to the Nine Regional States and the two City Administrations, no./054/02, dated 07/12/2002 EC (unpublished)

[661] The Draft Criminal Procedure Code of the Oromia Regional State, 2011, Finfinnee

reserved to the states by the Constitution. What lessons could we draw from such a practice? First, the Federal Government is in a place to usurp state powers which are clearly granted to the latter. We could also observe that there is a lack of strong and effective institutional mechanisms to resolve such a conflict. Consequently, it is easy to imagine that the constitutional supremacy is barely respected on the side of the Federal Government, and the doctrine of constitutionalism is at risk. Second, exercising the constitutionally delimited powers of the States is put for negotiation between the executive organs. Setting aside what the Constitution is all about, the then Minister of the Ministry of Capacity Building on the side of the Federal Government, and the then Capacity Building Bureau Head from the side of the Oromia Regional State Government acted and reacted whether the States are empowered to enact the criminal procedure code of their own. This shows that the States are still at the total mercy of the Federal Government and strong party discipline, not on the Constitution, for exercising the powers reserved to them. Thus, it may safely be deduced that the powers of the States which are constitutionally defined are exercised in negotiation with the Federal Government.

5.2.2.4. A critical assessment of the monist approach

The monist approach to the criminal justice policy under the Ethiopian federal system could be evaluated from a variety of perspectives. The most instrumental parameters are those which are enunciated in Part One of this thesis pertaining to the principles and values of federalism, the rationales, principles and factors of the distribution of powers, and comparative lessons drawn from the experiences and approaches of other federal systems. In the following explanations, an attempt will be made to assess the Ethiopian federal approach to the division of criminal legislative and policy mandate in terms of these standards.

5.2.2.4.1. The principles and values of federalism

The Ethiopian approach to the division of the criminal matters in general and the legislative and justice policy as a particular subject should be seen within the spectrum of the principles and values of federalism. In the context of federalism, as Ethiopia is a federal state, some remarks should be offered against the principles and values in the realm of criminal justice matters specifically as regards practice of legislation and policy design. Of all the principles of federalism, the shared rule and self-rule tenet has an immense relevance in appraising the Ethiopian approach to the division of the criminal legislative authority which is virtually exclusively granted to the federal government per the constitution. As explained in chapter two, the concept of shared rule refers to the case whereby the constituent units have a common power over matters which concern all or some of them at the federal or central level. Two points are worth articulating in relation to the shared rule notion *versus* the criminal legislative authority under the Ethiopian federal and constitutional architecture. On one hand, it is exclusively conferred upon the federal government in an unambiguous manner albeit the states are empowered to make criminal laws over matters which are not covered by the federal government. On the other hand, the Ethiopian law-making process is prone to centralization as the role of the second chamber—the House of Federation—in influencing the HPR at the time of law enactment as regards the regional interest is virtually a nil. One of the peculiarities of the Ethiopian federalism is that the second chamber is entrusted with other mandates than law making power.[662] Thus, it is tenable to argue that the Ethiopian parliament is unicameral albeit the Constitution declares a bicameral parliament.[663] From this constitutional provision, one could reach a conclusion that the Ethiopian parliament is a textual bicameral and a functional unicameral. This has a direct bearing on the shared rule notion concerning the process of a criminal law making mandate in which the states remain voiceless provided their interest in criminal justice is at stake.

As will be considered shortly, the fact that the criminal legislative authority is exclusively granted to the federal government diminishes the self-rule rights of the states on matters specifically delimited thereto by the constitution. The implication is that the states cannot make a criminal law on the matters conferred upon them unless on the magnanimity of the federal government. This could be readily observable from the comprehensiveness of the Criminal Code which incorporates a plethora of federal and state matters making them both the exclusive power of the former.

The other essential parameters of federalism that should be taken to evaluate the Ethiopia's mode of the division and practice of the legislative mandate over criminal justice matters are the values of federalism. The most relevant of the values and advantages are experimentation, morality, democratic principles, and autonomy. The centralized Ethiopian criminal justice

[662] By virtue of the Art.62 of the FDRE Constitution, the House of Federation is empowered to interpret the constitution, decide on the question of self-determination and secession of the NNP, organize the CCI, promote and ensure the equality and solidarity of the peoples, resolve interstate disputes, order intervention of the federal government in the states, decide on the sharing of revenues and subsidies, determine civil matters which should be enacted by the HPR.

[663] Art.53 of the FDRE Constitution provides that there shall be two Federal Houses: the House of Peoples' Representatives and the House of the Federation.

matters in terms of the legislative sphere narrows down the experimental opportunities of the states in tuning with their local preferences. It also stunts the local policy innovation capacity of the states in the areas of maintaining peace and security by preventing crimes at regional, local and community levels. Consequently, the local populace may be subject to the one-size-fits-all justice system whose effectiveness and efficiency is dubious.

Morality in a criminal law assesses the diverse culture of the society in light of the supremacy of the constitution and human rights sacredness. In view of this value, a criminal law which does not accommodate the culture of the society is not a law especially from the sociological legal theory. Viewed from this perspective, the fact that the Ethiopian criminal justice matters legislation under the unicameral parliament which is lacking in the shared rule is barely assumed to accommodate the culture of the NNP. Democratic principles such as participation, transparency, and accountability are also important yardsticks in appraising the division of the criminal justice matters. As will be analysed in the following, the distribution of powers including criminal justice matters entails accountability to which the constitution grants such a field. Ensuring and tracing accountability lies at the heart of democratic governance which embraces the justice system governance too. With regard to participation, the states are not represented in the law-making processes at the centre in which a criminal law is one among the many.

5.2.2.4.2. The distribution of powers

From the discussions provided in chapter three, it has been made clear that powers are not divided haphazardly in federal systems. This applies *mutatis mutandis* to the division of criminal justice matters. Thus, in order to allocate powers and functions between the federal government and the states, there should be rationales that necessitate for, principles that guide, and factors that affect the division of such powers. Appraised against these standards, the Ethiopian approach to the division of criminal legislative competence does not take into account the rationales of the distribution of powers such as the rectification of the past wrongs on the relationship between the different tiers of government, political accountability, expenditure reference, and conflict management, prevention, and resolution. With regard to the first rationale, it is discerned with the rule of thumb that one of the underlying ideals and purposes of the FDRE Constitution is rectifying a historically unjust relationships by promoting shared interests.[664]

Accountability in the criminal justice administration is one of the key principles as the justice system may break down for some reason. If a local populace wants to hold accountable a government official or employee for the maladministration of the criminal justice, it may be a tough venture, theoretically and formally arguing, for two valid reasons. For one thing, the Constitution clearly confers the power of making a criminal law on the federal government hence holds it accountable unless those criminal matters which are enacted by the states subject to the exhaustion by the federal government. However, the federal government is found far-flung from the locals by making the accessibility difficult. So far, despite the centralized criminal policy, the federal government has organized its justice institutions only in some regions for limited jurisdiction. The rest of criminal and security issues are carried out by the state institutions. For the other thing, although the states are exercising criminal administrative justice *de facto,* except in some gloomy mandates such delegation, the rule still goes that the criminal justice matters concerns the federal government which may be invoked by the states for escaping accountability. Indeed, this argument works only for theoretical and academic reasons because to date the states have exercised criminal administrative matters as if the laws are their own. Although the issue of accountability in the administration of criminal justice may not have gone as far as this proposition is concerned, it may be tenable to contend from the constitutional division of the criminal legislative power on the one hand and the dual institutional design on the other.

Expenditure reference is another important rationale of the division of criminal justice matters. The Constitution bestows on the federal government the power to make a criminal law on one hand and provides that orders each level of government to perform its functions by its own budgets on the other.[665] In light of this assumption, as the federal government centralizes criminal justice policy, the logic is that it should also bear the costs of administration (including adjudication) itself. Majority of the criminal matters enacted by the federal government are administered and adjudicated by the state institutions as if they are their own laws with their own budgets notwithstanding those reimbursed by the former for

[664] The Preamble of the FDRE Constitution

[665] Paragraph 1 of Art.94(1) of the FDRE Constitution stipulates that the Federal Government and the States shall respectively bear all financial expenditures necessary to carry out all responsibilities and functions assigned to them by law.

some delegated matters. Thus, the mode of the allocation of the power and the financial reference could not match in the criminal justice administration.

Moreover, the way the criminal matters are allocated by the constitution has ignited conflict of jurisdiction between the federal government and the states in many circumstances. Instead of resolving and alleviating a conflict, a case study conducted shows that there is a disagreement between the federal government and the states especially as regards the usurpation of power by the former. In addition to the criminal procedure and evidentiary code which is still stuck in a stalemate due primarily to the question of mandate, there are many circumstances which are dealt with in chapter eight that two orders of government have got into conflict as far as the criminal laws are concerned.

The monist approach to the division of criminal legislative mandate could also be evaluated against the principles and factors of the distribution of powers. The principles of distribution of powers, as discussed in chapter three, refer to constitutional entrenchment, mutual respect (non-interference), subsidiarity principle, interdependence, democracy argument, efficiency argument, and finance-follows-function, which are more or less associated with the values of federalism discussed above. The existence of a written, supreme, and rigid federal constitution is one of the underlying features of federalism. In this connection, notwithstanding other purposes of the need for such kind of constitution, the entrenchment of the powers of the federal government and the constituent units in the constitution is an instrumental tenet in a federal state. In light of this principle, it is easily understood from the Constitution that the way the criminal legislative mandate is crafted is in such a way that the state power in this respect is highly dependent on the benevolence of the federal government, not on the constitution. This is because while the federal government is predominantly granted to make a criminal law, the states may enact such a law only if the subject is not covered by the federal criminal laws. In other words, the federal government is at liberty to make such a law over any matter it thinks fit thereby denying the states of enacting the law. Or else it may leave some room for the states to exercise a criminal law over some specific fields. From this follows the logic that the criminal legislative authority of the states springs from the federal government, not from the constitution, which signals the features of a unitary state structure where the source of the powers of the administrative units is the central government. In such a trend, the central government can give and take back the powers and functions to the administrative units at its discretion. In this regard, the practice reveals, as described in the preceding discussions, that the federal government enacted a centralized, comprehensive criminal law over a plethora of matters, state matters included.

From the concurrent point of view as well, there are many proofs that substantiate the monist approach to the division of criminal matters. It has been pointed out in chapter three that one of the manifestations of concurrency under the Ethiopian constitutional distribution of powers is criminal authority which is designated as 'generic' concurrent power. As compared with the manifestations and forms of concurrent powers in general and that of the criminal law in particular in other federations, Ethiopia's approach appears to be very loose between the exclusive federal government on the one hand and concurrent power of the federal government and the states on the other. Such an ambivalence and looseness of the concurrency entirely emerges from the specific constitutional provision dealing with the subject. It is stated: *The House of Peoples' Representatives shall enact a penal code. The States may, however, enact penal laws on matters that are not specifically covered by Federal penal legislation*.[666] The English and Amharic versions of the Constitution in this respect are equally clear that the states' power to make a criminal law depends upon the room left by the federal government. As Assefa and Zemelak argue, the power to enact criminal laws falls within the exclusive competence of the federal government. The Constitution, however, allows states to enact penal laws on any criminal matter that the federal penal legislation has not covered which creates a generic concurrency on unspecified criminal matters between the federal and state governments.[667] Thus, the concurrency of criminal legislative authority comes into picture on the areas not exhausted by the federal government.

The monist approach is glaringly found in criminal concurrency because the Constitution has apparently empowered the federal government to decide on the magnitude of the state criminal legislative authority and possible rooms to be left there for. The only criterion considered envisaged by the Constitution in the criminal legislative concurrency is 'exhaustion or coverage', i.e., whether the federal government has exhausted or covered the subject matter. There is no other condition that the federal government is required to fulfil nor is any limitation imposed both substantively and procedurally in making a criminal law in the concurrency. This proposition could easily be contrasted with other forms of concurrency recognized by the Constitution. For example, in the framework concurrency, as both tiers of government are granted shared powers over economic, social, and development matters, it

[666] Art.55(5) of the FDRE Constitution
[667] Assefa and Zemelak, supra note at 92, p.256

could be assumed that the federal government is limited (by the constitution) to making general and national standards, policies, and laws by leaving detailed laws to be enacted by the states. This assertion is made clear in relation to concurrent powers on some fields. For example, the federal government shall establish and implement national standards and basic policy criteria for public health, education, science and technology as well as for the protection and preservation of cultural and historical legacies.[668] Moreover, in the legislative-executive split concurrency, specifically as regards land and other natural resources, the federal government is limited to make a law, and the states are empowered to administer the law made by the former. In other words, the states can claim the administrative power of land and other natural resources in the concurrent exercise of power although it is a bit difficult to distinguish between legislative and administrative mandates as widely expounded in chapter three. What is more, as one negative consequence of concurrency, centralization is inherent in the criminal legislative mandate.

The whole idea is that while there are some conditions and limitations sanctioned on matters concurrently granted to the federal government and the states in some fields mentioned above, no such limitation are imposed as far concurrent criminal authority is concerned. As many case studies suggest, in many cases even where constitutionally entrenched, concurrency favours the federal government over the constituent units. That is why the centralized, top-down, one-size-fits-all, or monist approach is selected for the discussion under this section.

This trend leads us to the analysis of the second principle of the distribution of powers: mutual respect (non-interference). This tenet is plainly stipulated in the Constitution that the federal government and the states shall respect the powers of each other (Art.50(8)). From this perspective, the fact that the federal government is empowered to make a criminal law over any matters whatsoever provokes the question of the federal comity, namely that it should not encroach on the state matters which are constitutionally delimited thereto in the name of making a criminal law. In this regard, the federal matters *versus* state matters dichotomy in the regime of the distribution of powers may not make sense as far as the criminal legislative mandate is concerned as it could be taken as a ground of and paving the way for the federal government to usurp state matters. Thus, the monist approach to the criminal matters legislative allocation is a ground of violating the mutual respect principle in

[668] Art.51(3) of the FDRE Constitution

other areas of division of powers. This shows that there is a sort of self-contradiction between the provisions of the Constitution which divide powers between the federal government and the states on one hand and grant an exclusive authority to the former over criminal spheres one the other. This becomes more controversial especially where the states are outdone by the federal government not to make criminal laws for regulating matters exclusively or residually reserved to them.

The subsidiarity principle is overtly overlooked in the division of the centralized criminal legislation under the Ethiopian federalism. In contrast to the subsidiarity principle which promotes a bottom-up approach, the division of the criminal justice opts for a top-down approach. This “one-size-fits-all” system restricts a tailored approach to criminal justice system in the diverse society like Ethiopia. The consequence would be that such a system may not be effective, efficient, and penetrated into the practical socio-economic lives of the people concerned. The principle of interdependence would be broadly considered within the intergovernmental criminal justice system relations which will be dealt with in chapter eight. In this respect too, there are some gaps and problems as to how the criminal justice sectors cooperate, collaborate, and coordinate in the exercise of the powers and functions in the administration of the criminal justice. Other principles of the distribution of powers such as democracy argument, efficiency argument, and finance-follows-function against which the monist approach to the division of criminal justice matters under the Ethiopian federalism is appraised are highlighted in the earlier discussions.

The factors that affect the distribution of powers in federal systems have relevance in assessing the division of the criminal justice approach as the latter is a subtheme of the former. The most crucial parameter in this connection is the nature and significance of the matter in question. In this regard, if the criminal matter has national/federal significance, the federal government should exercise an authority over it, and if it has a regional and local significance, the states should be empowered to assume the mandate. In addition, the more the homogeneous nature of the subject matter, the more likely that it should fall under the federal jurisdiction and the more the heterogeneous nature, the more likely that the states would have a power over it. Despite such factors, the Ethiopian federal approach to the criminal justice does not take into the factors affecting the division of criminal authority as a result of which the homogeneity approach appears to have dominated thereby the federal government centralizes the criminal justice system.

In a nutshell, it is possible to grasp that the Ethiopian approach to the division of criminal justice matters which is centralized departs from the principles and values of federalism, principles, rationales, and factors of the distribution of powers.

5.2.2.4.3. The comparative and theoretical insights

The Ethiopian monist approach to the criminal justice could be compared and contrasted with federal polities highlighted in chapter four: USA, Germany, and India. The approaches adopted by each federal system have a direct or indirect relevance to the study of the Ethiopia approach in the criminal justice matters.

To begin with, structurally, the US and Ethiopian federalism could be compared partially because they both are dual federations. As dual federal polities, both the federal government and the states have their own legislative, executive, and judicial organs which are basically assumed to make, implement, and adjudicate laws over their respective matters so delineated by the constitution including criminal laws. There are also similarities between the two federations as regards the form and approach of the distribution of powers in which the exclusive powers of the federal government are enumerated and residual powers are left for the states. Besides, the argument that Ethiopia can rightfully be described as (a largely) durable coming-together modern federation would not be dismissed that may parallel it with the US federal counterpart.[669]

In other cases, it may be difficult to compare the two federal countries with areas of commonalities. There are a lot of dissimilarities between the two jurisdictions. However, even in such differences, it is possible to compare by contrasting. Accordingly, from a comparative review, it is easily comprehended that the approach to the division of criminal authority between Ethiopia and the US appears to slightly portray an opposite system: while it is granted to the federal government with a marginal magnitude to the states (upon the benevolence of the federal government) in the former case, it is granted to the states with few criminal matters with the federal government in the latter. The only difference is that the federal government is conferred with few criminal matters which are grounded in the constitution in the US model, whereas the states' power in making a criminal law is contingent upon the amount and size of the room left by the federal government, hence not

[669] Genenew Assefa, "Specific Features of Ethiopian Federal Design", *in* Shastri, Sandeep, (ed.), *Equality and Unity in Diversity for Development*, 5th International Conference on Federalism, Volume 2: Federalism and the Democratization Process, Addis Ababa, Ethiopia, 2010, Forum of Federations, Shama Books, 2012, p.50

entrenched in the constitution in Ethiopia. This could be expressed through the claims and contentions provided by one order of government against the other in either case. In this sense, whilst there is a fervent quest for centralizing the criminal justice from the side of the federal government, the states are striving to reclaim such a power, especially in relation to their matters, from the federal government. This shows that the constitutional *status quo* over the division of the criminal justice matters which is highly devolved in the US and hyper-centralized in the Ethiopian counterpart could no longer have continuity. As a result, there are downward and upward quests for the criminal justice power in the US and Ethiopia respectively.

At this juncture, the three schools of thought in relation to the division of criminal matters in the US are of higher importance in the critical reappraisal of the Ethiopia's approach. From the doctrinal school of thought, it could be observed that even if the issue of the form of division of criminal matters is controversial in the Ethiopian federal and constitution design, there is no one case that is decided by the House of Federation to date. Hence, Ethiopia should draw a lesson from the US experience in litigating the subject of the division of criminal matters by making references to the distribution of powers, the constitutional perspective with specific reference to the text, context and spirit of the constitution, historical background, and school of analysis.

The normative school of thought also plays an instrumental role in the critical review of the Ethiopian mode of the division of criminal matters. It is plausible to begin the appraisal with the words of James Madison, the Federalist, which states that:

> "*In the first place, it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.*"[670]

This quote may be appropriate and pertinent to criticize the Ethiopian monist approach to criminal justice authority from the normative point of view. To this effect, three perspectives: utilitarian, institutional, and "what the law is and what it ought to be" are immensely of relevance. According to the utilitarian and institutional approach, it could be understood by the rule of thumb that the state justice institutions are organized more massively than that of the federal government necessitating for the task of criminal justice to be functioned by the

[670] Federalist paper number 17

states. This, on the other hand, proves the utilitarian perspective of the locus of the criminal justice matters authority in the federal setting. The federal government may not reach out across the country to install its institutions for the administration of criminal laws due to different reasons. Thus, the state institutions are best suited to administer the criminal laws.

With regard to the way the specific constitutional provision (Art.55(5)) is crafted in relation to the criminal clause, there are many normative questions to be posed *inter alia*: 1) Is the HPR constitutionally authorized to enact criminal laws regarding any matter it deems necessary without any bound? 2) Does it mean that the States are authorized to enact criminal laws regarding any matter which is not enclosed by the Federal Government? If the response is in the affirmative, then what is the essence of the federal matters and state matters dichotomy which is stipulated by the Constitution? What is the significance of the comity principle, as enshrined by the Constitution as well in this respect? 3) Is it the purpose of the Constitution in general and this very provision in particular to concentrate the criminal legislative jurisdiction in the hand of the Federal Government? Should the abovementioned provision be read into itself as it stands or *vis-à-vis* other relevant provisions such as provisions dealing with the respective powers of the two tiers of government and other principles of federalism entrenched in the Constitution? These questions may appear to be responded as readily as one could comprehend from the text of the constitution especially taking into the rule of concurrency. Accordingly, the possible alternatives are the fact that concurrent theory provides that: 1) the federal law may state only framework and leave details to states; 2) the federal law may regulate part of it and leaves the rest to states' 3) the federal law may exhaust all and leave nothing to states; and 4) the federal law may leave the matter to states until such time that there is a need to intervene nationwide. From these possibilities, it could be fathomed that the ultimate option to be pursued by the federal government is the exhaustion of the criminal regime by exploiting the concurrent rules which is tantamount to the centralization of criminal legislative spheres which otherwise is the negative consequence of centralization.

Nevertheless, while this is the clear and underlying postulate envisaged by the Constitution, the normative analysis seeks to challenge and question such a centralized tendency of the criminal justice policy from a variety of perspectives. Based on this series of questions, some authors forward their opinions in criticizing the centralized criminal authority. Wondossen critically evaluates how comprehensive, intrusive, and misleading the FDRE Criminal Code is in usurping the state matters in the name of making a code:

> *"The [Criminal] Code's over-inclusiveness was not envisaged under Art.55(5) of the Constitution. It creates confusion as to the judicial power of the federal and state courts to try cases arising from, and calls for interpretation and application of, the 2004 Criminal Code. Had the Federal law-making body been careful and selective in enacting the 2004 Criminal Code, the Code would have included provisions dealing only with matters listed under Art.51. In that case, only Federal courts would have judicial power to deal with cases arising from the Code, and the state councils would have passed their own penal laws covering other matters, which would have resulted in state courts having judicial power to deal with cases arising from these penal laws."*[671]

In this view, in order to have a clearly compartmentalized jurisdiction of the federal and state courts over criminal matters, the better approach is that the federal government is limited to its powers per Art.51 leaving the rest to the states. This is an area of normative school where the centralized criminal justice should be decentralized to the state councils. He also adds that:

> *"The other alternative, a harsh one, is to treat the provisions of the Criminal Code related to matters listed in Art.51 as valid federal laws, and to disregard the other provisions because they were not passed by a competent organ. This approach assumes that any of the provisions of the Criminal Code not related to matters listed in Art.51 refer to state matters addressed in Art.52. Hence, under this approach, the House legislated on matters over which it has no legislative jurisdiction. It follows that parts of the Code relating to matters over which the House has no jurisdiction to legislate are not valid laws, because the Constitution does not grant the House the power to legislate over those matters. Hence, each state council, pursuant to Arts.52 and 55(5) of the Constitution, shall legislate over such matters. This approach would settle the issue of jurisdiction, which has been unsettled and confusing. The suggestion would have the following consequences on the division of criminal jurisdiction between the federal and the state courts. First, the Criminal Code enacted by the House, being composed of criminal provisions related only to matters listed under Art.51, would be rightly considered a federal law, whether on the basis of the matter it deals with or the organ that passed it. It follows that cases arising under the Code would be federal matters to be entertained by the federal courts. This would allow the Federal Supreme Court to have the final and highest say on federal criminal cases. Second, each state council would legislate on matters not related to those listed in Art.51, which are state matters by virtue of Arts.52 and 55(5) of the Constitution. Such laws will be rightly considered state laws, whether because of the matters they address or the body that passes the law. it follows that criminal cases arising from such penal laws would be within the exclusive jurisdiction of state courts, and thus the state supreme court would have the final and highest say on matters arising these laws, as provided under Art.80(2) of the Constitution."*[672]

The federal matters and state matters dichotomy which is clearly defined by the constitution, the institutional design structured at federal and state levels which are entrusted with dealing with the laws and policies of the respective orders of government in general and the

[671] Wondossen, supra note at 3, p.282
[672] Id, p.284

allocation of criminal matters accordingly as a particular subject calls for the need to have a clear demarcation between the federal and state criminal jurisdiction. In the same standpoint, Simeneh also argues that the criminal legislative power granted to the federal government is not unlimited. As a result, he calls for the restraint of the federal government to its exclusive administrative affairs demarcated by the Constitution. He asserts:

> *"The provisions of Art.51 deal with public administrative matters vested on the Federal Government. Thus, Art.55 (5) authorizing the HPR to adopt a penal code is not, ideally, unlimited, power, but limited by its purpose as provided for under Art.51. The provisions of Art.55(1) should be understood to helping the Federal Government discharge its obligations and achieve its objectives as provided for under Art.51. Therefore, Art.55(1) does not authorize the adoption of penal provisions in every administrative bill. Even Corruption Crimes Proclamation no.881/2015 could only be justified by Art.55(5) as an amendment to the Criminal Code."*[673]

Viewed from the normative questions listed hereinabove, Ethiopia's monist approach to criminal justice policy is criticized to be ineffective, unconstitutional, and a perpetuation of the previous centralized governance and unitary state structure which is the antithesis of federalism. In this light, Abera argues that despite the fact that Ethiopian society is characterized by multiple culture and normative orders, it still has highly centralized criminal justice system.[674] He castigates the Constitution stating that the latitude of legal pluralism allowed by the Constitution has not gone far enough to embrace the criminal justice system as a result of which the Constitution has made no departure from the old centralist and unitarist approach.[675]

With regard to the dual sovereignty school of thought, commonly called school of regional autonomy, its relevance should be modified in the Ethiopian counterpart with a slight customization. In other words, its relevance to the study of the Ethiopian criminal justice authority is oblique. As a coming together federalism, the US federal experience shows that the states have retained some degree of the sovereignty at the phase of the founding. However, despite the devolutionary type of federalism, the Ethiopian case clearly recognizes the autonomy of the two tiers of government. As highlighted in the earlier discussion, from among other things, this principle is stipulated in the regime of the distribution of powers.[676]

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[673] Simeneh Kiros Assefa, "Legisprudential Evaluation of Ethiopian Criminal Law-Making", *Mizan Law Review*, Vol.14, No.2, December 2020, p.9

[674] Abera, supra note at 2, p.154

[675] Id, p.146

[676] Art.50(8) of the FDRE Constitution declares that Federal and State powers are defined by this Constitution. The States shall respect the powers of the Federal Government. The Federal Government shall likewise respect the powers of the States.

In this sense, it could be sound to argue that while the sovereignty/autonomy principle keeps the police powers of the states in equilibrium in the US federalism, autonomy guarantees to the states the exercise of criminal authority over state matters in the Ethiopian counterpart. Nevertheless, against this principle, the states have no an unambiguous constitutional backing to exercise a criminal power over matters which are delimited to them.

The Ethiopian approach to the division of criminal matters could also be compared with the German counterpart in many respects. The comparative relevance in this regard is related principally to the clear-cut types of federalism pursued by the two federations: where Ethiopia is a dual federation while Germany an administrative one.

Firstly, Germany being an administrative federalism, the executive power of the Lander emanates constitutionally from the administration of federal laws. This holds true for criminal laws as well. That is to say, the federal government cannot take over the administrative power from the Lander as it results in violation of the constitution. In light of this assertion, the Lander basically benefit from such an arrangement from two ways: on the one hand, they have an administrative power as the marker of the exercise of their self-rule right. On the other hand, although the legislative mandate is centralized, they have strong second chamber—the *Bundesrat*—that defends their interests at the centre when laws and policies are enacted. In Ethiopia, even though institutionally dual, for the criminal legislation and policy is widely centralized, its administration and adjudication is decentralized that resembles administrative federalism hence a '*de facto* administrative federalism' in the criminal regime. Stated otherwise, while Germany's is a *de jure* administrative federalism in the criminal enforcement as a specific field, Ethiopia's is a *de facto* administrative federalism. The Lander can claim a constitutional mandate of implementing laws made by the federal government. However, the states cannot claim an administrative mandate over laws made by the federal government under the Ethiopian constitutional and federal structure unless they are delegated by the latter. They nevertheless claim such a right over matters related to land and other natural resources. The federal government can at any time displace the state institutions and replace its own justice sectors by using the dual structural set up concerning the administration and adjudication of criminal matters. This may be worsened, unlike that of the German counterpart, in that the second chamber—the HOF—has little or no role in protecting and defending the interests of the states at the centre.

Secondly, the criminal legislative concurrency between the two jurisdictions could be compared and contrasted. In Germany, like that of the Ethiopian counterpart, a criminal law is categorized under the concurrent list. However, the way criminal legislative concurrency is stipulated differs. First, concurrency in the criminal authority is explicitly provided, hence constitutionally entrenched in Germany. But it is generically implied hence 'generic' concurrency in Ethiopia, in which the mode of the concurrency operates and is manifested upon the generosity of the federal government, lacking in the constitutional entrenchment. As such, there are some qualifications and limitations imposed on the federal government in order for it not to exhaust the field such as 'economic and legal uniformity', 'equal living standards' and the like that could be taken as a restraint against the federal government in Germany. Although concurrency favours the federal government and usually leads to centralization, as discussed in chapter three, such qualifications and conditions are the proof of a small window for the Lander to exercise their inherent power on concurrent criminal matters subject to the rules of concurrency.

The Ethiopia's approach to the division of criminal matters could also be compared with the Indian counterpart on several grounds. As described in the preceding chapter, both countries are multiethnic or multinational federations. While the criminal code and criminal procedure is unequivocally listed under the Concurrent List in India, only criminal code is enumerated to fall under the federal government jurisdiction with a generic concurrency in Ethiopia. The power to make a criminal procedure and evidentiary code is not explicitly provided in the Constitution unlike that of the Indian counterpart which by default falls under the residual power of the states. However, as discussed in the above explanations, the federal government is creeping towards centralizing it. Thus, the power to make the criminal code and criminal procedure and evidentiary code should be treated differently in Ethiopia unlike that of the Indian case. In consonance with the German experience, while the Indian criminal concurrency is constitutionally entrenched and manifested in an explicit stipulation, the magnitude of the state power in the concurrency depends on the room left by the federal government hence near to an exclusive federal matter in Ethiopia. In fact, it could be easily comprehended from the Constitution that the criminal legislative mandate is listed under the exclusive federal powers and functions over which the HPR shall exercise a legislative authority.[677]

[677] Art.55 of the FDRE Constitution enumerates the exclusive legislative mandates of the HPR.

Under the Indian Constitution, both the legislative, administrative and adjudicative spheres of a criminal law are listed under the Concurrent List. With regard to the administrative and adjudicative mandates of a criminal law, it is provided in the Seventh Schedule that both the Union Government and the States have the power to regulate the preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; the administration of justice, constitution and organization of all courts except the Supreme Court and the High Court; persons subjected to such detention; removal from one State to another State of prisoners, accused persons and persons subjected to preventive detention for reasons specified in entry 3 of this List; contempt of court, but not including contempt of the Supreme Court; lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficiencies; prevention of cruelty to animals; jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List. This shows that there is a concurrency in the legislation and administration of criminal laws. By contrast, only legislative concurrency (under the federal predominance) of a criminal law is spelt out in Ethiopia, and in other aspects such as administration and adjudication, as will be dealt with in length in the subsequent chapters, the Constitution envisages a dual design.

The other interesting area of comparison between Ethiopia and India pertains to the mode of dispersive approach to allocating matters of criminal justice across the three Lists in the latter and its instructive insights to the latter. In this vein, the federal government and the states are empowered to make criminal laws as far as regulating the matters enumerated under their respective jurisdictions are concerned in spelling out offences and imposing concomitant punishments in addition to the concurrent power over a criminal code and criminal procedure code. No such clue is contemplated in the FDRE Constitution. The federal government can make (as it has done so far) offences and punishments on matters reserved to the states in addition to its own. This issue was raised during the debate and deliberation on the Constitution as recorded in the constitutional minute. A member of the Constituent Assembly asked so that Art.55(5) of the Constitution should be modified in that the states have the power to make a criminal law over matters reserved to them notwithstanding the federal government's predominant power. Here is the excerpt extracted from the Minute of the Constitutional Assembly on the debate with regard to the scope of the criminal legislative mandate of the federal and state governments:

> *"...አንቀጽ 55 ንዑስ አንቀጽ 5 "የወንጀለኛ መቅጫ ሕግ ያወጣል። ይህ እንደተጠበቀ ሆኖ ክልሎች በፈደራል መንግስት የወንጀለኛ መቅጫ በግልፅ ባልተሸፈኑት ጉዳዮች ላይ ሕግ የማዉጣት ሥልጣን ይኖራቸዋል።" የሚለው ክልሎች በዉሰጣቸው ለሚነሱ የፍትሐ ብሔር ጉዳዮች ሕግ ያወጣሉ። ከክልል ክልል የሚለያዩ ነገሮች ስለሚኖሩ ሕጎቹ የተለያዩ እንደሚሆኑ ነገር ግን ይህን ለሚጥሱ መቅጫ የወንጀለኛ መቅጫ ማዉጣት እንደሚችል እንደሚገነዘቡ ሆኖም በንዑስ አንቀጽ 5 ላይ ግን በማዕከሉ የወንጀለኛ መቅጫ ሕግ የሚሸፈኑት በግልጽ ያልተቀመጡና ሁሉንም መሸፈን ከፈለገ ሊሸፍን ስለሚችል ክልሎች ራሳቸው በዉስጣቸዉ ለሚሰሩ ጥፋቶች በግልጽ የወንጀለኛ መቅጫ ሕግ የማዉጣት ስልጣን እንዳላቸው ለምን አላመለከተም? በዚህ ሁኔታ ከተቀመጠ ደግሞ በንዑስ አንቀጽ 6 ላይ ኮሚቴዉ እንዳመለከተዉ ማስተካኪያ ማዕከሉ ብቻ ህግ እያወጣ የክልሎችን ሕግ የማዉጣት ሥልጣን እያጠበበ አይመጣም ወይ በማለት ጠይቀዋል። በዚሁም መሠረት አቶ አህመድን ኢብራህም አንቀጽ 55(5) ላይ በዋናነት ለመግለጽ የተፈለገው ማዕከሉ በዋናነት ወይም በግልጽ ባልሸፈናቸዉ ሥልጣን ወይም ጉዳዮች ላይ ሁሉ ክልሎች ሕግ የማዉጣት ሥልጣን እንዳላቸው የሚያስገነዝብ መሆኑን ክልሎች የራሳቸውን ሕግ የማዉጣት ሕገ መንግስታዊ መብታቸው መሆኑን ማዕከሉም ሕግ እንደሚያወጣና ዋናዉ ቁም ነገር ግን ሁለቱም የሚያወጣቸው ሕጎች ከሕገ መንገስቱ ጋር መፃረር እንደለለባቸዉ አስረድተዋል። ወንጀልን በተመለከተም በአብዛኛው ከሰብአዊ መብት ጋር የተያያዘ በመሆኑ ንዑስ አንቀጽ 5 በግልጽ ለማዕከሉ መስጠቱን ነገር ግን አንዳንድ ቅደም ተከተሎች (procedures) ወይም አፈፃፀምና አገባቦች የተዘለሉ ወይም የጎደሉበት ሁኔታ ካለ ክልሎች የወንጀለኛ መቅጫ ሕግ ማዉጣት እንደሚችሉ በንዑስ አንቀፁ የተደነገገ መሆኑን አብራርተዋል።"*[678]

This could be roughly translated as:

> *"Art.55(5) provides that the federal government enacts the criminal code. Notwithstanding with this provision, the states may enact criminal laws which are not covered by federal criminal laws. As the states have the power to make civil laws, why are they not empowered to make offences on civil matters which fall under their jurisdiction? On other criminal matters, it could be provided that the federal government may exhaust making criminal laws. As far as enacting a criminal law is concerned, as it has a close link with human rights, per Art.55(5), it has been granted to the federal government. However, procedural issues or matters which are left uncovered may be enacted by the states."*

By virtue of this view, the federal government can make a criminal law and the states on those which are not covered thereby. But as far as their internal affairs are concerned, the states should be empowered to make offences and punishments over matters falling under their jurisdiction probably subject to the Constitution and standards set by the federal government. The response given then was that as criminal law is closely associated with human rights, it is exclusively granted to the federal government, and the states can make a procedural criminal law and other matters which are not covered under the federal criminal law.[679] Two points are noteworthy from this proposition. One, the issue of criminal legislative mandate is coupled with human rights in which the federal government is more trusted than the states with regard to the enforcement of human rights and fundamental freedoms. This assertion is unsound as no order of government is more trustworthy than the other in respecting and enforcing human rights in federalism perspective. But such a multi-tier system

[678] The Minute of the Ethiopian Constitutional Assembly, compilation no.4, *Hidar* 14-20/1987 EC
[679] Ibid

of governance broadens the protection of human rights on the one hand and the constituent units may provide a better protection than those spelt out in the federal constitution, but cannot anyway go below those standards. Two, the power to make a criminal procedure code was supposed to fall under the states, needless to debate as it is one of the residual fields which are reserved to the states.

5.2.2.5. Excess of power or exercise of the self-rule right?

Although the constitution grants the criminal authority to the federal government with the states' contingent upon the former, an observation reveals that the states are involved in making criminal statutes and formulating policies directly and indirectly connected with criminal justice. This provokes the question whether such acts are excess of power or a legitimate exercise of the self-rule right by the states in accordance with the constitution. This is an extension of the normative question to the monist approach to the division of criminal matters discussed in the foregoing sections. Despite the centralized criminal justice in its policy and legislation, some states have engaged in making incidental criminal statutes as a means of regulating matters falling under their jurisdiction. This is remarked by Assefa that although the Federal Parliament, by virtue of Art.55(5), exhausts the field, leaving no room for the States, this is not merely a paper power left for States, since they often include in their legislation specific offences which are not covered by the Federal penal code.[680] A close look at the criminal statutes enacted by the states, however, reveals not only the areas not enclosed by the federal government but they also enact penalties which are already dealt with by the federal pieces of legislation in conformity with and at times in contradiction to them. In connection with this suggestion, it is noteworthy to conceive of the concurrency of the criminal legislative jurisdiction.[681] By virtue of this rule, one could reason out with the rule of thumb that the federal government should limit itself to making criminal laws which are of federal and national character leaving those with regional and local matters to the states. This assertion springs from the normative interpretation of the specific constitutional provision dealing with the criminal legislative mandate because the literal meaning thereof in particular and practical observations followed by concurrency in other federal systems in general leads to the conclusion that the federal government would play an overwhelming role in centralizing the subject matter.

[680] Assefa, Supra note at 2, P.145
[681] Solomon, supra note at 5, p.64-65, Assefa, supra note at 394, p.140

In what follows, a sample of penalty clauses issued by the Oromia Regional State is briefly presented just for the sake of evaluating the power in light of exercising the self-rule right which is ensured by the Constitution. Land and other natural resources, intrastate commercial regulation, tax and financial administration, and offences related with the disclosure and registration of assets are some incidental statutes dealing with what amounts to criminal acts and consequent punishments. With regard to land administration, the State Council has made some activities punishable.[682] In connection with the administration of natural resources, the State Council has imposed criminal sanctions on some activities such as environmental pollution and impact assessment.[683] With regard to intrastate commercial activities, criminal punishments arising out of the quality control are enacted.[684] In addition, some activities fall under the state jurisdiction ranging between intrastate commerce, water resource management, and a part of natural resource administration.[685] There are many more examples that could be instantiated that the states have engaged in dealing with criminal justice matters.

A close inquiry into these instances of the exercise of criminal matters authority may be traced back to the Federal and State Constitutional foundations. For example, as a means of preventing corruption crimes, the Asset Disclosure and Registration Proclamation (No.169/2011) could be easily linked with Art.12 of the Oromia State Constitution in ensuring and implementing the principles of transparency and accountability of public officials and employees on official duties and responsibilities in the Region. Likewise, in relation to the crimes connected with tax, Art.52 and 97 of the FDRE Constitution empowers to the states over taxation. It is fathomed from the constitution that one of the powers divided between the federal government and the states is a taxation power which is enshrined under Arts.96-100 of the Constitution. Pursuant to these provisions, both the federal government and the states have enacted their own tax legislation and consequent tax administration which deals with tax offences and their punishments from among other things. A close reading of the fiscal powers demonstrates that taxation power is divided into exclusive federal, exclusive state, concurrent, and undesignated taxation power. From this assumption, one could easily

[682] Proclamation no.248/2023, the Proclamation to Amend the Oromia Rural Land Use and Administration
[683] Proc.no.177/2012, Oromia National Regional State Environmental Pollution Control Proclamation, art.20; Proc.no.176/2012, Oromia National Regional State Environmental Impact Assessment Proclamation, art.19
[684] Proclamation Number 234/2021, Proclamation to Determine the Oromia Region Market and Agricultural Products Quality Control System, Megeleta Oromia, 29th year, no.14/2021, Finfinnee, February, 2021, art.26
[685] For example, Proc.no.178/2013, Oromia Fishery Resources Development, Preservation and Utilization proclamation, art.16 could be mentioned.

glean that both tiers of government may enact their respective laws in order to administer same within their jurisdictions including the imposition of punishments.

The trend that the States enact supplementary criminal statutes as an exercise of the self-rule right has its parallels in other federal systems. For example, as explained in the foregoing explanations, the Indian federal experience reveals that the power to deal with offences over a certain matter follows the common lists. That is to say, the Union Government and the States have the power to make an act an offence over the fields enumerated under their respective lists without prejudice to the concurrent power of enacting a criminal code and procedure.

Donovan and Getachew locate the Ethiopian criminal legislative jurisdiction between the German model and the Canadian model.[686] From this angle, if we think of the Ethiopian criminal legislative authority in terms of concurrency, it appears to be equated with that of the German counterpart though the latter has expressly provided for but the former does not. However, if it is to be equated with that of the Canadian model, the conclusion may not take us further because in the Canadian Constitution, the Provinces have the power to impose punishments on acts committed or omitted on matters or laws falling under their jurisdiction. The Federal government is not allowed to encroach in matters falling under the exclusive jurisdiction of the Provinces on the issue concerning the imposition of punishments. But this does not work in Ethiopia as precedence is categorically given to the Federal Government, and the States may enact criminal legislation only if the said offences are not specified in the Criminal Code and other federal legislation. This argument confirms that even from the concurrent point of view, the self-rule rights of the states should be taken into account while the concurrent power is exercised by the federal government. It has been described in the foregoing chapter that concurrency is a challenge to the self-rule rights of the constituent units.

The states have also devised justice policy issues on the criminal matters directly and indirectly. Particularly, criminal justice policy matters are regulated by some statutes made by the state councils to this effect in the course of defining powers and responsibilities of justice actors in the criminal justice administration. For example, in the case of Oromia Regional State, exercising the criminal justice policy has been attempted by the police, attorney general, and the courts. Accordingly, the Police Commission is entrusted with devising

[686] Dolores and Getachew, supra note at 6, p.22

criminal justice policy on how to implement its powers and duties related to the prevention and investigation of crimes.[687] The President of the Supreme Court is assigned with developing policies and strategies regarding the judicial service delivery of the courts and follows up and supervises the implementation thereof.[688] Likewise the Attorney General is obliged to enforce and cause the enforcement of the national criminal justice strategy.[689]

Based on the above propositions, it could be safely argued that the fact that the states deal with criminal justice policy matters in various ways signals the exercise of the self-rule right by the normative standards, and not an excess of power. This line of argument could be supported by adducing other constitutional tenets that enable, empower, and even oblige states to exercise a criminal justice policy mandate. From the human rights point of view, the states are equally obliged to protect and enforce the human rights and fundamental freedoms. The Bill of Human Rights enshrined by the FDRE Constitution is also protected under the State Constitutions. The protection of these rights and freedoms are directly or indirectly connected with criminal justice administration. The FDRE Constitution which is supreme over any other laws including the state constitutions obliges any organs of government at any level (federal and regional) to respect and protect the human rights.[690] Thus, designing and executing a proper and effective criminal justice policy is a duty, not the right, a necessity, not an option, for the federal and state governments, in the course of enforcing the human rights protected by the constitution. Even by the rule of thumb that goes the states are there to provide a better human rights protection than that of the federal counterpart is fulfilled by exercising a better and strong criminal justice policy by the states. Stated otherwise, the states can formulate a more guaranteeing and conducive policy on the basis of those policies and legislation issued by the federal government, not less favourable ones. As expounded in the previous chapters, this practice is commonly accepted by the US new judicial federalism discourse.

Furthermore, one may provide an argument from the self-determination and self-government rights granted to the NNP which is an all-encompassing bundle[691] on one hand and the

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687 Art.45 of Proclamation no.213/2018

688 Art.13(12) of Proclamation no.216/2018

689 Art.7(2) of Proclamation no.214/2018

690 Art.13(1) of the FDRE Constitution clearly states that all Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this Chapter [three].

691 Art.39 enumerates a package of rights, privileges and powers that are granted to the NNP in relation to institution of self-government, language, history, identity, and others.

competences conferred upon the states in the regime of the distribution of powers.[692] Normatively, it is sound to hold that the states are capable of making criminal laws and justice policies over the matters that are conferred on them.

5.2.3. The progressive dichotomization approach

The progressive dichotomization approach to the division of criminal matters appears to be a response to the extremes between the monist and dualist approaches explicated hereinbefore. In addition to the institutional/structural dualism of criminal justice sectors on the one hand and the monist policy and legislative tendency which are overtly grounded in the Constitution on the other, the administrative spheres of the criminal justice system in general and the prevention, investigation, prosecution, adjudication, and prison administration reveals an approach that it is dichotomized into 'federal criminal justice matters' and 'state criminal justice matters'. Although the federal government is vested with the power of making criminal laws, it may not afford to administer same with its agencies at the exclusion of the states. Consequently, laws made by the federal government for governing criminal justice administration demonstrate that there are criminal matters which are primarily implemented by federal justice sectors, hence called 'federal criminal matters' and the controvertibly assumption that the rest to be implemented by state justice institutions also designated as 'state criminal matters'.

A close look at the laws dealing with the criminal justice administration both at federal and state levels demonstrates that criminal matters are vaguely divided into 'federal criminal matters' which are purportedly administered by the federal justice institutions and 'state criminal matters' administered by the state justice institutions. This sort of federal-state criminal matters divide is a difficult task albeit it is founded in the statutes enacted by both tiers of government in the regime of the administration of criminal justice within and by their respective agencies. Accordingly, the federal and state laws dealing with the allocation of criminal jurisdictions in their police appear to have split the monolithic criminal law into federal and state criminal matters. The Federal Police assumes only few criminal matters.[693]

[692] Art.52 provides for the powers of the states including the residual powers.
[693] Art.6(1-4) of proc.no.720/2011 (the Federal Police Commission Reestablishment Proclamation) provides for the criminal executive jurisdiction of federal police in two ways: general and specific. Generally, the prevention and investigation of any threat and acts of crime against the Constitution and the constitutional order, security of the government and the state and human rights; crimes falling under the jurisdiction of the Federal Courts; and execution of orders and decisions given by courts fall under the control of the Commission. Particularly,

State police exercise an executive jurisdiction over such criminal matters as any activities and movements that contravene and endanger the [state] constitutional system; prevention of occurrences of criminal acts and traffic incidents; prevent criminal acts against the interest of [state] government and its organizations; investigating crimes that fall under the jurisdiction of the Regional courts; and corruption, revenue and tax crimes.[694] The logic of this demonstration assumes that these are 'state criminal matters'.[695]

The division of criminal matters in terms of prosecutorial power also follows the same pattern. While the federal prosecutorial authority is hinged on the federal courts criminal jurisdiction,[696] that of the state prosecution corresponds with the state courts jurisdiction.[697] The progressive dichotomization in the execution of criminal matters is also evidenced from a baseline study conducted by the Ministry of Capacity Building Justice Reform Programme Officer. Hence, it is contended that the Public Prosecution Service, under the Ministry of Justice, prosecutes federal crimes before Federal and State Courts. The Federal Police, under the Ministry of Federal Affairs, are responsible for the investigation of federal crimes at federal and state levels. The State Police investigate state crimes and co-operate with the Federal Police. The Federal Prison Commission is responsible for the management and administration of prisons and the rehabilitation of convicts. In the States, the Regional Prison Commission fulfils this role.[698]

Moreover, criminal adjudication displays the progressive dichotomization approach. Federal courts are vested with only specific crimes mentioned in the federal courts proclamation and other statutes which define the jurisdiction of federal courts. The criminal jurisdiction of federal courts is contemplated in two ways: general and specific. By virtue of a general approach, the federal courts assume jurisdiction over crimes which arise under the Constitution, federal law, and international treaties; parties specified in federal law; and

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counterfeiting currencies and payment instruments; crimes relating to information network and computer system; crimes relating to human trafficking, abduction, trafficking in narcotic and psychotropic substances, hijacking of aircraft or ship, organized robbery, terrorism and violence fall under the federal police jurisdiction.

[694] Proclamation no 213/2018, the proclamation for the definition of the executive organs of the Oromia Regional State

[695] Abdi Gurmessa, *Police Power in Ethiopia's Federal Structure: Who does what in the Criminal Laws and Justice Policy Enforcement?* A paper presented at The 3rd National Police Research Symposium, Ethiopian Police University, July 15-16, 2021, Sandafa (unpublished)

[696] Art.6(3a) of the Federal Attorney General Proclamation (no.943/2016)

[697] Art.7(9) of the Oromia Attorney General Establishment Proclamation (Procl.no.214/2018)

[698] Federal Democratic Republic of Ethiopia, Comprehensive Justice System Reform Program, Baseline Study Report, Ministry of Capacity Building Justice System Reform Program Office, Centre for International Legal Cooperation, 2005 P.47

places specified in the Constitution or federal law.[699] As per a specific approach, some of them are made to fall under the federal courts jurisdiction.[700]

The bifurcation of criminal jurisdiction into federal criminal matters and state criminal matters has been introduced for the first time in the FDRE Draft Criminal Procedure Code which is under deliberation under the supervision of the Federal Attorney General. Although a clear definition and description of the two phrases is not given in the draft, federal criminal matters which are assumed to fall under the Federal courts would refer to criminal matters arising in and from the Federal laws, Federal matters, or Federal properties whereas state criminal matters refer to criminal matters which arise in and from state laws, state matters and properties although such criminal offences are incorporated in the FDRE Criminal Code and other Federal legislation. In this regard, Aderajew and Kedir argue that:

> *Under such a rule a case is a federal matter if it arises on federal law and a case is a state case if it arises on state law. We may, therefore, conclude that all cases that arise or all claims that are based on federal law may be called federal matters and the rest may be categorized as state matters. All laws made by the House of Peoples' Representatives under its enumerated power of legislation and laws made by the council of ministers are referred to as Federal laws; and all laws made by the state legislative bodies under their residual power of legislation are state laws.*[701]

There are theoretical and practical drawbacks in the progressive dichotomization of criminal matters in the enforcement regime. Firstly, the question where does the federal criminal jurisdiction end and that of the states' begin to arise may not be readily addressed. This might be complicated by the constitutional principle that the federal government is empowered to make a criminal law, and has its own executive agencies which are beholden with administering its laws. Coupled with this issue is also the question of mandate or the genesis of the criminal authority of state justice sectors. As discussed in the chapters that follow, a plethora of criminal matters are omitted from the jurisdiction of federal justice institutions. Moreover, the laws which deal with these matters do not provide for the transfer or delegation of the remaining criminal matters to the states. Some argue that the administration of criminal laws is exercised by the states without substantiating their arguments with strong legal backing. For example, Gedion and Abduletif maintain that:

[699] Art.3(1) of proclamation no.1234/2021
[700] Id, Art.4
[701] Aderajew Teklu and Kedir Mohammed, *Ethiopian Criminal procedure*, teaching material, sponsored by the Justice and Legal System Research Institute, March, 2009, Addis Ababa, p.231

> *Another area involving the execution of federal law by the states is criminal law. The Constitution empowers the federal legislature to enact a criminal code and authorizes the states to adopt criminal laws on matters not covered specifically by federal criminal laws. On this basis, the federal government has adopted a comprehensive criminal code. Given that this is federal legislation, one would expect its enforcement to be the task of the federal police, prosecutor, and judiciary. In reality, the Federal Courts Establishment Proclamation has indirectly left the application of a large part of the criminal code to the regional states. The proclamation has designated some crimes as federal crimes, but all other crimes are understood to be non-federal, and their investigation and prosecution are left for the regional states.*[702]

On top of this, it is very important to dwell on how the centralized criminal justice policy and legislation under the dual institutional setup is decentralized to the state justice actors: by devolution, delegation, or deconcentration? It is stated in the foregoing explanations that the Constitution concentrates the power to make a criminal law in the hand of the federal government. From the text of the Constitution, the states' power of enacting criminal legislation springs from the magnanimity of the federal government. From this point of view, there is no devolution of criminal justice power. Delegation is stipulated in the Constitution as regards the legislative, administrative and adjudicative spheres from the federal institutions to the states consequent upon budgetary reimbursement. Despite this provision, it is hardly clear to distinguish between which criminal matters are delegated and which are not. Specially, as discussed in chapter seven, judicial delegation in relation to criminal adjudication is more dubious. Moreover, from the deconcentration perspective (which is a clear attribute of a unitary and centralized system), it is cursorily fathomed from the statutes enacted by the federal government in the administration of criminal justice in general and that of defining its justice sectors' jurisdiction in particular that the laws are silent as to how the remaining criminal matters are decentralized to the state justice institutions even subject to revoking the power.

Secondly, if the federal government organizes its justice agencies in the regions (as it did in 2003 by establishing federal courts in five regional states) and take back criminal matters from the states claiming that criminal law a federal law, then what would be the fate of the state institutions? Although this is too theoretical and might be unaffordable for the federal government, it has a partial practical and logical significance that throws the state criminal jurisdiction in the dark. On the flip side of the argument is also the issue of self-rule or self-governance which is enshrined in the Constitution as regards criminal justice administration.

[702] Gedion and Abduletif, supra note at 107, P.177

Thirdly, the budgetary issues in the administration of criminal laws `and justice policy by the states are a subject of debate. The Constitution empowers the federal government to delegate some of its powers to the states hence downward delegation.[703] Delegation in turn entails budgetary question.[704] As far as criminal law enforcement is concerned, in order for the states to claim budget from the federal government, it is necessary to first pinpoint which criminal matters are delegated and which are not. To this effect, the FDRE and State Constitutions are inconsistent. While the former sets out funded mandate, the latter opts to adopt an unfunded mandate unless the provision is interpreted narrowly to imply delegation.

Fourthly, the constitutional judicial delegation from the Federal High and First Instance Courts to the State Supreme and High Courts respectively triggers a question as to how state *woreda* courts exercise criminal jurisdiction as it is absent in the delegation sphere. This debate also emanates from the assumption that a criminal law belongs to the federal government while in fact the state *woreda* (first instance) courts are exercising criminal adjudicative authority.

Finally, the issue of accountability comes into the fore in case and if a breakdown or failure of criminal justice happens in a state. One of the principles and rationales of distribution of powers in a federal state is democracy argument especially ensuring accountability. So long as there is no clear relationship between the federal and state justice institutions in the regime of criminal justice system, how can the people hold officials or bodies accountable? Can the federal government attribute to the state the failure of criminal justice? These are some difficulties that may obscure the criminal jurisdiction of the states under the progressive dichotomization as a trade-off between the dualist structural set up and monist criminal legislation and justice policy.

5.3. Conclusion

From an inquiry into the Ethiopian federal approach to the division of criminal justice matters, there are many lessons learned and conclusions drawn in this chapter. First, the three approaches to the division of criminal matters under the Ethiopian federal and constitutional design—the dualist (institutional/structural), the monist (legislative), and the progressive dichotomization—have proven defective in the critical analysis of the three aspects of the

[703] Art.50(9) cum 51, 78, 79, 80 of the FDRE Constitution
[704] Art.94 of the FDRE Constitution

criminal justice matters. In light of this argument, the way the justice institutions are designed, the criminal law enacted, and such laws are enforced portray incongruence in the federal arrangement. The consequence is that there is no clear understanding of the criminal justice administration as to who does what in what scope and context, who bears the costs required for the administration of the criminal laws and policies and how much for what/which criminal matters; who would be held accountable in case of the breakdown of the criminal justice system; and other related issues.

Second, the Ethiopia's monist approach to criminal legislation and justice policy could be criticized from the viewpoint of the principles and values of federalism, and the rationales, factors and principles of the distribution of powers which characterizes Ethiopia more as unitary and centralized state than federalism or devolved system in the criminal justice system. Consequently, there are no robust local experimentation and policy innovation by employing local knowledge, democratic principles, morality test, and other tenets in the regime of the criminal justice administration.

Third, as there is no clear theory which is more or less perfectly fit into the Ethiopian approach to the study of the criminal justice matters, it is appropriate to draw lessons from the schools of thought adopted by the US counterpart: the doctrinal, normative, and dual sovereignty/autonomy approaches which may be capable of alleviating the flaws in the division of the criminal matters.

Fourth, putting Ethiopia in a comparative perspective, it could be readily observed that there are some commonalities and dissimilarities as regards the division of criminal matters. To this end, as a dual federation, Ethiopia's approach may be juxtaposed with the US counterpart. From the constitutional point of view, the approach adopted by the two federations suggest diametrically opposite models: while the former grants the federal government with a predominant mandate over criminal legislation with marginal state authority, the latter confers police power in the states with few criminal acts to be enumerated under the federal government. This rule has been changed due to the practical quest for decentralization in the former and centralization in the latter. The concurrency of criminal authority is implicit in the US, and generic and loose in Ethiopia. In this case, the federal government needs to substantiate its intrusion by either the commerce clause or regulatory mandate of federal matters to make a criminal law in the former, whereas, no condition and requirement is needed for the federal government to make a criminal law of any kind in the latter. As a result of centralized tendencies in the US, three schools of thought are developed as a check to the limit of Congress in relation to criminal mandate. But no theory is developed thus far in Ethiopia in order to limit the unconstrained power of the federal government albeit it has a constitutional backing.

Ethiopia and Germany follow different types of federalism: dual and administrative respectively. However, in respect of criminal justice administration, it appears that while the former is a *de facto* administrative federalism, the later is a *de jure* administrative federalism. The administrative mandate is an inherent constitutional right of the Lander in Germany, but not in Ethiopia unless by delegation. The role of the second chamber is high in Germany, whereas it is very low or no in Ethiopia as far as the protection of regional state at the centre is concerned. In addition, criminal law is an explicit concurrent power in the former, but not in the latter: it is loosely provided such a way that the state power is contingent upon the munificence of the federal government.

The same argument holds true as well in the comparative view of Ethiopia and India from the concurrent perspective. This leads us to the summary of the comparison between India whereby both are multi-ethnic or multinational federations yet follow different approaches to the division of criminal matters. In the latter case, both the legislative and administrative spheres of criminal law are concurrent, whereas only the legislative aspect is concurrent in the former. While the federal government and the states are empowered to make criminal laws over matters conferred exclusively upon them by the constitution in India, such a dispersive approach is not adopted by the Ethiopian Constitution.

Chapter Six

The Criminal Executive Power

6.1. Introduction

Execution of criminal laws and justice policy as a sub-theme of administrative/executive power which is divided between the federal and state justice institutions is another area of focus in the overall criminal justice system. Along the same line with the division of executive power, a criminal executive authority is also divided between various levels of government. By criminal execution in this chapter, it refers to such activities as prevention and investigation of crimes, prosecution, educating the public about crimes and their consequences, and administration of prisoners. All these criminal enforcement functions have their corresponding institutions which they are entrusted with both at federal and state levels. The criminal justice agencies discharge their duties in relation to the administration of criminal laws which are centrally enacted by the federal government.

In this regard, a contradiction may come to pass where a centralized criminal legislation is decentralized administratively within the dual institutional structure. What the federal and state executive criminal justice institutions do as an exclusive and original aspect and delegation form in the enforcement of the criminal laws constitutes a heated debate which will be expounded in this chapter. Although a criminal law is centralized even as per the constitutional mandate, its administration is decentralized to the state and local justice actors. However, what valid constitutional foundations would be adduced to justify the assumption of executive criminal jurisdiction as such by the state justice sectors should be critically scrutinized from various angles. On the one hand, criminal justice administration could not lie outside of the involvement of the state institutions albeit legislative centralization. On the other, there must be a constitutional basis for the states to exercise such a power as respecting each other's powers granted to each by the constitution is an underlying principle of federalism which is also articulated in Ethiopian federalism.

Based on these propositions, it is understandable from the federal laws issued to define the criminal jurisdiction of the federal criminal executive agencies such as police, prosecutor, anti-corruption, and prison that only few criminal matters are specified to fall there under. Such laws keep silent as to how the rest of criminal matters which are enacted by the federal government are executed: whether they continue to fall under the federal government's realm or left to the states, and if so, how they are to be exercised is not clear. This is one of the problems which create an anomaly in the administration of criminal justice in the Ethiopian federal system. What is more, the states delineate the criminal executive jurisdiction of their justice organs despite lack of a criminal legislative power. The trend in turn provokes the question of legitimate authority to do so under the constitutional mandate. These and other related issues will be unearthed in this chapter.

Particularly, as hinted out earlier, the criminal executive power which is the major theme of this chapter pertain to prevention, investigation, prosecution, administration of prison, and other related functions which aim at administering criminal justice system. Educating the public for the purpose of raising the legal awareness of the people at large is also a component of administration of criminal justice. The Ethiopian criminal law gives priority to educating the public about crimes and their punishments as a preventive mechanism which is also the primary purpose thereof.[705]

The chapter is organized into six sections. Section one presents a brief introductory statements. Section two provides a description about an institutional and structural design of the criminal justice and security sectors under the Ethiopian federal system. Section three deals with how criminal executive authority is divided between the federal and state justice organs based on the laws which demarcate the criminal jurisdiction of such bodies. In this section, a descriptive legal approach will be employed to explore the statutory limits of the jurisdiction of the federal and state criminal executive organs. Section four critically evaluates the puzzles and problems of the division of criminal executive jurisdiction among various justice bodies at federal and state levels. Delegation and its consequent entailments such as the scope, form, and expenditure, will be elucidated in section five. The last section presents a summary of the chapter and potential lessons that could be learned from the approaches of defining criminal administrative power under the Ethiopian federal arrangement.

[705] Art.1 of the FDRE Criminal Code reads as: The purpose of the Criminal Code of the Federal Democratic Republic of Ethiopia is to ensure order, peace and the security of the State, its peoples, and inhabitants for the public good. It aims at the prevention of crimes by giving due notice of the crimes and penalties prescribed by law and should this be ineffective by providing for the punishment of criminals in order to deter them from committing another crime and make them a lesson to others, or by providing for their reform and measures to prevent the commission of further crimes.

6.2. Institutional Design

Security issues which also include criminal justice are articulated in the Ethiopian constitutional architecture. The Constitution accentuates *inter alia* the need for the lasting peace and security, the rule of law, human rights, development, and democracy which are the ideals and milestones envisioned by the authors of the Constitution *viz*. the NNP.[706] These ideals are also complemented and cemented by the fundamental principles of the Constitution which include the supremacy of the Constitution, sovereignty of the NNP, human rights, secularism, and democratic principles such as transparency and accountability.[707] Above all, all branches of government at federal and state levels are duty bound to respect and enforce the human and democratic rights protected by the Constitution.[708] It follows from these tenets that justice and security institutions are supposed to discharge their duties within this general spectrum.

All these responsibilities need to be fulfilled by duly designed institutions which are in fact incorporated by the Constitution. Hence, security and criminal justice institutions are set up at federal and state levels. For example, the federal government is authorized to establish and administer national defence and public security forces, and federal police forces.[709] On the other hand, the States are empowered to organize their police forces and maintain peace and security within their boundaries.[710] From this logic comes the assumption that while regional and local criminal and security matters are carried out by the state institutions, those which have national and federal characters would be run by federal justice and security agencies. Security and criminal justice matters are not discharged only by these institutions but there are also others such as public prosecutors, security organizations, anti-corruption commissions, prison administrations, legal training and research institutes, and other organs which are indirectly implied by the Constitution to carry out the enforcement of laws and policies in general and criminal laws in particular. That is to say, criminal and security matters are shared responsibilities between orders of government. In federal systems, there is a possibility for two or more actors at different levels to have either separate or shared mandates over security.[711]

706 The Preamble of the FDRE Constitution
707 Chapter of the FDRE Constitution
708 Art.13 of the FDRE Constitution
709 Art.51(6) and 55(7) of the FDRE Constitution
710 Art.52(2g) of the FDRE Constitution
711 Assefa, supra note at 440, p.8

Moreover, there are a number of statutes issued by the law-making organs both at federal and state levels that are meant to deal with these matters which may be taken as benchmarks to distinguish the jurisdictions of each of the agencies which are stipulated by the Constitution in general terms. Accordingly, the federal security and criminal justice institutions, as executive organs, include the Federal Police Forces which was established by Proclamation No.720/2011 (hereinafter referred to as the FPC Proclamation,[712] the Federal Attorney General established by Proclamation No.943/2016 (the FAG Proclamation), the Federal Ethics and Anti-Corruption Commission as re-established by Proclamation No.1236/2021 (the Federal EACC), the Federal Prison Commission re-established by proclamation No.1174/2019, the Ministry of Peace, and the Ministry of Defence. The Federal Prison Commission is accountable to the Federal Attorney General which in turn is accountable to the Prime Minister and the Council of Ministers.[713] As far as the accountability of the Federal EACC is concerned, there is an incongruity between the two statutes which deal primarily with the Commission and the powers and duties of the general federal executive organs. By virtue of the former, its accountability is for the HPR,[714] but according to the latter, the Federal EACC is accountable to the Prime Minister.[715]

Nearly all these security and justice institutions have their counterparts in the regional states with the exception of the Ministry of Defense which primarily falls under the exclusive jurisdiction of the federal government due to its nature as characterized by national significance. Hence, the regional states have their own police forces, prison administration, anticorruption commission, administration and security bureaus, attorney generals, and other peace and security organs. Unlike the federal institutional structures, police and prison administration organization in some States such as Oromia, is constituted and regulated in the whole gamut of the regulation of the dependent executive organs.[716] However, with regard to the regional state police forces, there is a move to govern it with a primary legislation to be approved by the State Council, *Caffee*.[717] While the Federal Police Commission is

[712] This proclamation (No.720/2011 came into force by repealing proclamation no.313/2003 which had in turn repealed proclamation no.207/2000
[713] Art.3(2) of the FAG Proclamation
[714] Art.3(2) of the Federal EACC
[715] Art.79(16) of proclamation No.1263/2021
[716] Art.41 and 42 of Proclamation No.242/2021, A Proclamation Enacted to Reorganize and Redefine the Powers and Duties of Executive Organs of Oromia National Regional State
[717] Oromia Police Commission Establishment Draft Proclamation, not yet approved

accountable to the Prime Minister,[718] the Oromia Police Commission is accountable to the President of the Region.[719] The Regional EACC which was established by proclamation No.197/2016 (hereby the Oromia Regional State EACC) is accountable to the Regional President.

Each of these institutions has its own powers and responsibilities on the one hand and joint tasks which they discharge in collaboration with other organs for the full implementation of policies, strategies and laws in relation to peace and security in general and criminal justice administration in particular. For example, the Ministry of Defence plays a pivotal role in the maintenance of peace and security in general and that of the defense of the nation and constitutional order from any threats in particular.[720] To this effect, it initiates and implements policies, strategies and laws with respect to national defense building; defends the territorial integrity of the country; combats guerrilla warfare and terrorism; deploys the national defense forces; and other related duties and responsibilities. Ministry of Justice or the Federal Attorney General is another federal justice organ conferred with several powers and responsibilities in relation to criminal justice administration which will be described in the sections that follow. The other federal security and criminal justice institution is the Ministry of Peace which principally deals with the initiation and implementation of ideas to formulate policies, strategies and laws in relation to peace; designing and implementing strategies to prevent extremism and fanaticism under the cover of religion, nation and other reasons; devising strategies for awareness creation and sensitization that foster a culture of respect and tolerance among communities, promoting the enhancement of cultural exchange, civic education, and artistic works that build national unity and consensus; and identifying causes of conflicts among local communities through study; submission of a study proposing recommendations to keep communities away from conflicts and instability.[721]

The Administration and Security Bureau is structured at an executive level which is beholden basically with the assurance of peace and security of the Region at large.[722] From among

[718] Art.79(7) of Proclamation No.1263/2021; the line of accountability of the Federal Police commission changes over time. Previously, it was accountable to the Ministry of Peace.
[719] Similar to the Federal Police commission, the Oromia Police Commission is accountable to the Regional President which was previously accountable to the Administration and Security Bureau (proclamation no.242/2021, the Definition of the Powers and Duties of the Oromia Regional State Executive Organs)
[720] Art.38 of proclamation No.1263/2021
[721] Art.41 of Proclamation No. 1263/2021, Definition of Powers and Duties of the Executive Organs Proclamation
[722] Art.24 of Proclamation No.242/2021, a proclamation for the definition of the powers and duties of the Oromia Regional State Executive organs

other things, the Bureau is entrusted with organizing and coordinating security forces for the maintenance of peace and security; conducting research as regards the problems related with the security issues and causes of conflict and forwarding recommendations and implementation thereof; getting involved in the crime prevention strategy with concerned organs; collaborating with other bodies to abort anti-peace elements; collecting information about the circulation of illegal arms and reporting to the concerned bodies; and controlling illegal settlement.

In addition, the Oromia Regional State organized a community-level peace and security institution called *Gaachana Sirnaa* (roughly and literally translated to mean "shield of the system").[723] Based on the organizational structure, the fundamental principles which guide the operation of the institution, and its duties and responsibilities, it could be comprehended that it is an indigenous system of preservation of peace and security of the people of the Region at the lowest unit of administration which involves the public participation appears to be preferred by the Regional government. Accordingly, the structure of the *Gaachana Sirnaa* follows the age grades which are employed in the Gadaa System.[724] As a lowest peace and security institution, the *Gaachana Sirnaa* is accountable to the *kebele* administrator. It works closely with other relevant security and justice agencies such as the militia offices and police forces. The objectives of the *Gaachana Sirnaa* are: the enforcement of peace and security of the people of the Region by protecting their rights, interest and benefits; promotion of the culture and values of peace and security of the people; encouraging the current and future generation to be conscious, organized and armed to take part in the maintenance of peace and security; and coordinating the people in building peaceful and secured society.

The Militia Office is also another security and criminal justice sector which is organized by the Oromia Regional State Council. It is a peace and security institution organized at bureau, zone, and *woreda* levels.[725] It may also be organized at *kebele* administrative levels as the case may be. Being organized under executive organs, it has a number of duties and responsibilities in ensuring peace and security and at times involved in playing its roles in criminal justice administration which particularly pertains to a police power. For example, the

[723] Proclamation No.245/2022, a Proclamation for the Establishment of the Oromia Regional State *Gaachana Sirnaa*
[724] Pursuant to Art.10 of Proclamation No.245/2022, the *Gaachana Sirnaa* is organized according to the age grades *viz*. *Dabballee* (0-8), *Gaammee* (9-16), *Kuusaa* (17-24), *Raabaa* (25-32), *Doorii* (33-40), *Gadaa* (41-48), 1st *Yuubaa* (49-56), 2nd *Yuubaa* (57-64), 3rd *Yuubaa* (65-72), 4th *Yuubaa* (73-80).
[725] Art.5 of Proclamation No.32/2000, a proclamation for the establishment of the Oromia Regional State Militia Office

Militia Office is entrusted with organizing, coordinating, and administering militia offices and personnel found at different hierarchical levels; preventing crimes in collaboration with other concerned bodies such as police forces for ensuring durable peace; providing support for justice bodies where there is lack of police forces; and other additional duties assigned to it by the Security Council of the Region.[726]

Criminal justice institutions are also organized in Addis Ababa and Dire Dawa City Administrations. Some of them like the police forces are established by federal laws. For example, the police commissions of the two city administrations are accountable both to the Federal Police Commission and their respective city administrations.[727] Accordingly, they shall submit their annual plans and performance reports to the FPC and their respective city administrations. The Addis Ababa City Police Commission is regulated by its own separate regulation issued by the Council of Ministers.[728] It acts on behalf of the FPC in the City. Moreover, it is provided that the Addis Ababa and Dire Dawa City Administrations shall establish their own ethics and anti-corruption commissions.[729]

From the abovementioned propositions, it could be argued that a far as an institutional set up with regard to the security and criminal justice system is concerned, it is decentralized from the central government to the regions and then to various local governments and administrations. However, there are some institutions such as the defense forces which are exclusively limited to the federal government hence not decentralized to the regions.

Nevertheless, recent developments following the political and legal reform reveal that some institutions such as police forces are moving towards a centralized system. A document dealing with Police Doctrine which was drawn up under the supervision of the Ministry of Peace, FPC, and Addis Ababa University provides for the unitary police system in the federal system.[730] According to the document, the regional police forces are accountable to the FPC; it centralises the recruitment process of regional state police by subjecting it to federal control; and the promotion and appointment of deputy commissioner and the commissioner

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[726] Art.53 of proclamation No.242/2021, a proclamation to define the powers and duties of the executive organs of the Oromia Regional State
[727] Art.20 of the FPC Proclamation
[728] Regulation No.96/2003, Addis Ababa City Police Commission Establishment Council of Ministers' Regulation
[729] Art.3(3) of the Federal EACC Proclamation
[730] Police doctrine draft tabled for discussion, November 28, 2019, https://waltainfo.com/police-doctrine-draft-tabled-for-discussion

of regional state police to be made by the federal government (Ministry of Peace).[731] The document was kept out of public access and hidden from publicity. Consequently, there are divergent arguments for the need for the Police Doctrine as a new policy system which was broadcasted by some media outlets and some academics who had an access to the document. According to Walta TV, for example, Minister of the Ministry of Peace, *Muferiat Kamil* stated that the draft was intended to improve the relations between the communities and police forces which was not good previously and help the country to build police institutions which are neutral from any political party.[732] On the other hand, as Assefa maintains, the document was prepared for dissolving the regional police, particularly, the special police forces under the pretext that it is heavily militarised against its mission and is becoming a threat to peace and security hence a tool for extremist ethnic and religious groups.[733] He presents this incidence as an evidence for the rise of an authoritarian centralization which is at odds with the constitutional and federal principles and ideals under the PP regime.

In this respect, the Police Doctrine document is not only against the Constitution which dilutes the state police constitutional institutional autonomy but it was also drawn up by exclusively federal bodies which did not include the state organs. This would complicate the problem of the centralized and unitary trend in a general state of affairs and police system as a particular institution. A unilateral decision that jeopardizes the state constitutional interest may fuel a disagreement between the orders of government. As Schnabel argues, in federal countries, changes to the distribution of power require the consent of both levels of government because when policy problems affect several governments of a federation but individual governments decides on policy unilaterally, i.e. without consulting the other governments, this fundamental principle of federalism can be violated as unilateral policy making potentially limits the other governments' autonomy without them consenting to such (often informal and implicit) changes in the federal balance of power changes which are often informal and implicit.[734]

At this juncture, it is noteworthy to delve into an analysis of the regional special police forces: their constitutional foundation, institutional set up, legal backing, and their powers and duties *vis-à-vis* the federal defense forces. The establishment, powers, organizational

[731] Assefa, supra note at 434, p.13
[732] Police doctrine draft tabled for discussion, November 28, 2019, https://waltainfo.com/police-doctrine-draft-tabled-for-discussion
[733] Assefa, supra note at 440, p.13
[734] Schnabel, supra note at 435, P.9

structure, and accountability of the regional special police forces from among other things have been dubious and controversial in the field of maintenance of peace and security at regional, inter-regional and international levels. That is why Assefa contends that the regional special police resemble more an army than a police as they have taken over the role of an army which basically resides in the federal government's jurisdiction.[735] Moreover, in some regions like the Ethiopia's Somali, the special police forces eventually took control of almost all security functions once held by the regular police, the custodial police, and the federal military.[736] In fact, as it was enunciated earlier, it is clearly stated in the Constitution that the states are empowered to maintain peace and security and establish police forces of their own. One could readily imagine the special police forces under this sphere. However, as compared with the regular police forces so established by the States, the special police forces are not backed by a clear legal and institutional set up. Since recently, the regional special police forces have become more controvertible and troublesome which ultimately resulted in the declaration of state of emergency in the Amhara Regional State as the regional regular law enforcement could not manage the situation. This was followed by the decision of the federal government to dissolve the regional special police force and its reintegration into the national defense or the regional regular forces.

As some studies suggest, regional special police started to operate and organize in the Ethiopia's Somali Region in 2007 for the counter-insurgency and riot control which gradually spread to all other regional states.[737] Since their organization in the regions, there are many problems and security crisis allegedly committed by the special police forces due to their undefined powers and duties. There are a lot of evidences for the severe human rights violations allegedly committed by the special police forces of the regions.

Assefa explores two perspectives as regards the study of debates surrounding the regional special police forces within the wider Ethiopian federal political landscape. These are centrist perspective and ethno-nationalist perspective. According to him, while the former promotes a centralized federalism or decentralized unitary system of governance which try to harness all federal and state security forces to that end, the latter looks for a more open political space with substantial autonomy in regional states.[738] The centrist perspective exponents argue that

[735] Assefa, supra note at 440
[736] Tobias Hagmann, Fast politics, slow justice: Ethiopia's Somali region two years after Abdi Iley, the London School of Economics and Political Science, Conflict Research Programme Briefing Paper 11 September 2020
[737] The Special Police in Ethiopia, European Institute of Peace, October 2021, p.3
[738] Assefa, supra note at 440, p.18

regional state special police are unconstitutional, a threat to peace, stability, unity and the integrity of the country, and thus should be banned or dissolved. Consequently, an attempt has been made to draw up a document that centralizes the recruitment process of regional state police by subjecting it to a federal control hence made accountable to the Federal Police while reserving the administrative accountability to the regional states.

According to the ethno-nationalist group, on the other hand, regional state special police are presented as an integral part of the right to self-government that logically follows from the provisions of the federal constitution such as Art.8,39, 46, and 47 that guarantee political autonomy; that regional states have the mandate to establish regional state special police as a means to ensuring self-government, peace and security within their territory; hence the special police should therefore be treated as members of the regional state police force, which is expressly mentioned in the regional state constitutions and further elaborated in the regional state laws establishing the police commission.[739]

As a middle ground theory between the two extreme approaches, Assefa proposed different options for regulating the regional special police forces in the Ethiopian security institutional arrangement. The first alternative is an integrationist approach which is intimately linked with the centrist suggestion. By virtue of this proposal, the regional special police would be integrated into either the national defense forces or federal police, along the unitary security model.[740] The second option is a framework model, an arrangement in which the federal government has the constitutional powers to make framework security legislation, but the administration and enforcement of that legislation tends to fall under the purview of the constituent units. In light of this approach, a federal framework law would set the guiding principles and standards for the special police forces, such as the nature of their training, mandate, level of engagement, and weapons it is allowed to carry, but it would leave the details for regional states to regulate.[741] The third proposal which propagates a dualist approach is to formalize a clear division of security mandates between the federal and regional governments along the similar lines of the legislative, executive and judicial powers. The last option is the balanced approach which keeps equilibrium between the politically mobilized cleavages and unity seekers under a confederal form in which the states retain some degree of political power including special police forces in cases where the federal

[739] Assefa, id, p.21
[740] Id, p.31
[741] Ibid

institutions fail to discharge their duties impartially for some reasons. All of these alternatives have their own merits and demerits.

Some other commentators still argue that instead of disbanding the regional special police forces, it may be sound to take a regulatory policy reform so that the forces should align its tasks with the human rights approach and principled on democratic policing, rule of law policing, community-inclusive policing, and impartial policing.[742] Moreover, Bereket maintains that the regional special police forces are threats to the peace and security in Ethiopia, hence recommends establishing a unitary federal peace and security regime.[743] In his argument, the idea of regional special police forces should be eliminated and limited to regular police forces which require a parliamentary act, not a constitutional amendment, in abolishing the regional special police forces. The second alternative proposed by Bereket is the formation of a federal-regional joint force which involves the federal government's oversight powers with respect to the regional special forces; forming a joint central command for all special forces, with authority shared between the federal and regional state which would bring its own management difficulties. This assertion was intended to serve the pendency of the integration of the regional special police forces into the ENDF.

6.3. Jurisdictional Limits: How the Laws Prescribe

Despite the institutional dualism of the structure of justice and security organizations within the centralized criminal justice policy as described in the above section, laws which define the criminal jurisdiction of the federal and state justice sectors make an attempt in compartmentalizing the specific areas of authority. Pending the question where the federal jurisdiction ends and that of the states' begin, it is worth noting how each federal and state law delineate the criminal execution of their respective justice sectors.

Although there are many security and criminal justice institutions as described in the above discussions, in this section, a specific emphasis will be placed on the powers and functions of the criminal justice executive organs; how the relevant statutes define their jurisdiction as regards criminal matters within he centralized criminal justice and legislation. Specifically,

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[742] Habib Jemal Zeynu, Human Rights Focused Regional Police Reform Guidance in Ethiopia, Hawassa University Journal of Law (HUJL), Volume 6, July 2022, ISSN (Print): 2664-3979 ISSN (Online): 2791-2752 https://journals.hu.edu.et/hu-journals/index.php/huj

[743] Bereket Tsegay, Regional Special Forces Pose Threat to Peace and Security in Ethiopia, IPI Global Observatory, February 22, 2021, https://theglobalobservatory.org/2021/02/regional-special-forces-pose-threat-to-peace-and-security-ethiopia.

criminal executive spheres such as prevention, investigation, prosecution, prison administration, and other related issues implemented by various justice organs will be described as follows. To this end, the laws made by the federal and state legislative wings would be taken into account as to how they deal with the compartmentalization of criminal executive jurisdictions.

6.3.1. Prevention and investigation

Criminal prevention and investigation responsibilities are basically the duties of the police forces. In this regard, both the federal and state police forces are involved in the performance pursuant to the statutes issued to identify the police powers and duties. By virtue of the FPC proclamation, the objectives of the FPC are maintaining and ensuring peace and security of the public and the state by respecting and ensuring the observance of the Constitution, the constitutional order and other laws of the country and by preventing and investigating crimes through the participation of the public.[744]

The FPC Proclamation also enumerates specific powers, duties and responsibilities that fall under the federal police forces. A close reading of the relevant provisions of the Proclamation demonstrates that the roles played by the FPC in relation to the prevention and investigation of crimes may be found in two forms: general and specific. As a general modality, the police forces are duty bound to prevent and investigate any threat and acts of crime against the Constitution and the constitutional order, security of the government and the state and human rights.[745] Moreover, the FPC is empowered to prevent and investigate crimes that fall under the jurisdiction of the federal courts.[746] In this regard, the FPC should follow the footstep of the federal courts in order to identify its limited authority in relation to prevention and investigation of such crimes. To this effect, laws which deal with the criminal jurisdiction of the federal courts are immensely of help.

Despite the general approach to the demarcation of the FPC powers and duties on the prevention and investigation of crimes, few items are specified that should be enclosed there under. In this manner, preventive and investigative powers over: counterfeiting currencies and payment instruments; crimes relating to information network and computer system; crimes relating to human trafficking, abduction, trafficking in narcotic and psychotropic

[744] Art.5 of the FPC Proclamation (No.720/2011)
[745] Id, art.6(1)
[746] Id, art.6(4)

substances, hijacking of aircraft or ship, organized robbery, terrorism and violence; and crimes in relation to tax laws, and committed abroad against the interest of the Country fall under the FPC.[747]

There are also a number of other functions and responsibilities that the FPC exercises which are supplementary and related with preventive and investigatory roles. For example, orders and decisions rendered by the federal courts are executed by the police forces. Issuance of national standards with regard to the recruitment and employment of police forces, education and training, ranks, wearing of uniforms, equipment and other related matters; capacity building activities such as establishing police training centres; facilitation of domestic and foreign continuing education and training for police officers are performed by the FPC. In addition, such powers and duties as forensic investigation and expert evidences; maintenance of law and order in regions based on intervention orders given by the federal government; studies and researches; collection, analysis and dissemination of information on causes of crimes and traffic accidents; issuance of permits for the possession, use, import, sale and repair of weapons and explosives and control of their movement; and issuance of different certificates on various matters are entrusted to the FPC.

On the other hand, the duties and responsibilities of the state police forces in relation to prevention, investigation and other related functions are determined by the laws issued by each state council. For example, the Oromia Police Commission is authorized *inter alia* to prevent any acts which may endanger the constitutional system, the interest of the government and its organizations; facilitate the implementation of criminal prevention strategy; prevent crimes and traffic accidents; carry out the analysis of causes of crimes and devising means of prevention; educate the community to protect themselves from criminal acts; organize community policing and security board for community participation in ensuring peace; undertake security activities to protect high ways which pass through the Region, government organizations, bridges, factories, and areas where huge investment activities are undertaken, public gatherings, public holidays, and higher government officials and other similar activities. The Regional Police forces are also entrusted with investigating crimes falling under the jurisdiction of the State courts.

The Addis Ababa City Administration has also its police forces which draw its powers from the FPC through delegation. The objectives of the City Administration Police Commission

[747] Id, art6(5)

are maintaining peace and security of the dwellers under the city administration by complying with and enforcing the constitution and other laws of the country by preventing crime based on the participation of the people.[748] The City's Police Commission has several powers and functions as regards the preservation of peace and security in the City boundary. In view of that, it has a power to prevent and investigate any crime in the City except those which are enumerated in the Federal Courts Proclamation to fall under the FPC jurisdiction; investigate and prevent crimes and petty offences that fall under the jurisdictions of the Addis Ababa Municipal Court; prevent any activities that jeopardize the administration by violating the charter of the City Administration; prevent crimes against the interest and institutions of the City Administration; safeguard the institutions of the City Administration; give security protection to the higher officials of the City Administration; execute orders or decisions of the federal and municipal courts; execute orders issued by the Federal Public Prosecutor and City Administration public prosecutor with regard to investigation of crimes; conduct citywide studies to enhance crime prevention and investigation and submit to the Federal Police Commission and to the City Administration; collect and analyse criminal data that fall under the jurisdiction of the commission and report to Federal Police Commission and to the City Administration; exchange information and undertake coordinated activities with security organs; enforce the rules and the flows of traffic in the City; and give patrol service to public and religious ceremonies, to sporting and other similar events.

As prevention and cognate responsibilities especially as regards corruption offences and other forms of improprieties, the Federal, Regional, and Addis Ababa and Dire City Ethics and Anti-Corruption Commissions have a primary role. Accordingly, the Federal EACC shall have many objectives, powers and duties in combating corruption and other forms of improprieties committed by the federal officials, employees, and other public enterprises owned and managed thereby. To this effect, enhancing ethical and moral values, prevention of corruption offences and other improprieties, working with the people, creating an institutional capacity, and ensuring transparency and accountability of public offices are some of the objectives to be achieved by the Federal EACC.[749] Moreover, devising National Anti-Corruption Policy and Strategy; provision of trainings on the prevention of corruption; and conducting studies are some of the powers and duties so assigned to it. Similar powers and duties are also bestowed upon the regional and city administration EACC.

[748] Art.5 of regulation No.96/2003, Addis Ababa City Police Commission Establishment Council of Ministers' Regulation
[749] Art.6 of the Federal EACC Proclamation (No.1236/2021)

6.3.2. Prosecution and related responsibilities

Prosecutorial responsibilities reside in the Attorney Generals both at federal and state levels. In fact, the Attorney Generals have a number of powers, responsibilities and functions in addition to prosecution as one sort of law enforcement sphere. As articulated by relevant laws which deal with the specific duties of the Attorney Generals, their objectives pertain to respecting and enforcement of the constitution and the constitutional order; ensuring the rule of law; enforcement of criminal law; and the protection of civil interest of the Federal Government and the public.[750] Similar objectives in relation to the Oromia Regional State Attorney General are stipulated in the State statute.[751]

While the major power and responsibility of the Attorney Generals is prosecution, there are also many other duties which are conferred thereupon. For example, the FAG is entrusted with devising criminal justice policy; causing the start and discontinuance of criminal investigation, supervision of criminal investigation, representing the federal government in the criminal and civil litigations; determination and decision of plea of guilty and plea bargaining; follow up the enforcement of judgements and orders passed by the courts; and other duties.[752] Likewise, the Oromia Regional State Attorney General is assigned *inter alia* with the enforcement of the national criminal justice strategy, ensuring the uniform application of the laws in the Region, serving as a principal advisor of the Regional President, and ensuring the conformity of the activities of executive organs in implementing laws.[753] The investigation of some criminal matters such as grave offences or corruption offences or crimes committed against the government and public interests or tax offences fall under the Regional Attorney General. In other cases, it carries out an investigation together with the Regional police forces.

Educating the public at large about the crimes, punishments, and their consequences is the primary objective encapsulated in the Criminal Code. The Attorney General is entrusted with providing, through various means, human rights education and legal awareness training; coordinate the concerned bodies operating in the sectors.[754] By the same token yet different

[750] Art.6 of the FAG Proclamation (No.943/2016)
[751] Art.6 of the Oromia Regional State Attorney General Office Establishment Proclamation No.214/2018
[752] Art.7 of the FAG Proclamation (No.943/2016)
[753] Art.7 of the Oromia Regional State Attorney General Office Establishment Proclamation No.214/2018
[754] Art.8(d) of the FAG Proclamation

scope, the regional attorney general also takes part in providing legal awareness raising education to the public; coordinate bodies participating in this issue; assess its effect.[755]

There are also some laws which deal with the powers and duties of the FAG in addition to the ones enumerated in its Proclamation. For example, with regard to prevention and suppression of trafficking in persons and smuggling, the FAG is entrusted specifically with: creating awareness to the public and concerned bodies as to the responsibilities of law enforcement bodies, laws promulgated to prevent and control the crimes, the means of recruitment employed by criminals, the types and means of exploitation and other related matters to prevent and control crimes; undertaking capacity building activities regarding the crime prevention, investigation, evidence scrutiny and related matters for Federal and Regional police, prosecutors and judges.[756]

6.3.3. Prison administration

The administrative responsibilities of prisoners are assigned to the federal and state governments. A cursory look at the powers, duties and functions of the federal and state prisons are virtually similar. These roles are directly connected with the constitutional human rights of the prisoners that should be respected and enforced by the federal and state prison administrations.[757].

6.4. Jurisdictional Conundrums: The Relevance of Progressive Dichotomization

Based on the abovementioned institutional design and operational division as regards the criminal justice system under the Ethiopian federal structure, the enforcement of a criminal law is decentralized to the state justice agencies whose jurisdictional issues become dubious *vis-à-vis* the federal justice institutions. From a close reading of the statutes issued to deal with the determination of criminal jurisdiction, it is overtly discerned that while the federal police, prosecutor, EACC, prison, and other justice organs are assigned with the enforcement

[755] Art.7(33) of the Oromia Attorney General Proclamation
[756] Art.38 of proclamation No.1178/2020, Prevention and Suppression of Trafficking in Persons and Smuggling of Persons Proclamation
[757] Art.21 of the FDRE Constitution safeguards the rights and privileges of the persons held in custody and convicted prisoners. Accordingly, it is enshrined that all persons held in custody and persons imprisoned upon conviction and sentencing have the right to treatments respecting their human dignity. All persons shall have the opportunity to communicate with, and to be visited by, their spouses or partners, close relatives, friends, religious councillors, medical doctors and their legal counsel. These rights are also protected in the State constitutions with equivalent phraseologies.

and administration of the Federal Constitution, laws, properties, officials, and other subjects which have a close connection and bearing with the federal government, the state justice sectors are entrusted with those items linked with the regional governments. In other words, although the criminal justice and legislation is centralized, its administration is dichotomized into federal criminal matters and state criminal matters which confirm the progressive dichotomization approach to the study of the division of criminal and security matters under the Ethiopian federal and constitutional design.

In view of that, the federal police forces are assigned with preventing and investigating crimes which are enumerated under its jurisdiction; protecting and enforcing the Federal Constitution and Constitutional order; protecting the federal higher officials; and executing the judgments, decision and orders passed by the federal courts from among other things. The Federal Attorney General is entrusted with representing the federal government and its interests; prosecuting crimes fallings under the federal courts; and protecting the Federal Constitution. The Federal Prison Commission discharges its duties with regard to prisoners which are sentenced by the federal courts. The Federal EACC on its part is assigned with preventing corruption offences which are linked with federal officials, employees, public enterprises, and other federal government organizations. From these propositions, one could observe that the state justice agencies are limited to their subjects in the administration of criminal law. The definitions rendered by the statutes presented in the Definitional Part also reaffirms that the subject matters regulated by the federal and state justice sectors are limited to their own matters which are constitutionally assigned to each.

For instance, according to the Oromia State laws dealing with the criminal jurisdiction of the justice executive organs, ‘constitution’ means the Constitution of the Oromia Regional State; ‘law’ means laws made by *Caffee*, officials and employees in the anti-corruption statute refer to those of the Regional Government, courts refer to the regional states, and so on. On the other hand, with regard to laws made by the HPR which deal with the executive criminal jurisdiction of the federal justice institutions refer all the definition of terms illustrated in the definitional part to the contexts of the federal government. Hence, the federal executive criminal justice institutions are dedicated to the Federal Constitution, laws, officials and employees, properties, courts, and other subject matters.

The dissection of the centralized criminal justice into the federal and state matters may be attributed to the constitution which divides powers on the subjects between the two tiers of government albeit the predominant position of the federal government over criminal laws which has become difficult in the enforcement. Despite the overarching power of the federal government in enacting a criminal law, it could not execute it with its justice institutions alone as a result of which the state justice sectors would be involved. Nevertheless, given the dual institutional structure of the justice agencies on the one hand and the centralized criminal legislation on the other, it is not easy to pin down the exact jurisdiction of the state justice institutions in the criminal law. This proposition sounds especially on criminal matters which are not specified to fall under the federal criminal executive organs. Striking of all is the only few criminal matters are enumerated to fall under the Federal police, public prosecutor and other organs. The questions to be posed and explained are thus: where does the federal criminal executive jurisdiction end and that of the state ones begin to arise? How are the state criminal executive institutions exercising the criminal law enacted by the federal government: by delegation, exclusively, or concurrently? How can we distinguish between this modality of administration of criminal laws by the state justice sectors? Can the states claim the original or inherent power of criminal administration over the criminal laws as such? The theoretical and formal question is also what if the federal government organizes its own criminal justice institutions throughout the country for the full implementation of its criminal laws, what would be the fate of the state criminal executive agencies? All these and other related questions will be expounded.

Criminal laws made by the federal government are primarily executed by the federal executive justice agencies. This is an underlying constitutional principle stipulated with the exception of delegation whereby the federal government may delegate some of its powers to the states. So it is important to explain the notion of delegation and its fiscal consequences in the Ethiopian federalism.

6.5. Delegation: Form and Budgetary Consequences

The FDRE Constitution empowers the federal government to delegate some of its powers to the states, hence downward delegation, not an upward one.[758] That is to say, only the federal government can delegate the states, not the way around. In other federal systems like India, the states can delegate their powers to the federal government. A close look at the Ethiopian Constitution, the three aspects of power—legislative, executive, and judicial powers—could

[758] Art.50(9) of the FDRE Constitution provides that the Federal Government may, when necessary, delegate to the States powers and functions granted to it by Article 51 of this Constitution.

be delegated from the federal government to the states. This rule is discerned from the texts of the Constitution particularly, while Art.50(9) *cum* 51 deals with the legislative and executive spheres, Arts.78-80 sets out the judicial delegation from the federal government to the states. In this section, an executive delegation, specifically that of the executive criminal execution authority in the criminal justice, will be articulated. The legislative delegation is not common in Ethiopian federalism where the federal government delegated the states.

At this juncture, it is essential to bring to light the form and budgetary consequences of delegation. It was explained in chapter three that one of the principles that guide the distribution of powers between the orders of government in federal systems is the finance-follows-function. In other words, budgets and other necessary logistics are allocated not in a vacuum but based on the specific jobs to be performed, and human and material resources required for the administration thereof.

With regard to a specific form of delegation, how the federal government delegates the states, is not explicitly dealt with. In this connection, one may be tempted to throw a question as to whether the delegation power is granted from the federal government to the states in accordance with a law to be made for this purpose which is not yet issued; or a piecemeal delegation which may be made with a day-to-day circular on the basis of each case encountered; or an oral delegation. As will be explicated in the following, based on the practical realities, a piecemeal delegation is widespread. Moreover, there are some statutes which provide for the delegation clause for each objective of the law issued.

As far as the budgetary consequence of delegation is concerned, the Constitution is plain in stipulating that the federal government should reimburse the costs or expenditures required for performing its powers and functions by the states.[759] This consequent budget required for the implementation of the federal laws by the states may not be waived unless expressly and unequivocally consented to by the states. Although a specific kind of form which is required for the waiver of such an entitlement is not contemplated by the Constitution, the bottom line is that the federal government does not have a constitutional basis to dictate the States to implement its laws for free or with the costs to be incurred by the latter. In this regard, as an unfunded mandate is an exceptional provision, it should be narrowly construed. Nonetheless,

[759] Art.94(1) paragraph of the FDRE Constitution lays down the general principle setting out that The Federal Government and the States shall respectively bear all financial expenditures necessary to carry out all responsibilities and functions assigned to them by law. The second paragraph of the same article goes on stating that unless otherwise agreed upon, the financial expenditures required for the carrying out of any delegated function by a State shall be borne by the delegating party.

how often the states demand the federal government for the spending they usually make for the enforcement of the federal laws within their territorial jurisdiction remains to be a Pandora's Box. That is to say, the states implement federal laws even if the expenditures are not reimbursed by the federal government as provided for by the Constitution.

At the outset, a point to be heedful of is that laws made by the federal government with regard to the definition of the executive criminal jurisdiction of the federal justice institutions provide for the delegation clause. And one should take into account that the criminal matters to be delegated to the state criminal justice institutions are presumably those which are explicitly enumerated to fall under the federal criminal justice organs. The question to be subsequently pondered is how about the rest of a plethora of crimes which are not specified in the federal statutes are exercised: whether they are concurrently exercised by the federal and state justice organ or are exclusively granted to the latter.

A close look at laws dealing with criminal jurisdictions connected with investigative, prosecutorial and related responsibilities demonstrates that this sort of functions may be delegated to the respective state criminal justice sectors. But there is no uniformity among them. For example, with a specific regard to the circumstances whereby the FPC delegates its powers and functions to the States' counterparts, there are variations observed in the relevant statutes issued and repealed from time to time given the scope and nature of the delegated powers. For instance, proclamation No. 207/2000, which was repealed by proclamation No 313/2003, provided that the Commission shall have the power to delegate the powers of investigation of federal offences to regional police Commissions as may be necessary.[760] In light of this mode of delegation, the specific power and function of the criminal executive jurisdiction of the FPC which was to be delegated to the Regional Police Commissions was only the investigative sphere; and only those criminal matters designated as "federal offences". This portrays that other functions pertaining to criminal enforcement such as prevention of crimes were not delegable at formal level, which is unconvincing to be practicable.

On the other hand, Proclamation No.313/2003 (which was repealed by Proclamation No. 720/2011), provided that the Commission shall delegate, when it is deemed necessary, its powers to Regional Police Commissions.[761] As per this very Proclamation, the delegation

[760] Art.6(11) of Proclamation No.207/2000
[761] Art.7(15) of Proclamation No.313/2003

clause was so general that unlike its predecessor it allowed for delegating all powers and functions bestowed upon it to the Regional Police Commission in case needed. As such, all criminal executive activities in general and prevention and investigation of crimes in particular were delegated to the Regional Police. The current Federal Police Proclamation which is in force, made a bit variation from its two predecessors stating that the FPC has the power to delegate, where necessary, regional police commissions to prevent and investigate crimes falling under the jurisdiction of federal courts and receive reports on the execution of the delegated power.[762] The delegation clause is made clear as regards the police power of the Addis Ababa City Police Commission. As the City Police Commission is accountable to the FPC, its powers and duties are derived there from by delegation.[763]

With regard to the prosecutorial powers, in spite of the fact that the Constitution envisages the delegation clause, the laws are silent as far as prosecutorial delegation is concerned. The FAG Proclamation does not say anything of its powers to the state attorney generals. However, the practice shows that it usually delegates the state public prosecutors to bring a charge or prosecution against the defendants on crimes falling under the FAG jurisdictions. For instance, whilst most of the time, delegation is granted in relation to terrorism crimes, the practice shows that delegations given by the FAG to the state counterparts received challenges from the courts during the trial. For example, the Federal High Court 13th Circuit Bench revoked the delegation of the then SNNPRS Attorney General in a certain criminal case reasoning that there are no specifics on whether the Regional Attorney General was empowered to bring a charge, litigate before the court, and withdraw or discontinue the prosecution by virtue of the delegation power.[764]

Most of the time, the FAG or the Ministry of Justice delegated the Regional Attorney Generals to act on its behalf on specific powers which fall under its jurisdiction as per laws made by the HPR. The practice shows that the request for the delegation power usually comes from the regional attorney generals and the FAG gives back such a power for the smooth operation of the criminal execution by the state prosecution institutions. From such a trend we could safely deduce that it follows a reactive approach to give delegation to the state

[762] Art.6(6) of Proclamation No 720/2011
[763] Regulation No. 96/2003, Addis Ababa City Police Commission Establishment Council of Ministers' Regulation, Art.4 particularly provides that Among the powers and functions bestowed on the Federal Police Commission, the functions listed under this regulation are delegated to City Administration to be undertaken by Addis Ababa City Police Commission.
[764] A letter circulated to the then nine Regional State Attorney Generals, dated 21 *Miazia* 2012 EC

attorney generals. The state attorney generals, in turn, are usually pushed by courts to adduce their power in relation to criminal execution such as prosecution at trial. For instance, the Oromia Regional State Attorney General requested the FAG to delegate on a terrorism case lodged in the Supreme Court of Oromia Southern Bench as the defendants submitted a preliminary objection that the Regional Prosecutor did not have a jurisdiction to prosecute them over federal crimes without having delegation power.[765] On the basis of the request submitted by the Oromia Justice Bureau, the Ministry of Justice dispatched the power of delegation to all regional public prosecutors over crimes connected with terrorism.[766]

It was also comprehended from practice that the request for delegation submitted by the regional attorney generals was made on a phone communication. This happened particularly on crimes connected with trafficking in persons and smuggling of persons.[767] In that specific delegation, the Ministry of Justice empowered the regional prosecutors to carry out or cause investigation, follow up and supervise the investigation, prosecute and litigate in the court having jurisdiction, and perform any other order or decision granted by the court.

In all facets of delegation described in the above explanations, the financial consequence is not mentioned. It means the states discharge the delegated duties with their own budgets without an expressed rationale for the waiver of such an entitlement pursuant to the Constitution.

As far as delegation clause is concerned, what are transferred from the federal government to the states by delegation are those criminal matters explicitly enumerated to fall under the federal criminal justice organs. To this end, it has been listed hereinabove how many of the criminal matters are granted to the FPC, FAG, Federal EACC, and Federal Prison Commission. The question to be subsequently pondered is how are the rest of a plethora of crimes which are not specified in the federal statutes are exercised by the states: whether they are concurrently exercised by the federal and state justice organs or are exclusively granted to the latter.

[765] A Letter of request for delegation written from the Oromia Regional State Justice Bureau to the Ministry of Justice, no.D/1-7/2004, dated 20/10/2004 EC (unpublished)
[766] A Letter of delegation written from the Ministry of Justice to the Oromia Regional State Justice Bureau, no.02/-354/2004, dated 02/06/2004 EC (unpublished)
[767] A letter written by the Ministry of Justice and dispatched to the then nine regional state justice bureaus, dated *Meskerem* 18, 2008 EC (unpublished)

To begin with, under the dual institutional structure organized by the constitutional and federal arrangement proves that laws made by the federal and state governments are executed by their respective executive organs including the criminal laws. An exception to this rule is delegation clause as repetitively described in the foregoing explanations. From the legislative viewpoint, criminal laws and justice policy are centralized under the federal government. On the contrast, the federal criminal justice agencies may not reach out all corners of the country for enforcing the criminal justice for various reasons. And criminal powers transferred to the states are those which are specified to be 'federal criminal matters'. With regard to those crimes which are not mentioned to fall under the federal criminal executive institutions, no stipulation is stated as to how they should be implemented, albeit they are still federal laws. From the federal government's perspective, the laws are silent whether they are executed exclusively by the states or concurrently by the federal and state justice sectors. This question is vital in reassessing the mode of the decentralized criminal justice administration. From the regional state perspective, it is discerned with the rule of thumb that their laws define the criminal executive jurisdiction of the police, prosecutor, EACC, and prison. Given the constitutional and theoretical assumptions, respecting one another's constitutional power compels the states to not usurp the criminal authority which basically is granted to the federal government. The only legitimate assumption of the criminal matters by the states is through delegation as far as those which are enacted by the HPR are concerned. This leads us to the deduction that the states do not have an exclusive jurisdiction over crimes which are not specified in the federal statutes which deal with the determination of jurisdiction. And they still belong inherently and originally to the federal justice organs.

The notion of concurrency does not hold water either. Criminal laws which are exclusively enacted by the federal government may not be subject to concurrent exercise of executive jurisdiction. The rule goes either exclusive federal matter to be delegated to the states or state matters to be exclusively and inherently exercised by the states without upward delegation. Concurrent approach to the execution of criminal justice is not even envisioned by the Constitution as broadly discussed in chapter three.

To this effect, laws made by *Caffee* Oromia make some sort of distinctions between the criminal laws enacted by the federal government and the states. For instance, by virtue of Art.2(20) of proclamation No.214/2018, the word "Criminal law" is interpreted to mean the criminal law enacted by the Federal House of Peoples Representatives or by the *Caffee*. In this context, what is exactly discerned with foreknowledge is that the Oromia Regional State criminal justice sectors have an exclusive and original jurisdiction over crimes enacted by the *Caffee*. In other cases in relation to the criminal laws made by the federal government, the assumption is that they do not have such a power unless delegated accordingly.

As expounded in the previous chapter, the progressive dichotomization approach to the division of criminal matters under the Ethiopian federal set up exhibits such a drawback that given the statutory design in place, it is hardly possible to demarcate where the federal criminal executive jurisdiction ends and that of the states' begins.

On top of this, it is important to harness the provisions of the state constitutions which stipulate that the regional executive organs should implement the laws made by the federal government in addition to those of the states'. The state constitutions however do not make it clear how they should execute the laws of the federal government. As a result, this stipulation should be considered within the whole text and spirit of the Federal Constitution that enshrines how the states exercise federal matters. In this sense, delegation comes into the fore and the state executive organs implement laws made by the federal government accordingly.

Hence, from the point of view of the federal government, criminal justice is *de facto* decentralized to the state justice institutions. The federal government is at liberty to take over the matters of criminal justice from the states by organizing its institutions given an economic affordability despite the normative assumptions that may be adduced to counter such an argument.

6.6. Conclusion

The administration of criminal justice in the Ethiopian federal design works under an institutional dualism on the one hand and a centralized criminal legislation, on the other. As a result, there is an incompatibility between a parallel institutional set up and a unified criminal laws which are virtually dominated by the federal government legislatively yet could not lie within the an exclusive federal administrative realms for many reasons. This gridlock calls for the involvement and participation of the state institutions in the enforcement of the criminal laws. This again provokes a question as to how the state criminal justice institutions get involved in the administration of criminal laws enacted by the federal government. While the Constitution provides for the delegation clause, specifically a downward delegation whereby the federal government delegates some of its powers and functions to the states, this notion is far from unambiguities as to which and how many of the criminal matters are delegated and not. Coupled with this problem is the fact that how is the delegation taking place and its consequences are treated in the criminal justice operation are thorny and shadowy issues.

Problems of delegation in relation to the administration of criminal justice as identified in the foregoing explanations, pertain to the fact that the practice is not consistent; it is hardly possible to distinguish between which criminal matters are delegated and which are not; even those matters which are clearly delegated to the states by circulars disregard the budgetary consequences of delegation; the statutes made by the federal government concerning the compartmentalization of an executive jurisdiction over criminal matters fail to stipulate how the rest of the plethora of crimes would be administered by the states and/or federal justice agencies. These gaps in the criminal enforcement regime are inherent in the progressive dichotomization approach to the division of criminal matters in the Ethiopian federal structure. Theoretically and formally, this criminal jurisdictional mystery may be further confounded by an assumption that goes if the federal government organizes its justice sectors across the country or in some regions, what will be the state criminal enforcement prospects? In spite of the fact that this question appears hyper theoretical, a critical evaluation of the criminal authority vested in the federal government and a dual institutional design could lead us to argue as such.

A cursory look at the comparative survey, as described in chapter four, the division of criminal executive authority in some federations is as linear as the other facets of criminal jurisdictions. For example, in the US approach, the criminal laws enacted by the federal government are administered by the federal justice institutions. Likewise, criminal laws made by the states are executed by state justice agencies thereby portraying a dual approach. In Germany, the laws made by the federal government are administered predominantly by the Lander, hence administrative/integrated approach. As a result, the federal government would not need to establish some executive institutions for the enforcement of its laws. For example, there is no federal prison for those convicts who are sentenced for violating federal criminal laws. Prisons are wholly administered by the Lander. In India, the administration of justice is a concurrent power granted to the federal and state justice institutions. In the three comparative approaches, it could be clearly understood that the allocation of the executive criminal authority is systematic and linear constitutionally and practically.

When we put the case of Ethiopia in these comparative perspectives, in addition to the anomalous incongruity between the dual institutional design and the centralized criminal legislation, the question of how the states are administering criminal laws made by the federal government is unclear as the laws opt for silence as far regulating such issues is concerned. This critical subject would also lead us to appraise the flip side of the coin—the legitimate authority or not of the state laws which deal with the exercise of criminal authority by regional criminal justice organs—whether they draw their power from the pertinent federal laws by delegation or otherwise or the trend is a *de facto* decentralization when seen from the federal government's angle.

Chapter Seven

The Criminal Adjudicative Power

7.1. Introduction

Criminal adjudication is allocated between federal and state courts. Both federal and state courts assume authority over criminal matters on the basis of laws made by the federal and state legislatures as a means of defining their respective jurisdictions. In this regard, different methods and approaches have been used as parameters and benchmarks for specifying and distinguishing the jurisdiction of the courts of one order of government from the other within the unified and centralized criminal policy and legislation. To this effect, the federal courts common jurisdiction is delimited on the basis of the nature of the law, parties, and places so named in Federal laws and Constitution. Likewise, the state courts jurisdiction is specified along more or less similar manners. Moreover, the criminal jurisdiction of the Addis Ababa and Dire Dawa City Courts, *Kebele* Social Courts, and Customary Courts in some regional states is also delineated by pertinent statutes. Questions may come into the fore that how criminal matters which are virtually entirely enacted by the federal government is divided between the federal, state, and city courts. What is the status of the power of the state and city courts in exercising federal criminal laws? How the criminal adjudicative mandate is decentralized to the state and city courts?

These questions will be analysed in this chapter, but it will also be presented in the next chapter especially as regards issues related with a critical analysis of the status of the state courts criminal jurisdiction. The objective of this chapter is to cast some light on the approaches used by pertinent laws in allocating and defining the criminal jurisdiction of courts at federal, state, and city levels. A critical assessment of the methods will also be made in light of the approaches to the study of the division of criminal matters in Ethiopia which are discussed in chapter five.

For that fruition, the chapter is organized into sections and subsections. While this section, section one, presents a brief introduction, the allocation of criminal matters will be dealt with in section two. The approaches used by the federal and state laws in determining the jurisdiction of their respective courts will be presented under separate subsections. The criminal authority of the two City Courts will also be discussed under separate subsection. The last section provides a conclusion of the chapter.

7.2. The Criminal Jurisdiction of Courts

With all its drawbacks and insufficiencies, the progressive dichotomization approach to the division of criminal jurisdiction has a direct relevance to an adjudicative sphere. As a part of criminal justice administration, laws made by law-making organs at federal and state levels go about specific jurisdiction of courts. Pursuant to the pertinent statutes, criminal matters are allocated not only between the federal and state courts but they are also divided among the Addis Ababa and Dire Dawa City Courts. In addition, despite its constitutional dubieties, recent laws made by some regional states bestow criminal authority on customary courts. In what follows, an attempt will be made to explore the criminal jurisdiction of the federal, state, and the two City courts in order by virtue of the laws which are enacted to that end.

7.2.1. The criminal jurisdiction of the federal courts

The criminal jurisdiction of the federal courts is stipulated by the proclamation [re]enacted for this purpose (hereinafter designated as FCP).[768] There are also other enactments which describe the jurisdiction of the federal courts over criminal matters with respect to the specific subject matters dealt with. As enunciated in the previous chapter, these statutes may be found in the primary and incidental forms concerning criminal regulation of a certain act/matter.

A closer look into the FCP and other related laws demonstrates that there are two major approaches charted to determine and define the criminal jurisdiction of the federal courts at all hierarchical levels. These are general and specific approaches. The latter is not in fact too specific as it contains a lot of other particular clusters or groups of criminal matters. Thus, the specificity is only relative to the former one which is more general than the latter. For the sake of clarity, each of them will be discussed in detail as follows one by one under separate and independent sections and subsections.

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[768] The Federal Courts Proclamation, Proclamation No.1234/2021, repealed the long-time and frequently amended proclamation (No.25/96). It is mentioned in the preamble of the new proclamation that one of the reasons that necessitated the promulgation of the proclamation by repealing the former is owing to an inconvenience for its repeated amendment.

7.2.1.1. General approach

The FCP uses a general approach as a means to the allocation of criminal jurisdictions which are generally categorized under the federal courts as a rule. In light of this approach, some important indicators of the 'federal matters' which are embedded in the Constitution have come into the forefront of the elaboration of the term. The three major items to define the general criminal jurisdiction of the federal courts are: places where the crime is committed, the nature of the laws breached, and the kind of parties involved in the litigation.[769] By virtue of the FCP, these are the principles upon which the criminal adjudicative jurisdiction of the federal courts is based notwithstanding other approaches to this effect. Hence, federal courts shall have [criminal] jurisdiction over cases involving the Constitution, Federal laws and international treaties; parties specified in Federal laws; and places specified in the Constitution and Federal laws. Each will be enunciated one by one as follows.

7.2.1.1.1. The nature of the law

Federal courts assume jurisdiction over cases arising in and involving the Constitution, Federal laws and international treaties. Thus, the violation of the provisions of the Constitution, federal laws, and international treaties, under this approach, would directly authorize the federal courts to exercise criminal adjudicative jurisdiction without any other precondition. It appears to be important to deconstruct what would these three terms or phrases mean. The violation of such provisions is punishable in accordance with the FDRE Criminal Code and other pieces of federal criminal legislation and as a result, the principle of legality remains intact.[770]

7.2.1.1.1.1. The Constitution

Criminal cases connected with the constitution falls under an exclusive jurisdiction of the federal courts. In this context, while there are federal and state constitutions designed by the federal system, the FCP that places a jurisdiction in the federal courts refers to the FDRE Constitution.[771] In other words, crimes linked with the state constitutions lie outside the

[769] Art.3 of the FCP deals with and provides for the general approach in determining the criminal adjudicative jurisdiction of the Federal courts.
[770] Read the Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No.414/2004, art. 2. For instance, the principles of no law no offence, equality, no crime by analogy, prohibition of double jeopardy, and proportionality of punishment.
[771] Art.2(1) of the FCP

jurisdiction of the federal courts. This distinction was not made clear in the previous federal courts proclamation. In fact, there are duties and responsibilities imposed on the federal government as regards the protection and guardianship of the Constitution.[772] The FDRE Criminal Code, in its special part, prescribes some acts as criminal offenses against the constitution and constitutional order.[773] Particularly, Art.238 of the Criminal Code provides that: whoever, intentionally, by violence, conspiracy or any other unlawful means, threats, (a)overthrows, modifies or suspends the Federal or State Constitution; or (b) overthrows or changes the order established by the Federal or State Constitution, is punishable with rigorous imprisonment from three years to twenty-five years; and where the crime has entailed serious crisis against public security or life, the punishment shall be life imprisonment or death. Art.239 also provides that whoever, by violence, threats or any other unlawful means, restrains or prevents any official or body constituted by the Federal or State Constitution from exercising their powers or forces them to give a decision, is punishable with rigorous imprisonment not exceeding fifteen years.

7.2.1.1.1.2. Federal laws

One of the grounds, under the general approach on the basis of law, in the determination of the criminal jurisdiction of the federal courts is whether the case arises in and involves the federal laws. This proposition would inevitably lead us to pose a question what are federal laws? What are the basic benchmarks that distinguish federal laws from that of the state ones? In the course of reacting to these questions, it seems worth beginning the analysis with the wordings used by the relevant statute. The phrase 'federal laws' or 'laws of the federal government' is offered a definition by the FCP. The meaning is more descriptive than a clear definition proper. Accordingly, "Laws of the Federal Government" includes all laws in force that are consistent with the Constitution and relating to matters that fall within the competence of the federal government as specified in the Constitution.[774]

According to this descriptive definition, for a certain law to be of federal government, it must fulfill some cumulative requirements, and as a result of which the absence of one or more of the conditions may render the law a non-federal one. In this view, the law might have been

[772] Some provisions of the Constitution such as Art.51(1) and 74(13) which provides that the Federal Government and the Prime Minister shall obey, protect, enforce and defend the Constitution can be taken as a proof to this proposition.
[773] Arts.238-243 of the FDRE Criminal Code
[774] Art.2(2) of the FCP. The previous proclamation (No.25/1996 also described the phrase in a similar wording.

made by the previous regimes namely, the monarchical and military dictatorial systems. But if it is ascertained that the laws are under the jurisdiction of the federal government per the Constitution, and is consistent with it, the law would belong to the federal government and is called a federal law. What if a certain law made by the federal government and has a constitutional basis that it is a federal power, but some of its provisions are unconstitutional. Could we say it is a federal law in light of the above mentioned description given for the federal laws? If some of the provisions of a certain federal law are alleged to be unconstitutional, it may be remedied through constitutional adjudication or constitutional review by the House of the Federation [775]and does not render that law non-federal.

Notwithstanding with the definition offered by the FCP, it is essential to go back to the Constitution what is meant by a federal law or laws made by the federal government. Although it may sound difficult to find a direct definition for a federal law in the Constitution, one could easily glean the fields where the federal government has a constitutional mandate to enact laws. This may be clear enough by navigating the powers granted to the federal government. From this point of view, all laws made by the House of Peoples‘ Representatives under its enumerated power of legislation and laws made by the council of ministers are referred to as federal laws; and all laws made by the state legislative bodies under their residual power of legislation are state laws.[776] The Constitution is also clear in stating that the House of Peoples' Representatives shall have the power of legislation in all matters assigned by this Constitution to federal jurisdiction.[777] Matters over which the HPR and Council of Ministers exercise power of legislation, the former primary legislation and the latter delegated one, pertain to Art.51, 55, 77 of the Constitution. To this end, other statutes confirm this definition as well. For example, the FAG Proclamation defines federal government laws as proclamations, regulations and directives issued by federal government organs empowered and includes international agreements ratified and acceded by Ethiopia.[778] The problem with this sort of definition is that it does not consider the constitutional foundation of these laws albeit such an issue is assumed to hold in a task of legislative operation by the federal government and the states as well. In general, a federal law is a law

[775]Art.84(2) of the FDRE Constitution.
[776]Aderajew and Kedir, supra note at 701, 231

[777] Art.55(1) of the FDRE Constitution
[778] Art.2(3) of the FAG Proclamation

made by a competent organ over matters specifically enumerated for the federal government pursuant to the Constitution.

At this juncture, it is noteworthy to analyze the FDRE Criminal Code within the spectrum of a 'federal law' as a ground of locating the criminal jurisdiction of the federal courts. Based on the definitions given to the phrase, the Criminal Code is one of the laws made by the federal government. The HPR is empowered to enact a criminal code and other federal criminal legislation per the Constitution (Art.55(5)). It is also authorized to enact other codes such as labor and commercial codes. These laws or codes are unquestionably federal laws. Nevertheless, unlike other federal systems which divide criminal matters between levels of government based in the rationales, factors and principles of the distribution of powers, the Ethiopian experience shows that the Constitution confers the criminal legislative mandate on the federal government categorically. In this regard, although the Criminal Code incorporates criminal matters which portray federal, regional, and local significance, it still is a federal law within the parameters described hereinabove. This assumption is also reaffirmed by the FAG Proclamation which defines a criminal law as the provision of a criminal law enacted on a proclamation by the House of Peoples Representatives.[779]

A problem with a 'federal law' rule as a litmus test for the conferral of criminal jurisdiction over federal courts in relation to the Criminal Code is that since it contains a myriad of state matters, it becomes a state of necessity to engage the state courts over such matters which in turn creates anomalous jurisdictional specificity in the federal design in general and institutional judicial dualism as a particular structure. It is for this perplexity that the subject of criminal matters is fraught with jurisdictional and practical ambiguities, anomalies, and confusions.

As discussed in the foregoing chapter, the progressive dichotomization approach to the division of criminal matters in general and that of adjudicative jurisdiction in particular is of immense importance. This proposition would lead us to conclude that even if the federal courts have a general criminal jurisdiction over laws made by the federal government, such a rule may not work for the Criminal Code which is a federal law yet incorporating state matters that invites for the state courts jurisdiction. The question however remains as to how the state courts exercise jurisdiction in such a case.

[779] Art.2(4) of the FAG Proclamation

7.2.1.1.1.3. International treaties

Federal courts have a judicial authority over disputes involving international treaties. International treaties are declared an integral part of the laws of the country.[780] Although the FCP does not define the term, other federal statutes offer a definition. For example, the FAG Proclamation defines it as an agreement concluded between Ethiopia and other State or states or an international organization in a written form whether embodied in one or more related instruments and whatever its particular designation may be and governed by international law and includes treaties, conventions, and protocols.[781]

Cases involving international treaties in general and that of criminal cases in particular would fall under the jurisdiction of the federal courts. Based on its nature and scope of application, all jurisdictions in connection with international accords belong to the federal government in general and Federal courts in particular. Crimes committed against international laws are specified in the FDRE Criminal Code.[782] Inherently, the power to negotiate and ratify international agreements is entrusted to the federal government by the Constitution.[783] Thus, it appears unquestionable for the federal courts to be empowered to have jurisdiction over such criminal cases.

7.2.1.1.2. Parties

One of the areas where the federal courts exercise a general jurisdiction is based on parties specified in federal laws. By virtue of this approach, in order to identify who these parties are or which parties are specified in federal laws will indisputably lead us to search for federal laws which contain such parties. The question, in the meantime, is whether all parties that are mentioned in the federal laws in relation to criminal cases, would fall under the federal Courts. What if, for example, the parties that are mentioned in the federal laws are that of the regional states or officials? Can the federal courts assume criminal adjudicative jurisdiction over them? This should be construed narrowly in a way that it can feed into the FCP that lays down general guidelines for the allocation of criminal jurisdiction of federal courts. As such, notwithstanding other statutes made by the federal government, the word ‘parties’ refer to the

[780] Art.9(4) of the FDRE Constitution provides that all international agreements ratified by Ethiopia are an integral part of the law of the land.
[781] Art.2(9) of the FAG Proclamation
[782] Arts.269-280 of the FDRE Criminal Code deals with crimes in violation of international laws. Some of these crimes include, but not limited to, genocide, war crimes, pillage, piracy and looting.
[783] Art.51(8) and 55(12) of the FDRE Constitution

federal officials and employees as defined by the proclamation, and should not be extended to include the regional counterparts.[784]

In this respect, it should be borne in mind that 'parties' as a ground of distinguishing the criminal jurisdiction of federal courts is to be figured out when there is a concrete case or litigation brought before a court. Whence, it would be resorted to search for that specific party to the case whether he/she is specified in federal laws. By virtue of the abovementioned instance, parties suspected of or prosecuted with corruption crimes are typical examples of this rule. In addition to the FCP, the Federal EACC Proclamation also identifies some parties which are designated as officials and/or employees of the federal government.

This method of determining the common criminal jurisdiction may be problematic and far-flung in locating the federal courts authority in that there may be parties which belong to the states yet specified in federal laws. That is to say, the mere fact that any parties are stated in federal laws would not entitle the federal courts to exercise criminal jurisdiction. Thus, the word 'parties' in this sense, should be restricted to federal parties which are pointed out in the federal or state laws as the case may be. An emphasis should be placed on the nature of the parties instead of the laws in which they are named.

7.2.1.1.3. Places

The other technique used for determining the general jurisdiction of federal courts in general and that of the criminal authority in particular is a place or a locus. The FCP simply states that cases in connection with or more specifically and relevantly crimes committed in places specified in the Constitution or in federal laws shall fall under the jurisdiction of the federal courts. It is hard to pin down which places are and are not specified in the Constitution or federal laws. It is an elusive term that requires a harmonious and narrow construal. How many places are mentioned in the Constitution and in federal laws? Are they limited in number or indefinite that even it is possible to add others to the so called places in the Constitution or federal laws? The Proclamation does not sufficiently define or describe what these places are and what they constitute in a clear manner nor do the Constitution and other federal laws.

[784] Officials of the Federal Government means members of the House of Peoples' Representatives and of the House of the Federation, officials of the Federal Government above Ministerial rank, Ministers, Judges of the Federal Supreme Court and other officials of the Federal Government of equivalent rank (Art.2(6); and Employees of the Federal Government includes all employees, other than those referred to under Sub-Article (1) hereof, engaged in the activities of the Federal Government (Art.2(7).

To this end, a cursory look at the provisions of the Constitution and other federal laws reveals that there are many places mentioned therein. For instance, the names of places that are mentioned in the Constitution include, but not limited to, the nine Regional States,[785] the Capital City of the Federal Government,[786] and the Federal Democratic Republic of Ethiopia itself as a broader term.[787] Consequently, it may be untenable to reach a conclusion that all the names of these places are the ones envisaged by the Proclamation albeit the term itself falls short of a sufficient precision. While these indications are from the constitutional standpoints, there are also other laws making mention of places, including some of those pointed out in the Constitution. Here too, it is highly disputable whether criminal cases arising in all such places stated in the federal laws would fall under the federal courts. On the other hand, there are authors who assert that the places so stipulated by the FCP as one determinant factor of common jurisdiction of the federal courts implies Addis Ababa and Dire Dawa. Despite all the above assertions, the term 'place' in the Proclamation must be understood to mean and refer to, the Capital City and/or seat of the Federal Government and Dire Dawa City Government which is accountable to the Federal Government, and not any places that are specified in the Constitution and/or in federal laws. To this effect, an argument that criminal cases arising in places specified in the Constitution and/or federal laws would fall under the Federal courts is indefensible as it may be against the spirit of the federal system in general and the self-rule right as a specific component.

To sum up, the methods used for the allocation of common criminal jurisdiction of the federal courts—laws, parties, and places—though lay down the ground of defining jurisdiction, are not sufficient benchmarks for several justifications. First, a' federal law' as one yardstick has proven inadequate to justify the common jurisdiction of federal courts over criminal matters as the Criminal Code and other criminal statutes issued by the federal government are also categorized as federal laws. In such a circumstance, while the federal courts should assume jurisdiction over all criminal matters so enacted, there are in turn a lot of reasons that restrict the assumption in this sense. Although the Criminal Code belongs to the federal government hence a federal law, the intent of the FCP is not to confer all criminal matters incorporated in

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[785] Art.47(1) of the FDRE Constitution lists the names of the nine regional states that constitute the FDRE. These are Tigray, Affar, Amhara, Oromia, Somalia, Benishangul/Gumuz, SNNPR, Gambella Peoples, and Harari People

[786] Art.49 (1) of the FDRE Constitution states that Addis Ababa is the Capital City of the Federal State (Federal Government). Here, Addis Ababa is mentioned as a place in the Constitution.

[787] The reading of Art.1 *in tandem with* Art.50(1,2) of the FDRE Constitution shows that the name of FDRE is mentioned in the Constitution.

these criminal statutes in the federal courts. In fact, the constitutional, theoretical and formal postulation is that federal laws in general and criminal laws enacted by the federal government in particular should be adjudicated by federal courts as an underlying principle. However, due to some practical challenges which are explained in the progressive dichotomization approach, this rule could not hold. As a result, the need for adjudicative decentralization in criminal justice has mounted thus far.

Second, parties and places are also defective in some respects unless construed in light of the principles and ideals envisioned by the Constitution and federalism. Parties which are specified in federal laws may belong to the states. Likewise, federal parties may be mentioned in state laws for different intents. Thus, parties intended by the FCP as a benchmark for the determination of the common jurisdiction of the federal courts should be understood to refer to those which belong to the federal government regardless of the laws they are stated therein. Places should also be interpreted narrowly in the context of jurisdictional conferral of federal courts over criminal matters. Either it should be clearly mentioned to refer to the two city governments (Addis Ababa and Dire Dawa) for constitutional and/or legal relationship between them and the federal government or other specific place with sufficient reason. Apart from this, there are many places stated in the Constitution and federal laws in which the mechanical application of the term as it stands may lead to the concept of a unification of the adjudicative system in the criminal justice administration.

7.2.1.2. Specific approach

According to the specific approach to the allocation of criminal jurisdiction, some matters related with criminal issues are specifically mentioned to fall under the federal courts mandate. Unlike that of the general approach, in light of the specific approach, the FCP enumerates some criminal cases that are vested in the federal courts. Hence, Art.4 of the FCP lists the specific crimes which it deems necessary to fall under the federal courts jurisdiction from among the chunk of crimes incorporated in the FDRE Criminal Code and other federal criminal statutes. Even though as many as seventeen crimes are listed, some of them encompass many crimes within themselves as a bundle. To this end, there are many methods used by the Proclamation in providing for the specific approach to allocation of criminal jurisdiction of the federal courts.

The first method pertains to an enumerative approach in which the particular criminal matters which fall under the federal courts are quantified. Accordingly, crimes against the national state; foreign state; international laws; interstate and international communication safety and freedom; safety of aviation; crimes regarding illicit trafficking of dangerous drugs; crimes falling under the jurisdiction of courts of different regions or under the jurisdiction of both the federal and regional courts as well as concurrent offences; crimes connected with conflicts between various nations; nationalities, ethnic, religious or political groups; crimes against customs duty and tax revenues of the Federal Government; crimes against the fiscal and economic interests of the Federal Government; crimes against currencies, government bonds or security documents, official seals, stamps or instruments; crimes committed by officials and employees of the Federal Government in connection with their official responsibilities or duties; crimes committed against the property of the Federal Government and which entail more than 5 years rigorous imprisonment; and crimes of which foreigners are victims or defendants that entailing more than 5 years rigorous imprisonment.

The second mode is a subject matter-specific approach whereby a criminal jurisdiction of the federal courts is delineated by statutes.[788] There are some Federal laws which provide for the subject matter approach in the determination of criminal jurisdiction of the Federal courts. For instance, criminal jurisdiction in relation to terrorism crimes belongs to the Federal High Court and the Federal Supreme court.[789] Criminal matters pertaining to coffee transactions are adjudicated by the Federal First Instance Court.[790] Criminal matters arising in relation to intellectual property laws are also adjudicated by the Federal Courts.[791] In view of this, criminal matters connected with copyrights and trademark laws fall under the jurisdiction of the Federal Courts. Criminal offences in relation to the human trafficking and smuggling of migrants are adjudicated by the Federal Courts. Accordingly, the Federal First Instance Courts shall dispose criminal matters arising out of such acts.[792] The other area of the subject matter approach in the course of determining the criminal jurisdiction of the Federal courts exists in corruption criminal matters. Accordingly, the anti-corruption offences laws vest the adjudicative power of corruption offences in the Federal High Court.[793] Criminal cases

[788] Art.4(17) of the FCP
[789] Art.2(10) &31 of the Anti-Terrorism Proclamation
[790] Art.16 of the Coffee Quality Control and Marketing Proclamation
[791] Art.2(9) of the Copyright Proclamation, Art.2(2) &49 of the Trademarks Registration Proclamation
[792] Art.24(1) of the Human Trafficking and Migrants Smuggling Proclamation
[793] Art.7(1) of the Anti-Corruption Special Procedure and Rule of Evidence Proclamation. Many enactments have been issued for the regulation of various aspects of corruption offences. For instance, Proclamation

involving federal properties,[794] and computer or cyberspace[795] would also fall under the Federal courts jurisdiction by the subject matter approach.

7.2.2. The criminal jurisdiction of state courts: a comparative glance

Despite controversies surrounding the exact jurisdiction of the federal and state courts over criminal cases, nearly all the regional governments have made a move towards enacting their own laws which define the criminal authority of their courts and other related justice institutions. For example, the Oromia National Regional State Courts Reestablishment Proclamation,[796] the Benishangul Bumuz National Regional State Courts Proclamation,[797] the SNNPR Court Establishment Proclamation, the Tigray National Regional State Court Reestablishment Proclamation,[798] the Harari People National Regional State Court Proclamation, and the Amhara National Region State Court Establishment Proclamation[799] could be mentioned and are the subject of analytical discussions in this section.

At the outset, it should be taken into consideration that all the states have established the three-tiered court structure which has been envisaged and stipulated by the FDRE Constitution at the minimum and some of them have gone further in organizing other court systems in addition. The minimum court structure adopted by all the states is the Supreme Court, High Courts, and First Instance Courts. While many of them also establish social courts as the lowest level of courts, the SNNPR organized a quite synchronized court arrangement which corresponds with the regional and sub-regional political and administrative structures. Thus, courts were organized into the State Supreme Court, Zonal High Court, and Special *Woreda* High Court and *Woreda* Court.[800] The Oromia Regional State has recently established a customary court which will be discussed in the following.

No.235/2001 which was later repealed by Proclamation No.433/2005, which was again revised by Proclamation No. 883/2015, established the Federal Ethics and Anti-Corruption Commission, and Proclamation No.236/2001 which was later on repealed by Proclamation No.434/2005 and revised by Proclamation No.882/2015 provides for the Anti-Corruption Special Procedure and Rules of Evidence. Moreover, Proclamation No.881/2015 provides for the corruption crimes in a special manner by amending those provisions in the Criminal Code on the subject.

[794] Procl.321/2003, art.2(3) federal property criminal jurisdiction

[795] Proclamation No.958/2016, Art.40(1)

[796] Proclamation No.216/2018 (the Oromia National Regional State Courts Reestablishment Proclamation)

[797] Proclamation No.58/2006 (he Benishangul-Gumuz Regional State Courts Revised Proclamation)

[798] Proclamation No.243/2014 (the Tigray National Regional State Courts Reestablishment Proclamation)

[799] Proclamation No.11/1995 (the Amhara National Regional State Courts Establishment Proclamation)

[800] Art.62(1) of the SNNPR State Constitution

A close look at these statutes reveals that the regions use several techniques in the allocation of criminal jurisdiction among their different hierarchical levels of courts. To this effect, like the federal counterpart, some of the regional legislation adopts general and specific approaches. For instance, the Oromia State court statute follows a somewhat similar pattern of allocating criminal jurisdiction by setting forth a general approach whereby the regional courts exercise jurisdiction over certain matters described in a very broad and vague manner.[801] In light of this approach, there are about five extensive areas where the regional courts exercise criminal jurisdiction *viz*. 1)any matter not exclusively reserved to the federal Courts by the Federal Constitution; 2)cases arising under the Regional Constitution or laws; 3)cases arising inside, or persons or properties situated in, the boundary of the region; 4)matters falling, by virtue of procedural and other laws, under the jurisdiction of the regional courts and cases arising in the boundary of the region; or 5)federal matters on delegation in accordance withArt.78(2) of the Federal Constitution.

These benchmarks could be subject to debate and are fraught with vagueness in the discourse of the allocation of criminal matters among the regional courts. To begin from the first yardstick, the FDRE Constitution does not make any explicit mention and description of the division of criminal and/or civil matters to fall under the federal courts. As explained in the foregoing discussions, judicial mandates are tersely stipulated which is too weak to enable us to differentiate the jurisdictions of the federal and state courts on the one hand that of the federal courts alone on the other. Hence, whether exclusive criminal jurisdiction or otherwise is granted to the federal courts as a result of which the residual powers are entrusted to the regional courts does not hold in the compartmentalization of criminal cases. This constitutional approach to the delineation of the criminal jurisdiction of the regional courts *vis-à-vis* the federal courts is a far-flung method as a general approach. In this connection, residual power in the regime of judicial power serves little in enabling us to define a criminal authority for the regional courts as distinguished from that of the federal counterparts.

In the second and third list—criminal cases arising in or connected with the regional constitution and/or laws and persons or properties situated within the boundary of the region—one could readily notice that a raft of criminal acts inferred herein are incorporated in the FDRE Criminal Code, the law whose mandate belongs to the federal government. It has been made clear in the preceding explanations that federal courts shall have a common

[801] Art.24 of the Oromia Regional State Courts Proclamation

jurisdiction over crimes arising in federal laws. This could safely be deduced that the regional courts may not exercise an inherent criminal jurisdiction over federal laws. On the other hand, the fifth list in terms of delegated criminal jurisdiction makes sense as it is constitutionally embedded especially the regional supreme court and high court on behalf of the Federal High Court and First Instance Courts up until the organization of the latter in the regions. The question that begs for clarification is which criminal cases are delegated and which are not given the comprehensiveness of the FDRE Criminal Code and other federal criminal legislation. Issues regarding this question will be enunciated in the next chapter.

In addition, the regional courts have jurisdiction over crimes committed in connection with the interests of the Region in *Finfinnee* (Addis Ababa).[802] Accordingly, crimes committed by or against the officials or employees of the regional government in connection with their official duties what are commonly designated as corruption offences; crimes committed against the property of the regional government or those committed in the premise or on the fence of the offices of the regional government; criminal matters the commission of which has commenced in the boundary of the Region and completed in *Finfinnee*, or the suspects hiding in the City fall under the State Courts jurisdiction.

While the above propositions clarify the general jurisdiction of the Oromia State Courts, the specific allocation of criminal matters has also been set forth in the Proclamation. Thus, the State Supreme Court has a first instance, appellate, and cassation powers over criminal cases.[803] With regard to the first instance jurisdiction, it exercises the criminal matters so delegated to it by the Federal High Court by the Constitution and other pertinent laws. In relation to an appellate jurisdiction, decisions rendered by the regional high courts are lodged in appeal to the regional Supreme Court. This may be either federal matters which are disposed by the regional high courts on behalf of the Federal First Instance Court or 'inherently' regional matters. The subject matter criminal jurisdiction of the state high court exists in first instance and appellate spheres. Hence, it shall have a first instance jurisdiction over crimes punishable with more than fifteen years of imprisonment. Moreover, it exercises, by delegation, a first instance jurisdiction over federal criminal matters which fall under the Federal First Instance Court. In an appellate aspect, decisions rendered by the regional district courts shall be lodged to the regional high court. The regional district courts have also first instance jurisdiction over crimes punishable with not exceeding fifteen years of

[802] Art.24(2-4) of the Oromia Regional State Courts Proclamation
[803] Art.25-26 of the Oromia Regional State Courts Proclamation

imprisonment.[804] What is more, it should be borne in mind that crimes or penalty clauses so prescribed by other laws made by *Caffee* would fall under the exclusive jurisdiction of the regional district courts. Crimes not categorized to fall under the regional High Court are also granted to the district Courts.

Recently, customary courts are also organized by the Oromia Regional State, which are empowered to exercise criminal authority.[805] In light of this provision, petty offences and crimes punishable upon complaint shall fall under the jurisdiction of the customary courts. One may question the constitutionality of customary courts' criminal jurisdiction as its powers are limited to family and personal matters.[806] This stringent requirement is also found in the State Constitution which limits the power of the customary and religious courts to civil matters.

The Benishangul Regional Courts legislation adopts a fairly similar approach to the federal and Oromia State method counterparts. As a general approach, it is expressly provided that the Benishangul Regional Courts shall have a common jurisdiction over regional matters, federal matters by delegation, and any administrative decisions which contravene the regional constitution.[807] As regards the specific approach, each level of the regional courts has criminal adjudicative authority with various jurisdictions. Hence, while the regional Supreme Court shall have a first instance, appellate, and cassation power, the high court exercises the first two spheres, and the *woreda* courts have the first instance aspect of judicial power over criminal matters. Federal criminal matters falling under the jurisdiction of the Federal High Court and First Instance Courts which are delegated to the Supreme Court and High Court of the region are intact.

By virtue of the Tigray State Courts statute, the State Courts have criminal jurisdiction on the state matters which are stipulated in the State Constitution, the state and federal laws, and federal matters which fall under the Federal High Court and the Federal First Instance Court jurisdiction. In the course of adjudicating the federal criminal matters on behalf of the Federal High Court and the Federal First instance Courts, the State Supreme Court and High Court

[804] Art.31 of the Oromia Regional State Courts Proclamation
[805] Art.8(1b) of Oromia Regional State Customary Courts Establishment Proclamation (No.240/2021)
[806] Art.34(5) of the FDRE Constitution declares that this Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute in which particulars are determined by a law. Art.78(5) of the Constitution also supports this provision.
[807] Art.5 of the Benishangul Regional State Courts Proclamation

shall be guided by the civil and criminal procedures and other relevant laws. The State courts exercise criminal authority in first instance, appellate and cassation powers as the case may be. Accordingly, the State Supreme Court shall have criminal jurisdiction in the three competences mentioned hereinabove. It shall have criminal jurisdiction in its first instance aspects in two circumstances as identified in the Proclamation. In the first place, the State Supreme Court shall exercise delegated authority over federal criminal matters which fall under the Federal High Court. On the other hand, the State Supreme Court shall have a first instance criminal jurisdiction over applications relating to change of venue from one High Court to the other. It receives appeals from the High courts.

The State Supreme Court has a cassation power over the state [criminal] matters which are finally decided by the courts of any level and which contain fundamental error of law. In view of that, decisions handed down by the *Woreda* Courts on appeal in confirmation of the social courts or rural land tribunal decisions, decisions rendered by the *Woreda* Court and confirmed by the High Court on appeal, decisions passed by the social court or rural land tribunal which are varied or reversed or modified by the *Woreda* Court and decided by the High Court on appeal, decisions rendered by the *Woreda* Court and varied or reversed or modified by the High Court on appeal and decided by the State Supreme Court over state matters, matters finally decided by the High Court in accordance with other relevant laws, state matters decided by the High Court and finalized by the Supreme Court on appeal, decisions finally rendered by the State Supreme Court in accordance with other relevant laws are said to be final and ripe for cassation review. In any case, the notion of second appeal is outlawed in the Tigray Regional State Courts practice.

The State High Courts have criminal jurisdiction in first instance and appellate power over the state criminal matters. In this regard, there is a commonality of approaches shared with the Oromia State Courts. The Tigray State Courts law uses the amount of punishment in compartmentalizing the State High Court first instance jurisdiction over the "state criminal matters". Hence, it considers criminal offences which are punishable with exceeding fifteen years rigorous imprisonment.[808] The 15-years rigorous imprisonment is the maximum penalty in the range. The subject matter approach is also used in order to regulate the criminal jurisdiction of the State High Court. In view of this, it does have a first instance jurisdiction

[808] Art. 20 of the Tigray State Courts Proclamation

over corruption offences and crimes committed against the State Constitution within the statewide territory.

Furthermore, the identity of officials has been taken into account in determination of the jurisdiction of the State High Court. To this effect, criminal jurisdiction in relation to the state officials in connection with their official responsibilities would fall under the High Court jurisdiction. The High Court does have the first instance criminal jurisdiction of the high court in accordance with other laws in force. In light of this method, the first schedule of the Criminal Procedure Code of the Empire of Ethiopia and the amendment proclamation thereto would be applicable only if the abovementioned approaches are not in place. Thus, criminal matters which fall under the high court jurisdiction as per criminal procedure and other relevant laws would belong to the State High Court if that is a state criminal matter. In addition, the State High Court has a first instance criminal jurisdiction over the Federal criminal matters upon delegation. In doing so, it exercises the criminal adjudicative power over those matters which fall under the Federal First Instance Court. Decisions rendered by the State High Court in this respect will be appealable to the State Supreme Court. The State High Court does have an appellate criminal jurisdiction over decisions rendered by the *Woreda* Court. This may occur on decisions rendered by the *Woreda* Court in its first instance jurisdiction or the one that is varied by the latter initially disposed by the social court. It is also stated that the State High Court may have an appellate criminal jurisdiction in accordance with other laws in force.

The *Woreda* Courts are empowered to adjudicate state criminal matters which are not vested in other courts jurisdiction pursuant to other laws and which are punishable with not exceeding fifteen years of rigorous imprisonment. They also have an appellate authority over decisions passed by the Social courts. The Tigray State Social Courts have jurisdiction over petty offences. The petty offences which fall under the Social courts' jurisdiction are enumerated in the Social Courts Establishment Proclamation of the Region.[809] The social Courts have first instance jurisdiction over those petty offences which are prescribed in the Proclamation and others which are stipulated in other laws.

The SNNPR Courts law dealt with the criminal jurisdiction of the state courts of all levels. The State Supreme Court exercised such an authority on four areas in first instance, appellate and cassation power. These are criminal offences strongly connected with corruption

[809] Arts.17-43 of the Tigray State Social Courts Reestablishment Proclamation

committed by the officials of the State, application for change of venue from one high court to another or to the Supreme Court itself, decisions in case of resolution of conflict of jurisdiction that arose between two or more High Courts or *Woreda* Courts under the supervision of two or more High Courts, and Federal [criminal] matters falling under the jurisdiction of the Federal High Court upon delegation. The first group of criminal offences falling under the State Supreme Court in first instance jurisdiction has much to do with corruption crimes in relation to the officials of the Regional State in connection with their official responsibilities. It was defined by the State Courts Establishment Proclamation as to what is meant by and include the State officials.[810] The State Supreme Court shall not consider criminal offences committed by the officials in connection with their personal responsibilities whatsoever.

Nevertheless, the fact that the State Supreme Court does exercise a first instance jurisdiction over corruption offences is not only subject to debate but it is also against the constitutional right of appeal of the accused persons. This provision seemed to have been rooted in the Federal Anti-Corruption Special Procedure and Rules of Evidence Proclamation which provides that corruption offences are adjudicated by the State Supreme Court and High Court in accordance with relevant laws. But because of its constitutionality issues, the State Supreme Court should not adjudicate any state criminal matters including corruption offences in its first instance jurisdiction. In other jurisdiction of the Regional States, corruption offences are adjudicated by the State High Court.

Thus, the Proclamation empowering the State Supreme Court to assume a first instance criminal jurisdiction over the state corruption criminal matters was unconstitutional. With regard to the first instance jurisdiction of the State Supreme Court in terms of handing down decisions on applications pertaining to change of venue, due care must be given as the Supreme Court should not adjudicate state matters in its initial jurisdiction because such a practice unequivocally contravenes the right of appeal of the defendants thereby violating the constitutional and legal rights in criminal and civil proceedings respectively. Thus, the power to decide on applications concerning change of venue must be the one from one High Court to the other and not from one High Court to the Supreme Court itself.

[810] Art.2(3) of the SNNPR Court Proclamation states that officials of the Regional State shall mean members of the State Council and Council of Nationalities, officials of the Regional State above the Bureau Head rank, Heads and Deputy Heads of Bureaus and other Regional State officials of equivalent rank, and judges of the Regional Supreme Court.

As commonly known, the State High Court shall have criminal jurisdictions in first instance and appellate aspects both over state and/or federal criminal matters. With respect to the first instance jurisdiction of the state matters, the High Court shall consider criminal matters falling under the jurisdiction of the High Court in accordance with the Criminal Procedure Code of the Empire of Ethiopia and other relevant laws. Accordingly, the first schedule of the Criminal Procedure Code and the amendment thereto plays a pivotal role in defining the first instance criminal jurisdiction of the State High Court. However, this approach is not immune from its own drawbacks. This is because there are many criminal matters which are prescribed by the FDRE Criminal Code and other federal and state statutes which expand the scope of the criminal jurisdiction of the State High Court. But the State Courts Proclamation did not provide for an exceptional circumstance whereby such additional criminal matters would fall under the jurisdiction of the State High Court without prejudice to the general principle mentioned herein above.

The other areas of the first instance jurisdiction of the State High Court resided in the federal criminal matters falling under the Federal First Instance Court jurisdiction which is granted to the former by delegation. The State High Court shall have an appellate criminal jurisdiction over decisions rendered by the *Woreda* Courts. The *Woreda* court is the lowest judicial organ established at *woreda* administrative level in the Region. It has criminal adjudicative jurisdiction over cases which fall under the *Awradja* and *Woreda* courts pursuant to other laws in force.

In the experience of the Harar People Regional State, the jurisdictions of the state courts are allocated in general and specific methods. In a broader manner, the jurisdiction of the State Courts lies in all matters that are of the State and do not belong to the Federal Courts in accordance with the FCP. In view of this, all criminal matters which are not mentioned in the FCP and the amendments thereto shall fall under the jurisdiction of the Regional Courts. Whether all criminal matters that are not specified in such federal laws would belong to the State courts is subject to argument. But the whole idea with this proposition is that as one aspect of general approach in the allotment of the jurisdiction of the State courts, it upholds the exclusive perspective. That is to say all criminal matters that are not listed in federal laws to be of the federal Courts would fall under the State Courts jurisdiction.

The other sphere of the compartmentalization device of the criminal jurisdiction of the Harar People Regional Courts is built in laws in force. In this manner, the courts shall have jurisdiction over the state matters which are supposed to fall under them in accordance with laws in force. Hence, laws, proclamations, regulations, and directives which are destined to define the state courts criminal jurisdiction over the state matters are applicable. To this end, it sounds plausible to mention such laws as the Ethiopian Criminal Procedure Code and its amendments from among others. By virtue of the specific approach, the Proclamation and other relevant legislation have made attempts to define the specific jurisdiction of each level of courts. Accordingly, all levels of courts have power to adjudicate both federal and state criminal matters in first instance, appellate and cassation power as the case may be.

The State Supreme Court exercises a first instance jurisdiction over federal matters which fall under the Federal High Court jurisdiction. From this it has become overtly clear that the State Supreme Court does not have a first instance jurisdiction over the 'state criminal matters'. This practice enhances the right to appeal of defendants in criminal proceedings and the lack of jurisdiction in this respect of the State Supreme Court seems an intentional act by the State legislative Council. The second facet of the criminal jurisdiction of the State Supreme Court rests in its appellate competence. In this respect, the State Supreme Court shall have the power to receive an appeal from the State High Court. In doing so, it does not discriminate between those decisions rendered by the First Instance Courts and confirmed or varied by the State High Court. Whether they are reversed or confirmed by the High Court, decisions passed by the former and appealed to the latter are subject to appeal to the Supreme Court. Hence, the notion of second appeal has apparently gained ground in the Harar People Regional Courts unlike that of the other States with the exception of the Oromia State courts. The Supreme Court shall also have an appellate criminal jurisdiction over federal matters which are initially decided by the State High Court substituting the Federal First Instance Court. The Supreme Court has a cassation power over the state matters which are finally disposed by subordinate courts of the Region and which contain fundamental error of law.

In addition to criminal cases falling under the jurisdiction of the Federal First Instance Court, the Regional High Court exercises first instance jurisdiction over criminal matters which used to belong to the High Courts in accordance with relevant laws. Hence, criminal matters which are regional in nature and were under the High court jurisdiction during the past regimes would belong to the State High Court. The first schedule of the Criminal Procedure Code and its amendment has an immense importance in this respect. Nonetheless, this sort of compartmentalizing the criminal jurisdiction of the State High Court suffers from a legal lacuna because the proclamation dealing with the Regional Courts jurisdiction does not take into account criminal matters that are not included in the first schedule of the Criminal Procedure Code and its amendment and the penal code which is currently repealed by the FDRE Criminal Code. No allocation method has been devised by the proclamation with respect to those criminal matters enacted anew in the FDRE Criminal Code and other laws both in the State and the federal government as the case may be. Furthermore, the State High Court has an appellate criminal jurisdiction over the state criminal matters which are decided by the State First Instance Court.

The Regional First Instance Court[811] shall have the first instance criminal jurisdiction over the state matters which used to fall under the jurisdiction of the *Awradja* and *Woreda* courts in accordance with the Code of Criminal Procedure and its amendments. Thus, criminal matters which are regional in nature and belonged to the jurisdiction of the *Awradja* and *woreda* courts would fall under the first instance jurisdiction of the State First Instance Court of the Region. This view has at least two shortfalls in the course of allocating criminal jurisdiction to the Regional First Instance Court. First, the laws defining the criminal jurisdiction of the courts does not differentiate between the federal criminal matters and state criminal matters. Rather, it includes and keeps both under the *Awrajda* and *woreda* court's jurisdiction. Secondly, as mentioned hereinabove, there are many criminal matters which are made in addition to those which were included in the former penal code. Thus, it creates a difficulty as to how to determine the jurisdiction of courts regarding such crimes.

The Amhara Regional Courts Proclamation, on the other hand, makes a cross reference to different sources in the specification of the jurisdiction of the regional courts. As such, the Regional Courts' jurisdiction over all matters in general and criminal matters in particular is determined by the Federal Constitution, the State Constitution and its Courts Establishment Proclamation.[812] Above all, the latter proclamation provides for the jurisdiction of the state courts both of civil and criminal matters of the State powers and that of the federal government by delegation. The proclamation uses a very general approach in the allocation of the criminal jurisdiction of the courts. First, the judicial power of the Region has expressly been merely stipulated. This might be needed in order to delimit the regional judicial power

[811] As far as the nomenclature is concerned, unlike other the Regional States which designate the name of the Regional First Instance Courts in their respective vernacular such as *woreda* court or district court, the HPNRS court experience demonstrates that it is directly copied from the Federal Constitution as such.
[812] Proclamation No.11/1995, the Amhara Regional Courts Proclamation

from that of the federal counterpart. In view of this, it is unambiguously provided that the Regional courts shall have [criminal] jurisdiction over all matters except those which are clearly specified under the Federal Courts jurisdiction.[813]

On the other hand, even though the specific criminal jurisdiction of the State Courts is not expressly itemized in the Proclamation, some light is shed on the subject. In this respect, it is stated that the courts of the Region shall hear and decide civil and criminal cases in first instance or on appeal in accordance with their respective procedures and other relevant laws.[814] Furthermore, it is declared that the Regional Courts have a criminal jurisdiction in accordance with Art.62 and 63 of the Regional Constitution and Art.78 and 80 of the FDRE Constitution. In light of these constitutional provisions, the State Courts shall exercise the state matters as an inherent power. In addition to their own state matters, the State Supreme Court shall exercise the Federal High Court's criminal jurisdiction, and the State High Court shall exercise the Federal First Instance Court's criminal jurisdiction over federal matters on delegation. Decisions rendered by the State High Court in lieu of the Federal First Instance Court over the Federal criminal matters are appealable to the State Supreme Court. And those decisions rendered by the State Supreme Court over Federal criminal matters in lieu of the Federal High Court are appealable to the Federal Supreme Court. However, as described in the preceding explanations, the FCP limits the flow of appeal from the State Supreme Court over federal matters to the only cases rendered by the Regional High Court and reversed by the former.

One must be heedful, at this juncture, that although it is not expressly provided in the Proclamation, it could easily be grasped from the Federal and the Regional Constitutions that the State Supreme Court does have a cassation power over decisions finally disposed by the regional courts and containing fundamental error of law. Compared with the experiences of courts of the other States, the Amhara Regional Courts proclamation suffers from many deficiencies. In the first place, the methods employed to apportion the criminal jurisdiction of the State courts is too general and expansive that may pave the ways to a lot of muddles in identifying a specific jurisdiction of each level of courts in the Region. As the law stands, justice professionals such as judges, public prosecutors and advocates may face troubles in pointing out the specific criminal jurisdiction of each level courts of the Region. Secondly, the Criminal Procedure Code and other relevant laws as a device of specifying jurisdiction of

[813] Art.5 of the Amhara Regional Courts Proclamation
[814] Art.6 of the Amhara Regional Courts Proclamation

the State courts may fall short of congruence due to the fact that court structure during the past regime and the current practice is not compatible. The current practice under the federal arrangement signals three-tiered court structures bifurcated into the federal and state levels. But the former practice under the unitary state system adopted the four-tiered court structure under the single government. Neither was adopted the federal and state matters dichotomy like that of the present case. Thus, a mere cross reference to such laws without qualifying with some indications does not avoid confusions abounding in criminal adjudicative jurisdiction in the Region.

7.2.3. The criminal jurisdiction of the two city courts

Although city courts lack an explicit constitutional entrenchment, there are some inferences that underpin the need for establishing and organizing the courts at city levels. Addis Ababa and Dire Dawa City Administrations could be instantiated in this regard. The two City Administrations are known by multiplicity of jurisdictions in general and that of criminal adjudication by courts in particular. Such a multiplicity of criminal adjudicative jurisdiction in the two Cities is propelled by the involvement of the Federal Government, the Oromia Regional State and the Cities as self-government in their own affairs. This holds water especially, as will be expounded in detail in the following, with regard to Addis Ababa City as it is the Federal Capital, Oromia Regional State Capital City and self-government *per se.* The criminal jurisdiction of the Addis Ababa and Dire Dawa City Administrations may be detected by referencing to the founding Charters, the FCP and other relevant laws in force. In this section, the spheres of criminal adjudicative jurisdiction within the two City Administrations will be dealt with at length in the sections that follow.

7.2.3.1. Criminal adjudication in Addis Ababa City: trifurcation of jurisdiction?

Whenever we look into the matters of jurisdictions in general and criminal authority in particular in the Addis Ababa City, both legally and practically, there are about three interests that need to be considered here. These are federal interests, Regional interests and Addis Ababa City self-interests that must be viewed from trifocal perspectives. Each of these interests is explained in detail as follows.

In connection with federal interests, the Constitution declares that Addis Ababa is the Capital City of the Federal State.[815] It goes on to state that the administration of Addis Ababa City shall be responsible to the Federal Government. Consequently, the Federal Government has many interests in Addis Ababa City in general jurisdictions and criminal matters in particular. Virtually, Addis Ababa being the Capital and seat of the Federal Government, all Federal offices and allied officials and employees are found in the City. The offices of the three common branches of government *viz*. the legislative, executive and judiciary of the Federal Government are situated in the City. The Federal Government owns several properties which are found in the City. Strongly related to the Federal interests is the fact that Addis Ababa City is the seat of various ambassadors, diplomats, consuls, international organizations, and regional organizations such as African Union (AU) and allied organizations. Affairs pertaining to these institutions are more or less regulated and negotiated by the Federal Government.

The whole idea is that Addis Ababa City, as the law stands, is treated and can be taken as possessing the status of Federal district territory without prejudice to interests of the Oromia Regional State in the City. This holds true and occupies a large space in criminal jurisdiction whereby the Federal Government centralizes notwithstanding the specific jurisdictions reserved to the City courts by relevant laws. It appears to be based on this backdrop that a jurisdiction regarding crimes committed in Addis Ababa City falls under the Federal Courts. As a result, both the Federal High Court and First Instance Courts have criminal jurisdiction over crimes committed in the Addis Ababa City geographical limits.[816] It is for this reason that corruption offences committed in connection with the Addis Ababa or Dire Dawa City Administrations are adjudicated by the competent Federal Courts.[817] These propositions, taken together, shows that the federal government has interest in Addis Ababa City with specific regard to criminal matters.

As far as the regional interest is concerned, the Constitution enshrines the special interests of the Oromia Region in the City.[818] This is one instance of an asymmetrical aspect of Ethiopian

[815] Art.49(1&3) of the FDRE Constitution
[816] Art.12(2) and 15(2) of the FCP
[817] Art.7(3) of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation
[818] The full text of Art.49(5) of the FDRE Constitution reads as the special interest of the State of Oromia in Addis Ababa, regarding the provision of social services or the utilization of natural resources and other similar matters, as well as joint administrative matters arising from the location of Addis Ababa within the State of Oromia, shall be respected. Particulars shall be determined by law.

federalism which is symmetrical as a rule.[819] Despite the fact that the Constitution declares that member states of the FDRE shall have equal rights and powers,[820] the Oromia Regional State is treated more equal than others as far as its interests in Addis Ababa City are concerned. This preferential constitutional treatment of the Region in the City is grounded in several justifications.[821] To mention but some of such justifications has much to do with historical, cultural, identity connections and geography of the Oromo nation in *Finfinnee* or Addis Ababa City. Although the Constitution provides for the special interest clause of the Region in the City which is also to be determined by a law made by the law-making organ, no particular law has been issued to this end. Nonetheless, it appears worthwhile to mention a draft bill which was an issue quarter a century after the promulgation of the Constitution. The draft enumerates the contents of the special interest of the Region in the City. But it is not a subject of discussion in this study and is presented in order to delineate the ideas revolving around the criminal jurisdiction of the State of Oromia in the City as one sphere of special interest clause. To this effect, it is provided that crimes committed against government and public enterprises, offices and affairs of the Region and other crimes committed in the Oromia Regional boundaries in which the suspects are harbored in the Addis Ababa City are to be investigated, prosecuted and adjudicated by the Regional police, prosecutors and courts.[822]

The Addis Ababa City Administration Establishment Charter also provides for the special interest clause of the State of Oromia in the City.[823] The Charter as a law made by the federal government, without specifying the meaning, content and scope of the special interest of the region in the City, has merely replicated the constitutional phraseology of the subject. In this respect, the criminal jurisdiction of the Region in the City is not even mentioned in the Charter. In the meantime, it is noteworthy to assess the Oromia State Constitution with regard

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[819] Solomon, supra note at 5

[820] Art.47(4) of the FDRE Constitution

[821] Betru Dibaba, Constitutional Special Interest of Oromia Regional State in Addis Ababa City Administration: Present Status and Future Challenges submitted in partial fulfilment for the requirement of the degree of bachelor of law (LL.B), Mekele University, College of Law and Governance, Department of Law (unpublished), p.21 *et seq.*

[822] Art.11(4) of the Draft Proclamation of the Definition of the Special Interest Of The State Of Oromia in the Addis Ababa City

[823] Read Art.62(2) of Proclamation No.361/2003 (the Addis Ababa City Charter). The only difference between the constitutional provisions and that of the Charter concerning the special interest of Oromia phrase is that the latter modifies how particularities of a law to this effect will be made. Accordingly, it states that the details thereof shall be set out by agreement to be made between the City Government and the Oromia Region or by law to be issued by the House of Peoples' representatives.

to the special interest clause. Despite the incorporation of the special interest clause in the FDRE Constitution and the Addis Ababa City Charter, the Regional Constitution is silent which ought to have been at least included in text.

Regarding the interest, not the special interest, of the Region in the City, the Constitution declares that *Finfinnee* shall be the Capital City of the Oromia State.[824] Thus, *Finfinnee*/Addis Ababa is a dual Capital. Nevertheless, the Oromia State has not been acting in the City as its Capital City. For instance, in any administration of the City, there is no involvement of the government of the Region. The City is wholly administered by its self-government systems and responsible to the federal government. Thus, practically speaking, the fact that *Finfinnee* is the Capital City of Oromia is only declared nominally. It is for this reason that some assert that Addis Ababa is not the capital city of the State of Oromia proper but it is the seat of the State Government. Leaving aside the capital city-seat dilemma of Addis Ababa for the State of Oromia, at least legally speaking, there is the interest of the Region in the City that necessitates for the regional involvement for the sake of criminal matters in its affairs. On top of this, it is worth explicating whether the constitutional special interest clause has something to do with the issue of determining the criminal jurisdiction of the Regional courts over criminal cases arising in the City. The answer to this question is in the negative response because adjudicative power of the Region's courts has nothing to do with the making of it special in any case. What the Region's courts do regarding the interests of Oromia in *Finfinnee* is similar to what they do in other areas of the Region from corner to corner, nothing else.[825]

There are also other statutes of the Region which deal with the interests of its own in *Finfinnee*. One such legislation has a strong connection with corruption offences committed in the City with regard to the Regional offices. To this end, the investigative and prosecutorial power of any corruption offences committed on public offices, public enterprises or public organizations of the Region found in *Finfinnee* shall fall under the jurisdiction of the Region's Anti-Corruption Commission.[826] Moreover, it is stated that the jurisdiction to hear corruption offences committed in public offices, public enterprises or public organizations of the Region found in *Finfinnee* City or any corruption offence

[824] The Oromia Regional State Constitution, Proclamation No.94/2005, art.2(3)
[825] Tsegaye Ararsa, Commentary: The Interest that is not so Special: Addis Ababa, Oromia and Ethiopia, Addis Standard, January 18, 2017
[826] Art.4(2) of Proclamation No.197/2016 (the Oromia National Regional State Ethics and Anti-Corruption Commission Reestablishment proclamation)

committed by any person in relation to any interest of the Region shall be vested in the High Court of Oromia Special Zone of *Finfinnee*, which is renamed as Sheger City.[827] Moreover, as explained in the foregoing subsection, the Oromia State Courts statute makes an explicit jurisdiction of courts in relation to criminal and civil matters. In addition to the criminal matters which are enumerated in the proclamation, civil matters related to the official duties or activities of the institution, official or employee of the regional government in the City are disposed by the regional courts.[828] To this effect, it is stated that the Supreme Court of the Region may establish necessary level of courts or organize necessary division such as circuit benches in the City.

The third type of interest pertains to that of the Addis Ababa City self-government *vis-à-vis* criminal justice administration. One of the faces of the trifocal status of Addis Ababa City is reflected in the self-interests that the Constitution bestows on it. That is to say, in addition to the interests of the Federal Government and that of the Oromia State that subsists in the City, the Addis Ababa City Government also has the interests of its own, which emanates from the Constitution and other laws. The delineation of the interests of the City is required for the moment as a means of compartmentalizing of the criminal jurisdiction of the City Courts as opposed to and compared with the jurisdiction of the Federal Courts and the Oromia State courts. With respect to the status of Addis Ababa City, there is an incongruity between the Constitution and the ensuing subsidiary laws made by the Federal Government. At the outset, one needs to take notice that during the Transitional Period Government Addis Ababa was granted the status of a National/Regional Self-Government designated as Region fourteen.[829] In contrast, the FDRE Constitution recognizes only nine regions denying Addis Ababa such a status. In other words, Addis Ababa City does not have the status of a region at least constitutionally speaking. It is stated that the residents of Addis Ababa shall have a full measure of self-government which is to be determined by law, and be represented in the HPR.[830] The full measure of government and representation phrase that the City has is embodied in the Establishment Charter. As a result, the Addis Ababa City Government has its own legislative, executive and judicial organs that are entrusted with the regulation of the internal affairs.

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[827] Id, Art.5(2)
[828] Art.24(3c) of the Oromia State Courts Proclamation
[829] Proclamation No.7/1992, the National/Regional Self-Governments Establishment Proclamation, Negarit Gazeta, 51st year, no.2, 14th January 1992, Addis Ababa, Art.3
[830] Art.49(2)&(4) of the FDRE Constitution

Although the Constitution denies Addis Ababa a status of a region, there are so many laws issued by the federal government which entitle same. These laws assimilate and put Addis Ababa City on equal footing with the constitutionally recognized regional states. Such a practice, more than provoking the constitutionality question of granting Addis Ababa a regional status, would inevitably compound the jurisdictional conflict problems between the Oromia State and the City because the latter is the capital city, the seat and center of the former. Consequently, it is difficult to treat Addis Ababa as a separate region.

The Charter establishes judicial organs in general and regular courts which would exercise criminal jurisdiction on the areas specifically reserved to them in particular. Accordingly, the City Administration shall have the Addis Ababa City Courts and *Kebele* Social Courts.[831] The City Courts, in turn, shall have a First Instance Court and an Appellate Court. While the First-Instance Court shall have first-instance jurisdiction over matters falling under the jurisdiction of the City Courts, the Appellate Court shall receive and hears appeals from the decisions of the First-Instance Court and other bodies vested with judicial power. Decisions rendered by the City Appellate Court shall be final without prejudice to cassation review. In addition, decisions rendered by a *Kebele* Social Court may be appealable to the corresponding First-Instance Court of the City. The decision of the latter court shall be final. Where a final judgment rendered by the City's First-Instance Court in a case lodged with it on appeal contains a fundamental error of law, application for cassation thereon may be brought before the City's Appellate Court.

Like the criminal jurisdiction of the federal and the regional courts, the Addis Ababa City Courts do have three aspects of jurisdiction. These are first instance, appellate and cassation powers. With regard to the first instance jurisdiction of the City Courts over criminal cases, it is expressly stipulated that the First Instance Court shall have jurisdiction over criminal matters in relation to fiscal matters that are set forth in Art.52 of the Charter, cases of petty offences, remand and bail applications on offences falling under the federal courts and execution of penalties imposed by executive bodies of the City. Criminal matters that are adjudicated by the Addis Ababa City Courts which would result from the fiscal regimes in the Charter appear to be many in number. For instance, criminal cases that arise out of taxes, duties and fees in the course of collection thereof in such areas as employees of the City excluding those of the federal government and its public enterprises and the Oromia State,

[831]Art.39 of the Addis Ababa City Government Revised Charter

urban agriculture undertaken and individual businessmen trading in the City, etc. The problem with this sort of detailing the criminal jurisdiction of the Addis Ababa City Courts is that the provisions of the Charter that deal with the fiscal regimes do not spell out penalty clauses. Thus, in order for the City Courts to impose penalties over crimes resulting from these matters, they need to look up in the FDRE Criminal Code and other relevant criminal statutes issued by the federal government more particularly laws dealing with taxes and associated matters.

The City *Kebele* Social Courts shall also have jurisdiction over some petty offences or transgressions of rules and regulations of the City. In view of this, matters related to contraventions of the City's hygiene and public health Regulations and other similar petty offences shall fall under the jurisdiction of the *Kebele* Social Courts. Criminal cases disposed by the *Kebele* Social Courts shall be appealable to the City First Instance Court, and those criminal decisions rendered by the First Instance Court shall be appealable to the City Appellate Court. In the interim, it is worth disentangling issues of the apparent omission of the notion of second appeal in criminal cases over matters passed by the City *Kebele* Social Courts and appealed to the First Instance Court as the decisions rendered by the latter become final and ripened for cassation review upon the fulfillment of the fundamental error of law requirement. The Addis Ababa City Appellate Court with its separate bench shall have, in addition to an appellate jurisdiction, a cassation power over final decisions of the Appellate Court upon appeal from the First Instance Court where there is an allegation of fundamental error of law regarding the final decision. The Charter unambiguously declares double cassation over final decisions handed down by the City Appellate Court with cassation power. It states as a party alleging a fundamental error of law in a final judgment rendered by the Addis Ababa City Courts may apply for cassation before the Federal Supreme Court. The City Courts do not have a jurisdiction to adjudicate corruption offences committed in connection with the officials and employees of the City Government Administration.[832] The appropriate Federal Courts are empowered to take over such a power of adjudication regarding corruption offences committed in the offices of the Addis Ababa and Dire Dawa City Administrations.

[832]Art.7(3) of the Anti-Corruption Special Procedure and Rules of Evidence Proclamation

7.2.3.2. *Criminal adjudication in Dire Dawa City: bifurcation of jurisdiction?*

The Dire Dawa City Administration is established by a Charter[833] and it lacks the constitutional basis to be ruled and governed by the federal government. It is clearly observed from the Charter that the City Administration was required to be a self-governing entity and accountable to the federal government due to the fact that there was a conflict between the Somali Region and Oromia State over the City. Nonetheless, it is questionable whether such kind of boundary and administrative conflict is resolved by making the City under the federal control and rule or other means of conflict resolution mechanisms as conflict always exists. This practice should not be taken as a precedent for other regions. Instead, effective conflict resolution mechanisms should be employed in order to manage frictions created rather than federalizing regional cities by the façade of doing the task of reconciliation.

With regard to the organizational structure of the City, one may observe that it is similar to that of the Addis Ababa City Government counterpart in many respects. Levels of courts and their respective jurisdictions in both civil and criminal matters are virtually identical to that of the latter. Unlike in case of Addis Ababa City where criminal jurisdiction is scrutinized from the trifocal perspective, in Dire Dawa City, however, it is approached from bifocal viewpoint. Two groups of interests are at stake in the City which is *mutatis mutandis* applicable to criminal adjudicative jurisdiction as well. These groups of interests are those of the Federal Government and the Dire Dawa City Administration as self-government *per se*. Regional interests connected with Somali and Oromia States are kept away from the City.

Despite the befuddlements surrounding the relationships existing between the federal government and the Dire Dawa City, the overall observation and analysis of Federal legislation reveals that as far as criminal adjudicative authority is concerned, both the Federal Courts and the City Courts do have their respective spheres of powers legally reserved to each in the City. The jurisdiction of the Dire Dawa City Courts as distinguished from that of the Federal Courts with regard to criminal matters arising in the City may also be appraised from the viewpoint that applies to the Addis Ababa City Courts. But the only difference lies in the fact that the Dire Dawa City Charter has copied the exact provisions of the corresponding Addis Ababa City Charter which deal with the criminal jurisdiction of the City

[833] Proclamation No.416/2004, the Dire Dawa Administration Charter Proclamation, Federal Negarit Gazeta, 10th year, No.60, 30th July 2004, Addis Ababa

Courts which are confined to the criminal matters arising in fiscal powers of the City Administration.

7.2.4. The allocation of criminal jurisdiction by the Draft CPREC

The Draft Criminal Procedure and Rules of Evidence Code (CPREC) sets out a different approach from the above mentioned methods and techniques of dividing adjudicative jurisdiction that the federal and state laws used in defining their respective courts criminal authority. Laws made by the federal government and the states prescribe the criminal jurisdiction of the federal and state courts over the criminal laws enacted by the former. In other words, both tiers of government exercise some degree of autonomy in delineating the criminal authority of their respective courts. Given the constitutional power vested in the federal government, it is discerned with the rule of thumb that federal courts' criminal power would be defined by the federal government through the HPR. What is dubious is the exact status of the state courts' criminal power which is so defined by the state statutes.

Nevertheless, by disregarding the parallel approach to the delineation of criminal jurisdiction at federal and state courts, the Draft CPREC is providing for a centralized, unified, and highly integrated operational approach to the compartmentalization of criminal matters. This trend proves the unitary system of judicial system in which the central government gives and takes back powers to lower administrative units including courts. In other words, the state councils cannot make laws regarding the criminal jurisdiction of their courts. The federal government would entirely regulate the criminal authority of the courts in the country. This is a clear contradiction with the constitutional and federal principles the country adopted following the demise of the unitary system and centralized governance. As the source of power for the federal and state governments is the constitution, one tier of government has no valid ground to give and take same to the other by its legislation.

Despite its constitutionality, the Draft CPREC employs different approaches in specifying the criminal jurisdiction of the federal and state courts in a single legal instrument. The Draft uses general and schedular approaches to allocating criminal matters between the federal and state courts on one hand and different levels of courts on the other. Pursuant to the former approach, the federal courts exercise criminal jurisdiction over offences the commission of which is not limited to the local administrative boundary of the federal or a state government; offences having international nature or transnational crimes; offences related with foreign affairs; military crimes; offences committed against the institutions, properties, documents and currency of the Federal Government; offences committed by officials and employees of the Federal Government in connection with their responsibility; offences committed in cities or places accountable to the Federal Government; offences committed against tax and finance related interests of the Federal government; and crimes committed against the federal system.[834]

On the other hand, the state courts have a common or general criminal authority over offenses the commission of which is limited to the local administrative boundary of the state government; simple offenses which are not limited to the local administrative boundary of the state; and matters not allocated to federal courts.[835] The local jurisdictions are allocated along the similar patterns that are set out in the Criminal Procedure of the Empire of Ethiopia.

As an exception, the Oromia State Courts criminal jurisdiction is provided unambiguously. Accordingly, the Oromia State Courts shall have criminal jurisdiction over offences committed against the state institutions, properties, documents and interests situated in the Addis Ababa city administration.[836] As repeatedly stated in the foregoing discussions, one of the asymmetrical exceptions of the Ethiopian federalism is witnessed in the special treatment of the Oromia State in the Addis Ababa City due to various reasons. While this provision has its constitutional and legal foundations, particularly in the regime of the criminal justice administration, criticisms and oppositions have been triggered from some commentators who vehemently recommend the HPR to opt out the specific provision. In view of that, Wondossen raised and disavowed three possible constitutional and legal underpinnings and assumptions that enable the Oromia State courts to exercise criminal authority over matters connected with the Regional interests in the Addis Ababa City.[837] These are the special interest clause, the delegation clause, and [ordinary] regional matters clause in relation to criminal adjudication. As he argued, all these grounds are not valid justifications to empower the Regional courts to adjudicate criminal cases pertaining to the Regional interests committed in the City. His assertions are unsubstantiated and self-defeating in many ways, however. From the special interest clause point of view, he argues that although the Constitution provides for in such a way that hints out for the State of Oromia to have

[834] Art.25(1) of the Draft CPREC
[835] Art.25(2) of the Draft CPREC
[836] Art.25(3) of the Draft CPREC
[837] Wondossen Demissie, Questioning Jurisdiction of Oromia Courts over Crimes Committed in Addis Ababa, The Reporter, January 30, 2021, https://www.thereporterethiopia.com/10842/

respected its special interest, no law has been made thus far for the detail, scope and content of the clause as a result of which it is hardly possible for the Regional courts to exercise a criminal jurisdiction in the City.

As will be explained shortly, the criminal adjudicative jurisdiction of the state courts emanates from and is highly influenced by the progressive dichotomization approach that bifurcates the centralized criminal law into the 'federal criminal matters' and 'state criminal matters' dichotomy based on the interest at stake. As far as this proposition is concerned, the case of Oromia State is not an exception. This line of argument is also in support of the third assumption raised by Wondossen pertaining to the institutions, properties, documents, and interests of the Region (s) that can be taken as yardsticks for the allocation of criminal jurisdiction despite the monist approach to the criminal justice policy and legislation. On the other hand, one could also envisage how the special interest clause empowers the Oromia State courts to have criminal jurisdiction over the regional interests. The law that is to be issued by the HPR in dealing with the details of the clause that is generally provided in the Constitution may not necessarily be the one that focuses specially on the subject. It may be found scattered in any pieces of legislation enacted by the federal legislature. To this end, the phrase "…joint administrative matters..." inserted in the special interest clause may be extended to the criminal justice administration from among other things. Hence, until a comprehensive law is issued to this effect, any statute enacted by the federal government regarding the criminal justice administration may incorporate the roles and powers of the Oromia State justice institutions in the City.

The second ground raised and rejected is the delegation clause. The delegation issues are set out under Art.50(9) and 78-80 of the Constitution. These provisions have little or no relevance on the adjudication of criminal matters in the Addis Ababa and Dire Daw City administrations. The former provision deals with delegated powers in relation to legislative and executive mandates. While the delegation of judicial power is spelt out in the latter provisions, it pertinence is almost nil as far as criminal adjudication in the two Cities is concerned. Crimes committed in the Cities are directly disposed by the Federal/ City courts without the need for delegating same to the State courts. In other words, it is those crimes which are committed in the boundaries of the states that are delegated to the State Supreme and High Courts from the Federal High and First Instance Courts for justified reasons as described elsewhere in this study. Hence, the Oromia State Courts criminal jurisdiction as regards its interests in the Addis Abba City administration originates from its 'inherent' power that the Constitution bestows on the Region. Essentially, there is no difference between the interests such institutions, properties, and documents of the Region at Bureau and equivalent levels in Addis Abba City and other similar interests found elsewhere in the towns of the Region such as Adama, Nekemte, Ambo, etc. which are found at zone, *woreda*, and *kebele* administrative levels. That is why crimes committed against the regional interests at all these administrative structures are adjudicated by the regional courts. Thus, there is no ground that the Regional Courts exercise criminal jurisdiction associated with the interests of the Region in the City by delegation on behalf of the Federal Courts. As a result, federal interests affected in the City would fall under the exclusive Federal Courts jurisdiction in relation to the criminal justice administration.

Marew also argues that the provision that empowers the Oromia State Courts to exercise criminal jurisdiction in Addis Ababa City is unconstitutional and against the federal system.[838] His arguments are not persuasive to withhold the criminal jurisdiction of the Oromia State Courts over Regional interests in the City. Whether Addis Ababa is a self-governing city, [semi-] sovereign entity, ethnic neutral, or heterogeneous and treated on equal footing with other member states, according to him, it could be fathomed with the rule of thumb that it is an urban local government. He questioned what is the problem with the Addis Ababa City Courts to adjudicate criminal matters which have bearing on the interests of the Oromia State? This question is pointless as the Region has already established its courts in the City as a result of which there is no reason to delegate its matters to the City Courts. Moreover, the Constitution does not provide for the upward delegation in which the states can delegate some of their powers to the federal government assuming that the Addis Ababa City Courts and other institutions are under the federal control. At any rate, the criminal jurisdiction of the Oromia State Courts in the City originates from the self-rule right in addition to the grounds described above. What is more, there is no constitutional and legal basis that enables the Region to delegate its powers to the City as far as its interests therein are concerned.

The schedular method in the allocation of criminal matters provides for the enumeration of each crime specified in the FDRE Criminal Code in corresponding with the particular level of

[838] Marew Abebe Salemot, Draft Criminal Procedure and Evidence Law Contradicts the Ethiopian Constitution and Federal Architecture, IACL-AIDC Blog (6 May 2021) https://blog-iacl-aidc.org/2021-posts/2021/05/06-draft-criminal-procedure-and-evidence-ethiopia

federal and state courts which is entrusted with that crime. It is similar with the Criminal Procedure Code of the Empire of Ethiopia which lists the jurisdiction of different tiers of courts during the unitary state. The crimes are also divided into grave, medium, and simple categories in the Draft CPREC. This approach equates the Draft bill under the federal arrangement with the Criminal Procedure Code which was enacted during the unitary system and centralized governance.

The Draft law also lays down the material and local criminal jurisdictions of the federal and state courts.[839] Hence, in addition to the schedular approach adopted by the Draft, the first instance, appellate and cassation powers are provided. The State and Federal Courts have first instance and appellate jurisdictions as the case may be. What is interesting, as will be discussed in detail in the subsequent chapter, is that the State Supreme Courts are stripped of the cassation power over criminal matters. The Federal Supreme Court appears to have taken over all aspects of cassation power as regards criminal matters which is unfounded in any circumstance.

According to the approaches to be adopted by the CPREC, the aspect of decentralization of criminal matters is a mix of delegation and deconcentration. It is delegation in some part because the jurisdiction of the State Supreme and High Courts are clearly named after the delineation of the Federal High and First Instance Courts. It is deconcentration because the federal government has apparently dominated the substantive and procedural laws of the criminal matters and is in a position to give and take back just like an instance in a unitary state system. It has been described in the above discussion that the criminal justice system in the Ethiopian federal structure is taking on a unified approach which runs against the federal spirit.

7.3. Conclusion

The criminal jurisdiction of the federal and state courts is more delineated by statutes than the constitution. Both the federal and state governments have thus far made laws that deal with the criminal authority of their respective courts over the same criminal law enacted by the former. Setting aside the controversies that may surround the nature and status of how the state courts exercise criminal adjudication, different approaches have been adopted in order to compartmentalize the criminal jurisdiction. Accordingly, the FCP adopts general and

[839] Art.27-47 of the Draft CPREC

specific approaches. In light of the first approach, based on the nature of the law, the federal courts shall exercise a common criminal jurisdiction on cases connected with federal government laws, the FDRE Constitution, and international treaties. Criminal cases which are associated with the places and parties specified in the federal laws and/or the Constitution also fall under the federal courts jurisdiction by a general approach.

However, this way of allocating the criminal jurisdiction of the federal courts suffers from some shortfalls. A criminal law in general and that of the FDRE Criminal Code in particular is a federal law but could not entirely lie in the federal courts jurisdiction. In this regard, a federal law as a benchmark in determining federal courts jurisdiction is apparently flawed from the point of view of criminal law even as supported by the definitions offered by various laws made by the federal government. If the federal courts are to assume jurisdiction over any federal law, by implication, they should also exercise all criminal matters that are incorporated in the federal criminal statutes. While this is logically sound, such a trend could not be practicable for various grounds. With regard to parties and places as well, the law set out such yardsticks in a vague language that should be construed by taking into account the federal ideals and principles such as the division of powers, federal comity, and rights and privileges bestowed to the NNP.

The specific approach to the division of criminal jurisdiction among the federal courts also suffers some downsides. The FCP enumerates only few criminal cases that should be granted to the federal courts from among the plethora of matters pertaining to crimes. This conjures two questions. For one thing, it is questionable how and by what standards of selection these specific criminal matters are picked to fall under the federal courts. second, it is not clear if and whether the federal courts are limited by these crimes compared with the remaining ones as all criminal matters adopted by the federal government all belong to it. Finally, the laws which deal with the delineation of federal courts jurisdiction opt to keep silent as to how the state courts exercise power over those matters which are and are not stated in the FCP.

Regardless of the fact that these loopholes are visible in the division and decentralization of the criminal justice administration from the adjudicative point of view, virtually all regional states have enacted laws which define the criminal jurisdiction of their own courts. Like that of the federal counterpart, the states have adopted different approaches in determining the criminal authority of their courts. The bottom line and common ground is that they allocate criminal matters among their courts on the basis of their interest such as constitution, law, property, persons, etc. A close look into crimes allied with these items show that they are all regulated by the criminal laws enacted by the federal government. Hence, from the regional government as well, it is hardly possible to trace how they have assumed adjudicative jurisdiction over such matters. Explained otherwise, the state laws do not unambiguously deal with issues whether the state courts exercise criminal adjudicative power by delegation, originally, or concurrently albeit this latter concept is subject to debate in the criminal justice administration as well.

Criminal matters are also adjudicated by other types of courts such as city courts, *kebele* social courts, and customary courts. Pursuant to the laws made by the federal government, the Oromia State, and the Addis Ababa City Government, criminal justice administration in relation to adjudication is carried out by the Federal Courts, Regional Courts, and City Courts respectively each having their specific areas of jurisdiction. Hence, the interest at stake involves the three governments which invites for the trifurcation of criminal adjudicative jurisdiction in the City. This is in fact pushed by two major factors. First, although the federal government apparently dominates the criminal regime which is also rooted in the Constitution, the adjudication is decentralized to the regional and city courts for the effective, efficient, and accessible justice delivery. Second, although the criminal matters are centralized in policy and legislation wise, the practice or the progressive dichotomization suggests that they decentralized based on the interests of the federal, regional, and city administrations. In other words, the Regions and City administrations find their interests in the criminal laws exclusively issued by the federal government. In the Dire Daw City, as the interests of the City and of the federal government dominates, criminal adjudication is divided between the City Courts and Federal Courts.

Questionably, *kebele* social courts and customary courts are also adjudicating criminal matters under strict procedures and prescribed requirements. With a particular reference to the customary courts which is very recently organized by the *Caffee* Oromia, one could detect some unconstitutional mandate that is bestowed thereon. The Federal and State Constitutions plainly envision the establishment of the customary and religious courts on matters related with family and personal issues. That is to say, criminal matters lie outside of the jurisdiction of these types of courts. While informal and indigenous criminal justice system is encouraging for the restorative reasons, a priority should be given to the constitution as it gains supremacy over any law. Hence, the Constitution must be amended to incorporate indigenous criminal justice administration that should subsequently be detailed by statutes made by the legislature.

Although the federal, state, and city courts' jurisdiction is dealt with the laws made by the respective governments, which indeed confirms the structural dualism of court system, the federal government is in a position to unify criminal adjudication in one legal instrument which is the CPREC (Draft). According to the Draft code, the criminal jurisdiction of all levels of courts of the federal, state, and city administrations is allocated by a law to be approved by the HPR. Upon the approval of the Draft Code, all the state and city laws which deal with the jurisdiction of criminal matters will be repealed and have no applicability. This trend will automatically turn the dual approach into a monist one which is identical to a unitary system. As a result, it will destroy the federal and constitutional principles adopted following the abolition of the previous unitary and centralized state structure and governance. By doing so, one could imagine what will happen to the diversity management in the criminal justice regime as a particular subject and powers, rights, and privileges accorded to the NNP in the country as general observation. The states lack the power to define the criminal jurisdiction of their courts. The federal government on the other hand unwarrantedly intrude in the state affairs by taking over their mandate which is unconstitutional. Thus, if the Draft code is approved without oppositions from the regions, it would mean a voluntary relinquishment of power.

When we compare the approaches used in dividing criminal matters by the federal and state laws with the Draft CPREC in relation to the allotment of jurisdiction between federal and state courts, it is clear from the latter that criminal justice administration in this respect is decentralized either through delegation or deconcentration. These two concepts are in fact very confusing in the regime of criminal law enforcement which was discussed in the previous chapter in relation to the executive aspect and will be analysed in the subsequent chapter in the intergovernmental criminal justice relations.

Chapter Eight

The Criminal Justice System and Intergovernmental Relations

8.1. Introduction

The operation of criminal justice system (hereinafter CJS) is like a moving wheel that steers from one justice institution to the other in a seamless continuum. In such a webbed sphere of criminal justice administration, the effectiveness and efficacy of one sector has a positive impact on the other related institution. In contrast, ineffective and poor achievement of one justice institution would inevitably affect the other negatively. To make the point livelier, if a police investigates a crime properly, the prosecutor lodges a charge on the basis of relevant and competent evidences that enables it to win the case and hold the defendant liable for the crime he/she committed and receive a proportional punishment thereupon. Depending on the strong charge and evidence produced by the prosecutor, the court would carry out a trial and hand down a judgement by giving a sentencing. Thereafter, the prison administration welcomes the prisoner and administer in accordance with the rights of such persons which are provided in the Constitution and relevant laws. This steering process of criminal justice occurs both at federal and state government levels.

Thus, the notion of the intergovernmental criminal justice relations is conceived from the perspective of the justice sectors strong cooperation and collaboration at one level of government (intra-governmental relations) and between the federal and state governments justice institutions (intergovernmental or vertical criminal justice relations). Besides, interstate criminal justice cooperation (horizontal IGR) is also as important as the two aspects of the intergovernmental criminal justice relations. Hence, a strong IGR in criminal justice administration is required for at least two reasons. First, as described earlier, effective and efficient criminal justice that meets a public satisfaction cannot be achieved without the concerted effort of the justice institutions altogether which in turn calls for collaborative, cooperative and harmonious working relationships. Second, the Ethiopian criminal justice displays a blend of centralization in one aspect and decentralization in the other sphere. As details are presented in the previous chapter, criminal legislative and policy matters are centralized under the federal government and the enforcement both executive and adjudicative mandate is decentralized to the state level justice agencies.

On the other hand, issues concerned with intergovernmental criminal justice relations could be considered through different angles. In this regard, despite arguments surrounding the scope of the criminal legislative power, both the federal and state governments are involved in making criminal laws with varying degrees. Such a trend engenders inconsistencies and conflicts between laws made by the HPR and state councils. Which law should prevail and how when there is a contradiction between federal and state laws will be articulated in this chapter in detail. As criminal justice is decentralized to the state institutions, how jurisdiction is allocated between the federal and state police, prosecutors, courts, EACC, and prison administrations through delegation or otherwise is also an area that should be discussed under this subject. In addition, there is an intricate working relationship between the police and prosecutors in crime investigation.

With this backdrop, the chapter is organized into different sections and a multitude of subsections. Section one presents a brief background of the need for the criminal justice systems intergovernmental relations. Section two provides for an overview of intergovernmental criminal justice systems relations. Section three deals with the aspects of IGR in the criminal justice system in which they may be revealed through the legislative, executive, and adjudicative spheres. An emphasis will be placed on the three aspects as to how the criminal justice organs both at federal and state levels cooperate, coordinate, and collaborate for the effective delivery of criminal justice. With regard to the legislative aspect, the supremacy clause under the Ethiopian federal and constitutional design will be articulated. In the executive IGR, an attempt will be made to describe as to how criminal executive bodies work together in the spirit of federalism. What is more, contentious issues related with the judicial intergovernmental relations on the areas of the exclusive-concurrent-delegation jurisdictions, cassation, inter-and intra-jurisdictional conflicts and their resolution mechanisms, the full faith and credit clause, and administrative mattes will be articulated. The last section provides a summary of the chapter and lessons that could be drawn there from.

8.2. Intergovernmental Criminal Justice Systems Relations

The concept of intergovernmental relations has a profound relevance for the administration of criminal justice in federal systems in general and Ethiopia in particular. Criminal justice system as a specific field of study inescapably requires collaborative mechanisms among various justice actors both vertically and horizontally. Thus, before proceeding with the details of the CJS intergovernmental relations from the legal and institutional point of view, it is noteworthy to throw some light on the basic notions of IGR and essential points that should be considered in the CJS that correlates both ideas. These subjects are discussed in order as follows.

8.2.1. Intergovernmental relations: an overview

It is a widely held view that regardless of the actual configuration, every federal system will, by definition and necessity, entail interaction between federal partners. Intergovernmental relations (IGR) refer to the institutions, mechanisms, processes and power plays through which this interaction unfolds between federal partners.[840] Through IGR, federal actors redistribute resources, share information, make joint decisions, and elaborate interlocking arrangements. Accordingly, IGR structures the interface between exclusive, but closely related, powers, and can also help clarify 'who actually does what' in the context of shared or concurrent jurisdiction.[841] Poirier emphatically argues that IGR helps determine who does what, who pays for what, and how things are done in specific policy areas. IGR also contributes to the gradual, ad hoc transformation of dualist federal systems into more integrated ones, in the (re)creation of regional blocks within a particular federation, on the margins of the official federal architecture and without recourse to formal constitutional amendments. In this respect, IGR is an instrument of para-constitutional engineering that can significantly affect the federal equilibrium.[842]

Intergovernmental relations were defined as formal and informal mechanisms to ensure coordination and cooperation between different levels of governments in decentralised and federal political systems. Coordination between different levels is required, because very often competences overlap and different policy issues require cooperation.[843] Based on this definition, it was demonstrated why power sharing between different levels and different elites (from different backgrounds) is useful in order to ensure the functionality of

[840] Poirier, Johanne, "Intergovernmental Relations: The Lifeblood of Federalism", *in* Kincaid, John and J. Wesley Leckrone, (eds.), *Teaching Federalism: Multidimensional Approaches*, 2023, Edward Elgar Publishing, Cheltenham, UK, p.79

[841] Poirier, ibid

[842] Ibid

[843] Andreas Heinemann-Grüder, Soeren Keil, Karl Kössler, Jens Woelk, "WORKSHOP A: Intergovernmental Relations: Meaning and Relevance for Conflict Management", *in* Hanns Bühler/Susanne Luther/Michael Siegner (eds.), *Federalism and Conflict Management*, Hanns Seidel Foundation, Institute for International Cooperation, International Munich Federalism Days, 2017, p.15

intergovernmental relations. Five reasons were offered: First, intergovernmental relations that are based on inclusion and power-sharing ensure the concentration of decision-making, and by doing so they contribute to functional decentralisation, strengthen local government and ensure that each level in a decentralised or federal system has appropriate competences and resources. Second, power-sharing in intergovernmental relations ensures transparency, cooperation and effectiveness in governance decisions. Third, functional intergovernmental relations ensure policy coherence and consultation and thereby focus on cooperation and ensure that a permanent dialogue between different levels of government exists. Fourth, functional intergovernmental relations ensure that policies are implemented based on consensus and that different perspectives are taken into account when policy is being discussed and implemented. This further increases inclusion and therefore the acceptance and respect for the rule of law. Finally, it was pointed out that intergovernmental relations are important, because they provide a framework for the federal dogma of "unity in diversity" by ensuring that policy divergence is allowed, while coordination enables the functionality of a system.[844]

Under the Ethiopian federal system, IGR was bypassed by the Constitution, and later regulated by a statute issued by the HPR.[845] The Proclamation defines IGR as any form of mutual interaction exercised vertically or horizontally between the Federal and Regional states or between and among the Regional States themselves, as deemed necessary, in pursuance of this proclamation.[846] The IGR Proclamation establishes various forums which are entrusted with the functions and responsibilities related with their respective intergovernmental roles.[847] As this sort of IGR is nascent in the history of Ethiopian federalism, much is yet to be seen for successes and failures. At any rate, the Proclamation appears to treat the criminal justice systems intergovernmental relations within the wider spectrum of the executive organs in which the unique features of the steering criminal justice operation seems neglected. As a result, as will be discussed in detail in the following,

[844] Id, p.16

[845] Proclamation No.1231/2021, The System of Inter-Governmental Relations in the Federal Democratic Republic of Ethiopia's Determination Proclamation, Federal Negarit Gazeta, 27th year No.7, Addis Ababa, 11th January, 2021

[846] Id, art.2(3)

[847] Art.6 of the IGR Proclamation sets out about six national forums. These are the National Legislative Bodies Relations' Forum, the National Executives' Relations' Forum, the National Judicial Bodies Relations' Forum, the National Sectoral Executive Relations' Forums, the House of Federation and the Regional States Relations' Forum and the Regional States Relations' Forum.

criminal justice requires a strong institutional and legal intergovernmental design which should be based on a set of guiding principles.

8.2.2. Criminal justice systems relations

While it is a state of necessity to collaborate for the effective delivery of criminal justice for the justice sectors, it is also equally important to emphasize their own internal and professional independence. To this end, there should be basic principles that guide the cooperative approach to the criminal justice administration. Institutional independence of some justice institutions such as that of the courts is constitutionally guaranteed that is not to be compromised. For other justice organs such as police and public prosecutors, professional independence is dealt with by statutes. Moreover, there are a lot of criminal and security agencies that get involved in the criminal justice spheres. For example, the Ministry of Peace, Administration and Security Bureau, Militia Office, *Gaachana Sirnaa*, and other similar organs are political and executive agencies which have side duties and functions yet involved partly in criminal justice. Activities such as crime prevention, investigation, prosecution, adjudication, and administration of prisoners require a professional expertise that lies outside of political realm. As a result, in order for the justice sectors to work impartially, independently, and fairly, they need some degree of professional independence.

For example, the FPC Proclamation urges the federal police to work with the Ministry of justice on areas related with prevention and investigation of crimes. However, one may question if there is any legal and institutional mechanism or working guidelines that regulates such kind of collaboration. What about internal and professional independence? It is known with the rule of thumb that police is more versed in the techniques and tactics of criminal investigation than the prosecutor. What if the prosecutor intervenes in the police profession? This works for all justice sectors such as court, police, prosecutor, prison as well.

With regard to the relations between the police and prosecutors in criminal investigation, the Oromia State law provides for the enactment of a regulation that deals with the working cooperation between the two justice institutions.[848] Although no such a regulation has been issued at the time of writing, one could assume that issues related with internal and professional independence will be taken into account in the law. As the laws stand, whilst the police are empowered to carry out a criminal investigation, the prosecutors are authorized to

[848] Art.41(16) of Proclamation No.242/2021

supervise and follow up the process. In such a joint mandate, there has been an allegation that the police and prosecutors get into conflict, the former invoking that the latter has intervened in their professional issues. In this regard, a study suggests that a problem characteristic to the Ethiopian criminal justice system is the weak coordination among the various institutions responsible for the administration of justice: investigative, prosecution and enforcement organs. One government report regards the coordination between police and prosecution poor which results in delays of cases.[849] Even worse, sometimes there are reports of antagonism between justice institutions. This lack of cohesion negatively impacts the smooth operation of the criminal justice system.[850]

As general criminal justice system collaboration, the Oromia Regional State issued a regulation that deals with the concerted and coordinated effort of the Regional justice organs for the best criminal justice administration.[851] According to this Regulation, the criminal justice reform is guided by an office which is accountable to the Regional President, and the head of the office is accountable to the Regional Vice President and Public Service Bureau Head. The office is organized at all administrative levels which go down to the *woreda* administration. There is a committee structured under the supervision of the office which is composed of the Regional President as a chairman, the Oromia Supreme Court President as a vice chairman, the *Caffee* speaker, the Regional Vice President and Public Service Bureau Head, Oromia Supreme Court Vice President, Oromia Justice Bureau Head, Oromia Administration and Security Bureau Head, Oromia Women and Child Affairs Bureau Head, Oromia EACC Commissioner, Oromia Police Commission Commissioner, Oromia Prison Commission Commissioner, Director General of the Oromia Legal Training and Research Institute, the Legal Advisor of the Regional President Office, and the Director of the Oromia Supreme Court Research Directorate as members of the Committee, and the Criminal Justice Reform Programme Coordination Office Head a member without vote. Such composition is also hierarchically structured at zone and *woreda* levels in the committee.

The composition of the criminal justice reform programme committee is a blend of executive organs and justice sectors which may create a difficulty of impartial and neutral delivery of justice especially in such a country where there is little or no separation between political party and government in general and politics and justice in particular. Above all, the

[849] An assessment of the Ethiopian Justice System, Prime Minister's Office, February 2018
[850] Supra note at 1, p.87
[851] Regulation No.82/2007, the Oromia Regional State Criminal Justice Reform Programme Coordination Office Establishment Regulation

committee is chaired by the Regional Chief Executive Officer and other hierarchical administrative units the trend in which it is highly likely that he/she may twist the criminal justice system towards his/her political whims. Moreover, the criminal justice relations intended by the Regulation is more about a programme which is headed by a committee that assumes that it may lapse one day sooner or later as a rule. That is to say, the coordination is presumed to last for only a specific period of time. As it is a very important institution despite the blend of political and executive organs which have indirect role in the criminal justice, such an arrangement should be designed for a permanent period of time which should also constitute criminal justice sectors only subjecting them to constitutional and legal accountability lines. What is more, the Regulation does not incorporate fundamental principles that should be taken into consideration for the internal working and professional expertise of the respective justice organs. As a result, it may be manipulated as an instrument of the violation of independence and an interventionist ground in the internal affairs of the institutions by the political bodies.

The Ministry of Justice in collaboration with other federal justice organs such as the Federal Supreme court, Addis Ababa and Federal Police Commissioners, held a consultation meeting which was concerned with the coordination forum for the better and improved criminal justice administration in the enforcement of the Rule of law.[852] In the joint forum, they addressed issues related with the coordination, collaboration, and cooperation of the federal justice organs as a state of necessity. Issues concerned with the internal independence of each justice sector were addressed and reached a consensus that a joint concert for the betterment of the criminal justice is required for administrative matters.

8.3. The Aspects of Intergovernmental relations in the Criminal Justice Systems

The subject of intergovernmental relations in the criminal justice system reveals itself in the three spheres of criminal law—legislative, executive, and adjudicative mandates—that also witnesses the involvement of federal and state justice organs in the field on the one hand and all the three aspects are interconnected and carried out by institutions functionally tied together on the other. Thus, intergovernmental relations in the CJS matters in the criminal legislative mandate where both federal and state legislature enact laws which are inconsistent which in turn invites for the discussions and debates as to which law should prevail in such

[852] The FDRE Ministry of Justice Face book Page, a post published on 11 March 2022

discrepancies. From the perspective of the executive criminal mandate, different justice organs such as police, prosecutors, EACC, and prisons are organized in a dual structure at federal and state levels to discharge their respective powers and duties in relation to the centralized criminal laws. How they share responsibilities and functions and cooperate for the improved justice system necessitates an intergovernmental relation.

An intergovernmental judicial relation is an important subject as well. Some powers are delegated to the regional courts from the federal counterpart with budgetary consequences. In this regard, which criminal matters are delegated and which are not is far from consensus. Moreover, cassation powers which are exercised by the Federal and State Supreme Courts is very much foggy when we assess the trend in the criminal adjudication processes. Which criminal cases are ripe for the State cassation bench and which are not; and which are exclusively granted to the Federal Cassation power needs to be clarified from different constitutional, legal, theoretical and federal principles. More important is the double cassation dilemma which has been a subject of debate and discussion among academia and practitioners in the Ethiopian constitutional and federal discourse in general and judicial powers in particular. Each of these aspects of criminal justice IGR will be articulated as follows one by one.

8.3.1. The legislative relations

In the previous chapters, it has been described that the criminal legislative jurisdiction of the federal government and the states has been analysed from the constitutional and statutory perspectives no matter how controversial the scope of the respective powers of the two orders of government given the nature of the Ethiopian federal design. In this subsection, an attempt will be made to discuss issues involving the criminal legislative power exercised by each level of government and how such power should be exercised by bodies entrusted with making a criminal law in a spirit that fosters an effective and coordinated criminal justice operation.

With regard to an intergovernmental criminal legislative relation between the federal government and the states, one of the controversial matters, in addition to the magnitude of the authority, is the issue pertaining to the supremacy clause. It is noticed that there is an inconsistency between the laws made by the federal government and the states on criminal statutes dealing with the same subject matter. In the discussion that follows, an in-depth analysis will be made as regards the supremacy clause by making a comparative survey from other federal systems.

8.3.1.1. *The conflicting criminal statutes*

As details are presented in chapter five, although criminal legislative authority is granted to the federal government, the states have continued to engage in enacting statutes which include criminal acts and concomitant punishments. While there are a number of laws which deal directly and indirectly with criminal matters both by federal and state governments, some of the provisions are inconsistent. In this subsection, such contradictory statutes will be analysed in a very general and quick view.

8.3.1.1.1. *Coffee laws*

Coffee transaction and quality control is a subject matter that should be considered under the commercial and business activities. A close look at the constitutional division of powers in a special reference to commercial matters shows that both the federal government and the states have different aspects of power. Accordingly, while the federal government is empowered to regulate a foreign trade, interstate trade, and enactment of the commercial code, the states have the power to regulate intrastate commercial activities which could be inferred from the residuary principle. The federal government enacted Proclamation No.602/2000 which was repealed by Proclamation No.1051/2017. This federal coffee proclamation which traces its enabling provision to Art.55(1) of the FDRE Constitution, is applicable to any person who directly or indirectly involves in coffee marketing and quality control. It does not distinguish between the scope of the federal and state powers regarding coffee as a commercial tool. The overall reading of the Proclamation reveals that as far as coffee marketing is concerned, the states are assumed as administrative unit of the federal government which goes against the principles of federalism. In other words, it could be assumed as it is operating under a unitary system of state structure and centralized governance. This could be easily contrasted with the previous federal coffee proclamation which 'empowered' the states to make their own coffee marketing laws.[853] One may question as to how the federal government ordered the states to implement laws made by it except by way of delegation entailed by budgetary issues at formal and theoretical level. Despite this

[853] Art.19(3) of proclamation No.602/2000 provided that the Regional States may issue laws necessary for the implementation of this Proclamation.

argument, the Federal Coffee Proclamation which is in force does not authorize the states to enact their own laws as regards coffee transaction although they have a constitutional mandate on an intrastate commerce.

On the other hand, it is evident that some states have issued their own coffee laws. For example, the Oromia Regional State enacted Proclamation No.160/2002 which appeared to have sprung from the previous federal coffee law (Proclamation No.602/2000) and which has been repealed by Proclamation No.234/2021.[854] In this very Proclamation, coffee is treated as an agricultural product, not in a separate legal document. In any case, despite the silence of the federal coffee law, the Region has issued its own law perhaps based on the constitutionally granted power. What is more, although the federal statute envisions a unitary-like system of coffee regulation, the Region did not feel threatened thereby and continues to make its own law.

At any rate, the coffee laws made at federal and state levels have included contradictory provisions. Regard having been had to the penalty clauses, the amount of punishment imposed by the federal law and that of the Oromia Regional State counterpart concerning the crimes committed or omitted linked with coffee marketing processes is incongruent.[855] In addition, the laws exhibit inconsistencies as far as the jurisdiction of courts is concerned. While the federal coffee statute empowers the Federal First Instance Court, the Oromia State counterpart vests the jurisdiction in the regional *woreda* courts.

8.3.1.1.2. Forest laws

Both the federal government and the states have enacted statutes dealing with the conservation, development and utilization of forest resources. Assuming forest as one of the natural resources envisioned by the Constitution over which the federal government makes laws and the states administer same in accordance with the laws made by the federal government, one could imagine the trend as a concurrency where legislative and administrative mandates are split. Hence, the federal government has made and unmade three consecutive proclamations which deal with the forest resources. The first proclamation was Proclamation No.94/1994 which was issued during the Transitional Government of Ethiopia,

[854] Proclamation No.234/2021, a Proclamation to Determine Oromia Region Market and Agricultural Products Quality Control System
[855] Art.19 of proclamation No.1051/2017 (the federal coffee proclamation) and Art.26 of the Oromia Coffee Proclamation No.234/2021

which in turn was repealed and replaced by Proclamation No.542/2007. The latter was also repealed by Proclamation No.1065/2018 which is in force. While the first forest proclamation was issued in accordance with the Transitional Period Charter, the latter two Proclamations were enacted on the basis of the Constitution. Proclamation No.542/2007 made a cross reference to Art.52(2d) and 55(1) of the FDRE Constitution as an enabling provision. These provisions were inserted in the preamble of the Proclamation which expressly recognized the power of the states in the administration of land and other natural resources, forest included. Proclamation No.1065/2018, however, cross references to Arts.51(5) and 55(1) of the Constitution which appears to have emphasized the power of the federal government. Whatever the case, from the relevant constitutional provisions, it could be discerned that land and other natural resources are governed under the concurrent power of the two tiers of government in which general, national and policy criteria and standards are issued by the federal government and the details to remain with the states.

The Oromia Regional State issued Proclamation No.72/2003 which deals with the forest matters at the regional level. This Proclamation makes a cross reference to Art.49(3a) of the Oromia State Constitution and Proclamation No.94/1994 of the federal forest law which is not in force. The irony is that this very federal forest proclamation did not mention that the states could enact laws dealing with forest development. In this connection, it should be borne in mind that whether the federal law expressly specifies or not in relation to such a power, once the Constitution empowers them, the states are at liberty to exercise in their own context and in line with the Constitution.

At this juncture, what is relevant for this study is that the federal and state forest laws which deal with the penalty clauses in relation to the crimes committed against the forest portray a glaring inconsistency on the magnitude of the punishments. The Forest Proclamation of the Oromia Regional State has spelt out the penalties for forest crimes in the Regional State territory. Accordingly, in all crimes relating to forest, the punishment ranges from 5 years to 15 years imprisonment.[856] On the other hand, the Federal forest law provides for a penalty clause in differing versions of which the minimum penalty is 6 months and the maximum one

[856] Proclamation No.72/2003, the Oromia Forest proclamation, Art.15 criminalizes such acts as cutting tree from forest, taking forest resource product, preparation or utilization of forest product in any form, transporting the forest resource product, storing the forest resource product, destroying erasing or falsifying the forest boundary mark, setting fire or damaging forest in any manner, and those prohibited acts mentioned in Arts.13 and 14. On all these criminal acts, the Proclamation imposes the punishment which ranges from 5 years to 15 years without making any distinction between the acts with regard to severity or other circumstances. Leniency and severity of the acts have not been taken into consideration.

is 15 years rigorous imprisonment and fine from 5000 birr to 30,000 birr.[857] In such contradictory federal and state laws, which should have precedence will be the subject of explanation in concrete cases brought before the courts.

8.3.1.1.3. Land laws

As described in the above paragraphs, land and other natural resources are regulated by the federal and state governments with different magnitude of powers over the same field. The states are empowered by the federal rural land use and administration proclamation to make their own laws for administering land. Hence, it is stated that each regional council shall enact rural land administration and land use law, which consists of detailed provisions necessary to implement this Proclamation; and establish institutions at all levels that shall implement rural land administration and land use systems, and shall strengthen the institutions already established.[858]

The laws made accordingly provide for different approach to the incorporation of penalties for crimes committed against land. In this light, while the federal rural land statute makes a cross reference to the criminal code,[859] the Oromia Regional State rural land proclamation clearly and explicitly stipulate for acts prohibited and concomitant punishments.[860]

8.3.1.2. The supremacy clause

Overlaps of jurisdictions and consequent conflict of laws between the federal and state governments are common in any federal systems. As discussed in chapter three, majority of powers divided between different orders of government display concurrency at its broadest sense. In substance, a supremacy clause would solve the regulatory disputes that may arise whenever legislative powers of both levels of government act on the same subject matter in accordance with the division of powers.[861] In such conflicting circumstances, a resolution device must be designed through an appropriate institutional system. We should stress that

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[857] Proclamation No.1065/2018, art.26

[858] Art.17 of the federal rural land use and administration proclamation (No.456/2007)

[859] Art.19 of the federal rural land proclamation (No.456/2007 states that any person who violates this Proclamation or the regulations and directives issued for the implementation of this Proclamation shall be punishable under the applicable criminal law

[860] Art.55 of the Oromia Rural Land Use and Administration Proclamation (No.248/2023) lists about ten criminal acts which entail imprisonment and fine.

[861] Colasante, Paolo, "Concurrent Powers in Italy: The New State-centred Approach and Prospects for Reform", *in* Steytler, Nico (ed.), *Concurrent Powers in Federal Systems: Meaning, Making, Managing*, Brill Nijhoff, Leiden: Boston, 2017, p.113

the only criterion used to resolve any conflicts that may arise when exercising powers is the 'competence principle'. In the event of a conflict, the Constitutional Court will determine whose power matches the disputed activity; whoever has the power conferred by the Constitution or by a Statute of Autonomy will be entitled to intervene, while the act performed without the power will be nullified as unconstitutional, being *ultra vires*.[862] To this effect, Steytler remarks that before the issue of consistency between federal and regional laws arises, the prior question is whether both the federal and the regional laws are consistent with the constitutional distribution of powers, and whether both laws meet an *intra vires* legality test by addressing if they fall within the domain of the policy field.[863]

Where both the federal government and the constituent units are explicitly empowered to legislate in the same policy fields, conflict of laws is unavoidable and thus a specific conflict resolution mechanism is provided for in constitutions. A conflict occurs when two laws are inconsistent to the point of being mutually destructive, that is to say, they cannot be applied at the same time.[864] In this regard, Dziedzic and Saunders argue that:

> *There is potential for conflict in any federal distribution of legislative powers that treats some or all powers as concurrent. The terminology of conflict in this context is used loosely to refer to any circumstance in which the same power is or might be exercised by both spheres of government, causing the legislation of one to fail. Each constitution in fact provides for this contingency in different ways: Australia uses 'inconsistency' as the touchstone; India uses the language of 'repugnancy'; the comparable provision in South Africa is cast in terms of 'conflict'; in the United States the problem is foreshadowed by the supremacy clause, with no mention of inconsistency or conflict at all. In Germany, the notion is inherent in the description of the power of the Länder to 'legislate as long as and to the extent that the Federation' does not do so, suggesting that, in this federation, dualism is the problem.*[865]

The supremacy clauses confirm that federal law is superior to state law, so that in cases of conflict, valid federal enactments—be they constitutional provisions, statutes or administrative regulations—prevail over state enactments, including state constitutional provisions.[866] Such a trend may entail a negative consequence from the regional autonomy point of view unless there are some exceptions and limitations. Hence, it is argued that the

[862] Pi-Sunyer and Torrens, supra note at 272, p.117
[863] Steytler, supra note at 111, p.312
[864] Ibid
[865] Dziedzic and Saunders, supra note at 119, p.20
[866] Burgess, Michael and G. Alan Tarr, *Sub-National Constitutions in Federal Systems*, Forum of Federations, 2021, p.10

federal supremacy clause limits sub-national constitutional space, and it may deter sub-national constitution-makers from adopting some provisions they favour.[867]

It is common in federal systems to deal with which law should supersede if there is repugnance between the federal and state laws regulating the same subject matter what is usually designated as concurrent powers whereby both orders of government are constitutionally empowered to exercise. In this respect, the subject of the supremacy clause is treated under the whole gamut of homogeneity clause, according to some commentators. In view of that, Burgess and Tarr define the homogeneity clause as constitutional provisions that impose on sub-national constitutions the respect of the principles and the spirit of the national constitution, thus regulating the amount of constitutional autonomy allowed to sub-national entities.[868] They articulate the homogeneity clause in the German and Austrian federal and constitutional context whereby in the former it requires the constitutional order in the Länder to conform to the principles of a republican, democratic, and social state of law whereas, in the latter Constitution further requires that Länder constitutions not to affect the federal constitution.[869] The homogeneity clause is unequivocally incorporated in the Provisional Constitution of the Federal Republic of Somalia as well.[870] While the Member States have the power to make their own constitutions, one of the fundamental principles enshrined by the Federal Constitution is that there must be harmonization between the Federal Constitution and the State Constitutions.

According to Steytler, the impact of an overriding federal law on a regional law could be twofold: it may invalidate the regional law (as is the case in Spain and Italy), or merely render the regional law inoperative (Switzerland, Germany, South Africa, and Kenya) whereby in the latter case the assumption is that since both orders of government may validly legislate in that particular area, the regional law simply becomes inoperative for as long as the conflict lasts; once the overriding federal law is removed, the conflict disappears and the law of the constituent units becomes operative again.[871]

[867] Ibid
[868] Ibid
[869] Ibid
[870] Art.121(1) of the Provisional Constitution of the Federal Republic of Somalia
[871] Steytler, supra at note 111, P.313

8.3.1.2.1. Approaches to the supremacy clause

There are different alternative approaches to the regulation and resolution mechanisms of conflicting federal and state laws over the same subject matter. Broadly, there are two major approaches. These are categorical federal supremacy and qualified federal supremacy or exceptional state supremacy. Some federations, such as US, provide for the categorical federal supremacy over the state constitutions and laws.[872] In light of this, the US Constitution, laws made by the Congress, and international treaties are given the same status and taken to be the supreme of law of the land which altogether subordinate any other laws made by the states. The state constitutions, in this regard, are subordinate to the federal laws in cases of inconsistencies. However, this does not mean that federal acts enjoy pre-eminence over the state laws without any limitation. There are restrictions to this rule. In view of this exceptional circumstance, regard must be had to the constitutional distribution of powers and other underlying principles. There must be a valid constitutional basis for the federal policy in question on one hand and the powers of the federal government are limited and enumerated, and the president and Congress must always respect the boundary lines that the Constitution created, on the other.[873] The supremacy clause does not give the federal government an unlimited power over the states. The states retain all powers that are not expressly delegated to the federal government by the Constitution.

In the US experience, usually preemption is used more frequently instead of supremacy in which although there is no conflict between the federal and state laws, the former would displace the latter. The state laws become dormant and inoperative as long as the federal one endures to be effective in the area. Kincaid identifies various forms of preemption: total, partial, explicit, and implied.[874] Total preemption means that Congress occupies a policy field completely and exclusively, whereas partial preemption leaves some room for state law. For example, many federal environmental laws establish national environmental protection standards but allow states to enact standards that are equal to or stricter than the federal standards, such as state standards that mandate lower levels of particular pollutants in water than required by federal law. Such partial preemption, according to him, establishes a

[872]Art.VI Section 2 states that this Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding

[873] Mikos, Robert A., *On the Limits of Federal Supremacy When States Relax (or Abandon) Marijuana Bans*, Policy Analysis, No.714, December 12, 2012

[874] Kincaid, supra note at 161, p.41-42

national floor that displaces state laws that fall below the floor but permits state laws that rise above the floor.

He contemplates four explanations how and why such a trend is different from the German framework concurrency.[875] First, these federal laws displace existing state laws, which is not ordinarily the case in systems that require the constituent polities to fill in the details of federal framework legislation and also administer it. Second, in 1992 the US Supreme Court ruled that '[t]he Federal Government may not compel the States to enact or administer a federal regulatory program' commonly known as the 'anti-commandeering' doctrine. The US system of concurrency requires each order of government to administer its own laws, except that the federal government can pay state authorities to administer federal laws. Nevertheless, states must comply with federal law as in, for example, achieving clean water and clean air standards set forth in federal law. Third, states are not left to fill in the details; instead, they are authorised to enact standards that can only equal or exceed federal standards. Fourth, the term 'framework legislation' in the United States usually refers to the establishment of internal congressional 'procedures that will shape legislative deliberation and voting on certain decisions in the future', an example being the Unfunded Mandates Reform Act of 1965 that establishes a point-of-order procedure in the US House and US Senate that can be used to stop bills containing unfunded mandates.

An explicit preemption is a federal statute or regulation that expressly displaces certain state laws. By contrast, an implied preemption occurs when a state law is overridden by a federal agency or federal court because its operation is incompatible with a federal law such that a party cannot comply with both the state law and the federal law, or the state law obstructs the execution of a federal law or the achievement of its objectives.

A similar approach is adopted by the Argentine Constitution with a quite differential treatment for the province of Buenos Aires.[876] The Australian Constitution also deals with the federal constitutional and legislative supremacy in a clear manner.[877] Likewise, in the Swiss

[875] Kincaid, id, p.42

[876] Art.31 of the Constitution of the Argentine Nation provides that this Constitution, the laws of the Nation enacted by Congress in pursuance thereof, and treaties with foreign powers, are the supreme law of the Nation; and the authorities of each province are bound thereby, notwithstanding any provision to the contrary included in the provincial laws or constitutions, except for the province of Buenos Aires, the treaties ratified after the Pact of November 11, 1859.

[877] The cumulative reading of art.5 and 109 indicate that the federal constitution and laws are superior to the state constitutions and laws and the former shall prevail in cases of inconsistencies. The state laws shall be invalid to the extent of the inconsistency.

constitutional experience, precedence is given to federal laws in cases of inconsistencies with the cantonal laws.[878] Nigeria also shares similar approach.[879] In all these federal systems, subject to the constitutional limits, an unqualified supremacy of a federal law is adopted in cases of conflict.

A preventive approach appears to have been adopted by some federations. For example, the Belgian Constitution states that from the day on which the Constitution becomes enforceable, all laws, decrees, decisions, regulations and other acts that are contrary to it are abrogated.[880] From this constitutional provision, it is also sound to assume that any law of such kinds as listed herewith which are enacted thereafter shall be invalid if they contradict the Constitution. The peculiar approach followed by the Belgian Constitution is that a preventive approach has been attempted in order to halt a conflict of laws in a proactive manner.[881] While this preventive approach is a good trend, it is hardly possible to avert conflict of laws and competences in federal systems. As a result, the Constitutional Court is empowered to receive and decide on cases involving conflict of laws.

The second approach to the resolution mechanism of inconsistent federal and state laws puts some conditions and exceptional circumstances on the side of the federal government on one hand and gives some room for the state laws to sustain on the other. There are some federal systems which could be categorized under this approach. In some federations such as Germany and Canada, the supremacy of state laws is preserved on some matters which are explicitly provided in their constitutions. In Germany, although the rule is the federal paramountcy,[882] there are exceptional matters whereby the Lander can make laws which may contradict with the federal ones. Since the package of federalism reforms that came into effect in 2006, the Länder have been able to enact deviating legislation in the exercise of particular concurrent powers that prevails over the federal law, at least for a while.[883] These reforms sought to reduce the potential for gridlock between the Bundestag and the Bundesrat by limiting the range of matters subject to the consent of the latter. To compensate the Länder for the loss of some powers, the Basic Law now authorizes Land legislation ‘at variance’ with

[878] Art.49 of the Swiss Constitutional clearly declares that federal law takes precedence over any conflicting provision of cantonal law; and the Confederation shall ensure that the Cantons comply with federal law.
[879] Section 4(5) of the Nigerian Constitution
[880] Art.188 of the Belgian Constitution
[881] Pursuant to art.141 of the Constitution it is clearly provide that the law organises a procedure to prevent conflicts between laws, federate laws and rules referred to in Article 134, as well as between federate laws themselves and between the rules referred to in Article 134 themselves.
[882]Art.31 of the Basic Law of Germany
[883] Dziedzic and Saunders, supra note at 119, p.24

existing centre legislation on six matters.[884] To facilitate the scheme, central legislation on these matters must not come into force within six months after promulgation, without the consent of the Bundesrat. The centre retains its power to legislate, however. If what has been described as 'legislative ping pong' unfolds, the most recent law prevails.[885] Likewise, as regards specific matters such as age pensions, provincial laws effectively prevail over federal legislation on the same subject in Canada. The Constitution of Canada deals with the Federal constitutional and legislative supremacy under different provisions.[886]

The Indian model offers a window of opportunity for the state laws to endure and operate in the state concerned even if they are repugnant to the federal law on a concurrent matter. Hence, although the principle is the federal supremacy, there is an exceptional circumstance whereby the state laws would prevail if the laws of the Union Government and the States are incongruous on concurrent powers.[887] State legislation that contains any condition 'repugnant' to existing federal law will prevail if, at the time of making, it was reserved for the consideration of the President of India (acting on the advice of the government) and it received the President's assent. However, the Parliament of the Union is at liberty to make, repeal or amend a law on the same subject matter at any time. Nayaran claims that this is a novel provision which is not present in other federal constitution; and it affords the Union Government an opportunity to examine the need felt by a State to legislate in a manner repugnant to Union legislation and to validate the repugnancy if there is sufficient justification for it in the light of the peculiar local conditions prevailing in that State.[888] This trend provides a good prospect for the preservation of regional and local diversity as an accommodationist approach. Although the State legislation applies only in the State

[884] Art.72(3) of the Basic Law of Germany reads as: If the Federation has made use of its power to legislate, the Länder may enact laws at variance with this legislation with respect to: 1. hunting (except for the law on hunting licenses); 2. protection of nature and landscape management (except for the general principles governing the protection of nature, the law on protection of plant and animal species or the law on protection of marine life); 3. land distribution; 4. regional planning; 5. management of water resources (except for regulations related to materials or facilities);6. admission to institutions of higher education and requirements for graduation in such institutions.
[885] Dziedzic and Saunders, supra note at 119, p.24
[886] Art.52(1) provides for the supremacy of the Constitution whereas art.92A(3) provides for the federal supremacy clause in which where a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.
[887] Art.254 of the Indian Constitution, particularly sub-article 2 of this article provides that where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State.
[888] Nayaran, supra note at 549, p.44

concerned and be overridden by the central legislature at any time, it offers an interesting additional application for concurrent powers.[889] As former Minister Shouri pointed out in 2014, a reforming federal government unable to get its legislation through a fractured federal Parliament could enable like-minded State governments to initiate 'progressive' legislation, to which the President would assent under article 254(2).[890]

The exceptional and qualified approach as an alternative to the categorical federal supremacy is adopted by South Africa and Kenya in which the prevalence of the central laws over the provinces and counties will be limited by certain conditions. If these requirements are not met, the assumption is that the provincial laws would supersede over the central laws. In South Africa and Kenya a qualified override clause is used, which introduces the subsidiarity principle not at the law-making stage but at the conflict-resolution stage.[891] Accordingly, in South Africa an extensive override clause sets a low subsidiarity threshold in favour of the centre as a result of which a national law prevails over a provincial law if: the former applies uniformly to the country as a whole and deals with a matter that cannot be regulated effectively by provincial legislation; a matter requires uniformity by establishing norms and standards, framework or national policies; or it is necessary for the maintenance of national security or economic unity, the protection of the common market, promotion of interprovincial economic activity, promotion of equal opportunity or equal access to government services, or the protection of the environment.[892]

The other exceptional approach is an instance where the state laws have a superior position over federal laws in some federal systems. If supremacy rests with the states, provinces or regions (which is rare, but was found, for example, in the 2005 Constitution of Iraq), then concurrent authority is that which the sub-national legislatures choose to leave up to the federal or national legislature; at any time, the sub-national legislatures may reclaim power from the centre and assert their own legislative authority over a concurrent matter.[893]

In a nutshell, regulating the issue of which law should prevail in cases of inconsistencies between the federal government and the states through a constitutional means is of paramount importance for various reasons. For one thing, the laws made by a competent organ should have certainty of enforcement and be free from an arbitrary nullification. For the other thing,

[889] Dziedzic and Saunders, supra note at 119, p.23
[890] Ibid
[891] Steytler, supra note at 111, p.313
[892] Section 146(2) of the South African Constitution and Art.191 of the Kenyan Constitution
[893] Bulmer, supra note at 10, p.14

a clear constitutional stipulation for the resolving mechanisms of such conflict will guarantee both levels of government to be treated as co-equals over their respective mandates. As a whole, whatever the approaches in respect of a categorical federal supremacy, state supremacy or qualified and exceptional supremacy clause, the bottom line is that the rules of the distribution of powers and their boundaries enshrined by the constitutions remain intact. With this in mind, in what follows, an attempt will be made to provide an in-depth and critical analysis of the approaches followed by Ethiopia in the constitutional design and federal experimentation from a variety of perspectives.

8.3.1.2.2. The Ethiopian experience

Lack of a clear and explicit provision for the supremacy clause is one of the unique features of Ethiopian federalism.[894] Setting aside the question whether it was intentionally sidestepped or due to a poor drafting, such a loophole has created difficulties among the practitioners as to which law should prevail and have applicability in case of inconsistencies between the federal and state laws on the same subject matters. This problem has been abounding in the criminal proceedings where the criminal statutes enacted by the federal government and the states are contradictory on some grounds. Consequently, many measures have been taken by the courts, executive organs, and legislature as a gap-filling purpose. However, a critical appraisal will be made whether such practices are used as gap-filling measures by way of interpretation of law and/or the constitution or are unconstitutional acts.

In any case, the supremacy clause in the Ethiopian constitutional and federal discourse could be approached from four perspectives given the practical trends hovering across the concerned institutions. These are constitutional, legislative, executive, and judicial approaches. Each will be expounded in detail one by one in the following subsections.

8.3.1.2.2.1. The constitutional approach

Under the Ethiopian federal system, the Federal and State Constitutions deal with the supremacy clause differently as a result of which it should be discussed under different subsections. A distinction to this end has been made because both constitutions adopt

[894] Ethiopian federalism is characterized by some peculiarities that distinguish it from other federal systems. For example, explicit secession clause, unicameral parliament the second chamber of which is entrusted with extra legislative and policy mandate in the shared rule, ‘ethnic’ sovereignty, and dearth of clear intergovernmental relations.

different approaches to regulation of the supremacy clause which should be discussed separately as follows.

8.3.1.2.2.1.1. The Federal Constitution

The FDRE Constitution provides for both the homogeneity and supremacy clauses from the perspective of the Federal Constitution, putting same at the top of all laws including the state constitutions and laws. Nevertheless, unlike the experiences of other federal systems, Ethiopia's federalism is hallmarked by the blanket lacuna of the federal supremacy clause. Nowhere in the Constitution is the federal supremacy clause provided either explicitly or implicitly. It is an area of inquiry whether and why the Constitutional Commission and the Constitutional Assembly sidestepped such a profoundly instrumental notion in any federal system. Putting aside the intention of the drafters and adopters of the Constitution *pro tem,* it may be cogently speculated that the federal pre-emption is prevaricated in the Ethiopian Constitution due to the fact that the longstanding central domination in respect of social, economic and political aspects remains threatening in the camouflage of the federal supremacy clause.

In light of this suggestion, it may be argued that the Federal Constitution intentionally omitted the federal supremacy clause. As is observable from the readings of the preamble and several pertinent provisions of the Constitution, one of the purposes thereof is rectifying the past wrongs, injustice and oppressions in the areas of history, culture, language, resource, politics, and socio-economic dimensions of the NNP in the country. The country was ruled under a gross centralization and unitary state under the cover of a nation-state building project against the will of the NNP of Ethiopia. So there is a fear that giving precedence for the federal laws over state laws may lead to the recurrence of similar history instead of rectifying same. Instead of accommodating and maintaining the diversity of each NNP, it may destroy same in the name of federal supremacy clause.

Thus, the question begging for a tenable response is that which law prevails in cases of contradictions, inconsistencies, conflicts, or discrepancies? As a reaction to this question, the gist of the Constitution enlightens us with the general principle that the legislature, both at the federal and state levels, is the supreme political organ within the respective bounds of jurisdictions under the very postulation of the fact that no tier of government is superior or subordinate to the other in a federal system. Accordingly, laws made by the HPR at the federal level are supreme and applicable in and by the Federal Government, whereas laws made by the state councils in particular are applicable within the Region and not subordinate to federal laws or the laws of other Regional States. Consequently, in cases of inconsistencies, neither the federal laws take precedence nor become subordinate to the state laws and the vice versa. Hence, federal laws are applicable within the bounds of Federal Government and the state laws are applicable within the spheres of each Regional State in their respective contexts without the need for worrying about the preemption or subordination of the federal laws or state laws. Nevertheless, this argument may not take further in such cases as criminal matters which are concurrent where the federal and state legislatures have been making conflicting laws over the same policy fields.

Consequently, Assefa explores different theories and assumptions on the constitutional loopholes of the supremacy clause.[895] Accordingly, the default supremacy, an assumption that the federal law should have precedence over the state laws in cases of contradictions; the fact that issues of the supremacy clause should be considered in light of the sovereignty, rights and privileges of the NNP (art.8, 39 of the Constitution) in which an assumption to be adopted that the state laws should have a prevalence; the case-by-case view; and the compact theory. Hence, viewed against the alternative approaches described above, Assefa's proposals as a response to the constitutional silence are: the categorical federal supremacy; state supremacy, or exceptional and qualified supremacy based on the specific case lodged in the courts. The first two alternatives may be disadvantageous, especially in such a federation like Ethiopia where constitutional adjudication is negligible because the former approach may empower the federal government to overwhelm the state powers, whereas the latter advance a centrifugal sentiment. The third approach, the case-by-case alternative, appears to be plausible to be adopted as it is circumstantial and qualified that may take into account the principles of federalism and the Constitution. Despite these suggestions, as will be shortly discussed, the doctrinal and empirical illustrations reveal the categorical federal supremacy over the state laws.

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[895] Assefa, supra note at 4, p. 199, 294 *et seq.*

8.3.1.2.2.1.2. The State Constitutions

Although the federal supremacy clause is circumvented by the Federal Constitution, nearly all constitutions of the Regional States provide for the clause.[896] In view of this, it is stated that the state councils enact laws which are not inconsistent with the Federal Constitution and laws. In other words, the States do not make laws which are repugnant with the federal laws and Constitution. From this provision, it could be understood that the federal supremacy clause is only dealt with in an implied, not explicit manner. As pointed out earlier, as far as the conformity of the state laws with the Federal Constitution is concerned, it is clearly enshrined with regard to the supremacy of the Federal Constitution,[897] under the provisions dealing with the fundamental principles of the Constitution.[898] And this is beyond questionable as a supreme, written, and rigid constitution is one of the underlying principles of federalism.

However, the fact that the supremacy clause is incorporated in the state constitutions begs for clarification when seen from various angles in relation to the federal laws. What does it mean to say that state laws made by the States must conform to the federal laws? How could we assess the constitutionality of the State Constitutions in light of the Federal Constitutional supremacy in this respect? From the outset, the question is whether the States could stipulate the federal supremacy clause which is not incorporated in the Federal Constitution and whether the state constitutions are constitutional viewed from the litmus test of the Federal Constitution. In order to explicate these themes as a course of responding to the questions raised herein, it is important as well as necessary to assess the two concepts of supremacy—the federal constitutional supremacy and the federal legislative supremacy—because the two notions are by far different and need to be treated differently. The State constitutions should also have accentuated the two notions in having incorporated the supremacy clause.

In the meantime, one should bear in mind that constitutions of some States differentiate between the Federal Constitutional and legislative supremacy clauses. For instance, the

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[896] Art.47(3)(a) of the Affar Constitution, Art.49(3)(1) of the Benishangul Constitution, Art.51(3)(1) of the Gambella Constitution, Art.49(3)(a) of the Oromia Constitution, Art.49(3)(a) of the Somali Constitution, Art.51(3)(a) of the SNNPR Constitution.

[897] The full text of Art.9(1) of the FDRE Constitution reads as 'The Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect.

[898] These fundamental principles adopted by the Constitution are the Sovereignty of the People (Art.8), Supremacy of the Constitution (Art.9), Human Rights (Art.10), Secularism (Art.11), and transparency and accountability (Art.12).

Tigray Regional State Constitution provides that the laws made by the state council should not contradict the FDRE Constitution.[899] It gives precedence to the Federal Constitution which is its duty to do so and neglects the incorporation of the supremacy of the federal laws over the state ones within the Region. The Amhara Regional State Constitution affirms the region's constitutional supremacy over state laws enacted by the council and keeps silent as to the Federal legislative preemption.[900] On the one hand, although the Amhara State Constitution seems silent with regard to the Federal Constitutional supremacy clause, Art.9(1) thereof binds it to respect the fundamental principle and needless to reincorporate in the Region's Constitution. On the other hand, the fact that the Region's Constitution ignores the federal legislative supremacy over the state laws appears to be valid viewed from the Federal Constitutional perspective. By the same token and with slight difference, the Harari Regional State Constitution does not stipulate both Federal constitution and laws to take precedence over the state laws.[901] This does not however mean that laws issued by the Harari Regional state council are unmonitored by any means. But rather both state and federal constitutional supremacy must be tacitly understood to be observed. At this juncture, one should not lose sight of the fact that the state constitutions are the supreme law of the respective Regional States. This rule has also been adopted as one pillar and fundamental principles of the state constitutions. Thus, any law made by the state council is supposed to be in conformity with the constitutions of each state.

The principle of the Federal Constitutional supremacy, under the wide spectrum of the fundamental principles of the Constitution, obliges the State Constitution to observe the preeminence of the Constitution under the pain of being rendered of no effect. The word "any law" provided in the Federal Constitution includes the State Constitutions as a constitution is one of the laws designated as general and public laws. Besides, from the viewpoint of the duty of the States towards the Federal Constitution, it is unequivocally provided in State Constitutions that the Regional Government shall have the obligation to preserve, uphold and defend the Federal Constitution in addition to its own.[902] This obligation has already been imposed by the Federal Constitution upon the States.[903] The Federal Constitution gives a

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[899] Art.49(3(a) of the Tigray Regional State Constitution.
[900] Art.49(3)(1) of the Amhara Regional State Constitution
[901] Arts.47 and 51 of the Harari Regional State Constitution
[902] Art.47(2) (d) of the Oromia State Constitution
[903] Art.52(2)(a) of the FDRE Constitution provides that the States shall have the power and function to establish a State administration that best advances self-government, a democratic order based on the rule of law; to protect and defend the Federal Constitution

clear direction and guidance as to how the State Constitutions govern their respective internal matters in general and make regional laws including constitutions in particular. In light of this proposition, prescriptive mechanisms and procedures are envisaged by the Federal Constitution in drafting, adopting and amending the State Constitutions.[904] As such, the State Constitutions must maintain the federal constitutional supremacy upon drafting, adoption and amendment. This is an area where the homogeneity clause is clearly spelt out in the Federal Constitution. Moreover, there are pertinent constitutional provisions that make a clue that the state constitutions must keep the homogeneity clause of the Federal Constitution. This sense of the federal constitutional conformity is envisaged in relation to the emergency power of the States over natural disasters or an epidemic where they incorporate the emergency power in their constitutions.[905]

Besides, taking the constitutional provisions of the States which stipulate the federal legislative supremacy clause as they stand, it appears to be hardly sound to reach a persuasive argument. Literally, it means and implies that the state laws must conform to the federal laws even in cases where the specific federal law is allegedly unconstitutional. In this respect, the state laws would be locked between two compelling circumstances. These choices are either respecting the supremacy of the Federal Constitution which is one of the fundamental principles of it by ignoring federal laws which are adjudged unconstitutional, or violate same by conforming to the federal legislation which are against the Constitution hence unconstitutional. To this end, one should underscore that the States could not invoke the federal legislative supremacy principle in violating the constitutional supremacy rule because what binds all tiers of government in the observance of the constitutional supremacy is the Federal Constitution without prescribing any exceptional circumstances to the rule. Therefore, notwithstanding the State constitutions that have provided for the supremacy of the Federal Constitution and legislation in a mixed phrasing, the constitutional tenet from the Federal Constitution is that the States are duty bound to respect the constitutional supremacy at the expense of the federal laws.

[904] Art.50(5) of the FDRE Constitution states that the State Council has the power of legislation on matters falling under State jurisdiction. Consistent with the provisions of this Constitution, the Council has power to draft, adopt and amend the state constitution.

[905] Art.93(1) (b) of the FDRE Constitution reads as "State executives can decree a State-wide state of emergency should a natural disaster or an epidemic occur. Particulars shall be determined in State Constitutions to be promulgated in conformity with this Constitution."

Consequently, the fact the State Constitutions provide for the supremacy of federal laws over their own—the one which is not embodied in the Federal Constitution—serves neither as a gap filling mission nor is taken as a blessing in the discourse of the constitutional development of both the Federal and State governments. Rather, it is an unconstitutional practice and an approach and can be taken as defiance and a stumbling block that has the potential of stunting and retarding the linear and prospective processes of the constitutional development under the federal experimentation. Despite the fact that the State Constitutions oblige the State councils not to enact laws which are in conflict with the federal legislation, there are many laws found contradictory to each other, as described in the foregoing explanations. That is to say, no attention has been given to the federal supremacy clause which is incorporated in the state constitutions.

8.3.1.2.2.2. The statutory approach

The statutory or legislative approach to the resolution of conflicting federal and state laws empowers the legislature of a level of government, principally the federal government, to provide for the supremacy of the law of one order of government, predominantly of the federal government, over the state laws. In light of this suggestion, the blanket silence of the federal supremacy clause by the FDRE Constitution appears to have provoked the federal law maker to fill the lacuna through imposing the paramountcy of the federal laws over the State counterparts. This approach abounds from the side of the federal government whereby its lawmaking wing—the HPR—enacted proclamations which put the federal laws over the state ones as if they are in the hierarchy of laws under the same tier of government.

For instance, federal courts dispose cases involving state matters primarily by applying and interpreting the State laws.[906] However, if the State laws which are applied by the federal courts over the State matters are inconsistent with the federal laws and international treaties, they shall not be applicable.[907] In other words, federal laws shall have applicability in this respect. Nevertheless, the new FCP which repealed the previous one does not provide for the supremacy of federal laws over the state laws if the latter is contradictory with the former as far as a specific case brought before the federal courts is concerned. Thus, the question which law prevails in such inconsistencies remains debatable under the new FCP at least at formal and theoretical level.

[906] Art.6(1) (b) of Proclamation No.25/96, the Federal Courts Establishment Proclamation
[907] Id, Art.6(2)

The Ethiopian Electoral, Political Parties Registration and Election's Code of Conduct Proclamation prescribes for the inapplicability of any law (including those made by the States) which contravenes this Proclamation.[908] It further provides that Regional elections laws that pertain to regional council elections shall be in accordance with relevant elections provisions of the Constitution and this Proclamation.[909] It is noteworthy to mention the electoral proclamation issued by the Tigray National Regional State, which was controversial and adjudged unconstitutional and of no effect by the House of the Federation.[910]As a legal cover, it is provided that any federal and regional laws that contradict the Proclamation or regulations to be issued subsequently shall not be applicable.[911] In addition, the COVID-19 Emergency Proclamation issued by the HPR clearly subordinated the laws of the states if they contradicted therewith.[912] In all these instances, the question remains as to whether the federal legislature is constitutionally empowered to make federal laws that preempt the state laws.

An intergovernmental approach to the resolution of the conflict of federal and state laws over concurrent powers is also attempted by legislative approach under the IGR regulatory scheme. In this vein, in the realm of intergovernmental relations, the National Legislative Relations Forum is empowered to ensure the harmonization and complementarity of laws made by the federal and state governments over matters exercised concurrently by either tier of government.[913] In this regard, as far as concurrent powers are concerned, the Forum oversees the compatibility of laws made by each order of government. What is more, the IGR Proclamation also emphasizes that each level of government should enact a law on matters constitutionally granted to it in a way that should not imperil the powers of the other tier of government. The Forum is also entrusted with rectifying and resolving inconsistent laws which have been in force and those which may be made in the future. Much is yet to be seen as to how this trend is to be taking ground. However, the power to resolve the supremacy issues between the federal and state laws is basically that of the House of Federation as it involves a constitutional dispute on account of the silence of the Constitution. As a result, it could be argued that the power of the National Legislative Relations Forum in this regard is

[908] Art.162(2) of Proclamation No.1162/2019 provides that any law which contradicts this Proclamation shall not be applicable on matters covered by this Proclamation
[909] Id, Art.4(2)
[910] Proclamation No.321/2020, the Tigray National Regional State Electoral Proclamation
[911] Art.3(3) of Proclamation No.3/2020, the State of Emergency proclamation
[912] Proclamation no.3/2020
[913] Art.8 of proclamation No.1231/2021, an IGR Proclamation

unconstitutional and usurpation of power. On the other hand, this approach may be equated with the Belgian preventive mechanism of the conflict of federal and state laws. But as future is uncertain, federal and state laws may be inconsistent that calls for the resolution mechanisms and procedure. In such a case, while the Constitutional Court is empowered to resolve disputes surrounding the discrepancy of the laws of the federal government and the states in Belgium, it is the House of Federation in Ethiopia that is authorized by the Constitution.

8.3.1.2.2.3. The executive approach

The role of an executive organ is manifested in issues related with the resolution of supremacy clause in one or other ways. At regional level, the Oromia Attorney General is empowered to ensure the consistency of the enacted laws with the constitution, regional and federal laws, international conventions, rights of women and children as well as other legislations adopted by Ethiopia.[914] "Constitution" in this respect is the FDRE Constitution and Oromia State Constitution in accordance with the definition given by the Regional Attorney General Proclamation. At federal level, the task of ensuring the consistency of laws is maintained by the Federal Attorney General at the drafting phase. In light of this, the Federal Attorney General is entrusted with ensuring the draft laws prepared by government organs are consistent with the Constitution and federal laws.[915] From this proposition, one could comprehend that issues revolving around the consistency and otherwise of the laws made by the federal government and the states is taken into account when a bill is drafted by Attorney Generals both at federal and regional levels. This may be taken as a preventive mechanism.

However, as the state attorney generals are restricted to drafting the state laws and the federal counterpart is destined to draw up federal bills, it is rarely possible to avoid the likelihood of conflicting laws over concurrent matters so delineated by the Constitution. Furthermore, the draft bills are overseen by the respective legislative organs which may be guided by their internal policies and contexts which necessitates for the inclusion of unique local and regional matters calling for an inconsistent law. As hinted out in the preceding discussions, this trend is a commonplace in India whereby inconsistent state laws are tolerable as far as

[914] Art.7(36) of the Oromia Attorney General Proclamation (No.214/2018)
[915] Art.6(5a) of the FAG Proclamation (No.943/2016), in addition, the Federal Attorney General is authorized to ensure that international agreements to be signed or adopted by Ethiopia are in consonant with the Constitution, and other laws of the country and are acceptable in view of the standards of national interest.

the specific regional and local matters are concerned. In such a case, it may be tough for the attorney generals to merely oversee the consistency of laws by a mechanical text of the law under drafting. In fact, this too could be assumed to be unconstitutional particularly as regards the consistency of state laws in line with federal laws which may be debatable especially when the federal government has not enacted a law on the subject matter under way.

The other circumstance where an executive approach has been taken is where some federal authorities compel the state governments to reject the state laws and apply those enacted by the federal government when they are contradictory. In light of this, an executive approach has been advanced in order to resolve the federal-state legislation inconsistencies in an [informal] intergovernmental administrative manner. For instance, with regard to the coffee, laws made by the Federal Government and the Oromia Regional State with respect to quality control and marketing mandate, the provisions dealing with the jurisdiction of courts exhibit a conflicting incidence, from among other things.[916] The conflicting provisions arise from the fact that while Federal Coffee law empowers the Federal First Instance Court to assume the jurisdiction of cases involving coffee quality and marketing transactions, the Oromia State law, on the other hand, empowers the Regional first instance courts regarding such a case arising in the Region. There are diverging arguments with regard to these inconsistent laws among judges and prosecutors of the Region and others. This argument has also been rooted in the practical realities on the ground. Some of them assert that the federal law should be applicable and the Regional High Courts must consider coffee cases upon delegation, whereas others hold that the Region's law should be applied and the Regional first instance courts are competent to adjudicate the cases. Such divergence of opinions over the statutes invites us to pose the question which law should prevail in such an inconsistent situation as this.

With regard to these conflicting laws, the Federal Attorney General and the Oromia Justice Bureau (currently the Oromia Attorney General) made a circular-based question and answer-like exchange of ideas. In this case, the Federal Attorney General ordered the Justice Bureau to apply the Federal Coffee legislation and the Regional High Court should consider criminal

[916] Proclamation No.160/2010, the Coffee Quality Control and Marketing Proclamation, Megeleta Oromia, May 8, 2010, Finfinnee, Art.24, which is currently repealed and replace by proclamation No.234/2021, Proclamation to Determine Oromia Region Market and Agricultural Production Quality Control System Proclamation

cases involving coffee quality control and marketing transactions. The reasons mentioned by the Federal Attorney General are (*translation mine*):

> *As per the cumulative reading of Art.4 and 15 of the Federal Coffee Quality Control and Marketing Proclamation (No.602/2008), Art.2(4) of the Federal Attorney General Proclamation and Art.55(5) of the FDRE Constitution, the power to enact criminal law which is implemented within all Regions and Federal places belongs to the Federal Government as a result of which it has issued the Coffee trade criminal legislation. The Regional States shall have criminal legislative power only on areas which are not specified by the Federal Government. However, the Oromia National Regional State has enacted a proclamation (No.160/2010) on coffee quality control and marketing transaction which is the exact verbatim copy of the Federal counterpart. In so doing, the Region has not only made the criminal law for oneself but the law itself is also inconsistent with that of the Federal law on the subject which has resulted in conflict of jurisdiction among the crime investigation bodies of the two tiers of government, perversion of justice and dearth of predictability thereby violating the Constitution and the Coffee legislation of the FDRE. Based on these reservations, the Federal Attorney General warned the Oromia Justice Bureau not to apply the Region's legislation and to notify all concerned organs of the Region accordingly.*[917]

The Oromia Justice Bureau reacted in a very unyielding and recalcitrant manner to the order addressed to it from the Federal Attorney General. The Bureau Head resisted the letter of order having reasoned as follows (*translation mine*):

> *Based on the federal arrangement adopted by the Constitution, the powers of the Federal Government and of the States are distinctively stipulated. Accordingly, the States shall have the power to enact regional laws including their own constitutions. Likewise, the Oromia Regional State issued a law dealing with coffee marketing transactions which is applicable within the Region. In so doing, the Region is not only authorized by the Federal Constitution, but it is also empowered by the Federal Coffee Quality Control and Marketing Proclamation. The law made by the Region on Coffee trade has not been verbatim copied from the Federal counterpart as arrogated by the Federal attorney General. Thus, if the laws made by the two tiers of government are contradictory, we may resolve it through consultation and dialogue with the concerned bodies in accordance with relevant procedures. Apart from this, the letter full of indiscretion, criticisms, and command, which undermines the law made by the Region, is strictly both illegal and unacceptable.* [918]

The Federal Government enacted the coffee proclamation prior to the Oromia Regional State and empowered all the Regional States to make laws of their own on coffee trade by stipulating that any law which is against the federal coffee law will be of no effect.[919] Setting aside the question whether the state power as regards an intrastate commerce in general and a specific subject matter on coffee in particular emanates from the Constitution or a federal law, it is worth appraising the action and reaction made between the Federal Attorney

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[917] A letter written by the Federal Attorney General to the Oromia National Regional State Justice Bureau, numbered as 01/--2068/2009, dated 27 Yekatit, 200 E.C

[918] A letter written by the Oromia Justice Bureau to the Federal Attorney General, numbered as 01/wg.60/2429, dated 12/07/2009 E.C

[919] Art.19(3) and 17(2) of the Federal Coffee Quality Control and Marketing Proclamation (no.602/2008) which is repealed and replaced by Proclamation No.1051/2017

General and the Oromia Regional State Justice Bureau with respect to the conflicting laws of the Federal Government and of the Region. From the outset, one should be mindful of the fact that the two proclamations, especially the provision dealing with the jurisdiction of courts over criminal matters of coffee marketing transactions are apparently contradictory and has become the point of controversy among legal practitioners as stated in the letter written by the Federal Attorney General. But the way out proposed by the Federal Attorney General that insists on asserting that the Region's law must be rendered inapplicable and the Oromia Regional State justice actors including the public prosecutors must apply and implement the law made by the Federal Government tends to be unconstitutional, illegal and ill-procedural as well. Critically appraised against this rule, the letter written by the Federal Attorney General to the Oromia Justice Bureau is ill-grounded. No regional law or federal law which is unconstitutional may be annulled through such an intervention as this. The Federal Attorney General does not have such a power both constitutionally and statutorily. From the Regional Justice Bureau too, disputes on issues related with the supremacy clause are not resolved through a consultation and dialogue to be made between executive organs. Laws made by competent organs at federal and state levels which should be implemented by executive organs should not be put to negotiation for annulment outside the procedural channels set forth by the constitutions and laws.

In addition, there are many occasions where high profile executive officials made a press statement that in case of discrepancies between the federal and ate state laws, it was highly commanded that the federal laws should undoubtedly prevail. For instance, during the COVID-19 emergency situation, Mr. Nigusu Tilahun, the then PM's Press Secretariat Head, gave a press statement that if the Federal state of emergency proclamation and the state counterpart (namely, of the Tigray Regional State) contradict each other, the latter should not have applicability. The issues revolving around the federal supremacy clause which lacks a constitutional ground can be resolved by neither a legislative mechanism nor an executive press statement. It requires something more than this—a constitutional litigation through the CCI and HOF—whose performance thus far is relatively poor in the constitutional development.

8.3.1.2.2.4. The judicial approach

Courts have also engaged in resolving issues related with the federal supremacy clause on cases brought before them. A judicial approach has been practiced both by the Federal Courts and State Courts in deciding the inconsistent laws made by the federal government and the states. For example, in *Imran Taju v Oromia Attorney General*[920] the Federal Cassation held that the Federal Coffee Proclamation should have applicability as there is a clear inconsistency with that of the Oromia Coffee Proclamation as regards the amount of punishment for crimes related with coffee trading. The Cassation reasoned *inter alia* that the power to make a criminal law belongs to the HPR by virtue of Art.55(5) of the Constitution as a result of which the states have no mandate to enact a criminal statute which is repugnant to the federal one. This argument advanced by the Cassation may provoke the question whether the states are empowered to make a criminal law which is in conformity with those which are already issued by the federal government pursuant to the constitutional provision specified hereinabove.

The practice of federal supremacy clause has also taken ground at regional level. In *Oromia Attorney General v Asmarew Iniyew et al*[921] the Oromia Supreme Court Cassation division handed down a precedent that subordinates the Regional forest statute which contradicts with the federal counter part on the provisions dealing with the amount of punishment over crimes committed against the forest. The Regional Cassation bench analysed the case on the grounds of the fact that the Oromia Forest Proclamation was enacted based on the Federal Forest Proclamation No.94/1994, the law which was repealed and replaced by Proclamation No.542/2007 and subsequently by Proclamation No.1065/2018 as a result of which it does not have relevance to apply; in accordance with Art.49(3A) of the Oromia State Constitution, *Caffee* should make a law which conforms to the Federal Constitution and laws; the power to make a criminal law belongs to the Federal Government, and the States may make such laws when it is not covered under the Federal criminal statutes, but all forest criminal acts are fully stipulated in the Federal Forest Proclamation, hence the Oromia Forest Proclamation dealing with the penalty clause lacks applicability.

The subordination of the Oromia forest law to the federal counterpart by the Regional Cassation in handing down a binding judgement has been taken by some legal practitioners as a good strategy of creating a uniformity of punishments across the country.[922] Nonetheless,

[920] Imran Taju v Oromia Attorney General, Federal Supreme Court Cassation Division, vol.25, file no.209763, dated 25/5/2014 EC

[921] Oromia Attorney General v Asmarew Iniyew *et al*, vol.5, File no.303547, Supreme Court of Oromia, 2020

[922] Raggasa Yimenu, East Showa High Court judge and criminal bench coordinator argued that the binding cassation decision passed by the Regional Cassation with respect to the interpretation of legal issue dealing with the forest criminal case has solved many problems and challenges (such as the uniformity of the

this precedent may be virtually subject to many criticisms. First, the court has no power to annul the law made by *Caffee*, the legislative organ of the Region, by virtue of the principle of separation of power. To this end, the courts and other branches of government of the Region are duty-bound to execute the laws of the Region.[923] In this respect, although the court is authorized to interpret the law, its scope of power in this regard would not extend to annulling it in the disguise of interpretation which belongs to the law maker in the separation of powers. What is more, there is no need for the interpretation of the law as it is clear enough to pass a judgement within the regional self-rule of the State based on the Federal and State Constitutions. Second, the power to decide on issues connected with the supremacy clause lies outside the jurisdiction of the regular courts including the Cassation. Consequently, based on these grounds, one could assert that the Cassation has failed the Federal and Regional Constitution in general and that of the State law and self-rule right which should have been advanced by the judicial organs in particular.

The forest case was also decided by the Federal Cassation with majority as to the superiority of the Federal Forest Proclamation over the Oromia State counterpart. In *Negash v Oromia Regional Attorney General*,[924] the majority held that the federal forest statute should prevail over the Oromia Regional State Forest Proclamation for various *raison d'être*. The reasons advanced by the majority are: 1) the Oromia Regional State Forest Proclamation No.72/2003 was issued in accordance with Art. 49(3A) of the Regional Constitution and the Federal Forest Proclamation No.94/1994, a proclamation was repealed and replaced by Proclamation No.542/2007 which in turn was in force at the time of the commission of the forest crime; 2) Art.18 of the Federal Forest Proclamation No.542/2007 enumerated the powers and duties of the regions. Art. 20(1) of the Proclamation also clearly provided for the punishment for the crimes related with forest; 3) in addition, by virtue of the Art.55 (2A) and 55(5) of the Federal Constitution, the power to make laws over natural resources and enact a criminal law belongs to the HPR; 4) pursuant to Art.22 (2) of Proclamation No.542/2007, the Oromia Regional State Forest Proclamation has no applicability as it is inconsistent with the Federal

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application and interpretation of the law in one country, that the constitutional right of the accused (the right to equality before the law) and taking advantage of the favourable law. Mr. FayisaTolasa, the Cassation Bench Coordinator at the Supreme Court of Oromia also argued that the binding decision handed down by the Oromia Supreme Court Cassation Bench has created the uniform application of laws in relation to cases involving coffee and coffee trade issues in the Region.

923 Art.3(2) of the Reestablishment Proclamation of the *Megeleta* Oromia News Paper Proclamation No.186/2014 states that the Legislative, Executive and Judicial body of Government and any natural or legal person shall have obligation to execute laws published on the *Megeleta* Oromia.

924 Negash Haile v Oromia Regional State Attorney General, Federal Supreme Court Cassation Division, file no: 107960, dated 18/4/2008 EC (unpublished)

Forest statute.[925] 5) The Federal Forest Proclamation No.542/2007 was issued later than that of the Oromia Forest Proclamation No.72/2003 and the crime which the petitioner was accused of was incorporated therein which favoured him. As a result, courts have an obligation to choose the law which favours the defendant in accordance with Proclamation No.25/1996 and Art.22(2) of the Federal Constitution, and Art.6 of the FDRE Criminal Code.

On the other hand, the dissenting Judge held that the Federal Forest Proclamation No.542/2007 could not repeal the Oromia Regional State Forest Proclamation No.72/2003 as a law made by a state council (*Caffee*) is ought to be repealed by the same body, not by anybody else. Federal laws have no privilege to rescind state laws. As forest is a scarce resource, and is indispensable for green economy and climate change for the Region, Ethiopia and the world over, *Caffee* intended to impose grave punishment for the conservation and utilization of forest in the Region as a result of which no lenient punishment for perpetrators was foreseen. Hence, the State forest law should be applicable even if it is in contradiction with the Federal forest statute.

In the meantime, it is noteworthy to evaluate the reasoning presented by the majority and dissenter in this very case as regards the pre-eminence of the federal law over the state counterpart. To begin from the dissention, the argument holds water because any law made by a constitutionally authorized organ ought to be repealed and rendered inapplicable by the same body following the appropriate processes and procedures. The federal government organs such as the court, the HPR or any other body is not empowered to rescind the laws made by the states whatsoever with the exception of challenging it before the House of Federation. The dual institutional set up designed by the Constitution attests this assumption. What is more, problems and crises connected with the deforestation are key points and an argument that should be emphasized beyond the mechanical application of the provisions of the law.

The arguments advanced by the majority should be scrutinized as there is a scant understanding among the scholars and practitioners of law as to how the federal and state laws are applicable and interpreted and their scope of application. On the onset, federal matters are adjudicated by federal laws and state matters are adjudicated by state laws. Accordingly, there is no principle of choice of law between the two groups of laws on the

[925] Art.22(2) of Proclamation No.542/2007 provided that no law, regulation, directive or practice shall, in so far as it is inconsistent with this Proclamation, have effect on matters provided for in this Proclamation.

respective matters. If there is a need for interpretation, a judge is obliged to choose between the state laws for the state matters and federal laws for the federal matters. A federal judge cannot choose between federal laws and state laws for state matters and the vice versa for the state judge(s) over state matters and federal matters. In this respect, whether a federal law is issued later or earlier than the state one, includes a more lenient punishment than that of the state, it has little relevance in applying the state law/federal law. True, the State Forest Proclamation incorporates a graver punishment and was issued earlier than that of the federal counterpart. The principles set out in Proclamation No.25/96, Constitution, and Criminal Code with regard to the favourable provision what is also known as the lenity principle, do not work for choosing between the federal law and state law. It is only applicable within the laws made by the same tier of government. This principle is stipulated in the State Constitution which should have applicability within the laws made by *Caffee*. And the one incorporated in the Federal Constitution must be applicable within the federal laws which the federal judges should be heedful.

The other reason underscored by the majority is the power of the HPR in relation to the natural resources and criminal law by virtue of Art.55(2A) and 55(5) of the Constitution. Yes, it is very true. However, the question which law should have precedence in case there is contradiction between the federal and state laws over matters which belong one or the other tier of government constitutes a constitutional adjudication, not resolved by a court whose mandate is limited to interpretation of the law, not the constitution. As explained elsewhere in this study, Art.55(5) is subject to different approaches of interpretation which at the same time calls for a constitutional interpretation. In this connection, the provisions of the laws made by the federal government and that of the Oromia State are clear that does not warrant an interpretation which lacks the existence of the fundamental error of law. Other reasons that the majority presented are also scrutinized within this consideration. In light of these propositions, the arguments presented by the dissenting judge are more convincing.

To sum up, although the practice connected with the resolution of the federal supremacy question through the state constitution, federal laws, executive, and judicial approaches abound, all of them tend to be unconstitutional. The only way out to the deadlock is either through the amendment of the Constitution or by way of interpretation by the House of Federation.

8.3.2. Executive relations

The intergovernmental CJS relations with regard to the executive criminal justice organs are rarely regulated under the federal structure. In the centralized criminal justice policy and legislation on the one hand and the dual institutional design of the federal arrangement on the other calls for a strong and effective intergovernmental relation for executive criminal justice institutions. However, the legal and institutional frameworks for the regulation of such relations between the federal government and the states (vertical relations) and among the states (horizontal relations) are inadequate. Even the recent statute issued by the Federal Government which deals with the IGR by itself is not sufficient in governing the CJS relations as it places more attention on the legislative, judicial, executive, and other sectoral relations.[926] It does not directly and explicitly deal with the intergovernmental CJS relations. It is rather to be considered under the general national executive relations forum which may be tantamount to give less attention to the administration of criminal justice under the federal system. In fact, as a law that deals with IGR as a general subject under the federal set up, it may not be supposed to delve into the criminal justice sectors functional relations.

Intergovernmental relations in the administration of criminal justice and the problems surrounding it have been explored by some research findings. Hence, a problem characteristic to the Ethiopian criminal justice system is the weak co-ordination among the various institutions responsible for the administration of justice: investigative, prosecution and enforcement organs which results in delays of cases, antagonistic relationships, and lack of cohesion from among other things.[927] As a dual structural design, both the federal government and the states have already organized their respective justice institutions which are entrusted with administering the criminal justice system in the bounds of their jurisdictions. In this subsection, an attempt will be made to explore the legal and institutional frameworks that are meant to deal with intergovernmental CJS relations both vertically and horizontally.

[926] Proclamation No.1231/2021, Art.6
[927] Supra note at 1, p.87

8.3.2.1. Police relations

Intergovernmental relations in the police institutional system exist in a variety of ways. First, from the professional and expertise point of view, the police are assumed to be versed in the task of criminal investigation tactics and techniques which in turn is connected with the prosecutor for supervisory roles. In such a case, there should be clear rules of intergovernmental relations between the police and prosecutor both at federal and state levels. Art.6(2) of the FPC Proclamation provides that the federal police forces should work in collaboration with the Ministry of Justice and other relevant organs with respect to crime investigation. Second, there are some laws which deal with the inherent powers and duties of the police in many fields which link the police institution with other relevant ones. For example, in crimes related with trafficking and smuggling of persons, the Federal Police shall work, as the cases of investigation, information exchange, capacity building and similar matters, in collaboration with the Federal Attorney General, National Security and Intelligence Service, Ministry of Labour and Social Affairs and other stakeholders to prevent and control the crimes stipulated under the Proclamation.[928]

With regard to the vertical relations, laws made by the HPR in relation to establishing the federal police forces and defining their powers and duties provide for the intergovernmental police relations. Hence the federal and state police institutions have exercised cooperation in the field of ensuring peace and security and criminal enforcement as a specific mandate. But a close look at the statutes shows the way intergovernmental relations are regulated differs. For example, pursuant to Proclamation No.207/2000, the first proclamation which dealt with federal police institution after the adoption of the Federal Constitution which establishes a federal system in the country, important areas of intergovernmental police relations were stipulated.

Accordingly, the FPC had relations with regional police commissions concerning federal cases in which the regional police organs, while investigating federal criminal cases, and preventing crimes in accordance with delegation, were accountable to the FPC; the FPC and regional police commissions would hold a joint meeting at least once a year; the FPC would give training and professional assistance, and other supports to regional police commissions; the regional police commissions should send reports and statistical data to the FPC to be

[928] Art.41 of Proclamation No.1178/2020, Prevention and Suppression of Trafficking in Persons and Smuggling of Persons Proclamation

commonly used for research and general purposes concerning crimes, traffic offences and security.[929] There had also been a joint meeting of the FPC and the regional police commissions which specifically emphasized on exchange of experience by evaluating the crime prevention and investigation activities; devising and deciding on joint crime prevention schemes; joint identification of police related matters that required uniform standards; and framing the standard and evaluating their implementation.

Despite the constitutional lacunae towards the subject of IGR as a general concept, laws made by the federal and state legislatures provide for the working relationship in the course of executing criminal laws and related functions. As such, the FPC Proclamation makes explicit provisions towards the intergovernmental police relations.[930] Accordingly, the law establishes a joint council that regulates the working relationships between the Federal and State police institutions and which is presided by the Commissioner General of the Federal Police. The powers and duties of the Council are also enumerated in the Proclamation.[931] The Council shall have an ordinary session which will be held four times in a year and extraordinary meeting whenever necessary. The Joint Council is empowered to adopt its own rules of procedure.

There are some deficiencies in the statute dealing with the intergovernmental police relations.[932] Notwithstanding whether this rule of procedure is already adopted or not, the Proclamation, in the first place, is not clear enough in the delineation of who constitute the members of the Joint Council and their respective powers and roles. Secondly, in dealing with the intergovernmental police relations, the Proclamation mentions only one guiding principle which should be considered in the coordination and cooperation processes between the two tiers of police institutions. That is the principle of independence of the internal affairs of the police institutions of the federal government and of the states. This poses such questions as to what about other principles stipulated by the Constitution which are also supposed to guide the intergovernmental police relations in a federal setting such as co-

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[929] Art.25 of Proclamation No.207/2000

[930] Art.18 of Proclamation No.720/2011

[931] For instance, modernizing police institutions, building professionalism and use technology, setting uniform standards of police administration, joint operations in respect of national matters, aggrandizing public participation in the prevention of crimes, collaboration and mutual assistance in the prevention and investigation of crimes, strengthening information exchange system and the institutional outlook and unity of police officers, and cooperation during the intervention of the Federal Government in the States.

[932] Abdi Gurmessa, Police Power in Ethiopia's Federal Structure: Who does what in the Criminal Laws and Justice Policy Enforcement? A paper presented at The 3rd National Police Research Symposium, Ethiopian Police University, July 15-16, 2021, p.17, Sandafa (unpublished)

equality principle (no order of government is neither superordinate nor subordinate to the other), the principle of mutual respect or non-interference in one another's powers and functions (federal comity), partnered and harmonious relations (as contrast to the superior-inferior relations) transparency and accountability that may emanate from consultation and decision-making processes, observance of the supremacy of the Federal Constitution, and the like. These fundamental principles should be taken into account in the regulation of intergovernmental police relations.

Thirdly, the Proclamation is limited to dealing with the vertical intergovernmental police relations. Letting aside the controversy whether the FPC has the power to regulate the horizontal (inter-regional) intergovernmental police relations especially in setting national standards on areas relating to the enforcement of criminal laws, it is observed that the Proclamation is silent on this very issue. Some States, however, make hazy provisions in describing both vertical and horizontal intergovernmental police relations. For instance, the Oromia State Police Commission shall have the power and duty to exchange information and work in collaboration with federal and Regional concerned security organs with a view to ensuring peace and security in the Region.[933] But the law does not clearly provide for the specific mechanisms and *modus operandi* of how such intergovernmental police relations take place.

The FPC Proclamation also makes explicit provisions on areas that necessitate for cooperation with the regional police forces. For instance, it works in collaboration with regional police commissions on matters relating to forensic investigation; develop national policies, strategies and uniform standards on the prevention and investigation of crime and ensure their implementation upon approval by the government; provide educational, training, technical and advisory support to regional police commissions with emphasis on regions that need affirmative support (Art.6 (16, 21, 24) of the FPC Proclamation). In the case of the Oromia Regional State, it is provided that such a relationship should be detailed by a regulation to be issued by a competent body (Proclamation No.242/2021 art.41 (2, 16)).

[933] Art.45(7) of Proclamation No.213/2018

8.3.2.2. *Prosecutorial relations*

The FAG Proclamation establishes a Joint Council which facilitates intergovernmental prosecutorial relations.[934] This could be taken as a vertical IGR with respect to an operational relation between the federal and regional attorney generals. In other words, the law is silent as to how and whether the State Attorney Generals (a horizontal IGR) are carried out. The Joint Council is constituted by the senior management of the Federal Attorney General and regional public prosecution institutions. It is also indisputably stated that the Joint Council shall issue joint plan on common and similar matters of the justice sector to make their performance effective, efficient and uniform. It is evident from the Proclamation that the Joint Council may be under a pressure of the Federal Attorney General.[935] On the one hand, it is overtly set out that the Federal Attorney General is the chairperson of the Joint Council and heads of regional public prosecution institutions are mere participating members. On the other hand, the Proclamation empowers the chairperson to facilitate the works and meetings of the Joint Council.

Moreover, the joint working plan to be drawn up by the Joint Council is supposed to achieve a uniform application and implementation of the criminal justice across the country. This trend, although it is embedded in the Constitution, appears to deny the diverse and indigenous criminal justice system which is implicitly rooted in the NNP.[936] Thus, it could be safely argued that the intergovernmental prosecutorial relations through the Joint Council may perpetuate the undermining of the indigenous criminal justice administration by imposing a uniform application of the criminal justice policy. This practice may be compounded by the potential lower voice of the regional prosecutors in the Joint Council as they are mere members of the Council, which means they may not influence the decision making processes.

8.3.2.3. *Ethics and anti-corruption commissions relations*

The intergovernmental relations adopted by the Federal Ethics and Anti-Corruption statute overtly portray a unitary state and centralized government system. Pursuant to the Proclamation, the Regional and City Governments Ethics and Anti-Corruption Commissions

[934] Proclamation No.943/2016, Art.20
[935] Id, Art.20(3&5)
[936] Art.34(5) and 78(5) of the FDRE Constitution provide for the resolution of disputes by religious and customary courts in relation to family and personal matters in accordance with the religious and customary laws.

should submit their periodical reports to the Federal counterpart.[937] Moreover, as is comprehended from sub-Article 1 of Art.21 of the Proclamation, the Federal EACC is the leading organ at the top of the powers, functions and activities carried out by the Regional and City Government counterparts. It is also empowered to establish a planning, reporting and relation system with the EACC of the regional and city administrations. Consequently, although it is apparently a dually structured ethics and anticorruption institutions both at the federal and state levels, the intergovernmental relations adopted by the Federal EACC proves a unified and centralized practice which is not an attribute of federalism.

The previous Federal EACC proclamation which was repealed, dealt with extensive issues of various intergovernmental relations.[938] For example, creating an aware society which cannot tolerate corruption, as well as corruption prevention, investigation and prosecution; that the Regional Institutions were accountable to the Commission when they investigated and prosecuted in accordance with the delegation given to them; would form a joint forum where they deliberated on the success of their anti-corruption activities and evaluate their performance in which the forum was empowered to draw up its own internal regulations; exchange experiences in matters of corruption prevention, investigation and prosecution as well as in the promotion of ethics; devise joint directions with respect to training; deliberate on studies presented by the Commission or Regional ethics and anti-Corruption institutions; and forward recommendations and measures to be taken on the basis of the study to the proper government body thereby ensuring their implementation. Moreover, the Regional EACC institutions were required to submit statistical data and periodic report regarding the state of corruption offences in their respective region to the Commission. An intergovernmental EACC relation is stipulated as one of the powers and functions of the Federal EACC. The Federal EACC coordinates regional ethics and anticorruption commissions; and provides them with the necessary technical support.[939]

[937] Proclamation No.1236/2021, Revised Federal Ethics and Anti-Corruption Commission Proclamation, Art.21 deals with the working relationship of the Federal, Regional and City Governments Ethics and Anticorruption Commissions.
[938] Proclamation No.433/2005 art.25
[939] Proclamation No.1236/2021, Art.7(14); Read also Art.21 its relationship with the regional and city anticorruption commissions.

8.3.2.4. *Prison relations*

The Federal and Regional prison institutions have a joint council like that of the Attorney Generals counterpart.[940] The law does not provide a full account of the joint council, particularly on its membership composition, chairmanship, and other members with their voices. It seems that much is left to the internal working rules and procedures to be issued either by the Joint Council or other competent organ. This is also not unambiguously mentioned in the Federal Prison Proclamation. At any rate, the areas of cooperation are specified in the Proclamation.[941] An interesting point in the regulation of an intergovernmental prison relation which is conducted through the Joint Council is that it gives an autonomous exercise of powers and functions which falls under the respective prison institutions as a result of which it is not subject to compromise in the camouflage of working relationship.[942]

8.3.3. *Judicial relations*

Intergovernmental judicial relations may exist between the federal and state courts in relation to the delegation, concurrency, double cassation, and administrative matters. It is evident from the Constitution that there is a relationship between the federal and state courts on areas listed herein that require an in-depth analysis. A fair time and space will be given to discuss the intergovernmental judicial relations as follows.

8.3.3.1. *The exclusive-concurrency-delegation dilemmas*

One of the issues that require attention as regards the intergovernmental judicial relations is the one dealing with the exclusive, concurrent, and delegated powers of the federal courts

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[940] Proclamation No.1174/ 2019, Federal Prison Proclamation, Art.68

[941] Art.68(3) enumerates the issues on which the Joint Council cooperate. Accordingly, it makes an intergovernmental relations one: a)national polices and strategies of issued by the government and on current issues; b) Prepare and follow up implement of standards on security, custody, basic provisions and rehabilitation of prisoners; c) Improving national correctional service, researching best practices and expand implementation of such good practices; d) Work jointly on the selection, training and recruitment, and other administrative matters; e) Establish system for prisoner's statistics and data exchange; f) Establish national standard for the selection, training, ranking, uniform, armament of prison police and other related matters.
Id, Art.68(1) provides that Without prejudice to the respective legal mandate provided by law, the Commission and Regional prisons shall establish a joint council to enable them strengthens their working relationship.

[942] Id, Art.68(1) provides that without prejudice to the respective legal mandate provided by law, the Commission and Regional prisons shall establish a joint council to enable them strengthens their working relationship.

and/state courts. As repeatedly pointed out in the previous chapters, the Ethiopian criminal justice policy is known for its centralized feature hence a monist approach in its legislative sphere and decentralized in its administration, both execution and adjudication. On the other hand, it was also hinted out that the allocation of the criminal authority signifies a dualist approach in its institutional structure. In such a case, one may be tempted to distinguish between the original, concurrent and delegated judicial jurisdictions of the federal and/or state courts given the constitutional postulate that the federal courts and the state courts entertain federal matters and state matters respectively.

Particularly, it is surely debatable from the state courts perspective, how they exercise power over criminal laws made by the federal government: which criminal matters are originally and exclusively given to the state courts? Which are delegated, and which sorts are concurrently exercised? The conundrums subsisting in the specific type of the jurisdiction of the state courts in relation to criminal matters may be attributed to the pertinent constitutional provisions and the statutes issued by the federal government which regulate jurisdiction of federal courts. This sort of controversy also throws the practice of criminal adjudication by the state first instance courts into a dark and puzzling position.

To begin with, the notion of an exclusive criminal jurisdiction springs from the assumption that the federal courts adjudicate federal criminal matters and the states courts decide on state criminal matters based on the dual institutional design which could be excepted by the downward delegation. However, this assumption does not work for the practical impediments as a large area of criminal policy and legislation is conferred upon the federal government which handicaps the federal courts to assume all powers of adjudication. On the contrast, only few and insignificant number of criminal matters is enacted by the state councils that are negligible for the state courts to utilize various resources. Hence, an original/exclusive jurisdiction of the state courts over criminal matters enacted by the federal government is formally and constitutionally unthinkable. Consequently, the trend by which the state courts exercise a criminal jurisdiction should be searched either in concurrency or delegation or both, if any.

Consequently, the notion of judicial concurrency in general and that of the criminal jurisdiction in particular comes into picture at the moment. From the constitutional point of view, concurrent judicial power is contemplated whereby the caption and content and context convey different messages on the one hand and the English and Amharic versions are headed differently on the other.[943] Thus, as far as a constitutional concept of judicial concurrency is concerned, it is barely understood that the federal and state courts have concurrent jurisdiction over criminal matters and laws which are exclusively enacted by the federal government. The FCP also sets out the jurisdiction of the federal courts over concurrent offences.[944] Again, it is hardly comprehensible what is meant by 'concurrent offences' which is also not defined by the Proclamation as to what constitutes the term. The Amharic version reads as "*yeteyayazu wenjeloch"* which is to be construed as crimes falling under the jurisdiction of courts of different regions or under the jurisdiction of both the federal and regional courts. In this context, perhaps, it may refer to a crime which is commenced in one region and completed in the other or those crimes which are associated on various grounds calling for the joinder of cases and/or parties from different regions and/or between federal and regional courts.

On the other hand, there are divergent views on the concurrent and exclusive jurisdiction of the state courts over the crimes which are not clearly mentioned in the FCP to fall under the federal courts jurisdiction. For example, Abebe contends that they are the exclusive jurisdiction of the state courts.[945] By contrast, Assefa argues that the crimes which are not specified in the FCP would be the concurrent jurisdiction of the federal and state courts.[946] He bases his assertion on the fact that if the scenario of the federal courts' exclusive and state courts' exclusive criminal adjudicative jurisdiction is drawn, the Federal Government will lose its inherent power as envisaged in the Constitution, the Criminal Code and the Proclamation itself (Art.3). Moreover, Gedion and Abduletif also maintain that:

> *Another area involving the execution of federal law by the states is criminal law. The Constitution empowers the federal legislature to enact a criminal code and authorizes the states to adopt criminal laws on matters not covered specifically by federal criminal laws. On this basis, the federal government has adopted a comprehensive criminal code. Given that this is federal legislation, one would expect its enforcement to be the task of the federal*

[943] Art.80 of the FDRE Constitution (in English version) as captioned as "concurrent jurisdiction of courts", deals with other subjects than issues connected with concurrency of jurisdiction which basically gravitates around the delegated jurisdiction from among other things. The Amharic version, on the other hand, is captioned as "*yefird betoch tamranetna siltan*" which could roughly be translated as "the integrated court system and their jurisdiction" which basically appears to concentrate on the organizational structure of the courts and their jurisdiction. Nevertheless, as described earlier, the contents and contexts of the provisions of the Constitution are different from the caption.

[944] Art.4(8) of the FCP (proclamation No.1234/2021) reads as Federal Courts shall have jurisdiction over crimes falling under the jurisdiction of courts of different regions or under the jurisdiction of both the federal and regional courts as well as concurrent offences.

[945] Abebe, supra note at 7

[946] Assefa Fiseha, Federalism, Teaching Material, sponsored by the Legal and Justice Research Institute, March, 2009, Addis Ababa, P.461.

> *police, prosecutor, and judiciary. In reality, the Federal Courts Establishment Proclamation has indirectly left the application of a large part of the criminal code to the regional states. The proclamation has designated some crimes as federal crimes, but all other crimes are understood to be non-federal, and their investigation and prosecution are left for the regional states.*[947]

All these views that assert that all the remaining crimes are left for the states either on the grounds of exclusivity or concurrency lack in the constitutional and legal foundations because state courts have no legitimate ground to claim a concurrent and/or exclusive jurisdiction over criminal matters which are exclusively enacted by the federal government as long as the Constitution and the pertinent laws, namely the FCP keep silent as to the rest of the crimes. This in turn leads to the other face of the dilemma of delegation of criminal jurisdiction to the state courts.

The question of judicial concurrency in general under the Ethiopian federal arrangement and that of the criminal matters in particular may be compared and contrasted with the models of other federations. In this vein, in USA, the state courts exercise majority of federal laws concurrently with the federal courts because they are not explicitly prohibited from doing it. As Kincaid maintains:

> *As a consequence of concurrent legislative powers, Hamilton noted in Federalist 82 that state courts also have concurrent jurisdiction with federal courts in all cases arising under the laws of the union, where it is not expressly prohibited. Hamilton even contended that this concurrency would restrain the growth of the federal judicial power, which was much feared by Anti-Federalists, because the state courts would hear most federal cases, though appeals would go to the federal courts. This judicial concurrency, he averred, would diminish the motives to the multiplication of federal courts, and would admit of arrangements calculated to contract the appellate jurisdiction of the U.S. Supreme Court. Numerically, Hamilton was correct: more than 98 per cent of all litigation occurs in the state courts. But in reality, the small numbers of cases decided by the federal courts have huge impacts on the powers of the states.*[948]

This proposition proves that there is a coincidence between the legislative concurrency and judicial concurrency where there is no clear prohibition of the state courts from receiving and deciding on federal laws. By contrast, there is no direct relationship between the legislative concurrency and judicial concurrency in the criminal law regime due to the fact that institutions are dual coupled with the mutual forbearance principle and the vast majority of the criminal law is centralized by the federal government.

In Germany, as it is an integrated/administrative federation, both laws exclusively and concurrently enacted by the federal government, including the criminal law, are administrated

[947] Gedion and Abduletif, supra note at 107, p.177
[948] Kincaid, supra note at 161, p.40

and adjudicated by institutions of the Lander. There is no correspondence between the legislative concurrency and adjudicative concurrency. The federal government cannot claim a concurrent judicial authority with the Lander. With the exception of some criminal matters which ought to be decided by the federal courts, which could also be delegated to the courts of the Lander, other cases belong exclusively to the latter. In this case, the rule of delegation, not concurrency, would be applicable. Thus, there is a clear distinction between exclusivity, concurrency, and delegation in the German experience.

In India, both the legislative and administrative (execution and adjudication) aspect of criminal justice is unequivocally stipulated as a concurrent power. In light of this arrangement, both the federal and state courts are destined to receive and deicide on the criminal laws made by the federal government. In the light of central legislative dominance in these areas, the devolution of administrative authority is seen as a sop thrown to the regions because of their *de facto* denuded legislative authority.[949]

However, the relationship between legislative and administrative mandates of a criminal law from the perspective of the exclusivity-concurrency-delegation trio under the Ethiopian federal formula is not as clear as the models of federations mentioned above. Hence, from the Constitutional point of view, followed by the principle that the federal courts exercise jurisdiction over the federal matters and state courts on the state matters, it is stipulated that some powers of the Federal High and First Instance Courts are delegated to the state courts for some justifications. In this regard, the Constitution provides for different approaches as to how such federal courts jurisdictions are delegated. By virtue of the first approach which is general, it is stated that all levels of the state courts are implicitly delegated to exercise the jurisdictions of the Federal High and First Instance Courts.[950] In light of this constitutional wording, the state courts of all levels, including the state first instance courts, are empowered to exercise criminal matters by way of delegation.

The second approach, which makes a specific mention to the State Supreme Courts and High Courts limit the delegated power to these tiers of state courts by discounting the state first instance courts from the list.[951] A particular reference is observable from the compensatory

[949] Steytler, supra note at 111, p.318

[950] Art.78(2) o the FDRE Constitution makes clear that the House of Peoples' Representatives may, by two-thirds majority vote, establish nationwide or in some parts of the country only, the Federal High Court and First-Instance Courts it deems necessary. Unless decided in this manner, the jurisdictions of the Federal High Court and of the First-Instance Courts are hereby delegated to the State courts.

[951] A cumulative reading of Art.79(7) and 80(2,4) of the FDRE Constitution

budgets clause which are only meant and allocated for the State Supreme and High Courts. Thus, the Constitution appears to be providing for contradictory approaches as far as the judicial delegation power is concerned. As regards the concurrency-delegation dilemma, Assefa and Zemelak maintain that:

> *The Constitution also contains a provision that refers to a 'concurrent jurisdiction' of federal and state courts. Having divided judicial power between the state and the federal courts, the Constitution further confers the power to adjudicate federal matters in state courts. This is what the Constitution refers to as a 'concurrent jurisdiction' of federal and state courts. A state High Court exercises the power to adjudicate federal matters that are within the material jurisdiction of a federal court of first instance, while a state Supreme Court is given the power to adjudicate matters that are within the material jurisdiction of a federal High Court. The latter also has appellate jurisdiction over decisions passed by a state High Court on federal matters. The Constitution requires the federal government to allocate a 'compensatory budget' to the states to cover the costs of the state courts that adjudicate federal matters. It is questionable, however, whether this can appropriately be considered 'concurrent judicial power'. The Constitution does not allow both the state and federal courts to simultaneously exercise judicial power on a federal matter in their own respective capacity; a state court is not authorized to exercise judicial power over federal matters in its capacity as a state court. Quite the opposite is true: when adjudicating federal matters, a state court is for all intents and purposes considered a federal court. This shows that a certain functional competence or power is not necessarily a concurrent function or power even where the Constitution refers to it as such. One can actually state that state courts are merely serving as federal courts through a delegation of judicial power that otherwise belongs to the federal courts.*[952]

Seen from the statutory point of view, some federal statutes define the specific criminal jurisdiction of the federal courts over few matters and keep silent as to the remaining plethora of criminal cases which are incorporated in the FDRE Criminal Code. Thus, the assumption is that those crimes which are mentioned in the FCP to fall under the Federal High and First Instance Courts are delegated to the State Supreme and High Courts respectively if the specific approach to the delegation clause in light of the constitution is to be adopted. In this light, the State Supreme and High Courts should follow the footsteps of the Federal High and First Instance Courts in order for one to differentiate those crimes which are delegated and not delegated. As tersely pointed earlier, the jurisdiction of the state first instance courts becomes a controversial subject in such a postulation. Despite the dilemmas surrounding the exclusive-concurrent-delegation clauses in the compartmentalization of criminal jurisdiction of the state courts *versus* the federal courts, the state first instance courts have a power to

[952] Assefa and Zemelak, supra note at 92, p.247

exercise criminal jurisdiction which is grounded in several justifications and constitutional basis.[953]

At this very juncture, it is noteworthy to articulate the implication of delegated power *versus* exclusive and/or concurrent powers. As clearly set out in the Constitution, the delegated powers come to an end where the HPR, by a two-thirds majority vote, decides that the organization of the Federal High and First Instance Courts is required in some or all over the country based on the need or necessity.[954] To date, on the basis of this constitutional provision, the Federal High Court is established in five regional states *viz*. Afar, Benshangul, Gambella, Somali and SNNPRS.[955] In addition, there are still needs for the proliferation of the establishment of the federal courts in the regions. On the wake of the political reform in Ethiopia, Assefa and Zemelak suggested, as a policy recommendation, that the federal courts be established throughout the country with clearly demarcated mandate in enforcing chapter three of the Constitution.[956] By virtue of the Federal High Court Establishment Proclamation, the assumption is that criminal matters which were exercised by the State Supreme Courts in lieu of the Federal High Court should be transferred thereto. As far as the pending cases are concerned, the proclamation provides for two options: either to be continued to be heard by the State Supreme Court or transferred to the newly established Federal High Court by the order of the Federal Supreme Court.[957] From this trend, one could readily glean that unlike an exclusive jurisdiction, delegated jurisdictions are subject to revocation upon the fulfilment of the requirements.

In general, it is hardly possible to trace the legitimacy of the criminal adjudication by the state courts either in the domain of exclusivity or concurrency and in some respects delegation. Thus, it may be argued that the decentralization of criminal adjudication is more a *de facto* system than a *de jure* that calls for constitutional and statutory reforms or amendment for setting out a clear allocation of criminal jurisdictions.

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[953] Abdi Gurmessa Amenu, “Criminal Adjudication by State Courts under the FDRE Constitution: The Quest for Compartmentalization of Jurisdiction”, *Oromia Law Journal* [Vol.5,No.1,2016], p.17-21

[954] Art.78(2) of the FDRE Constitution

[955] Proclamation No.322/2003 (The Federal High Court Establishment Proclamation)

[956] Assefa Fiseha and Zemelak Ayele, “Introduction and Policy Brief”, *In* Assefa Fiseha (ed.), *Emerging Issues in Federalism and Governance in Ethiopia*, Addis Ababa University Printing Press,2018, p.22

[957] Art.3 of the Proclamation which is captioned as “pending cases” states that cases pending in the Supreme Courts of the regions mentioned in Article 2 of this Proclamation in accordance with Article 78(2) of the Constitution before the coming into force of this Proclamation shall be heard and decided by the same courts. Notwithstanding the Provision of Sub-Article (1) of ' this Article; the Federal Supreme Court may decide to transfer cases pending in Regional Supreme Courts to be heard and decided by the Federal High Court.

8.3.3.2. The [double] cassation dilemma

The cassation question in the Ethiopian constitutional and federal design continues to be as questionable and debatable as it was as laws are enacted one after the other dealing with the subject. While the Constitution provides for the dual cassation which should be exercised by the Federal Supreme Court over federal matters and the State Supreme Courts over state matters, it has been prone to conflicting interpretations owing to the insertion of a thorny term '*any*'.[958] In light of this, it is argued by some scholars and practitioners that the Federal Cassation has the power to review the final decisions of any courts including that of the State Cassation decisions which is dubbed as double cassation or cassation over cassation. The practice perpetuated by the Federal Cassation division to date also testifies to this trend.

This practice is vehemently objected and criticised by some scholars on the basis of various justifications. Mehari substantiates many reasons why the practice of double cassation should end very soon.[959] These rationales are the fact that the need for the uniform interpretation of the law defeats the very purpose and essence of federalism which accommodates diversity and engenders a unitary and centralized system, and that Federal Cassation should limit its resources and time to issues which have a national significance instead of regional and local matters which should be left to the state cassation. Other factors which ostensibly necessitate for the cassation over cassation should be eliminated and resolved through different mechanisms rather than entrenching such a trend for the sake of accessible and language-friendly justice services at regional level which saves the costs and lethargy of the litigants who shuttle many kilometres to and from Addis Ababa for the search of justice.

The issue worth explaining, in the meantime, is the scope of the cassation power of the Federal and State Supreme Courts over criminal cases and whether the State Cassation has such a power at all. According to Mehari, some laws such as a criminal law, commercial law, and labour law should not be seen by the State Courts by way of cassation.[960] However, with regard to the criminal law, the state cassation divisions are reviewing criminal cases upon the requirements of the fundamental error of law and finality clause. On the other hand, even the

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[958] Art.80(3) of the FDRE Constitution states that: Notwithstanding the provisions of sub-Articles I and 2 of this Article: (a) The Federal Supreme Court has a power of cassation over ***any*** final court decision containing a basic error of law. Particulars shall be determined by law. (b) The State Supreme Court has power of cassation over any final court decision on State matters which contains a basic error of law. Particulars shall be determined by law.

[959] Mehari, supra note at 592, p.39

[960] Mehari, id, p.53

Federal Supreme Court Cassation Division passed a precedent that the state cassation should receive and decide on cassation petitions on cases related with labour relations albeit the Constitution clearly and exclusively grants such a power to the HPR.[961]

The controversy of the cassation power of the state courts over criminal cases is manifested in the draft criminal procedure and evidentiary code wherein it totally deprives the states of such a power and intends to centralize under the Federal Supreme Court. This may be difficult to apply if the draft code is approved as it stands unless the criminal justice system is to be wholly centralized institutionally against the principles of federalism and the constitution.

8.3.3.3. Inter-and intra-jurisdictional conflict and its resolution mechanisms

It is common for the conflict of jurisdiction to occur as between the federal courts and state courts (vertical jurisdictional conflict), between the state courts (horizontal or interstate jurisdictional conflict), and among the courts of the same tier of government (intrastate jurisdictional conflict) which also includes the conflict of jurisdiction between the hierarchical federal courts as well. Such conflict of jurisdiction may exist either in claiming or disclaiming forms as the case may be. The proposition is grounded in the logics of the fact that the courts are duty bound to receive and decide on disputes which appear before them on the basis of law and evidence by virtue of their local, material and judicial jurisdictions. In such instances, they are supposed to claim their jurisdiction on the specific matter. On the other hand, they should not entertain matters which lie outside of their jurisdiction. Thence, they should reject the case by disclaiming jurisdiction over the matter. In this regard, IGR which could be found in formal and informal ways plays important roles with respect to the prevention, management, and resolution of jurisdiction and other conflicts.[962]

As a form of judicial IGR, the conflict of jurisdiction occurring between claiming and disclaiming should be resolved by an effective and speedy legal and institutional mechanism. To this effect, laws made by the federal government and the states as regards the definition of

[961] Oromia Seed Enterprise v Worku Abegaz et al, Federal Supreme Court Cassation Division, file no.190225, dated 28/01/2013 EC. Pursuant to Art.55(3) of the FDRE Constitution, the HPR is empowered to enact a labour code, and by virtue of art.3(1a) of the FCP, the Federal Courts shall have a common jurisdiction over federal laws.

[962] Asnake Kefale, "what lessons can be learned from how federations deal with security matters, including intergovernmental relations and traditional institutions and practices at the national and other levels?" *in* Asnake Kefale (ed.), *Equality and Unity in Diversity for Development*, Volume 5:Federalism and Conflict Prevention, Management and Resolution Mechanisms, Addis Ababa, Ethiopia, 2010, Forum of Federations, 2012, Shama Books, p.76

the jurisdiction of their respective courts provide for the resolution mechanisms. For example, the Federal Supreme Court is empowered to resolve the jurisdictional conflicts arising between the courts of states (interstate conflict), Federal Courts, Addis Ababa and Dire Dawa City Courts.[963] The Federal Supreme Court may not get into the full scale trial and litigation as regards the resolution of the jurisdictional conflict. Rather it simply renders an order which it may find appropriate. However, it should be borne in mind that the order to be given must be based on the relevant provision of laws including the Constitution; and avoid arbitrary discretion which may be subject to controversy. In so doing, the order rendered in an informal manner may serve as a speedy conduct of the case.

In the meantime, it seems worthy of posing a question as to how an order on the conflict of jurisdiction is given: by administrative order to be issued by the President, Vice President of the Federal Supreme Court or other appointed leaders on the bench? Plus, should it follow administrative letters or circulars coming in and going out in the judicial bureaucracy or filed and numbered like that of the ordinary litigations? The Federal Courts Proclamation does not deal with these and other related issues on the specific *modus operandi* of the resolution of the conflict of jurisdiction. Nevertheless, issues related with the occurrence and resolution of conflict of jurisdiction, especially on areas pertaining to criminal matters is instrumental in the federal experimentation in determining the exact scope of the jurisdiction of the federal and state courts. In this manner, the practice to be developed by the Federal Supreme Court should be not be downplayed.

Moreover, as is closely fathomed from the Federal Courts Proclamation, the Federal Supreme Court resolves conflict of jurisdiction arising between two or more state courts, federal courts, Addis Ababa City Courts and Dire Dawa City Courts. It does not mention the sort of conflict of jurisdiction that may occur between the state courts and federal courts. This loophole matters because there are circumstances whereby federal courts assume jurisdiction over criminal matters committed in the states which is transferred to the state courts by delegation until the Federal High and First Instance Courts are organized in the regions upon the fulfillment of the requirements set out in Art.78(2) of the FDRE Constitution.

With regard to an intrastate jurisdictional conflict, the state laws deal with how it is resolved. Given the structure of courts in each regional state, the conflict may arise between the *woreda*

[963] Proclamation No.1234/2021, art.51(4) provides that Where two or more Regional or Federal Courts or Addis Ababa or Dire Dawa cities Courts claim or disclaim jurisdiction over a case, the Federal Supreme Court shall give the appropriate order thereon. The previous proclamation (No.25/96, Art.35(2)) which was repealed by the current Federal Courts Proclamation did not include the resolution of conflict of jurisdiction in Addis Ababa and Dire Dawa City Courts.

courts, *woreda* courts and high courts, between high courts, high courts and the state Supreme Court. In what follows, a comparative survey of the experiences of the states is provided in order.

The SNNPRS adjudicative jurisdictional conflict resolution mechanism displayed that the Supreme Court and the High Court of the Region shall bear such a duty.[964] In this view, the Regional Supreme Court would resolve a jurisdictional conflict that arose between two or more High Courts of the Region or *Woreda* Courts under the supervision of two or more High Courts whereas, the Regional High Court would resolve the claim-disclaim conflict that may arose between two or more *Woreda* Courts under its supervision. Although the proclamation was silent as to the resolution of conflict of jurisdiction that arose between the High Courts and the Supreme Court, it could safely be deduced from the premises of the above mechanisms that the Supreme Court of the Region itself would resolve it. The decisions or orders given by the Supreme Court and the High Court of the Region in relation to the jurisdictional conflict were non-appealable.

The Benishangul Gumuz Regional State courts experience more or less resembles that of the SNNPR counterpart. Both the Regional Supreme Court and the High Court shall have the power to resolve the jurisdictional conflict that may arise between the High Courts and the *Woreda* Courts respectively.[965] Accordingly, where conflict of adjudicative jurisdiction arises between two or more High Courts of the Regional State, the State Supreme Court shall give a necessary decision, and where a conflict of jurisdiction arises between two or more *Woreda* Courts in the Region, the State High Court which supervises them would resolve it. But unlike that of the SNNPR counterpart, the Benishangul Gumuz Courts Proclamation does not make it clear whether the Regional Supreme court does have the power to resolve a jurisdictional conflict that may arise between itself and the High Courts and between the *Woreda* Courts which are located in and supervised by two or more High Courts of the Region. Like that of the SNNPR courts, however, it is expressly provided that decisions rendered over applications regarding jurisdictional conflict are not subject to appeal.

As far as the resolution of the conflict of jurisdiction that may arise in the courts of the Addis Ababa and Dire Dawa City Administrations is concerned, the two establishment proclamations/charters have provided in one and the same phraseology.[966] Accordingly, the

[964] Arts.5(1)(c) and 6 (1)(d) of the Revised SNNPR Regional Courts Proclamation
[965] Art.7(2) and 8(1)(d) of the Revised Benishangul Gumuz Regional State Courts Proclamation
[966] Art.42(1) of the Addis Ababa City Government Revised Charter and Art.34(1) of the Dire Dawa City Administration Charter

Federal Supreme Court shall have the power to decide on conflict of jurisdiction that may arise between the City Courts and the Federal Courts. But neither of the two charters stipulates which level of court shall have the power to resolve such a conflict. For instance, conflict of jurisdiction may arise between the City First Instance Courts *inter se* or between the City First Instance Courts and the *Kebele* Social Courts. On the other hand, it does not sound rational for the Federal Supreme Court which is seated in Addis Ababa City to decide on issues related with the conflict of jurisdiction that may arise between the Dire Dawa City Courts and the federal Courts as it is far away from Dire Dawa, as a result of which a delay may ensue.

The Oromia Courts Proclamation grants the power of resolution of conflict of jurisdiction to the State Supreme Court.[967] According to the approach followed by the Oromia State courts, a conflict of jurisdiction that may arise between various levels of courts is resolved exclusively by the State Supreme Court. In addition, as it is gleaned from the Regional State Courts Proclamation, issues related with the dispute of jurisdiction forms a full litigation aspect in which the relevant procedures and rules are due to be observed. In this regard, unlike that of the Federal and other regional state approaches which are more tantamount to an administrative order as a means of resolving conflict of jurisdiction, the Oromia's jurisdictional conflict appears to be resolved as an ordinary lawsuit. Accordingly, the decision rendered by the State Supreme Court may be appealable. This may hold true especially when the subject matter belongs to the federal government and adjudicated by the State Courts upon delegation.

It is important to criticize the law that grants all forms of conflict of jurisdiction arising in the Region to the State Supreme Court. It should be decentralized in some respects. For example, a conflict that may occur between *woreda* courts should be resolved by the High Court. The State Supreme may receive and decide on conflicts arising between *woreda* courts and high courts; and between high courts in different zonal administrations. What is more, litigations with regard to conflict of jurisdiction should not go through all processes and procedures of an ordinary lawsuit. It should be considered in an accelerated or summary procedure. A dispute concerning conflict of jurisdiction is not an end in itself, but a means to an end. Hence, it should be resolved as expeditiously as possible in order to avoid unnecessary delays on the primary subject matter that is adjourned in the court that has firstly received the case.

[967] Proclamation No.216/2018, A Proclamation to Redefine the Structure, Powers and Functions of the Oromia Regional State Courts Proclamation, Art, 25(2e) provides that the State Supreme Court shall have the jurisdiction over applications regarding disputes in relation to jurisdiction of courts.

In this regard, it is noteworthy to consider the approach adopted by the SWEPRS Courts Proclamation.[968] Although the State Supreme Court seems to have been authorized to resolve conflict of jurisdiction that may arise in all levels of courts, such a power is decentralized to the High Courts to receive and decide on such disputes that appear from *woreda* courts. That is to say, the State Supreme Court does not consider issues related with conflict of jurisdiction that occurs at the *woreda* courts level. Some regional state laws such as that of the Harari People Regional State Courts Proclamation does not deal with the jurisdictional conflict and its resolution mechanisms.[969]

8.3.3.4. The full faith and credit clause

As repeatedly discussed in the foregoing chapters, federalism is characterized by having different levels of government which are constitutionally recognized, both horizontally and vertically. Besides, federalism promotes mobility of citizens from one region to the other for socio-economic objectives. In such circumstances, certificates, licenses, judgements, and any other public records that are officially issued to a mobile person by federal government organs or other regional states may be required in other parts of the country. The best example is a judgment rendered by the federal or state courts dispatched to other state courts or other executive organs for execution.

Two points are noteworthy in this regard in the Ethiopian federal context. For one thing, the Constitution does not explicitly provide for the full faith and credit clause. For the other thing, in addition to the constitutional loophole, how should the public records issued by other organs of government other than the one disposed to execute same be taken? Should it be executed automatically or subject to some procedural scrutiny? What if the judgement or any record sent for execution is against the Constitution, the law and public morality of the specific region? Is it to be rejected categorically? What mechanism should be designed? These questions will be shortly discussed in detail after an analysis is made with regard to the experiences of some other federal systems in relation to the full faith and credit clause. Hence, federations like the USA,[970] Australia,[971] and Argentina[972] unambiguously incorporate

[968] The SWEPRS Courts Proclamation (draft), Art. 7(2e) and 8(5)
[969] Proclamation No.154/2021, Proclamation to Redefine the Harari People Regional State Courts
[970] ARTICLE IV SECTION 1 Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.
[971] Art. 118 Recognition of laws etc. of States: Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.

such a decisive clause in their constitutions. Accordingly, the public acts, records, and judicial proceedings, including laws of a state is to be given a full faith and credit by other state throughout the country. What is common for all these federations is that the power to regulate the full faith and credit clause is granted to the federal government through the law-making organ.

In Somalia, although the full faith and credit clause is not mentioned in an express manner, the ideas thereof are incorporated under the interstate commission whose powers and functions include the clause.[973] The interstate commission is regulated by the federal government. The Interstate Commission shall be composed of members appointed by the Prime Minister and at least an equal number of members appointed by each government of the Federal Member States.[974] The Commission is empowered and entrusted with facilitating intergovernmental coordination and cooperation among the Federal Government and the governments of the Federal Member States` and resolving any administrative, political or jurisdictional disputes between the Federal Government and one or more governments of the Federal Member States or between the governments of Federal Member States. Although IGR is dealt with in other provisions of the Constitution, the role of the Commission seems to include and resemble that of intergovernmental cooperation. Broadly speaking, however, the interstate commission may be taken as one aspect of an IGR institutional mechanism that facilitates a horizontal cooperation.

Back to the questions raised hereinabove in the Ethiopian context, it has become a point of heated debate as to how the full faith and credit clause is applicable under the federal deign in the absence of clear constitutional, legal and institutional framework. This proposition matters especially as some federal laws order any organs of government or persons to execute judgements and orders rendered by the federal courts, by imposing criminal punishments for the failure to do or obey the order. The pertinent law is the Federal Courts Proclamation that

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[972]The Argentine Constitution provides for the full faith and credit clause in a broad manner under various provisions of the Constitution. For example, under Section 7, it is stated that the public acts and judicial proceedings of one province are worthy of full faith in the others; and Congress may, by general laws, prescribe the manner in which such acts and proceedings shall be proved and the legal effects thereof. Relatedly, Section 8 also provides that the citizens of each province shall be entitled to all rights, privileges, and immunities inherent in the condition of citizen in the other provinces. The extradition of criminals is a reciprocal obligation among all the provinces. in a more general manner, Section 125 reads as the provinces may enter into partial treaties for purposes of the administration of justice, of economic interests, and works of common benefit, with the knowledge of the Federal Congress.

[973] Art.111F of the Provisional Constitution of the Federal Republic of Somalia establishes an interstate commission.

[974] Id, Art.111(3)

commands the obedience and execution of decisions passed by the federal courts unconditionally.[975] It is emphasized that the decisions and orders are binding and enforceable in Ethiopia. The failure to execute accordingly entails criminal liability up to two years simple imprisonment and a fine up to 5000 ETB.[976] The previous Federal Courts proclamation provided for the enforcement of the decisions and order of the federal courts by the state courts unconditionally albeit it did not incorporate the criminal liability for the failure to do so.[977] In that sense, the relationship between the federal and regional courts was clearly the superordinate-subordinate form. Despite the constitutionality, legality or morality test, it was unambiguously provided that the federal courts of any level can order the regional courts for the execution of the decisions and orders passed by the former.

This criminal sanction will lead us to critically analyse the questions posed hereinabove particularly when a decision passed by the federal courts is against the Constitution, the law and public morality of the specific region requested to execute or cause the execution of the decision. Pursuant to the provisions of the law herein-mentioned, there is only one option to choose from the two available alternatives: either categorically execute the unconstitutional/unlawful/immoral decision or receiving the punishment that it entails. Given the legal and institutional setup as a third alternative, we don't have any at the moment except through the general IGR system designed recently or an informal way of interaction between the judicial leaders.

To make the explanation more concrete and live, in *Aberash G/Yes v Tola Maqi*,[978] the Federal First Instance Court ordered the Oromia Land Administration Bureau to execute the decision passed in favour of the Judgement Creditor after bidding an auction. The order was the unconditional delivery of the rural land registered in the name of the Judgement Debtor to the Judgement Creditor. The Oromia Regional State Land Administration Bureau was

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[975] Proclamation No.1234/2021, art.51 states that: 1) unless otherwise provided by law, decision and order rendered by any Federal Court shall be binding.2) Decisions or orders of the Federal Courts shall be executed within Ethiopia. Any government body or institution, non-government organization or person residing in any region shall have the obligation to execute or cause to be executed such decisions or orders. 3) Any person who fails to discharge his obligation imposed by this Proclamation be shall held accountable in accordance with this Proclamation and any other relevant law.

[976] Id, Art.52 sanctions a criminal liability. Particularly, sub-article 2 of the article provides that Whosoever fails to obey a court order or decision hinders the execution thereof or fails to cooperate or give assistance when so requested is punishable, unless the more severe penalty is provided for in another law, with simple imprisonment not exceeding two years or with fine not exceeding birr 5, 000.

[977] Art.35(1) of proclamation no.25/96 stated that Federal Courts of any level may order that decisions and orders given by them be enforced by Regional Courts.

[978] Aberash G/Yes (Judgement Creditor) v Tola Maqi (Judgement Debtor), the Federal First Instance Court, file no.85823

perplexed by the order and responded by invoking the following reasons why it was not able to execute the decision:[979] (1) per Art.9 of the Oromia Rural Land Administration and Use Proclamation no.130/1999 and Art.10 of the Regulation issued for the implementation of the Proclamation, Regulation No.151/2013, rural land is only transferred through donation and succession; no other way is allowed; (2) pursuant to art.6(8) of the same Proclamation, any individual or organ who bought houses and other buildings built on rural land shall be obliged to take off his property; (3) by virtue of Art.5(7) of the Oromia Rural Land Administration and Use Regulation No.151/2013, husband and wife upon divorce shall not have the right to share their land holding if the land holding is less than 0.5 hectare for cereal, 0.25 hectare for perennial trees, and 0.25 hectare for irrigation. The size of land requested for execution which is $1000m^2$ is 0.1 hectare which is below land use standard. In such a case where the parcel is not eligible for division, the husband and wife shall use the land holding in other ways than transferring to other third party which are provided under Art.5(8) of the Regulation.

Based on the responses, the Federal First Instance Court could not force the Land Bureau thereafter to execute the judgment. The judgement was crystal clear that it was against the law. What is more, the Constitution prohibits the sale and other means of exchange of land.[980] This prohibitive provision is also enshrined in the State Constitution with the same wording used in the Federal Constitution.

Now, in such a circumstance, can the penalty clause provided in the Federal Courts Proclamation be applicable for the mere fact that the Land Bureau refused to obey and enforce the order? The answer is definitely no. On the other hand, it should be taken into account that the court must be fully aware that any decision which declares the right of the judgement creditor be enforceable from the perspective of the constitution, law and morality. In other words, unenforceable judgement is a mere declaration that is of no use for the judgement creditor; and that is not the very purpose of any court. Therefore, for such unprincipled practices to end there must be a legal and institutional design to work out in a federal spirit. Besides, public records, including decisions of courts must be eligible to conform to the constitutional, legal, and moral principles in order to secure their enforceability in any parts of the country. Otherwise, any regional government organs and

[979] A letter written by the Oromia Regional State Land Administration Bureau, numbered BLO-X-17/6929, dated 24/02/2015 EC

[980] Art.40(3) of the FDRE Constitution

persons are obliged to protect and defend the institutions of their respective regions such as their constitutions and laws from any obliterating circumstances. To this end, it is important to bear in mind that a full faith and credit is given to those public records which are in harmony with the FDRE Constitution at the top and state constitutions, laws, and public morality of the society of the specific region.

8.3.3.5. Administrative matters

The foregoing discussions in relation to the judicial IGR has apparently placed more emphasis on the professional judicial functions which has a direct bearing on the exercising of the very judicial power on cases appearing from parties to the case. In this subsection, an intergovernmental judicial relation pertaining to administrative matters will be explained. As usual, the legal and institutional mechanisms which are dedicated to dealing with the vertical judicial administrative relations (between the federal courts and the state courts) and horizontal judicial administrative relations (interstate courts) will be explored.

To begin with, as pointed out in the foregoing discussions, since the State Supreme Courts and High Courts are delegated to exercise the jurisdictions of the Federal High and First Instance Courts, the intergovernmental relations may not end in the purely judicial service. Rather the issues of budget and the *modus operandi* of the federal matters in the state courts may be an issue of a continuous and interactive agenda between the leaders of the respective courts. This reminds us of the administrative wing of the judicial function under the federal setting which also needs to be enhanced by an effective intergovernmental judicial relation. Indeed, the aspects of an administrative facet of a judicial IGR may go further than this specific point.

As far as the federal matters delegated to the State Supreme and High Courts are concerned, the Constitution makes a clear connection between the federal and state courts on administrative matters. As regards the expenditure required for the accomplishment of the delegated federal matters, the states need compensatory budgets from the federal courts.[981] Although the Constitution seems to provide that the States can directly claim budgets from the HPR, the practice and logic goes that they obtain such budgets from the Federal Supreme

[981] Art.79(7) of the FDRE states that budgets of State courts shall be determined by the respective State Council. The House of Peoples' Representatives shall allocate compensatory budgets for States whose Supreme and High courts concurrently exercise the jurisdictions of the Federal High Court and Federal First-Instance Courts.

Court which in turn gets its annual budgets from the HPR by taking into consideration the necessary ones to be reimbursed to the state courts. For an in-depth clarity, this area needs to be explored by a separate empirical inquiry. Specifically, issues related with how much budget is allocated to the state courts, and how it is calculated, the channel of budget defence, the reporting system, how budget deficiency is met, auditing system, and other points call for a deep research. Prospective researchers may take up the responsibility and advance the study in order to fill the scholarly gaps on the area.

On the other hand, there is an administrative interaction between the federal and state courts on areas concerning the appointment of judges. While the judges of the state first instance courts are appointed directly by the State Council upon the recruitment and nomination of the State Judicial Administration Council, the State Supreme and High Court judges must receive recommendation from the Federal Judicial Administration Council before their appointment.[982] However, this requirement is not absolute as a result of which if the Federal Judicial Administration Council does not submit its recommendation within three months, the State Councils will automatically appoint the judges. The power of the Federal Judicial Administration Council to forward its recommendation is limited by timeframe and lacks acceptance thereafter.

Unlike the sort of intergovernmental criminal executive relations which is provided in a general manner to be categorized under the executive or sectoral relations forum, the judicial counterpart is explicitly dealt with under the IGR Proclamation.[983] In light of this arrangement, the National Judicial Relations Forum (NJRF) is established which is composed of the Federal Supreme Court President and the State Supreme Court Presidents. The Presidents of the Addis Ababa and Dire Dawa City Courts are not included in the membership composition. With regard to the federal powers delegated to the state courts, it is specified that there is already established and operating justice and judicial consultancy bodies to which the NJRF should complement. Accordingly, the NJRF is entrusted with a range of responsibilities. The activities and duties enumerated in the IGR Proclamation are conducted through deliberations, discussions, consultations, and issuance of directives on some subjects. The common affairs to be carried out by these consultative mechanisms include, but not limited to, the types of service delivered that it should be effective, efficient, accessible, technologically-assisted, and meeting the public satisfaction; the rule of law and

[982] Art.81(4) of the FDRE Constitution
[983] Proclamation No.1231/2021, Art.11-12

justice; the harmonized interpretation of the federal laws at all state levels; the independence and impartiality of the judiciaries; federal matters delegated to the state courts and their administrative matters; issuance of directives on integrated capacity building and other reform programs; and general issues which are targeted at strengthening the justice and judicial systems.

The other form of judicial IGR is implied in the Federal Courts Proclamation in relation to the Plenum of the Federal Courts judges. The Plenum comprises of the Presidents and Vice-Presidents of the Federal Courts, Judges of the Federal Supreme Court, two judges, one woman and one man, from each Federal High Court and Federal First Instance Court, Presidents of Regional Supreme Courts, Presidents of Addis Ababa and Dire Dawa City Courts.[984] As pointed out in the earlier discussion, the Addis Ababa and Dire Dawa City Courts which are excluded from the NJRF are included in the Federal Courts Plenum. But the repealed Federal Courts Proclamation did not incorporate the membership of these Presidents. The Plenum may also comprise other members from various organs of government without no vote in the decision making processes.

With regard to the powers and duties of the Plenum, one could observe the various roles played thereby broadly the administration of justice across the country which includes the one in the regional states. In this regard, the independence and accountability of the judiciary are focused. As a particular improvement of administration of justice in the Federal Courts, the Plenum is empowered to issue directives and pass decisions. The proposal for the reform, amendment, and making of laws are also forwarded to the HPR by the Plenum. The Plenum convenes once in a year. Based on this, it could be difficult to assume the Plenum as an effective and strong platform for intergovernmental judicial relation albeit the involvement and participation of the leaders of the Regional State and City Courts. However, despite the rare convention of the Plenum, the fact that the administration of justice becomes an agenda may be taken as a good trend.

At this juncture, it is important to critically assess the effectiveness and responsiveness of the formal judicial IGR that is dealt with by the IGR Proclamation and the Federal Courts Proclamation. In the first case, the *modus operandi* appears to be more formalistic, headed and administered by its own secretariat, and time-taking from among other things. In the second case, as is understood, its meetings happen once a year which is not too responsive to

[984] Art.42 of the Federal Courts Proclamation (No.1234/2021)

administrative matters of the operation of justice system. Thus, in between the two and as an exceptional circumstance, there should be an arrangement which facilitates the judicial IGR. For example, during the COVID-19 emergency situation, a letter signed by the Federal Supreme Court President was dispatched to the supreme courts of the then nine regional states.[985] A close look at the circular reveals at least three important points in the judicial federalism: (1) It was a command for the closure of courtrooms; (2) It was directly addressed to the Presidents/personal, hence not institutional; (3) As clearly understood from the text of the letter/circular, the order was decided by the Federal Courts leaders which did not include the Regional Supreme Courts Presidents, i.e., it was not participatory at least through various electronic means of communications in order to pass the decision as it was banned to physically gather or convene during the time.

8.4. Conclusion

One of the important elements of the operation of criminal justice in the Ethiopian federal system is the intergovernmental CJS, a system where different yet highly interlinked justice institutions work together in a coordinated, cooperative, harmonious and smooth manner for the effective and efficient delivery of justice for citizens that has a positive impact on the prevalence of peace and security, economic development, and the rule of law. The type of the intergovernmental CJS may be found in the vertical aspect (between the federal and state justice sectors), horizontal aspect (interstate CJS), and intrastate relations. While the formal adoption of IGR in the Ethiopian federal experiment is a recent history which came into existence by a law made by the HPR rather the constitutional incorporation, it has an indirect stipulation for the criminal justice intergovernmental relations probably under the national executive relations forum which does not take into account the unique features of the working system of the criminal justice institutions.

The form of intergovernmental CJS relations may exist in the legislative, executive, and adjudicative aspects. From the legislative point of view, there are some conflicting criminal statutes made by the federal and state governments which in turn call for the discussion and analysis of the supremacy clause which is missing in the Ethiopian constitution. To this end, different approaches have been adopted which gives rise to the constitutionality question. While the Federal Constitution opts for sidestepping the clause, the state constitutions of

[985] A letter dated 2 *sene* 2012, ref no.m/1-6-1/8701, a circular dispatched to the presidents of the Nine regional state supreme court

majority of the regions provide for the supersedence of the federal laws over the state ones if the latter are repugnant to the former. Some federal laws stipulate for the prevalence of the federal laws over the state laws. Executive approach has also been exercised as a way out for the conflict of federal and state laws. What is more, precedents handed down by the Federal and Oromia Cassation divisions towards the supremacy of the federal laws strikingly exacerbate the problems surrounding the resolution of contradictory laws on concurrent powers. The judicial approach to the resolution of the conflict of federal and state laws turns to be confounding given the role of ordinary courts in interpreting the constitutional disputes *versus* the House of Federation. The gist of all of these trends towards the supremacy clause is that they are all unconstitutional practices which should be filled with the amendment or interpretation of the Federal Constitution.

On the other hand, each executive criminal justice sector has more or less intergovernmental relations which are hazily provided for by the federal statutes. While there is a regulatory deficit how the federal and state justice sectors should cooperate, collaborate and coordinate based on clear guiding principles, a close look into the scattered laws demonstrates that the relationship between some of the justice institutions such as the EACC proves a unitary feature. The lack of strong intergovernmental CJS relations on the other hand would result in the ineffectiveness of the justice delivery owing to the absence of smooth working relationships.

As far as intergovernmental judicial relations are concerned, the scope of the cassation power of the federal and state courts over criminal cases, the inter-and intra-jurisdictional conflicts and their resolution mechanisms, the full faith and credit clause, and administrative matters occupy the centre stage of the subject. It is found out, in this regard, that there is a deficit in the legal and institutional mechanisms of regulating such fields. Whilst the federal and state courts share many things in common, the way they should coordinate, collaborate, and cooperated is poorly regulated.

In all justice institutions, the issues of jurisdiction in relation to original/exclusive, concurrent, and delegation powers remain controversial given the dual institutional structure on the one hand and the centralized criminal legislation and policy on the other. This dubiety is compounded by the silence of the laws made by the HPR in the definition of the jurisdiction of the federal justice sectors as to how the federal and state courts apportion jurisdictions over the criminal matters. This trend critically questions the legitimacy of the decentralization of criminal justice administration to the state justice actors. Hence, the finding is that it is decentralized more in a *de facto* system than *de jure*.

PART THREE

SUMMARY, CONCLUSIONS, RECOMMENDATIONS, AND BIBLIOGRAPHY

Chapter Nine

Summary, Conclusions, and Recommendations

9.1. Introduction

This dissertation focuses on the operation of criminal justice system in federal systems as a specific area of study. Hence, the subject of criminal justice has been contemplated from various notions of federalism *viz*. principles and values of federalism, and principles, rationales, and factors that affect the distribution of powers in federal systems in its broadest sense. Approaches adopted by different federal systems to the study of the allocation of criminal matters have also been inquired putting the Ethiopian counterpart at the centre stage of the research. In this chapter, an attempt will be made to provide a summary, concluding remarks and appropriate recommendations under separate sections.

9.2. Summary

Policy fields in general and the subject of criminal justice as a specific area in a federal political governance should be considered within the parameters of attributes and principles of federalism. Federal systems could be classified based on several benchmarks and attributes. For example, they may be classified as dual *versus* integrated/administrative, coming together *versus* holding together, symmetrical *versus* asymmetrical, cooperative *versus* competitive. In all these groups of federal systems, it is important to establish conceptual, philosophical, theoretical and empirical links between federalism and criminal justice administration and how the two concepts interface. At its broadest sense, in this regard, federalism and criminal justice are associated on a myriad of nexuses from the perspective of federalism as a general notion and distribution of powers as a specific attribute thereof. Particularly, values and principles of federalism such as experimentation, local policy innovation, morality, democracy, liberty, mobility, and dual autonomy are some converging concepts.

The task of dividing criminal matters between different orders of government also leads us to the analysis of the conceptual nexuses of the two notions. In light of this interfacing point, how and why powers and responsibilities are assigned to each and/or both levels of government has its impact on the allocation of criminal matters as well. Hence, as powers are not divided haphazardly, considerations need to be given to principles, rationales, and factors that affect the distribution of powers. As such, principles that guide the distribution of powers such as constitutional entrenchment, the subsidiarity principles, democracy, efficiency argument, and finance-follows-function are crucial for the analytical study of the division of criminal matters between federal and state governments in Ethiopia and beyond. The reason why dividing such a mandate is required is also rooted in several grounds which more or less resembles the principles listed herein. Above all and in addition to that, managing and resolving conflicts which arise from the lack of a wise and systematic division of power and resource could be mentioned as a primary rationale of the distribution of authority in general and criminal justice in particular. Emphasizing on the nature of a specific subject matter in relation to the allocation of criminal jurisdiction in its legislative, executive, and adjudicative spheres, whether it characterizes a national or local significance, is very important in minimizing or avoiding an arbitrary division of criminal matters. While the distribution of powers could be affected by various factors, this litmus test of national-local rule of dividing criminal matters plays a pivotal role in locating an appropriate jurisdiction in order to ensure accountability and efficiency in the justice administration.

With this conceptual backdrop, federal systems adopt different approaches to the division of criminal matters between the federal government and the states. Broadly, there are various approaches to the division of criminal matters and police powers which include unitary and centralized approach, an approach in which only one and single system operates nationwide in the criminal justice administration; a dual approach, an alternative model in which criminal justice is organized into federal and state dichotomies; an integrated/administrative model, an approach which confers a legislative mandate to the federal government and the execution to the constituent units; and a blend of these approaches.

Specifically, a comparative survey was made to analyze the approaches to division of criminal matters in the selected federal polities: USA, Germany, and India. While the common ground for the three federations is that there is a systematic approach to the allocation of criminal matters which is embedded in their respective constitutions in relation to legislative, executive, and adjudicative aspects, they adopt different models.

Accordingly, from the US case study, it was explored that the constitution enumerates only few criminal matters to fall under the federal government and leaves the vast majority of criminal and police mandate with the States with the residuary rule. This approach proves that the criminal justice administration in the US federalism is highly devolved by the constitution. As its type of federalism is dual, the devolution of criminal justice in this respect extends to legislative, executive, and adjudicative spheres. Despite this devolution, the federal government made many attempts to centralize criminal justice policy by using its commerce clause. As a result, the Supreme Court, scholars, and *amici curiae* developed three schools of thoughts—doctrinal, normative, and dual sovereignty (autonomy) perspectives respectively, by opposing the unlimited congressional excess of power. The three theories provide different yet related assumptions and premises as to how the power of Congress could be limited and curbed from intruding into the State's self-rule rights. In this vein, the doctrinal school of thought bases its grounds *inter alia* on the formal distribution of powers, the historical antecedents and genesis of the federation, and the intentions of the Founding Fathers. It is also known as the constitutional perspective as the ultimate goal of the Supreme Court is to interpret the provisions thereof from the point of view of many historical facts. The normative school of thought, on the other hand, places more attention on where should criminal justice policy be, as opposed to where it is assigned by the constitution. As such, it critically appraises the locus of the criminal jurisdiction from the utilitarian theory, the accessibility test, democratic principles such as accountability, participation of the people, and efficiency and effectiveness of the criminal justice administration from among other things. The normative perspective also gives more emphasises to the common values and attributes of federalism (the relationship between the federal and state governments) and localism or decentralization (the relationship between the States and their local governments). In either case, it is held that the criminal justice should be devolved and decentralized respectively for the sake of democratic principles. The dual sovereignty (autonomy) school of thought accentuates on the advantages of the presence and disadvantages of the absence of the autonomy principle enshrined by the constitution. From this perspective, the dual autonomy helps the States to retain their inherent constitutional power over the criminal and security matters. In a nutshell, the three schools of thoughts offer various explanations that encourage the devolution of the criminal justice by virtue of the constitutional text and federal spirit.

The German approach to the division of criminal matters follows the same pattern as the whole system in which the federal government makes a law and the Lander execute and adjudicate same hence administrative/integrated federalism. In this integrated model, the aspect of powers is split between the two orders of government. In this vein, the federal government's mandate is limited to the lawmaking and policy formulation, whereas the Lander are limited to the administration of the laws and policies. Hence, from the constitutional point of view, the federal government cannot claim the administrative mandate of their own except on those matters which are expressly mentioned by the Basic Law. Likewise, the Lander cannot claim the legislative power which the federal government is conferred with. As a result, it is unconstitutional for the federal government to exercise an administrative power and the Lander legislative authority. In the regime of criminal justice, thus, the institutions of the Lander are settled to execute and adjudicate criminal laws made by the federal government. Accordingly, there are only few federal justice organs established to enforce the criminal law. Hence, the police, courts, attorney generals, prison administrations which are destined to prevent and investigate crimes, prosecute criminals, sentence the convict and administer prisoners are basically those which belong to the Lander.

Accordingly, the Criminal Code and Criminal Procedure Code are enacted by the federal government and put to be executed by the Lander justice institutions. What is more, the Lander can also make detailed laws over the general and framework laws made by the federal government without rescinding the latter. The principles set out in the Criminal and Criminal Procedure Codes are to be generally accepted and applied by the Lander. In case of gaps and too generality, they could fill it by detailed laws subject to the supremacy of the federal law. Thus, the enforcement of criminal laws by the Lander institutions is their inherent constitutional mandate. From this approach, it could be deduced that while the legislative aspect of the criminal justice is centralized, its administrative sphere (both executive and adjudicative) is devolved. This arrangement might emanate from the homogeneous nature of German people wherein the question of accommodating diverse cleavages is of little or no concern. On the other hand, it should be borne in mind that the centralized legislative and policy mandate is compensated by two major schemes. The first compensatory scheme is the strong participation and role of the second chamber, the *Bundesrat*, in the lawmaking processes at the centre with a decisive veto power on some important matters related to the interests of the Lander. In such an arrangement, an intergovernmental negotiating power of the Lander is high as compared with other federations with low profile role of the second chambers. It also bolsters and enhances the shared rule principle of federalism at the centre. The second one is the fact that, as described above, the administrative mandate is the exclusive power of the Lander in which they could tailor the federal laws to their respective regional and local circumstances. This scheme provides the Lander with an opportunity to make minute laws over the general laws made by the federal government in order to execute the laws made by the latter in their local preferences. Therefore, the role of the Lander is vital and huge in the administration of criminal justice as a direct and inherent mandate. Indirectly, the fact that the Lander take an important part in the central decision making process would enable them to administer the laws smoothly and collaboratively.

The approach adopted by India to the division of criminal matters is quite different from the other two federations mentioned above. In this regard, there are about three approaches to the analysis of the division of criminal matters. Like that of the US counterpart, the approaches appear to have been influenced by the design of the distribution of powers. The first approach is exclusive federal criminal matters which emanates from the exclusive powers of the Union Government over the enumerated subject matters commonly known as the Union List. In light of this approach, the federal government makes criminal statutes regarding offences and concomitant punishments as a means to exercising a regulatory power. There are also few criminal matters which are explicitly granted to the federal government as an exclusive criminal jurisdiction in addition to the regulatory and incidental authority. The second approach which is similar to the first one is an exclusive state criminal jurisdiction which enables them to spell out offences and their penalties over the policy fields enumerated under the State List. The third approach is related with the concurrent assignment of criminal code and criminal procedure code to both federal and state governments. Formally, it could be argued that the criminal justice is constitutionally devolved albeit the centralized nature of the Indian federalism.

At this juncture, it is noteworthy to analyze the approaches to the allocation of criminal matters in the three federal polities from the design of the distribution of powers and concurrency. From the design point of view, the assignment of criminal justice matters is highly influenced by the approach and form of the distribution of powers over general policy fields. In India, the three-common-list-approach seems to authorize both the Union Government and the States to exercise a criminal authority in some respects. Accordingly, as described hereinabove, they have an inherent criminal jurisdiction over subject matters listed under the three lists. In a similar pattern but different design, the US model shows that the constitution enumerates the exclusive powers of the federal government and leaves the rest to the States. Criminal matters also follow suit whereby few offences are listed to fall under the exclusive federal government and the remainder to be reserved to the States by residuary. In

Germany, as the split is made between the legislative and administrative mandates in the general distribution of powers, so is the assignment of criminal authority.

From the perspective of concurrency, the experiences of the three federations prove that criminal authority is concurrently conferred upon the federal government and the states in one way or another. While concurrency as general notion is their commonality, there are some of variations as to how such a concurrency applies in each federal polity. In view of that, the US criminal concurrency of the federal government with the States emanates from the commerce clause. On account of its dual institutional design, the concurrency of criminal matters ends in the legislative power; it does not extend to the executive and adjudicative spheres. As a result, the rule of dualism compels the federal government to enforce its laws made in lieu of concurrency. It cannot force the state institutions to execute its laws unless on some grounds such as spending clause and the consent of the states. Thus, a state criminal law which became a federal one as a result of concurrency would be implemented by the federal agencies which, on the other hand, prohibit concurrency of administration by the anti-commandeering principle. From the top-down approach, although the federal government cannot as a rule force the states to administer (execute and adjudicate) its laws, the state institutions are at liberty to enforce same, from the bottom-up approach. This creates an opportunity for a forum shopping in the judicial concurrency as a litigant can lodge her case before a federal or state court alternatively. This model should be scrutinized very carefully as it has a paramount relevance for the critical analysis of the Ethiopian concurrency of criminal authority in terms of legislation, execution, and adjudication. Thus, the chief justification provided for the US judicial concurrency as a forum shopping over federal criminal laws springs from the logic that the state courts are not explicitly prohibited by the Congress to receive and decide on cases connected therewith. Consequently, cases involving federal criminal statutes continue to be concurrently adjudicated by the federal and state courts until the latter are definitely barred from disposing the cases by Congress. In other words, Congress can prohibit the state courts from disposing such cases. Thus, it should be underscored that concurrency would not rule out the dualism in the US criminal justice administration.

In Germany, a criminal law is enumerated under the explicit list of concurrency. This stipulation has two major implications in the German context of the distribution of powers in general and criminal law as particular subject matter. The first specific implication is that although a criminal law is a concurrent power, the rules of concurrency proves that a predominant discretion is granted to the federal government. Secondly, while the federal government is empowered to make a law, the states are destined to administer same. Hence, the criminal legislative concurrency might be tilted towards the federal government which inherently weakens the self-rule rights of the states albeit they could be compensated by the shared rule and administrative mandate flowing from it. However, there are potential positive windows left for the states that enable them to exercise legislative authority over criminal matters. For example, subject to the federal supremacy clause, economic and legal unity clause, framework clause and other qualifiers embodied in the Basic Law, they could make such laws. The other form of concurrency implied by the Basic Law is the split of legislative and administrative mandates whereby each level of government is empowered to make and administer federal law. Nevertheless, this form of concurrency in such an integrated type of federalism should be considered seriously. An observation from the application of concurrency in many federal systems reveals the form and manifestation of concurrency to the extent of *de facto* concurrency in which the federal government is tacitly given an upper hand which otherwise is an unconstitutional usurpation of power. By this logic, if the federal government continues to use its unlimited power to centralize in the name of concurrency, the administrative power of the states will be diminished and ultimately taken away from them. As a result, in such a concurrency as the split of legislative and administrative spheres of competences should be monitored under the constitutional controlling mechanisms.

In India, both the legislative and administrative mandates of criminal justice are concurrently granted to the federal and state governments. Under the Concurrent List, the power to enact the criminal code and criminal procedure code displays the legislative concurrency. In the same list, the administration of justice, organizing courts except the Supreme Court and High Court, the maintenance of public order, organizing detention centres, jurisdiction and powers of courts with the exception of that of the Supreme Court over matters enumerated in the Concurrent List are the illustration of some administrative mandates in respect of criminal matters which are concurrent. From these propositions, it could be understood that the three aspects of criminal jurisdictions—legislative, executive, and adjudicative spheres—are enumerated in the explicit Concurrent List. Consequently, the administration of criminal justice appears to be so flexible that the State institutions are empowered to administer criminal laws until they become of federal or national importance. Unlike that of the German counterpart, there is no split between the legislative and administrative mandates of criminal justice. Both the legislative and administrative authority in relation to criminal justice is flexible within the concurrency. In the meantime, it is important to note the exceptional circumstance to the federal supremacy clause which provides for the state supremacy subject to different conditions in the regime of concurrency. In the exercise of regional and local affairs, the state law may be preserved within the specific state upon receipt of presidential assent even if it may be repugnant to the federal law. This experience may provide the states with an opportunity to expand local policy innovation in the criminal justice administration

At this juncture, it is crucial to juxtapose the Ethiopian approach to the division of criminal matters within the comparative survey. A closer look at the constitution, laws made to regulate the criminal justice, and practical observations, it could be gleaned that there are three major approaches to the study of criminal jurisdictions under the Ethiopian federal experimentations. These are dual, monist, and progressive dichotomization approaches. The dualist approach also known as the institutional and structural approach to the study of the criminal jurisdiction emphasizes on the dually organized governmental bodies at federal and state levels by the constitution. In light of this approach, the constitution unequivocally establishes the legislative, executive, and judicial organs. The respective powers and functions of each governmental body so established at either level of government are delineated by the constitution. Accordingly, the HPR and State Councils are empowered to make laws over the matters granted to the federal government and the states respectively. The executive powers of the federal and state governments are vested in the Council of Ministers and the regional Administrative Councils respectively. Likewise, the federal and state courts are empowered to exercise judicial powers over the federal and state matters correspondingly. The dualist approach to the assignment of criminal matters would be viewed in this spectrum of institutional design along with their respective mandates in the federal structure. To this end, security and criminal justice institutions such as police, public prosecution, courts, prisons, and ethics and anti-corruption commissions are organized both at federal and state levels.

The problem and shortfall with the dualist or institutionalist approach to the study of the criminal justice administration in Ethiopia is that even though the criminal justice organs are established and organized dually alongside their respective federal-state mandate divides, practice shows that state institutions are settled for administering federal laws, including a criminal law, as their own without having clear delegation from the federal government. This may provoke a question whether such a practice is concurrency or usurpation of power, especially strictly adhering to the principles set out in the constitution.

The second approach is the monist or legislative approach in which the federal government is entrusted with a predominant power of legislation in criminal matters. A close look at the specific provision of the constitution devoted to the criminal legislative power, one could envisage a concurrent power, and for sure it is, given the vast and dynamic spheres and manifestations of concurrency in the realm of the distribution of powers. Thus, it could be questioned as to how and why monist approach instead of concurrent approach to the study of criminal legislative and justice policy in Ethiopia? There are multiple valid justifications to this question for the choice of the former over the latter in this particular thesis.

First, from the design of the constitutional text, it could be readily fathomed that criminal legislative jurisdiction is enumerated under the exclusive powers of the federal government. Second, the constitution grants the federal government the discretion to leave or not to leave some room for the states that overshadows the criminal jurisdiction of the latter. The state power in this respect is grounded in the federal government, not in the constitution, lacking in a constitutional entrenchment. In light of this logic, the federal government can give and take back an opportunity of criminal legislation to and back from the states without any bound. Third, from the perspective of the role of the second chamber and an intergovernmental negotiation at the centre, it is easily observable that the HOF has little or no say in the lawmaking and policy formulation processes which hampers the shared rule which constitutes one of the fundamental attributes of federalism. Hence, as a unicameral parliament, Ethiopia's lawmaking process is known for its centralization including criminal justice policy. Fourth, an empirical study in relation to the exercise of concurrent powers proves that it is tilted towards the federal government which on the other hand favours centralization thereby inhibiting the fundamental principles of federalism such as the self-rule rights.

Fifth, the choice of the monist approach over concurrent one could also be gleaned from the relevant provisions dealing with concurrencies in the constitution in relation to other policy fields. For example, as an explicit form, concurrent power of taxation is stipulated. The framework concurrency as regards the vast areas of economic, social and development matters is spelt out in two major ways. On the one hand, the constitution uses some qualifying terms such as "national standards", "basic policy criteria" and other qualified languages in order to delineate the scope of the federal government. On the other, the same mandate is provided to fall under the state jurisdiction that empowers them to exercise a concurrent power. From the legislative-administrative split concurrency point of view as well, the constitution distinguishes between the legislative power of the federal government and the administrative authority of the states on matters related to land and other natural resources. Moreover, both spheres of mandates are unambiguously specified under the exclusive federal and state powers. Perhaps, in all these forms of concurrency, it may not be easy to foreknow the scope of the respective mandate of the federal and state governments, where one ends and the other begins to arise. While such a dim extent may be distinguished on a case by case basis in constitutional litigations, the bottom line is that concurrencies in these subject matters are unquestionable. However, such qualifications and conditions are not available in the criminal legislative concurrency.

Finally, it was found out that the monist approach has become evident from the doctrinal analysis of the Ethiopian criminal justice policy where the federal government apparently dominates enacting primary and incidental criminal statutes including the comprehensive Criminal Code, unified criminal justice policy, and creeping towards making a unified and centralized criminal procedure and rules of evidence code which should have been the state mandate by the rule of residuary. The constitution makes clear that the federal government is entrusted with enacting a criminal code and other statutes in relation to criminal matters. Its power in this respect does not extend to or include the making authority of the criminal procedure and evidence code. Thus, it is a usurpation of power.

The monist approach is prone to a variety of criticisms in the Ethiopian criminal justice administration viewed from different principles and perspectives. Broadly, the principles and values of federalism such as shared rule and self-rule, experimentation in general and enhancement of local policy innovation by applying local or indigenous knowledge in particular, and morality issues are overlooked. In addition, the principles, rationales and factors that affect the distribution of powers in federal systems such as constitutional entrenchment, the subsidiarity principle, democratic tenets, efficiency, finance-follows-function, homogeneity *versus* heterogeneity of the society, and national *versus* local significance of a subject matter are not taken into consideration.

Specifically, putting the monist approach in the comparative perspective, there are some lessons that could be learned from other federal polities as to how the field of criminal justice is devolved in one way or another systemically. For example, in the US approach, criminal justice belongs to the states with the exception of the few offences exclusively granted to the federal government. However, as Congress centralizes it by using the commerce clause and regulatory pretext, the three schools of thoughts are developed which oppose the centralized criminal justice. These theories are relevant for the Ethiopian counterpart where the criminal justice policy is over centralized. From the doctrinal point of view, jurisdictional questions may be lodged with CCI/HOF for seeking the relative exact power of the federal government by looking closely in the overall provisions of the constitution *vis-à-vis* Art.55(5).

By doing so, it may be tenable to consider other factors such as the design of the overall distribution of powers and historical antecedents in order to analyze the scope of the criminal mandate of the federal government and the states as a counterapproach to the monist one. From the normative school of thought as well, attention should be paid to not the constitutional locus of the criminal authority but where exactly should it fall given various justifications. To this effect, the utilitarian theory is beneficial in order to disentangle the over comprehensive and centralized criminal laws into federal and state dichotomies. In this regard, the values and principles of federalism and democracy play fundamental roles. The dual sovereignty (autonomy) is also a useful theory which has a paramount relevance to the critical evaluation of the monist approach to the stud of criminal jurisdiction. In this regard, one could safely demystify the apparent contradiction designed by the constitution between the autonomy rule and the potential breach of such a rule under the guise of criminal authority. To elaborate more, the constitution divides powers between the federal and state governments with the strict principle of mutual forbearance or comity whereby both tiers of government should respect their powers by restraining themselves from intruding into one another’s mandates. However, this rule is susceptible to violation where the federal government makes criminal laws over matters reserved to the states by the constitution as a result of which the regional autonomy may be imperilled on account of the centralized criminal jurisdiction. In a nutshell, the three US theories in relation to criminal jurisdiction advocate for the devolved criminal justice against the centralized approach which are pertinent for Ethiopia too.

From the concurrent perspective, it is relevant to juxtapose the German and Indian approaches with the Ethiopian counterpart. With regard to the Ethiopian criminal legislative concurrency, it has been described in the above discussion that it is constitutionally and empirically negligible and loose from the side of the states to exercise it along with the federal government. What is more, as will be shortly summarized, the concurrency aspect of the criminal matters is legislative mandate, not the executive and adjudicative one. But in Germany and India, the concurrency of criminal justice is manifested in legislative, executive, and adjudicative spheres. Particularly, the Lander would exercise the administrative power of the criminal justice in addition to the concurrent power they have over enactment of criminal code and criminal procedure code. Their self-rule rights may not be at jeopardy because of the fact that they are compensated by the administrative power on the one hand and the strong and effective role of *Bundesrat* in the lawmaking process at the centre on the other. Thus, it could be argued that the concurrency of criminal justice is in favour of the Lander as much as the federal government. An Indian approach is an interestingly relevant for Ethiopia in many ways. First, the concurrent power of criminal code and criminal procedure code is explicitly provided in the Concurrent List hence constitutionally entrenched albeit subject to some centralizing tendencies. Second, the regulatory approach to the making of criminal statutes follows the Exclusive List whereby the federal and state governments are empowered to make and unmake offences and stipulate consequential punishments over matters exclusively enumerated for them. This approach reinforces the self-rule rights of the states by enabling them to innovate on criminal justice administration over policy fields specifically granted thereto. Thirdly, in order to keep the federal excess at bay, the constitution specifically mentions some criminal matters that are exclusively bestowed on the federal government. All these conditions have the potential of restricting the federal government from monopolizing the criminal justice system.

Above all, the Indian regulatory approach to the criminal authority is immensely relevant for Ethiopia. The states are virtually denied of the criminal authority even over their matters which are constitutionally granted to them due to the monist approach. This question was raised by a member of the Constituent Assembly during the constitutional deliberation. But it was downplayed by asserting that the federal government would be the competent and pertinent level of government that should take over the criminal matters as it is intertwined with the human rights protection which is an implausible argument on some grounds. Moreover, while the criminal legislative and administrative (executive and adjudicative) mandates are concurrent in India, it is only legislative concurrency in Ethiopia based on the dualist approach to the study of the criminal justice. This mismatch of approaches has created a lot of problems in the criminal justice administration under the federal setup.

The third approach to the analysis of criminal jurisdiction in Ethiopia is progressive dichotomization. This approach seems to be a responsive mechanism and middle ground theory to the extreme polar of the dualist-institutionalist approach and the monist-legislative approach to the allocation of criminal authority. In view of this perspective, even though both the federal and state governments have their own justice institutions which are destined to deal with the laws and matters of their respective powers within the constitutional limits, the centralized criminal legislation and justice policy appears to have disrupted the assumption in that the laws made by either government in regulating the jurisdiction of their institutions come up with a different and probably a third approach: a progressively evolving theory. While the dualist and monist approaches are constitutional perspectives, the progressive dichotomization is statutory. It focuses on the approach used by laws made by the federal and state governments in dealing with defining the criminal jurisdiction of their justice institutions.

Accordingly, while the federal justice institutions are constitutionally and legally bound to enforce criminal laws made by the HPR as a general mandate, the statutes which regulate the allocation of criminal jurisdictions among police, public prosecutor, courts, and prisons use qualified terminologies which implicitly divides the hitherto centralized criminal matters into 'federal' and 'state dichotomies. As such, qualifying terms such as 'federal law', 'federal properties', 'federal constitution', 'federal officials and employees', and other similar languages are explicitly used by the laws made by the federal government in the delineation of the criminal jurisdiction of the federal justice agencies. This dichotomization is also evident from the state laws as well. The laws made by the states in this regard use such terms as 'state constitution', 'state law', 'state officials', 'state properties', and other similar expressions.

Particularly, as is grasped from the Federal Police Proclamation, Federal Attorney General Proclamation, Federal Courts Proclamation, Federal Prison Proclamation, and EACC Proclamation, the so called 'federal criminal matters' are provided in general and specific approaches. For example, in view of the general approach, the Federal Police is empowered to prevent and investigate any threat and acts of crime against the Constitution and the constitutional order, security of the government and the state and human rights. By virtue of the specific approach, on the other hand, the power of the Federal Police in relation to prevention and investigation of crimes is limited to such crimes as: counterfeiting currencies and payment instruments; information network and computer system; human trafficking, abduction, trafficking in narcotic and psychotropic substances, hijacking of aircraft or ship, organized robbery, terrorism and violence; crimes committed in foreign countries against the interests of the country based on mutual agreements entered into between the states.

The criminal jurisdiction of the Federal Attorney General is aligned with the jurisdiction of the federal courts. As a result, it is a state of necessity to spell out the jurisdiction of the federal courts. Accordingly, in light of the FCP, two major approaches—general and specific—in a quite similar to that of the preventive and investigative jurisdiction of the Federal Police. By virtue of the general approach, the common [criminal] jurisdiction of the federal courts is based on the cases involving federal constitution, federal laws, and international treaties, parties and places specified in the constitution and federal laws. This approach to the delineation of criminal jurisdiction of federal courts may be problematic especially in relation the cases arising from federal laws, parties and places. This is because from the definition offered to the federal law, criminal law which are enacted by the federal government are included as a result of which cases connected therewith shall fall under the federal courts realm. This mode of interpretation would be self-defeating viewed from the FCP in determining and specifying the criminal jurisdiction in a very narrow manner in the bulk of other criminal cases. Moreover, the word "places" specified in the federal constitution and laws is a vague concept due to its generality. As a specific approach, there are some criminal matters listed in the FCP to fall under the federal courts jurisdiction. In the same fashion, the jurisdiction of the Federal EACC and Prison is also defined in a similar method.

A brief comparative glance of the state laws dealing with the demarcation of the criminal jurisdiction of their own justice institutions demonstrates that they employ both general and specific approaches like that of the federal government's counterpart. Aside the problems and drawbacks of such an arrangement which emanates from the progressive dichotomization, the states define the criminal jurisdiction of their courts, police, prosecutors, EACC, and prisons.

The notion of the vague dichotomies of 'federal criminal matters' and 'state criminal matters' which was implied by the statutes dealing with the jurisdiction of the federal and state justice institutions at either level, appears to have become an explicit approach by the Draft CPREC. The Draft CPREC is intending to delineate the criminal jurisdiction of the federal and state courts in the same pattern with the existing Criminal Procedure Code of the Empire. Essentially, a unified and centralized approach is under way in the allocation of the jurisdiction of the courts which is an antithesis of the federal setup designed by the constitution. The assumption is that the federal government seeks to bring the administration of the criminal justice under its single control. Above all, it is controversial whether the federal government is empowered to make such a unified law in general and enact a codified law on the criminal procedure and evidence rules in particular.

Like that of the dualist and monist approaches, the progressive dichotomization is also defective many ways. First, federal laws which define the criminal jurisdiction of the federal justice organs appear to have committed fallacies in abridging the jurisdictional limit to only few criminal matters. Unless the remaining criminal matters are expressly delegated to state agencies, the approach that limits the jurisdiction of the federal institutions to the meagre criminal matters does not hold as all criminal laws made by the federal government should, in principle, be enforced by the federal organs with the exception of delegation. Moreover, as long as the laws which deal with these matters do not provide for the transfer or delegation of the remaining criminal matters to the states, the question as to how the state justice institutions exercise such a power remains unaddressed.

Second, unlike that of the German counterpart where the federal government cannot claim the administrative mandate of its laws by establishing its institutions in the Lander, the Ethiopian federal government can organize all its institutions in general and that of the justice sectors for the administration of criminal justice in particular in all or some of the states. By doing so, it can take over the responsibility of enforcement of criminal laws from the state institutions. In such a case, it could be logically argued that the administration of criminal justice would ultimately fall under the complete realm of the federal government at the total cost of the states' self-rule rights. Third, despite the question of mandate, the states are exercising the administration of criminal justice. This practice provokes the expenditure issues: whether the states are administering federal criminal justice policy and laws with their budgets and/or the one allocated (if any) from the federal government. The expenditure controversy might spring from the lack of clear delegation clause which entails compensatory budgets. As far as criminal law enforcement is concerned, in order for the states to claim budget from the federal government, it is necessary to first pinpoint which criminal matters are delegated and which are not. This in turn raises the issues of democratic principles such as accountability in case of the breakdown of criminal justice in some states. In order for the federal government to hold states accountable, there should be a clear mandate delegated to the latter.

The other important theme is the criminal justice systems intergovernmental relations. This subject could be considered from a multiple point of views in the administration of criminal justice. Criminal justice, unlike that of the civil and administrative one, operates within the framework of the involvement of some important institutions in which the absence and/or poor performance of one of them would automatically results in the total miscarriage of justice. Thus, delivering an effective and efficient criminal justice to the society needs to be bolstered by strong coordination, cooperation and collaboration among the justice sectors both vertically and horizontally. To this effect, the police, prosecutors, courts, prisons, EACC's, and other relevant justice sectors should have both a horizontal and vertical relations for the improved delivery justice within the federal structure.

An intergovernmental criminal justice system may exist in the form of legislative, executive, and judicial aspects. From the legislative point of view, it was discovered by this study that there are some criminal statutes made by the federal and state governments which are inconsistent and create challenges in the implementation. This compulsorily leads to the question of supremacy clause and its resolution mechanisms under the Ethiopian federal and constitution design. As the Ethiopian Constitution, unlike that of the other federal systems, bypassed the resolution mechanism of the conflict between the federal and state laws over concurrent matters, it was explored by doctrinal and empirical evidences that different approaches have emerged as alternative resolution mechanisms which ultimately boils down to unconstitutional practices in one way or another. Although the Federal Constitution is silent, the state constitutions provide for the implicit supremacy clause. The constitutionality of such an approach could be challenged as the state constitutions cannot be enacted in contradistinction with the Federal counterpart. This argument could be considered within the homogeneity clause stipulated by the Federal constitution. The second approach is the statutory perspective in which some federal statutes provide for the superiority of federal laws over the state ones. Again, from the constitutional point of view, such a power is not given to the federal government so that it can pre-empt the laws made by the states in cases of inconsistencies. It was also discovered that there are circumstances whereby an executive approach was taken to resolve conflicts arising out of the laws enacted by the federal government and the states. As a judicial approach to the supremacy clause, decisions handed down by regular courts in general and that of the Cassation division in particular, at federal and state levels, prove the prevalence of the federal laws over the state ones in cases of inconsistencies. Two points are noteworthy here. One, all these acts and decisions are against the constitution. Two, all of the approaches are in favour of the supremacy of federal laws over the states' which has the potential of diminishing the accommodation of diversity in the federal system. Therefore, the resolution mechanism of the conflict of laws between the federal and state governments lacks an institutional centeredness on the one hand and totally ignores the diversity management on the other.

An intergovernmental criminal justice system from the executive and judicial organs is extremely important in the effective delivery of justice service at federal and state levels. The gap between the dualist approach to an institutional structure and the monist approach to the legislative and policy mandates of the criminal matters could be bridged by strong intergovernmental systems. A formal IGR is a recent history in Ethiopia when the Proclamation to that end was enacted as a gap filling approach to the vacuum that has been marked by the constitution. To important points are worthy of note in relation to the IGR law *vis-à-vis* the criminal justice intergovernmental relations. One, as a new law, its prospects and achievements are yet to be seen. Two, as a general IGR regulation, the specific area of the criminal justice is not visible in the proclamation. As a special policy field that requires many institutions for its accomplishment, criminal justice needs separate institutional and legal mechanisms of intergovernmental CJS both vertically and horizontally: vertically between the federal government and the states, and horizontally between individual states and intrastate relations (intersectoral CJS which also applies to the federal government as well).

On the other hand, it was found out by this study that the federal and state laws dealing the criminal justice systems are not adequate in regulating the intergovernmental CJS relations. For one reason, the provisions which govern the specific IGR are scant and found scattered in various pieces of legislation lacking in a comprehensive policy and strategy. For the other reason, some attempts at regulating the criminal justice IGR are politicized as the composition of the justice forum blends justice and political heads. Such an arrangement may imperil the fundamental principles such as professional independence, impartiality, and neutrality which in turn endangers the rule of law in general and the administration of criminal justice in particular.

In the intergovernmental CJS regulation, the exclusive-concurrency-delegation dilemmas in relation to the jurisdiction of courts should be scrutinized. These concepts are found to be fraught with ambiguities as to which criminal matters could be exercised exclusively and concurrently by federal and/or state courts, and which are delegated. In this vein, it is the constitutional rule that as far as exclusive criminal jurisdiction of courts is concerned, the assumption is that criminal laws made by the federal government are disposed by federal courts, and those made by the state councils are adjudicated by the state courts. It is at this occasion that the issue of delegation comes into picture where the jurisdiction of the Federal High and First Instance Courts is delegated to the State Supreme and High Courts respectively. As this mode of delegation is constitutional form, it cannot be revoked unless with the fulfilment of the requirements set out by the constitution. Such an approach to the delegation of the criminal jurisdiction of federal courts to the state counterparts has got its difficulty in envisaging the legitimacy question of the jurisdiction of the state first instance courts.

The issue of judicial concurrency is also another area of controversy given the constitutional text and empirical scrutiny. The constitution is clear enough in sanctioning the distribution of powers in respect of legislative, executive, and judicial spheres by some basic rules such as mutual respect and constitutional entrenchment. Coupled with the logic of institutional dualism, unless they are delegated by the federal courts, state courts cannot claim mandate over federal criminal matters either exclusively or concurrently. To this effect, the concurrency stipulated in relation judicial power by the constitution depicts a sort of indistinctness *vis-à-vis* delegation; what the caption sets forth differs from the contents of the provisions. Thus, unlike the US counterpart, where state courts can exercise federal criminal matters concurrently with the federal courts because they are not expressly prohibited from doing so by Congress, state courts in Ethiopia are constitutionally barred from exercising federal matters with the exception of delegation. Thus, it was discovered by this study that the general and specific jurisdiction of the federal and state courts over criminal laws made by the federal government *vis-à-vis* exclusivity, concurrency, and/or delegation remains dubious.

9.3. Conclusions

To conclude, there are many critical insights gained from the doctrinal, comparative, and empirical approaches employed by the study and lessons learned from the selected federal polities in relation to the operation of the criminal justice systems in federal political governance. From all these methodological perspectives, the study of criminal justice system under the Ethiopian federal structure lacks a systematic and critical analysis. The subject as a specific policy field has been scarcely researched. Less academic and scholarly attention was given. As a result, some academics and practitioners could hardly distinguish between the operation of the criminal justice between the present federal system and the previous unitary state and centralized governance.

The constitution has also its contribution in obscuring the jurisdictional issues of the criminal justice matters in the federal structure. It grants the federal government with the predominant mandate by making that of the states' dependent upon the discretion of the former. This sort of scheme makes the federal government the giver and taker of power which likens federalism with unitary state system. In other words, the criminal legislative power of the states lacks constitutional entrenchment. The loose form of concurrency implied by the constitution is tilted towards the federal or central domination in many respects. While this constitutional approach is not a problem *per se*, the other fundamental precepts so recognized such as institutional dualism allied with the principles of mutual respect and an entrenchment arising out of the rigid constitution makes the criminal justice administration more difficult. This kind of difficulty is also compounded by the statutory deficits which limits the jurisdiction of the federal justice institutions to few criminal matters on the one hand and keep silent as to the remaining ones on the other. What is more, the state justice sectors are exercising the criminal matters which are omitted from the purview of the federal realm without having any clear mandates. This may logically raise many questions such as legitimacy, democratic principles, budgetary issues, and so forth. As the assignment of power to any level of the government entails accountability *inter alia*, the federal government would be accountable for leaving the criminal laws in the vacuum without clearly transferring same to the states with such mechanisms as delegation.

As it stands, the constitutional mode of the division of criminal matters between the federal and state governments does not take into account the important notions allied with principles and values of federalism in general and that of the distribution of powers in particular. Thus, the one-size-fits-all approach undoubtedly discourages *inter alia* experimental federalism, local policy innovation, efficiency, democracy, the subsidiarity principle, shared rule and self-rule, morality test, and regional autonomy. To this end important lessons could be drawn from other federal polities where criminal justice is devolved in one way or another. Especially, on matters reserved to the states, some federal systems such as India bestow the regulatory spheres of the criminal matters to the states with some exceptions. At any rate, the approaches, theories, and doctrines followed by other federations are more systematic than that of the Ethiopian counterpart in assigning criminal justice mandates on either level of government.

9.4. Recommendations

Based on the findings and conclusions of the study made above, the following policy recommendations could be forwarded.

1) As far as the division of criminal matters is concerned, Art.55(5) of the FDRE Constitution should be amended or interpreted by the HOF in such a way that the state power in this regard should be constitutionally entrenched, not dependent on the discretion of the federal government. The mode of concurrency sought by the constitution should also be conceived of within this spectrum albeit favouring the federal government in most cases. In this vein, other factors and principles and values of federalism and distribution of powers should be considered. Above all, the self-rule rights of the states, local policy innovation, efficiency, democratic principles, the subsidiarity principle, morality, national *versus* local significance of a subject matter, and other related factors should be emphasized in order to avoid or minimize the haphazard approach to the assignment of mandate in the areas of criminal justice administration. By doing so, the centralized criminal justice policy should be devolved to the states.
2) Particularly, the power to enact a criminal procedure and rules of evidence code should be left to the states by virtue of the residual powers. It should not be unified and centralized under the federal government. In doing so, the states should be empowered to define the jurisdiction of their institutions in general and that of the justice sectors in particular.
3) Lessons should be learned from other federal polities as to how criminal matters are divided between the federal government and the states in a systematic way. To this end, the US dual approach, the German integrated approach, and the Indian mixed approach can impart important lessons for Ethiopia in many ways of allocating the criminal jurisdiction in its legislative, executive, and adjudicative spheres. It may be appropriate to choose the best model based on the above mentioned principles and factors and the specific internal contexts of each federations.
4) Form the statutory point of view, the laws made by the federal government mention only few criminal matters to fall under the federal realm for execution and adjudication and bypass the rest. This should be averted sooner or later by transferring the remaining criminal matter to the states through delegation. By securing such kind of valid mandates, the states will be standing on the vantage point where the legitimacy of administering criminal laws made by the federal government is not prone to question and dubieties. It is also useful from the side of the federal government in order for it to escape the accountability entailed from the conferral of the criminal justice policy.

5) There should be a comprehensive, strong and organized intergovernmental criminal justice systems relation to be devised by a joint justice sectors forum which should emphasize on the internal administrative autonomy, professional independence, impartiality and neutrality in the coordination, cooperation and collaboration of the administration of criminal justice both vertically between the federal government and the states, horizontally among the states, and within the intrastate justice institutions.
6) In the intergovernmental legislative criminal justice system, with particular reference to the resolution mechanisms of the conflict of laws made by the federal government and the states, there should be a single institutional centeredness. The multifarious meddling acts in resolving inconsistent federal and state laws from the statutory, executive, or judicial approaches should end sooner. In this respect, either the constitution should be amended to incorporate the supremacy clause or interpreted by the HOF as to which law should prevail and how. By doing so, it is very important to draw lessons from approaches adopted by other federal systems to choose between a categorical federal supremacy, a qualified federal supremacy, an exceptional state supremacy, state supremacy or a case by case basis approach on based on the crucial fundamentals of federalism such as accommodation of diversity and the preservation of unity, and the shared rule and self-rule rights principles.
7) As there is a scholarly deficit in the study of criminal justice systems in the context of the federal political governance in Ethiopia, further researches should be carried out in advancing the conceptualization and theorization of the theme. Compared to other federal systems, the US theoretical development in relation to the criminal jurisdiction *vis-à-vis* federalism is worth paying attention to and drawing lessons. The doctrinal, normative, and dual sovereignty (autonomy) schools of thoughts play crucial roles in the critical analysis for the criminal jurisdiction in Ethiopia. This thesis used a doctrinal research method principally. Thus, prospective researchers are kindly advised to push forward by conducting an empirical research on the field of the criminal justice in federalism.

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