



ADDIS ABABA UNIVERSITY
COLLEGE OF LAW AND GOVERNANCE
CENTER FOR FEDERAL STUDIES

**CRIMINAL LAW AND CAPITAL PUNISHMENT IN FEDERAL
ETHIOPIA; THE CASE OF OROMIA AND SNNPRS**

A Thesis Submitted to Addis Ababa University College of Law and Governance studies Center for Federal Studies in Partial Fulfillment of the Requirements for the Degree of Masters of Art (MA) in Federal Studies.

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Approval

**ADDIS ABABA UNIVERSITY
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DECLARATION

I Yadeta Gizaw, hereby declare that this thesis is original and has never been presented in any other institution. I also declare that any information used has been duly acknowledged.

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This thesis has been submitted for examination with my approval as University supervisor.

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Acronym

MOJ	Ministry of Justice
EPRDF	Ethiopian People’s Republic Democratic Front
FC	Federal Court
FDRE	Federal Democratic Republic of Ethiopia
FHC	Federal High Court
HOF	House of Federation
HPR	House of peoples of Representatives
ONRS	Oromia National Regional State
SC	Supreme Court
SNNP	Southern Nation Nationalities and Peoples
SSC	State Supreme Court
USA	United States of America

Abstract

The thesis looks in to criminal laws and death penalty powers of the regional states in Ethiopia; the case of Oromia and SNNPR State. Principally, the FDRE Constitution has established ethnic based self-governing federal arrangement and incorporates division of Legislative, executive and judicial powers with dual Government structure. This federal arrangement has one major goal, providing the various ethno-national groups - 'Nations, Nationalities and Peoples' - of Ethiopia with the power to govern themselves through self rule and shared rule. Although the constitutional principles and the federal arrangement exemplify such features, the criminal laws power is centralize. Based on this, the main issue addressed in this paper is as whether the regional states are exercising criminal laws legislative, adjudicative and implementation power in general and death penalty in particular. To test this, the writer used descriptive and analytical qualitative technique. Primary data were collected from key informants through interview. Countries constitutions, legal documents and other relevant documents were also used as secondary data. The writer after making serious analysis has reached the Following findings: In the federal arrangement substantive criminal law legislative power is vested with both the federal and Regional States. The regional states power is limited only to matters not specifically covered by federal criminal code or laws. Criminal procedural law legislative power is reserved as residual power for the regional states, however the Federal legislative organ exhaustively define all criminal matters leaving almost no rooms for the regional states and take away the Regional states power and enacted centralized criminal code and laws. Following centralized federal criminal code, normatively speaking criminal laws adjudication and implementation power is also centralized. It is only the federal court and federal criminal law enforcing agencies establishment proclamations that sufficiently define their criminal jurisdiction while the regional states courts and criminal enforcing agencies have no sufficient laws which determine their criminal jurisdiction. However practically criminal laws adjudication and implementation is decentralized, as a result Oromia and SNNPR state courts assume residual criminal jurisdiction. With respect to death penalty implementation the issue is treated differently, although regional states are adjudicating capital crimes, the implementation of death penalty requires the blessing of the central government. It cannot be executed, pardoned or commuted unless the head of the state sign it. Based on the findings, the writer come up with the conclusion that for the real implementation of federalism in criminal justice system, the Federal criminal code should be amended and regional states should exercise their power to determine their own matters by themselves and as such determine state nature crimes and corresponding penalties to adjudicate and implement by themselves.

CHAPTER ONE: INTRODUCTION

1. Introduction

1.2 Back ground

Federal system is characterized by the existence of two or more tiers of governments in which the power between them is constitutionally divided. The overthrow of the military regime of Ethiopia in 1991 by a coalition of rebel forces brought a drastic change in the political system of the country as a result of which Ethiopia established a federal form of government creating largely ethnic-based territorial units. With the seizure of power by the ruling EPRDF (Ethiopian People's Revolutionary Democratic Forces) the Ethiopian state has radically been reorganized from a Unitarian to ethnic federal state. The principal aim of the new federal arrangement is to provide the various ethno-national groups - 'Nations, Nationalities and Peoples' - of Ethiopia with the power to govern themselves while at the same time maintain the unity of the country through a mechanism of shared rule.

According to the current constitution Ethiopia has 9(nine) constituent units or states, these are Tigray, Afar, Amhara, Oromia, and Somali, southern Nations, Nationalities and People's region or SNNP; Gambella; Benshangul/Gumuz and Harari and these constituting units are autonomous having self rule power on their individual interest¹. One of the unique features of federalism is the power division between the central government and the constituting units which is set by the constitution.

The United States federal system has influenced many other federal systems so much so that the techniques for dividing powers between the federal and state governments in Ethiopia are very similar to that of the United States constitution.² In USA each constituent unit has its own constitution and the state governmental structures are closely parallel to that of the federal government with separate executive, legislative and judicial branches. Essentially, each state is a sovereign entity, inherently free to promulgate and enforce laws and policies that pertain exclusively to that state. State authority is limited under the federal constitution only to the extent that the relevant authority has been delegated to it by the federal government. The power of state government extends to nearly all aspects of the regulation of matters internal to the state, such as

¹ Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Negarit Gazeta Year 1.No.1. (Hereinafter cited as FDRE Constitution), Article 47(1)

² Assefa Fiseha, federalism, teaching materials prepared under the Sponsorship of Justice and Legal System of Research Institute (2009) p;7

the establishment and maintenance of state courts, prisons and correctional institutions; the regulation of industries, businesses and so forth.³

FDRE constitution also classifies the power of the federal government and the power of the regional government, in which case the federal government power is enumerated under article 51 of the constitution where as art. 52 of the constitution leave all residual power and certain listed power to the regional governments. As per article 52 of the constitution each state is free to enact and execute the state constitution and other laws, to formulate and execute economic, social and development policies and strategies, to establish and administer a state police force, and to maintain public order and peace within the state and so forth.

The doctrine of distribution of powers, criminal matters or laws, being one aspect thereof, should be considered in Federalism. In many Federations criminal laws power distribution is not treated differently in their constitution but in Ethiopia it is differently treated under the constitution. Article 55(5) of the constitution vests the HPR to enact the penal code and the regional states may, however enact criminal laws on matters that are not specifically covered by the federal legislation.

Basing on this different approach of the constitution, practically the Federal law making organ (HPR) centralized the criminal laws by statutory laws like for instance by the criminal code. Normatively speaking following the centralized legislative criminal power the adjudication and implementation of the criminal laws is also centralized. In principle federal laws including federal criminal laws should be adjudicated and implemented by federal courts and federal law enforcing agencies and vice versa for regions if there is any.

However practically criminal laws adjudication and implementations are exercised by both the Federal and regional unit's courts and criminal enforcing agencies but there is no adequate law which sufficiently governs how the regional unit's criminal justice sectors execute federal criminal laws. As a result of which criminal punishments are imposed by both regional and FCs, also implemented by both federal and regional executive agencies like the police, public prosecutors and prison administration. However unlike all other penalties all death penalty issues are centralized. The penalties can only be executed if and only if it is confirmed by the head of State, whether the punishment is imposed by the federal or regional courts. It can only be pardoned or commuted in to life imprisonment by the head of State. Different approach are

³ <http://www1.umn.edu.humanrts/cat/cat-reports2000.html>, accessed at September 2014

evident in criminal law making, adjudicating and implementation powers, in some instance the regional states exercise some power while in other it is fully centralized by the central law making authority.

The establishment and administration of the police force and prison institution as criminal enforcing agencies are vital in criminal justice system. Article 52(2)(g) of FDRE constitution clearly empowers the regional states the power to establish and administer their own police force for maintaining law and order within their respective territories. This means that the state police have the power to investigate crimes limited under their jurisdiction and co-operate with the Federal Police, if necessary.

However there is no clear constitutional provision as to whether the establishment and administration of prison institution is the power of the regional states or not, but some argues that establishment and administration of prison institution is also part and parcel of the establishment of police force and at the same time it is the power of the regional states. With this regard even though there is no clear constitutional provision there are laws or proclamations enacted both by the federal government and regional governments for the establishment and administration of prisons.

For example Proclamation 365/2003, proclamation for establishment of federal prison commission sets the power and function of the federal prison commission. This proclamation stipulates among other things the relationship between the federal and regional prison commissions. It obliges the management council of the federal prison commission to make efforts towards good relations between the commission and regional prison commissions.⁴

Under Ethiopian legal system administration of prisoners among other things includes execution of penalty which can range from simple imprisonment to death penalty⁵. Among execution of other penalties, execution of death penalty is vital one. On the other hand not only execution of death penalty but also the power to determine mode of execution of the penalty is also the main function of prison administration. According to article 117(3) the mode of execution of the punishment is not determined by the law but it is left for the desecration of the federal and

⁴ Federal Prisons Commission Establishment Proclamation No. 365/2003, Federal Negarit Gazeta, 9th year no. 90, Art.10

⁵ The Criminal Code of the Federal Democratic Republic of Ethiopia, proclamation No.414/2004, 9th of may, 2005, articles 106,108 and 117

regional prison administrative organs. However, no regulation of that nature has ever been issued both by regional state and federal government.

The regional governments remain to be silent with this regard, so in this thesis the power of the regional states with regard to establishment and administration of prison institution and the reasons/causes why the regional states failed to execute and determine mode of execution of capital punishment are analyzed.

On the other hand according to some legal scholars capital punishment by its nature is cruel and inhuman and many philosophers have been worried about the purpose of punishment whether it serves its aim or whether it is severe by itself. Because of this fact, arguments are very hot about the abolishment of capital punishment. Some countries have practically abolished death penalty from their legal system; Ethiopia's record of execution level of death penalty, particularly since the coming into power in 1991 of the current regime, illustrates that capital punishment has been practically abolished particularly by the regional states though there is no clear and settled policy exist to that effect.⁶ In the last 20 years, although many death penalties have been ruled by the courts throughout the country, only three were implemented by the federal prison commission and no regional state has executed a single capital punishment since its establishment which created disparity with the federal experience as a result of federal restructuring.

Beyond the cruelty of the punishment, delay of execution of the penalty is also subject to controversies and the non execution and delay of execution of the penalty raises an issue that, how criminals on the death row are handled and treated in prison institution until the execution is carried out. With this regard according to article 118 of the criminal code the treatment of criminals on the death row awaiting confirmation and execution of the death sentence should be under the same condition of prisoners serving sentence of rigorous imprisonment.

Similarly there have been a number of cases in which delays in carrying out sentence of death has been described as 'unacceptable' and the condemned person has brought proceedings based on a claim that, because of the inordinate delay, the execution of the sentence would amount to cruel and inhuman punishment and, as such, would be unconstitutional under the ground of psychological sufferings.

For instance in *Zimbabwe v Attorney-General* it was decided that the execution of death penalty on four criminals after 52 and 72 months was declared to be unconstitutional. According to the

⁶ <http://www.addisstandard.com/death-penalty>, accessed on September 2014

Ethiopian criminal code execution of death penalty, sentence shall be carried out without any cruelties, mutilations or other physical suffering. According to this stipulation any physical suffering in execution of the sentence is clearly prohibited. For example, the penalty cannot be executed by hanging because such method is cruel or it involves physical suffering⁷.

In USA the issue is controversial and subject of discussion among legal scholars and even among judges. The Supreme Court has not yet accepted any case based on the length of an inmate's death row tenure, but some judges of the Supreme Court are arguing and dissenting their idea on many judgments that the excessive time prisoners on the death row spent should be considered as cruel and unusual punishment under the Eighth Amendment of the constitution.⁸

Beyond the legal argument and controversies, there is also important issue under Ethiopian federal set up to describe the power of House of Federation and constitutional interpretation commissions of the regional states to see and determine unconstitutionality of such issues. And finally, if the penalty can be declared unconstitutional can the house of federation or regional constitutional interpretation commission who is empowered to declare unconstitutionality of any government's organs decision substitute the penalty with life imprisonment is also another important area that require analysis.

1.3 Statement of the problem

Even though Ethiopia is federal country in which power is constitutionally divided between the central and regional states to exercise both self rule and shared rule powers, however practically the current criminal law in general and DP execution in particular is centralized and power is concentrated at the central government. According to article 55(5) of the constitution the HPR have a power to enact the penal code and the regional states may, however enact criminal laws on matters that are not specifically covered by the federal legislation. Basing on this constitutional provision the Federal law making organ (HPR) enacted a centralized or federalized criminal laws leaving almost no room for the regional states.

Normatively speaking not only criminal law legislative but also criminal adjudication and implementation power is also centralized. However, practically speaking criminal laws adjudication and implementations are exercised by both the Federal and regional unit's courts

⁷ Dajene Girma Janka, Handbook on Ethiopian criminal law 2005, pp 174-176

⁸ Thompson v. Mcneil, US Suprem court, No. 08-7369, March 9, 2009, available at http://www.cdcr.ca.gov/Capital_Punishment/docs/ accessed on September 2014

and criminal enforcing Agencies. As a result of which criminal punishments are imposed by both regional and FCs and also implemented by both federal and regional executive Agencies. Like criminal law making power of the central government which is centralized, all DP implementation issues are also centralized. The penalties can only be executed if and only if it is confirmed by the head of State, whether the punishment is imposed by the federal or regional courts, whether the prisoners are detained in the federal or regional prisons. It can only be pardoned or commuted in to life imprisonment by the head of State whether the punishment is imposed by the Federal or regional state courts. Basing on this fact there is practical discrepancy between the regional states and the federal government in executing DP in which case the federal government has executed the punishment of 3 prisoners while the regional states has uniformly failed to execute capital punishment since 1991 of their establishment. So in this thesis the writer identified and analyzed the constitutional and statutory power of the regional states to legislate, adjudicate and implement federal criminal laws in general and DP in particular.

Similarly, according to article 52(2)(g) of FDRE constitution the regional states have also power to establish and administer their own police force for maintaining law and order within their respective territories. However there is no clear constitutional provision as to whether the regional states have constitutional power to establish and administer their own prison institution. So this study also analyzed and identified this issue.

With regard to mode of execution of DP the current criminal code is silent about mode of execution of capital punishment and it gives the power to determine mode of execution for federal and regional prison administrators, but practically there is no any rule that has been issued by the regional states and federal prison commission. So the study further indentified the practice of the regional states with this respect too.

In recent years, there have been a number of cases in which delays in carrying out sentence of death has been described as ‘unacceptable’ and unconstitutional. Therefore, if the execution of death sentence is to be human and constitutional, it should be executed in reasonable period. The reasonable period is not something defined but left for the discretion of subjective judgments. However such period can neither be too long nor too short. So if delay of execution of death sentence can be declared as unconstitutional or prisoners are to bring compliant, whose power to determine such issue is another important point that are analyzed.

1.4 Research questions

- 1.4.1 Are criminal laws power, including those deserving death penalty conferred to the federal government under FDRE constitution?, to what extent the regional states have power to enact their own criminal laws?
- 1.4.2 Is the Head of state power to confirm, pardon and commute all death penalty decisions compatible with Ethiopian federalism and FDRE constitution?
- 1.4.3 Do the regional states have constitutional power to establish prison institutions?
- 1.4.4 Do regional states have power to implement death penalty? And what reasons and causes are triggering factors not to execute capital punishment?
- 1.4.5 What are practical differences between the federal prison commissions and regional state prison administration with respect to execution of capital punishment?

1.5 Objectives

1.5.1 General objectives

Although the current criminal code is centralized, it is observable that the regional states are adjudicating and implementing criminal laws including death penalty. As a result there are many prisoners of DP in custody. So the main objective of this research is to identify and describe the criminal laws power and practice of capital punishment in Oromia and SNNPR states in relation to the federal practice.

1.5.2 Specific objectives

- i. To asses and identify the constitutional power of regional states to legislate, adjudicate and implement criminal laws in general and capital crimes in particular,
- ii. To asses and identify the constitutional power of regional states with regard to establishment and administration of prison institutions.
- iii. To asses and analyze the influence of centralized criminal code on implementation of DP by the regional states.
- iv. To asses and identify the reasons why the regional states failed to execute capital punishment and determine mode of execution of the penalty,

- v. To describe whether the reasons for the non execution between the regional states have disparity,
- vi. To asses and identify the practical disparity between the federal prison institution and regional states prison administration,
- vii. To explain and analyze whose power to declare unconstitutionality of delay of execution of capital punishment and whether such organ has a power to substitute the penalty in to life imprisonment

1.6 RESEARCH METHODOLOGY

The study is descriptive and analytical; the analysis is made using qualitative technique. It tried to analyze the constitutional frame work with practical problem under study.

1.7 Data Sources

For the study both primary and secondary data are used. There are different published and unpublished sources available regarding the problem under study. The secondary source of data used are different graduation thesis which directly focus on the topic, and other published legal instruments these are, FDRE constitution, Oromia, and SNNP regional state constitutions, prison and police establishment proclamations and all other related legal instruments. In addition other secondary data include books, journals, electronic materials and other publications. The primary data used are interview and personal observation. Personal observations were conducted into those selected prisons of the two regional states. Interviews were gathered from research participants, these are prison and Justice Bureau authorities of the Oromia National Regional State, SNNPRS prison and Justice Bureau authorities, Federal prison commission authorities and ministry of Justice pardon board office and from Federalism scholars. The primary data sources have been collected as shown in the table below.

Table 1.1 Sample Area and Sample of respondents

Key informant	Sample Areas and Sample Size of Key Informant						
	Federal Prison Administration	Mr of Justice	Regional Prison commission		Regional Justice Bureau		AAU, center for federal studies
	-	-	Oromia Prison Commission	SNNPRS Prison Commission	Oromia Justice Bureau	SNNPRS Justice Bureau	AAU Federalism scholars
Sample responders	2	1	2	2	2	3	2
Total	3		4		5		2

1.8 Significance of the study

Since 1995 of federal restructuring the federal government has enacted federal criminal laws with the exception of some of the regional states that tried to define regional criminal offences. As a result of which criminal laws adjudication and implementation power of the regional states are not clearly legalized. This brings about the implementation of criminal penalties including death penalty problematic. The theme of this study gains importance in light of the increase, in recent years, in the numbers of prisoners of DP awaiting confirmation and execution of capital punishment. So it primarily identified the criminal laws legislative, adjudicative and implementation power of the regional states and the reasons that hinder the regional states not to carry out execution of capital punishment and provided information what available measures has to be taken with this respect. The study also advances the researchers, students, judges and regional sates executive organs particularly prison administrations. Further, the paper contributes

to the existing studies on the Ethiopian federal experience, making a practical analysis. It also suggest the feedback remedies to the regional government organs and to the Head of State either to make rules and regulation to determine the organ that must handle the issue and mode of execution of the penalty to put in to effect the punishment imposed or to let policies will be adopted to practically abolish the penalty from the legal system. It also gives information to criminals on the death row spending extra time to bring an action for nullification of the punishment. Finally the study can serve as a stepping stone for further and in-depth studies for researchers, experts, judges, policy designers even law practitioners, to further deepen the study on similar topics to come up with constructive conclusions and recommendations enabling the maintenance of Ethiopian federalism and legal system.

1.9 Scope and limitation of the study

The study is all about the criminal justice system and practice of execution of capital punishment in Ethiopian federal set up with focus to some selected regional states. Member states of the federal democratic republic of Ethiopian are 9(nine) in number these are, Tigray, Afar, Amhara, Oromia, and Somali, southern Nations, Nationalities and People's region or SNNP; Gambella; Benshangul/Gumuz and Harari (FDRE constitution) but the study only covered two of the regional states these are Oromia and southern Nations, Nationalities and People's region or SNNPR. Even though it was good to assess the practical problem of criminal law power and reasons of all regional states for the non execution of the death penalty because of time and resource the study is limited to these 2(two) regions. The two regional states are purposely selected by the researcher because of their population size and relatively have high prisoners serving sentence of DP. So the study covered regional prison commissions of the regional state under study. Based on this fact from oromia regional state regional prison commission and from SNNPRS regional prison commissions were selected. On the other hand the study was not covered and aimed at to make any legal analysis but only focus on the constitutional and political aspect of the issue, to identify how much the regional states are capable and autonomous to exercise their constitutional power under the federal set up.

1.10 Organization of the Paper

This paper is organized in to four chapters, bibliography and appendixes. Chapter one provides an introduction and background of the study. Chapter two offers conceptual framework of Federalism, Criminal Justice System and Capital Punishment. It outlines the meaning and

definition of federalism as well as the concept of criminal justice system in general context. It further dealt with Criminal law making and implementation power of regional states in different federations. Mostly, here the attention is given to the general overview of capital punishment implementation of some countries. Chapter three highlights Federalism, criminal Justice system and Execution of capital punishment in Ethiopian in general and in study area in particular. It has tried to review Ethiopian federalism from the perspectives of Historical and Ideological background of the present federal system. Under this chapter the writer importantly, explores the concept and the legal framework of the power of regional states to implement criminal laws in general and execution of capital punishment in particular. It has been tried to assess the Constitutional and relevant domestic legal instruments so as to test the legal base, and scope of capital punishment execution in Ethiopia. Finally, it has been also examined the practice of capital punishment execution in Oromia and SNNPRS regional states so as to understand the divergence and convergence between the regional states and with the Central government. The chapter also emphasizes the government institutional remedy to safeguard the violation of human right in light of principle of Federalism. Chapter four provides the concluding remarks along with major findings and recommendations. At the end bibliography and appendixes have also provided.

2. CHAPTER TWO: CONCEPTUAL FRAMEWORK; Federalism, Criminal Justice System and Capital Punishment

This chapter summarizes the general concept of federalism and criminal justice system. In the first section, the meaning of federalism and criminal justice system has been pointed out. In the second section, criminal law enforcement and prosecutorial power has been analyzed. The third section has made to explain the power of establishing and administration of prison institution and execution of capital punishment in federations. Generally, the purpose of this chapter is to provide a highlight on federalism, criminal justice system and execution of capital punishment, so as to understand how the Ethiopian criminal justice system, particularly capital punishment is conceptualized and operationalized in Ethiopian federal system.

2.1 The meaning of federalism and criminal law enforcement

The concept of federalism is a broad concept like other political concepts and it has different meaning for different scholars. The term *federalism* is derived from the Latin root *foedus*, which means "formal agreement or covenant." Daniel Elazar has described the concept of federalism as existence of constitutional power division between two or more orders of government combining element of shared rule for certain specified common interest and regional self rule for constituent regional states of government for other specified individual interest.⁹

Scott W. Allard also describes Federalism as a concept of political system which allows division of power between the national (central) and local or regional governments. It allows multiple or two or more level of governments with their own jurisdiction. Federalism "units smaller polities in an overarching political system by distributing power among general and constituent government in a manner designed to protect the existence and authority of both."¹⁰

Another American political scientist William Riker also defined federalism as a political organization in which the activities of government are divided between regional states and a central government in such a way that each kind of government has some activities on which it makes final decisions¹¹.

⁹ Daniel Elazar, Exploring federalism, published by university of Alabama, 2006 p;5

¹⁰ Scott W. Allard, The Relevance of Intergovernmental Policy and Intergovernmental Relationships to Public Administration July, 2002, p;3

¹¹ Riker W. Federalism, Handbook of Political Science: Governmental Institutions and Processes, eds. Fred I. Greenstein and Nelson W. Polsby (Reading, MA: Addison-Wesley, 1975), pp. 98).

One of the basic feature of all federations which differentiate federalism from other form of government for example from unitary is the existence of at least two orders of government, one for the whole federation and the other for the regional states, each acting directly on its citizens. The constituting units have their own executive, legislative and judicial organ through which their self rule power is exercised where as the Central government also has the same structure.

Older forms of federalism assume that each order of government has the capacity to function as such, including, at least, the capacity to make and administer law.

The implication of this assumption for present purposes is that not only legislative powers, but also executive and judicial powers must be allocated under the constitutional arrangements¹². Some federations allocate or divide only legislative authority while others allocate Legislative, executive, judicial and financial powers. It is considered essential for governments to possess the executive and judicial authority and the financial resources to implement the function within their legislative competence.¹³ Some consider the absence of legislative and judicial institution at two level of government as unions than federal¹⁴.

Maxwell A. Cameron and Tulia G. Falleti point out that federalism has three dimensions that can be conceptually disaggregated, First, the vertical division of executive power, all federal systems vertically divide executive power and thereby create sub-national executives and is classified as executive federalism. Second, the horizontal separation of a sub-national legislature creates legislative federalism. Nearly all federal systems create sub-national legislatures as well as executives, because a constituent unit of a federation that could not pass its own laws would be a constitutional nullity. Third, judicial federalism refers to the creation of regional courts. A regional government that could not interpret and enforce its own legislation would be legally and politically reliant on the independence of the central judiciary¹⁵. Regional states are considered as sovereign when they make, interpret and enforce their own laws by their own law making and enforcing agencies. Regional states should be allowed to make their own laws based on their local preferences and execute their laws by their agents.

¹² Cheryl Saunders, Constitutional Arrangements of Federal Systems, *Publius*, Vol. 25, No. 2. (Spring, 1995), pp. 61-79.).

¹³ *Supra* note 2, p;272

¹⁴ Maxwell A. Cameron and Tulia G. Falleti Federalism and the Subnational, Separation of Powers, University of British Columbia and University of Pennsylvania *Publius*/Spring 2005, volume 35 issue 2 p;263

¹⁵ *Ibid* p;248

Historically before 19th century the maintenance of public order was perceived as a strictly local affair¹⁶. The responsibility for ensuring peace within the community fell upon the shoulders of ordinary citizens who shared similar beliefs and values and who could be relied upon to enforce those societal norms that were most closely associated with the prevailing moral and ethical values. In the early 19th Century, however, this system increasingly challenged by the social, demographic, and economic developments and was replaced, to a great extent, by advances in the development of a formalized process of law.¹⁷ Law enforcement system began to evolve as a result of the introduction of a political and legal framework and after institutionalization of law enforcement.

In the beginning, however, the responsibility for maintaining order hardly concerned the Central government. Criminal activity was relatively unsophisticated and largely confined in place. Crime, by definition, remained a local phenomenon - local in origin, local in its characteristics, and local in its effects - and the highly decentralized nature in which the administration of justice took form as a result reflected this state of affairs.¹⁸

Increased federal involvement in local law enforcement activity has clearly reduced the autonomy that the states had once enjoyed in tailoring their responses to local crime control issues. Federalism became one among a growing number of factors that were employed to determine the best uses and proper limits of federal power.

Scholars have highlighted that federalism questions often are or should be about localism as much as they are about state power and there are important differences in how those laws are made and enforced. Law enforcement at state and local level has its own political meaning for the local community. 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 central government and the regional states and their localities). 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

¹⁶ G. Jack Bengtson, Jr *Partners in crime: Federal crime control policy and the States, 1894 – 1938*, A Dissertation Submitted to the Graduate College of Bowling Green State University in partial fulfillment of the requirements for the degree of Doctor of Philosophy, December 2006, p;21

¹⁷ *Ibid* p;19

¹⁸ *Ibid* p;20

Indeed, as Richard Briffault has noted, the ‘intellectual case for federalism’ often converges with the case for decentralization, or localism.¹⁹

Based on this fact, any attempt to consolidate or expand federal authority was regarded with deep suspicion and hotly opposed on the ground that the expansion of federal power risked undermining the strength of local democratic processes. There was reason for concern because the responsibility for enforcement involved a system of law that acknowledged and conformed to local standards and characteristics.²⁰ Local officials were perceived as being not only more responsive to local problems and values, but also more accountable for their decisions, policies, and actions. Federal influence and direction on the other hand seriously weakening the local ties or community focus characteristic of state Legislatures, courts, police and other criminal justice agencies²¹.

Normally the controversial issue is the highly federalization of crimes which traditionally handled by states and not those crimes which are federal in nature.

Transnational and international crimes are among the triggering factor of criminal law centralization or federalization. There is definitely a vital federal role in interstate and international crime. Only the federal government can handle crime under those circumstances, and its involvement does take care of the mobility problem.

Historically state’s jurisdiction is tied foremost to a piece of geographic territory. Accordingly, a state un-controversially had the general authority to prescribe, adjudicate, and enforce its laws within its own borders. This classical sovereignty model affirms the state’s “monopoly” of power within its borders and reveals the traditional paradigm of prescriptive jurisdiction as exclusively territorial. But currently both national and international jurisdictional rules have evolved to account for the growing reality that crime is no longer strictly local, and presently provide for the extraterritorial extension of criminal law to foreign actors abroad and in federation beyond the

¹⁹ Richard Briffault, “What About the ‘Ism’?” Normative and Formal Concerns in Contemporary Federalism, cited by Rachel E. Barkow, federalism and criminal law: what the feds can learn from the states, *Michigan Law Review* [Vol. 109:519 , p;538,

²⁰ Supra note 16, p;9

²¹ Ibid

territory of state where the state has some objective interest in protecting itself against their potentially harmful acts.²²

The evolution of crime as an inter-jurisdictional acts changed jurisdictional rules, which began eroding the rigid territorial paradigm. This is true both of jurisdictional rules among the several states (the U.S. states), and of jurisdictional norms of international law among the world's nation-states. Both bodies of rules presently provide for *extra*-territorial jurisdiction, and indeed correspond rather neatly in important respects.

U.S. states have, for the most part, abandoned the restrictive common law approach to territoriality and have adopted statutes, based largely on the Model Penal Code, that enlarge the concept of territoriality roughly to encompass conduct within the state that leads to or is intended to lead to a harmful result outside the state, as well as to conduct occurring outside the state that leads to or is intended to lead to a harmful result inside the state. Likewise Universal jurisdiction on international crimes empowers states to have universal jurisdiction which does not rely on a territorial or national nexus to the act or actors over which a state claims legal authority. The very commission of certain “universal crimes” engenders jurisdiction for all states, irrespective of where the crime occurred or which state's nationals were involved.²³

At present, this category of crime is generally considered to include piracy, slavery, genocide, and crimes against humanity, war crimes, torture, and certain acts of terrorism.

Most of these international crimes are punishable with DP as a result of which in federations such crimes are federal crimes. Most federal nature crimes are capital crimes which are punishable with DP. It can be argued that in most federations most DP crimes are federal crimes and states have no as such power on crimes punishable with death penalty. With the exception of some federal countries like Nigeria in which minor crimes entail DP based on Sharia laws.

Federalism also reflects diversity, to increase the likelihood of innovation and experimentation, and to engage in the kind of competition that constrains governmental behavior. Justice Kennedy observed, the idea of federalism is that a National Legislature enacts laws, which bind the people as individuals, not as citizens of a State; and, it follows, freedom is most secure if the people themselves, not the States as intermediaries, hold their federal legislators to account for the

²² Anthony J. Colangelo, Constitutional Limits on, Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law, Harvard international law journal, Volume 48, Number 1, Winter 2007, p;129

²³ Ibid , p;130

conduct of their office.²⁴ Among different legislations criminal law legislation and its enforcement power division in federations is the most controversial issue. Federalism has its own benefit in criminal law system, even though some of the benefits are undercut by the federalization of criminal laws in the countries for example like USA. There are at least three benefits of a federal system: (1) The division of powers between separate governments preserves individual liberty; (2) Local decision makers are more likely than centralized ones to be attuned to local concerns and responsive to the local electorate; and (3) The states, because they may approach problems differently, may serve as "laboratories of experimentation" that help identify the most effective laws²⁵.

In USA for example many states have recently expressed that there has been a steady decline in the protection of human rights by federal government. State courts have expanded the liberties and rights of individuals by utilizing the constitutional rights that are granted on the state level. Judicial federalism has enabled them maintain their approach towards criminal justice.

The manner in which federations have been created is equally important in determining whether more power has to be devolved to the states or not including criminal law making and implementation power. Some scholars argue that federations come about in two ways, either through the aggregation of independent states or the devolution of power to sub-national units. Stein Rokkan and Derek U. Urwin call these processes organic and mechanical federalism²⁶. Similarly, Daniel Weinstock names them –federal integration and federal restructuring²⁷. In contrast, federal restructuring or mechanical federalism refers to devolutionary processes that lead to the federalisation of a once unitary political system.²⁸

²⁴ Richard W. Garnett, *cornell law review* vol. 89 issue 1 nov, 2003, *The New Federalism, the Spending Power, and Federal Criminal Law*, p;21

²⁵ Michael A. Simons, *prosecutorial discretion and prosecution guidelines: A case study in controlling Federalization* *New York University Law Review* vol 75;893 p;908

²⁶Burris 2001; Duchacek 1970; Weinstock 2001). Stein Rokkan and Derek U. Urwin (1982: 11). Cited by Keller, Edmond J. *federalism, federation and ethnic conflict; concept and theories*, PDF accessed on December 2014, www.openaccess.leidanuniv, p;27

²⁷ Daniel Weinstock 2001: 75-83 , Cited by Keller, Edmond J. *federalism, federation and ethnic conflict; concept and theories*, PDF accessed on December 2014, www.openaccess.leidanuniv, p;27

²⁸ *Ibid* p;27

Riker assumes that every longstanding federation, democratic or not, is the result of a bargain whereby previously sovereign polities agree to give up part of their sovereignty in order to pool their resources to increase their collective security.²⁹

Another scholar Alfred Stepan proposed three types of federalism based on the ways through which federations have been formed. He called Federations that came about as the result of a federal bargain *coming-together federalism*. On the other hand federations that emerge from a completely different historical and political logic are *holding-together federalism*. And then there is what he calls "putting-together" federalism, which created through a heavily coercive effort by a nondemocratic centralizing power to put together a multinational state, some of the components of which had previously been independent states.³⁰ Mehari pointed out that holding-together federalism necessitates the empowerment of the constituent unit of the federation. It divides sovereignty among the constituent regional states. Conversely, in 'coming-together federalism', the member states unite to establish a union/state by sharing part of their sovereignty with the federal union/state³¹.

The United States, Switzerland, and Australia are examples of closest to the pure model of a largely voluntary bargain units that "come together" to pool their sovereignty while retaining their individual identities. At the other end India, Belgium, and Spain are examples of "holding-together" federalism.³² There is ongoing debate among scholars with respect to federal genesis of Ethiopia.

Andreas argues that although Ethiopian federalism was born in the wake of a long standing unitary state, the constitutional principles governing federalism exemplify features coming-together federalism. His assertion is based on the fact that the ethnic communities and their political representatives were free to assume power to reconstruct a shared political power after the military regime or the unitary state had ceased to exist and it was in the absence of the

²⁹ Alfred Stepan, *Federalism and Democracy: Beyond the U.S. Model*, journal of democracy 10.4 (1999) p;22, available at <http://www.catedras.fsoc.uba.ar/deluca>, accessed on January 2015

³⁰ Alfred Stepan, journal of Democracy vol. 10 no 4, National Endowment for Democracy and Johns Hopkins University press (1999), p;28

³¹ Mehari Taddale Maru, *Devolution of Power in Ethiopia: The Legal and Political Aspects*, An Abridgment of papers on, Federalism, Diversity, Migration and Devolution of Power, Submitted to the University of Oxford and Harvard University, Presented to Public Discussion Forum for Political Parties Organized By *African Initiatives for a Democratic World Order*, March 2008, United Nations Conference Center, Addis Ababa, p;9

³² Supra note 2

unitary state or after it ceased to have its legitimacy that the ethnic community newly reconstructed through the agreement and free will of ethnic communities to join the political community.³³ On the other hand many other scholars argue that Ethiopian federalism is holding-together federalism. Keller has described Ethiopia as a ‘putting together’ federation, following Alfred Stepan’s distinction of ‘holding together’ and ‘coming together’ federations.³⁴

Those who argues that Ethiopian federalism is not coming together federalism bases their argument on the fact that the nine regional states had no independent existence prior to the formation of the federation rather they devolved as a means to ensure self rule autonomy to the ethnic groups.

Assefa Fiseha, on his part observes taking both lines as most favorable alternative to reach sound conclusion. As per this perspective, therefore, the genesis of Ethiopian federalism falls somewhere in between, and it is difficult to stick to any of the above perspective³⁵.

In holding together federalism power is devolved to the states. Likewise criminal law justice system which includes criminal law making, adjudication and implementation power must rest on the states. In Ethiopian the devolution of power to the states were the necessary factor for the newly establishment of the federal system which should not be compromised at any cost. Federalization of state nature crime is against such top down principles of power sharing. While the current criminal law of Ethiopia define almost all crimes as federal crime without leaving any room for the regional states. So currently all crimes that are punishable with death are federal crimes yet the adjudication and implementation of such crimes are practically left under the jurisdiction of both federal and state courts.

2.2 Criminal law making and implementation power in federations

In federal system criminal law legislative power of federal and regional governments are different. Likewise the manner in which the federal governments execute their laws throughout the territory is also different, some federal systems rely on their dual structure that is, federal and

³³ Andereas Eshete, Ethiopian journal of federal studies, center for federal studies, Addis Ababa university, Vol.1, No.1 June 2013,p;89

³⁴ Keller 2002, cited by Marijke Frank, Summer Institute Guadalajara 2009, *Ethnicity, Diversity and Democracy*, EDG Project, Effects of Ethnic Federalism in Ethiopia. Holding Together or Splitting Apart? PDF p;10

³⁵ Assefa 2013, cited by Misganaw Addis, practice of self-government in the southern nations nationalities and peoples’ regional state: the case of segen area peoples’ zone, unpublished thesis, Addis Ababa university college of law and governance studies centre for federal studies, p;17

regional structure to execute their own laws, while others relies on regional machinery for the implementation of federal laws³⁶. For example in German the federal government is predominantly responsible for legislating most of the laws while the Regions are responsible for implementing such laws and described as ‘executive federalism’.³⁷ The Länder have the right to legislate in all areas which are not vested solely in the Federation by the Basic Law. Federal and regional powers sometimes overlap in areas such as justice, social welfare, civil law, criminal law, labour law and economic law. The Länder have their exclusive legislative powers with regard to culture, education, universities, local authority matters and the police.³⁸ Criminal law legislative power is concurrent power of both the federal and the Lander according to article 72 of the Basic Law. It states that, the Lander shall have power to legislate so long as and to the extent that the federation has not exercised its legislative power by enacting a law. The Lander can only enact criminal Law if the federal government has not exhausted the criminal legislative area.³⁹

The administrative role of the Länder is defined in Art. 83 of the Basic Law, which confers upon them both the right and the duty to ‘execute federal statutes as matters of their own concern in so far as this Basic Law does not otherwise provide or permit’.⁴⁰ Articles 84 and 85 Basic Law differentiates in this field between administrative functions to be performed by the Länder ‘as matters of their own concern and other matters in which ‘the Länder execute federal statutes as agents of the Federation.’⁴¹

The basic principle is that the *Länder* shall implement federal legislation as matters of their own concern, as long as the Basic Law does not provide otherwise. The opposite is strictly forbidden; the federation is not allowed to carry out any state law. Therefore, direct federal executive powers are very limited and provided for only in areas in which unified administration is considered to be essential.⁴²

³⁶ Supra note 2, p;352

³⁷ <http://extranet.cor.europa.eu/divisionpowers/countries/MembersLP/Germany>, accessed on October 2014

³⁸ Ibid

³⁹ Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 11 July 2012 (Federal Law Gazette I article 72

⁴⁰ Ibid

⁴¹ Ibid article 84 and 85

⁴² Ibid

However the federal government still has the means to influence the *Länder* in their execution of federal laws. It may regulate *Land* agencies that administer federal laws. It may also confine *Land* administrative discretion by issuing administrative guidelines, and may issue by-laws that bind third parties as well. There may be federal supervision to ensure that the *Länder* carry out federal laws and federal observers can be dispatched to state agencies for this purpose.

Finally, there can be an intermediate form of administration in which the *Länder* enforce federal laws as “agents” of the federation, subject to binding federal instructions. The Swiss federalism, like its German counterpart, is also characterized by executive federalism. A consequence of which is that the issues in which the cantons are free to legislate are quite few and have been diminishing compared to earlier times as a result cantons have no power to prosecute civil law, contract law and criminal law⁴³.

Contrary to the American and other systems of dual federalism, the Cantons implement federal law (i.e., administrative federalism). Consequently, the federal administration is rather small in size and would not be capable of executing federal law by itself. While federal law binds the Cantons in terms of how they implement it, the Confederation must leave them as much leeway as possible and must shoulder the financial burden as well as take into account the particularities of each Canton (Article 46).

Swiss federalism has followed the European concept of administrative federalism. Law of the European Union (EU) implementation requires special rules. The European law relates to both the spheres of competences of the federation and of the states. It concerns federal as well as provincial jurisdiction. For Example the Austrian constitution provides special orders for the implementation and it is possible that for the adaptation to directives, ten bills (one by the federal parliament, nine by the provincial parliaments) have to be passed. About one third of the provincial statutes (wholly or in part) are passed in order to implement European law.

The states are bound to take all necessary measures within their autonomous sphere of competence to implement juridical acts within the framework of European integration. If a state fails to do so, the European Court of Justice of First Instance has to declare the dilatoriness.⁴⁴

⁴³ Supra note 2, p;329

⁴⁴ Martin F. Polaschek, Implementation of International and Supranational Law by Sub-national Units, Work Sessions 3 and 15, 15, published by the forum of federations, available at www.forumfed.org, retrieved on 13/1/2015, PDF p;295

Similarly in Swiss it is chiefly the responsibility of the Cantons to enforce federal law within cantonal territories.⁴⁵ Legislative and implementation power of criminal law is a shared power and not exclusively vested with neither of the two. Criminal law and criminal procedure were mainly cantonal until 1942. Since 1942, cantonal criminal codes have been replaced by a new federal criminal law. For a long time cantonal courts decided on criminal procedures on the basis of cantonal statutes. With the constitutional amendment of 2000, the federation has been granted the power to issue legislation on criminal procedure.⁴⁶ In addition civil procedure, which remained cantonal laws, has recently been transferred to federal power by the new constitution.⁴⁷ This statute has been adopted by the parliament but it can only be enforced when the new authorities (e.g. for investigation) provided for in this new procedural law are in place. The proposal for this legislation on criminal justice authorities is currently in parliament. But every canton still has its own criminal code of procedure, since 1 April 2003, the new art. 123 par. 1 of the Federal Constitution is in force which grants—among others—the competence of legislation in the field of criminal procedure law to the federation. Even The cantons are responsible for public order within their territory in peacetime as there is no federal police force and federal criminal case is investigated by the cantons in which the cantons are simply executing federal criminal law⁴⁸.

On the contrary in dual federalism like the United States federation, the national and state governments act independently of each other. As a result the national government takes care of its enumerated powers and the states independently take care of their reserved powers. In such federation the allocation of executive authority is in principle considered co-extensive with the distribution of legislative responsibilities. So that not only legislative but also executive, financial and judicial powers are divided between the federal government and the states so that each will act autonomously⁴⁹.

⁴⁵ Thomas Fleiner, Distribution of Powers and Responsibilities in Federal Countries, Global Dialogue on Federalism Forum of Federations – www.forumfed.org McGill-Queens University Press – www.mqup.ca Swiss confederation,p;10, accessed on October 2014

⁴⁶ Thomas Fleiner, the current situation of federalism in Switzerland, REAF, núm. 9, October 2009, p. 51-90

⁴⁷ Ibid p;329

⁴⁸ Supra note 2, p;329

⁴⁹ Assefa Fiseha: teaching materials of federalism prepared under the Sponsorship of Justice and Legal System of Research Institute 359, At the time the constitution of USA was adopted and even after that the principle of dual federalism that the founder of the constitution thought the national and state

Compared to the executive federalism scheme of the German and Swiss federations, in the United States it is difficult to imagine that Congress would ever trust the states to enforce federal laws. The federal (i.e., national) government and each of the fifty states has independent authority to enact criminal codes applicable within the territorial reach of its legislative powers. Each also has the authority to enforce those criminal laws through its own criminal justice process- that is, through its own criminal justice agencies and its own laws of criminal procedure.⁵⁰

The usual reason federal laws are enacted is that the states have proved unwilling to tackle the problem. The same political pressure that produced legislative reluctance is, therefore, likely to trigger delay in the execution of such laws.⁵¹

In USA, the term "federalization" usually describes the legislative process of enacting federal criminal laws that cover conduct that is already criminal under state law. In some important ways, this conception of federalization is unduly narrow. Unlike Swiss and Germany because US is common law legal system Congress is not the only participant in the process of extending federal law to cover conduct usually prosecuted by states-prosecutors and judges also play important roles in that process.⁵²

The increase of federalization of crime is considered by different scholars as affecting the very essence of federalism itself and looked from different perspectives. Some complain that federalization offends the basic principles of federalism and division of governmental powers that underlie the Constitution. The Constitution does not authorize Congress to involve itself in crime fighting. It specifically authorizes only a few categories of criminal laws, all of which involve uniquely federal concerns.⁵³

governments act independently to create, finance, and implement policies to fulfill their distinct constitutional responsibilities. However several realities account for today's intergovernmental relations, the complex networks of national, state, and local governments' collaborative efforts—in domestic policy matters are issues at hand. Unless the policies made by the national government are implemented at all state level which requires the co-operation of all in such instance is one challenge which go against dual federalism. Knowing that they can benefit from federal grants, state and local governments perpetually lobby national policy makers in hopes of influencing the policies they will have to implement.

⁵⁰ Aderajew Teklu and Kedir Mohammed Ethiopian Criminal Procedure, Teaching Material, Prepared under the Sponsorship of Justice and Legal System Research Institute, March, 2009, Addis Ababa, p;26

⁵¹ Ibid

⁵² Supra note 25, p;895

⁵³ David B. Kopel, The Expanding Federal Police Power, Cato handbook for Congress, p183

Others claim that federalization has caused a workload crisis that threatens both the character and the quality of the federal courts. Still others argue that overlapping federal and state criminal jurisdiction creates an arbitrary lottery, with the losers ending up in FC. Because the federal court penalties are believed to be crueler than the states. Beale, notes numerous cases in which defendants prosecuted in federal court were sentenced ten or even twenty times more severely than comparable defendants prosecuted in state court.⁵⁴

The federal judiciary was one of the first institutions to offer critical commentary on federalization of criminal law in USA. The court decided the case of *United States v. Lopez*, which invalidated a congressional statute that made it a federal crime to carry a firearm within one thousand feet of a school as a challenge against federalization of crime. The Court disagreed with the government's claim that the statute was a proper exercise of the Commerce Clause power under the constitution. However the cases did not stop Congress from its relentless push to pass new criminal laws. In view of this it is perhaps worth exploring the experience of the United States Supreme Court in interpreting the commerce clause, although it is far from settled as to whether the commerce clause is concurrent or exclusive federal power.

The commerce clause is one of the most debated and contested clauses of the US Constitution. The *commerce clause* is both the chief source of Congressional regulatory power justifying virtually all of its economic regulations and more controversially a limitation. With the wide interpretation given to the commerce power by the Court this power became the source of the federal government's extensive power to regulate the economic life of the country, to deal with national economic problems, to prevent or restrict disfavoured local activities and to restrict the states from interfering with the flow of trade and traffic over state boundaries⁵⁵.

The Constitution of USA enumerates only four types of federal crimes: counterfeiting, piracy and felonies on the high seas, offenses against the law of nations, and treason.⁵⁶ Article I, section 8, clause 10 of the constitution empower the congress to define and punish piracies and felonies committed on the high seas, and offences against the law of the nation. The high seas clause cases primarily arise out of the maritime drug law enforcement Act and more recently out of the Drug Trafficking Vessel Interdiction Act. Early on the lower federal appellate court concluded that congress's power to define

⁵⁴ Supra note 25, p;896

⁵⁵ Supra note 2, p;308

⁵⁶ David B. Kopel, The Expanding Federal Police Power, Cato Handbook for Congress, p183

and punish piracies and felonies committed on the high seas, and offences against the law of nations vested it with authority to enact Martine Drug Law Enforcement Act.⁵⁷

The court's understanding of the law of nations clause in the case *United States v Bellainzac-Hurtado* leaves congress with little discretion to define and punish the crime. The court in this case decided that the congressional authority under the law of nations clause did not extend to a prohibition of drug trafficking within the territorial waters of another nation. The court decided that an offence is punishable under the clause only if it is contrary to customary international law, and the issue is or drug trafficking was not recognized as contrary to customary international law when the law of nations clause was drafted⁵⁸.

Ever since the Nation's birth, however, the federal government has criminalized a range of other activities that directly threaten the interests of the federal government a large number of federal criminal statutes were enacted to fill the void, covering "extortion, kidnapping, bank robbery, theft, kickbacks, racketeering, and firearms possession."⁵⁹

Much of the federal criminal legislation enacted in the last century, and especially within the past forty years, covers conduct previously addressed exclusively by state authorities. There are different arguments why the congress is making more and more federal criminal laws that traditionally have been handled by states. Some conclude that the driving factors in federalizing criminal laws in USA were, the unwillingness of the states (despite their ability) to prosecute offenses against minorities and the inability of the states (despite their willingness) to prosecute multistate offenses.

Creating a new federal crime provides an easy and attention-getting way for federal politicians to appear "tough on crime." From a public choice perspective, interest group support for new criminal legislation often makes federalization irresistible to federal lawmakers. Moreover, Congress can create new federal crimes without appropriating any specific money for enforcement, thereby avoiding the hard political choices attending the allocation of scarce resources.

The Department of Justice claims to be sensitive to federalization concerns, and claim the relative scarcity of federal crime-fighting resources; Department Of Justice simply cannot assume primary responsibility for the vast array of ordinary crimes that occupy state and local

⁵⁷ Charles Donly, senior specialist in American Public Law, congressional Authority to Enact Criminal Law; An Examination of Selected Recent Cases, prepared for members and committees of Congress, march 27, 2013, p;15-16

⁵⁸ Ibid p;16

⁵⁹ Jennifer Johnson Criminal Justice Agencies: Insulated or Cooperative?, The Carrington Rand Journal of Social Sciences, June 2014, Vol. 1, No. 2, 059-063.p;88

law enforcement agencies⁶⁰. However currently 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 or not.

In Nigeria criminal law making power of states is similar to that of the United States of America. The power to make criminal law belongs to both the federal and state governments. The Constitution of the Federal Republic of Nigeria 1999 regulates the distribution of legislative business between the National Assembly, which has power to make laws for the Federation and the House of Assembly for each State of the Federation.

Normally the constitution does not clearly provide the criminal jurisdiction of the federal government and state. However it provides for the criminal legislative power under the incident and supplementary matters clause and as such the federal government can enact criminal law on exclusive and concurrent list and the states can enact on the concurrent list⁶¹. The current legislation in force at the federal level is largely contained in the Laws of the Federation of Nigeria 1990⁶². The federal criminal laws are applicable in southern states with the exception of Lagos, most criminal offences fall under the jurisdiction of the states.

Criminal laws vary from state to state across Nigeria, thirty-six states in total. Each state has its own set of laws, which define individual crimes and punishments within the territory of the state. Twelve northern states have incorporated Shariah law into their penal laws. Shariah courts operate alongside courts in the common law system. The DP is predominantly a state issue, and state-level amendments can greatly impact the scope of the DP.⁶³

There are criminal law provisions which prescribe mandatory DP for a wide range of offenses. Additionally, under Shariah law, the retributive DP for killing applies in every case, precluding judicial discretion without the consent of the victim's relatives.⁶⁴ There are many mandatory death penalties in Nigeria including for minor crimes which is different from state to states. For

⁶⁰ *Supra* note 25, *p*:956

⁶¹ The constitution of the federation of Nigeria, 1960, legislative list; part I-Exclusive List, par.44, part II concurrent List par.28

⁶² <http://www.Nigeria-law.org/LFNMainPage.htm>, accessed on October 2014

⁶³ Human Rights Watch, "Political Shariah" Human Rights and Islamic Law in northern Nigeria, p. 13, Vol. 16, No.9, Sep. 2004.

⁶⁴ <http://www.deathpenaltyworldwide.org/country-search-post.cfm%3Fcountry%3DNigeria>, accessed on January 2015

Example in states applying Shariah law, rape committed by a married person carries the mandatory DP by stoning under demanding evidentiary showings.⁶⁵

Indian federalism is known for the differential loading and varied arrangement of power division. Canada, Brazil, and United States are examples of largely dualistic federations; Germany, Austria, South Africa, and Spain follow the interlocking model. India has strong features of both.⁶⁶ In India power is divided between the federal government and the union. The seventh schedule of the constitution broadly divides and distributes competencies, treating states on equal bases.⁶⁷ Both at the federal and state levels, legislative authority emanate from the constitution. The executive authority of federal and state has been made co-extensive with legislative competence.

The legislative power is vested with the Union Parliament and the state legislatures and the law-making functions are divided into the Union List, State List and Concurrent List in the Indian Constitution. The Union Parliament alone can make laws under the Union list and the state legislatures alone can make laws under the State list, whereas both the Parliament and the State Legislatures are empowered to make laws on the subjects mentioned in the Concurrent List of the Constitution. The concurrent powers include criminal law and procedure, civil procedure, marriage and divorce laws.

Under the Constitution, criminal jurisdiction belongs concurrently to the central government and the governments of all the states⁶⁸. At the national level, two major criminal codes, the Indian Penal Code, 1861 and the Code of Criminal Procedure, 1973, deal with all substantive crimes and their punishments, and the criminal procedure respectively to be followed by the criminal justice agencies. The concurrent list contains items that enable the union to undertake measures of social reforming, economic planning and growth. Union law has priority over any state law in

⁶⁵ Ibid

⁶⁶ Federalism an introduction, dividing powers;-Who does what and how? PDF, available at <http://www.forumfed.org/en/federalism> P;22, accessed on October 2014

⁶⁷ Kum Aravelu Chockalingam, Measures for crime victims in the Indian Criminal Justice System, the 144th international senior seminar, visiting experts' papers, resource material series no.81, p;98

⁶⁸ A Global dialogue on federalism, volume 2, distribution of powers and responsibilities in federal countries, edited by Akhtar Majeed, Ronald L. Watts, and Douglas M.Brown, p; 164-167 published for Forum of Federations and international association of center for federal studies. McGill-Queens University Press Monteria and Kingston London. Ithaca 2005, p;74

the event of conflict between the two.⁶⁹ A law made by parliament that applies in any state may confer powers and impose duties up on the state or its officers and authorities. All major offences are defined in the Indian Penal Code. Besides the Indian Penal Code, many special laws have also been enacted to tackle new crimes. Art. 245 provide the territorial extent and limit to the laws made by the federal and the state governments.

The federal laws have extraterritorial jurisdiction but state laws are limited to the state territory.⁷⁰ For the execution of the criminal law the Indian constitution sets up a federal judiciary consisting only of the Supreme Court without any inferior courts in the federal judicial system. There is a single integrated system of courts for the union as well as the states that enforce and interpret both the Union and state laws and at the head of the entire system stands the Supreme Court of India. Below the Supreme Court stand the high court's of the different states and under the high court's there is a hierarchy of other courts which are referred to in the constitution as subordinate courts: courts subordinate to and under the control of the high courts⁷¹.

India retains capital punishment for a number of serious offences. The Indian Supreme Court has allowed the DP to be carried out in only 4 instances since 1995. However, the scope of the DP according to the law has actually expanded over time. For instance, new anti-terrorist legislation since the 1990s has included the DP.

In January and February 2014, the Indian Supreme Court emphasized the importance of the clemency process for capital inmates and commuted a total of 22 death sentences.

The constitution, under Article 72 and 161, provides both the president of the country and the governors of the state have been given prerogative power to grant pardon including capital punishment.⁷²

The Supreme Court reasoned that undue, inordinate, and unreasonable delay in considering mercy petitions constitutes torture. The Court stated that pursuant to Article 32 of the Constitution, the Supreme Court has the power to commute death sentences into life imprisonment upon undue delay in disposal of mercy petitions.⁷³

⁶⁹ Kum Aravelu Chockalingam, Measures for Crime victims in the Indian Criminal Justice System, the 144th international senior seminar visiting experts' papers, resource material series No.81, p;98

⁷⁰ The constitution of India, Article 245

⁷¹ Assefa Fiseha, federalism, teaching materials prepared under the Sponsorship of Justice and Legal System of Research Institute, 2009 p;442

⁷² Article 72 and 161 the Indian constitution

⁷³ Ibid

In addition, the court determined that the government must carry out post-mortem examinations of executed prisoners to provide the courts with data on the cause of death, which will allow for consideration of whether hanging constitutes cruel and inhuman punishment.⁷⁴ After 8 years without executions, India carried out two executions in close succession in November 2012 and February 2013. Both prisoners had been convicted of taking part in terrorist attacks.⁷⁵

2.3 Prosecutorial power of Regional states in criminal law justice system

The allocation of criminal law making power is limited to legislative power where as criminal law enforcement requires the existence of judicial and executive institutions. In dual federations like USA the responsibilities and powers of the federal government and the state governments are distinctly separated. So that national government and the state governments share powers and responsibilities in a horizontal fashion. As a result of which the state governments exercise powers without any interference from the national government.

In criminal justice system the power of the prosecutor at both level of government is vital. Prosecution is one of the main activities done in the criminal justice process. It includes decision to prosecute or discontinue prosecution, ordering further investigation and preliminary hearing.⁷⁶

In USA Federal prosecutors focus on the cases they bring, not on the ones they do not. Because primary law enforcement responsibility rests with the states, state prosecutors are blamed for under enforcement, not federal prosecutors.

Similarly, federal prosecutors do not concern themselves as much with how their selection of cases affects a community. They do not have an obligation to fix local problems, and they are not directly accountable to those communities. The federal government's enforcement decisions therefore largely ignore the day-to-day realities of local communities.⁷⁷

Rachel E. Barkow, describe that, despite some counter-trends that have helped prosecutors retain discretion in local offices, it is accurate to describe federal criminal prosecution today as, overall,

⁷⁴ <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=India> accessed on January 2015

⁷⁵ Ibid

⁷⁶ Aderajew Teklu and Kedir Mohammed Ethiopian Criminal Procedure, Teaching Material, Prepared under the Sponsorship of Justice and Legal System Research Institute, March, 2009, Addis Ababa, p:2

⁷⁷ Rachel E. Barkow, Federalism and Criminal Law: what the Feds can learn from the States, Michigan law review Vol. 109:519), p:536

more centralized than in previous decades.⁷⁸ In contemporary trend the centralization of criminal law enforcement is not limited between the federal and states, there exist centralization tendency of prosecutorial power within the federal government.

The Department of Justice in Washington (main justice) has a power to control the charging and plea decision of federal prosecutors. It has issued a series of directives how a federal criminal case has to be charged against individual and corporations. For example federal prosecutors need approval or notice the main justice in deciding whether or not to seek the DP in death eligible cases.

U.S. attorneys and federal judges in a district are also more likely than Main Justice to take into account the attitudes and values of local juries in making their decisions. Thus, to the extent Main Justice takes on a decision-making role for itself or orders a particular standard that disregards local jury preferences, that too has the effect of stripping local communities of some of their law enforcement power.

In Germany criminal prosecution power is fundamentally the duty of the state public prosecution office. The offices are hierarchically structured as independent organs of the administration of criminal justice. It is established with parallel to the judicial power at both states and federal level. State Judicial Power lies with the individual *Bundesländ* and there are independent *Land public prosecution offices* in each *Bundesland*. Federal prosecutorial power is vested with federal prosecutor office with limited criminal jurisdiction⁷⁹.

The territorial competence of public prosecutors is governed by the territorial jurisdiction of the court where the public prosecution office has been established: The Federal Public Prosecution Office exists parallel to the FC of Justice. The federal government is only responsible for the five supreme courts of appeal and the Federal Constitutional Court.⁸⁰

On the one hand, the Federal Public Prosecution Office performs the classical functions of a “public prosecution office at the Federal Court of Justice”, i.e. it represents the prosecution in all cases that come before that court: on the other hand, the Federal Public Prosecution Office also act in cases of first-instance jurisdiction of the Higher Regional Courts of the Courts

⁷⁸ Ibid

⁷⁹ Eberhard Siegismund, The Public Prosecution office in Germany : Legal Status, Functions and Organization, 120TH International Senior seminar visiting experts' papers, p;60

⁸⁰ Hans-Peter Schneider, the Federal Republic of Germany, international association of center for federal studies, p;7

constitutional act, i.e. particularly in cases of crimes against the state and of terrorist crimes as well as in other cases involving serious crime that goes beyond individual *Länder* borders.⁸¹ This means, for instance, that the intervention of the Federal Public Prosecutor General was called for on an exceptional scale after the events of 11 September 2001 in New York.⁸² Crime of terrorism as international crimes is federal crime which directly requires the involvement of the federal government.

2.4 Prison institution and criminal justice system in federations

Normally, criminal law is drafted in such a way that it is possible for a common man to understand what is permitted and what is prohibited because there is a possibility of going to jail (prison) whether federal or state if mistake is made.

Thus, Prison is one of the most recognized institutions where the wrongdoers are detained as punishment. Safety and a sense of security are the most important things for the survival of any society. Society prohibits certain activities which disturb its security. Society prohibits such activities basing on the general conscience of the society, which is found in the values and norms.⁸³ However, the state or the society declares only certain selected acts for punishment as a crime. State is the empowered organ to prohibit and punish such wrongs which affect the interest of the public including the individual victims and the state can take a direct action against the wrong-doer. This is possible only when there is fully operative and effective criminal justice system, which is strong enough to deal with the violators of the law.

The presumption inherent in criminal law is that if the punishment is sufficiently harsh, persons who might do something criminal are prevented from doing so because they fear punishment. If enough people fear punishment, there will be considerable reduction in criminal activity.⁸⁴ So prisons are designed to achieve or implement this purpose of punishment and only release prisoners to the society up on accomplishment of this purpose as a result of which a good citizen will be produced.

⁸¹ Ibid

⁸² Ibid

⁸³ Mrs. Glory Nirmala K. and Ato Serkaddis Zegeye Ethiopian Criminal law I, Teaching Material, Prepared under the Sponsorship of Justice and Legal System Research Institute, March, 2009, Addis Ababa, P;9

⁸⁴ Ibid

Different authors defined Prison differently. For instance: “Imam Amidi M. Zuberi” defined the term ‘prison’ as: A public building used as a house of convicted criminals and accused persons remanded in custody and waiting trial; or it is any place of confinement; or it is a jail, penitentiary, place of reformatory,⁸⁵

Alexander L. Bednar also defined prison as, any Correctional Institution or any penal or correctional facility, jail, reformatory, detention center, halfway house, or residential community program operated by, or under contract to, a state, a territory, a political subdivision, of a state or territory, for the confinement or rehabilitation of persons charged with or convicted of a criminal offense or other persons held in lawful custody.⁸⁶

Prisons are needed to support important public safety and the criminal justice system goals. It is a place where purpose of punishment is assumed to be achieved. It is used as a sentencing option to incapacitate offenders (so they cannot commit future crimes in the community), to deter offenders (to deter the individual offender from committing more crime and to use the example of incarceration to deter others from committing crime), for rehabilitation (so offenders are less likely to offend again upon release), and retribution (to punish offenders for past misconduct).

In federations the establishment of prison institutions and correctional institutions are vital like all other criminal justice system institutions. But not all federated countries have a legal concept of federal prison. In most federations both the central and regional states have their own prison and correctional institutions while in other the power remains with national government only. In most Federations State and federal corrections enforce separate laws and have their own law enforcement agencies and facilities.

Location and type of crime are the determining factors in whether issues are handled by state or federal corrections. In USA State corrections deal with crimes committed at the state level. Unlike federal corrections these crimes are only committed in one state and have no connection to the federal government or its agents. The role of the state police varies for each state. State police usually handle serious crimes such as murder but their roles and jurisdiction vary by location⁸⁷.

⁸⁵ Imam Amidi M. Zuberi, march 31,2001, Being in Prison-Right or Wrong “Dedicated to Prisoners World Wide”, P.1

⁸⁶ Alexander L. Bednar, (2003), ‘Prisoners’ Right to Healthcare’ page, 1.

⁸⁷ Nancy La Vigne Julie Samuels, The Growth & Increasing Cost of the Federal Prison System: Drivers and Potential Solutions, December 2012, urban institute policy center, p;3

In Canada Federal prisons are used for convicts sentenced to longer terms of imprisonment, the correctional service of Canada operates federal prisons, which house inmates with sentences of two years or more; provincial prisons are responsible for those with shorter terms. In Brazil federal prison is used for those inmates who considered dangerous.

In Australia there are no federal prisons. The Directors of Public Prosecutions are responsible for all criminal offenders, whether the charges are state or federal. However, federal prosecution takes place in the territory of the crime committed as the FCs have no jurisdiction. The offender, if convicted, will be sentenced to the correctional facility closest to the state territory⁸⁸.

In Germany there is no federal law governs penal administration although there is only one Federal Penal Code governing the entire country. Each one of the German states has jealously guarded its independence in penal affairs. Each of the several states or "lands" of Germany has sole jurisdiction over its prisons⁸⁹. So the power to establish and administer prison institution belongs to the federal states though governed by a federal law.

In Nigeria the states has no independent power to run, maintain or supervise the prison institutions across the nation. The prison service is by law under the supervision and control of the Federal Ministry of the Interior and Civil Defense, Fire, Immigration and Prisons Services Board (CDFIPB). No state equally has the power to establish any form of correctional institution, as penal-related matters are still in the exclusive list of the Laws of the Federation. But the irony is that while the federal government possesses and controls prisons, detainees and convicts come mainly from state courts.

Across the nation, arrested, detained or convicted persons pour into various prisons by the order of State-based magistrate courts, high courts, sharia courts, and others which include federally run courts.⁹⁰

There is also ongoing issue as to whether the federal government has a duty to work on the protection of prisoners' human right issue in state and local prisons.⁹¹

⁸⁸ Overview of Australian Justice and prison system, Attorney General and Justice available at <http://en.wikipedia.org> retrieved, 13, December 2014

⁸⁹ Nathaniel Cantor, prison reform in Germany 1933, journal of criminal law and criminology, vol 25, issue 1 may-June, p;85

⁹⁰ <http://www.nigeriatell.com>, accessed on November 2014

⁹¹ Sarah Vandenbraak Hart, Evaluating Institutional Prisoners' Rights litigation: costs and benefits and Federalism considerations, p;77

International human rights instruments are binding on the States and their agents, including prison officials in order to manage the prisoners in compliance with the international human right instruments. Thus, prison officials are obliged to know, and to apply, International Principles of prisoners' rights.⁹² As such, prisons institutions have a duty to treat with humanity and respect the inherent dignity of persons deprived of their liberty. To this effect in some federation there is uniform standardization of prisoner's condition and protection while in others states are at liberty to go on their own ways.

In USA there are a dual standard for the manner of protection of prisoners right and the administration of the prisons, depend upon whether it is a local (states) or a federal officer who is making the protection and act the administration of prisons⁹³.

The federal government has repeatedly determined that state and local prisoners should be treated fairly and humanely, and that the constitutional rights of prisoners should be enforced. The federal government, for example, has provided financial support to professional organizations in corrections, such as the American Correctional Association, which has established a strong accreditation program for correctional institutions and the treatment of prisoners.

Through the National Institute of Corrections, the federal government supports extensive training and technical assistance for state and local corrections officials. The federal government also supports corrections research through the National Institute of Justice.⁹⁴ It also addresses that, concerning the regulation of prisoners discipline and administration of state detention; the states have the power and are subject to federal authority only when paramount federal constitutional rights supervene. Additionally federal courts have power over state prisons whenever there is unconstitutionality issue related with prison conditions.⁹⁵

⁹² A Compilation of International Human Rights Instruments concerning the Administration of Justice (Office of the United Nations High Commissioner for Human Rights (OHCHR), Professional Training Series No. 9/Add.1); and OHCHR, Human Rights: A Compilation of International Instruments, vol. I (2 parts), Universal Instruments (United Nations publication, No. E.02.XIV.4).

⁹³ Tallack, W. (2003), Penological and Preventive Principles, reprinted in 1984, Garland Publishing, American University, Law Review Vol.20.p;89

⁹⁴ Sarah Vandenbraak Hart, evaluating Institutional Prisoners' Rights litigation: costs and benefits and Federalism considerations, p;79

⁹⁵ Alison Brill, Rights Without remedy: the myth of State court Accessibility after the Prison Litigation Reform act, Cardozo law review [vol. 30:2, p;646

In Canada, concerning the health services of prisoners, only the federal government has a statutory (i.e. a written law) obligation to provide prisoners with essential health care akin to that available in the community. As such, the Canadian federal prison system is governed under the Corrections and Conditional Release Act (CCRA) and the accompanying regulations.⁹⁶

Hence, the Canadian CCRA is mandated to provide every prisoner with essential health care and reasonable access to health services that will contribute to his or her rehabilitation and reintegration into the community. Hence, in Canada, however, Provincial and territorial prison systems are created under provincial laws. That means, the overall provincial and territorial legislation does not incorporate international standards for the treatment of prisoners to the same extent as does the CCRA. For such reasons, regarding health services of prisoner, provincial and territorial laws are weaker than the CCRA in conferring on provincial and territorial prisoners.⁹⁷

2.5 Execution of Death Penalty in Different Federations

The new dynamic of capital punishment abolition in federations seemed to be achieved through the federal principle. The benefit of federalism towards capital punishment abolition is, in some federations states are at liberty to practically abolish the penalty while the federal government is enforcing the execution of the penalty.

States may practically abolish the penalty even though there exist same or uniform criminal law at country level, particularly in executive federalism where the implementations of federal laws are the power of states. The proper organ having authority within federations to retain or abolition capital punishment whether federal, state or local is an important issue.

Criminal justice system in general and Capital punishment execution in particular is multi jurisdictional issue. For example in US it is local, state and federal prosecutorial power to bring criminal charges.

In federal countries like USA some states have abolished DP either by law or practically while others retain it. In such instance the application of the federal DP to crimes committed in states that have abolished capital punishment is a tiny problem.

⁹⁶ Rebuma Tefera Alemu a critical assessment of prisoners' right in the oromia national regional state: the case of Burayu prison administration, college of law and Governance centre for federal studies Addis Ababa university, MA thesis may, 2014,p;10

⁹⁷ Ibid p' 11

Different scholars argued that federal death sentences should be constitutionally impermissible for crimes committed within the borders of abolitionist states strictly on federalism grounds. Defendants in abolitionist states have used this argument to attack the charges they face as unconstitutional, both facially and as applied.⁹⁸

There is also ongoing hot debate with regard to execution of death penalty in Nigeria in general and in some of the states in particular. Like in USA some of the Nigerian states put in to effect death penalty while others are refraining from the execution.

The method of execution of death penalty is equally controversial in Nigeria. Under secular law, hanging is the method of execution.⁹⁹ Under Shariah law (applied in some northern Nigerian states), executions can be carried out by hanging, shooting and Stoning which is reserved for Muslims.

Under the Federal Robbery and Firearms Act, applicable in the Federal Capital Territory, death sentences can be carried out by hanging, if so decided by the governor. The High Court of Lagos declared that execution by hanging is unconstitutional; however the ruling is only enforceable within Lagos State¹⁰⁰.

International Human right institutions like Amnesty international keeps on revealing the method of execution like stoning are against international Human right instruments which Nigeria itself is party to some of it. The rate of execution of death penalty in Nigeria dropped dramatically after the fall of the military government in 1999. From May 1999 to 2006, Amnesty estimates that at least 22 people were executed.¹⁰¹ After a 7-year hiatus without executions, four death row inmates were executed in 2013. In June 2013, President Goodluck Jonathan urged state Governors to sign death warrants for death row prisoners. The four executions took place shortly after in Edo State in violation of Nigerian and international law.¹⁰²

Yet in some of the states the execution has not been effected because the states governors refrain from confirming the penalty.

⁹⁸ Michele Martinez Campbell, Federalism and Capital Punishment: New England Stories, Vermont Law School Faculty Accepted Paper #07-12, p;81

⁹⁹ www.deathpenaltyworldwide.org/country-search-post.cfm, accessed November 2014

¹⁰⁰ Ibid

¹⁰¹ Ibid

¹⁰² Amnesty Intl, Nigeria executions: “They almost executed him secretly”, <https://www.amnesty.org/en/news/nigeria-death-penalty-feature> accessed on 14 January 2015

A unique facet of the modern debate about capital punishment is the characterization of the death penalty as human right issue than about the appropriateness of the punishment. Human right issue is international issue which sometimes goes beyond the authority of states and local governments in federations.

The implementation of international law in federation is full of problem. In some federations, constitutional law provides special rules, generally giving the federal government the power of (subsidiary) implementation.

In some federations sub-national units have the power to conduct relations with foreign states and/or sub-national units, and to conclude international treaties in the area of their legislation.¹⁰³

In federations states or sub units are autonomous on their internal matter but the power of the federal government is not limited to the federation when it comes to human right issue.

Human right issue is international issue which should be implemented by all states. Additionally the power of states or local governments for the implementation of international laws should also be considered.

In many federations, the sub-national units are prohibited from being parties to international treaties, Canadian provinces are almost sovereign in some fields; they cooperate with other federal units all over the world and increasingly engage in foreign policy¹⁰⁴. This is also a case with other federations. For example, the Swiss cantons, and the German and Austrian Länder participate in foreign policy, while in other federations like Canada, the United States or Brazil; the federal government cannot force states to implement international law.

In such federation's human right issues including death penalty as international issue may be implemented by different states differently. This can lead to international conflicts, especially where human rights are concerned. In some countries, the provinces are obliged to take all measures required for the implementation of international treaties and human right issues if they fail to do so, the federal authorities can take the measure by subsidiary legislation or force the sub-national unit to oblige.¹⁰⁵ So in federations the issue of abolition of death penalty as international human right issue should be considered as whether the power to abolish or retain the penalty vested with regional states or the national government.

¹⁰³ Martin F. Polaschek, Implementation of International and Supranational Law by Sub-national Units, Work Sessions 3 and 15, forum of federations, p;290

¹⁰⁴ Ibid

¹⁰⁵ Ibid

2.6 International Human Right Instruments on Abolition of Death Penalty

Different International human right institutions and activist oppose death penalty. The Universal Declaration is a pledge among nations to promote fundamental rights as the foundation of freedom, justice and peace. The rights it proclaims are inherent in every human being. They are not privileges that may be granted by governments for good behaviour and they may not be withdrawn for bad behaviour.

Fundamental human rights limit what a state may do to a man, woman or child. No matter what reason a government gives for executing prisoners and what method of execution is used, the DP cannot be separated from the issue of human rights. The movement for abolition cannot be separated from the movement for human rights.

Article 3 of the Universal Declaration of Human Rights proclaims that “Everyone has the right to life”.¹⁰⁶ Article 5 categorically states that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.

Art 6 of the United Nations convention on civil and political rights (ICCPR) stipulates a number of conditions and limitations on the laws authorizing the DP abolition inconformity with other provision of the covenant. According to this stipulation of ICCPR capital punishment can lawful be carried out only when the conditions laid are met otherwise the punishment is considered as arbitrary under sub article 1 of the same provision.¹⁰⁷

Many international human rights institutions believe that the DP violates these rights. Many governments also share this view, and have recognized that the DP cannot be reconciled with respect for human rights. The United Nations has declared itself in favour of abolition. The Council of Europe has included a moratorium on executions and moves towards complete abolition among its provisions of entry for states of the former Soviet Union.

Amnesty International opposes the DP in all cases throughout the world, and without reservation, on the grounds that it is a violation of the universally guaranteed right to life and constitute the ultimate cruel, inhuman and degrading punishment. Many other international human rights institutions have the same approach towards abolition of death penalty.¹⁰⁸

¹⁰⁶ Art 3 of Universal Declaration of Human Rights adopted and proclaimed by the General Assembly of the United Nations On 10 December 1948, by its resolution 217 A (III).

¹⁰⁷ 1966, United Nations convention on civil and political rights (ICCPR) art.6

¹⁰⁸ Azerbaijan, Time to abolish the death penalty Amnesty International March 1997 AI Index: EUR 55/02/97p;1

The second draft optional protocol of the ICCPR covenant on the abolition of death penalty which was adopted on 15 December, 1989 in resolution 44/128 open opportunity for states to join international commitment for the abolition of death penalty. The protocol calls up on state parties to abolish death penalty and within their jurisdiction. The only exception allowed is in time of war pursuant to a conviction for a most serious crime of a military nature committed during war time.

It provides for the total abolition of the DP but allows state parties to retain death penalty in time of war if they make reservation to that effect at the time of ratifying or acceding to the protocol.¹⁰⁹

The commitment of different international institutions and community towards abolition of capital punishment at global level has brought about the abolition of DP from many countries legal system and will push to achieve what Roger calls the progress as “new dynamic”. Which he tried to speculate the possibility that worldwide abolition of DP will be achieved within the foreseeable future.

2.7 Power of Head of State in Federations with respect to Death Penalty.

Generally there are two forms of Government system, these are Presidential and Parliamentary forms of governments.

The presidential system, also called the congressional system, is a system of government where an executive branch exists and presides separately from the legislature. A presidential system is a system of government where an executive branch is led by the president who serves as both head of State and head of Government.¹¹⁰

Countries that have presidential form of government are not the exclusive users of the title of president. For instance, a dictator who may or may not have been popularly or legitimately elected may be and often is called a president. Likewise, many parliamentary democracies are formally styled republics and have presidents, a position which is largely ceremonial.¹¹¹

¹⁰⁹ The second draft optional protocol of the ICCPR covenant on the abolition of death penalty which was adopted on 15 december, 1989 in resolution 44/128, art,1,2 and 3

¹¹⁰ Sileshi Zeyohannes and Dagnachew Asrat, Ethiopian constitutional law I, Teaching Material, Prepared under the Sponsorship of Justice and Legal System Research Institute, March, 2009, Addis Ababa, p 153

¹¹¹ Ibid

A parliamentary system also known as parliamentarianism or parliamentarism, is a system of government in which the executive is dependent on the direct or indirect support of the legislature (often termed the parliament) often expressed through a vote of confidence.

But they usually have a distinct heads of state and head of government, the former vested in the person of the president elected either popularly or by the parliament or by a hereditary monarch (often in a constitutional monarchy) and the latter in the person of the prime minister or premier.

The head of state has such roles as symbolic role, chief diplomatic officer, nominal chief executive officer, chief appointments officer, legislative role (formality-signing on bills passed by the legislature), and other prerogative such as pardon/amnesty and granting various titles and other honors.

Pardon is a mechanism by which injustice is corrected. It is the forgiveness of a crime *and* the cancellation of the relevant penalty. It is a general concept that encompasses several related procedures: pardoning, commutation, remission and reprieves. Commutation or remission is the lessening of a penalty without forgiveness for the crime; the beneficiary is still considered guilty of the offense. A reprieve is the postponement of punishment, often with a view to a pardon or other review of the sentence (such as when the reprieving authority has no power to grant an immediate pardon).

Today, pardons are granted in many countries when individuals have demonstrated that they have fulfilled their debt to society, or are otherwise considered to be deserving. Pardons are sometimes offered to persons who are wrongfully convicted or who claim they have been wrongfully convicted.¹¹²

Pardon may be granted on conditional or without condition. The condition may be of any nature that is subsequent or precedent. Pardon may apply to all penalties and measures whether principal or secondary including death penalty.¹¹³ International human right instruments leaves states the option to impose the death penalty but urges them to move towards abolition and also imposes certain limits on the way in which the death penalty can be imposed. Among which the right to seek pardon or commutation of the sentence is vital. Different federal countries veste the

¹¹² Silesh Zeyohannes and Danyachew Asrat, constitutional law I, Ethiopian Teaching Material, Prepared under the Sponsorship of Justice and Legal System Research Institute, March, 2009, Addis Ababa, p 155

¹¹³ Ibid

power to grant pardon for different organs but principally for the president based on their forms of government they adopt.

The president of the United States of America has the constitutional power to grant pardon and reprieves for offences against the United States. A famous pardon was that was given by President Gerald Ford to former President Richard Nixon¹¹⁴.

In the United States the pardon power of the President of the United States is limited to the federal crimes. Federal Crimes is granted Pardon under Article II, Section 2 of the United States Constitution which states that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment".¹¹⁵

The governors of most of the states have also the power to grant pardons or reprieves for offenses under state criminal law. In other states, that power is committed to an appointed agency or board or to a board and the governor in some hybrid arrangement (in some states the agency is merged with that of the parole board, as in the Oklahoma Pardon and Parole Board.

Similar to the United States, the right to grant pardon in Germany is divided between the federal and the state level. Federal jurisdiction in matters of criminal law is mostly restricted to appeals against decisions of state courts. Only "political" crimes like treason or terrorism are tried on behalf of the federal government by the highest state courts. The right to grant a federal pardon lies in the office of the President of Germany, but he or she can transfer this power to other persons, such as the chancellor or the minister of justice.

For all other (and therefore the vast majority of) convicts, pardons are in the jurisdiction of the states. In some states it is granted by the respective cabinet, but in most states the state constitution vests the authority in the state prime minister. As on the federal level, the authority may be transferred

According to the Nigerian Constitution, the President and State Governors have the power to grant pardons and commute death sentences. The President may pardon, suspend, or decrease any punishment imposed under a law passed by the National Assembly after consultation with the Council of State and may also exercise these powers with respect to death sentences issued by a court-martial.¹¹⁶ Governors exercise similar powers with respect to punishments imposed under state law "after consultation with such advisory council of the state on [the] prerogative of

¹¹⁴ Academic American encyclopedia Vol.15, 1986, p:83

¹¹⁵ USA constitution, article 2 section 2

¹¹⁶ Constitution of the Federal Republic of Nigeria. art. 175 May 29, 1999

mercy as may be established by law of the State.” Prisoners may petition for clemency after they have exhausted all appeals.¹¹⁷

In practice, pardons and commutations of death sentences occur at both the federal and state levels. In January 2000, for instance, President Obasanjo issued a federal amnesty, ordering the pardon and release of prisoners who had been on death row for over 20 years and commutations to life imprisonment for those who had been on death row for 10 to 20 years.

At the state level, in another example, the governor of Lagos pardoned and released three death row inmates in June 2009. Many state governors prefer commutation and pardon than signing DP for execution.¹¹⁸

Under the Constitution of India (Article 72), the President of India can grant a pardon or reduce the sentence of a convicted person, particularly in cases involving capital punishment. A similar and parallel power vests in the Governors of each State under Article 161. In India there is no separate body of state law. All crimes are crimes against the Union of India. Therefore, a convention has developed that the Governor's powers is exercised for only minor offenses, while requests for pardons and reprieves for major offenses and offenses committed in the Union Territories are referred to the President.¹¹⁹

Under the 1955 revised constitution of Ethiopia, granting pardon and amnesty was the prerogative of the Emperor. Pursuant to art 35 of the constitution the emperor had granted pardon and commuted death sentences to a number of prisoners from 1956-1966.¹²⁰

The 1930 and 1958 revised penal code of Ethiopia incorporates the imposition of DP for grave crimes. Both codes further prescribe the execution of the DP only up on confirmation by the Emperor.

The current criminal code which was promulgated after federal restructuring has also incorporated similar provision granting the power for head of the state.¹²¹ Confirmation of death penalty for execution is not unique under Ethiopian legal system but some other federal countries have also incorporated similar principle. In Nigeria execution of death penalty is affected only if

¹¹⁷ Ibid

¹¹⁸ Amnesty Intl., *Death Sentences and Executions in 2009*, p. 23, ACT 50/001/2010,

¹¹⁹ The constitution of India, art 72 and 161

¹²⁰ Meseret Tsehay, *the power of Head of State with respect to Death Sentence under the Ethiopian law*, AAU June 2001 unpublished thesis, p;43

¹²¹ Criminal code of Federal Democratic Republic of Ethiopia 1996, article 117

it is signed by the Governor of respected state for state crimes and by the head of state for federal crimes.

2.8 Constitutional Adjudication and Unconstitutionality of Delay of Execution of Death Penalty

Historically cruel and unusualness of punishment was constituted by departure from the common law in the direction of greater severity without the kinds of morally sufficient reasons that would indicate an evolved understanding of the common law.¹²² The English Bill of Rights forbade judges from imposing new ('unusual') punishments that were significantly more harsh ('cruel') than those that were traditionally permitted under the common law.¹²³

Americans . . . feared the imposition of torture and other cruel punishments not only by judges acting beyond their lawful authority, but also by legislatures engaged in making the laws by which judicial authority would be measured.¹²⁴

There is an emerging consensus that the Cruel and Unusual Punishments Clause was likely understood as limiting punishments to those established by the common law of punishment. Thus, one can understand the Clause as imposing a bar on punishment that is excessive in relation to that which has been imposed on similarly situated offenders according to longstanding practice.¹²⁵

The United Nations' Universal Declaration of Human Rights is the first international instrument that stipulates prohibition of torture or cruel, inhuman degrading treatment or punishment. Many countries have also incorporated similar provision in to their local laws.

The issue of cruel and unusual punishment is related with imposition and execution of DP in different ways. Some legal scholars argue that capital punishment by its nature is cruel and inhuman and worried about the purpose of punishment whether it serves its aim or whether it is severe by itself. Others argue delay of execution of the punishment after imposition is also cruel and unusual.¹²⁶

¹²² Michael J. Zydney Mannheimer, Cruel and Unusual Federal Punishments, *IOWA LAW REVIEW* [Vol. 98:69, p;96

¹²³ Ibid

¹²⁴ Ibid ,p;97

¹²⁵ Ibid p;90

¹²⁶ Supra note 120, p;27

One of the major human rights instruments dealing with torture that provides a definition of what torture is the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment but, acts of cruel, inhuman or degrading treatment or punishment are not expressly defined by the UNCAT or other instruments.

Degrading treatment or punishment may involve pain or suffering less severe than torture or cruel or inhuman treatment or punishment and will usually involve humiliation and debasement of the victim. Degrading treatment or punishment is that which is said to arouse in its victims feeling of fear, anguish and inferiority, capable of humiliating and debasing them. This has also been described as involving treatment such would to breaking down the physical or moral resistance of the victim, or as driving the victim to act against his will or conscience.¹²⁷

In General Comment 7/16, paragraph 2 and General Comment 20/44, paragraph 6 & 11, the Human Rights Committee indicated that prolonged solitary confinement, especially when the person is kept incommunicado, might violate Art.7. Similarly, particular circumstance of the death row phenomena may constitute cruel or inhuman treatment.¹²⁸ In General Comment 20/44, paragraph 6, the committee stressed that the capital punishment “must be carried out in such a way as to cause the least possible physical and mental suffering”. With respect to the current language used in Article 6 and 9 of ICCPR, life imprisonment and capital punishment as such cannot be deemed a violation of Art.7 under a systematic interpretation of the covenant.¹²⁹ Now a days it is not only the DP imposition and its method of execution that is subject of debate as to whether it is Cruel or unusual punishment but also delay of execution is considered as Torture and Cruel, Inhuman or Degrading Treatment or Punishment.

With this regard currently there have been a number of cases in which delays in carrying out sentence of death has been described as ‘unacceptable’ and the condemned person has brought proceedings based on a claim that, because of the inordinate delay, the execution of the sentence would amount to cruel and inhuman punishment and, as such, would be unconstitutional under the ground of psychological sufferings.¹³⁰

¹²⁷ Tesfaye Tadesse Abebe, Freedom from Torture, Inhuman or Degrading Treatment or Punishment: the case of some selected prisons of Oromia National Regional State, Addis Ababa University School of Graduate Studies Faculty of Law, Submitted to Addis Ababa University, School of Graduate Studies in Partial Fulfillment of the Requirement of the Degree of Masters in Human Rights Law, March, 2011p;17

¹²⁸ Ibid

¹²⁹ Ibid p;41

¹³⁰ Dajene Girma Janka, handbook on Ethiopian criminal law 2005, pp 174-176

Dajene Girma has raised the practice of other countries which considered delay of execution as unconstitutional. For instance in *Zimbabwe v Attorney-General* it was decided that the execution of death penalty on four criminals after 52 and 72 months was declared to be unconstitutional because of the inordinate delay, the execution of the sentence would amount to cruel and inhuman punishment and, as such, would be unconstitutional under the ground of psychological sufferings.

In other case, *Guerra v Babtiste* death penalty to be executed about five years latter was declared to constitute cruel and unusual punishment as a result of which the sentence was commuted. Hence in those countries where there are constitutional principles (international principles) prohibiting cruel and unusual or degrading punishment, delay in the enforcement of death penalty has the tendency to convert or commuted DP to life imprisonment.¹³¹

The other related equally important in a federation is the presence of a body that umpires disputes concerning the constitutionality of laws in general and the division of powers in particular. Constitutional adjudication is the process of settling down the issues and disagreements involving constitutional matter. It is related to adjudicating constitutional issues rather than other issues. It is a matter of determining constitutionality of laws in general and the division of powers among governmental organs in particular.¹³²

From the principle of constitutionally guaranteed division of power and the supremacy of the constitution follows that the last word in settling disputes about the meaning of the division of powers must not rest either with the federal government alone or with the states.¹³³ The supremacy of constitutions obliges all laws and government decision and acts to comply with the constitutions and any violation of constitutional principles subjects such laws and acts for revision.

Additionally in federation, though power is divided between the federal and state governments; disputes and overlaps of powers cannot be avoided completely. For instance, a parliament enacts a law inconsistent with the supreme federal Constitution. Government may violate constitutionally guaranteed rights through its acts or decisions. So that any private individual

¹³¹ Ibid pp 174-176

¹³² Solomon Emiru Gutema Compatibility of the Revised Oromia National Regional State Constitution of 2001 with the FDRE Constitution with Respect to Adjudication of constitutionality issues and its possible effects, Addis Ababa University School of Graduate Studies Faculty of law, Constitutional and Public Law stream, June 2011p;25

¹³³ Ibid p;144

may bring a claim that his/her/its right is violated by the government act and decision or by the conduct of any other non governmental organs.

Furthermore, a state Constitution may become incompatible with the federal Constitution on vital principles of democratic government like principles of check and balances among the three branches of government, independence of judiciary, separation of powers and others¹³⁴

In many federal systems or federations, the judicial system serves as an arbiter of conflict between the levels of government over allocation of authorities and in other federations the power is vested with special courts or tribunals. Federations in the civil-law tradition, including Germany, Austria and Belgium, have created specialist courts or tribunals to consider constitutional questions.

Common-law federations, including the United States, Canada, Australia, India, and Malaysia, generally resolve constitutional disputes through the jurisdiction of the ordinary courts and the highest courts in the form of Supreme Court¹³⁵. Ethiopia follows peculiar approach in solving constitutionality issues the House of Federation is empowered with constitutional adjudication power although there is no case brought to it with this respect.

¹³⁴ Ibid p;26

¹³⁵ Cheryl Saunders, Constitutional Arrangements of Federal Systems, Publius, Vol. 25, No. 2. (Spring, 1995), p;67

CHAPTER THREE;

3 FEDERALISM, CRIMINAL JUSTICE SYSTEM AND EXECUTION OF CAPITAL PUNISHMENT IN ETHIOPIA

Chapter two offered conceptual framework of federalism and criminal law Enacting and Enforcement power in general. This chapter has tried to depict federalism, criminal Justice system and Execution of capital punishment in Ethiopian in general and in study area in particular. It has tried to review Ethiopian federalism from the perspectives of Historical background and Ideological background of the present federal system.

The second section highlights the implementation of centralized federal criminal laws system in Ethiopia. It has been devoted to deal with the structure and subject matter distinction of criminal law making and enforcement system in Ethiopia. The third section also confers the conceptual, meaning and historical development of prison institution and capital punishment execution in Ethiopian.

It has been tried to assess the constitutional, legal bases and scope of capital punishment execution in Ethiopia. Finally, it has been also examined the practice of capital punishment execution in Oromia and SNNPRS regional states so as to understand the divergence and convergence between the regional states and with the central government. Finally the organ having power to adjudicate constitutionality of human right issue with respect to execution of capital punishment is also analyzed.

3.1 Historical Back Ground of Ethiopian Federalism

Ethiopia is a unique country because it is the only African state that has never been colonized but was under imperial rule until 1974. It has been governed by several emperors until the overthrow of Emperor Haile Selassie in 1974.¹³⁶ Ethiopia for the most part has been under a decentralized rather than a centralized system of governance preceded the coming in to power of the in 1930, leaving certain exceptions of brief unitary attempts by Emperor Tewodros (1855-1868) and Menlik II (1889-1913).¹³⁷ On the one hand the re-emergence of central Ethiopian Government from the accession of Tewodros in 1855, signaling the end of the Zemene mesafent, was

¹³⁶ Marijke Frank, Effects of Ethnic Federalism in Ethiopia; Holding Together or Splitting Apart?, Summer Institute Guadalajara 2009, Ethnicity, Diversity and Democracy, EDG Project. University of Toronto/University of Freiburg Sociology/Anthropology, p;2

¹³⁷ Supra note 2, p;19

necessarily defined as a process of centralization in which the Imperial Government and regional Lords were viewed as Rivals, and it became mission of the Emperor to subdue and subordinate local rulers.

The centralization of governance was also manifested in the late nineteenth and early twentieth century's. Menlik was able to conquer vast areas to the south and west of the core area of historic Ethiopia, most of which came under direct imperial control, and which greatly expanded the revenue available to the central Government. In the nineteenth Century Ethiopia was marked by the era of princes; each region having its own king, ruler or chieftain. Some were in a state of war with one another as much with the authority at the centre; in fact as one goes from the centre to the periphery, power of the centre seems to fade away gradually. The authority of the centre was subject to the perennial tendency of certain regional warlords to become endowed with an aura of legitimacy in their own right, which poses a central theme in Ethiopian politics; i.e. persisting dualism – centralization and regionalism.¹³⁸

The way of centralization clearly showed that the practical difficulty of imposing uniform imperial administration over the whole of the territory, rather than any recognition of the value or legitimacy of diversity, let alone any idea that Governance should derive from the culture and consent of the governed.¹³⁹

On the other hand, broadly speaking the decentralized form of governance, in fact if not in form was characterized as kind of federalism. However, it was not accompanied by any formal and conceptual bases for dividing power between the central Government and regional states, not alone any written specification in terms of constitution or any documents.¹⁴⁰

Assefa Fisseha remarked this de-facto federalism in Ethiopia has tried to be realized at the reign of Yohannes IV.¹⁴¹ During his reign he attempt give the power to the kings, *Rases* and the *Dejazmaches* had full-flagged, judiciary power for the court, political and administrative powers

¹³⁸ Sileshi Zeyohannes, constitutional law II, teaching materials prepared under the Sponsorship of Justice and Legal System of Research Institute, 2009 p;7

¹³⁹ Christopher Clapham, The Ethiopian Experience of Devolved Government, Ethiopian Journal of Federal Studies, center for Federal Studies, Addis Ababa University, Vol.I, No. 1, Addis Ababa University press 2013, p;17

¹⁴⁰ Ibid, p;17

¹⁴¹ Assefa Fiseha, Federalism and the Accommodation of Diversity in Ethiopia, A comparative Study, (Wolf Legal Publishers, the Netherlands 2007), pp. 11

in their jurisdiction.¹⁴² After the death of Yohannes in 1889, no one was in a position to contest Menlik accession in his place and Menlik seized the Solomonic title and turned the course of the Empire to the South and followed the twin imperial policies of modernization and centralization. As a result the process by which the most powerful regional Lord proclaim himself Emperor, and other lords, while formally recognizing his authority continued to exercise considerable autonomy within their domain.¹⁴³

The authority of the Emperor was absolute, indivisible and unchallengeable, and was ritually reinforced by various symbolic devices including anointment by the Abun, imperial seclusion, and the removal to an isolated mountain top of princes that was recorded by the earliest European visitors.¹⁴⁴

The coming in to power of Emperor Haile Selassie in 1930 and the subsequent issuance of the 1931 Constitution was the first written constitution in the history of the country, marks a new era with the purpose of consolidating his power. It heralded the end of the role of the duality that existed for centuries and did not make any reference to federalism. True to its goal of unification and modernization of the country under an Emperor, it could envisage only a unitary state.¹⁴⁵

In the midst of the strengthening of the Emperor's resolve for centralization of power, Eritrea joined Ethiopia in 1952 under a United Nations (UN) sanctioned federal arrangement. The federation of Eritrea with Ethiopia was finalized by the UN General Assembly Resolution which was passed on December 2, 1950.

It was the first seven Articles of the Resolution that formed the Federal Act. By proclamation Number 124 of 11 September 1952 the Eritrean Constitution with the Federal Act was put into force in *Negarit Gazette*. At this point in time, the federation of Eritrea with Ethiopia came into effect. The Federal Act as well as the Eritrean Constitution provided for a 'federal arrangement' between the two governments. The government of Eritrea was authorized, as a manifestation of its autonomy, to exercise legislative, executive and judicial powers. The actual division of power under the federal act vested a number of basic functions in the Central government: notably

¹⁴² Shiferaw Bekele, *Kasa and Kasa Papers on the Lives, Times and Images of Tewodros II and Yohannes IV (1855-1889)*, (1990), p.306

¹⁴³ *Supra* note 139, p;17

¹⁴⁴ *Ibid*

¹⁴⁵ Abdissa Dashura, *Implication of Cassation over Cassation in the Ethiopian Federal context: With Special Reference to the principle of Self-Determination*. A Thesis Submitted to Addis Ababa University, College of Law and Governance: Center for Federal Studies in Partial Fulfillment of the Requirements for Masters (MA), May, 2014, p;59

defense, foreign affairs, currency and external trade while reserving residual powers to the Eritrean government. These included civil and criminal law, police, health, education, natural resources, agriculture, industry and internal communication.¹⁴⁶

These authoritarian regimes applied politics of nation-building and tried to unite Ethiopians by enforcing Amharic culture on all citizens. However, the ignorance of Ethiopia's cultural diversity provoked resistance against the ruling elites.¹⁴⁷

In 1974 Emperor Haile Selassie was overthrown by Mengistu Haile-Mariam and the Derg (military ruling council) entered the stage. They gradually built an Ethiopian Marxist state. Mengistu's regime engaged in a cruel and bloody civil war on two fronts against opponents of the government against an ideological pan-Ethiopian movement on the one hand, and against ethnically-based resistance movements.¹⁴⁸

Among the ethnically-based resistance movement the TPLF was in the forefront. Towards the end of the 1980s, the TPLF built a coalition of movements representing ethnic groups aiming to overthrow the Derg regime, called the Ethiopian People's Revolutionary Democratic Front (EPRDF). Most of the coalition parties were movements initiated by the TPLF, and therefore did not necessarily have the support of the groups they claimed to represent.¹⁴⁹ The EPRDF that assumed power in May 1991 after its protracted 17 year armed insurgency undertaken the reconstruction of the Ethiopian state.

Mengistu was thrown out in 1991 and a transitional period followed, from 1991 to 1995 as a first step for the re-construction. The EPRDF expressed an intention to reconfigure the Ethiopian State to reflect the composite sovereignties of each ethnic group. At a national 'Peace and Democracy' conference, a Transitional Period Charter for Ethiopia was drafted, with reference to the UDHR, including a provision for power-sharing through a broad coalition government. At

¹⁴⁶ Supra note 6, p;42

¹⁴⁷ Marijke Frank, Effects of Ethnic Federalism in Ethiopia; Holding Together or Splitting Apart?, Summer Institute Guadalajara 2009, *Ethnicity, Diversity and Democracy*, EDG Project. PDF, available at <http://ehrp.org/wp-content/uploads>, p;2

¹⁴⁸ Yonas Girma Adimassu, Implication of Ethiopian Federalism on the right to freedom of Movement and residence: critical analysis of the law and the Practice, A Thesis Submitted to Addis Ababa University College of Law and Governance Presented in Partial Fulfillment of the Requirements for Masters of Constitutional and Public Law, March 2013, p;61

¹⁴⁹ Ethnicity, state and human rights in Ethiopia, Available at <http://www.uio.no/studier/emner/jus/humanrights/> accessed on October 2014

the conference, Eritrea's right to self-determination and independence was recognized. Eritrea officially seceded after a referendum on independence in 1993¹⁵⁰.

The most significant development in the initial transition was the adoption of the Transitional Period Charter. The charter proclaimed fundamental human rights and guaranteed the right of each individual, each nation and each ethnic community in Ethiopia to self-determination.¹⁵¹ It also established two parallel systems of government, the central government and the regional/national self-governments.

The Transitional Charter of the Transitional period (1991-1995) declared that each 'nation, nationality, and peoples' was provided with 'the right to administer its own affairs within its own defined territory and effectively participate in the central government on the basis of freedom, and fair and proper representation'. As a result, the Transitional Government enacted Proclamation 7 of 1992 in January 1992 for the establishment of regional self-governments.

Thus, the 1992 Proclamation (7 of 1992) enumerated about 60 ethnic groups, and provided for the 48 of the ethnic groups to establish their own 'National/Regional Self –Governments' at the wereda level or above. The remaining 17 small-sized ethnic groups were incorporated within some of the 48 self-governing ethnic enclaves as minorities. The 'nation, nationalities and peoples' with small-size population and identified as 'minority nationalities' are provided with a right to have an appropriate representation in their respective District legislative body or council.¹⁵²

The Transitional Council of Representative established a Constitutional Commission to draft a constitution. It later adopted the draft and presented it for public discussion. Then, a Constituent Assembly ratified the federal constitution in December 1994, which came into force in August 1995. The transitional period come to end up on enactment of the 1995 constitution.

¹⁵⁰ Ibid

¹⁵¹ Hashim Tewfik, Transition to Federalism: the Ethiopian Experience, Forum of Federations, The Global network on federalism, p;1

¹⁵² Ethnicity, state and human rights in Ethiopia, Available at <http://www.uio.no/studier/emner/jus/humanrights/>, accessed October 2014

3.2 Ethiopian Federalism; Present

Federalism emerged as an important instrument of nation/state building after the collapse of European colonial empires in the immediate post World War II period. In this respect, many post-colonial multi-ethnic countries of Asia and Africa adopted federalism, Even if several of these federations failed in their infancy.¹⁵³

In ethnically divided countries, the hope is that political recognition of cultural and ethnic pluralism through federalism reduces ethnic tensions and conflicts. That is why federalism has been presented as a compromise between ethnic nationalism, which like nationalism in its classical form advocates congruence between nations and states. Ethiopia the third-most populous country in Africa is proud to be one of few African states that were never colonised by European states. In 1991, following the collapse of military rule, Ethiopia established a federal system creating largely ethnic-based territorial units.

The federalization of Ethiopia was introduced after a long period of attempted centralization in the country and was received with both hope and scepticism from the international community and political groupings within the country. Certain Western academics considered “ethnic federalism” as innovative, “giving room for thinking differently about ethnicity in the political evolution in Africa” while others saw it as a recipe for state disintegration.¹⁵⁴ However, in Ethiopia the transformation that has taken place in the political structure since 1991 has been both radical and pioneering.

It has been radical because it has introduced the principle of self-determination for federated regional states in a formerly highly centralized and unitary state. It has been pioneering, because Ethiopia has gone further than any other African state, and further than “almost any state worldwide” in using ethnicity as its fundamental organizing principle.¹⁵⁵ The new transformation is envisaged in the constitution and as such the Constitution is also a departure from the past in many regards. The new political structure of a federal form of state structure

¹⁵³ Keller, Edmond J. *Federalism, Federations and Ethnic Conflict: Concepts and Theories*. P;23

¹⁵⁴ Chabal, Partick and Daloz, Jean-Pascal (1999), *Africa works Disorder as a political instrument*, Oxford: James Curry,p: 58

¹⁵⁵ David Turton, *Ethnic Federalism, the Ethiopian experience in comparative perspective*, Easter African studies, p;1

envisages two layers of government: federal and regional.¹⁵⁶ There are nine regional and two city governments.¹⁵⁷

Government powers and functions are divided between the regional states and the Central government. The mode of division of powers and functions are, both have exclusive and concurrent power where as residual power is left for the regional States. The constitution vests and clearly lists federal power under Art.51 and 55. Powers not explicitly vested on the Central government and not listed as concurrent power automatically become regional states power, which means anything that is not given to the Central government alone or the federal and regional governments concurrently is left to regional governments.¹⁵⁸

Article 99 is an exception to this principle and taxation power is left to the joint session of HPR and HF. It also provides a limited list of exclusive power of the states under Art.52 (2). So it can be said that the States powers are exclusive, concurrent and residual as well. Although it appears from Article 51 that the powers and functions of the Central government are exhaustively listed, there is a mechanism for the transfer of some powers, especially civil matters from the states to the Central government when the House of Federation deems necessary to establish and sustain one economic community as per Art.62(8) of the FDRE Constitution. In addition; some powers of the Central government can be delegated to the states as per art.50 (9) of FDRE Constitution. Each federal and state governments exercises legislative, executive and judicial powers within its allocated sphere and is autonomous from one another. In the Ethiopian federation, symmetry is the Constitutional standard. Thus; states have “equal rights and powers.”¹⁵⁹

3.3 Ideological Foundation of Ethiopian Federalism

The main purpose of dealing with the ideological basis of Ethiopian Federalism at this stage is aimed at assessing whether the ideological foundation have something to do with determining the implication of Ethiopian federal set up of regional states in governing themselves with all aspects in one or another way.

¹⁵⁶ FDRE Constitution, Article 50

¹⁵⁷ Article 47(1) of the Constitution lists Member States of the federation. It should be noted that the Constitution contains a right of self-determination, including the unconditional right of secession. Constitutionally speaking there is only one city government accountable to the federal Government, see article 49 of the constitution. Dire Dawa has no any constitutional ground and it was established by revised proclamation.483/2006

¹⁵⁸ FDRE constitution, articles 51, 52, 55, 62(8), 80 and 98

¹⁵⁹ Ibid article 47(4)

The historical event that affects the federal setup of Ethiopia was the emergence of Marxism-Leninism as uncontested ideology of students and their challenge to Ethiopian unity and Amhara domination at the second half of 1960s and first half of 1970s.

The emergence of a radical Marxist Leninist opposition since the 1960s led to ethnic centered liberation front. Thus, the radicalization of the students took a new turn towards the beginning of the 1970s when they began to tackle the problem of ethnic relations in the country. The constitution is also designed based on this fact as a remedy for the resolution of Ethiopia's long-standing problem of the nationality question. The preamble of the constitution clearly vests with the nations, nationalities and people to exercise fully and freely the right to self determination.

The constitution starts with the words: "We the nations, nationalities, and peoples of Ethiopia." This phrase indicates that all the ethno linguistic identity groups as collectivities, rather than individual citizens are, in principle, the authors of the constitution.

Based on this principle the new federal restructure is principally based on the right of nationalities to self government including the right to succession. The Federal Constitution not only recognizes ethno linguistic identity, but it also establishes regional states based on such identity.¹⁶⁰ The rationale behind this constitutional recognition, as highlighted in the preamble of the constitution is to show that "our destiny can be best served by rectifying historically unjust relationships."¹⁶¹ This basic formula adopted by the constitution of the right to self-determination for ethno-national groups is an important remedy for the resolution of Ethiopia's long-standing problem of the nationality question.

The preambles of FDRE Constitution clearly puts the main objective of recognizing nations, nationalities and peoples to freely exercise the right to self governance is to build one political community founded on rule of law and capable of ensuring lasting peace, guaranteeing democratic order, and to bring economic and social development. It is to emerge common out look towards common destiny and to create one economic community. The fulfillment of this objective can be achieved through the interest of living together, which again requires full respect of individual and people's fundamental freedoms and rights.¹⁶²

¹⁶⁰ Supra note 31 p;38

¹⁶¹ Supra note 148, p;64

¹⁶² David Turton, Ethnic Federalism, the Ethiopian experience in comparative perspective, Easter African studies, preamble

The ruling Ethiopian People’s Revolutionary Democratic Front (EPRDF) innovates preservation of different identity based on difference in language and culture for self-determination and the establishment of regional states based on such identity as ideological foundation for Ethiopian federalism.

The integration of the internal aspects of self-determination in to the Ethiopian constitution and making it an ideological basis of the federal set up is a necessary approach to the political process in Ethiopia after EPRDF took power. Providing appropriate platform for the use of one’s language, promotion of culture, preservation of history, full measure of self governance and equitable representation at both regional and federal level is a matter-of-fact solution to the problems of ethnic identity that will possibly arise owing to uneven treatment or office sharing scenarios.¹⁶³

3.4 Salient Features of Ethiopian Federalism

The FDRE Constitution has many striking features, one of which is right of ethno-cultural communities to self-determination, including the right to establish a regional state or independent state. This makes the Ethiopian Constitution unique. Pursuant to the Preamble and Articles 1, 8, 39 and 40 (4) of the Constitution, Ethiopia’s ethno- linguistic federalism is such that the ethno-cultural communities as a group – not Ethiopian nationals – are sovereign, and are the building blocks of the federation.¹⁶⁴

The other most important feature of Ethiopian federalism is Constitutionalization of the right to secede. Article 39 of the constitution provides that all nation, nationalities and peoples of Ethiopia have unconditional right to self determination up to secession. In terms of political theory, secession and federalism are considered to be antagonists rather than friends.¹⁶⁵

Instituting unicameral legislature in actual operation but bicameral in form at the federal level is the third salient feature of Ethiopian Federalism. Bicameralism is an essential feature of federalism for the rational of preserving the federation.

The USA, Germany, and other federal systems use a bicameral system in order to ensure the representation of the interests of individual states and provinces, as well as the population of the country. Under “federal bicameralism”, the lower house is typically apportioned on the basis of

¹⁶³ Supra note 148, p;65

¹⁶⁴ Supra note 31, p;10

¹⁶⁵ Supra note 145, p;60

population; while the upper house is divided amongst the regional states. Both houses have the legislative power in federal countries. However, the HF, the upper house of the Ethiopian parliament, is “composed of representatives of NNP” is a representative of the ethno-cultural groups rather than the states. But the states may have their interests aired through the ethnic groups that come out of them.¹⁶⁶ These are some of the basic features of Ethiopian federalism.

3.5 Criminal Law legislative power of the Federal and State Governments

As discussed earlier under chapter two of this paper different federal countries follow different approach in making criminal laws. This section discusses constitutional criminal law enacting power of the central and regional states in Ethiopia. Even though currently we have centralized or federalized criminal code whether such Legislation was made in line with the constitution and Ethiopian Federalism are discussed.

In dual federalism like USA criminal Law making power of regional states and the Central government is separate. In others executive federalism like Swiss and Germany the Central government is mandated to make criminal laws while the states or cantons are simply implementing the federal laws.

Tsegaye Ragassa, Assefa Fiseha and other federalism scholars pointed out that Ethiopian federalism is dual in structure.¹⁶⁷ Art 50(2) of FDRE constitution clearly recognizes the existence of dual government structure having legislative, executive and judicial power at both the states and Central government. Again different scholars argue that Ethiopian federalism is holding together federalism in which the nine constituting units are devolved the power from the center.¹⁶⁸ In holding together federalism power is devolved from federation to the federating unions. In most of such federations like all other powers, criminal law making power is shared between the central and regional states. Federal matters left for the Central government, State and local matters left for the states.

The devolution of power from the center to the constituting unit is the central issue for Ethiopian federalism which unit the country together. Based on this fact the legislative power division in

¹⁶⁶ Ibid, p;61

¹⁶⁷ Assefa Fiseha, Federalism, Teaching materials prepared under the Sponsorship of Justice and Legal System of Research Institute, 2009, p;354 and Tsegaye Regassa, Learning to Live with Conflicts: Federalism as a Tool of Conflict Management in Ethiopia, an Overview, Mizan Law review, Vol 4, No 1, 2007, pp. 93

¹⁶⁸ Supra note 31, p;9

general and criminal law making power in particular between the Central government and the regional states should be treated with such central issue.

Art 55(5) of the constitution empowers House of People Representative to enact penal code and the States may, however, enact criminal Laws on matters that are not specifically covered by federal legislation.¹⁶⁹ Some writers argue Criminal law making power according to this constitutional provision is concurrent power of both the central and regional unit governments. For instance, Abdi Gurmessa tries to identify two concepts which are envisaged in the provision. The first perspective is related with criminal codification power of the central government. He identified that the Central Government power is to make a consolidated, properly and systematically arranged codified body of criminal law which also include defining the object and purpose of criminal law, the principle of legality, the scope and nature of crimes which the states are duty bound to comply with. Contrary to that regional states have no power to enact codified penal law but only criminal laws. Here the power of the central Government is enacting codified law while the regional states can make criminal laws but not codified one.

The second scenario is related with the criminal legislative jurisdiction of the states which is limited only to the legislation on crimes that are not specifically covered by the federal criminal code. In this case the power over which the states are authorized to enact criminal legislations subject to whether the crimes are exhausted or not in the federal criminal legislation or/and code. For him according to article 55(5) of the constitution the fact that a priority has been given to the Central government in enacting criminal code and other criminal legislations will qualify it to have upper hand over all criminal matters at the expense of regional autonomy. As a result he argues that there is clear centralization of criminal law making power in the country.

The writer also shared some of his point with this regard. The provision of the constitution clearly identify that both the central government and the regional states have a power to make or enact criminal legislation. The important issue is giving priority for the Central government to first define federal nature crimes and corresponding penalties.

As it can be understood from the provision the issue is not as such about codification rather it is clearly identified that the regional states have a power to enact criminal laws on matters not specifically covered by the federal legislation or code. The Central government can enact the

¹⁶⁹ Article 55 of FDRE constitution lists Powers and Functions of the House of peoples Representative, the organ have legislative powers in all matters assigned to it among which article 55(5) vested criminal making powers for both the Federal and State Governments.

legislation or codified law but the provision seems that the central government should not enact on state matters. What matters most is the nature of crimes that has to be defined by the central government as federal nature crimes and State nature crimes that has to be defined by the regional states as State crimes. Whether such Laws are codified or not by either of the two is not as such an issue. Codification is different from law making power as codification is more of administrative job.

Currently because of transnational and international crimes and other triggering factors federalization of criminal law is evident in different federal countries. The USA constitution enumerates only four federal crimes but the congress has been making more and more crimes, so federalization of criminal law is increasing by congress act. Scholars argue that Crime, by definition, remained a local phenomenon - local in origin, local in its characteristics, and local in its effects and better handled by local agencies.¹⁷⁰

The federalization or centralization of the current criminal law of Ethiopia is not the instance of the FDRE constitution but rather it is of the central government law making organ exhaustively defining almost all criminal matters, as federal matters, leaving almost no rooms for the regional states.

Ethiopian federalism is holding together federalism in which more power should be devolved to the regional states than the central government.¹⁷¹ The central government has to define only federal nature crimes and corresponding penalties and vast array of crimes which are state and local in nature should be left for the discretion of the states. The constitution as it stands to preserve different identity, culture and tradition of nations, nationalities and peoples of Ethiopia¹⁷² any constitutional power division between the tiers of government must be understood and interpreted considering the very essence of federalism. Both central government and regional states must take in to account the very genesis and basic features of the constitution while exercising their power under the constitution.

The writer believe that the constitutional power art. 55(5) should be exercised considering the devolving power of the regional states and believe that the Central government has to define only federal nature as federal crimes leaving state nature crimes for state which is the vast room for regional states to make or unmake state crimes. However the fact that a priority has been given to

¹⁷⁰ Supra not 16

¹⁷¹ Supra note 31

¹⁷² FDRE constitution preamble

the federal government in enacting criminal code and other criminal legislations will qualify it to have upper hand over all criminal matters to first define federal criminal matters which actually enabled it to exhaustively define all criminal matters as federal criminal laws. It is based on this constitutional priority power given to it that the HPR enacted centralized criminal code and other criminal laws.¹⁷³ The room left for regional states to enact state crimes is very limited and even can be said no room is left, as all state and local matters are covered by the federal criminal code. And that is why no regional state has enacted any criminal laws which define State crime except some of the regional states that determine the power of social courts and empowering them to adjudicate petty offences and other.

One can argue that the social court establishment proclamations of some of the regional states which empower the social courts to entertain petty offences are a clear demarcation of states power to make criminal law. It is very important to note at this juncture that originally defining state nature crimes and its corresponding penalties is different from determining the jurisdiction of the courts on already enacted federal crimes, as it is more of procedural Laws.

For Example Oromia regional State, by proclamation number, 66/2003, proclamation to provide for the re-establishment and determination of the powers of the social courts of the regional state determines criminal jurisdiction of social courts. It was believed to be necessary to redefine the power of the social courts because the former proclamation did not adequately address all issues.¹⁷⁴ Article 14 of the proclamation clearly prescribes criminal Jurisdiction of the social courts on petty offences, the minimum penalties of which ranges from one day arrest to thirty days maximum arrest and a fine of one birr to three hundred birr.

All crimes defined or prescribed from articles 14 to 38 were punishable with fine not exceeding three hundred birr or arrest not exceeding thirty days or one month. However, punishment shall be determined by taking into account the seriousness of the offence committed as well as the reform which it brings to the offender himself. It is clear from this proclamation that the regional State of Oromia had exercised its power to enact criminal laws. Most of those crimes are already defined by the federal criminal code and were not newly defined by the regional State. Here it is important to raise Abdi's argument that the Central Government can enact codified criminal Laws yet the regional States can also make the crime as state crimes.

¹⁷³ The 1996 criminal code

¹⁷⁴ Proclamation number 66/2003 preamble, A proclamation to revise the proclamation for re-establishment and determination of the powers of the social courts of Oromia

One may also argue that what the regional Government did was not making criminal laws but simply determining the jurisdiction of social courts which is purely criminal procedure issue than the enacting the substantive criminal laws.

However this proclamation was amended by another proclamation as a result of which criminal power of the social courts was totally withdraw from the jurisdiction of the social courts.¹⁷⁵ The reason for the amendment was vast violation of prisoner's human right. The social courts were arbitrarily imprisoning individuals without due process of law and admissible evidences.

The other contentious area of law that the Oromia regional State incorporates criminal penalties is land use regulation, regulation for the implementation of rural land administration and use regulation.¹⁷⁶

This regulation was enacted to enforce proclamation number 130/99, Proclamation to amend the proclamation No. 56/2002, 70/2003, 103/2005 Oromia Rural Land Administration and Use. Article 27 of the proclamation clearly describes any land user who violates the provision of the proclamation or regulation issued for the implementation of the proclamation shall be tried under the applicable law.

There is slight difference between the English and Amharic version of the provision. The English version simply says the criminal issue to be adjudicated according to applicable law where as the Amharic translation of the provision says applicable criminal law.

The Amharic version of the provision is sound than the English version because the issue is related with criminal matters and so criminal law should be applicable. Even though the proclamation refers criminal cases that may arise in violation of the proclamation to other criminal laws the regulation which is enacted to implement the proclamation prescribe criminal punishments. According to article 33 of the regulation the criminal punishments prescribed ranges from simple imprisonment of one month to five years imprisonment. All crimes under the regulation are imposed only if there is no other criminal law which is punishable with more Sevier penalty. So the application of the regulation is conditional.

¹⁷⁵ Proclamation number 128/99, A proclamation to revise the proclamation for re-establishment and determination of the powers of the social court no. 66/2003, the objective of the Amendment was to correct problems encountered on the implementation of the proclamation. As one can understand from the two proclamations the latter totally withdraw criminal power of the social courts, so the problem with the implementation is related with criminal issue implementation.

¹⁷⁶ Oromia Rural land administration and use regulation number 151/2005

The criminal punishment is prescribed for individuals who commit, or violates the regulation, for instance any person who illegally holds rural land, illegal construct houses on the land or illegal use for whatsoever is punishable with one - five years imprisonment.

It is also prescribed that any government officials particularly who is empowered to issue, cancel or change land use certificate, and illegally does the same is punishable with rigorous imprisonment of one years to five years. It is also prescribed that any rural landholder illegally holds land use certificate or collect false certificate is also punishable with similar penalty.¹⁷⁷

It is clear that the regulation incorporates criminal punishments with respect to illegal rural land use. At this juncture it is important to raise a question that, irrespective of regional States power to enact criminal laws on matters not specifically covered by the federal criminal laws, defining crime and punishment by regulation is another controversial issue. This regulation enacted to implement the rural land administration and use proclamation. The proclamation clearly stipulate that any land user who violates the provision of the proclamation or regulation issued for the implementation of the proclamation shall be tried under the applicable law while the regulation which was enacted to implement the regulation prescribe criminal punishment which is actually against the proclamation itself.

In SNNPRS there are both social court establishment proclamation and land use proclamation. Like Oromia land use proclamation, the SNNPRS land use proclamation does not incorporate criminal punishment rather it simply refers to the criminal code. The proclamation clearly describes any land user who violates the provision of the proclamation or regulation issued for the implementation of the proclamation shall be tried under the applicable criminal law.¹⁷⁸ Unlike the Oromia land use regulation which prescribe criminal penalties for the violation of the proclamation or regulation, in SNNPRS there is no such regulation which incorporates criminal punishment for violation of the proclamation.

Again unlike Oromia regional former social court establishment proclamation there is no criminal jurisdiction prescribed in the SNNPRS social court establishment proclamation.¹⁷⁹ At this point one can understand the difference between the two regional states in making criminal

¹⁷⁷ Ibid, Article 33

¹⁷⁸ Proclamation number 53/2003, Rural State Land Administration and utilization proclamation, Debub Negarit Gazeta 8th year number 2, First march 2003, Article 24

¹⁷⁹ Proclamation number 65/95, A proclamation for re-establishment and determination of the powers of the social courts Debub Negarit Gazeta

laws. Generally the Oromia regional state has made different attempts to enact criminal laws, so the regional states are exercising their criminal laws making powers on which they believe to be purely state nature crimes.

It is revealed that practically speaking even though the current criminal code is federalized or centralized criminal code the regional states are also exercising criminal law enacting power not only by proclamation but also by rules and regulations. One can say that the regional states are exercising criminal making power under article 55(5) of the FDRE constitution though not on all state nature crimes.

The disadvantage of federalizing criminal law and its enforcement is directly related with legitimacy issue and scarcity of resource. It is difficult for federal criminal law enforcement agencies (police, prosecutor, courts and prison institutions), to assume primary responsibility for the vast array of ordinary crimes in all regional states. In multicultural federalism like Ethiopia where the very ideological foundation of the new form of Government or federalism is to empower the ethno-cultural communities to self determination which can also be manifested through law making, law interpreting and implementing power centralizing criminal laws legislation is against such principle.

It is obvious that the main object of any criminal law is to govern human behavior. Human behavior is reflected in the values and cultures in which people belongs. Ethiopia is characterized by differences in culture, language and socio economic phenomena, and such diversity requires recognition and preservation of differences through self rule and shared power division principle. Law making power of regional states is one of the mechanism through which the regional states exercise their self governance and self determination power. So in such diverse society imposing a one-size-fits-federal criminal law on the 9 regional states undermines the states' ability to make laws based on their local tradition, custom and value, because Oromia is different from Amhara region and both are different from SNNPRS.

3.6 Criminal Procedure Laws Making Power of regional States under FDRE Constitution

Another major approach to the normative question of federalism in criminal law focuses on procedural differences between federal and state systems to decide where best to allocate power. As discussed under chapter two of this paper, broadly speaking there are two models of criminal procedure legislative power division in different federations.

The US (dual) model and the integrated or the Swiss model. In the US model, both the Federal and the regional states have power to make criminal procedure. The dual nature of the criminal substantive approach is also used for the criminal procedure.

In Swiss model or executive federalism approach the criminal procedure legislative power is vested with the Central government and the regional states only administer the federal criminal code by the federal criminal procedure.¹⁸⁰ It is time to consider the Ethiopian approach to which model the criminal procedure legislation power resembles, and as such to answer whose power to make the criminal procedure laws in Ethiopian federation?.

Unlike the criminal code (law), the FDRE Constitution is silent about the layer of government having the mandate to enact criminal procedure rules. There are different arguments whether the power to legislate criminal procedure belongs to the central or regional state.

Yenesh Bahiru holds that the power to legislate criminal procedure code should be vested with the Central government. Her argument is based on art 55(5) of the constitution and argues that the level of government responsible for the making and enforcement of the criminal law should have also the mandate to proclaim criminal procedure rules. She also propounded that for the purpose of creating one economic community, the objective of the constitution which is stated in the FDRE preamble there is a need to have uniform criminal law which is applicable nationwide and criminal procedure laws too for the implementation of the criminal code¹⁸¹.

Abdi argues to the contrary, that criminal procedure making power is a residual power under the constitution and residual power is left for the regional states, so criminal procedure making power is vested with the states.¹⁸² He identified five justifications to substantiate his argument and states should have their own criminal procedure code. The centralization of the FDRE draft criminal procedure is unconstitutional as it violates the right of states self determination under the guise of human right protection.

In the above arguments of the two scholars, Yenesh do not identify the constitutional mandate vested with the regional states to enact or define state crimes and corresponding penalties based

¹⁸⁰ Supra note 46

¹⁸¹ Yenesh Bahiru, The power to legislate criminal procedure code under the federal system, issues in Ethiopia, A thesis submitted in partial fulfillment of the requirement for LLM of public law and good governance in the institute of federalism and legal studies, Ethiopia civil service University, AA June 2011 unpublished, p;44

¹⁸² Abdi Gurmesa, criminal Jurisdiction of State courts under FDRE constitution, Addis Ababa University LLM program, college Of Law and Good Governance School of Law, constitutional and Public Laws stream, march 2014, p;6

on the nature of their respective realities. Even though the current criminal code we have is federalized criminal code in my opinion it is the result of the priority given to the federal law enacting organ, that of the HPR exhaustively defined federal criminal matters leaving almost no room for the regional states.

As discussed earlier each constitutional power division should be seen and exercised by both the federal and regional states with consideration of dual and holding nature of Ethiopian Federalism. It is the writers' stand that criminal procedure making power should not be treated independently of art 55(5) of the constitution. Accordingly the Central government is empowered to enact criminal code, the states may, however, enact penal laws on matters that are not specifically covered by the federal penal legislation. The power of states to make criminal procedure legislation should be the extension of their criminal law making power. In other words the regional states have criminal procedure making mandate to regulate and enforce their own criminal law or state crimes which is not defined by the federal criminal law.

But it is hardly possible to say the Central government who is empowered to define federal nature crimes by the constitution has no power to make criminal procedure at all but rather I can say the Central government can make criminal procedure to enforce its own criminal law and states do have also the same power to enforce state criminal laws which they ought to make as per article 55(5) of the constitution.

Practice reveals that the criminal procedural laws are found in both the federal and regional legislations. At federal level the criminal procedure code of 1960 is the major legislation but some other procedural rules also found in different legislations.¹⁸³

At state level some attempts has been made among which some of the legislations with respect to criminal procedures enacted by Oromia regional states and SNNPRs are discussed. Oromia regional state has made an attempt to make criminal procedure laws and rules. The Region has made some attempt, based on some unique features it have which necessitate the enactment of its own criminal procedure.

The FDRE constitution enshrines that the special interest of the state of Oromia in Addis Ababa within the state of Oromia, shall be respected.¹⁸⁴ Finfinne is the capital city and the seat of Oromia regional state government. The criminal Jurisdiction of the state on crimes committed

¹⁸³ Anti terrorism proclamation, no. 652/2009, federal negarit gazeta, 15th year number 57, 28th august, 2009

¹⁸⁴ FDRE constitution Article 49(5)

against the interest of Oromia regional state within finfinne, crimes committed or omitted by the Employees and officials thereof in finfinne should be determined by the criminal procedure code of oromia and not by criminal procedure code of the Central government. These were the reasons for forward move of the regional state to make its own criminal procedure code.

With this regard the regional state government has requested the ministry of capacity building that the draft criminal procedure of the FDRE which is not yet put in to force should include the Oromia regional state unique futures, and cultural and reform based changes that have already taken root in the region in different offices. In its response to the request, the ministry permitted all the regional states including Addis Ababa and Dire Dawa city administrations to enact their own criminal procedure code. In spite this fact the Central government is moving towards centralization of the criminal procedure code¹⁸⁵.

With this regard there were instances where the Oromia finfinne surrounding special High court has adjudicated criminal cases committed by the regional officials in Finfinne. The regional state courts assume such jurisdiction based on the fact that unlisted criminal jurisdiction of federal courts under proclamation 25/96 belongs to the regional courts. One can argue that matters not specifically mentioned under the federal court proclamation are presumed to fall under exclusive state jurisdiction. This line of argument is clearly adopted by SNNPRS court establishment proclamation, powers not clearly vested with the federal courts fall under the regional court's jurisdiction.

For instance article 5 of the proclamation determine jurisdiction of the supreme court, among which the regional supreme court has first instance jurisdiction over offences for which officials of the regional states are held liable in connection to their official responsibility.¹⁸⁶ In Oromia even if the practice follows the same approach the regional court establishment proclamation does not deal with the issue.

The other criminal procedure rule which is the reflection of the culture, tradition and value of the nation, nationality and people attitude towards how different phenomena takes place within their Jurisdiction. This may include, among other things, how witness takes oath on the event of giving their testimony before the bench or judge in court, which is one component of the criminal procedure code.

¹⁸⁵ Supra note 181, p;57

¹⁸⁶ Proclamation number 43/2002 revised SNNPR court proclamation, Dehub Negarit Gazete, 7th year number 10, April 2002, Awassa., article 5

The Oromia court Bench administration system directive, the oath close incorporated in directive, the English translation reads as “I shall speak the truth, and not the lie, if speak a lie, may God deprive me of offspring, if he gives me, let my spring not grows up, if he grows up, let him not speak, if he speaks, let him not be revealed or recognized. Or I shall speak the truth, and I shall not deny the truth, if I deny the truth, let serpent (snake) intrude my home, let my home be the home of pig, and my offspring be the offspring of the destitute. Or I shall speak only the truth, if I speak the lie, let my offspring not grown up, let the seed of my grain not germinate, let what I eat not comfort to my body.¹⁸⁷

The other procedural law which determine both civil and criminal jurisdiction of the regional state distric and high courts is proclamation number 141/2008, a proclamation to provide for the re-establishment of Oromia courts. It was designed to determine the Jurisdiction of Oromia courts on the bases of the regional and federal constitution. It was further designed to recognizing the need to improve the management and operation of courts in accordance to the socio-economic and political development of the region in order to safeguard rule of law and insure public trust. It is found necessary to render efficient and effective, transparent and accessible judicial services to the public by ensuring judicial independence and accountability in a balanced manner.¹⁸⁸

This proclamation establishes ‘legal officer’ which replace the former registrar and shall mean a person who is registrar or in addition to the mandates given to the court registrar in the procedure codes is appointed by the commission to render similar judicial services. The officer has also the power to adjourn cases in consultation with the cases manager, issue summons, receive statement of defenses; sign stamp and give out court order; open and present files. Some of this power and functions are not the function of Registrar under the civil procedure codes.¹⁸⁹

In federal and some other regional courts this mandate remains with the registrar. The proclamation further determines the structure and organization of the regional state courts. It also determines civil and criminal Jurisdiction of the state Supreme Court, High and District courts.

¹⁸⁷ Abdi Gurmessa, criminal Jursdiction of State courts under FDRE constitution, Addis Ababa University LLM program, college Of Law and Good Governance School of Law, constitutional and Public Laws stream, march 2014, p;83,

¹⁸⁸ Proclamation number 141/2008, a proclamation to provide re-establishment of Oromia courts, Megeleta Oromia, 16th year no.10/2008, preamble

¹⁸⁹ Civil Procedure Code Of The Empire Of Ethiopia Of 1965 Negarit Gazeta Extraordinary Issue No. 3 of 1965, Article 229 and 230

The proclamation further repeals some of the Jurisdiction of District and High courts under civil and criminal procedure codes. Article 27 of the proclamation lists the power of High courts.

It provides that, the High court has first instance Jurisdiction in accordance with the provision of the civil and criminal procedure codes and other relevant laws. Sub article two of this provision reads as ‘notwithstanding the provision of sub-Article 1 of this article, a High Court shall have first instance Jurisdiction over criminal cases punishable with more than 10(ten) years imprisonment.

This is a clear divergence from the criminal procedure code. This proclamation clearly shows that the regional State is exercising its power with respect to criminal procedure enacting power. Under the former criminal procedure code criminal Jurisdiction of the High court was not all crimes punishable with more than 10 years imprisonment. There are crimes which are punishable with less than 10 years but fall under the Jurisdiction of High Courts.¹⁹⁰

The other divergence from the civil procedure code is, the High court first instance jurisdiction suits regarding immovable property where the amount involved exceeds ETH 50,000(fifty thousand birr), and on all suits regarding movable property where the amount exceeds ETH 30,000(thirty thousand) which is under the civil procedure code 15,000(fifty thousand) and 10,000(ten thousand) birr respectively¹⁹¹. Similarly with regard to civil matter the civil procedure code article 15(2)(h) vest suit regarding filiations as exclusive jurisdiction of high court whereas article 28(2) of the proclamation stipulate suit relating to filiations is first instance jurisdiction of District courts.

This proclamation of Oromia regional state clearly incorporates both criminal and civil jurisdiction of both the District and High courts which repeals or amends the federal criminal and civil procedure codes. This clearly shows the power to enact criminal procedure code or laws belongs to the regional States and practically the Oromia regional State is enacting its own criminal procedure laws.

¹⁹⁰ The Criminal Procedure Code of the Empire of Ethiopia proclamation No.185 of 1961,for example Federal first instance courts have first instance jurisdiction over criminal matters determined by proclamation 25/96 article 15, in addition to that it have jurisdiction over cases that are under the jurisdiction of awraja and woreda courts pursuant to the laws in force. The laws in force referred under the provisions of the proclamation are obviously the First Schedule of the CPC, for example crime committed under article 654 of the criminal code is punishable with less than three years yet it is under the jurisdiction of High Court.

¹⁹¹ Supra note 188, Article 28(1)(b)

In SNNPRS the practical reality is different from Oromia regional state practice. The regional state courts establishment Proclamation defines the powers and duties of the RC.¹⁹² The proclamation defines first instance, appellate and cassation Jurisdiction of all level of the regional State courts. In Particular in relation to criminal and civil case jurisdiction it back refer to both the criminal code, civil procedure code and other relevant laws and there is no any divergence from the criminal procedure code and civil code.¹⁹³ Unlike the Oromia regional State court establishment proclamation there is no newly prescribed court jurisdiction which is different from what is vested by the two procedural codes. The same is true with regard to social court establishment proclamation.

3.7 Criminal Laws Implementation Power of regional States in Ethiopia

Implementation of federal laws in general and criminal law in particular either by federal executive agencies or regional states executive agencies are the issues discussed under this section. As discussed earlier one of the basic feature of all federations is the power division between the central government and regional staes. As far as executions of federal laws are concerned there are two models or experiences exist among most federal countries.

Older forms of federalism assume each order of government has the capacity to function as such, including, at least, the capacity to make and administer law. This assumption of division of power for present purpose is, not only legislative powers, but also executive and judicial powers must be allocated under the constitutional arrangements.¹⁹⁴ Thus regional states are considered as sovereign when they make, interpret and enforce their own laws.

The manner in which the Central governments execute their laws throughout the territory is different among different federal countries. Some federal systems rely on their dual structure that is federal and state structure to execute their own laws, while others relies on state machinery for the implementation of federal laws.

In Ethiopia Federal laws implementation in general and federal criminal law implementation in particular by the regional states' executive agencies should be seen from the very essence and

¹⁹² Proclamation 43/2002, A proclamation which define power and duties of the Regional state courts, Debub Negarit Gazeta-No. 20th April, 2002

¹⁹³ Ibid p;2-3, article 4 of the proclamation provide the civil and penal code as well as their procedural laws and other relevant laws in force shall apply with respect to matters not provided for under the proclamation, so long as they are not inconsistent therewith.

¹⁹⁴ Supra note 12

genesis of Ethiopian federalism. Art 50(2) of FDRE constitution clearly recognizes the existence of dual government structure having legislative, executive and judicial power at both the regional states and Central government. All criminal executive agencies are established both at central and state unit level, such as the office of public prosecutor, the police, prison institutions etc. yet the regional states has not yet define any crime as state crime and only implementing federal criminal laws.

In dual federalism like the United States federation, the Central and regional governments acted independently of each other. In such federation the allocation of executive authority is in principle considered co-extensive with the distribution of legislative responsibilities. So that not only legislative but also executive, financial and judicial powers are divided between the Central government and the regional states so that each will act autonomously.

In such federation both have independent authority to enact criminal codes applicable within the territorial reach of its legislative powers. Each also has the authority to enforce those criminal laws through its own criminal justice process- that is, through its own criminal justice agencies and its own laws of criminal procedure. The regional states are not duty bound to execute federal laws unless otherwise there is a need for the co-operation or co-ordination between the central and the regional states.

FDRE constitution clearly recognizes the legislative power of Central government to enact federal laws and legislative power of regional states to enact state laws. Both the federal and the state have their own respective criminal justice executive organs for the implementation of criminal laws. The issue worth noting is whether there exist and need to exist federal executive agencies at state level for the implementation of federal criminal law at regional states or whether federal criminal law has to be implemented by state executive agencies is an issue.

As discussed above enacting a criminal law is the mandate of both the federal and regional state government pursuant to Art 55/5 of the FDRE Constitution. But, regions can enact criminal law on matters not covered by federal criminal law. However, the constitution is not clear about the jurisdiction of the two tiers of government over the implementation of the criminal law. It is not clear from the constitution whether the regional executive agencies are duty bound to implement Federal criminal laws.

Art 50(9) empowers the Central government when necessary to delegate regional states to exercise the power and functions listed under article 51. The delegation of power is only limited

to the functions and power of the Central government listed under article 51 of the constitution. The list of the constitutional provision does not include criminal law implementation power or function.

Different arguments are forwarded. Some argue that the Central government should have the mandate to apply the criminal law it has enacted, through the federal judicial and executive institutions. Others say even though the Central government enacted it, the regions have the responsibility to apply it. According to Art 52/2/g of the FDRE Constitution, the regions have the power to organize police force and maintain law and order.

These functions are highly connected with the application of the criminal law. The regional states cannot maintain peace and security without the proper implementation of the criminal law. But when one clearly see in to the constitutional provision of article 55(5) because of the dual nature of Ethiopian federalism the Central government has to define its own crimes (which is federal in nature) and regional states also define state nature crimes. Art 55(5) of the constitution is designed in such a manner that the Central government has to define only federal nature crimes and not state or local nature crimes. So that state executive agencies implement state crimes and federal executive agencies implement federal crimes.

One point that should be understood is federal nature crimes are not numerous in nature; it is due to different triggering factors that federalization of crimes in dual federalism like USA is currently increasing. So if federal nature crimes are few, federal executive agencies at regional states can enforce and numerous areas of crimes would be state crimes which can be implemented by state agencies. However, the HPR ends in making all nature crimes federal crime leaving no room for the regional states to define state nature crimes.

At this juncture one can raise some issues which clearly show the intention of the constitution makers. The writer strictly argues, practically speaking since the criminal code makes or defines almost all crime as federal crime expecting the implementation of such vast federal crime through the federal executive agencies at all regional states which ends in implementing throughout the country will make dual structure of Government meaningless as a result state executive agencies will be jobless.

As discussed above, Abdi argue that even though the constitutional approach in respect to execution of federal laws seems to be consistent with legislative power, hence dual in nature there are other exceptional circumstances where by regional states may be held responsible for

the execution of federal laws. The first exception is constitutionally stipulated delegation doctrine. For him the constitution has provided the doctrine of delegation, in which the Central Government when it deems necessary can delegate the regional states for the implementation of federal laws and the doctrine of constitutional delegation is not limited to execution of federal laws but also include legislative power of federal Laws, which means the federal Government can delegate the regional states to make laws.

The second exception is the fact that the regional states have incorporated the duty of implementing the federal laws in their constitution, they have duty to implement federal laws. The third exception is the constitutional mandate in which some of the FDRE constitution provisions empower the Central government to enact laws and the regional states to administer such Laws.

But Abdi failed to identify how the three exceptional circumstances are related with criminal law implementation power of the regional states. The constitution clearly identify the delegation power under art 50(9) is limited only to the power and function of the Central government granted to it by article 51 of the constitution. Yet criminal law implementation and making power is not listed under article 51 of the constitution.

The main objective of criminal law implementation is to maintain peace and order.¹⁹⁵ This objective and purpose of criminal law is achieved through the establishment of criminal law enforcing agencies among which the establishment of police force is vital. The power to organize police force and maintain law and order is vested with both the Federal and State power. So the first exception of Abdi's argument has no any application for criminal laws enforcement, because this power and function is not listed under article 51 of the constitution.

With the second exception even though the regional constitution has stipulated that the regional states have duty to implement federal laws, it is illogical to assume such upward delegation mechanism. The regional constitution has to comply with the FDRE constitution and the regional states cannot take the power of the central Government unless they are given by the constitution or through delegation. with the third exception art51(5), 55(2) and 52(2,d) clearly vested with the power to administer the utilization, and conservation of land and other natural resources to the regional states while the power to make laws on those area is left for the central Government. It is clear that the Central government is responsible for the legislation of the matters while the

¹⁹⁵ Supra note 5, Article 1

regional states are responsible for the administration of the laws made by the Central government. Here again the constitution has clearly identify on which matters the power of administration of federal laws are possible, the writer rather argue to the contrary that this constitutional provision clearly shows the areas in which the regional states are vested administration power and the Central government with legislative power is clearly identified, it is only on such specific areas that the regional states can assume administration power and have no power to administer all other federal laws except under those explicit provisions of the constitution.

There are other constitutional provisions which clearly show the duality of the criminal law making and implementation power of federal and regional states. For example art 28 of the constitution clearly prohibit legislative and other regional organs of the government not to grant pardon or amnesty on international crimes except the head of state.

On the other hand regional constitution Based on this fact oromia and SNNRS constitution empower the regional unit head of state to grant pardon. This has to be understood that the pardon power of the regional states has to be interpreted to be applicable only on state crimes while the Head of states power is applicable on federal matters. International crimes listed under article 28 of the constitution are federal nature crimes.¹⁹⁶ But currently since there is no state crimes enacted by the council of states the regional states head has no any pardon power on federal criminal laws except through delegation. Currently the regional States are granting pardon for crimes under state court jurisdiction by delegation.

In Federations even though there are dual government structure through IGR and constitutional delegations regional states may be empowered to execute federal laws. In Ethiopia criminal law enforcement power by the regional states is not either based on cooperation which is expressed through either informal or formal IGR mechanism or constitutional delegation as the delegation power under article 51 of the constitution does not include criminal law making and implementation powers.

3.8 Criminal law Jurisdiction of some of the Justice Sectors of the Regional States

Generally in Ethiopia, the justice sectors are organized at the federal and regional level. The main actors in the criminal justice system are separately organized. The courts, public

¹⁹⁶ Oromia national Regional State revised constitution of 2001 Article,49(3)(g), Revised constitution of 2001 SNNPR State Article

prosecution, the police and prison institutions are among the major justice sector institutions. There are also specialized institutions like ethics and anti-corruption, revenues and customs involved in the criminal justice. These institutions are unique as they are accorded both police and prosecution powers. This section of the paper will be devoted in discussing criminal jurisdiction and implementation power of the regional justice institution with special inference to Oromia and SNNPR states.

3.8.1 Criminal Laws Adjudication Power of State courts under FDRE constitution

Both at federal and regional states judicial power is inherent power of the judiciary.¹⁹⁷ The Ethiopian Constitution gives some hint about the organization of the judiciary. The constitution clearly recognizes at least structurally the existence of dual judicial system.

However even though legislative and executive power of the federal and regional states is clearly identified by the constitution there is no any judicial power division between the two tiers of government.¹⁹⁸ The absence of clear judicial constitutional power division subjects judicial jurisdiction full of problem and debate.

As discussed under chapter two this paper if one takes the federal principle of division of power strictly, not only are legislative and executive functions divided between the Central government and the regional states, but judicial authority too is divided. This would lead to a dual set of courts: Federal Courts applying and interpreting federal laws and another set of Courts applying and interpreting the laws of each state. That seems to be the case with the United States and other dual federalism. Where separate court systems exist it is assumed that judicial power is divided between them in line with the rest of the federal arrangement.¹⁹⁹

FDRE Constitution states that supreme federal judicial authority is vested in the Federal Supreme Court and reserves for the HOPR to decide by a two-third majority vote to establish inferior Federal Courts as it deems necessary, nationwide or in some parts of the Country. With the recent decision of Parliament Inferior Federal Courts are established in some regional states,

¹⁹⁷ FDRE constitution Article 79(1).

¹⁹⁸ Article 51 and 55 of FDRE constitution clearly identify legislative and executive power of the Federal government, article 52 also list exclusive power of the Regional states, in addition to that any other unlisted or residual power also belongs to the Regional states. Article 79 and 80 of the constitution only declare the existence of dual court structure, unlike legislative power there is no clear constitution power division of the courts.

¹⁹⁹ Sileshi Zeyohannes, Ethiopian constitutional law II, Teaching Material, Prepared under the Sponsorship of Justice and Legal System Research Institute, March, 2009, Addis Ababa, p;189-190

while the delegated power seems to continue in three other regional states namely: Oromia, Amhara and Tigray.²⁰⁰

As for the organization of the inferior Federal Courts in the regional states, the Constitution declares that the jurisdictions of the Federal High Court and of the First Instance Courts are delegated to State Courts. By virtue of this delegation, the State Supreme Court exercises, in addition to its state jurisdiction, the jurisdiction of the FHC and the State High Courts exercise, in addition to their state jurisdiction, the jurisdiction of the Federal First Instance Court and are appealed to the State Supreme Court, while decisions rendered by a State Supreme Court on federal matters are appealed to the Federal Supreme Court.²⁰¹

Art 78(2) of the constitution empowers the HPR to establish federal first instance and high court at all regions. One can argue that the HPR power is not limited to the establishment of the courts but also include the determination of federal and regional states power. It seems it is based on this argument that the HPR enacted federal court establishment proclamation 25/88, and this proclamation identify judicial power of federal courts power.

The other argument is that the HPR has no power to enact such law as power between the two tiers of governments should be made by the constitution. The proclamation does not take in to consideration the regional states power. The issue of determining federal and regional states power by legislations and constitution is two different things, because constitutionally guaranteed power division will not be subject to simple majority amendment procedure like ordinary legislations, and the body empowered to umpire constitutional dispute including power division is vested with different organ than ordinary courts.

Unlike in USA, in Ethiopia constitutionally speaking even though criminal law making power is concurrent power of both the federal and regional states the implementation power of already federalized criminal law belongs to totally federal power, and only federal judicial power and federal law enforcement agencies can apply it. But to the confusion of many the regional state judiciaries are also exercising criminal jurisdiction in their ordinary duty and may believe that criminal laws are shared judicial power of both the federal and State courts.

There are two views as far as the Ethiopian court structure of shared judicial power is concerned. On the one hand there are those who hold that the dual court structure is strictly taken both under

²⁰⁰ Assefa Fiseha, federalism, teaching materials prepared under the Sponsorship of Justice and Legal System of Research Institute, 2009, P;444

²⁰¹ Supra note 199, p;191

the constitution and the proclamations issue and as a result contend that civil or criminal cases fall either before an exclusively FC or an exclusively state court; hence there is no case of shared/concurrent judicial power. One indication of this is the fact that Proclamation 25/96 has not openly provided for the existence of shared judicial powers.

The other view is that different federal legislation for instance, labor cases are mentioned nowhere in the proclamation as federal cases but known for certain from Article 55(3) of the Constitution that it is a federal law matter.²⁰² The commercial code too is a federal law by virtue of Article 55(4) of the Constitution and the same holds true for the penal code (Article 55(5)). It is known also for certain that the state courts do adjudicate criminal cases in the regular discharge of judicial duties, not in their delegated powers. The fact that the federal Supreme Court does also review state cases when it discovers errors of law also suggests the existence of shared judicial powers.

As a result despite the apparent parallel existence of courts, like other powers, there are shared judicial powers. The holders of the second argument substantiate the argument by saying, Besides, the federal and state Constitutions incorporate a huge number of rights and freedoms, The rights and freedoms incorporated under chapter three of the FDRE constitution imposes duty to respect and enforce the provision of the chapter on all legislative, executive and judicial organ of both the federal and state governments. Apart from other organs of the government the Judiciary at all levels must give more emphasis in carrying out the duty. It is clear that ‘respecting and enforcing’ fundamental rights and freedoms by the judiciary is meaningless, unless the judiciary in one way or another is involved in interpreting the scope and limitation of those rights and freedoms which it is bound to enforce. According to the second stand criminal adjudication power of courts is shared jurisdiction of both the federal and state courts.

Abdi also argue that, the major justification to this argument is the fact that the constitution provide for two different terminologies delegation and concurrency-as far as the jurisdictional linkage between the federal and state courts on the federal matters, more particularly criminal adjudicative competency is concerned²⁰³. For him the two terminologies would not mean the

²⁰² Assefa Fiseha, federalism, teaching materials prepared under the Sponsorship of Justice and Legal System of Research Institute, 2009 p; 447

²⁰³ Abdi Gurmessa, criminal Jurisdiction of State courts under FDRE constitution, Addis Ababa University LLM program, college Of Law and Good Governance School of Law, constitutional and Public Laws stream, march 2014,p;8

same, because the criminal jurisdiction in the three powers (legislative, executive and adjudicate) as between the Central government and the regional states should be treated in light of federalism, the guiding principle of the distribution of powers, the subsidiarity principles and the experience of other federations.

Because the constitution treats the two differently under different provision or article is the first implication for the difference. Further delegation is the act of entrusting another with authority or empowering another to act as an agent or representative. From the very definition of the term “delegation”, one may comprehend that it is temporary act and as a result, easily terminated by the delegator.²⁰⁴

Based on this fact the state’s High and Supreme Court constitutional delegation remains until the federal first instance and high courts are established at the regional states. The establishment of the courts will bring to an end the delegated power of the regional states. So currently the establishment of federal High and First instance court at five regional states have brought States delegated criminal jurisdiction to an end.

Abdi further argue, however the constitution provides for the delegation of the Federal High and First instance courts to the state courts the constitution does not stipulate how the delegation should take place, its consequences, (the issue of reimbursing financial expenditures) and the hierarchical apportionment of criminal cases. As far as the reimbursement of financial expenditures connected with delegation is concerned, article 94(1) of the constitution will be *mutatis mutandis* applicable to the courts as the criminal cases are delegated to the state courts.

Thus the federal government should cover the financial expenditure incurred by state courts.²⁰⁵

On the other hand, black’s law dictionary defines the term “concurrent jurisdiction” as jurisdiction that might be exercised simultaneously by more than one court over the same subject matter and within the same territory, a litigant having the right to choose the court in which to bring the action. From this definition it can be understood that both the federal High and First courts on the one hand and the States supreme and High courts have an inherent criminal adjudicative jurisdiction.²⁰⁶

State Supreme Court can exercise the jurisdiction of the federal matters concurrently with the FHC. This holds true also to the State high courts in the exercise of the jurisdiction of the federal

²⁰⁴ Ibid p;116

²⁰⁵ Ibid p;114

²⁰⁶ Ibid, p;117

first instance courts. This trend is expected to continue to exist even if the federal Government establishes federal High and first instance courts at regional states.

However the important issue that should be raised is which crimes fall under the concurrent adjudicative jurisdiction of both the federal and state courts? and to what extent are these compatible with the federalist arrangement and type Ethiopia has? These questions are answered by issuance of statutory laws by HPR. So the delegation clause of the constitution is conditional, that is the regional State High and Supreme courts exercise the power until the federal government establish the federal courts at the regional state or at country level when it deems necessary, where as the concurrence power is not subject to any condition in which both the federal and state courts have jurisdiction together.

3.8.2 Criminal laws jurisdiction of state and federal courts under FDRE constitution

The power division employed by the constitution is very general and needs statutory legislation for the detailed power division of criminal law adjudication power between the federal and regional states.

It is based on this argument that the HPR enacted FC establishment proclamation 25/88, and to identify judicial power of federal and regional states power. The proclamation has been amended by proclamations number 138/98 and 321/2003. From the outset, the proclamation has set out three subject matter jurisdictions which are common for both civil and criminal jurisdiction of federal courts; these are *laws*, *parties* and *places*. It stipulates that federal courts shall have jurisdiction over, first, “cases arising under the Constitution, federal laws and international treaties²⁰⁷”.

Federal laws include all previous laws in force which are not inconsistent with the constitution. Second, over *parties* specified in federal laws, party based subject matters Jurisdiction are cases involving litigant parties to the case as per article 3(3) of the Proclamation.

²⁰⁷ Federal court establishment Proclamation number 25/88 NegaritGazeta-No.13-15th February 1996, Addis Ababa, article 3 identified three common jurisdictions and article 2 defines official of federal Government, employees of the federal government, Laws of Federal Governments, and there is no definition given to the places of the Federal Governments, whether it is limited to the capital city and Dire Dawa or extends to other regional places.

Third, federal courts shall have judicial power in places specified in the FDRE Constitution or in federal laws. The very controversial issue is with respect to places specified under the constitution and federal Laws. Some argue that the federal judicial jurisdiction is limited to federal cities that are Addis Ababa and Dire Dawa. While others argue that it does include other places where the federal courts are established.

Assefa also adds that according to the new proclamation that sets up parallel federal courts across the country, federal courts will also exercise jurisdiction over cases arising in other places of the country. The proclamation has listed the federal criminal court jurisdiction and further apportion between Federal first Instance, High and Supreme Court first instance jurisdiction and appellate jurisdiction.

This Proclamation clearly diverges without sticking to the principle that the federal courts adjudicate federal Laws and State courts Adjudicate State Laws. It also provides criminal Jurisdiction of the Federal courts in a listing method.²⁰⁸ The question comes into picture therefore, that what about crimes unspecified under the proclamation? Does it mean the unspecified crimes belong to state courts Jurisdiction? If so do state courts have their own Laws to vertically determine criminal jurisdiction between the three levels of state court?

Abebe argues that those federal cases not mentioned by Proclamation 25/96 belong to „exclusive state jurisdiction because a federal matter by virtue of this proclamation is narrowly defined.“ He writes, matters not specifically mentioned under the proclamation as falling under the FC jurisdiction are presumed to fall under exclusive state jurisdiction. The rest of the federal laws, which are not enumerated, are then understood to be within the jurisdiction of state courts.

This line of thought could also be supported by the overall tone of the federal arrangement we have in the country. This line of argument implies the federal courts have only and limited

²⁰⁸ Proclamation 25/96 Article 4 of the Federal Courts Proclamation bestows upon federal courts criminal jurisdiction over: offences against the national state; offences against foreign states; offences against the law of nations; offences against the fiscal and economic interests of the federal government; offences regarding counterfeit currency; offences regarding forgery of instruments of the federal government; offences regarding the security and freedom of communication services operating within more than one region or at international level; offences against the safety of aviation; offences of which foreigners are victims or defendants; offences regarding illicit trafficking of dangerous drugs; offences 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 and offences committed by officials and employees of the federal government in connection with their official responsibilities or duties.

jurisdiction of both civil and criminal cases listed under the proclamation and this rules out the possibility of *shared* judicial power.

Assefa argues that this proclamation which defines the civil and criminal jurisdiction of federal courts lists only a fraction of the offences or cases to be adjudicated by federal courts. The listing of the proclamation is not exhaustive listing of the jurisdiction of federal courts and as known for certain that state courts do adjudicate cases arising from federal laws in their competence as state courts, not in their delegated function.²⁰⁹ The Federal courts should not be excluded from their inherent jurisdiction, so the bulk of federal cases adjudicated by state courts should be shared, not as exclusive state matter and what is defined by Proclamation 25/96 is the exclusive federal matter. So unmentioned matters are shared jurisdiction of both the federal and regional states where as the listed matters are exclusive Federal matters.²¹⁰

Both the Oromia and SNNPR States have their own court establishment proclamations.²¹¹ Abebe's argument of residual criminal law jurisdiction of regional state courts seems to be followed by SNNPRS court establishment proclamation. The proclamation has set out common jurisdictions of the regional State courts. Accordingly the RC shall have jurisdiction over regional matters except those expressly reserved to the federal courts, have powers over matters falling under federal courts jurisdiction upon delegation, it have a power to rule out any administrative action, decision or order which contravene with the regional constitution and except those cases decided upon delegation from federal courts, decision of the regional supreme court shall be final.

The proclamation shows that the RC have jurisdiction over matters not expressly listed by the federal courts proclamation as federal jurisdiction. Abebe's line of argument is clearly adopted by SNNPRS court establishment proclamation, power not clearly vested with the federal courts fall under the regional court's jurisdiction.

According to this line of arguments matters not specifically mentioned under the federal court proclamation are presumed to fall under exclusive state jurisdiction. The rest of the federal laws, which are not enumerated, are then understood to be within the jurisdiction of state courts. For

²⁰⁹ Assefa Fiseha, federalism, teaching materials prepared under the Sponsorship of Justice and Legal System of Research Institute, 2009 p;460

²¹⁰ Ibid

²¹¹ Proclamation number 43/2002 revised southern Nations, Nationalities and peoples regional courts establishment proclamation and proclamation number 141/2008 A proclamation to provide for the re-establishment of oromia courts.

instance article 5 of the proclamation determine jurisdiction of the supreme court, among which the regional supreme court has first instance jurisdiction over offences for which officials of the regional states are held liable in connection to their official responsibility. It is clear that the Federal Court establishment proclamation determine as Federal Courts jurisdiction, offences committed by officials of the federal government in connection with their official responsibility.²¹² The contrary reading of the provision ends in what is provided by the SNNPR State proclamation. Even though the proclamation does not expressly list all other matters, the phrase, “*Regional courts shall have jurisdiction over regional matters except those expressly reserved to the federal courts*” clearly shows that the regional state Courts have jurisdiction over matters, including criminal matters, not listed as federal courts jurisdiction by the federal Court Establishment proclamation.

This proclamation further go against principle of cassation over cassation, sub article 4 of the provision clearly puts the decision of the regional supreme court on state matters is final, which means, except the regional supreme court others courts including the federal supreme court has no power of rendering final decision on state matters.

Abdisa identified that there is a disagreement between the federal and regional state courts whether the FDRE constitution incorporate cassation over cassation. State courts claim the Federal Supreme Courts Cassation Division has no constitutional power to entertain on state matter, and interfere in to state matter is considered as encroach the state power as well as disregard the principle of division of power. As a result cassation over cassation is against the very principles of a federal system and has the aim of discouraging self-determination on the ground that interfering in state jurisdictions.²¹³

In addition the proclamation covers only delegation power of regional states over matters falling under federal courts jurisdiction, and there is no issue of concurrence power is stipulated. Because Abebes line of argument which is also stipulated in the proclamation rules out the possibility of *shared* judicial power. As a result federal courts have only and limited jurisdiction of both civil and criminal cases listed under the proclamation. All other matters not expressly vested with the Federal Courts will automatically fall under regional states court’s jurisdiction. The Oromia regional state courts establishment proclamation does not provide such listed

²¹² Supra note 207, Article 4(12)

²¹³ Supra note 145, p;99

criminal jurisdiction of the Courts. The Proclamation does not provide common jurisdiction of the regional State courts rather it simply provide the power of the regional supreme, high and district courts power. But practically the regional state courts, particularly in relation to crimes committed by oromia officials in Finfinne, the Finfinne surrounding Oromia special High court has been assuming to have jurisdiction on such cases. In one case a corruption crime was committed by Oromia official in Finfinne, the crime was investigated, prosecuted and adjudicated by concerned Oromia regional state authorities including the regional High court located at Finfinne.²¹⁴

This case clearly shows Abebe's line of argument and similar to what is envisaged under SNNPR State court establishment proclamation. It is clear that even though the proclamation does not clearly stipulate like in the case of SNNPRS court establishment proclamation, the practice reveals that all matters not specifically mentioned under the federal court proclamation fall under exclusive state jurisdiction. The oromia regional state like that of the SNNPR State is practically following the same line of assuming criminal jurisdiction over such state matters.

Oromia court establishment proclamation has incorporated another different approach with respect to delegation power of the federal court Jurisdiction. On the one hand it vests power to the regional Supreme Court first instance jurisdiction over federal matters representing the federal High court. The delegation power of the regional state Supreme Court on FHC jurisdiction is provided not as a delegation power but as a representation power. Whether delegation power is one and same with representation is an issue.

On the other hand with regard to federal first instance court jurisdiction the proclamation does not refer as either delegation or representation power but simply says, "shall hear and decide on federal first instance jurisdiction matters" this is the Amharic translation of the article the English provision does not even provide as federal jurisdiction. The other different issue is the proclamation provides criminal Jurisdiction of the regional state high Court for crimes punishable with more than 10 years which is different from the one provided under criminal procedure code. This issue has discussed under the previous section. Generally although the

²¹⁴ Public prosecutor of Ethics and Anti corruption commission of Oromia regional state v Zeleke Teshome, Finfinne surrounding Oromia special high court criminal division file number 04828, decided on 9/10/2003, In Another similar case crime of corruption committed in finfinne by Oromia officials the same procedure of handling the criminal case was followed, Oromia North Shoa High court criminal division file number 07091, the case was transferred to North Shoa through change of venue.

current criminal code is centralized law, practically both the federal and RC are adjudicating criminal matters that fall under their jurisdiction, but there is no adequate law which sufficiently governs how the regional unit's courts adjudicate federal laws in general and federal criminal laws in particular.

3.8.3 Criminal Law Prosecutorial Power of Regional states in Ethiopia

Like all other criminal law enforcement agencies the existence of ministry of Justice at federal and Regional Justice Bureau at regional level indicate the duality of the criminal law enforcement agencies. As discussed earlier in dual federalism state executive agencies are designed to execute state laws while the federal law enforcement agencies are designed to execute federal laws.

From the criminal law making power perspective discussed above the regional public prosecutor is expected to exercise its power on state crimes which ought to have been defined by the regional law making organ. The federal public prosecutor has to exercise its power on federal crimes. Yet practically regional states' public prosecutors are implementing the federal criminal laws. Since there is no regionally defined crimes by the state councils the regional states are busy of doing federal business than their own.

The ministry of Justice is one of the federal institutions that are meant to take part in criminal enforcement task at federal level. It represents the Central government for the enforcement of criminal laws in addition to other tasks it is vested with. The criminal jurisdiction of the federal public prosecutor is limited to crimes falling under federal courts jurisdiction. It is worth noting that all state criminal executive agencies power is also limited to crimes fall under the jurisdiction of the state courts.

The ministry of Justice in addition to other functions and powers vested with, is the authority to direct and supervise the federal police force and prison administration, it instruct for investigation where it believes that a crime, falling under the jurisdiction of the federal courts, has been committed; order the discontinuance of an investigation or instruct for further investigation on good causes. Like the ministry of Justice the regional states Justice bureau has many power and functions. The power and functions of the Justice Bureaus of all regional states

are the same in many perspectives²¹⁵. To focus on the justice bureaus of Oromia regional state and SNNPR states, the criminal enforcement power of the regional States Justice Bureau are many among which investigate criminal matters falling under the jurisdiction of the regional courts in collaboration with the Police; lodge charge representing the government, draw charge where it is necessary, order the discontinuance of an investigation or instruct for further investigation on good causes.

The regional justice bureau having all these power and function by regional state proclamation its power to enforce federal criminal law under FDRE constitution and Ethiopian federalism is unsettled issue. Is there any constitutional ground for this Justice sector to enforce federal criminal Laws?, is there any Law which identify which crimes fall under the state court Jurisdiction so that the Justice Bureau will also exercise the same? If any what type of power division is applied?, these are some of the question that should get an answer to identify the power of this Justice sector. As discussed earlier the current criminal code is federal criminal law and regional states have left with no room to define state crimes.

The Justice Bureau of the regional states is enforcing federal criminal laws. There is no any constitutional provision which empower the regional Justice Bureau to enforce federal criminal laws. Not alone providing and deterring the power and the function of this Justice sector the establishment of the Bureau as an independent institution has no any constitutional bases.

Mulisa identified that, the office of attorney general /prosecution office/ which is an indispensable corollary to an independent judiciary in the enforcement of human rights missed from the ambit of constitutional framework both at Federal and state level and established as executive organ of the government through ordinary act of the parliament under the minister of Justice at Federal level and state Justice Bureau at regional level.²¹⁶

Thus, the current legal and institutional framework of prosecution office in the Oromia National regional state (ONRS) is vulnerable to political influence because of the absence of constitutional recognition to an independent and autonomous function of the office of attorney

²¹⁵ Proclamation number 163/2003 E.C A proclamation to provide for the definition of powers and duties of the executive organs of oromia regional states. Art. 22 enumerate the power and function of the Justice Bureau of the regional states. Proclamation number 90/98 of the SNNPR State article 14 provides powers and Duties of the Bureau of justice and security, accordingly among other, order the discontinuance of an investigation in accordance with the law, withdraw and close charges; instruct for criminal investigation, follow up criminal cases falling under the jurisdiction of the regional courts.

²¹⁶ Interview with Mulisa Abdisa, Oromia Regional State Justice Bureau process owner of criminal investigation, conducted on

general and putting the institution under the strong supervision and instruction of the head of the institution who is politically appointed person and not an expert in criminal justice system.²¹⁷

It is important to note that other criminal enforcement institutions like the police and the courts have constitutional recognition both at central and regional states.

The prosecution office because it is not established as an independent organ under both the central and regional unit's constitution and it is not logical to assume the constitutional power division for an organ not constitutionally established as an institution. Irrespective of the institutionalization of the prosecutor office as far as criminal jurisdiction is concerned, Abdi argue that it is more likely that the state Justice Bureaus enforce the federal criminal laws concerning crimes committed within their respective jurisdiction.

In such cases, Abdi said delegation becomes a necessary tool together with its consequential aspect; that is the reimbursement of the financial expenditures. But as the writer argues somewhere above the power to make or implement the criminal law is not within the ambit of article 51 of the constitution. Article 50(9) clearly stipulate that the Central government can grant delegation to the regional states if necessary, and only the powers and functions of the Central government listed under article 51 of the constitution.

Yet the power of the Central government to enact the criminal code is the power given under article 55 of the constitution. In addition to that the main objective of criminal law enforcement is to maintain public order and peace, to achieve this objective of the criminal law enforcement the establishment of police force and other justice sector institution is vital. The constitution again empowers the regional states to maintain public order and peace within their territory as a result of which delegation by the central government is not necessary. So both criminal law making and implementation power of the central Government is not within the ambit of article 51 of the constitution and cannot be delegated as per article 50(9) of the constitution.

Abdi argue that the criminal law making power is shared judicial jurisdiction of both the federal and regional states power and if that is so, how can the Central government delegate the regional states on which the regional state themselves have concurrent power with the Central government is another important issue which makes the argument self defeating. So based on these facts the regional Justice Bureau has no any constitutional power to enforce the federal

²¹⁷ Mulisa Abdisa, The Legal and Institutional Frameworks for Prosecution Office in Ethiopia: the case of Oromia National Regional State Justice Bureau, Addis Ababa University LLM program, college Of Law and Good Governance School of Law, constitutional and Public Laws stream, march 2014, p;3

criminal code and constitutionally speaking the power cannot be delegated to the regional States though the practice is different.

3.8.4 Power of the Federal and Regional states to establish and Administer Police Force

Both the federal and regional unit Governments have the mandate to establish their own executive organ in general and criminal law executive organ in particular which result in parallel justice actors. Accordingly the Central government has the power to organize and determine national defense, public security, and a national police force.²¹⁸ Likewise the regional states have also a power to establish and administer a state police force, and to maintain public order and security.²¹⁹

Administration of public order and security is the power of both the federal and state powers and both has also a power to establish their own executive agencies for the enforcement of this power. The duality of criminal laws enforcement agencies is visible here too.

As discussed earlier according to article 55(5) of the constitution, constitutionally speaking criminal laws legislative power is concurrent power of both the federal and regional states. The Central government can enact criminal code or laws only on federal nature crimes and such has to be implemented by the federal police and regional states can also enact criminal laws on state and local nature crimes to be implement by state police.

But practically the federal laws enacting authority (HPR) ends in enacting the current criminal code or defining all crimes as federal nature crimes and then left the regional states without any criminal enacting authority. Theoretical speaking the dual nature of Ethiopian federalism is here reflected in criminal law making and implementation power division. Here it is very important to see the objective of the federal police establishment proclamation.

As per the proclamation the objective of the commission is to maintain peace and security of the public by enforcing the constitution and other laws of the country, and by preventing crime through the participation of the people. It is provided that the police commissions of Addis Ababa and Dire Dawa city administration shall be established under the federal police commission. Based on this fact jurisdiction is not an issue as far as the two cities are concerned,

²¹⁸ FDRE constitution article 55(7)

²¹⁹ FDRE constitution article 52(2)(g)

but here the criminal law enforcement jurisdiction of the federal police vis-à-vis the regional states police jurisdiction at the regional State is an issue.

To this effect the proclamation has set out two mechanism in an attempt to identify the criminal enforcement jurisdiction of the federal police Commission from that of the regional states Police commissions. The first method pertains to the fact that the commission may establish the federal police Rapid reaction Force, crime investigation, and other organs that carry out the powers and functions of the commission in any Region.²²⁰ In view of this provision, the federal police commission can carry out criminal enforcement function of federal matters as it establishes its branches at the regional states.²²¹

As discussed above the commission is established to deal with its own federal matters in this case federal criminal laws. The duality of criminal law enforcement agencies at both level of Government brings about the criminal law making power of regional states under article 55(5) of the constitution in to picture. Because the current criminal code is federal code if all criminal enforcement agencies including the federal police are established at the regional level to enforce the criminal code the regional states remain with no criminal enforcement function. For the mere fact the federal government has enacted criminal law on all matters including state matter crimes which ought to have been enacted by the regional states will make State matter crimes to be implemented by the federal agencies.

This is against the dual nature of Ethiopian federalism. The second mechanism used as an identifying tool of the federal criminal enforcement or execution from that of the regional states is an illustrative method or qualifying the matter or powers. The illustrative method is strongly connected with the enumeration of subject matters that are supposed to fall under the jurisdiction of the federal Police. For example, it has a duty to prevent and investigate crimes that fall under the jurisdiction of Federal Courts; prevention of any activity that may violate the constitution and

²²⁰ Proclamation number 313/2003, Federal Police Commission establishment proclamation, 9th year number 30, Negarit Gazeta, 4th January 2003, art.7, it has also power to maintain law and order in any region in accordance with the maintain order of the Federal Government when there is a deteriorating security situation beyond the control of the concerned region and a request for intervention is made by the region or when disputes arise between two or more regions and the situation becomes dangerous for the federal security. Safeguard the security of borders, airports. Railway lines and terminals, mining areas, and other vital institutions of the Federal Government; give security protection to higher officials of the Federal Government and dignitaries of foreign countries; execute orders and decisions of courts; etc

²²¹ Abdi Gurmessa, criminal Jurisdiction of State courts under FDRE constitution, Addis Ababa University LLM program, college Of Law and Good Governance School of Law, constitutional and Public Laws stream, march 2014, p;99

that may endanger the constitutional order, prevention of violence against public peace, terrorism etc.

The list of crimes enumerated under the federal police commission proclamation are not all crimes listed under the criminal code, which means there are crimes not listed by the proclamation but exist on the criminal code, the implication of which is unlisted crimes fall under the Jurisdiction of the regional police for its implementation. But the problem is that how those listed crimes under the federal police commission can be implemented at and within the regional States territory.

As regard to the criminal enforcement powers of the regional states, both the Oromia regional state police proclamation and the SNNPR state Police proclamations does not list any crimes on which the regional states Police have a power.²²² The regional proclamation even does not refer to the criminal jurisdiction of the police to prevent and investigate crimes that fall under the jurisdiction of the State Courts.

For instance the power listed under the Oromia regional Police commission are not clearly listed crimes, the commission shall have the duty to prevent any activities and movements which contravene and danger the constitutional system, prevent occurrence of criminal act and traffic accidents, cause the criminal investigation to be conducted in accordance with the constitutional and legal rights of the suspected and detained persons etc. here it is important to look at the word any activities or movements which contravene the constitutional system.

For Example act of terrorism obviously contravene the constitutional system in which case according to this proclamation the regional police have a power to deal with such a case, in fact this is clearly against terrorism proclamation. Again such line of argument makes even the regional Police have a power on any crimes including federal jurisdiction crimes so far it contravenes the constitutional system.

The SNNPR state Police Commission Proclamation has also similar provision and neither the two proclamations determine criminal jurisdiction of the regional police commissions. The implication is that only the federal Police commission have criminal enforcement jurisdiction on criminal laws and regional states have no criminal enforcement power on criminal laws. So the

²²² Proclamation number 163/2003 E.C A proclamation to provide for the definition of powers and duties of the executive organs of oromia regional states, Article 34 provide power and functions of the Regional State police. Proclamation number 90/98 of the SNNPR State article 15 provides powers and Duties of the Regional State Police.

question is that how the regional states police commission enforces criminal cases within their territory, and here again Abdi argue that the constitution and legal mechanism through which the regional police commission enforces the criminal laws on behalf of the federal police commission is delegation.

He further pose that the notion of delegation in criminal enforcement jurisdiction has gained constitutional background in general and statutory root in particular. The doctrine of delegation under the FDRE constitution entails the reimbursement of financial expenditures by the delegating party (the Central government). Compensating budget is required in the areas of human resource fulfillment, institutional setup and proper and accessible implementation of the criminal laws. But as the writer discussed earlier, on the one hand delegation is necessary only when the power is exclusive power of the Central government, and the delegation power is limited only for the functions and power listed under article 51 of the constitution. But both criminal law making power of both the federal and regional states is vested under article 55(5) of the constitution.

On the other hand with respect to criminal law implementation power regional states have the power to establish their own police force to maintain public order and security, and as such they can implement their own criminal law which is the main function of criminal laws. Criminal laws enforcement executive agencies are designed to enforce the laws to maintain public order and security which is the very objective of criminal law enforcement and this power is clearly vested with both the regional states and the Central Government. So both criminal law making and implementation power is not the one listed under article 51 of the constitution as exclusive power and as such cannot be delegated.

3.8.5 Historical Background of Prison Institutions in Ethiopia

There is no any documentary or credible oral evidence showing the exact period when prisons were established in Ethiopia. As Ethiopia was not politically unified state in its ancient history, each region had its own ruler who has his own particular way of dealing with criminals. It is, therefore, in this situation that the early prisons of Ethiopia can be studied. The prisons of traditional Ethiopia were mainly used to confine the successors to the throne.

These people were mostly placed on the mountains. The mountains were cold and big and are round on top and it takes fifteen days to go round it. Since these mountains are closed by one or

two very strong gates there is no possibility to go out of it. In this particular place those who are nearest to the king are placed. Those with the nearest blood relationship are watched with care. Those who are descendants and already almost forgotten are not so much watched over. The would be kings were not permitted to associate themselves with the public so as to avoid that no one may have an opportunity of learning the secrets of the mountain. Mount Gishen of Wollo, Mount Wehni of Begemder and Mount Debre Damo of Tigray were among the prominent mountains that served as detention centers. On Mount Wehni prisoners can have little relief from the monotony of daily life on the mountain except possibly in the ceremonies of the church of St. Mariam.²²³

Generally, even if the number and the exact situation of prisons remain unascertained in the post Minilik Ethiopia, Emperor Hailesilasse in his book pointed out that prior to 1925 E.C. the places where prisoners were kept were filthy and contrary to health. He further added that after 1925 E.C. he built from his own private purse prisons which have the necessary accommodation such as clinic, school and vocational training, and the chaining of prisoners was abandoned and permanent guards were posted to watch over prisoners. Therefore, it is at this point that we can with full confidence say the era of modern prisons began in Ethiopia.

After this time onwards the number of prisoners and prisons in Ethiopia has shown an increase dramatically. According to the report of the Special Rapporteur on Prisons and Conditions of Detention in Africa there were about 63,000 prisoners and 171 prisons in Ethiopia in 2004. While the number of prisoners increased to 80, 974 (including 2,123 female and 487 child living in prison with their mothers) in 2008, the number of prisons have shown a decrease to 120 at the same year. This could be due to the new federal restructuring arrangements in the country.²²⁴

²²³ Tesfaye Tadesse Abebe, Freedom from Torture, Inhuman or Degrading Treatment or Punishment: the case of some selected prisons of Oromia National Regional State, Addis Ababa University School of Graduate Studies Faculty of Law, Submitted to Addis Ababa University, School of Graduate Studies in Partial Fulfillment of the Requirement of the Degree of Masters in Human Rights Law, March, 2011 P;100

²²⁴ Ibid, p; 101

3.8.6 Power of Regional states to establish and Administer Prison Institutions

Currently both the federal government and the regional states have their own prison institutions.²²⁵ As per article 52(2)(g) of the constitution the regional states have power to establish and administer their own police force for maintaining law and order within their respective territories, but the constitution is silent as to whose power to establish and administer prison administrations. Under this section the power of the regional states to establish and administer prison administrations are discussed. In doing so some questions like, to which tiers of Government such power belongs? Does Prison institutions considered as part and parcel of police force? If establishment of prison administration is considered as residual power of states do they have duty to enforce federal criminal laws?, this equations and other are discussed below.

FDRE constitution is silent as to whether this power belongs to either or both of the Central and regional unit governments. As the writer earlier explored different scholars argument that the establishment and administration of prison institution is part and parcel of the establishment of police force and the power to establish police force belongs to both the federal and regional states.²²⁶ So both the federal and regional states can establish and administer their own prison institution.

According to the constitution the power to establish and administer police force is left for the discretion of the regional states, additionally the Central government has also power to establish and administer national Defense and public security forces as well as a federal police forces.²²⁷

As above discussed, according to FDRE constitution criminal law making power is concurrent power of the central and regional unit governments. Yet the criminal code enacted in 1996 by HPR after the reestablishment of the federal government is federal law. The constitution gives power for regional states to define criminal acts on matters that are not specifically covered by federal Penal code. From this constitutional provision it seems that all criminal enforcement executive agencies including prison institution should implement only their own respective laws.

²²⁵ Federal Prison Administration is established by proclamation No. 365/2003, Federal Prisons Commission Establishment Proclamation, in Oromia the prison commission is established by proclamation number 163/2003, A proclamation to provide for the reorganization and definition of the powers and duties of the executive Organs of the oromia national Regional State, article 35, Proclamation number 90/98 of SNNPR State article 15 provides power and function of the Regional State Prison Commission.

²²⁶ Supra note 74,

²²⁷ FDRE constitution Articles 51(6) and 52(2)(g)

As a result federal prison institutions implement federal laws and State prison institutions implement State laws. The power of regional states to establish prison institution is not as such controversial because the powers not expressly vested with the Central Government is residual power and at the same time belongs to the state.

The power to establish prison institution should be interpreted as residual power of the regional states. Unspecified constitutional powers should be treated as residual power and should not be interpreted as part of other power expressly provided in the constitution. Thus the writer goes against this argument that prison establishment power is part and parcel of establishment of police force. Actually both line of argument empowers the regional states to establish prison institutions but the second line of argument deny the federal government to have similar power.

There are federal countries like Australia in which the federal government uses state courts and state prisons for federal law implementation. Constitutionally speaking in Ethiopia the constitution denies the federal Government to establish its own prison institution and there is also no provision which empowers the federal government to use State prisons. Institutionally speaking both at federal and regional states the institution of Police is different from the institution of Prison institution.

At federal level even if both are accountable to ministry of Affairs functionally and structurally both are different institutions established by different laws.²²⁸ Under the former proclamation of federal prison establishment proclamation Prison wardens had military rank but currently article 35 of Federal prison establishment proclamation stipulates that no prison warden member of any hierarchy shall have a military rank. However, he shall have ranks and badge of the Prison warden.

From the provision it is clear that prison wardens are different from the police force. So both Police force and prison institutions have different structure and have different and independent function and as such the prison institution cannot be considered as part of the police force. The regional States have power to establish and administer Prison institutions but the next question to

²²⁸ For example Federal police is established by proclamation number 313/2003, the organ is accountable to Ministry of Federal Affairs, the Minister shall, follow up the overall activities of the Commission, approve the appointment of the Assistant Commissioners of the Commission; and appoint Commissioners, Commissions submit the annual plan, report, and performance of the Commission to the Federal Government with its recommendations, examine and approve the studies on the organization, Performance, human resource, and capacity building program submitted to him by the Commission, take measures necessary for the implementation of the Proclamation.

be posed is does the regional state prisons have any constitutional power to enforce federal criminal laws?.

As earlier discussed in dual federalism like USA and Ethiopia the implementation of federal and state laws should be made by their respective state and federal executive agencies. It is in executive federalism like Germany and Swiss that the state has constitutional obligation to implement federal laws. In Ethiopia constitutionally speaking the existing federal criminal laws has to be implemented by the Central government.

Regional prisons have no any duty to implement penalties imposed by federal or state courts on federal criminal matters. Even if Regions have constitutional power to establish prison institution it should be interpreted so as to implement state criminal laws or all other State matters including civil matters which entail any penalty.

In other words, State prison institution has duty only to execute penalties imposed because of violation of state crimes or any other state civil matters which entail penalties. As earlier said even if state courts have shared power to implement federal criminal law state executive agencies including state prisons have no duty to implement such penalties.

So Regions have power to establish prison institution like all other state executive agencies for the implementation of state laws and are only duty bound to implement penalties imposed by state courts on state crime or civil matters. As far as delegation is concerned the same approach has to be followed with all other criminal laws enforcement agencies. So the implementation of criminal laws is not listed under article 51 of the constitution and as such cannot be delegated to the regional states.

Generally speaking practice reveals that all regional states' executive agencies, the police, public prosecutor and prison institutions exercise criminal jurisdiction which emanate from shared judicial jurisdiction of state courts which emanate from statutory law, which is specifically proclamation 25/96. Practically the regional unit's police investigate crimes that fall under the jurisdiction of the regional State courts. The public prosecutor lodge charges on crimes that fall under the jurisdiction of the regional State courts. The same approach is followed with regard to the regional unit Prison commission.

However all regional states' executive agencies, the public prosecutor, the police and prison institutions have no any constitutional ground to implement federal criminal laws except through delegation. It is also important to note that the power of those organs to implement criminal law

is not listed under article 51 of the constitution and as such it cannot be delegated. So it can be argued that all criminal law enforcing regional executive agencies power is the extension of the RC to adjudicate criminal cases which fall under regional unit's court's jurisdiction. Oromia prison commission executes penalties imposed by all the regional State courts that either imposed through the delegation power of the RC or by their concurrent jurisdiction. There are also other instances where prisoners may be transferred from the federal prison or/and from other regional states to Oromia regional state prisons.²²⁹

The National Regional State of Oromia has established its own commission for the administration of prisons. There is no a separate legislation for the establishment of Oromia Prisons Administration Commission. It was established under Proclamation No. 163/2011, a proclamation to provide for the reorganization and redefinition of the powers and duties of the executive organs of the Oromia National Regional State.²³⁰ Article 35 of this proclamation provides for a detail list of powers and duties of Oromia Prisons Administration Commission. The commission has a duty to ensure and respect human rights of prisoners without any discrimination, ensure that prisoners who are sent to prison administration only be with court order and warrant; perform work which enable to return prisoners who have acquired behavioral and psychological change to their previous social life, etc. Currently, as of November 2010, there are 35 prisons and one vocational training center in the whole Oromia region, including all prisons organized at District and Zone level. Each the 19 zonal administration of the region has one prison institution and the remaining are located at District level.²³¹

There is no any formal or informal IGR mechanism which negotiated between federal prison institutions and regional states prison institutions. However Prisoners can be transferred from the regional state to the federal in two ways. The first one is up on request of the prisoners due to their social problems. Second some dangerous prisoners may be transferred from regional prison to federal prison and the federal prison accepts such prisoners without any refusal.

This is also practically true even between the regional states for example there are a prisoner's transferred from Tigray, SNNPRS, Amhara regional state to Oromia regional state.²³² The same

²²⁹ An interview with Oromia Prison commissioner, commissioner Thehay Negash interview conducted on march 2/2015

²³⁰ Supra note 215

²³¹ Supra note 229

²³² Ibid

holds true with respect to SNNRS prison administration, The National Regional State has established its own commission for the administration of prisons.

There is no a separate legislation for the establishment of Prisons Administration Commission. It was established under Proclamation No. 90/98, a proclamation to provide for the reorganization and redefinition of the powers and duties of the executive organs of the SNNPRS. Article 15 of this proclamation provides for a detail list of powers and duties of the Prisons Administration Commission. The commission has many duties among which it has duty to make persons subject to correction receive academic and vocational education to be good citizens at the end of their imprisonment, provide food, shelter, clothing and medical services to prisoners subject to corrections, respect and see that human rights of prisoners are respected through appropriate protection.

4 Capital Punishments and its Execution in Ethiopian Federalism

Death Penalty which is also referred to as capital punishment may sometimes be imposed if the crime committed is exceptionally serious. It is claimed that the imposition of such penalty is a scintillating example of states power to do whatever it likes to its citizen. It is the most serious criminal punishment and it is the last thing a state can do on individuals.

On the other hand, DP is the most controversial and divisive topic in criminal justice system. The issue of DP is related to respect for human life, the possibility of imposing and executing it arbitrarily and mistakenly as it is irreversible.²³³ That is why while some other countries have abolished it from their legal system some other countries retain it. As it is discussed in the former section both retentionist and abolitionist have their own ground and justifications. DP is the most serious criminal punishment imposed as a means of the last resort and it is recognized against an extraordinarily dangerous criminals.

In Ethiopia the constitution recognizes the imposition of death penalty as a punishment under exceptional circumstances for serious criminal offences. Article 15 of the constitution guarantees the right to life. The provision reads as ‘every person has the right to life. No person may be deprived of his life except as a punishment for a serious criminal offence determined by law’.²³⁴

²³³ Dajene Girma Janka, A handbook on the criminal code of Ethiopia, 2013, p;171

²³⁴ FDRE constitution, Article 15

The constitution allows taking person's life as a criminal punishment. The criminal code also recognizes the punishment of death penalty under exceptional circumstances.

The current criminal code which was enacted by the HPR is federal criminal code. As discussed in the above title the intention of the drafter of the constitution does not seem that the Central government defines all crimes as federal crime. we have currently federalized or totally centralized criminal code which is against the dual nature of Ethiopian federalism. There is no any state criminal code or laws enacted by the regional states so as to determine state crime and corresponding penalty including death penalty punishment.

Actually as discussed under chapter two of this paper most capital crimes are federalized crimes and are federal in nature in many federations. Particularly international crimes and transnational crimes are some of such nature crimes. The regional courts are adjudicating the Federal criminal code by virtue of statutory jurisdiction. Likewise all other regional criminal laws executive organ are also enforcing this criminal laws. Among some of the criminal laws enforcing executive organs, the regional prison institutions are the one which are obliged to execute or enforce court ordered penalties including DP decisions²³⁵.

The criminal code stipulates that the mode of execution of DP has to be determined by the state and federal prison institutions. The implication of the federal Criminal code empowering regional prison institutions to determine mode of execution of death penalty is that, the regional states have or may have power to execute or enforce DP decisions. This also emanate from criminal law legislative power of the regional states which is envisaged under article 55(5) of the constitution.

Yet practically speaking the regional staes prison institutions have determined no method of death penalty execution. Higher officials of Oromia and SNNP regional states prison commission believe that regional States have no power to execute death penalty even if all criteria are fulfilled. For instance if the Head of the state confirm the execution of death penalty, it has to be executed by the federal government at country level. Thus, the respondents believe that the power is not given to the regional states even if the criminal code has such provision.²³⁶

²³⁵ Proclamation 163/2003 of Oromia Regional state, article 3, one of the main functions of the prison commission is to insure that prisoners who are sent to prison administration are only be with court warrant and order.

²³⁶ Interview with Commissioner Thehay Negash Oromia prison commission, Temesgen Assefa SNNPRS prisoner's administrator executive, conducted on march 2/2015 and April 6/2015 respectively.

The criminal code identified five elements under which the imposition of death penalty as a punishment is prohibited. These are:- first, it should be passed only for grave and complete crimes and on exceptionally dangerous criminals, who has attained the age of eighteen and in the absence of any mitigating circumstances. The stringent requirement shows the imposition of the penalty is only possible under exceptional circumstances.

It is not only the imposition of the penalty but also the execution of DP has to fulfill some criteria before it is effected. The criminal code stipulates that DP cannot be executed on a person who is fully or partially irresponsible or on a person who is seriously sick or on pregnant women as long as they continue to be in that state.

According to the criminal code there are about 36 crimes which are capital crimes and punishable with death penalties. According to proclamation 25/96, the federal courts have criminal jurisdiction over almost all capital crimes listed under the criminal code. The federal courts have exclusive criminal jurisdiction over those capital crimes specifically listed under the proclamation. While unlisted capital crimes are either exclusively falls under regional unit's criminal jurisdiction or shared jurisdiction of both the federal and regional unit's court's jurisdiction.

There are only few capital crimes which do not fall under the list of the federal courts establishment proclamation but are punishable with DP according to the criminal code.²³⁷ These crimes are Crimes committed against the public interest or the community which include Crimes against public safety Art.512, Spreading of human disease art.514, Aggravated homicide art.539, Rape art.620, Aggravated robbery art.671, Looting art.672, and Piracy art.673. The regional states courts have criminal jurisdiction over those crimes and can impose DP. Practically both

²³⁷ For instance according to the criminal code capital crimes committed against the State or against national, includes, Outrages against the constitution or the constitutional order Art. 238, Armed Rising or civil war Art. 240, Attack on the Political or territorial integrity of the state Art. 241, Crimes against the external security and defensive power of the state includes, Attack on the independence of the state Art. 246, Impairment of the defensive power of the State Art. 247, High Treason Art. 248, Collaboration with enemy Art. 251, Espionage Art 252. Crimes committed in violation of international laws (fundamental crimes) includes, Genocide Art. 269, War crimes against the civilian population, War crimes against wounded sick and ship wrecked persons or medical services Art. 271, War crimes against prisoners and interned persons Art. 272, Pillage, Piracy, looting (art. 273), Dereliction of duty towards the enemy Art. 275, Use of illegal means of Combat Art 276, Franc Tireurs(Art.278), Crimes against the constitution or the state include, Military crimes and crimes against the Defense force and the police includes, Desertion, insubordination, Mutiny, crimes against Guards, sentries or patrols, breach of Guard duty, demoralization of the Defense force, Cowardice, Capitulation and abandonment of a wounded or killed member and Sabotage, (Arts. 288, 298, 299, 302, 303, 311, 312, 313, 316 and 327)

the federal and RC are assuming jurisdiction over those capital crimes which shows shared criminal jurisdiction of both the central and regional courts.

Execution of DP in general and long stay of DP prisoners in particular are the most controversial and debatable issues in many federal countries. In Ethiopia currently there are about 171 (one hundred seventy one) death row prisoners. Among which in Oromia there are 40 (fourty) prisoners awaiting execution and confirmation of the penalty.²³⁸

In Ethiopia even though the federalized criminal code and other federal criminal laws are incorporating DP as criminal punishment and courts are imposing the same the prison administration of the federal and regional states are not executing the death penalties. Records reveal that only the executions of three DP prisoners were effected since 1995 of the newly structured federal system in Ethiopia.²³⁹ It is very important at this point to raise the central issue of this paper that, why DP is not executed generally both by the federal and regional states?, do regional states prison commissions have discretionary power with this respect? Why the federal prison administration has executed three and leaves the others? What are the general and specific reasons for non execution by each of the two regional states and the central government? what is the power of head of state with this regard? Does it have any constitutional and legal bases to grant such power to the head of states? Do regional states have power to grant pardon to federal criminal laws prisoners? Do they have any constitutional and legal ground to do so? These are the central issues discussed separately in the next section.

5 Execution and reasons for non execution of Death Penalty in Ethiopia

Criminal punishment should be enforced in the manner provided by the criminal code. As a result if the criminal law provides for a certain manner of enforcing imprisonment, the imprisonment should be executed in that manner. In federations having different federal and regional states criminal code the execution of punishment may be different from one State to the other or from state to the Central government. Like its imposition, the execution of death penalty is also controversial and method of execution varies from State to State.

²³⁸ An interview with ato Haile Adaro, MR of Justice Pardon board executive, march 3/2015

²³⁹ Kasech Tenea Capital Punishment; the law and the practice in Ethiopian legal system AAU 2009 (unpublished thesis) p, 52

For example, Saddam Hussein, the ex-president of Iraq, was hung publicly. In some States in USA, DP is executed by using electric chair. In some other legal system the use of lethal injection to execute death penalty is adopted. In Ethiopia First DP becomes enforceable only after it is confirmed by the Head of the state; that is the president of the country. Of course if the criminal is the member of the Defense force, his DP should be first confirmed by the commander in chief of the Armed Forces (the Prime Minister) then by Head of the State.²⁴⁰

Secondly, the current federal criminal code provides that DP should be executed with the precincts of a prison by human means.²⁴¹ Consequently it cannot be executed publicly and by using inhuman means such as hanging, burning, burying alive and mutilation.²⁴² One important point that should be raised at this juncture is the Power of Head of State to confirm DP.

This power of the Head of State has no clear constitutional ground. The 1955 revised constitution clearly grants the power to confirm DP for the Head of State or Emperor. Article 59 of the constitution reads “no sentence of death shall be executed unless it be confirmed by the Emperor’. Art 28 and 71(7) of FDRE constitution gives the president the power to commute death sentence in to life imprisonment and pardon respectively. Based on this constitutional provision one can argue that the president’s power to commute DP in to life imprisonment include the power to confirm DP.

Likewise the regional states constitutions grant the power to grant pardon to the regional head of states but there is no any provision which deals with the issue of confirmation of death penalty.²⁴³ So both the FDRE constitution and the regional states constitution are silent about confirmation of death penalty by the Head of State and Head of the regional states respectively. The only difference between the two constitutions with this regard is the Head of State has power to commute DP in to life imprisonment for international crimes listed under article 28 of the constitution. Whether the power of the Head of State to commute DP in to life imprisonment is restricted to the crimes under article 28 or extends to all other DP crimes is again an issue.

The writer of the paper argue that if the commutation is available for the most dangerous crimes prescribed under article 28 it is also possible for the Head of State to commute all other DP in to

²⁴⁰ Dajene Girma Janka, A handbook on the criminal code of Ethiopia, 2013, p;172

²⁴¹ The Criminal Code of the Federal Democratic Republic of Ethiopia 1996, proclamation No.414/2004, 9th of May, 2005, Article 17

²⁴² Supra note 240, p;7

²⁴³ Oromia national Regional State revised constitution of 2001 Article,49(3)(g), Revised constitution of 2001 SNNPR State Article

life imprisonment. To make it reasonable crimes under article 28 are even unpardonable by legislature or any other state organ but can only be commuted in to life imprisonment by the head of state. Thus the head of the State can commute all other DP crimes which are less dangerous than crimes listed under article 28 in to life imprisonment.

From this argument one can say that there is no any limitation to commute all DP in to life imprisonment by the head of state. It can also be said or concluded that all DP can be commuted to life imprisonment by the Head of state without any limitation including those crimes listed under article 28 of the constitution. Similarly there is another issue with this regard, whether the power of Head of State to grant pardon under article 71(7) of the constitution include DP is another controversial issue. Article 28 and 71(7) should be interpreted together.

Under article 28 of the constitution what is prohibited by the legislature or other state organ is commutation of the penalty by amnesty or pardon. As discussed under chapter two of the paper the Indian constitution as opposed to other countries incorporated the issues of pardon in a very detailed manner. The constitution, under Article 72 and 161, provides two safety valves. Accordingly, both the president of the country and the governor of the state have been given prerogative power to grant pardon.

In Nigeria according to the Constitution, the President and State Governors have the power to grant pardons and commute death sentences. The President may pardon, suspend, or decrease any punishment imposed under a law passed by the National Assembly. Governors exercise similar powers with respect to punishments imposed under state law.

Prisoners may petition for clemency after they have exhausted all appeals. For instance, prisoners may be eligible for commutation or release after 10 years of good conduct on death row, in practice, pardons and commutations of death sentences occur at both the federal and state levels. In January 2000, for instance, President Obasanjo issued a federal amnesty, ordering the pardon and release of prisoners who had been on death row for over 20 years and commutations to life imprisonment for those who had been on death row for 10 to 20 years. At the state level, for example the governor of Lagos pardoned and released three death row inmates in June 2009.

In Ethiopian context too, the power to grant pardon vested on both the federal and the regional governments.

Nevertheless, the regional governments' power, unlike their Indian and Nigerian counterpart, is not absolute: as they have no power over capital punishments. There are arguments with this

regard whether pardon includes DP or not under Ethiopian legal system? This issue is discussed under the next section.

The other important issue is even though the regional states constitution incorporates the power of Head of the regional states to grant pardon because the current criminal code we have is federal law and its implementation by the regional states require delegation. The Power of Head of states incorporated in the regional constitution empowers them to grant pardon only on state crimes and not include federal crimes. And as such pardoning on Federal crimes require delegation. Proclamation number 840/2006 is enacted with this intention.²⁴⁴

Under Ethiopian Legal system Pardon means commutation and remission of sentence. Remission and commutation of sentence are parts of clemency. They can't be parts of pardon because the result they produce is different from the result that is anticipated under pardon's very essence.²⁴⁵

In Germany according to the constitution, the chancellor can delegate its power to grant pardon to regional states of the federal matters.²⁴⁶

In Ethiopia too the Central government may, when necessary, delegate to the States power and Functions listed under article 51 of the constitution. As the writer discussed under the previous section the doctrine of delegation envisaged under this article is restricted to the power and functions under article 51 of the constitution. Article 71(7) reads "the president shall.....," the mandatory nature of the provision undoubtedly makes this power of the President one of the main function that should be performed by the president of the federation.

This mandatory function of the president is again out of the ambit of power and functions listed under article 51 of the constitution and as such it cannot be delegated to the regional states. However there is a Proclamation enacted by the Federal Government which provides delegation power of granting pardon for appropriate regional states organ.²⁴⁷ Why delegation is required For the regional states while their constitution has the same stipulation?, If so, why commutation of

²⁴⁴ Proclamation 840/2014, it empower the Head of State to grant when necessary to give delegation to the appropriate Regional State organ to on matters covered under the proclamation, article 5

²⁴⁵ National Pardon Issues Forum And Backlog cases Clearance program, organized by Mr of Justice in collaboration with Justice for all-Prison fellowship Ethiopia, August 2-3, 2002 E.C Capital Hotel Addis Ababa, p;11

²⁴⁶ National Pardon Issues Forum And Backlog cases Clearance program, organized by Mr of Justice in collaboration with Justice for all-Prison fellowship Ethiopia, August 19-20, 2010 E.C Intercontinental Hotel Addis Ababa, p;15

²⁴⁷ Supra note 244

death penalty is excluded from the delegation while there are many death row prisoners are suffering at regional Prisons? Are some of the questions that can be posed at this juncture.

Unlike in Nigeria and India the regional states have no constitutional power to commute or confirm DP and have no delegation power under the proclamation to do so. However there are about 121 (one hundred twenty one) death row prisoners exist at 5(five) regional states while the other 3(three) regional states have no a single death row prisoners.²⁴⁸

The head of the State having constitutional mandate to commute DP in to life imprisonment has also commuted very few death row prisoners since the establishment of federal restructuring. There is no such practice by the Head of the regional States.

These are some of the normative arguments with regard to execution and non execution of death penalty. Beyond the power of the regional states with regard to execution of death penalty the Head of the State who is Empower to either to commute DP in to life imprisonment or confirm the penalty for execution has failed to do both, as a result of which currently there are about 171 death row prisoners awaiting confirmation and execution of DP at regional and federal level.²⁴⁹

5.1 Reasons for non Execution of Death Penalty

Principally the main reason for the non execution and/or non commutation of death penalty in to life imprisonment is because of the non confirmation of the penalty by the Head of State who is the only organ having legal but not constitutional power to do so. Even Though the constitution empowers the Head of the state to commute death penalty in to life imprisonment and the criminal code give power to Head of the State to confirm DP, because of the absence of any institution, any rule, regulation, clear guidelines and procedure and further IGR mechanism to communicate the issue with the Head of the state for execution and commutation, DP at nationwide has not been effected.

²⁴⁸ An interview with Federal prisoners Justice Administration Directorate Director Ato Birhane H/Sillasse, 17/7/2015 totally there are about 171 death row inmates. In Federal prison there are 50, Oromia 40, Tigray 27, SNNPRS 24, Amhara 20, Somalia 10. There are no death row prisoners in Gambella, Afar and Benishangul Regional States, one may raise why in those Regional States there are no death row prisoners, it can be either the courts are not imposing death penalty as a punishment or no capital crimes has been committed.

²⁴⁹ An Interview with Super Intendant Aschalew Mekonin, Federal Prisoners justice affairs high official, according to the interview, there were about nine death row prisoners of the Dergi Regime higher officials convicted of “Red terror “ or international crimes like Genocide, the president has commuted the death penalty to life imprisonment and were released by parole. Their petitions were communicated to the office of the president through the ministry of Justice. Interview conducted on 17/7/2015 E.C

Commutation of death penalty by the Head of State has clear constitutional ground. Confirmation of death penalty by the Head of State for execution has no clear constitutional ground but legal ground.

As discussed above the federal pardon procedure which empowers the head of the state to give delegation to appropriate regional government organ the power to grant pardon seems to decentralize pardon power to the regional states. However unlike Nigeria and India this power does not include the power of confirmation of death penalty for execution.

As discussed under chapter two of the paper, in parliamentary federalism the Head of the state has no power and only has ceremonial power. The constitution is designed in such a way that it empowers the Head of the State with only ceremonial power including pardon power. Yet the criminal code vests the head of the state with other power that is the power to confirm DP. It is this legal but not constitutional power of the head of the state that makes the debate and controversies on death penalty execution critique. This criminal provision which empowers the Head of State to confirm death penalty for execution is from the very beginning is unconstitutional; because Ethiopia is federal State and all powers should be divided between the central and regional Government by the constitution. Statutory laws can only be enacted considering the constitutional power division.

The constitution grants only pardon power to the head of state leaving the power to confirm death penalty. Granting this power to the head of state has no any justification and even there is no such experience with other federal countries.

However the Head of the State had not exercised both the constitutional power and the legal power vested with it. Generally there are many striking factors for the non confirmation or non commutation by the Head of State.

The first is, although the head of the state is legally empowered to confirm DP for execution there is no rule, regulation or guidelines that has been issued by the head of the state as to how the petition has to be communicated. Second no institution to handle the case, third there is no any IGR mechanism between the regional state and with either Head of State or with other federal criminal law enforcing Organs.

With the first factor the office of the president has issued no rule, regulation or guidelines how to petition for the request of commutation by either the death row prisoners or their families. Both

at federal and regional state the pardon boards are not examining death penalty petitions, because they believe that pardon laws are not applicable for death penalty.

Except pardon procedure laws there is no law, rule or regulations which deal with death penalty issue. Death row prisoners are not submitting any petition to any of those organs and none of those criminal enforcing organs are requesting the Head of the state for confirmation of death penalty for execution. For instance, as discussed above in Nigeria there is regulation which provides that death row prisoners may be eligible for commutation or release after 10 years of good conduct on death row.

There is no any institution at both federal and regional states empowered to organize and handle the issue. Again there is no clear regulation or guidelines as to which Organ has to request the confirmation of death penalty. Many of the criminal enforcing sectors argue the ministry of Justice, the prison institutions, courts and the Head of the State itself has to handle the issue.

The power to enforce penalties or punishments in general and execution of death penalty in particular involves directly or indirectly the participation of all justice sectors in General and prison institution in Particular.

The ministry of Justice in General and Pardon board in particular contest that the power of presenting and handling the death penalty issue to submit for the head of state either for confirmation or commutation does not belong to the ministry.²⁵⁰

The Ministry of Justice has the functions and Duties to represent the Central government in the institution and trial of criminal charges; withdraw criminal charges for good causes and in accordance with the law; follow up the execution of decisions of the courts; one of the main function of the Ministry is to follow up the execution of decisions of the courts. Some people argue that this power of the Ministry of Justice includes the follow up of death penalty executions or commutation by the President.²⁵¹

For instances there were petitions from the families of the death row prisoners to the pardon Board office at Ministry of justice requesting pardon or commutation of the death penalty. The families brought their petition to this organ believing that the Ministry or the pardon board have

²⁵⁰ An interview with Ato Haile Adaro, MR of Justice Pardon board executive, interview conducted on march 3/2015

²⁵¹ Proclamation number 691/2010, proclamation to Define Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, Federal Negarit gazeta 17th Year No. 1 ADDIS ABABA 27th October, 2010, article, 16(6)

the power to handle the issue and to submit the same to the Head of State, but the Pardon board having heard the case from the families of the death row prisoners rejected the petition based on the fact that the office is not duty bound to handle death penalty issues and pardon does not include death penalty.²⁵²

There is ongoing confusion on the part of the families of the death row prisoners to bring their petition either to the MOJ, to prison institutions or directly to the head of state at federal level. There is also arguments and confusion on the part of regional states criminal law enforcing executives whether Pardon include death penalty or not and most of them believe that pardon does not include death penalty.²⁵³ Both FDRE and regional constitutions empower the head of the state and head of regional states to grant pardon without making any distinction between the kinds of punishment. In addition the criminal code clearly provides that pardon applies to all kinds of penalties and measures irrespective of the type of the punishments. It is clear from the constitution and criminal code that pardon applies to all penalties including death penalty.

However at regional states level there is no attempt made to any of those offices to bring petition for request of commutation or pardon for death row prisoners.²⁵⁴ Regional pardon boards which examine petition of pardon and submits recommendation to the regional Head of state and for federal criminal jurisdiction to the ministry of justice excludes death penalty petitions from examinations. Although the proclamation clearly vests the power to follow up the execution of decisions of the courts to the MOJ, practically the ministry or the pardon board within the ministry is not handling and following death penalty issue.

According to the federal Prison commission establishment proclamation, the commission has also power and duties to ward and reform the prisoners it admits upon judicial sentences or warrants; and shall also enforce other judicial decisions; similar to that of the Ministry of Justice the federal Prison commission has also power and duty to enforce Judicial decision which also include the execution of the death penalty.²⁵⁵ But practically both at federal and regional level the prison institutions believe that the power to handle death penalty issue and power to examine

²⁵² Supra note 250

²⁵³ Interview with ato Beruk SNNPRS pardon board office professional and Ato Ababu Oromia prison commission prisoners legal affairs process owner. conducted on April 6/2015 and march 2/2015 respectively.

²⁵⁴ Ibid

²⁵⁵ Proclamation No. 365/2003, Proclamation for Federal Prisons Commission Establishment, Federal Negarit Gazeta, 9thYear No. 90 Addis Ababa-9" September, 2003

petition of death penalty and submit the result to the head of state should be either the courts themselves or the ministry of justice and respective prosecutor office at region.²⁵⁶ Both at federal and regional states the prison institutions contest that the institutions have no power to examine any death penalty petition to submit the result to the Head of state.

The other justice sector that has duty to follow up the execution of punishment in general and execution of death penalty in particular is the courts. The power of courts to enforce their own decision emanate from both substantive and procedural laws. The criminal procedure code has stipulated the manner in which criminal sentences has to be enforced by different concerned authorities. Article 4 of the code obliges the presiding judge by warrant under his hand in the form prescribed in the third Schedule to order the person sentenced to death to be detained until the sentence confirmed. Where the sentence is confirmed, it shall be carried out in accordance with the conditions laid down in the order of confirmation.

It is based on this procedural law that regional and federal prison authorities have the stand that courts should send the copy of death penalty decision directly to the head of the state and follow the execution of the penalty.

In my interview with Federal prisoners Justice Administration Directorate Director Ato Birhane H/Sillasse, has the stand that both the regional and federal courts rendering death penalty decisions can directly send the copy of their decision to the head of the state so that the president either confirm the penalty for execution or commute to a lesser penalty.

As far as the co-operation or relationship between the regional criminal enforcing agencies with the Head of state or with other federal criminal law enforcing agencies is concerned, for instance according to my interview with Ato Fekadu and Commissioner Thehay, the Oromia regional state has never communicate death penalty issue neither directly with the Head of State nor with the Mr of Justice and believe that it is the Business of the Head of State and the Ministry of Justice to organize and to follow up court decision at federal level as they do not have direct relation with the Head of State.²⁵⁷

As far as the regional justice sectors are concerned it is not sound to assume either the regional courts or other regional criminal law enforcing agencies to follow up and communicate the issue

²⁵⁶ Interview with Temesgen Assefa, SNNPRS prisoners affair executive and komander Deneke Dangesu, SNNPRS prisoners affair officer, interview conducted on April 6/2015

²⁵⁷ Interview with Ato Fekadu Soboka Head of Oromia Justice Bureau, interview conducted on march 19/2015

with Head of the State in the absence of any IGR mechanism between the respective justice sectors. The newly enacted proclamation which gives power for the Head of State to delegate its pardon granting power to appropriate regional Government organ is silent about confirmation of death penalty which ought to have resolved the issue. But arguably the proclamation clearly dealt with death penalty issue as far as pardon is concerned and whether pardon includes death penalty or not is discussed under the next section.

The Oromia regional state has been exercising the power to grant pardon even before the enactment of the proclamation. With this respect the regional state has been exercising this power on regional courts criminal jurisdiction. This is one indicative of federal arrangement that allows the regional states to take power in their criminal system. There is no actual delegation by the president based on the provision of the newly enacted Proclamation. The regional State has never sent any petition of the prisoners to the Head of State either as request for confirmation of the death penalty or for request of commutation.

The regional state believe that the power to commute or confirm death penalty belongs to the head of State so it is up to the Head of State to either request the region the petition of the death row prisoners or to leave up on its discretion. The only thing the regional state justice Bureau has been doing is, up on request of the MOJ it sends the name and profile of the prisoners simply for report purpose and nothing more.²⁵⁸

In SNNPR there are totally 32 (twenty four) death row prisoners. The death row prisoners spend from 2 to 18 years awaiting confirmation for execution. In the region there were no death penalty executions since the establishment of the regional state. The only reason for the non execution is the non confirmation of the death penalty by the head of state. The reasons for the non execution at both regional states are the same and one. The reason for the non confirmation and non commutation of the death penalty by the Head of state is similar to that of the Oromia regional State. There is no any organ either from the central government or at regional state concerned with the issue.

The regional state has been sending the profile of the death row prisoners to the MOJ simply for the mere purpose of report and nothing more. Both the SNNPRR State Bureau of justice and

²⁵⁸ Ibid

prison commission has been sending the profile of the death row prisoners up on request by ministry of justice and also some times by themselves in search of a solution for the prisoners.²⁵⁹

5.2 Historical and Legal ground of Pardon and Amnesty in Ethiopia

Pardon refers to an act of exonerating a person or group of persons from the consequence of committing a crime. In this case the consequence of committing a crime is criminal punishment and a person who is pardoned will not be punished. Or, if his punishment has begun, it will be interrupted.²⁶⁰ It also refers to “[a]n executive action that mitigates or sets aside punishment for a crime. An act of grace from government power which mitigates the punishment the law demands for the offense and restores the rights and privileges forfeited on account of the offense.

A pardon releases offender from entire punishment prescribed for offense and disabilities consequent on his condition; it reinstates his civil liberties.²⁶¹ Amnesty refers to a legislative or executive act by which a state restores those who may have been guilty of an offence against it to the position of innocent person. In international law Amnesty refers to an act of forgetting past offenses granted by the government to persons who have been guilty of neglect or crime. Amnesty is applied to rebellion acts against the state. Amnesty differ from pardon in that amnesty causes the crime to be forgotten, whereas pardon, given after conviction, example the criminal from further punishment.²⁶²

In Ethiopian history, it has been observed that the monarch used to grant pardons.

Accordingly, emperor Menelik absolved the Italian prisoners of war that were captured at the battle of Adwa. During Emperor Haile Selassie regime, pardon got legal recognition: on both of the 1931 and the 1955 revised imperial constitutions, and the 1957 penal code of the empire of Ethiopia. Under the 1955 constitution the Emperor has the right and duty to maintain Justice through the courts and the right to grant Pardon and Amnesty and to commute Penalties. The emperor had the prerogative power to grant pardon and amnesty.

Under the 1957 penal code, remission and commutation of sentences were treated as pardon. According to Article 239(2) of the penal code, pardon used to apply to all penalties and measures

²⁵⁹ Interview with Ato Beruk Tesfaye, SNNPRS pardon board professional, interview conducted on April 6/2015

²⁶⁰ Dajene Girma Janka, A handbook on the criminal code of Ethiopia, 2013, p;198

²⁶¹ Sileshi Zeyohannes, constitutional law II, teaching materials prepared under the Sponsorship of Justice and Legal System of Research Institute, 2009 p;162

²⁶² Supra note 260

regardless of their gravity. Similar to pardon, amnesty was recognized under the 1957 penal code and the 1955 revised constitution of the empire of Ethiopia.²⁶³ The power to grant amnesty as in the case of pardon was vested on the sovereign power. Amnesty, unlike pardon, would be granted in respect to certain offences or certain classes of offenders.

Accordingly, during the reign of Emperor Haile Selassie, a total of 1,853 prisoners were pardoned in his annual coronation celebrations in 1956 and 1958. On top of that, on Dec 19, 1960 history recalls that the Emperor granted amnesty for all imperial guards who plotted against him and took part in rebellion activity. Moreover, in 1970 he forgave 200 armed men who were under the command of General Gutu Waqo and caught by Ethiopian troops.

During the Derg regime, like the previous two Emperors', pardon and amnesty got legal recognition. And the Derg communist constitution gave the power to grant pardons to the President of the Nation. In view of that, in 1976 the president of Derg government pardoned 209 political prisoners. Besides, in 1990 he pardoned all those Jews who received prison sentences for their attempts to leave Ethiopia illegally for Israel, Jerusalem Post – Jerusalem (Mar 30, 1990).²⁶⁴

Under the FDRE government, pardon (remission and commutation) has been given broader weight than before. The FDRE constitution, the FDRE criminal code and Pardon procedure give recognition to pardon and related issues. Until September 2007, the present government didn't grant pardon. The reason was mainly because of the absence of procedural law. The first Pardon procedure law was promulgated in 2004 by proclamation number 395/2004 which was repealed currently in 2014.²⁶⁵ Following the 2004 promulgation of the procedure, all but Afar regional governments enacted its own pardon procedure. Consequently, they all established their respective pardon board.

FDRE constitution clearly vests the power of pardon with the president of the Central government. Art. 71(7) make it clear that the president is empowered to grant pardon.²⁶⁶ Article 71(7) reads “the president shall, in accordance with conditions and procedures established by

²⁶³ penal Code of the Empire of Ethiopia 1957, article 239

²⁶⁴ National Pardon Issues Forum And Backlog cases Clearance program, organized by Mr of Justice in collaboration with Justice for all-Prison fellowship Ethiopia, August 2-3, 2002 E.C Capital Hotel Addis Ababa, p;2-4

²⁶⁵ Proclamation number 840/2014, Procedure of granting and executing pardon proclamation, Federal Negarit Gazeta, 20th year no.68, August 2014

²⁶⁶ FDRE constitution Article 71(7)

law, grant pardon. ” the mandatory nature of the word shall undoubtedly makes that pardon power of the president is one of the main functions performed by the president.

The current criminal code like the 1957 penal code treated pardon as remission and commutation of sentences. According to Article 229 of the criminal code, pardon used to apply to all penalties and measures regardless of their gravity. There is confusion between Pardon and other forms of clemency and again whether Pardon applies to death penalty or not in Ethiopian legal system.

5.3 Death Penalty, Pardon and Other Forms of Clemency

From the critical analysis of the 2004 federal pardon procedure and the current 2014 federal pardon procedure one can understand that pardon, similar to the 1957 penal code of empire of Ethiopia, means commutation and remission of sentence. Remission and commutation of sentence, however, are parts of clemency.

The former (2004) Federal Pardon procedure proclamation does not define what Pardon means rather it defines petition for pardon. article 2(4) reads as “Petition for pardon” means an application submitted that a sentence be remitted in whole or in part, or that a penalty reduced to a lesser nature or gravity;” The 2014 Federal Pardon procedure proclamation define what Pardon is and it reads as “Pardon” means a decision to remit a sentence in whole or in part or to reduce it to a lesser nature or gravity.

Both proclamation incorporate similar things that pardon is all about remission and commutation of sentences and does not refer to the forgiving the culprit of the crime only attached to the penalty. Accordingly Remission and commutation can’t be parts of pardon because the result they produce is different from the result that is anticipated under pardon’s very essence. Both commutation and remission can’t forgive the culprit of the crime he/she is applying for, but only forgive the penalty associated to the crime; whereas, pardon forgives the culprit of the crime and the penalty attached to it. Pardon is the forgiveness of a crime *and* the cancellation of the relevant penalty where as Commutation or remission is the lessening of a penalty without forgiveness for the crime; the beneficiary is still considered guilty of the offense.

Pardon may apply to all penalties and measures whether principal or secondary including death penalty. International human right instruments leaves states the option to impose the death penalty but urges them to move towards abolition and also imposes certain limits on the way in

which the death penalty can be imposed. Among which the right to seek pardon or commutation of the sentence is vital.

Following from that premises, therefore, until now no one has been granted pardon in Ethiopian legal system, but sentences are either commuted or remitted under the pretext of pardon.²⁶⁷

As per article 28 Of FDRE constitutions the Head of State is empowered to commute death penalty in to life imprisonment for international crimes and what is envisaged here is commutation of death penalty and not Pardon. Article 71(7) on the other hand talks about Pardon. However practically pardon under Ethiopian legal system is commutation or remission of sentences.

The criminal code also provides for similar definition that Pardon is all about remission or commutation of sentences.²⁶⁸ In addition to this federal Pardon proclamation 2014 provides that sentence under the proclamation means all principal, secondary punishments or prevention or protection measures.²⁶⁹ The proclamation further define “courts” as federal courts, regional courts that deals with federal matters according article 78(2) of the constitution and RC which passed death sentences.

According to the definition the proclamation is applicable among other things on death penalties imposed by the regional courts. From all the above it is clear that Pardon include commutation or remission of death penalty. However the practice is different, both federal and regional prison and prosecutor officials contest that pardon does not include death penalty issue and both regional states and federal pardon boards are not handling and examining death penalty petition to submit the recommendation to the concerned body as per the pardon procedural laws.²⁷⁰

The 2014 federal pardon procedure proclamation makes clearer than the former proclamation with regards to the application of pardon on death penalties. Article 4 provides that the proclamation shall be applicable on federal courts, military courts, final criminal penalties rendered by regional state court entertaining federal jurisdiction in accordance with article 78(2) of the constitution and death penalty imposed by regional state courts. It is clear that the federal pardon procedure have application in addition to federal courts and military courts, it have application on final criminal penalties rendered by state courts through delegation. Article 78(2)

²⁶⁷ Supra note 260, p;11

²⁶⁸ Article 229(1) of the criminal code

²⁶⁹ Supra note 263, Article 2(2)

²⁷⁰ Supra note 259, 257 and 250

of the constitution talks about the jurisdictions of the FHC and of the First Instance Courts are delegated to State Courts. By virtue of this delegation, the State Supreme Court exercise the jurisdiction of the Federal High Court and the State High Courts exercise the jurisdiction of the Federal First Instance Court, so for criminal penalties rendered through such delegation the pardon is granted by the Head of state.

In addition for death penalties imposed by regional state courts pardon is granted according to the federal pardon procedure. Here is an important issue that the regional states may impose death penalty on federal criminal jurisdiction through delegation or on state criminal jurisdiction but have no power to grant pardon on any death penalties. According to proclamation 25/96 there are capital crimes which fall under the jurisdiction of state courts but such death penalties rendered by state courts are subjected to pardon power by the Head of state and the regional states have no power to grant pardon on such death penalty cases.

For all other penalties imposed by the regional state courts which fall under regional state courts jurisdiction head of the regional state have pardon power. As far as criminal jurisdiction of regional states are concerned as discussed under the previous sections there are criminal matters that fall under the regional state courts jurisdiction which may entail death penalties either as shared jurisdiction or exclusive state jurisdiction. However on any death penalty imposed by the regional states courts the regional governments have no power to grant pardon except through delegation.

5.4 The Power of Head of State and Head of Regional States with Respect to Pardon and Amnesty under FDRE Constitution

As earlier discussed the current criminal code is centralized federal criminal code the implementation of which has to be made by federal criminal law enforcing agencies. Based on this fact constitutionally speaking the centralization of Pardon on death penalties is not against the criminal code but it is against court establishment proclamations, because the regional criminal jurisdiction is determined by this proclamation. The centralization of the pardon on death penalties imposed by the Regional unit's courts is against this law. As a result of which even if regional courts have power to impose death penalties on capital crimes the regional government have no power to grant pardon on such criminal penalties.

The Indian constitution under Article 72 and 161, empower both the president of the country and the governor of the state to grant pardon. In Ethiopian context too, constitutionally speaking the power to grant pardon vested on both the federal and the regional governments. Nevertheless, according to the federal pardon procedure law the regional governments' power, unlike the Indian is not absolute: as they have no power over capital punishments. The proclamation clearly grants pardon power for death sentence to the head of state including on matters falling under criminal jurisdiction of RC.

Oromia and SNNPRS constitutions empower the president to grant pardon and amnesty. As discussed under chapter two of the paper, it should be clear that transnational and international crimes are currently federalized or are federal nature crimes. Art 28(1) of FDRE constitution prohibits regional states not to commute either by amnesty or pardon, international crimes like crimes against humanity, summary executions, genocide, forced disappearance or torture.

This is clear that such crimes are federal in nature and the power to grant pardon on federal nature crimes belongs only to the president of the Central government under which the same provision gives power to him to commute death penalty to life imprisonment. Can those crimes be pardonable once commuted by the president to life imprisonment under article 71(7) of the constitution? What about other crimes which are punishable by death, can the president commute to life imprisonment or not? The crimes listed under article 28 of the constitution are not pardonable because sub article one of the same provision clearly identify that it shall not be barred by limitation and may not be commuted by amnesty or Pardon by state legislature or any organ except by the Head of State (the President). In practice the president had commuted only few death penalties for high officials of the Derge Regime convicted of “red Terror” crimes.²⁷¹

As said earlier it is very important to note that constitutionally speaking criminal law making power is concurrent power of the federal and regional states in which the regional states can make state crimes which are not covered by the Central government. Yet the presumption is that the Central government defines and punishes only crimes that have federal nature and leaves state matters for state law makers. It seems that it is from this presumption that both the federal and state president has given power to grant Pardon on their respective prisoners of the federal and regional crimes and criminals. But because there are no any state crimes defined by the

²⁷¹ An interview with Super Intendant Aschalew Mekonin, Prisoners justice affairs high official, interview conducted on march 17/2015

regional states the Head of the regional states have no power to grant Pardon on federal crimes except through delegation. It seems it is from this assumption that proclamation 840/2014 empowers the Head of State to delegate appropriate regional organs to Grant pardon on regional courts criminal jurisdiction.

According to the Federal Republic of Germany's constitution, the chancellor can delegate its power to grant pardon to regional states of the federal matters. In Ethiopia the currently enacted Proclamation, proclamation 840/2006 empowers the President to delegate his power to the appropriate regional state organ on matters covered under the proclamation. One of the matters covered under the proclamation is granting pardon for death penalties but practice reveals that the regional Governments are granting pardon on criminal matters falling under both federal and state courts jurisdiction except on death penalties. The regional governments are granting pardon on criminal matters which are entertained by the RC by their delegation power except death penalties without any delegation.²⁷²

Whether the power to grant Pardon can be delegated or not is another issue. As the writer earlier discussed the issue with other Justice sectors, here too the doctrine of delegation envisaged under article 50(9) of FDRE constitution is limited to the powers and functions listed under article 51 of the constitution where as the power of the Head of State listed under article 71 of the constitution.

Practice reveals that the federal president is granting pardon only for federal prisoners whose cases fall under federal courts jurisdiction. Yet Federal criminals entertained by regional courts either by their delegation or concurrent power their pardon case fall under regional states jurisdiction. Before 2006 there was no any law which empowers the Head of State to grant delegation to the regional States to grant pardon.²⁷³

There are instances where federal prisoners may be granted pardon according to regional states rule and regulation. Prisoners who are transferred from federal and other regional state to Oromia regional State, their pardon case is examined and screened according to Oromia regional state regulation and transferred to the concerned federal or regional state (transferee state or Federal) for granting pardon. The same approach is followed by other regional State prison commissions, prisoners transferred from federal to any other regional state their Pardon case is screened

²⁷² Interview conducted with Mulisa Abdisa Oromia public prosecutor criminal investigation and Beruk Tesfaye SNNPRS pardon board professional, conducted on march 17 and April 6/2015 respectively.

²⁷³ Proclamation number 840/2014 article 5

examined according to the regional states prison in which the prisoners transferred and vice versa.

5.5 Unpardonable Crimes and FDRE constitution

All the regional states have their own rules and regulation by which they identify prisoner's eligible for Pardon. According to FDRE constitution all crimes except crimes listed under article 28 of the constitution are pardonable but the federal and regional rules and regulations make some offences unpardonable which is actually unconstitutional.

The constitution clearly identifies only international crimes and other crimes committed against humanity, so defined by international agreements as unpardonable. From this constitutional provision one can easily understand that all other crimes which are not clearly excluded by the constitution are pardonable. Article 71(7) also empowers the head of the State to grant pardon irrespective of the type of crime for which the convicted is punished. It is clear that the constitution identifies only few crimes which are not pardonable. On the top of what has been provided under Article 28 of the FDRE constitution, both the federal and regional prisons have identified certain crimes which are not pardonable.

The Justification for the regional states to identify unpardonable crimes are, the seriousness of the crime, moral standards of the society and the need to discourage some specific crimes, in Oromia there are 10 identified crimes, in SNNPR there are 9(nine) crimes which are identified, the federal prison regulation has also identified 9(nine) crimes which are not pardonable. The two regional states have 4(four) common crimes which are not pardonable. One can note why unpardonable crimes identified by the two regional States are different.

The essence of multi-ethnic or multicultural federalism lies with managing and respecting different values, norms and attitudes of the society. Ethiopian federalism is basically designed to respond and to preserve diversity that is why the writer argues that article 55(5) of the constitution should be understood that the Central government has to define and determine corresponding penalties to only federal nature crimes and leaving room for state nature crimes. The seriousness of a certain act as a crime in Oromia is not the same with that of SNNPRS, so the penalty determined for murder in Oromia should not be equal for penalty determined for murder in SNNPR, because the societal value toward the same acts or crime in the two regional states are different.

Here the issue of unpardonable crimes and the justification for the difference has a good implication which requires different way of handling criminal issues. For Example one of unpardonable crime under oromia regional state regulation is crime of theft, irrespective of the penalty imposed on the criminal, if someone is punished for committing crime of theft he/she will not be eligible for pardon. Even if the crime is simple theft which may be punishable with simple imprisonment because of the societal value and standard of hating the act the regulation has excluded the crime from such privilege. While in other, for instance under federal prison commission pardon rule crime of theft is not excluded from pardon.²⁷⁴.

5.6 Effect Of Delay of Execution and Non Execution of Death Penalty Under FDRE constitution

In recent years, there have been a number of cases in which delays in carrying out sentence of death has been described as ‘unacceptable’ and the condemned person has brought proceeding based on a claim that, Because of the inordinate delay, the execution of the sentence would amount to cruel, inhuman and degrading treatment or punishment and, as such, would be unconstitutional. Therefore, if the execution of death sentence is to be human and constitutional, it should be executed in reasonable period. Such period can neither be too long nor too short, so whether such argument is tenable under FDRE constitution is one of the important points considered under this section.

The other issue worth noting is, whether confirmation of death penalty by the head of State is the only solution to avoid delay of execution, additionally if delay of execution of death sentence can be declared as unconstitutional or prisoners are to bring compliant, whose power to do so under FDRE constitution and can the empowered organ changes the penalty in to life imprisonment as a result of the nullity of the death sentence like ordinary courts?, are some of the main points that are addressed under this specific section.

Now a day’s Human right issue is universal issue treated and protected equally by most of the States irrespective of the nature of or type of the Government whether unitary or Federal. It is universally accepted notion that human right is not a privilege given by state rather it is naturally

²⁷⁴ An interview with Ato Fekadu Soboka Head of Oromia Justice Bureau, interview conducted on march 17/2015

gifted privilege to everybody. States should respect and enforce all human right issues incorporated in international Human right instruments.

The 1995 FDRE constitution gave wider recognition for human rights than those previous constitutions. The whole part of the chapter 3 of the constitution, titled “fundamental rights and freedoms,” is devoted to guarantee human rights.

The constitution, with strict terms, stated that international instruments ratified by Ethiopia are an integral part of the law of the land. Article 18 of the constitution expressly provides that “no one shall be subjected to cruel, inhuman or degrading treatment or punishment”. At the same time Article 93 (4(c)) of the constitution places Article 18 in a non- derogable rights list. Thus, according to this provision article 18 cannot be suspended at any time even in the declaration of state of emergency.²⁷⁵

Further, Article 19 and 21 of the constitution have a lot of things to do with the protection of the right of prisoners to freedom from torture, inhuman or degrading treatment or punishment, whether directly or indirectly. Article 21 of the FDRE constitution, under the title “The rights of persons held in custody and convicted prisoners” reads: “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 counselors, medical doctors and their legal counsel.” Article 19(5) of the constitution also reads: “Persons arrested shall not be compelled to make confessions or admissions that could be used in evidence against them. Any evidence obtained under such coercion shall not be admissible.”

Despite the fact that the constitution prohibits cruel, inhuman or degrading treatment or punishment, just like the 1955 revised constitution it does not have any explicit provision which prohibits torture particularly. It is important to analyze whether the provision is to exclude torture or not. Tefaye argue that which the writer also agree with, the fact that the separate term “torture” is not found clearly in the constitution may serve as a ground for someone to argue that torture is not covered or contemplated in the constitution. However, interpretation of constitutional and legal provisions must be constructive rather than distractive. Under this circumstance, a liberal interpretation must be used in which cruel and inhuman treatment can

²⁷⁵ The Constitution of the Federal Democratic Republic of Ethiopia, proclamation no. 1/1995, Negarit Gazette, year 1, No. 1, Art, 18, 93(4)(c)

cover torture. Using strict interpretation in this situation makes the provision meaningless and fallacious. Is there any degrading or inhuman treatment painful or severe than torture? Logically speaking, if the constitution prohibits inhuman and cruel treatment, for the stronger reason it must prohibit torture as well.²⁷⁶ So the FDRE constitution strictly prohibits individuals from torture, cruel, inhuman or degrading treatment or punishment. So any execution of penalties including death penalty executions should be effected in a manner which does not entail any torture, cruel or degrading treatment and punishment.

All the above provisions of the constitution are applicable directly or indirectly to the prisoners on the death row until and including time of execution.

6 Federal and Regional states proclamations which deals with protection of prisoners Human Rights

Despite the constitutional provision, one of the very important laws related with the protection of individuals from torture, cruel, inhuman or degrading treatment in the Ethiopian legal system is the federal prisons commission establishment proclamation number 365/2003.

The preamble of the proclamation, as one of the objectives of the proclamation, states that it is enacted to establish an organ of federal prisons which adheres to the constitution of the Federal Democratic Republic of Ethiopia and committed to laws enacted under it. For that matter, the proclamation intends to establish federal prisons which respect, among other things, individual's right to freedom from torture, inhuman or degrading treatment or punishment. The proclamation is also intended to be a means of executing decisions of courts including death penalty though the carrying out of custody in reformatory and rehabilitative manners which is contrary to the practice of torture, inhuman or degrading treatment or punishment.

The regional states proclamations have also the same or similar stipulation with regard to protection of individuals from torture, cruel, inhuman or degrading treatment or punishment.

There is no separate legislation for the establishment of Oromia Prisons Administration Commission. It was established under Proclamation 163/2003 of *Megeleta Oromia*, a

²⁷⁶ Tesfaye Tadesse Abebe, Freedom from Torture, Inhuman or Degrading Treatment or Punishment: the case of some selected prisons of Oromia National Regional State, Addis Ababa University School of Graduate Studies Faculty of Law, Submitted to Addis Ababa University, School of Graduate Studies in partial fulfillment of the requirement of the degree of masters in Human Rights Law, March, 2011p;111

proclamation to provide for the reorganization and redefinition of the powers and duties of the executive organs of the Oromia National Regional State.

Article 35 of this proclamation provides for a detail list of powers and duties of Oromia Prisons Administration Commission. The commission has a duty to ensure the respect for human rights of prisoners without any discrimination. The commission is under duty to design and implement a means to rehabilitate prisoners, for which it must facilitate the provision of regular and basic education and vocational training essential to the prisoners life in addition to preparing different types of sporting games places necessary for the mental and physical well- being of prisoners.

Similar approach is followed for the establishment of SNNPRS Prison commission. The commission is established by proclamation number 90/98 it has also similar provision with that of Oromia regional state prison commission. The commission has power and duty to respect and see that human rights of prisoners are respected through appropriate protection.

Beginning from the constitution followed by the regional states and federal Prison establishment proclamations all have incorporated the protection of human right particularly prisoners/ individuals protection from torture, cruel, inhuman or degrading treatment or punishment.

Hence in those countries where there are such constitutional principles (international principles) prohibiting cruel and unusual or degrading punishment, delay in the enforcement of death penalty has the tendency to convert or commuted death penalty to life imprisonment. Human right violation of death row prisoner's is related with either the moment of execution or time they expend before execution of death penalty. It is subject to human right issue in different perspective. The suffering the prisoners encounter is related with both physical and psychological suffering.

Physical suffering includes in addition to the physical difficulties of confinement, there are also the mental rigours of waiting for execution. Inmates on death row- some held there for several years – face continued uncertainty as to their ultimate fate. Several studies have indicated that the cruelty of the death penalty is not restricted to the actual moment of execution; the waiting period with its prolonged periods of isolation and enforced idleness can lead to severe depression, apathy, and both physical and mental deterioration²⁷⁷.

At this juncture it is important to raise which type of suffering is incorporated in the criminal code of Federal Democratic Republic of Ethiopia. Article 117(3), second paragraph, of the

²⁷⁷ Ibid

English and Amharic version of the criminal code provides for different things in relation to death penalty. The English version states “the execution of the sentence shall be carried out without any cruelties, mutilations or other physical sufferings”. So according to this stipulation what is prohibited is causing any physical suffering, which includes cruelties and mutilation in the course of executing the penalty and it is limited to the moment of execution.

For example the penalty cannot be executed by hanging because such method is crueller it involves physical sufferings. Hence other sufferings such as psychological suffering due to delay in the execution of the sentence are not prohibited. The Amharic version, on the other hand, is wider than the English translation because the prohibition is not limited to physical sufferings.

Even though it is possible to argue the English version of the criminal code article 117 provision is restricted to the actual moment of execution the FDRE constitution clearly prohibits any type of cruel and unusual or degrading punishment be it before or during the execution of death penalty.

Historically cruel and unusualness of punishment was constituted by departure from the common law in the direction of greater severity without the kinds of morally sufficient reasons that would indicate an evolved understanding of the common law.²⁷⁸ The English Bill of Rights forbade judges from imposing new (‘unusual’) punishments that were significantly more harsh (‘cruel’) than those that were traditionally permitted under the common law. So any punishment which is more Sevier than the one traditionally understood constitutes unusual punishment and it is as such unconstitutional so far it is incorporated in the constitution.

With regard to the latter scenario, it is considered that if the execution of death sentence is to be human and constitutional, it should be executed within reasonable period. Such period can neither be too long nor too short. The length of the period wasted before enforcing the sentence may be manifested as unreasonable. For example in Oromia regional state there are 40(forty) death row prisoners among which 7 of them spent more than 10 years awaiting confirmation and execution of the sentence.

Likewise in SNNPR State there are 33(thirty three) death row prisoners awaiting confirmation and execution of death sentence among which 6 of them spent more than 10 years.²⁷⁹ In different

²⁷⁸ *Michael J. Zydney Mannheimer*, Cruel and Unusual Federal Punishments, *IOWA LAW REVIEW* [Vol. 98:69, p;96

²⁷⁹ Interview with SNNPRS prisoners affairs executive Ato, Temesgen Assefa, conducted on April 6/2015

countries such unnecessary delays are considered as unconstitutional as it is against unusual punishment and as a result such death penalties are commuted to life imprisonment.

As far as the method of execution is concerned even though the criminal code clearly empower both the federal and regional states Prison institution to determine mode of execution no regional state has determine the methods. According to the higher official of the two regional state prison institutions they believe that, not alone determining mode of execution, there is no willing to execute death penalty decisions even if it confirmed by the head of state. Both officials believe that even if execution of death penalty has to be effected it should executed by the federal prison and should not be at regional unit level.

The justification is that first criminal law is federal law, particularly those crime which are punishable with death penalty are federal crimes, and should be executed by the federal government. The other justification is that the absence of willing on the part of the regional officials to execute such penalties is because there exist a fear that such execution may cause uncomfortable conditions in the society.²⁸⁰ The federal prison commission even though had executed three death penalties it did not determined mode of execution. The methods of execution used for the execution of the three death row prisoners were not known even by higher officials of the prison institution.²⁸¹ While conducting an interview with higher officials of the federal prison, the writer of this paper did not get any information as to what methods were used to execute the penalties. The authorities either reserved themselves from disclosing the method used or frankly do not know the method used to effect the execution.²⁸² From this point of view it is hardly possible to know what method were used to effect death penalty in Ethiopia and not possible to know whether the method is against the constitution or not.

7 Unconstitutionality of delay and non execution of death penalty and the power of HOF

Delay and non execution of death penalty as human right issue is currently a controversial issue. Under international and national human right instruments such acts are claimed to be against prohibition of torture, cruel and degrading treatment or punishments. There is also wide trend

²⁸⁰ Interview with Fikadu Soboka Head of Oromia Justice Bureau and Ato Temesgen Assefa SNNPRS Prison affairs executive, conducted on march 17 and April 6/2015 respectively.

²⁸¹ An interview with Federal prisoners Justice Administration Directorate Director Ato Birhane H/Sillasse, interview conducted on march 17/2015

²⁸² Ibid

that such unconstitutional acts are subjected to revision based on clearly stipulated local constitutions.

In Ethiopia even though there are many death row prisoners awaiting confirmation and execution of death penalty no other constitutional way out has been practiced since the establishment of the federal structure to protect death row prisoner's right. Constitutional adjudication is the process of settling down the issues and disagreements involving constitutional matter. It is related to adjudicating constitutional issues rather than other issues. It is a matter of determining constitutionality of laws in general and the division of powers among governmental organs in particular.

The supremacy of constitutions obliges all laws and government decision and acts to comply with the constitutions and any violation of constitutional principles subjects such laws and acts for revision. It is not only laws that may violate constitutional principles but also Government may violate constitutionally guaranteed rights through its acts or decisions. So that any private individual may bring a claim that his/her/it's right is violated by the government act and decision or by the conduct of any other nongovernmental organs.

Again it is inherent in any federal system that there must be an organ for the adjudication of constitutional issues and for the settlement of disputes concerning the competence of the two levels of governments. While in most other federations this is a task undertaken by either the Supreme Court or the Constitutional Court, in the 1995 Ethiopian federal constitution, this task is entrusted to the non-legislative second chamber, otherwise known as the House of Federation (HoF)²⁸³

The long stay of the prisoners without knowing their future fate clearly violates their human right, and it is considered as a government act which contravenes the human right constitutional principle. In many countries such long stay of prisoners on the death row is considered as unconstitutional and declared unconstitutional up on the request of the prisoners. But in Ethiopia practice reveals that there are prisoners on death row spending more than 15 years in the prison. But there is no such practice that victims bring their complaint to the concerned organ to check the constitutionality of the act. In India the constitution, under Article 72 and 161, provides both

²⁸³ Assefa Fiseha, federalism, teaching materials prepared under the Sponsorship of Justice and Legal System of Research Institute, 2009, p;396

the president of the country and the governors of the state have been given prerogative power to grant pardon including capital punishment.²⁸⁴

The Supreme Court reasoned that undue, inordinate, and unreasonable delay in considering mercy petitions constitutes torture. The Court stated that pursuant to Article 32 of the Constitution, the Supreme Court has the power to commute death sentences into life imprisonment upon undue delay in disposal of mercy petitions.²⁸⁵ In addition, the court determined that the government must carry out post-mortem examinations of executed prisoners to provide the courts with data on the cause of death, which will allow for consideration of whether hanging constitutes cruel and inhuman punishment.

In my interview with the Oromia regional state prison commissioner the only thing the regional states know is that they transfer the name of the prisoners on the death row when the ministry of justice request and the ministry of justice after collecting the detail of the profile of the prisoners retain within itself. There is no any department or concerned body to communicate death penalty issue with the president. There is no any procedure or rule through which death penalty issue is communicated with the president.

So the reason for non execution of death penalty by the Central government is because of the non confirmation of death penalty by the Head of State. The non execution by the regional states are because of either the non confirmation of death penalty by head of state or the absence of or exclusion of delegation power by the head of State to the Head of regional States only on Pardon which do not include death penalty.

So whatever the reason may be the non execution of the death penalty brings about long stay of prisoners on the death row awaiting confirmation and execution which result in violation of prisoner's right. Such act is clearly against the prohibition of cruel, torture, degrading treatment and punishment and hence it is against article 18 of FDRE constitution. As a result any government acts and decision which is against the constitutional principle can be nullified by the competent authority that is the HOF.

²⁸⁴ Article 72 and 161 The constitution of Indian

²⁸⁵ Ibid

Chapter Four

8 Conclusion and Recommendation

8.1 Conclusion

As discussed in the introductory part of the paper, although Ethiopia has adopted federal form of Government to provided the various ethno-national groups - 'Nations, Nationalities and Peoples' - of Ethiopia with the power to govern themselves through self rule mechanism and at the same time to maintain the unity of the country through a mechanism of shared rule, practically with respect to criminal law making, adjudicating, implementing and capital punishment implementation the power is totally concentrated in the hands of the central government and the doctrine of distribution of legislative, adjudicative and executive powers remained on the paper.

In Ethiopia constitutionally the regional states have their own executive, legislative and judicial organ through which their self rule power is exercised. However practically they remained dysfunctional with respect to criminal law power and capital punishment executions.

The doctrine of constitutional distribution of powers between the Central and regional states is the fundamental defining institutional characteristic of federations. As opposed to other forms of government the existence of powerful motives to be united for certain purposes and deep-rooted motives for autonomous regional governments for other purposes is a common feature of all federations and this has expressed itself by distribution of powers. This distribution of powers is commonly related to legislative, executive, judicial and financial functions. It is considered essential for governments to possess the executive and judicial authority and the financial resources to implement the function within their legislative competence.

The doctrine of distribution of powers is determined by many factors among which the mode of the formation of the federation is the most decisive factor. To this end, a litmus test of homogeneity or heterogeneity of the society of a certain federation should be taken seriously. The more prevalent homogeneity the more powers to be given to the Federal Government and the more prevalent heterogeneity the more powers to be given to the regional states. Ethiopia is characterized by heterogeneity as a result of which more power including criminal law legislative power should be devolved to the regional states. However the practice is different.

In the doctrine of the distribution of power, we could find that there are different forms of division of legislative powers. These are exclusive, residual, shared and concurrent legislative. The traditional method for the division of legislative powers, employed under the older federal

constitutions, is by reference to subject matter. Even among federations of this kind, however, different models exist. Some, like the United States: Switzerland and Australia: allocate specific powers to the central Governments, either exclusively or concurrently. In other federations like India and Malaysia both central and regional states exclusive power are listed to be exercised concurrently by either order of government.

The Canadian Constitution, by contrast, uses two lists, allocating powers to the center and the provinces respectively, generally on an exclusive basis. Residual powers also follow different approach, in United States: Switzerland and Australia residual or unspecified powers are left to the states while in India and Canada residue powers reserved to the center. Concurrent powers are also treated differently by different federations. In some Federations, they are expressly provided in their constitutions in other Federations, they are found scattered here and there. In Ethiopia the constitution uses three lists, allocating exclusive power to the central government, allocating concurrent powers to both the central and regional states and some other listed powers to the regional states while all residual powers are also reserved for the regional states.

Beside the method for the division of power there is no a priori formula to determine which powers should be devolved to the federal authority and which to the regional authorities.

Criminal law legislative power is one aspect of the doctrine of division of powers in federation. Different approaches are followed by different federation for allocation of criminal laws legislative powers. For instance in USA the federal (i.e., national) government and each states has independent authority to enact criminal codes applicable within the territorial reach of its legislative powers. In Nigeria criminal legislative power is vested with both the central and regional states. Normally the constitution does not clearly provide the criminal jurisdiction of the federal government and state. However it provides under the incident and supplementary matters clause and as such the federal government can enact criminal law on exclusive and concurrent list and the states can enact on the concurrent list.

In German Criminal law legislative power is concurrent power of both the federal and the Lander. The constitution states that, the Lander shall have power to legislate so long as and to the extent that the federation has not exercised its legislative power by enacting a law. The Lander can only enact criminal Law if the federal government has not exhausted the criminal legislative area. In Swiss Legislative and implementation power of criminal law is a shared power and not exclusively vested with neither of the two.

In Canada also both the central and regional states have power to legislate criminal laws. The same approach is followed with respect to defining capital crimes and corresponding death penalties. In federations where death penalty is not abolished, in USA, India and Nigeria both the Central Government and regional states have power to determine capital crimes which entail death penalty. From these different federations' constitutional criminal laws legislative and capital punishment implementation power divisions, it is clear that the regional states have clear constitutional powers to legislate criminal laws in general and defining capital crimes and corresponding death penalties. Based on this fact when we examine the Ethiopian position there is centralized criminal laws legislative approach.

However the centralization of the criminal laws is not the premise of the FDRE constitution rather it is the premise of the statutory laws. The current criminal code and other criminal laws like for instance terrorism proclamations centralize criminal legislations. The same holds true with respect to death penalty implementation that both execution and commutation of the penalty can only be implemented if and only if the Head of the State confirm or commute it to lesser punishment. Such centralized criminal legislation, adjudication and implementation power is clearly against regional states self governance power.

The main objective of the Ethiopian federalism and FDRE constitution is to maintain and preserve self governance of nations, nationalities and peoples of Ethiopia and all constitutional powers should be exercised by both the federal and regional states basing this constitutional objective. According to art 52 of the Federal Constitutions the regional states have a legislative power on issues that fall under regional states jurisdiction. This is compounded with the right of self-determination and self rule of ethno-linguistic communities compatible with each individual regional state power. However those nations' nationalities and peoples of Ethiopia which were constitutionally promised for genuine self administration their satisfaction have just remained on its theoretical and ideological commitment than the practice with respect to criminal law legislative and death penalty execution.

Although not sufficiently some of the regional states have made an attempt to preserve their self governing power with this respect. Oromia regional state has made an attempt to define some criminal offences and corresponding penalties which found in different laws. This is one indication of the regional states exercising their constitutional powers. Another major approach of federalism in criminal law focuses on procedural differences between federal and state

systems to decide where best to allocate power. Broadly speaking there are two models of criminal procedure legislative power division in different federations.

The US (dual) model and the integrated or the Swiss model. In the US model, both the federal and the regional states have power to make criminal procedure. In Swiss model or executive federalism approach the criminal procedure legislative power is vested with the Central government. In Ethiopia unlike the criminal code (law), the FDRE Constitution is silent about the layer of government having the mandate to enact criminal procedure rules. But in such cases the constitution grants residual power with the regional states.

Currently like the criminal code the criminal procedure code is also centralized although some regional states have made some attempt with this respect. For instance the Oromia regional state has made to make criminal procedural rules and laws. The regional state court establishment proclamation and the oath directive is a good indicative of this scenario, which contains procedural rules and criminal jurisdiction of the regional courts on some criminal matters. The power of states to make criminal procedure legislation should be the extension of their criminal law making power. In other words the regional states should have criminal procedure making mandate to regulate and enforce their own criminal law or state crimes.

Like criminal legislative power, normatively speaking criminal laws adjudication and implementation power is also centralized. In principle federal laws in general and federal criminal law in particular should be adjudicated and implemented by federal courts and federal criminal law enforcing agencies.

Although practically both the federal and regional state courts and criminal laws enforcing agencies are exercising the function there is no adequate law which sufficiently governs how the regional unit's criminal justice sectors execute federal criminal laws. There are only sufficient laws which determine criminal jurisdiction of Federal courts and Federal criminal law enforcing agencies and no adequate laws which determines regional states criminal jurisdiction. The federal court establishment proclamation determines federal courts criminal jurisdiction in a listed manner while regional states assume residual criminal jurisdiction. This is clearly envisaged in SNNPRS court establishment proclamation. Practically Oromia courts are also assuming criminal jurisdiction on matters not listed as federal criminal jurisdiction.

The same holds true with respect to death penalty implementation. Because capital crimes are parts of centralized criminal laws, all capital crimes are legislated by Federal Governments.

Although practically death penalty can be adjudicated by the regional courts its implementation requires the blessings of the Central Government. FDRE constitution clearly provides that it is only the Head of the State that has power to commute death penalty in to life imprisonment for international crimes listed under article 28 of the constitution. Likewise according to federal pardon procedure death penalty can only be pardoned by the head of the State. Additionally according to the criminal code death penalty can only be enforced if and only if it is confirmed by the Head of State.²⁸⁶ Implementation of death penalty for execution or commutation to lesser penalty requires the signature of the Head of the State whether the penalty is imposed by the federal or RC. This power of the head of the state is contrary to Ethiopian federalism which adversely affects self governing power of the regional states.

In parliamentary federalism the Head of the state has no such power and only has ceremonial power. The FDRE constitution is designed in such a way that it empowers the Head of the State with only ceremonial power including pardon power. So the power of Head of State to confirm death penalty for execution which is provided in the criminal code is unconstitutional. Contrary to what is provided in the criminal code practically the head of the State is not exercising its power, as a result of which at both federal and regional prison institutions there are about 171 death row prisoners awaiting execution and confirmation. Although the regional states courts are imposing death penalties and regional states prisons are detaining many death row prisoners there are no any guidelines, rules or regulations and institution issued by the head of the state as a result of which delay of execution subjects the prisoners to psychological sufferings.

Under international and national human right instruments delay and non execution of death penalty are claimed to be the permission of torture, cruel and degrading treatment or punishments, which is against the principle of our constitution and human right. This delay and non execution of death penalty by default termed as a trend of unconstitutional acts and is supposed to be subject to the revision of local constitutions. The FDRE constitution, with strict terms, stated that international instruments ratified by Ethiopia are an integral part of the law of the land. Article 18 of the constitution expressly provides that “*no one shall be subjected to cruel, inhuman or degrading treatment or punishment*”. Further, Article 19 and 21 of the constitution have a lot of things to do with the protection of the right of prisoners to freedom from torture, inhuman or degrading treatment or punishment. Despite this constitutional

²⁸⁶ FDRE constitution article 28, Federal pardon procedure article 4 and criminal code article 117

provision, federal prisons commission establishment proclamation the regional states proclamations have also the same or similar stipulation with regard to protection of individual's prohibition from torture, cruel, inhuman or degrading treatment or punishment,

Oromia Prisons Administration Commission and SNNPRS Prison commission have incorporated human rights and prisoner's right protection.

In those countries where there are such constitutional principles (international principles) prohibiting cruel and unusual or degrading punishment, delay in the enforcement of death penalty has the tendency to convert or commuted death penalty to life imprisonment. Accordingly, this protection becomes wide enough to specifically address death row prisoners as one category of citizens.

After analyzing the practical reasons and justifications for non execution of death penalty by the Federal, Oromia and SNNPRS Prison commissions there are about 171 death row prisoners in the country among which 121 are confined in these three prison commissions which is very high number and covers 66.12% of the total death row prisoners. This figure shows that there is a need to give more attention to death row prisoners at the two regional states and the federal Government. In addition to the high figure of death row prisoners there are about prisoners that have spent more than 10 years in the prison awaiting confirmation or commutation of the penalty but both the federal and regional state governments did nothing to give them the solution. The Head of the State who is legally empowered to confirm death penalty for execution and constitutionally empowered to commute death penalty in to lesser crime issued no rule, regulation or guidelines to enforce the penalty. In addition the HOF who is constitutionally empowered to declare and safe guard any such constitutional violation of Governments acts remain silent.

8.2 Recommendations

In the thesis the criminal laws and capital punishment in Ethiopia has been discussed. The finding is that the centralized federal criminal code, the centralization of death penalty implementation has been legally and practically incompatible and contradictory with principle of division of power, principle of Federalism and principle of Self-Determination. The multi cultural nature of the Ethiopian society necessitates the devolution of power to various ethno-national groups - 'Nations, Nationalities and Peoples' - of Ethiopia. As a result of which dual nature of federalism has been designed and should be the central point in exercising constitutional powers.

Therefore, the writer forwards the following recommendations.

- ❖ Firstly article 55(5) of FDRE constitution grants criminal legislative power for both the federal and regional legislative organ to define federal nature crimes and state nature crimes and corresponding penalties respectively. So the existing centralized criminal laws and codes should be amended and the Federal law making organ should define only federal nature crimes and corresponding penalties leaving all regional nature crimes to the regional states. The regional unit's legislative organs should define regional nature crimes and determine corresponding penalties basing on their culture, tradition, custom and value to preserve the self governance of the regional states.
- ❖ The same holds true with respect to criminal procedure legislative power. The federal government should only legislate criminal procedure to enforce its own criminal laws that are federal in nature and regional states should also legislate their own criminal procedure to enforce their own criminal laws which are state nature. So the current centralized criminal procedure has to be amended to comply with the principle of self determination and division of power.
- ❖ Following criminal laws legislative powers criminal laws adjudication and implementation power should be taking in to consideration the dual nature of Ethiopian federalism. As a result federal courts should adjudicate only federal criminal laws and regional courts should adjudicate regional crimes which are state nature crimes and enacted by the regional law making organ. Federal criminal law enforcing agencies should implement only federal criminal laws and regional criminal laws enforcing agencies should enforce regional laws. However this can be true only when the current

centralized criminal laws are amended. Even in the existing centralized criminal code the regional courts should assume residual criminal jurisdiction and exercise all criminal matters not listed as federal criminal matters by the federal courts establishment proclamations.

- ❖ The same holds true with respect to death penalty, the criminal code should be amended which empowers only the head of state to confirm death penalty before execution for all crimes. On the one hand in federations the head of state has only ceremonial power and as such granting such power is against the principle of division of power and federalism. On the other hand even if granting such power is constitutional the power of the Federal head of the state should be limited to death penalty which is imposed by federal courts. For death penalty which falls under regional states criminal jurisdiction the power to confirm the penalty should be vested with the head of the regional states.
- ❖ Because of the high number of death row prisoners even if the criminal laws are centralized and the head of the State is fully empowered to determine the fate of death penalty, currently the Head of the state is dysfunctional with respect to either confirming death penalty for execution or commuting it to lesser penalties which include life imprisonment or other lesser imprisonment. So the head of the State should issue regulations, rules or guidelines as to how death penalty issue has to be handled.
- ❖ Although many death row prisoners exist at regional prisons, the only thing the regional states know is that they transfer the name of the prisoners on the death row when the ministry of justice request and the ministry of justice after collecting the detail of the profile of the prisoners retain within itself, so the ministry of Justice should transfer the profile of the death row prisoners and has to handle the issue to communicate with the head of the state.
- ❖ Both the Federal and Oromia and SNNPR state Pardon Boards are excluding death penalty petitions from pardon; however the federal pardon procedure law clearly provide that it has application on death penalties. So both the federal and regional pardon boards should accept death penalty petition and examine the petition so that the Head of the State can commute the penalty in to lesser penalties.
- ❖ The federal Pardon Procedure has to be amended and death penalties imposed by the regional courts or which fall under the regional court's jurisdiction should be pardoned

by the regional government and regional Pardon boards must have power to examine the case.

- ❖ The Head of the state delegation power on pardon issues which is applicable for all other criminal penalties should have application on death penalties and so that the regional governments can grant pardon for death penalties.
- ❖ The House of Federation should make unconstitutional the act or the uncertain delay of death row prisoners spending many years without any legal remedy which is contradictory to the constitutional provision of Article 18, considering as degrading treatment or unusual punishment up on the recommendation of Council of Constitutional Inquiry and the act shall be made *null and void*.
- ❖ The same holds true for regional constitutional commissions undue delay of death row prisoners by the regional prison commission should be declared unconstitutional and changed to life imprisonment up on compliant by the death row prisoners.

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Interviews

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2. Interview with Ato Birhane H/Sillasse, Federal Prisoners Justice Administration Directorate Director, march 17/2015
3. Interview with Super Intendant Aschalew Mekonin, Federal Prisoners justice affairs High official, march 17/2015
4. Interview with Ato Fikadu Soboka Head of Oromia regional State Justice Bureau, march 17/2015
5. Interview with Ato Mulisa Abdisa Oromia public prosecutor criminal investigation, march 17/2015
6. Interview with Commissioner Thehay Negash, oromia peison commission commissioner, march 2/2015
7. Interview with Ato Silesh Ababu, Oromia prisoners statistics, appeal and transfer affair process owner, march 2/2015
8. Interview with Ato Temesgen Assefa SNNPRS Prison affairs executive, April 6/2015
9. Interview with komander Deneke Dangesu SNNPRS prisoners affair executive, April 6/2015
10. Interview with Ato Beruk Tesfaye SNNPRS Pardon Board Professional, marc April 6/2015
11. Interview with Ato Wondimu Tura, SNNPRS pardon Board professional, April 6/2015
12. Interview with Ato Girma SNNPRS senior public prosecutor, April 6/2015

13. Interview conducted with Ato Abdisa Dashura federalism scholar, MA Holder from Center for Federal Studies, April 8/2015
14. Interview with Ato Melkesa Midega, Federalism scholar PH.D candidate Center for Federal Studies, April 8/2015

APPENDICES

Interview guide questions for federal, Oromia and SNNPR states prison commissions, Justice Bureau and Ministry of Justice.

I Yadeta Gizaw, a Masters student in Addis Ababa University, kindly requests.....to prepare or inscribe your answer for the following interview questions. This interview guide is prepared for the purpose of gathering information for my Master's thesis entitled "*federal restructuring and execution of capital punishment in Ethiopia; the case of Oromia and SNNPRS*" that I am pursuing in AAU college of Law and Governance, Center for Federal Studies. I am grateful for your kind cooperation and investing your precious time to respond to my interview questions. In case you may not need your name to be mentioned the writer will use anonymity and you can refrain from writing your name.

For federal prison administration

1. What is the constitutional and legal ground for the establishment of regional prison commission for implementation of federal criminal law?
2. How many death penalty has been executed since 1991 of federal restructuring?, why or what are the reasons for non execution of the others?
3. Do you believe that the execution of only few prisoners on the death row is against right to equality of art. 25 of FDRE constitution?
4. What are the similarity and difference between federal and state prisons?
5. Do you think that state prison commissions have duty to execute penalties imposed according to federal criminal law? Did states have ever refused to execute any penalty?
6. Is there any IGR mechanisms for co-operation of federal and state prisons? What is the relationship between the federal and state prison commissions?
7. What are the procedures and methods used for the request of pardon and death penalty confirmation by head of state?

8. What method of death penalty execution has been used by the federal prison? And is there any rule adopted with this regard?

For Oromia and SNNPR states prison commissions

1. What is the constitutional and legal ground for the establishment of regional prison commission for implementation of federal criminal law?
2. How many inmates are on the death row?, What are the reasons or causes for non execution of death penalties since the establishment of the region prison?
3. What other problems do you observe for the non implementation of the penalty?
4. What method of execution is to be used if execution is to be effected?
5. Do you think the non execution of the penalty by states is because of the states autonomy and Ethiopian federalism?
6. Do you think even if other criteria are fulfilled states are autonomous not to execute the penalty?
7. What procedure and language is used to communicate pardon grant of criminals and confirmation of death penalty to the head of state? What are the responses?
8. Do you think state prison commission is duty bound to execute federal criminal law?
9. What is the relationship between federal and state prison and what support or assistance is given by the federal prison to the state?, is there any standardization made by the federal prison which is applicable on states with regard to prisoners protection and other?

For Head of state office and pardon board of federal and state governments

1. What are the reasons or justifications for non confirmation by head of state? how/why the execution of only few federal death penalty prisoners were confirmed?
2. Do you think it is against states autonomy and federalism to centralize such power on criminal law and specifically on capital punishment?
3. What is the legal and constitutional power to grant pardon by head of regional state?
4. What kind or types of crime and criminal cases are passed to either head of state or head of regional state for pardon grant?

5. Do you think pardon power given to regional states head include federal criminal prisoners cases? Or should it be limited to prisoners of state crimes?

For federalism scholars

1. Do you think federal criminal law is against states autonomy, which limit their power to make (define) state crimes?, What do you think is the reason to have such criminal law?
2. Do you think the criminal code is against dual structure of the law making power of states and federal?
3. Do you think criminal code is shared judicial jurisdiction of state and federal courts?
4. Do you believe regional states have duty bound to enforce federal laws, particularly the criminal code?
5. Do you think regional states have constitutional power to establish prison institutions for the enforcement of federal criminal law?
6. Do you think the presidential powers of confirmation of Capital Punishment and pardon on contradict Ethiopian federalism?