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# CRIMINAL JURISDICTION OF STATE COURTS UNDER THE CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

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# CRIMINAL JURISDICTION OF STATE COURTS UNDER THE CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

A Thesis Submitted to the School of Graduate Studies Addis Ababa University School of Law, Constitutional and Public Laws Stream

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## SIGNED APPROVAL SHEET BY THE BOARD OF EXAMINERS

# CRIMINAL JURISDICTION OF STATE COURTS UNDER THE CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

## BY ABDI GURMESSA AMENU

*Approved by Board of Examiners*

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## Acronyms

FDRE–The Federal Democratic Republic of Ethiopia

HOF–The House of the Federation

HPR –The House of Peoples' Representatives

NNP–The Nations, Nationalities and Peoples

P.–Page

Para.–Paragraph

PDRE–The Peoples Democratic Republic of Ethiopia

SNNP –The Southern Nations, Nationalities and Peoples

USA –The United States of America

EU– European Union

## Declaration

*I hereby declare that the title "**Criminal Jurisdiction of the State Courts under the Constitution of the Federal Democratic Republic of Ethiopia**" is my own original work which has not been presented for any degree or examination in any University and the sources used have been duly acknowledged and cited.*


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# Abstract

*The thesis looks into the criminal jurisdiction of the Federal Government and the States in the FDRE Constitution with a comparative view of other federations. The criminal jurisdiction discussed in this thesis pertains to the legislative, executive and adjudicative jurisdiction of criminal laws in light of the Constitution and other statutory laws. The criminal legislative power has been centralized by the Federal Government at the adverse effect of the regional autonomy of the States with respect to the criminal legislative power on crimes which characterize regional or ethnic features. This constrains the doctrine of federalism especially the principle of self-rule which is exercised under the notion of the right to self-determination which has been constitutionally guaranteed.*

*Although criminal law is centralized in Ethiopia in its legislative aspect, it is decentralized in its enforcement or execution and adjudication to the Regional States. With respect to criminal execution, the principle follows that the Regional criminal justice actors enforce the federal criminal laws on delegation. Delegation on the other hand entails reimbursement of financial expenditures so required in the discharge of criminal enforcing processes. Such reimbursement is expected to be effected by the Federal Government.  Nonetheless, there is no adequate law which governs the delegation and its consequence. Conflict of jurisdiction is the other problem which should be taken into account while talking of the criminal jurisdiction with respect to its execution as between the Federal and State criminal justice actors more particularly, the police and public prosecutors.*

*The problem of inadequacy of legal regimes in criminal enforcement pertains also to criminal adjudication. As far as the criminal jurisdiction of the Federal and State Courts is concerned, there is a sort of confusion in the Constitution in relation to the notion of delegation and concurrency. The subsequent statutory laws could not also solve this problem. There is neither adequate law in the States with regard to the apportionment of criminal cases between the Courts at each hierarchy.*

# Chapter One

# Introduction

## 1.1. Background of the Study

Unlike a unitary form of government, a federal system is characterized by the existence of two tiers of governments−the Federal Government and the States−which are also independent within their respective jurisdictions and autonomous from one another, with the constitutionally guaranteed distribution of powers between them. Such powers constitutionally distributed between the two tiers of governments are not unilaterally revoked by either of them. This is one ground of the differentiation of unitary and federal forms of governments.

Ethiopia introduced a federal form of government with the adoption of the 1995 Constitution named as the Constitution of the Federal Democratic Republic of Ethiopia (hereinafter referred to as the FDRE Constitution or simply the Constitution). Some scholars also trace the introduction of the current Ethiopian federalism back to the Transitional Government of Ethiopia in *de facto*. There are some features that make Ethiopian federalism unique to other federations. The fact that the Constitution gives the sovereign power to the Nations, Nationalities and Peoples of Ethiopia (hereinafter referred to as the NNP), the Constitution is interpreted by the Second Chamber (the House of the Federation (hereinafter abbreviated as HOF throughout the thesis)), and the fact that the Constitution has stipulated the right to secession of the States, among others, are some distinct features of the Ethiopian federalism.

The Constitution comes up with the provisions dealing with the distribution of powers between the Federal Government and the States. This distribution of powers pertains to the legislative, executive and judicial competences. This proposition also holds true for criminal laws as well. The distribution of powers between the Federal Government and the States in relation to criminal law in the three aspects of power (legislative, executive and adjudicative) provided for in the Constitution and other statutory laws is not, however, clear enough to identify the criminal jurisdiction of the two orders of governments.

With this general overview in mind, the thesis discusses the scope of the power of the three branches of government (legislative, executive and judicial organs) of either government in a rather detailed manner. Accordingly, an attempt will be made to identify the criminal legislative power of the Federal government and of the States within their respective jurisdictions or as provided in the Constitution; how the Federal Government and the States execute criminal laws with their respective justice actors, and how the State Courts adjudicate criminal cases as per the Constitution and other statutory laws.

### 1.2. Statement of the Problem

Conflict of jurisdiction in relation to criminal laws and cases between the Federal Government and the States, under the three branches of government, would be created due to the fact that there is lack of clear provisions of criminal laws pertaining to its legislation, execution, and adjudication. For instance, the Constitution is silent as to whose power the enactment of the criminal procedure code is. Some States such as Oromia, as will be discussed in detail in chapter three of this thesis, proposed its own criminal procedure code and put forward a request to the Federal Government claiming such a power. The Oromia Regional State Government may invoke the constitutionally guaranteed right to self-determination for that matter. To the contrary, the Federal Government is moving toward centralizing the criminal procedure law.

Moreover, while the Regional States invoke the principle of the residual power and the realization of their right to self-determination in order to enact their own criminal procedure laws, the Federal Government may counterclaim it under the guise of uniformity and the corollary of Art.55(5) of the Constitution. In the midst of such claim and counterclaim, a rivalry relationship would be created between the two tiers of governments.

Actually, the Constitution provides only for a substantive jurisdictional part of the criminal law. Accordingly, the House of Peoples' Representatives (hereinafter abbreviated as HPR) shall enact a penal code; and the States may, however, enact penal laws on matters that are not specifically covered by the Federal penal legislation.[1] In the guise of this Constitutional provision, the

[1] The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, *Negarit Gazeta*, 1st year, No.1, 21st August, 1995, Art.55(5)

Federal Government centralized criminal laws and as a result, the States are left with few or no criminal legislative jurisdiction. Such trend of centralization of criminal laws would thin out the scope of the right to self-determination of the NNP with respect to criminal spheres. It also breaches the regional autonomy of the States thereby denying them the power and right to exercise criminal legislative authority. The States are made to be dependent upon the Federal Government concerning criminal legislative authority even on matters which fall under their jurisdiction.

While the Federal Government is conferred with the power to enact criminal laws, a point to be noted here is that the criminal laws are enacted by the HPR which is the representative of the whole citizens of the Country. The HOF which is the composite of the NNP has little role in law-making power in general and criminal law in particular. Moreover, the Regional States are not directly represented in the Federal law-making organ. Thus, the Regional States and the NNP do not have any say on criminal legislative power while criminal laws are enacted countrywide.

There are problems which are also strongly connected with the legal regimes governing criminal laws including the Constitution itself. The apportionment of criminal cases as between and among the Federal Courts and State Courts on one hand, and as between and among the State Courts at each level on the other, is one of the areas we could see the problems that revolve around legal regimes governing criminal laws. Such problems arise from the ambiguity and vagueness of the existing laws governing the criminal law both in substantive and procedural issues, and inadequacy or absence of statutory laws regulating criminal jurisdiction in enforcement and adjudication. These problems give rise to the criminal jurisdictional conflict with respect to legislative, enforcement and adjudicative jurisdictions within the concerned bodies. This conflict of jurisdiction is highly connected with the power conflict as between the Federal Government and the States on a specific matter.

All these problems, taken together or separately, have blurred the scope of criminal jurisdiction of the Federal Government and the States especially in the areas of enforcement and adjudication. It is difficult to set a clear borderline between the Federal criminal enforcement and adjudication on one hand and State criminal enforcement and adjudication on the other.

### 1.3. The Research Questions

The thesis would present as many questions as possible pertaining to criminal jurisdiction as per the Constitution and other statutes. The following are some of the questions purported to be posed:

1. What are the guiding principles or factors affecting the distribution of powers between the central government and the states? What do the experiences of other federations look like in the distribution of powers including criminal legislative power between the two tiers of government? To what extent and how far the Ethiopia's criminal jurisdiction is influenced by the guiding principles of the distribution of powers, principle of subsidiarity and the experiences of other federations?
2. Is the Ethiopia's criminal legislative competence divided or centralized? What is the scope of criminal legislative power of the States under the Constitution? What is/is there a difference between criminal code and criminal legislations (a penal code and penal laws, as provided by the Constitution)? What does the Constitution envisage on the two terminologies? Whose power is the enactment of the criminal procedure code, of the Federal Government or of the States? What factors determine the power of enactment of criminal procedure code under the Constitution?
3. Can the States invoke their right to self-determination in order to enact their own criminal procedure code? What about the principle of the residual power that is constitutionally vested in them? What is the extent and scope of the right to self-determination of the Regional States as provided in Art.39 of the Constitution? What is the right to self-determination and criminal policy nexus envisaged by the Constitution?
4. Where do we place or how do we locate the States' First-Instance Courts in the criminal delegate jurisdiction in the Constitution and as per Proclamation No.25/96 and its subsequent amendments? Do/don't they have any criminal jurisdiction anyway? Is it tenable to argue in a way to avoid the State First-Instance Courts, Constitutionally, from entertaining or adjudicating criminal cases? How can this be seen in terms of the doctrine of federalism? Do Proclamation No.25/96 and its successive amendments broaden or narrow down the criminal jurisdiction of the Federal and/or State Courts?

### 1.4. Objectives of the Study

The main objective of the thesis is to make an attempt to locate the criminal jurisdiction of the Federal Government and the States in the Constitution and other statutory laws and identify the scope of the criminal jurisdiction of the two tiers of governments. It is also the objective of the thesis to look into whether the States[2] can invoke the right to self-determination on one hand and the fact that the residual power in the Constitution is vested in them enables same to enact their own criminal procedure code. The thesis touches upon the right to self-determination guaranteed to the NNP by the Constitution in relation to criminal jurisdiction. An attempt will also be made to expound whether the State First-Instance Courts have criminal jurisdiction, and whether the fact that they are currently adjudicating criminal cases is *de facto* or *de jure*. To this end, a critical analysis of adjudicative jurisdiction will be made in order to locate the State First-Instance Courts in criminal adjudication in light of the Constitution and principles of federalism.

Above all, it is the aim of the thesis to assess whether Ethiopia's criminal law is divided or centralized, when tested in light of the Constitution and other statutory laws. Ethiopia's criminal law and policy will also be tested in terms of the guiding principles of the distribution of powers, subsidiarity and experiences of other federations.

### 1.5. Scope of the study

The thesis will focus on the diagnosis of criminal jurisdiction of the Federal Government and the States in relation to the three powers of government i.e., legislative, implementation/enforcement and adjudication. It will also look into the criminal jurisdiction in its substantive and procedural aspects**.** The experiences of other federations following dual and executive federalism will also be presented as a comparative consideration with that of the Ethiopian counterpart. To this end, the US Constitution, the Basic Law of the Republic of Germany and other federations such as India, Nigeria and Switzerland will be analyzed in relation to the treatment of criminal

[2]The member states which are the building blocks of a federal government in different federations can be termed by different nomenclature: In Ethiopia, they are called States, Regional States, Regions or members States, in USA, they are called States, in Germany, they are termed as *Lander*, in Switzerland, they are known as Cantons, in South Africa, they are called provinces. The writer also uses other terminologies such as constituent units interchangeably throughout the thesis as the case may be.

jurisdiction. As far as the relevant laws of the Regional States, in connection with criminal jurisdiction, are concerned, for the convenience of accessibility, the writer may opt to make use of that of the Oromia Regional State. This does not, however, become a bar for the use of other Regional States' laws as the case may be and to the extent that they are relevant.

### 1.6. Literature Review

In an analysis of identifying the scope of criminal jurisdiction of the Federal Government and the States under the Constitution, relevant literatures have been explored. In the first place, broadly, taking into account the type of federalism (dual and executive federalism) and criminal jurisdiction therein, the US and German Constitutions respectively will be analyzed in relation to the Ethiopian counterpart as to how they treat criminal jurisdiction.

With regard to the power to legislate criminal procedure code under the Constitution, Yenenesh Bahiru holds the view that such a power should be vested in the Federal Government.[3] She substantiated her argument with Art. 55(5) of the Constitution in that this provision is intended to include both the substantive and procedural criminal codes. She also propounds that for the purpose of creation of one economic community, the objective of the Constitution which is stated in the Preamble thereof, and the need for a uniform nationwide application of the criminal law, the criminal procedure code should be enacted by the Federal Government. But she has not taken into account the notion of the residual powers that are already vested in the States and criminal procedure law is one of them. Neither did she consider the multicultural settings of the States that are recognized by the Constitution which also extend to the exercise of their powers in terms of criminal procedure law.

In relation to the jurisdiction of State Courts, Munir concludes the State First-Instance Courts do not have the competence of criminal adjudication.[4] He supported his argument by Art.78 (2) of

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[3]Yenenesh Bahiru, *The Power to Legislate Criminal Procedure Code under the Federal Systems: Issues in Ethiopia*, A Thesis Submitted in Partial Fulfillment of the Requirements for LL.M of Public Law and Good Governance in the Institute of Federalism and Legal Studies, Ethiopian Civil Service University, Addis Ababa, June 2011, Unpublished, p.44

[4]Munir Abdullahi, *Delegated Jurisdiction of State Courts on Federal Matters: Particular Reference to Harari Regional Stat*e, Submitted in Partial Fulfillment of the Requirements for The Bachelor of Degree of Law (LL.B) at the Faculty of Law, Ethiopian Civil Service College, July 2005, Unpublished, p.28

the Constitution that stipulates that until the HPR establishes the Federal High and First-Instance Courts throughout the Country or in some parts thereof, upon the fulfillment of the required two-thirds majority votes and where it is deemed necessary, the jurisdictions of the Federal High and First-Instance Courts are delegated to the States Supreme and High Courts respectively. Likewise, Sintayehu argues that the State First-Instance Courts (*Woreda* Courts) will not adjudicate criminal cases when seen from the point of view of delegation.[5] Teklit also opines that the *Woreda* courts of the States do not have exclusive or delegated power on federal matters as delegation of power is given to State Supreme and High Courts.[6] Gadissa, with a similar indication, equates the term 'delegation' with 'concurrency' provided under the Constitution to mean the same in the intention of the drafters of the Constitution.[7]

Assefa also believes that the jurisdictions of the Federal High Courts and First-Instance Courts are delegated to the States Supreme Court and High Courts respectively[8] thereby the State First-Instance Courts would be out of the game in criminal adjudication, at least theoretically speaking.

As the writer has just mentioned the works of the above writers together with other authors' arguments, their conclusion is that the State First-Instance Courts are debarred from adjudicating criminal cases seen from the Constitutional point of view. The major justification to this argument is the fact that the Constitution provides for two different terminologies–delegation and concurrency–as far as the jurisdictional linkage between the Federal and States Courts on the

[5] Sintayehu Birhanu, *Federalism: Legislative and Judicial Competence on Criminal Matters in Ethiopia: A Critical and Comparative Analysis,* Submitted in Partial Fulfillment of The Requirements for the Degree Of Bachelor Laws (LL.B) at the Faculty of Law, Addis Ababa University, June,2006, unpublished, p.73

[6] Teklit Yimesel, *Jurisdiction of Courts under the FDRE Constitution: The Case of Cassation Power*, Submitted in Partial Fulfillment of the Requirements for the Bachelor of Degree of Law (LL.B) at the Faculty of Law, Ethiopian Civil Service College, July 2005, Unpublished, p.33

[7] Gaddissa Butta, *Federal Criminal Jurisdiction and its Delegation to States with Special Reference to Oromia*, Senior Research Paper Submitted in Partial Fulfillment for Bachelor of Law (LL.B), Ethiopian Civil Service College, Faculty Of Law, August 2007, Unpublished, P.20

[8] Assefa Fisseha, (2009).*Federalism, Teaching material,* Justice and Legal System Research Institute, Addis Ababa, p.462

Federal matters, more particularly criminal adjudicative competence is concerned. It is a firm belief of the writer that the two terminologies would not mean the same. The fact that the Constitutional provisions treat the two terminologies under different articles and captions tells us something of the notions of the delegation and concurrency of the judicial powers purported therein. With a view to reconciling the two notions, one should not be in a position to debar the State First-Instance Courts from adjudicating criminal cases which is constitutionally guaranteed. But rather other mechanisms should be devised in order to resolve the deadlock. To this effect, statutory laws which are complementary to the Constitution should be enacted in the areas of delegation and concurrency.

Consequently, the writer argues that criminal jurisdiction in the three powers (legislative, executive and adjudicative) as between the Federal Government and the States should be treated in light of the principles of federalism, the guiding principles of the distribution of powers, the subsidiarity principle and the experiences of other federations. This is because a federal form of state differs from that of a unitary one by the existence of the constitutionally guaranteed distribution of powers between the two tiers of government based on the standards that determine which power belong to the federal government and which ones belong to the States. To this end, the thesis also explores the scope of the right to self-determination of the NNP in relation to criminal matters. In so doing, effective, efficient, context-based and accessible public services will be given a central place in an attempt to locating the criminal jurisdiction of the Federal Government and the States in legislative, executive and adjudicative powers.

The FDRE Constitution appears to give a priority for the Federal Government in respect of enacting criminal laws (a criminal code and legislations). Accordingly, the FDRE Criminal Code has almost exhausted dealing with criminal affairs. There are also other criminal legislations enacted by the Federal Government. The Federal Government is also moving toward unifying a criminal procedure code. In so doing, how far such centralized criminal law is effective and even at times accepted by all regional states or each NNP has not been taken into account. There are multicultural societies in Ethiopia which have their own culture, tradition, and custom requiring a contextualized, but not a unified criminal justice system. In the move to enact a unified criminal procedure code, the Federal Government has not heeded the constitutional caveat that the residual powers are vested in the States.

## 1.7. Significance of the Study

There are some institutions which are supposed to be the beneficiaries of the study either directly or indirectly. These institutions are the legislative, executive and judicial organs of the Federal Government and of the States as well. They may benefit from the findings acquired from this thesis in their respective roles in relation to criminal jurisdiction. In so doing, enacting, enforcing and adjudicating criminal laws by the respective organs, appropriate policy formulation in relation to criminal jurisdiction may be carried out at the Federal and State levels.

## 1.8. Limitation of the Study

During the conduct of the study, the writer encountered many limitations. Time limit within which the study should have been conducted is one of the limitations. Since the courses due for the completion of the LL.M programme in the Constitutional and Public Laws stream was not covered in one year, the time given for the conduct of the study was decided to be reduced to five months period.

There was also a limitation with regard to the accessibility of Regional laws which are necessary for the conduct of the research especially laws related with criminal issues. As known, many of the laws of the Regional States are not available on website. This has hindered me from having access to the Regional laws in the discussion of criminal jurisdictions due to the distance of the Regional States from Addis Ababa. It is for this reason that the Oromia Regional State has been opted to be recurrently used and cited.

The third limitation relates to the financial assistance granted for the conduct of the research. In the study of determination of the criminal jurisdiction of the Federal Government and of the States in its three powers (legislative, enforcement and adjudicative), sufficient financial assistance is required for the better carrying out of the research. Discovering the experiences of different Regional States on one hand and of the Federal government on the other in the discernment of the scope of the criminal jurisdiction demands financial assistance for the costs or expenses so incurred in the duration of doing all these activities. Consequently, it becomes difficult to do all this with the money granted, and as a result, a rough only of the study has been attempted instead of the conduct of purely an empirical research.

There is also a problem with different officials such as judges to cooperate on issues connecting with interview questions. Unexpected reluctance and tacit refusal to cooperate is observed from many of those who are requested to assist in offering answers based on interview questions.

### 1.9.Methodology of the Study

The study centers on library-based or document analysis methodology. Thus, books, laws, articles, different commentaries, journals, theses or senior essays, among other things, are explored pertaining to criminal jurisdiction in its legislative, executive and adjudicative competences. To this end, a deep analysis has been made to reach the way out for the problems and research questions provided for in this chapter.

Furthermore, a comparative analysis will be conducted in juxtaposition with other federations on areas of criminal jurisdiction. Accordingly, the experiences of such federations as USA, India, Germany, Canada, Nigeria and Switzerland will be analyzed. The guiding principles of the distribution of powers and the principle of subsidiarity will be utilized in order to appraise the approach of Ethiopia's criminal jurisdiction.

Although the research is not empirical in approach in the mainstream, case studies or inspection of documents pertaining to criminal jurisdiction as between the Federal Government and the States have been conducted. An interview has also been carried out for the sake of additional clarification or to unravel what the practice looks like in different institutions or justice actors.

### 1.10. Organization of the Study

The thesis consists of six chapters. Chapter one, the introductory part, presents the background, objective, significance, research questions, statements of the problems, limitations, literature review, methodology, and scope of the study. This Chapter describes the overall guidelines, essence and problems of the research.

Chapter Two discusses federalism and its principles in general. In this chapter, the US-model, the German model and other similar approaches will be analyzed in juxtaposition with the case of Ethiopia. The doctrine of the distribution of powers between the Federal Government and the States, among the other features of federalism, has been focused in depth. The three jurisdictions (the legislative, executive and judicial) are presented in this very chapter. The principle of subsidiarity, its philosophical foundations from different perspectives will also be presented in this chapter.

The criminal legislative jurisdiction in Ethiopia will be discussed in Chapter Three. To this end, the chapter will compare and contrast the Ethiopian criminal legislative jurisdiction with other federations such as the USA. It also discusses the criminal legislative power of the Regional States over the enactment of criminal procedure code of their own.

Chapter Four discusses the criminal enforcement jurisdiction by the Federal and State justice actors. This chapter plays a pivotal role in explaining the scope of the criminal enforcement jurisdiction of two tiers of justice actors.

Chapter Five focuses on the criminal adjudicative jurisdiction between the Federal Courts and the States Courts on one hand and between and among the State Courts at all levels; how criminal cases are apportioned among the States Courts from top to down.

Finally, Chapter Six comes up with the conclusion and recommendation of the study.

## Chapter Two

## Federalism and Its Principles

### Introduction

A federal form of government is characterized by the existence of two orders of government in one sovereign state. Each order of government is autonomous within its jurisdiction in exercising powers constitutionally guaranteed. This chapter deals with federalism, its principles or major characteristic features, the doctrine of the distribution of powers and its guiding principles, and the principle of subsidiarity. These issues are highly interlinked to one another in the field of federal system. Let us begin with the definition of federalism.

### 2.1. Definition

Before making a launch into the definition of federalism, it is noteworthy to state that there is no one and universally agreed upon definition for the term 'federalism'. The lack of a universally accepted definition of the term 'federalism' may be attributable to the fact that there are as many justifications for the formation of a federal government as the number of federations crafted, although it may happen that similar moves and pressures towards the formation of federal government might sometimes be taken. It is for this reason that some scholars assert that federalism is a fluid concept.[9] Different federations have entered into federalism as an option of political ideology on different grounds. Some have formed a federal form of government for the sake of devolution of power against a unitary government, others for the military/defence, economic, foreign affairs, others as a result of colonial formula, a political geometry already designed by the colonial powers and others for the sake of the assurance of self-determination.

In spite of the fact that there is no a universally agreed upon definition of the term 'federalism', there are two closely interrelated types of definitions for the term, that scholars of the field have coined to date. These are an etymological definition and contextual definition.

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[9]Federalism:www.politics.ubc.ca/.../**Federalism**_and_the_Separation_of_Powers_Aug, **Accessed on 30/08/2013 at 3:11 PM**

### 2.1.1. Etymological Definition

This sort of definition takes into account the lexical definition of the term 'federalism'. Accordingly, the term 'federalism', 'federation' or 'federal' etymologically, comes from the Latin word '*foedus'* which means treaty or covenant.[10] Traditionally, thus, federalism, being essentially a covenant, is a solemn agreement among smaller polities to form a large perpetual polity.[11] This gives an impression that the federal government and the states are presumed to have consented to live together and cooperate in different functioning. In support of this definition, Daniel Elazar defines federation as a kind of government which establishes a common general government in which to form a polity, constituent units which both govern themselves and share a common constitutional government of the whole.[12] It is a system in which the general government has direct access to every citizen and supremacy in those areas in which it is granted authority.[13] Thus, federalism is the process by which two or more governments share powers over the same geographic area.[14] It is a political system in which the powers are divided between the central government and numerous regional governments.[15] Federalism as an organizing principle advocates a multi-tiered government combining elements of shared rule through common institutions for some purposes and regional self-rule for constituent units for some other purposes, thereby accommodating unity and diversity within a larger political union.[16]

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[10] www.shodhganga.inflibnet.ac.in/jspui/bitstream/10603/.../07_chapter%201.pdf , Accessed on 30/08/2013 9:25 AM

[11]Tsegaye Regassa, *Ethnic Federalism and the Right to Self-determination as a Constitutional Legal Solution to Problems of Multi-Ethnic Societies: The case of Ethiopia*, Submitted in Partial Fulfillment of the Requirements for the Master of Laws Degree (LL.M) at the Faculty of Law, the University of Amsterdam, May 2001, Unpublished, p.16

[12]Daniel Elazar (1987*). Exploring Federalism*, Alabama University Press, p.159

[13]Tsegaye, Supra note at 11

[14] http://usgovinfo.about.com/od/rightsandfreedoms/a/whatisfederalism.htm Accessed on 21/08/2013 at 3:35 PM.

[15]Ibid

[16]Assefa Fisseha, (2007).*Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, Revised edition, p.102

From the etymological definition of the term 'federalism', it may easily be observed that the notion gives an impression that the political and legal relationship between the central and the constituent units governments are consent based scenario in which the two governments come together to coexist and cooperate based on their mutual willingness. Stated otherwise, it is the outcome of the consensual deliberation undertaken between the two orders of governments.

At this juncture, it sounds logical to raise the strictly legal definition of federalism as an extension of an etymological definition. Thus, federalism can be identified with a federal government, i.e. a federal state as a type of governmental organization within which both central and component governments operate directly upon the people, each being independent within respective, constitutionally laid down spheres of allocated powers and in a coordinating relationship with one another, whereby the residuary powers lie with the authorities of component units.[17] From this definition of federalism, it is possible to grasp that a federal form of government is identified as being independent as well as coordinate in the relationship between the central government and the constituent units. And there is a constitutionally safeguarded distribution of power between the centre and the constituent units. The strictly legal definition of federalism described above also notes the place of the residuary powers, i.e., in the constituent units. But as far as the place of the residuary powers is concerned, the caveat that they are entrusted with the constituent units may not horizontally hold true across all federations. For instance, in the Indian federation, the residual powers are vested in the central government.

### 2.1.2. Contextual Definition

The definition given for the term 'federalism' under this theme relates to the context or the nature of federations from the very initial formation and how they are enabled to have come to the status of being called a federal government. Hence, the nature or genesis of the federation determines the contextual definition which is also ascribable only to a particular federation as a

[17]Thomas Fleiner and Lidija R. Basta,(1996). *Federalism, Federal States and Decentralization*, in Basta and Fleiner, (ed.), *Federalism and Multiethnic States: The Case of Switzerland*, 2nd ed., (Fribourg, PIFF vol.16, Helbing & Lichtenhahn), p.1.

result of which this type of definition is a federation-specific. Accordingly, Dr. Assefa has identified about four context-based meanings of the term ‘federalism’.[18]

Consequently, the first dimension of the contextual definition of the term ‘federalism’ pertains to the context of the older federations. The phrase ‘older federations’ refer to the USA, Switzerland, Germany. From the perspective of these older federations, federalism might mean the joining together of some semi-autonomous units for some goals. It is the coming together of the previously independent states to form one sovereign government for the promotion or preservation of unity.

The second dimension of the contextual definition of the term ‘federalism’ is viewed from the perspective of the context of the EU. Thus, in the context of the EU, federalism might refer to the coming together of the bulk of European States and the emergence of new institutions combining confederal as well as federal features. The third dimension of the contextual definition of federalism has a strong connection with that of the former communist federations. From the point of view of the former communist federations, federalism may mean the existence of some features associated with the division of powers in constitutional form rather than operational reality. This view of contextual definition of federalism denies the practical constitutional application which is set forth from the beginning at the time of entering into federalism. To this end, Anderson asserts that the communist Soviet Union, Czechoslovakia, and Yugoslavia all had nominally federal constitutions, but were in reality centrally controlled by one-party regimes.[19] The fourth dimension of the contextual definition of federalism may be seen from the African context. Accordingly, the colonial experience of divide and rule may imply the political ideology of federalism. Thus, the contextual definition of federalism leads one to state that federalism might mean different things to different people depending on historical and cultural context.[20]

[18]Assefa, Supra note at 16, p.101

[19]George Anderson, (2008).*Federalism: an introduction*, Forum of Federation, Oxford University Press. P.9

[20]Supra note at 18

## 2.2. Significance of Federalism: why Federalism?

Being one type of a form of government, federalism as an ideology, is receiving more attention and popularity than ever before. There are at present, among the 192 politically sovereign states recognized by the United Nations, 25 that are functioning federations in their character, claim to be federations or exhibit the major characteristics of federations.[21] Watts also notes that currently, there is a move from a world of sovereign nation-states to a world of diminished state sovereignty and increased interstate linkages of a constitutionally federal character.[22] From these assertions, one can deduce that it is not without justification or compelling forces that different nation-states have been making a move towards a federal form of government, hence federalism being a necessity rather than an optional phenomenon. Time brings various technological advancements to the world so much so that each nation-state could be able and is expected to adapt itself to the impacts of the technological political developments. Thus, technological, economic, political, and social and cultural circumstances, among others, have become compelling reasons that led many nation-states towards the federal form of government. In addition, the writer will discuss in detail the circumstances that necessitate federalism in the following manner.

### 2.2.1. Accommodation of Diversity and Preservation of Unity

In countries where multiethnic, multilingual, and multicultural societies are the evident fact of the genesis of the country, two interests must be balanced: diversity should be accommodated on the one hand, and unity must be preserved on the other. There must be equilibrium of maintaining the two notions with a balanced hold.

The notion of diversity which needs to be accommodated in a federal form of government may range to such respects as language, culture, identity, religion and other related composite issues which are identified by each ethnic group. It is the very purpose of the notion of the federal system to hold together diversified ethnic groups recognizing their respective identity, language, culture, and religion (divided internal sovereignty) so as to form one sovereign and independent

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[21]Ronald L. Watts, (2008). *Comparing Federal Systems*, 3rd ed., Queen's University Press, London, p.22

[22]Ibid

political state (national sovereignty) in which unity is preserved. Therefore, the twin purpose of federalism: accommodation of diversity and preservation of union is one of the fundamental justifications or compelling forces that prompt the creation of federal system. Here, Strong distinguishes between unity and union. He asserts that the federating units though, desiring union, do not desire unity, for if they desired unity they form not a federal but a unitary state.[23] Due recognition should be accorded to the constituent units because they are the building blocks of the central government. The central government cannot exist without the existence of each constituent unit. But the way each federation is created may differ based on whether coming together and/or holding together dichotomy. In either case, however, the presupposition is that the existence of constituent units as a building block is mandatory for one to imagine a federal system.

### 2.2.2. Shared Rule and Self-rule

In a federal form of government, as described above, there exists a dual form of government in which the type of governance falls into a shared rule for common purposes and a self-rule for individual state purposes. While the need for common purpose is required for the whole citizens of the country, the individual state purpose or self-rule is required for the respective constituent units' citizens. Reasons for the increased interest in federalism as a political concept and federations as in the form of institutions are the fact that there is the need to provide the closest institutional solution combining shared rule for some commonly shared purposes and self-rule for other purposes of regional interest in the world today.[24] Shared rule implies the circumstances wherein the common interests of the federal or central government which comprises of the constituent units, at the national level, are maintained in the name of the sovereign and independent state. National issues which are capable of affecting the citizens and boundaries of the country are governed under the notion of shared rule.

The notion of self-rule also connotes the concept of localized governance in which the government comes closer to the public. It is through and by the local government that the

[23]C.F. Strong, (1963).*A History of Modern Political Constitutions*, Capricorn Books: New York, p.104

[24]Assefa, Supra note at 16, P.99

demands and preferences of the people are identified and public goods and services are delivered to the society concerned. In support of this, Watts puts his assertions in the following words:

> *The desire for smaller, self-governing political units has arisen from the desire to make governments more responsive to the individual citizen and to give expression to primary group attachments—linguistic and cultural ties, religious connections, historical traditions and social practices—which provide the distinctive basis for a community's sense of identity and yearning for self-determination.*[25]

Thus, the responsiveness of local governments must be able to meet the linguistic and cultural ties, religious connections, historical traditions and social practices. These items are played by the concept of self-rule.

### 2.2.3. Growing worldwide interdependence with different networks

With respect to the significance of federalism under this theme, Watts has diagnosed many justifications for the need for federal system in the current world. The first factor relates to the modern developments in transportation, social communications technology and industrial organizations.[26] To this effect, he identified dual pressures: the desire for larger political organizations that desires for progress, a rising standard of living, social justice, and influence in the world arena and by growing awareness of worldwide interdependence in an era whose advanced technology makes both mass destruction and mass construction possible on the other hand, the desire for smaller self-governing units or smaller political organizations which includes the responsiveness of the local governments to the linguistic and cultural ties, religious connections, historical traditions and social practices which provide the distinctive basis for a community's sense of identity and yearning for self-determination.[27]

The second factor attributable to the emergence of federalism has a strong connection with economic and political forces unleashed by global economies. Watts has explained the circumstances whereby the peoples of a certain state become both international or global

[25]Watts, Supra note at 21, P.23.

[26]Ibid

[27]Ibid

consumer and local citizens at the same time thereby making use of global communications and consumership.[28]

The spread of market-based economies−such as contractual relationships, non-centralized market-based economy, entrepreneurial self-governance and consumers rights consciousness, diversified in preference to homogeneous market, interjurisdictionally mobile, competitive and cooperative market−are the other factors that necessitate a federal system.[29] Fourthly, changes in technology have also given rise to the creation of decentralized and "flattened hierarchies" involving non-centralized interactive networks which in turn results in a non-centralized political organization makes federalism more relevant.[30] Fifthly, the idea of federalism is necessitated in search for the notion of subsidiary principle. The principle of subsidiarity, as will subsequently be discussed, is concerned with the circumstances whereby the "higher" political body should take up those tasks they cannot be accomplished by the "lower" political bodies themselves.[31]

### 2.3. Principles or Common Characteristics of Federations

There are some common features that distinguish a federal system from that of the unitary one albeit the way each federation is crafted and designed may differ from one another. The following are the typical elements or characteristic features of federal systems. For the sake of relevance to the topic of the thesis, an emphasis will be made on the doctrine of distribution of powers.

#### 2.3.1. Umpiring the federation

The inevitability of disputes between the federal government and the states on the provisions of the constitution necessitates the existence of a body that takes over the umpiring role. 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 or with the states as a result of which an impartial

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[28]Id, p.24

[29]Ibid

[30]Ibid

[31]Ibid

body, independent of the federation and the states, that decides on the meaning of the contested provisions concerning the division of power is essential for a federation. To this end, different federations have adopted different institutions to settle constitutional disputes. For instance, Constitutional Court in Germany, Supreme Court in USA, HOF in Ethiopia are some to mention.

### 2.3.2. Written, Rigid and Supreme Federal Constitution

Unlike a unitary state and centralized government in which the legal relationship between the center and the local governments is regulated by a statutory law, in the federal form of government, however, the relationship between the federal government and the states is regulated by a written constitution. To this effect, George Anderson has rightly put it in the following:

> *Effective federal governance must be based on a written constitution and the rule of law. The constitution sets the basic framework and principles of the federation. A constitution can be symbolically important in fostering unity or discord within the country. Constitutions vary greatly in their length, specificity, and accessibility.*[32]

The presence of a written constitution between the federal government and the states presupposes, among other things, the institutional structures within which the federation operates, separation of powers between and among the three branches of government: the legislative, executive and the judiciary, the guiding principles of the constitution that regulates the relationship between the people and the government. The federal arrangement presupposes the existence of a supreme federal constitution from which the federal government and the states derive their authority.[33]

If the federal constitution contains the basic principles governing the relationship between the federal government and the states and if the authority of both governments derives from the constitution, then it follows that in order to ensure its supremacy, it should not be subject to

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[32]Anderson, Supra note at 19, P.55

[33]Assefa, Supra note at 8, p.136

unilateral alteration by either order of government alone.[34] This gives us a hint of the notion of constitutional supremacy on one hand and the amendment of constitution on the other together with the interplay between the two. As far as the constitutional supremacy is concerned, many federations have provided same in their respective constitutions. For instance, Art.9 of the FDRE Constitution states that the Constitution is the supreme law of the land; any law, customary practice or a decision of an organ of state or a public official which contravenes the Constitution shall be of no effect. Art.VI, sub-Article 2 of the US Constitution also provides that [this] Constitution, and the Laws of the US which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the Authority of the US, shall be the supreme law of the Land (emphasis added).

With regard to an amendment of the constitution, it is maintained that the constitution should not be subject to unilateral and arbitrary alteration; and as a result, the participation of the federal government and the states in the amendment process is the prime requirement.[35]

### 2.3.3. Distribution of Powers

The other typical feature that characterizes a federal system is the constitutionally guaranteed distribution of powers between the two orders of governments (the federal government and the states). The writer discusses the distribution of powers in a federal system in a rather deep manner under this subsection, as it is a stepping-stone to discussion of the jurisdiction of criminal matters in its legislative, executive and judicial powers in Ethiopia and other federations, in the subsequent chapters.

In as much as there are at least two orders of government (the central government and the states) in a federal form of government, powers are inherently divided between the two levels of government, which are constitutionally safeguarded. No one contends the fact that federations are distinguished from other polities primarily by the fact that political power (commonly related to legislative, executive, judicial, and financial functions) is constitutionally divided between the

[34] Id, p.141

[35] Ibid

federal government and the states, and both orders of government are autonomous with respect to the powers granted to them.[36] This is indirectly based on the dual principle implicit in every federation of the desire to be united and to be autonomous.[37] The duality in essence, refers, here, to the parallel existence of the two orders of government with the constitutional guarantee of the division of power contemplated between them. Thus the fundamental defining institutional characteristic of federations has been the constitutional distribution of powers between the federal and regional governments. Furthermore, what distinguishes federations from other forms of federal systems such as decentralized unions or confederations is the constitutional guarantee of autonomy over a certain range of assigned functions for each order of government.[38]

#### 2.3.3.1. Guiding Principles of Distribution of Powers

In any federation, powers are not arbitrarily distributed between the federal government and the constituent units. Neither is there any one formula that is universally accepted by federations in the distribution of powers. However, there are principles that guide or factors that affect the distribution of powers between the federal government and the states. Some of these guiding principles or factors that affect the distribution of powers are presented as follows.

##### 2.3.3.2.4. **Unity *versus* Diversity**

The preservation of unity and accommodation of diversity, being one advantage of federalism, has a lot to do with the distribution of powers between the federal government and the states. When powers are divided between the federal government and the states, the powers so to be distributed are expected to be tested in terms of preservation of unity (which powers are capable of maintaining unity) on one hand and which are capable of reflecting regional identity (powers which are distinctive to each regional state so to be accommodated) on the other. To this effect, Watts has held the following idea:

> *In all federations, a common feature has been the existence at one and the same time of powerful motives to be united for certain purposes and of deep-rooted motives for*

[36]Assefa, Supra note at 16, p.104

[37]Ibid

[38]Watts, Supra note at 21, p.101

> *autonomous regional governments for other purposes. This has expressed itself in the design of federations by the distribution of powers between those assigned to the federal government for the purposes shared in common and those assigned to the regional units of government for the purposes related to the expression of regional identity.*[39]

The interplay of the unity-diversity nexus and the distribution of powers in any federation is thus, the defining principle that guides the nature of powers which should fall under either of the two or both tiers of government. Accordingly, powers which characterize the need for unity or common purpose oriented would fall under the federal government, and those powers which are region specific or which characterize regional identity featuring diversity are supposed to fall under the state jurisdiction.

At this juncture, it is worth stating, as an extension, the homogeneity and heterogeneity of the nature of the society which constitutes the federation. This is because the homogeneity-heterogeneity test determines which powers should belong to which order of government. To this end, Watts suggests that the more the degree of homogeneity within a society the greater the powers that have been allocated to the federal government and the more the degree of diversity the greater the powers that have been assigned to the constituent units of government.[40] As the number of multicultural and multilingual societies increases in a federation, the mode of the distribution of powers should demonstrate the trend that more powers will be given to the states. In this view, the powers which should be vested in the federal government are limited in deeply multiethnic and multilingual societies. David Black argues that we should most strictly define and limit the powers of the central government, and leave all other powers not so defined to the local legislatures.[41]

This gives an impression that powers are not divided haphazardly, but rather it should take into account the standard that what power requires the commonality so as to be categorized under the

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[39] Id, p.83

[40] Id, p.84

[41] David Black, Federation Issue, www.ccentre.wa.gov.au/documents/fediss.**pdf**, Accessed on 17/01/2014 at 3:48 PM, p.3

federal government jurisdiction on the one hand, and what requires regional identity or distinctiveness so as to be categorized under the jurisdiction of the state governments on the other. This holds true especially in multiethnic or ethno-nationalist based federations. There are powers which are inherently federal in character and as a result destined to preserving unity; serving the common purposes; maintaining the sovereignty of the federation and hence falling under the jurisdiction of the federal government. International relations (foreign policy), interstate commerce, currency, and national defence are some of those powers which require the involvement of the federation.[42] These are accomplished by the central government even in the presence of multicultural, multiethnic and multilingual societies in the federation because the benefits or services obtained from these matters are made to the interest of all citizens of the federation, not just for the few or some of them.

Under the tenet of the unity-diversity litmus test of the distribution of powers between the federal government and the states, the caveat of shared rule and self-rule takes the central stage when power is divided between the two tiers of government having the view of preserving unity and accommodating diversity. In other words, when powers are divided as between the federal government and the states, due care should be taken in order to identify powers which deserve shared rule so to be a federal power and which deserve self-rule so to be a state power in terms of governance. However, such taxonomy of shared rule and self-rule should not affect the exclusive and/or shared power in the distribution of powers as between the two tiers of government.

#### 2.3.3.2.5. **Geographical, Historical and Cultural Factors**

These items are the other tests through which powers are examined when they are distributed between the federal (central) government and the states. They are also factors that are capable of contributing to the common purpose that culminates in unity and deep-rooted diversity that culminates in regional identity or state specific.[43] Watts has noted that these items together with linguistic, economic, security, demographic, intellectual and international factors are the contributory factors that are capable of affecting the particular distribution of powers in different

[42]Constitutions of many federations such as the US (Art. I) and Ethiopia (Art.51) vest such powers in the Federal Government.

[43]Watts, Supra note at 21, p.83-84.

federations.[44] These factors, taken together or separately, determine the nature of the doctrine of the division of powers between the federal government and the states which varies from one federation to the other. Let's see some of these items one by one as follows.

**Geographical Factor**

Geographical location has a lot to do with the distribution of powers between the two tiers of government. Powers which transcend one regional state in their very nature and operation would fall under the federal jurisdiction and becomes a federal power or authority. Matters concerning citizens or residents of different states are governed by the federal government. This is what is termed as diversity jurisdiction.[45] This may be justified on the ground that if one of the states to which the citizen belongs governs the case, it may favor its own citizen and be biased against the other.

The test of geographical factor in the doctrine of the distribution of powers should not be restricted only to geographical location of the matter but it should also extend to the geography of the extension of the public utility or services. To this end, there are public services which are equally needed by all citizens of the country alike. Such kind of public services touch all peoples in all regional states. As a result, such regional cross-cutting public services should be taken over by the central government. National defence, currency, interstate commerce and foreign affairs are some of the examples to mention here.

On the other hand, there are matters which would fall under the state jurisdiction based on their geographical location. Here, what is to be taken into account is not only the geographical location of the matter but also its nature whether it characterizes federal or regional features. If the matter characterizes regional behavior and is located in the region, it falls under the state jurisdiction and becomes the state power. The fact that powers should be divided between the federal government and the states based on geographic litmus test is justified by effectiveness, efficiency, accessibility, and ease of accountability.

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[44] Ibid

[45] Larry Kramer, Diversity Jurisdiction, www.docstoc.com/docs/8386932/**Diversity-Jurisdiction**, Accessed on 30/01/2014 10:50 AM

## Historical Factor

Historical factor test is all about the nexus between the past history that existed before the adoption of the constitution and introduction of federalism and the distribution of powers. The constitution must be there to rectify the past injustice, marginalization, and unequal treatment that was prevailing in the past.[46] The rectification of such discriminatory experiences should be carried out by appropriate distribution of powers between the federal government and the states. If the mode of the distribution of powers is not appropriate enough to rectify the past history, there may spring complaints against the federal system. For instance, if all powers or considerable share thereof is vested in one tier of government, say the federal government, then one may easily deduce that the federation is little more than a unitary state or centralized government.

Therefore, in order to distribute powers between the federal government and the states, historical settings should be enquired as carefully as possible. The historical settings should be included in the constitution in a way it is able to demonstrate that the past injustice, wrongs, and discrimination having existed between and among different ethnic groups or class societies should be duly rectified in the area of the distribution of powers. The mechanism of rectifying the past unjust relationships should extend to the distribution of authority in terms of resources and power.

## Cultural Factor

Culture plays a pivotal role in determining the distribution of powers between the federal government and the states. Multicultural federations are especially characterized by the respect, promotion, and preservation of the cultures of each constituent unit or ethnic group as the case may be. Cultural factor test in the distribution of powers between the federal government and the states envisages that power should be divided based on the respective cultures of each constituent unit among themselves. The federal government is not expected to centralize powers which are inherently culturally sensitive and relative to the states concerned. Powers involving such

[46]The Preamble of the FDRE Constitution reaffirms this issue.

culturally sensitive matters should fall under the state jurisdictions as culture of every state is relative to them.

#### 2.3.3.2.6. **The Mode of Formation of Federation**

The process by which each federation is created or established may also affect the mode of the distribution of powers between the federal government and the states. In view of this test of the distribution of powers, Watts enunciates that there are three possibilities whereby the distribution of powers differs accordingly.[47]

The first possibility relates to the situation whereby a certain federation is created by aggregation. According to Watts' enunciation, where the process of establishment has involved the aggregation of previously distinct units giving up some of their sovereignty to establish a new federal government, the emphasis has usually been upon specifying a limited set of exclusive and concurrent federal powers with the residual (usually unspecified) powers remaining with the constituent units.[48] Watts exemplifies his suggestion by giving a classic example of the US, Swiss and Australian federations.

The second possibility in relation to the process by which a certain federation is established which may affect the distribution of powers is the situation whereby a federation has involved a process of devolution from a formerly unitary state. In such devolutionary federations, Watts propounds that the powers of regional states have been specified and the residual authority has remained with the federal government. It is the inverse of the first case (of aggregative federation). Belgium and Spain are categorized under this instance.

The third possibility is the combination of the above two types of processes of establishment of a federation. This happens where a federation is created partly by aggregation and partly by devolution or simply by the blend of the two processes. In such federations, exclusive federal, exclusive provincial and concurrent powers are specified, the residual authority remaining with the federal government. Canada and India are the best illustrative examples.

[47]Watts, Supra note at 21, p.84

[48]Ibid

### 2.3.3.2.7. **Time**

The period in which the constitutional distribution of powers was drafted determines or affects the mode of the division of powers between the federal government and the states. Under this heading, what is required to be made clear is that time has its own pressure in affecting how the constitutional distribution of powers should be arranged and what form it should take. This may be pressed by scientific and technological findings, inventions and discoveries, and political developments taking place from time to time. Accordingly, Watts propounds that the eighteenth and nineteenth century constitutions of the United States, Switzerland and Canada distributed powers in fairly general terms, while the newer federal constitutions of the latter half of the twentieth or early twenty-first centuries have often included minutely detailed lists of powers and extensive provisions for intergovernmental institutions and processes.[49] As a result, there are three lists in such constitutions of as an Indian federation: exclusive federal, exclusive state and concurrent lists. Thus, as time progressed from the eighteenth and nineteenth century to the twentieth and twenty-first centuries, the mode of the constitutional distribution of powers also changed from the general appearance to the specific and more detailed manner.

### 2.3.3.2.8. **The common law and civil law Legal systems**

The legal system of different federations has affected the mode of the constitutional distribution of powers between the federal government and the states. Some federations such as the United States, Australia, India, Malaysia and Nigeria are those which have the common law tradition; Canada and South Africa follow a mixed common law and civil law system whereas European and Latin American federations such as Switzerland, Germany, Austria, Belgium, Spain, Brazil and Mexico have a civil legal tradition.[50] The pursuit of different legal traditions by these federations causes distinct constitutional law and application and interpretation. As a result, in federations where the civil law tradition has prevailed the result has usually been a much more explicit delineation of jurisdiction and a more limited scope for judicial review.[51]

[49]Id, p.85

[50]Ibid

[51] Ibid

#### 2.3.3.3. The Principle of Subsidiarity

Whenever the issue of the distribution of power is raised, the principle of subsidiarity would inevitably come into picture. In this subsection, the writer will discuss the definition, nature, and significance of subsidiarity and its principles, its philosophical foundations, political and human rights aspect and an institutional system.

##### 2.3.3.3.1. **Definition**

Etymologically, the term subsidiarity is, more distantly, derived from the Latin verb subsidio (to aid or help), and the related noun subsidium (aid or assistance).[52] The Oxford English Dictionary defines subsidiarity as the idea that a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level.[53] Subsidiarity is an organizing principle of decentralization, stating that a matter ought to be handled by the smallest, lowest, or least centralized authority capable of addressing that matter effectively.[54] The notion of subsidiarity advocates that political, social, cultural, economic, or administrative tasks should primarily be accomplished by the lowest possible administrative units and transferred to the central government as a subsidiary business. The central government avails itself in order to assist the lowest institutions.

Watts also notes that the principle of subsidiarity is the notion that a "higher" political body should take up only those tasks that cannot be accomplished by the "lower" political bodies themselves.[55] It is the principle that states that only subjects that cannot be adequately dealt with by a lower order of government should be performed by the higher order of government. The 'higher-lower' scenario here opined by Watts is not to mean that there is superior-subordinate relationship between the federal government and the states but rather it would mean the ideal relationship between the two orders of government.

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[52] http://en.wikipedia.org/wiki/Subsidiarity, accessed on 08/01/2014 at 4:10PM

[53] Ibid

[54] Ibid

[55] Watts, Supra note at 21

In the viewpoint of the subsidiarity principle, thus, whenever a decision is made concerning whether a certain matter is federal power or state power, it should begin from the conception that whether that specific matter is effectively and efficiently performed or not by the lower governments. This has an important implication in political and human rights philosophical foundations as will be discussed in the following. The principle of subsidiarity enhances the bottom-up, not top-down approach to governance system. A matter falls under the federal government if it cannot be fully exercised by the states. To this end, Calabresi and Bickford have explicated the issue as follows:

> *The central government should play only a supporting role in governance, acting only if the constituent units of government are incapable of acting on their own. The word itself is related to the idea of assistance, as in subsidy, and is derived from the Latin 'subsidium', which referred to auxiliary troops in the Roman military.*[56]

Thus, the principle of subsidiarity is of the view that the central government should take up powers from the constituent units for the sake of supportive purposes only. This may take place in such circumstances as whereby due to the nature of the matter it goes beyond the jurisdiction of the regional states. In such cases, the federal government assumes that power as an auxiliary authority. It is congruent to the phrase that "Federalism avoids overly centralized, top–down command and control mechanisms which national governments might otherwise tend to favor."[57]

#### 2.3.3.3.2. **The Historical Background of the Principle of Subsidiarity**

Subsidiarity first appeared prominently in modern European political thought as a result of Catholic teachings in the 1930's emphasizing the importance of the individual as a rights bearer in an era of fascism and communism.[58] The papal encyclical *Quadragesimo Anno* (1931) provided:

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[56]Steven G. Calabresi and Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law*, Northwestern University School of Law Northwestern University School of Law Scholarly Commons, Faculty Working Papers, 2011, http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/215 p.6

[57] Id, p.14

[58]Id, p.7

*Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a great evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.*[59]

In the view of the Catholic teachings, therefore, it is fatally wrong and a great evil to take away powers from the individuals or subordinate organizations and give it to the community or higher association as far as the former are able to accomplish on their own. The higher organization is not expected to interfere in the matters which the lower entity can perform. But rather it should assist or cooperate so that the lower association would accomplish the matter competently. To this effect, the current Catechism of the Catholic Church states that:

*[A] Community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good.*[60]

Presently, the principle of subsidiarity in EU law appears in Article 5(3) of the Treaty on European Union. It provides that "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."[61]

From this provision of the Treaty of the EU, we could figure out that there are prerequisites which should be fulfilled for the Community (EU) to take up those powers which do not fall under its exclusive jurisdiction. This can be considered from two angles: from the angle of the Community and the member states cumulatively. From the angle of the member states, a certain

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[59]Ibid

[60] Ibid

[61]The Maastricht Treaty of the European union, 1992, www.eurotreaties.com/maastrichteu.pdf

competence which does not fall under the exclusive jurisdiction of the Community falls in the latter if the former cannot sufficiently achieve a proposed action on their own. From the perspective of the Community (EU), it falls under the jurisdiction of the Community if the proposed action is better achieved by it based on the reason of the scale and effects. Thus, the principle is that in the absence of these requirements, it is the member states that assume the power on those matters which do not fall under the exclusive jurisdiction of the Community (EU).

#### 2.3.3.3.3. **The philosophical Foundations of the Principle of Subsidiarity**

The principle of subsidiarity is built on various philosophical foundations. Scholars advocate the principle of subsidiarity backing same by different philosophical underpinnings. The first philosophical underpinning is the economics of federalism. The economics of federalism maintains that the principle of subsidiarity upholds variation in preferences, competition for taxpayers and businesses, experimentation to develop the best set of rules, and lower monitoring costs.[62] From its very nature, the principle of subsidiarity is characterized by advocating accessible, flexible, contextualized and real world conditions. The fact that public officials are held accountable as closely as possible by the local peoples and being responsive to the needs and preferences of the peoples at proximity has an economic benefit that reduces unnecessary expenses. The people may more easily physically observe and question government officials in close proximity rather than many miles away.[63]

The second philosophical foundation of the principle of subsidiarity is linked to human or natural rights. From the human rights or natural law point of view, the principle of subsidiarity grows from the belief that individual rights exist as a matter of natural law. Because rights belong naturally only to individuals, social entities (such as families, communities, cities, nations, or confederations) may legislate only to the extent that individuals or smaller social units lack competence.[64] It is for this reason that Rudolf von Jhering says "Every individual should say the

[62]Supra note at 56, p.12

[63]Id, p.22

[64]Paolo G. Carozza, Subsidiarity as a Structural Principle of International Human Rights Law, the American Journal of International Law Id, p.6

phrase of Louis XIV: "I am the state."[65] Subsidiarity is desirable not because it maximizes utility, although it may often do that, but because it recognizes the natural right of individuals to have their problems addressed by the level of government that is closest to them.[66] The principal advantage of subsidiarity as a structural principle of international human rights law is that it integrates international, domestic, and subnational levels of social order on the basis of a substantive vision of human dignity and freedom, while encouraging and protecting pluralism among them.[67]

Thus, the notion of subsidiarity is strongly connected with the human rights theory in that the fact that human rights is inherent in the human person, should begin to exist from grass root level. To this effect, Carozza argues that:

> *Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person: the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere.*[68]

Thus, if the realization of human rights becomes evident from lowest institutions of any kind in the society, it implies that the protection and respect accorded to human rights will become actual everywhere. The proponents of the principle of subsidiarity in terms of the human rights discourse claim that subsidiarity is personalistic, rather than contractual or utilitarian. That is, its first foundation is a conviction that each human individual is endowed with an inherent and inalienable worth, or dignity, and thus that the value of the individual human person is ontologically and morally prior to the state or other social groupings.[69] Because of this value, all

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[65]Id, p.1

[66]Supra note at 64, p.20

[67]Id, p.6

[68]Ibid

[69]Ibid

other forms of society, from the family to the state and the international order, ought ultimately to be at the service of the human person.[70]

In connection with this issue, the fact that an individual person is granted freedom in the name of human rights enables him to respond to circumstances that encounter his life of any kind (political, economic, social, and legal aspects) by using his own initiatives. Thus, respecting the dignity of the human person and the integrity of the groups that constitute his or her personhood (and that themselves have a certain integrity) requires that all forms of society be oriented toward the freedom of "lower" forms of association, and ultimately toward the freedom of the individual.[71] In short, subsidiarity takes the freedom necessary to human dignity and extends it to a regard for freedom at all levels of social organization.[72] If the lesser associations are abolished or reduced to mere agencies of the higher, the result is the monolithic state which expresses the essence of social totalitarianism, the reduction of all societies to one omnicompetent society.[73]

The third philosophical basis of the principle of subsidiarity is grounded in political power. The principle of subsidiarity enhances and states that political powers are exercised by the constituent units and are transferred to the federal government upon the will of the former where they find it absolutely necessary. To this end, Mark Friesen holds that:

> *The principle of subsidiarity maintains that issue areas and political authority are only exercised at the national state level if it is deemed necessary by the constituent units, and if the issue or political authority would better be dealt with at the national level. Subsidiarity implies that political authority ultimately rests with the constituent units of society, and is only transferred to a federal/national level if it is absolutely necessary.*[74]

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[70]Id, p5

[71]Id, p.6

[72] Ibid

[73]Id, p.8

[74]Mark Friesen, *Subsidiarity and Federalism: An Old Concept with Contemporary Relevance for Political Society*, WWW.library.queensu.ca/ojs/index.php/fedgov/article/download/4418/4432, p.3

The principle of subsidiarity can also be defended from the perspective of the assurance of the right to self-determination. As a result, subsidiarity is conducive to ensuring that self-determination by local populations is preserved because rules and actions are being implemented at levels of government where individuals are more involved and can be effectively represented. Accountability by local governments is preserved; a local population's dissatisfaction with actions can be effectively directed at the level of local government directly responsible for those actions.[75] The fact that the principle of subsidiarity extends to the maintenance and enforcement of local identities, and allows the local governments to be more responsive to local needs is the further dimension of the right to self-determination.

Furthermore, the principle of subsidiarity and democratic theory would also conform to one another. The central theme of democracy is the people itself. It is a system in and by which a people governs itself with its own democratic options. The notion that smaller polities allow greater democratic control over public policy is familiar to democratic theory**.**[76] Thus, the exercise of political power by the lowest human association is an indication and proof of the principle of subsidiarity and democracy.

### 2.4. Jurisdiction

Black's Law Dictionary defines the term 'jurisdiction' in a broader as well as in a narrower sense. Broadly, the term 'jurisdiction' could be defined as "a government's general power to exercise authority over all persons and things within its territory.[77] In the narrower definition of the term, jurisdiction could be defined as a court's power to decide a case or issue a decree, or a geographical area within which political or judicial authority may be exercised.[78] This type of definition limits the scope of the term 'jurisdiction' to political or judicial jurisdiction. It does not, for example, include the legislative jurisdiction. In the former definition of the term 'jurisdiction' however, it may include the three traditional branches of government: the

[75]Id, p.9

[76]Paul D. Marquardt, *Subsidiarity and Sovereignty in the European Union,* Fordham International Law Journal, Vol.18, Issue 2, Article 7, 1994, p.638, available at https://litigation-essentials.lexisnexis.com/webcd/app?action.

[77]Bryan A. Garner (ed.), Black's Law Dictionary, 8th ed, 2004, p.2490

[78]Ibid

legislative, executive and judicial jurisdictions. It is the aim of the thesis to deal with the former definition, i.e., the legislative, executive and judicial jurisdiction in this section as a precursor to the subsequent discussions pertaining to the criminal jurisdiction. Thus, the legislative, executive and judicial jurisdictions will be dealt with in a rather detailed manner as follows.

#### 2.4.1. Legislative Jurisdiction

Legislative jurisdiction refers to a legislature's general sphere of authority to enact laws and conduct all business related to that authority (emphasis added).[79] It is the power of the law-making organ to enact laws. How the powers are divided between the federal and state governments in relation to legislative jurisdiction in their respective constitutions, in different federations, will be dealt with in detail in the following manner.

The legislative jurisdiction has various forms in the distribution of powers. These forms may be exclusive, concurrent, residual, and shared powers.

##### 2.4.1.1. Exclusive Legislative jurisdiction

In legal parlance, the notion of exclusive power refers to the powers for which the federal constitution has created a monopoly which either is in the hands of the federation or of the states.[80] Exclusive powers may only be assigned to the central government leaving the undefined and unenumerated powers to be exercised by the regions, or enumerate the exclusive powers of each level of government.[81] The listing of the exclusive powers of each government is for the purpose of delimiting the scope of the power and for curtailing any unnecessary interference with the power of a government.[82]

There are different scenarios as to how the constitutions of different federations treat the exclusive legislative jurisdictions. The first scenario pertains to the cases where the exclusive legislative powers of the federal government alone are listed. For instance, in the USA, the

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[79]Id, p.2494

[80]Solomon Nigussie, (2008). *Fiscal Federalism in the Ethiopian Ethnic-based Federal System,* Revised Edition, Wolf Legal Publishers, P.60

[81]Ibid

[82]Ibid

exclusive powers are listed only for the federal government,[83] but with some kind of 'catch-all phrases' which broaden the extent of the federal power.[84] The second scenario is all about the fact that the exclusive legislative jurisdictions of both the federal and state governments and the concurrent powers are listed. For instance, the German Basic Law provides the exclusive powers for the central and regional governments as well as concurrent powers for the two levels of government.[85] But in Germany, many of the federal exclusive legislations are executed by the *Lander*.[86] Furthermore, in the Indian and Canadian cases, the exclusive legislative jurisdictions of both the central and state governments are listed.

### 2.4.1.2. Residual Legislative Jurisdiction

Residual powers are those powers which are not included in the list of exclusive or shared powers.[87] In some cases, they are not specifically enumerated because they were unforeseen by the drafters at the time of constituting federal constitution.[88] Residual powers may also be left during the initial stage of establishing the constitution for the reason that there were no objections concerning the allocation of subjects between the central and the state governments.[89] Dr. Solomon has illustrated this by the case of the USA where several civil and criminal matters were left untouched in the federal constitution.[90] The assignment of residual power to the states was intended to underline their autonomy and the limited nature of powers assigned to the federal government.[91]

Different federations place the residual powers either in the central government or in the states. Federations such as USA place the residual powers in the states. However, federations such as India assign residual powers to the central government. To this effect, Watts holds that in

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[83]Art. I, Section 8 of the US Constitution

[84]Solomon, Supra note at 80

[85]The German Basic law, Art.70-74

[86] Id, Art.83-85

[87]Solomon, Supra note at 80, p.61

[88]Watts, Supra note at 21, P.39

[89]Solomon, Supra note at 80, P.62

[90]Ibid

[91]Watts, Supra note at 21, p.107

federations which are created by aggregation such as USA, Switzerland, Australia, Germany, Malaysia, Argentina, Brazil, Mexico, Nigeria, Russia, Pakistan and the United Arab Emirates, the residual powers are retained by the states.[92] By contrast, he claims that in federations crafted by devolution such as India and Canada, among others, the residual powers are left with the central government. Here, Watts makes the aggregative-devolutionary dichotomy the yardstick for the identification of the place of the residual powers in different federations.

There are several factors that are capable of limiting the extent of the residual powers. For instance, the extensiveness of the exclusive powers reduces the magnitude of the residual powers. The significance of the residual powers is related to the number and comprehensiveness of the enumerated lists of legislative power in the constitution; the greater the enumeration of powers, the less the scope of the residual power will be.[93] The other factor that affects the residual powers relates to the "implied powers" clause. These implied powers are not meant to stand on their own but rather they depend upon the enumerated powers with a view to fulfilling the objectives of the enumerated powers. It implies that the specific power could not have been exercised without the 'implied power'.[94] This holds true especially in the US Constitution whereby 'the necessary and proper' clause has been provided.[95] Thus, in the name of the "implied powers", the federal government may encroach and narrow down the residual powers. In practice there has been a tendency for the courts to read the maximum "implied powers" into the specified federal authority at the expense of the scope of the undefined residual state powers, thus producing a tendency over time towards the progressive centralization of government powers.[96]

#### 2.4.1.3. Shared Legislative Jurisdiction

Shared legislative jurisdiction requires both the federal and state governments to be interdependent upon one another in exercising a certain power. Thus, while it may be desirable that the states should legislate on a certain matter, it may also be necessary for the center to

[92]Ibid

[93]Ibid

[94]Solomon, Supra note at 80, p.67

[95]Supra note at 83

[96]Watts, Supra note at 21, P.108

legislate on the same matter in order to secure uniformity across the nation.[97] Shared legislative powers presuppose that the twin purpose of federalism–unity and diversity–be maintained in that while the central government is expected to set out general guidelines in relation to legislative power overall the country, each constituent state enacts laws in their specific situations which should be adapted to their respective people's demands and preferences. It can broadly be stated that the bulk of social and economic affairs falls into the category of shared powers.[98]

The recognition of shared powers has a strong connection with the inevitability of the overlap of jurisdictions. Despite the autonomy of the two orders of the government (the central and regional) in the exercise of their respective jurisdictions, it is not totally possible to separate one level of government from the other. This prompts the two levels of government to share powers as between themselves taking into account the preservation of unity and accommodation of diversity. Shared powers take two forms: concurrent and framework legislative jurisdictions.

#### 2.4.1.4.1. Concurrent Legislative Jurisdiction

Concurrent legislative jurisdiction refers to the case whereby the central government and the states have the legislative power over the same subject matter. Although the notion of concurrency implies the legislative power of the center and the states, the trend is that there is a federal dominance and in case of inconsistency, it is the federal legislative power that prevails. Ronald Watts puts the advantage of the concurrent powers as follows:

> *Concurrent lists of legislative power avoid the necessity of enumerating complicated minute subdivisions of individual functions to be assigned exclusively to one area of government or the other, and reduce the likelihood that such minute subdivisions will over time become obsolete in changing circumstances.*[99]

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[97]Assefa Fisseha, (2006). *Theory versus Practice: In the Implementation of the Ethiopian Ethnic federalism.* In David Turton (ed.), Ethnic Federalism: The Ethiopian Experience with Comparative Perspective, (p.131-159). Addis Ababa University Press, p.141

[98]Id, P.142

[99]Watts, Supra note at 21, p.106

Dr. Solomon has identified three ways in which the concurrent powers reflect themselves in different federations.[100] The first case the concurrent powers exist is related to the circumstance whereby they are clearly and separately stipulated in the constitution. India, Germany and Nigeria are some of such instances.[101] The second mode of existence of the concurrent powers is that they exist in the constitution but not in a listed and separate manner. The Swiss Constitution is one example.[102] Thirdly, the concurrent powers may be acquired through practice and convention, as in the case of the USA and Australia since no separate list of concurrent powers is found in their constitution.

The point one should not overlook in the meantime is that in the law of concurrency, the principle of federal paramountcy or federal supremacy is the norm in the constitutions of many federations.[103] The principle of 'federal supremacy' maintains that the federal government, its laws, and institutions are supreme, i.e., superior to, and override, the state laws and institutions.[104]

#### 2.4.1.4.2. Framework Legislative Jurisdiction

Framework legislation provides for the federation to issue general legislation in a specific policy field, on the strict conditions that substantial room is left for the states to issue their own legislation within the limits set by the federation.[105] Thus, framework legislative power needs

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[100]Solomon, Supra note at 80, p.64

[101]List III, seventh schedule of the Indian Constitution, Art.74 of the German Basic Law, and Part II, second schedule of the Nigerian Constitution

[102]Art.62-64, and 66 &69 of the Swiss Constitution. The former two Articles deal with the educational matters in that primary education is the cantonal jurisdiction, whereas the professional education and technical universities is the jurisdiction of the confederation. The latter two Articles deal with the concurrent powers of the confederation and the Cantons on scholarship, cultural activities and sport education.

[103]Art.VI Sub-Article 2 of the US, Art.4 (5) of the Nigerian Constitutions stipulates provisions dealing with federal supremacy clause. The Indian Constitution also provides for the principle of federal paramountcy in case of inconsistency in relation to the concurrent powers listed in the constitution.

[104]Tsegaye Regassa, *Sub-National Constitutions in Ethiopia: Towards Entrenching Constitutionalism at State Level*, Mizan Law Review Vol. 3 No.1, March, 2009, p.15

[105]Assefa, Supra note 97, p.142

some kind of coordination between the federation and the states.[106] The central government may therefore use framework legislation to maintain federation-wide standards, while leaving the states a room to legislate on details and deliver services in a manner adapted to local conditions.[107] Unlike the exercise of concurrent power in which the dominance of the central government is very possible, federal framework legislation is an interesting compromise that requires significant decentralization of policy-making authority without sacrificing uniformity where uniformity is needed.[108] Framework powers not only preserve the right of the states to legislate, but also positively presuppose future state legislation.[109] The states are allowed to make laws on matters they are given the power in order to put them into practice.

There is a slight difference between the concurrent and framework legislative powers. Hence, while concurrency purports to give priority for the central government in case of inconsistency between the center and the states, the framework legislative power is meant to hold the two orders of government in a coordinate relationship over a specific subject matter, the former setting a general and uniform standard and the latter breaking down same into the context of their respective matters in relation to delivering public services to their peoples. There is no federal supremacy in the case of the framework legislative power, but rather the center and the states work in cooperative with each other on a specific jurisdiction.

Although Dr. Solomon and Dr. Assefa opine that shared legislative power takes two forms (framework and concurrent powers), Watts treats the concurrency and shared powers differently, the latter consisting of the notion of framework power *per se*. Actually, concurrent and shared powers are slightly different. In concurrent legislative power, both the central government and the states would come up with the enactment of a certain matter, and if there is inconsistency between the two, the dominant practice is that the central government prevails over that of the states. Moreover, the states exercise concurrent powers until that specific power gains federal importance. Shared legislative power, however, connotes that there is co-equal participation or involvement of the two tiers of governments. Joint decision-making is the best attribute of

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[106]Solomon, Supra note at 80, p.66

[107]Supra note at 98

[108]Ibid

[109]Ibid

shared power. But the degree of involvement of the central government and the states may be different. While the central government sets out general guidelines on a specific matter with a limited power, the states implement that matter in a broad manner in a way that it conforms to the peoples thereof.

### 2.4.2. Legislative Jurisdiction under the FDRE Constitution

The FDRE Constitution provides for the distribution of powers between the Federal Government and the States. The distribution of powers stipulated by the Constitution pertains to the legislative, executive and judicial authority as purported to be divided between the Federal Government and the States. Let us first discuss the legislative jurisdiction.

#### 2.4.2.1. Exclusive Legislative Jurisdiction

The FDRE Constitution incorporates exclusive legislative jurisdictions of the Federal Government. The cumulative reading of Art.51 and 55 of the Constitution gives us the broad and long exclusive legislative jurisdictions which are vested in the Federal Government. Because of the fact that the Federal Government is entrusted with wide powers, some scholars question the actual significance of the residual powers which are left for the States.[110] As the magnitude of the exclusive jurisdiction of the Federal government increases, the magnitude of the residual powers which are supposed to fall in the States deceases. Actually, a cursory reading of Art.51 in conjunction with Art.55 implies that the Federal Government is exclusively empowered to have a huge number of powers. Art. 51 itself enumerates as many powers as 21 as the exclusive jurisdictions of the Federal Government. There are also other powers which are not listed in Art.51 but enumerated in Art.55 under the exclusive legislative jurisdiction of the Federal Government. Some of these powers are the enactment of the labour code, commercial code, and penal code. Thus, it could safely be argued that as the extensiveness of the exclusive federal jurisdiction increases, the case may be that the trend of progressive centralization happens because the powers of the states may become thinner and thinner, which may also be capable of diluting or eroding the regional autonomy of the states.

[110]Tsegaye, Supra note at 104, p.14

As described in the foregoing discussion, the exclusive legislative powers may also be meant for the states in some federations. The question worth posing here is in relation to Art.52(2) of the FDRE Constitution whether it is meant to constitute exclusive state powers or it is merely the indication of the list of the residual powers already stated in Art.52(1). Different scholars have varying opinions with regard to this issue. To this end, Dr. Solomon holds the view that in principle, the Constitution follows the US model by enumerating the powers of the center and allocating the residual powers to the States, but it also incorporates some features from India and Canada by listing some powers by the states.[111] A closer look at Art.52 (2) indicates that the lists of powers mentioned are routine functions of the States rather than exceptional ones.[112]

From among the powers which the States are entrusted with are the establishment of state administration that best advances self-government, enactment and execution of the state constitution and other laws, formulation and execution of economic, social and development policies, strategies and plans of the State, administration of land other natural resources in accordance with Federal laws, levying and collection of taxes, enactment and enforcement of the State civil service, and establishment and administration of a state police force, and maintenance of public order and peace within the state. Thus, the list of all of these state powers characterizes more of the state exclusive power rather than a mere indicative list of the residual powers purported by the Constitution. Furthermore, the residual powers are not expected to be listed like that of the exclusive lists but rather they remain unspecified notwithstanding that they are left for the center or for the states.

#### 2.4.2.2. Residual Legislative Jurisdiction

The FDRE Constitution expressly provides that all powers not given expressly to the Federal Government alone, or concurrently to the Federal Government and the States are reserved to the States.[113] A plain reading of this constitutional provision unequivocally equates the Ethiopian model to that of the USA in relation to the place of the residual powers. This gives an impression that in order to identify the residual powers in the FDRE Constitution, one should go through

[111]Solomon, Supra note at 80, P.61

[112]Assefa, Supra note at 97, P.140

[113]Supra note at 1, Art.52(1)

searching what constitute the exclusive federal powers and concurrent powers. Powers existing apart from these categories are grouped under the reserve powers which belong to the states. But as discussed above, since the exclusive powers of the Federal Government are more extensive, the significance of the residual power in Ethiopia is questionable. However, this does not mean that there are no powers which are unspecified. There are powers such as the enactment of the criminal procedure code which are not specified in the Constitution. Whether the States have the power to enact the criminal procedure code of their own will be the point of discussion of chapter three.

At this juncture, it is worth unfolding the issue of undesignated powers of taxation in relation to the residual powers in the Ethiopian system of the distribution of powers. With regard to this particular power, the Constitution takes the undesignated power of taxation away from the States and gives it to the joint decision of the two Federal Houses. Accordingly, the HOF and HPR shall, in a joint session, determine by a two-thirds majority vote on the exercise of powers of taxation which have not been specifically provided for in the Constitution.[114] Thus, the Constitution has put a limitation on the residual powers on matters relating to the powers of taxation which are not specifically listed in the Constitution. This indicates that the residual powers in Ethiopia do not go to the extent of the undesignated taxes.

#### 2.4.2.3. Shared Legislative Jurisdiction

The FDRE Constitution does not expressly provide for the provision of shared legislative powers. But there are some powers which characterize the nature of overlapping jurisdictions as between the Federal Government and the States. Art.51 (2) and (3) and Art.52 (2, c) provide for the national and regional policies, strategies, and plans in respect of economic, social and development matters respectively. Thus, while the Federal Government sets out general guidelines on economic, social and development plans and strategies, the States implement same in a way conforming to their respective contexts. Both tiers of governments are involved in these shared powers accordingly. Art.55 (6) also signifies shared legislative power as between the Federal Government and the States. The Federal Government enacts civil laws to establish and sustain one economic community. This is a general framework how the Federal Government

[114] Id, Art.99

installs one economic community by enacting a civil law as deemed necessary by the HOF and the States act broadly within this sphere of arrangement. A cumulative reading of Art.51 (5), 52(2, d) and Art.55 (2, a) of the Constitution also indicate that the power over land and other natural resources is one aspect of shared power.

#### 2.4.2.4. Concurrent Legislative Jurisdiction

Art.98 of the FDRE Constitution expressly stipulates the concurrent power of taxation. Accordingly, (1) the Federal Government and the States shall jointly levy and collect profit, sales, excise and personal income taxes on enterprises they jointly establish; (2) They shall jointly levy and collect taxes on the profits of companies and on dividends due to shareholders; (3) they shall jointly levy and collect taxes on incomes derived from large scale mining and all petroleum and gas operations, and royalties on such operations. Apart from this, the Constitution does not have any provision which expressly provides for concurrent legislative jurisdiction.

Nevertheless, the amendment of the Constitution (although the text of the amendment has not been promulgated in the *Negarit Gazette*) has reserved the power for the center by interpreting the phrase ‘concurrent power of taxation’ to mean only taxes which are determined and administered by the central government but the proceeds of the taxes are shared with the states.[115] This gives an impression that the notion of the concurrent power in the Ethiopian Constitution is not found in its express provision and Art.98 itself is no more operational in the area of concurrency. Thus, one should be cautious when reading Art.98 of the Constitution which says ‘concurrent power of taxation’ since it does not actually confer a concurrent legislative power over the taxation powers listed in the same provision.[116]

Moreover, a close reading of Art.98 goes beyond the notion of concurrency and nears shared power as all activities in relation to the taxation are done jointly by the Federal Government and the States even though the caption states “concurrent power of taxation”. It is for this reason that Dr. Assefa notes that since concurrent powers are not specifically listed elsewhere in the

[115]Solomon, Supra note 80, p.64

[116]Ibid

Constitution, the general view has been that they have little, if any, significance in the Ethiopian federal system.[117]

He argues that Art.55 (5) which deals with the enactment power of criminal code and other legislation is a type of concurrent power. The full version of the article states that "while the Federal Government shall enact a penal code, the States may enact penal laws on matters that are not specifically covered by the Federal penal legislation." Does this provision demonstrate a concurrency of criminal legislative power? Basically, there are two assumptions underlying the concept of concurrent powers. The first assumption is that the two tiers of government have equal powers to legislate on a certain matter, and in case there is inconsistency, the central government prevails over the States. Secondly, the States continue legislating on a certain matter until that matter gains federal importance. But as will be discussed in depth in the following chapter, Art.55 (5) gives a priority for the Federal Government in relation to a criminal legislative jurisdiction. The States, rather than coming up with their own criminal law until it gains federal importance, they have to wait until the Federal Government exhausts criminal legislations. The priority given to the Federal Government on criminal legislation may not cause it to apply the "federal importance" clause and becomes opportunistic to legislate on criminal laws in a sweeping manner.

In such circumstances, therefore, it is a bit difficult to say that Ethiopia's criminal legislation is concurrent. But rather it sounds cogently logical to assert that, narrowly speaking, the Ethiopian criminal legislative power is 'residual.' This may be justified on the ground that the States have to enact criminal legislations after counting the crimes specified in the Federal Criminal Code and other criminal legislations. In other words, if the Federal Government sweeps all crimes incorporating in its legislations, no doubt, the States will remain empty-handed. Thus, the notion of concurrency in the Ethiopian federal system is dubious.

### 2.4.3. Executive Jurisdiction

In the foregoing discussions, we have been looking at the legislative jurisdiction and its various forms such as exclusive, residual, shared and concurrent legislative powers in relation to the

[117] Assefa, Supra note at 97, p.145

FDRE Constitution. In this section, we will emphasize on the executive jurisdiction in some federations including that of Ethiopia in a brief manner.

A broad view of the constitutional and federal experience of different federations the world over shows that there are two scenarios as far as the execution of federal laws is concerned. The first scenario pertains to the US model in which the legislative and executive jurisdictions correspond with one another and they are coextensive. This is called dual federalism. In this approach, federal laws are executed by federal agencies. Explained otherwise, in principle, the states are not responsible for the administration of the federal laws unless otherwise there is a need for the cooperation or coordination between the central government and the states.

The second scenario is followed by such federations as Germany. In this approach however, while the Federal government is responsible for the legislation of federal laws, the states are responsible for the execution of the same. This approach is known as administrative federalism. In addition to Germany, there are other federations which follow an administrative federalism. For instance, Switzerland and India are among some of them. Thus, while these federations are relatively centralized legislatively, they are much more decentralized administratively.[118] These federations have shown that benefits can flow from the administrative decentralization of federal legislation particularly in adapting it to the different circumstances and sensitivities of the various regions.[119]

Then, a question comes into picture as to what about the case of Ethiopia? Does it fall under the US model or German model? What is the standpoint of the Constitution? To begin with, the Constitution states that the Federal Government and the States shall have legislative, executive and judicial powers.[120] Consequently, the HPR is the highest authority of the Federal Government which is the legislative organ thereof, and the State council is the highest organ of the State authority which is empowered over legislation of the matters falling under the State jurisdiction. Furthermore, the Federal Government and the States have their own executive

[118]Watts, Supra note at 21, p.111

[119]Ibid

[120]Supra note at 1, Art.50(2)

organs.[121] An emphatic reading of Art.74 of the Constitution implicates that the supervisory, control and implementation role of the Prime Minister is highly and totally connected with the laws adopted by the HPR.

Furthermore, a cursory reading of Art.51 also gives an impression that Federal laws are executed by the federal agencies. Thus, we could deduce from all these propositions that the Ethiopian constitutional approach in respect of the execution of federal laws seems to be coexistent with legislative power, hence dual in principle. But there are other exceptional circumstances whereby the States may be held responsible for the execution of the federal laws. The first exceptional way the States would execute the federal laws, which is constitutionally stipulated is delegation.[122]

The doctrine of delegation as stipulated in the Constitution does not, however, only stand for the execution of federal laws but also for enactment over matters falling under the jurisdictions of the Federal Government. Furthermore, the doctrine of delegation as provided in the Constitution, is not meant to be arbitrarily used, but only where it is found to be necessary. The requirement of necessity for the Federal Government to delegate its jurisdictions to the States is also followed by other mandatory requirement. That is an issue of financial expenditure. The Constitution states that unless otherwise agreed upon, the financial expenditures required for the carrying out of any delegated function by a State shall be borne by the delegating party.[123] This constitutional mandate may be conceded between the Federal Government (the delegating party) and the States (the delegatee) so as to exclude the financial expenditure clause from the delegation agreement. Thus, the principle of delegation of powers under the FDRE Constitution awaits statutory laws for its full operation hence the States are not forced to take over federal laws to implement bearing and covering the costs that are required until the issue of delegation together with its consequence, i.e. a financial expenditure, is settled with the Federal Government.

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[121]Id, Art.50 (6) The State administration constitutes the highest organ of executive power. And Chapter Eight of the Constitution broadly deals with the Federal Executive organs. As a result, the highest federal executive powers are vested in the Prime Minister and the Council of Minister.

[122]Id, Art.50(9)

[123]Id, Art.94

The second exceptional circumstance and that is also strange to the Federal Constitution is the fact that the States have incorporated the duty of implementation of the federal laws in their respective constitutions.[124] One may question here as to what prompted the constitutions of the States to include the clause of the execution of the federal laws by the States. Given the fact of the financial capacity of each State in Ethiopia, how could they bear the financial expenditures required for the execution of the federal laws within their realms in the absence of laws regulating the agreement of delegation between the two orders of government? How could the States cover the expenses required for the execution of the federal laws? How do they execute? What kind of institutional mechanisms did they set up for the execution of the federal laws? What is the status of the federal laws in the States? and other related questions are worth posing in the meantime. These questions also pertain to the criminal laws or jurisdiction which are enacted by the Federal Government but enforced by the States as the State laws.

The third way of the exceptional circumstance whereby the States are held responsible for the execution of the federal laws is the constitutional mandate. The cumulating reading of Art.51 (5), 55(2, a) and 52(2, d) of the Constitution provides that while the Federal Government enacts laws for the utilization and conservation of land and other natural resources, the States are mandated to administer the same in accordance with the federal laws. This has an implication that the Federal Government is responsible for the legislation of the matters hereinabove mentioned, whereas the States are responsible for the administration of the laws made by the Federal Government on the same, hence the relationship between the two signals administrative federalism in respect of the land and other natural resources.

There are also other mechanisms which are extra constitutional through which the States are responsible for the execution of the federal laws.  These are through the Ministry of Federal affairs, the party structure, and policy-making.[125]

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[124]Art.56(1) of the Afar Regional, Art.58(1)of the Amhara Regional, Art.59(1) of the Benishangul/Gumuz, Art.54(1) of the Tigray Regional, Art.61(1) of the Gambella Regional, Art.62(1) of the Harari Regional, Art.55(1) of the Oromia Regional, Art.59(1) of the Somali Regional, Art.66(1) of the SNNP Regional Constitutions

[125]Assefa, Supra note at 97, p.153-157

### 2.4.4. Judicial jurisdiction

Black's Law Dictionary defines judicial jurisdiction as "The legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it".[126] There are two views with respect to court structure and judicial powers in federations. The first view states that the fact that the state courts' decisions are subject to review by Federal Courts, such trend is sufficient to protect the interest of federal government, and as a result, there is no need of establishing Lower Federal Courts since they are perceived as unnecessary, expensive and likely to be an intrusion on the autonomy of the state governments.[127] The trend in some federations such as Germany, Switzerland and India would instantiate this view. Art.92 of the German Basic Law states that the judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the *Länder*. Thus, there are three types of courts in Germany: the Constitutional Court, the Federal Courts and courts of the *Länder*. All lower and intermediate courts of appeals are State Courts, whereas all Courts of final appeals are Federal Tribunals. All judicial power not given to Federal Courts is reserved to the states.

The Indian Constitution organizes a single integrated court system in which only one Supreme Court at the federal level without any federal inferior courts, and the High Courts and other subordinate courts, courts below the High Court, at the state levels are established. The states in India are all subjected to the jurisdiction and powers of a single integrated judicial system.[128]

The second view supports the dual set of courts in which like that of the legislative and executive organs, the federal government and the states have their own judiciary for the adjudication of cases arising within their respective jurisdictions.[129] This holds true in Ethiopia[130] as will be

[126]Supra note at 77, P.2494

[127]Sileshi Zeyohannes, (2009).*Constitutional Law II*, *Teaching Material*, Justice and Legal System Research Institute, Addis Ababa, p.196

[128]Id, p.198

[129]Id, p.196

[130]It is for this reason that Art.50 (2) of the Constitution states that the Federal Government and the States have legislative, executive and judicial powers.

discussed in the subsequent discussion and USA. The US Constitution in Art.III Section 1 stipulates that the judicial power of the United State shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish. The States have also their own courts which are responsible for the administration and adjudication of the state laws.

#### 2.4.4.1. Judicial Jurisdiction in the FDRE Constitution

The FDRE Constitution establishes an independent judiciary and it clearly spells out that judicial powers, both at Federal and State levels, are vested in the courts.[131] There are three tiered courts both at the federal and state levels namely, the Federal Supreme Court, Federal High and First Instance Courts, and the State Supreme Court, State High and First-Instance Courts. The Constitution has directly established the Federal Supreme Court at the federal level, and the three tiers of state courts at the state level. But it makes the establishment of the Federal High and First-Instance Courts contingent upon the requirements as provided in Art.78(2) of the Constitution. These requirements are the fact that the HPR may, by two-thirds majority vote, establish nationwide, or in some parts of the country only, the Federal High Court and First-Instance Courts if it deems necessary.

The same sub-Article goes on to state that unless decided in this manner, the jurisdictions of the Federal High Court and of the First-Instance Courts are hereby delegated to the State Courts. From this constitutional provision, we can understand that the jurisdictions of the Federal Supreme Court are not delegable to the State Courts by any means. Furthermore, we can also state that until the establishment of the Federal High Court and First-Instance Courts, their jurisdictions are constitutionally delegated to the three tiers of the State Courts. This discussion vis-à-vis the criminal jurisdiction will be deeply inquired in chapter five which chiefly discusses criminal adjudicative jurisdiction. The notion of delegation as one aspect of decentralization is an important concept in the subsequent discussions in this very thesis.

With regard to the judicial jurisdiction, while the Federal Supreme Court shall have the highest and final judicial power over Federal matters, the State Supreme Courts shall have the highest

[131]Supra note at 1, Art. 78 & 79(1)

and final judicial power over State matters.[132] Art.80 of the Constitution under its caption which reads "Concurrent Jurisdiction of Courts" stipulates in its sub-Article 2 that the State Supreme Courts shall also exercise the jurisdiction of the Federal High Court. Furthermore, the Federal Supreme Court has a power of cassation over any final court decision containing a basic error of law. This holds true also for the State Supreme Court that it has power of cassation over any final court decision on State matters which contains a basic error of law. State High Courts shall, in addition to State jurisdiction, exercise the jurisdiction of the Federal first-Instance Courts. As far as the procedure for the appeal of the jurisdictions of the Federal High Court and of the First-Instance Courts which are exercised by the State Supreme Court and High Courts is concerned, the Constitution provides that decisions rendered by a State High Court exercising the jurisdiction of the Federal first-Instance Court are appealable to the State Supreme Court, whereas decisions rendered by a State Supreme Court on Federal matters are appealable to the Federal Supreme Court.[133]

To sum up, this chapter has placed a general and brief consideration on jurisdictions in the doctrine of the distribution of powers and the principle of subsidiarity. An attempt has also been made to have a brief look at jurisdictions pertaining to executive and judicial aspects. In the ensuing chapter, a specific subject matter of the legislative jurisdiction, the criminal law, with respect to its legislative jurisdiction in Ethiopia and abroad will be discussed.

[132] Id, Art.80(1) (2)

[133] Id, Art.80(5) (6)

## Chapter Three

## Criminal Legislative Jurisdiction

### Introduction

In the preceding chapter, we have tried to look at a brief description of the doctrine of the distribution of powers and factors affecting and principles guiding it and the principle of subsidiarity. In so doing, we touched upon the legislative jurisdiction and its various forms such as exclusive, residual and shared and concurrent legislative powers with the respective exemplifications relating to federations including the case of Ethiopian federal and constitutional experience. To this end, we have made an attempt to identify what constitutes each group of various forms of the distribution of powers in some federations mentioned therein.

In this chapter, an attempt will be made to make a discussion on the legislative jurisdiction of criminal matters, one of the subject matters in the classification of jurisdictions, in federations; how the criminal law, both in its substantive and procedural aspects, is treated under the constitutions of different federations. A comparative analysis will also be made as to what the Ethiopian constitutional standpoint looks like on the criminal legislative jurisdiction and its departures from other federations and the principles of distribution of powers and subsidiarity.

### 3.1. Principles Guiding Criminal Legislative Jurisdiction

Keeping the applicability of the guiding principles of the general distribution of powers, as discussed in chapter two, to criminal legislative jurisdiction as well, there are also specific principles guiding or factors affecting criminal legislative jurisdiction in federations. Two of these principles are explained in the following.

#### 3.1.1. The Laws Breached

Criminal legislative jurisdiction follows the law violated in that the government whose law has been breached has the power to make criminal laws on it. If the laws of the federal government or international laws are violated, it is the central government which enacts criminal law upon it. Likewise, if the laws of the regional states are violated, it is the regional states which enact criminal laws.[134] Thus, federal laws and regional laws have a sound bearing on the determination of criminal legislative jurisdiction whether it belongs to the central government or the constituent units. This will be broadly discussed under the experiences of federations in the following discussions.

### 3.1.2. The Nature of Distribution of Powers

The nature of the form of distribution of powers as enshrined in the constitution affects the criminal legislative jurisdiction of many federations.[135] In as much as there are various forms of distribution of powers namely, exclusive, concurrent and residual powers, the criminal legislative jurisdiction is also made to follow the same pattern in many federations. For example, as will be discussed in the following subsection, the US constitution enumerates those criminal matters which should fall under the Federal Government. It does not list criminal matters which fall under the states. The fact that the constitution left other criminal matters apart from those which fall under the Federal Government implies that other criminal matters would fall under the state jurisdictions by the caveat of residual power. This is the corollary that has sprung from the fact that the constitution vests the residual powers with the states.

The Indian constitution provides the criminal legislative jurisdiction in accordance with the three lists of the forms of the distribution of powers.[136] These are the Union list, the State list and the Concurrent list. The criminal legislative power also follows the same pattern. The Federal Government shall have criminal legislative power over the Union list; the States shall have criminal legislative power over the State lists and the two tiers of government shall have concurrent criminal legislative power over those concurrent powers. The power of enactment of

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[134]State v Federal criminal prosecutions, http://www.criminaldefenselawyer.com/resources/criminal-defense/federal-crime/state-vs-federal-crimes.htm, Accessed on 02/08/2013 10:00 AM

[135]As will be discussed in the subsequent sections, criminal legislative jurisdiction follows just other conventional distribution of powers between the federal government and the states.

[136]The Constitution of India, Art.246, Seventh Schedule, List I-Union List (Para.93), List II-State List (para.64), List III-Concurrent List (Para.1&2) specifically deals with the fact the Federal Government shall have power to enact criminal laws on matters falling under its exclusive jurisdiction; the States have criminal legislative power over matters falling under their exclusive jurisdiction, and criminal and criminal procedure codes fall under the concurrent power between the two tiers of government respectively.

the criminal code and criminal procedure code falls in the concurrent power lists. The Nigerian experience also shows that the Federal government and the provinces have criminal legislative power in terms of incidental and supplementary clause.[137]

### 3.2. Criminal Legislative Jurisdiction in Some Federations

Criminal legislative jurisdiction as one subject matter in the doctrine of the distribution of power is treated by the constitutions of different federations differently. Accordingly, while some federations such as the USA follow a dual system of the criminal legislative jurisdiction, other federations such as Switzerland, on the other hand follows an integrated or centralized system in which case only the central government legislates both the criminal code and criminal procedure code. Let us see the criminal legislative jurisdiction of both the substantive and procedural laws of some federations in the following manner.

#### 3.2.1. USA

The US Constitution does not clearly stipulate the criminal legislative jurisdiction of the Federal Government and that of the States, but rather there are constitutional provisions which are used as an inference towards the dual system of the criminal legislative power. These inferences may contemplate that there are criminal legislative powers over which the Federal Government has an exclusive power on one hand, and that over which the States have their exclusive criminal legislative power on the other notwithstanding the federal supremacy and "the necessary and proper" clauses as provided in the US Constitution. In case of inconsistency between the Federal Government and the States with respect to the criminal legislative jurisdiction, the federal supremacy clause dictates that the Federal laws will prevail over that of the States' ones.[138]

With respect to the criminal legislative power of the Federal Government, Art. I, section 8 (6) of the US Constitution states that the Congress shall have the power to provide for the punishment

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[137]The Constitution of the Federation of Nigeria, 1960, Legislative List: Part I-Excusive List (Para.44), Part II-Concurrent List (Para.28) and Part III which deals with the interpretation stating that the "incidental and supplementary" clause includes issues dealing with offences.

[138]Art.VI, Section 2 of the US Constitution declares the supremacy of both the Constitution and other laws made by the Congress over any other laws.

of counterfeiting the securities and current coin of the US. Section 8 (10) also goes on to state that the Congress shall define and punish piracies and felonies committed on the high seas, and offences committed against the Law of Nations. Furthermore, Art.III, section 3 provides that the Congress shall have the power to declare the punishment of treason. From all these provisions, we can easily glean that the Federal Government has an exclusive criminal legislative power over such crimes as committed on the securities and current coin of the USA (counterfeiting), piracies and felonies committed on the high seas and crimes committed against the Law of Nations, and the punishment of the crime of treason. The presumption is, thus, that crimes apart from these ones are vested in the States in relation to the legislative power.

As far as the State criminal legislative jurisdiction is concerned, Art. IV Section 2 of the US Constitution gives an inference. It states that a person charged in any State with treason, felony or other crimes, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime. In addition, Art.III, section 2 envisages that crimes committed in the States shall be tried by Jury in each state. This implies that those crimes which are committed in the states are tried by the state courts and those crimes that are committed in the federal or union is tried by the Federal courts. From the two provisions presented in this very paragraph, we can state that apart from the crimes which are categorized to fall in the Federal Government, other crimes are so place-specific that the States have an authority to legislate on crimes committed within their jurisdiction. Thus, the US Constitution is such a decentralized nature that it gives wide criminal legislative power to the States on crimes committed within their respective jurisdictions.

The typology of crimes so as to cause them fall under the two orders of government in the US Constitution may take us to the Federal crimes and the State crimes scenario. As discussed hereinabove, there are crimes which the Federal Government has a monopoly power especially over those powers which are enumerated in the Constitution, and there are crimes which the States have an exclusive criminal legislative power especially taking into account the place where the crime is committed. Explained otherwise, crimes are divided as that of the federal and states crimes although it appears to be difficult to wholly identify which crimes constitute the federal and which constitute the state ones. However, it is of importance to determine the Federal crimes and the State crimes so as to identify which order of government together with its institutions, the Federal or the State, which has jurisdiction to entertain the criminal offences.[139] Thus, in order for one to bring his/her case to the Federal or the State criminal justice actors, he/she needs to first identify which crime has been committed, the Federal or the State one.

What benchmarks are used to divide crimes as federal or state in the US dual approach? The first criterion, as discussed above, is the fact that the constitution itself has enumerated those crimes which belong to the Federal Government namely, counterfeiting of money, piracies and felonies committed on the high seas and offences committed against the Law of Nations. Other crimes such as mail fraud (and other types of fraud), kidnapping (especially if the victim was carried across state lines), any crime involving interstate travel, including heists and transport of stolen property or illegal contraband, tax evasion, and immigration offenses are also federal crimes.[140] While these offences are federal crimes, those crimes which are not listed in the constitution are categorized under the state crimes based on where they are committed. This reminds us of the caveat that the residual powers are reserved to the States. Thus, the States are empowered to legislate on crimes committed within their respective jurisdictions. To this end, one internet source notes that:

> *Each state has its own criminal code which governs the conduct of its citizens. So, something can be a crime in one state, but not in another. Likewise, an action can be criminal under state law, yet not be characterized as a crime under federal law. Local law enforcement generally handles state crime investigation and prosecution. Crimes that occur locally and do not involve federal property are often handled by a state criminal court.*[141]

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[139]A prior determination of criminal jurisdiction as between the federal government and the states has two advantages: Avoidance or prevention of jurisdictional conflict and ease of access to justice on the side of justice seekers.

[140]State crimes v Federal crimes, http://www.criminaldefenselawyer.com/resources/criminal-defense/criminal-offense/state-crimes-vs-federal-crimes, Accessed on 02/08/2013 at 10:10 AM

[141]Ibid

From this proposition, we can state that due to the fact that the States have their own criminal law, an act that constitutes a criminal offence in one State may necessarily be the case of neither other State nor the Federal one. This tells us the fact that the US criminal legislative jurisdiction is dual in approach. However, the duality of such jurisdiction shall not destroy the principles of the federal supremacy, the necessary and proper clauses and the need for cooperation between the Federal Government and the States. Explained otherwise, these are the probable limitations to the dual criminal legislative jurisdiction in US Constitution.

The second litmus test and which is closely related to the first benchmark in the demarcation of the federal crimes and the state crimes is the principle of "*locus*" or the place where the crime is committed. To this end, if the crime happens in one state, it is typically a state crime, unless it is expressly named federal crime whereas, if a crime occurs throughout many states, or crosses state lines, it often becomes a federal crime.[142] On the other hand, from the wording of Art. I, section 8, clause 17 of the Constitution, we could infer that the Congress shall have the power to exercise exclusive legislation in all cases whatsoever over the Federal District (Washington D.C). Thus, the criminal legislative jurisdiction in the District falls in the Federal Government, hence crimes constituting the Federal offences. The other situation whereby a certain crime becomes the federal one is based on "the federal enclave". The Congress has enacted the Assimilative Crimes Act which provides that any act that would have been a crime under the laws of the state in which a federal enclave is situated is also a federal crime.[143]

Furthermore, when a certain crime violates the State laws, it becomes the state crime. State crimes are typically all conduct that violates state laws, such as murder, traffic violations, and other areas where conduct is completely encompassed in the state.[144] On the other hand, in the

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[142] State v Federal criminal prosecutions, http://www.criminaldefenselawyer.com/resources/criminal-defense/federal-crime/state-vs-federal-crimes.htm, Accessed on 02/08/2013 10:00 AM

[143] Federal Jurisdiction (US), http://en.wikipedia.org/wiki/Federal_jurisdiction_(United_States), Accessed on 12/10/2013 3:35 PM

[144] Supra note at 142

United States, a federal crime or federal offense is an act that is made illegal by U.S. federal legislation.[145]

In the meantime, it is important to note that the Federal Government and the States have their own criminal procedure codes in the administration of the criminal laws which they are entrusted with.[146] While the Federal crimes are administered by the Federal criminal procedure code, the State crimes are administered by the State criminal procedure code. State Criminal Procedure is defined by the state constitution, statutes, rules, and judicial decisions of each state.[147]

In general, the US model in relation to the criminal legislative jurisdiction, in its both substantive and procedural spheres, follows a dual system, keeping the federal supremacy and "the necessary and proper" clauses intact. The duality of the criminal legislative jurisdiction does not also totally get rid of the complexity and concurrency of jurisdiction in the taxonomy of the Federal crimes and the State crimes. The dual approach in the criminal legislative jurisdiction has many advantages. For instance, it enhances the regional autonomy of the States; it decentralizes the criminal matters and laws to the States from the central government; each state is also allowed to contextualize the criminality or otherwise of a certain act, and is not necessarily forced to follow the criminality or otherwise of an act by other state or the Federal Government, subject to the supremacy and "the necessary and proper" clauses.[148]

### 3.2.2. Switzerland

In contrast to the US model which is dual in nature, the Swiss criminal legislative jurisdiction is clearly constitutionally centralized. This is not an exaggeration as the federal government is responsible for the overall legislation whereas, the cantons are responsible for the administration

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[145] Federal crimes in the US, http://en.wikipedia.org/wiki/Federal_crimes, Accessed on 02/08/2013 at 10:05 AM

[146] Criminal procedure, http://www.lawyershop.com/practice-areas/criminal-law/criminal-procedure, Accessed on 02/08/2013 10:00 AM

[147] Ibid

[148] Art. I, Section 8, Para.18 of the US Constitution provides that the Congress shall have the power to make laws which shall be necessary and proper for carrying into execution other powers vested in it (emphasis added).

of the federal laws. The criminal legislative jurisdiction is also made to follow the same trend in the Swiss Constitution. The fact that the Federal Government is empowered to legislate on criminal law unequivocally extends to both the substantive and procedural criminal codes. Thus, Art.123 (1) of the Swiss Constitution provides that legislation in the field of criminal law and criminal procedure is a federal matter.

Although the criminal legislative jurisdiction is centralized in the Swiss case, the adjudicative and the executive criminal jurisdiction with criminal justice is vested in the cantons unless otherwise provided by statutory laws. By so doing, the Federal Government is duty bound to cover expenses required for the construction of institutions, and for the improved carrying out of penalties and measures.

### 3.2.3. Germany

The German Basic Law states that the criminal legislative jurisdiction is the concurrent power of the Federal Government and the *Lander*.[149] Art.72 of the Basic Law of Germany provides for the guiding principle of the law of concurrency. It states that on matters within the concurrent legislative power, the *Länder* 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. This gives an impression that although the criminal legislative jurisdiction is concurrent in Germany precedence is given to the Federal Government, and as a result, the *Lander* are authorized to legislate on criminal law if the Federal Government has not exhausted the area.

The Basic Law also provides that if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest, for the reason that priority should be given to the Federal Government in the case of concurrent criminal legislative jurisdiction. Thus, the Federal Government has the overriding power over criminal legislation for the sake of the requirement of the establishment of equivalent living conditions throughout the federal territory, the maintenance of legal or economic unity for the purpose of national interest.

[149]Basic Law of Germany, Art.74(1) &(2)

In the meantime, one should not lose sight of the fact that when laws in general and criminal law in particular are made in Germany, there is a huge participation of the Second Chamber, the *Bundesrat*, which is the blend of the delegates of the Executives of the *Lander.*[150] Thus, the *Lander* would participate in the criminal legislation when enacted at federal level through the *Bundesrat*. Even the consent of the *Bundesrat* is required for a bill to be adopted by the *Bundestag*. This helps to maintain the regional interests of the *Lander* at the federal level in criminal legislation and policy.

### 3.2.4. India

The Indian Constitution provides for the criminal legislative jurisdiction in three forms in line with the three lists (the Union List, State List and Concurrent List). As far as the Union List is concerned, offences against laws which fall in the Union are enacted by the Federal Government (the Union), whereas offences against laws relating to those which fall in the State List are enacted by the States. Explained otherwise, the Federal Government has criminal legislative jurisdiction on matters falling under its exclusive list, and the States have criminal legislative jurisdiction on matters falling under their exclusive list. The term 'offences' inserted in the Union List and the State List separately refers to the criminal legislations relating to crimes committed or omitted in the respective laws of the concerned order of government.

However, the power of enacting penal code and Criminal Procedure Code is vested in the concurrent list in which case both the Union and the States have concurrent power over the Codes. The Indian Constitution thus distinguishes between the criminal legislative power on one hand and criminal (penal) code enactment power on the other.[151]

### 3.2.5. Nigeria

The Nigerian Constitution does not clearly and expressly provide for the criminal jurisdiction of the Federal Government and of the States with respect to criminal code and/or criminal legislations. However, even though the constitution is silent on whose criminal code enactment

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[150] Art.50 of the German Basic Law provides that the *Länder* shall participate through the Bundesrat in the legislation and administration of the Federation and in matters concerning the European Union.

[151] Supra note at 136

power is, it provides for the criminal legislative jurisdiction under the ‘incidental and supplementary matters” clause.[152] Accordingly, in as much as there are exclusive lists and concurrent lists, the concerned governments (the Federal Government on matters exclusively enumerated for it, and with the States on matters concurrently enumerated for both), have the power to enact criminal legislations or offences.

This tells us something that the criminal legislative jurisdiction is not entirely conferred upon one order of government, but rather it is concurrently given for the Federal Government and the States. The Federal Government can criminalize acts calculated to constitute criminal offences on powers exclusively falling under its jurisdiction, and the States can as well criminalize acts which are deemed to constitute criminal offences on matters falling under the concurrent jurisdictions, together with the Federal Government subject to the federal supremacy in case of inconsistency. Thus, the criminal legislative jurisdiction in the Nigerian constitution follows both lists (the Exclusive List and the Concurrent List).

### 3.2.6. Canada

The Canadian Constitution, as far as criminal legislative jurisdiction is concerned, sets out an approach that enunciates that the Federal Government is vested with the enactment of criminal code and criminal procedure code[153] whereas, the provinces are vested with the power of imposition of punishment of fine, penalty or imprisonment on laws which are exclusively enumerated for the Provinces.[154] Although the Federal Government is entrusted with the power of enactment of uniform criminal code and criminal procedure code, the Provinces are not precluded from legislating criminal matters; rather they are empowered to make criminal

[152]Supra note at 137

[153]Art.91 of the Canadian Constitution provides for the exclusive powers of the Federal Government in general, and sub-Article 27 specifies the fact that the power of the enactment of criminal law and criminal procedure belongs to it in particular. One should not lose sight of the fact that the phrases “criminal law and criminal procedure law” refers to the criminal code and criminal procedure code respectively, hence falling within the Federal exclusive power.

[154]Art.92 of the Canadian Constitution provides for the exclusive lists of the Provinces in general, and sub-Article 15 particularizes the criminal legislative jurisdiction of the Provinces in which case they are empowered to do so on matters or laws specifically listed under their jurisdiction.

punishments in the form of fine, penalty or imprisonment on matters falling within their jurisdiction. This enhances the regional autonomy of the Provinces in the area of the criminal legislative jurisdiction. Each Province may criminalize acts which it deems go against the law or matters which are under their respective jurisdiction independent of the other provinces and/or the Federal Government. On the other hand, the Federal Government also enacts its own criminal code, within which acts which are deemed to go against the Federal exclusive powers are criminalized, and thereupon enacting criminal procedure code for the whole nation.

In conclusion, there is a divergent approach to criminal legislative jurisdiction in different federations. Accordingly, while the US model appears to be dual in approach, the Swiss model is highly centralized both in criminal substantive and procedural laws, the German model is concurrent. The Indian model appears to follow the three notable lists (the Union List, the State List and the Concurrent List) in which case the criminal legislative jurisdiction corresponds with the Union List for the Federal exclusive powers, the State List for the State exclusive powers and the criminal code and criminal procedure code under the Concurrent List. The three Lists share their respective criminal legislative jurisdictions under the Indian constitution. The Nigerian model on criminal legislative jurisdiction follows the "incidental and supplementary matters" clause on the division of powers between the Federal exclusive and concurrent powers Lists. The Canadian approach to criminal legislative jurisdiction contemplates that while the power for enactment of the criminal code and criminal procedure code is vested in the Federal exclusive power, the provinces are empowered to impose punishments on matters falling under their respective jurisdiction.

To date, an attempt has been made to draw the existing experiences with respect to criminal legislative jurisdiction in different federations mentioned above. In the following discussions, the writer will attempt to unravel the criminal legislative jurisdiction in Ethiopia in light of the Constitution and other subsidiary laws pertaining to criminal law in both Federal and State laws as the case may be.

### 3.3. Criminal Legislative Jurisdiction under the FDRE Constitution

From the above discussion which focuses on the comparative perspectives of the criminal legislative jurisdiction of different federations, we could understand that there are various approaches to the subject. It could be found logical to opine that there are as many approaches to criminal legislative jurisdiction as there are federations the world over. In this very section, the writer will make an attempt to locate the criminal legislative jurisdiction in the Ethiopian constitutional and federal experience. Whether the Ethiopian federal criminal legislative jurisdiction is centralized or divided, both in its substantive and procedural aspects, whether such an approach enhances federalism or constrains same, the extent of the right to self-determination of the NNP in relation to the criminal law, whether the criminal legislative jurisdiction is dual or integrated in approach and what it ought to be, whether the States have the right to enact their respective criminal procedure code, and other points will be the subject of the discussion.

To begin with, Art.55 (5) of the Constitution provides that the HPR shall enact a penal code. It goes on to state that the States may, however, enact penal laws on matters that are not specifically covered by the Federal penal legislation. From this constitutional provision, we can draw that there are two concepts as far as the criminal legislation herein provided is concerned. The first concept is related to the notion of criminal or penal code whose main issue has a strong connection with the principle of codification. Black's Law Dictionary defines the term 'code' as "a complete system of positive law, carefully arranged and officially promulgated; a systematic collection or revision of laws, rules, or regulations".[155] Thus, the power over criminal law to make a consolidated and properly and systematically arranged law, promulgating same is vested in the Federal Government. Accordingly, the power to define the object and purpose of criminal law, the principles of legality, the scope and nature of crimes, etc is vested in the Federal Government. Stated otherwise, the States are precluded from the power of enactment of law over criminal or penal code under the Constitution. In any matter so demanded within their criminal legislative jurisdiction, if any, the States are duty bound to follow and defer to the principles and rules provided for in the Federal Criminal Code. For instance, the notion of the principle of legality, scope of the application of criminal law, what constitutes and does not constitute a

[155]Supra note at 77, P.774

criminal offence, etc, are common for both the Federal and the State criminal legislations. It is for this reason that the Federal Government has set out the comprehensive Criminal Code.[156]

The FDRE Criminal Code (hereinafter referred to as the Criminal Code) being a codified law or simply a code, consists of, *inter alia*, object and purpose of criminal law, principle of legality, equality before the law, the scope of the application of the criminal law. It also consists of the general part, special part and the part dealing with the Code of petty offences. The general principles set out in the Criminal Code should be observed by any regulation or special laws of criminal nature except as otherwise expressly provided therein.[157] Such regulations or special laws of criminal nature, whether they are of the Federal Government's or the States' refer to criminal legislations as is to be explained in the following discussions.

The second concept easily gleaned from the wording of the above constitutional provision is the notion of criminal or penal legislation. The second paragraph reads as "The States may, however, enact penal laws on matters that are not specifically covered by Federal penal legislation". From this provision, it is possible to understand that the criminal legislative jurisdiction of the States is limited only to the legislation on crimes. That is to say that they are not conferred with the power to enact a criminal code of their own. The Federal Government has totally centralized the enactment of the criminal code leaving the States only with the power to enact criminal legislations. Again, it is noteworthy to delineate, here, that the power over which the States are authorized to enact the criminal legislation is subject to whether the crimes are exhausted or not in the Federal criminal legislations and/or Code.

At this juncture, it is worth posing a question as to whether criminal legislative power in the FDRE Constitution is divided or centralized. Is it the spirit of the Constitution to centralize criminal legislative power? How should the Constitution be considered in interpreting Art.55 (5)? Should Art.55 (5) stand alone or be seen in conjunction with other discourses of the whole Constitution? These and other similar and related questions may be posed in order to explore whether the constitutional stance on criminal legislative power is divided between the Federal Government and the States or centralized by the Federal Government.

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[156]Proclamation No.414/2004, the Criminal Code of the Federal Democratic Republic of Ethiopia, 9$^{th}$ of May, 2005, Addis Ababa

[157]Id, Art.3

A close reading of Art.55 (5) of the Constitution may enable us to argue for and against the nature of centralized criminal law and policy in Ethiopia. The fact that a priority has been given to the Federal Government in enacting a criminal code and other criminal legislations will qualify it to have an upper hand over all criminal matters at the expense of regional autonomy. Accordingly, in his 'Monist Approach to Criminal Policy in Ethiopia (*emphasis added*)', Abera argues that Despite the fact that Ethiopian society is characterized by multiple culture and normative orders, it still has highly centralized criminal justice system.[158] He castigates the Constitution stating that the latitude of legal pluralism allowed by the Constitution has not gone far enough to embrace the criminal justice system as a result of which the Constitution has made no departure from the old centralist and unitarist approach.[159] Consequently, the Federal Government is at liberty to criminalize or not any matter it deems necessary leaving the States with few or no criminal legislative power. The States are, thus, at the total mercy of the Federal Government as far as criminal legislative power is concerned. How far such a centralized criminal legislative power and policy in Ethiopia is adaptable to the Regional States; whether it enhances or constrains federalism and other related consequences thereof will be broadly discussed as the discussion goes on.

In contrast to the above argument, it sounds cogent to argue against the centralized criminal legislative power as provided in the Constitution. This argument can be justified and backed by having the overall constitutional idea envisioned by the Constitution. Firstly, the HPR is the representative of the whole citizens, and enacts laws including criminal law which are nationwide in nature, leaving those matters which are regional in nature to the State Councils. The parallel existence of the legislative organs both at the federal level (HPR) and state level (the State Councils) indicates that while the HPR enacts laws which are federal, the State Councils enacts laws which are regional in nature. This scenario should be applicable *mutatis mutandis* to the criminal law.

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[158]Abera Degefa, (2013). *Legal Pluralism in Multicultural Setting: Legal Appraisal of Ethiopia's Monist Criminal Justice System*. In Elias N. Stebek and Muradu Abdo (eds.), Law and Development, and Legal Pluralism in Ethiopia (p.141-155), Justice and Legal Systems Research Institute, Addis Ababa, p.154

[159]Id, p.146

Secondly, a full application of Art.52 (2) of the Constitution enables the States to enact criminal laws on matters which fall under the jurisdiction of the States because criminal law is conceived to be the corollary of those powers which are enumerated to be the State powers. The powers which are enumerated under the State jurisdictions are incomplete powers unless the States are authorized to enact criminal laws over such powers. This holds true in other federations such as India whereby criminal legislative power follows the three notable lists (the Union List, the State List and concurrent) powers. The States have authority to enact criminal law on matters that fall under their respective jurisdictions or criminalize acts which breach the State laws. In Canada too, the provinces have a criminal legislative power over matters falling under their jurisdiction in relation to the determination and imposition of fine and penalty of imprisonment. However, as will be discussed in the following, the FDRE Criminal Code incorporates those crimes which should have been conferred upon the State.

Thirdly, what is expressly given to the Federal Government is the power of enactment of a criminal code and other federal criminal legislations. The power of enacting criminal code no doubt should belong to the Federal Government because it lays down general principles on criminal laws which are applicable to all Regional States as well. This trend is also helpful in creating and setting a uniform criminal justice system throughout the Country thereby reaffirming the constitutional preambular manifesto of one economic community. Other criminal legislations which are federal in nature such as crimes against federal laws and places are also justified on the basis of a federal character. This implies that crimes apart from those which characterize federal government should be reserved for the States.

Fourthly, the exercise and realization of Art.39 of the Constitution in the assurance of the right to self-determination in terms of promotion and preservation of culture, language, identity and history which are capable of characterizing each NNP are under the jurisdiction of each State. Thus, with regard to their history, language, culture and identity, in the fullest possible sense including criminal spheres of these items directly concerns the respective States. It must be the State itself that determines the criminality or otherwise of a certain act on the language, history, identity and culture, thereupon getting these bundle of rights respected. This strengthens the States to realize their right to self-determination expanding its scope to the extent of criminal legislative power over matters relating to the items above mentioned.

Fifthly, customary criminal justice system that is inherent in each NNP of Ethiopia dictates some crimes to be enacted by the States. Although the FDRE Criminal Code centralized crimes almost in its entirety, the customary criminal justice systems operate informally based on their own customary laws, procedures and institutions at the community level, and as a result, there is a divergence between the multicultural and diversified social structure and the centralist legal system.[160] In practice, even in the face of the unwelcoming Ethiopian legal climate for customary justice systems, the various non-state legal orders coexist along with the formal legal system.[161] The customary justice systems appear to have resisted and survived the sweeping and hostile abolition measures taken by the state against them.[162] Thus, although Art.3347 (1) of the Civil Code declared the repeal of customary practices before fifty years now, they are existing till today. Despite lack of official recognition, the customary justice systems are widely used in the area of criminal justice in most of the rural parts of Ethiopia.[163] Thus, while there are such concrete and practical circumstances alongside the existence of multicultural and multiethnic societies in Ethiopia, it does not seem feasible to centralize criminal law and policy.

In addition to the Constitutional foresight of the criminal legislative power as opined in the foregoing discussion, there are also other statutes which give a hint of dividing crimes between the Federal Government and the States, hence federal crimes and state crimes. Proclamation No.25/96 is a typical example to this end. In the determination of the jurisdiction of the Federal Courts, Art.3 of the Proclamation limits the jurisdiction of the Federal Courts to cases arising under the Constitution, Federal Laws and International Treaties, parties and places specified in the Constitution and Federal Laws. This shows that cases arising under the State Constitutions, laws, parties and places specified in their laws fall under the State Courts. The fact that the Proclamation left other crimes unmentioned indicates that the remaining crimes are regional in character and should be left to the Regional Courts. Moreover, the Proclamation nowhere stipulates the delegation clause. Thus, the question to be posed here is why do the States not enact laws on these crimes under their jurisdiction and which have regional importance inherently. Furthermore, crimes listed under Art.4 of the Proclamation are more federal than

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[160]Id, p.147

[161]Ibid

[162]Ibid

[163]Ibid

regional in nature. As a result, there is a presupposition that these crimes belong to the Federal Government, hence federal crimes and the remaining crimes would belong to the States constituting state crimes.

Despite the first line of argument which emphasizes criminal centralism under the guise of the Constitution and which is also the more predominant than the second line of argument in the present Ethiopian criminal law and policy, the latter argument is capable of demonstrating the federal crimes and state crimes scenario.

There are also other scholars such as Dr. Solomon and Dr. Assefa who argue that Ethiopian criminal legislative jurisdiction is concurrent.[164] The latter writer adds that although the Federal Parliament, by virtue of Art.55 (5), exhausts the field, leaving no room for the States, this is not merely a paper power left for States, since they often include in their legislation specific offences which are not covered by the Federal penal code.[165] An analytical assessment will be made how far the States have included in their legislations offences which are uncovered by and in the Criminal Code and other federal criminal legislations, in the discussion which follows.

Donovan and Getachew have tried to place the Ethiopian criminal legislative jurisdiction somewhere in between the German model and the Canadian model.[166] According to the view of these co-writers, if we think of the Ethiopian criminal legislative jurisdiction in terms of concurrency, like that of the view of the above scholars, it appears to be equated with that of the German counterpart though the latter has expressly provided for but the former does not. However, if the Ethiopian criminal legislative jurisdiction is to be equated with that of the Canadian model, the conclusion may not take us further because in the Canadian Constitution, the Provinces have the power to impose punishments on acts committed or omitted on matters or laws falling under their jurisdiction. The Federal government is not allowed to encroach in matters falling under the exclusive jurisdiction of the Provinces on the issue concerning the imposition of punishments. But this does not work in Ethiopia as precedence is given to the

[164]Solomon, Supra note at 80, P.64-65 and Assefa, Supra note at 97, P. 145 respectively

[165]Assefa, Supra note at 97, P.145

[166]Donovan, Dolores A. and Getachew Assefa, Homicide in Ethiopia: Human Rights, Federalism, and Legal Pluralism, American Journal of Comparative Law, Summer 2003, p.22

Federal Government, and the States may enact criminal legislations only if the said offences are not specified in the Criminal Code and other legislations.

### 3.4. The Departure of Ethiopian Criminal Legislative approach from Other Federations

In the discussion of the doctrine of distribution of powers between the federal government and the states, we have explored that there are principles which guide or factors which affect the division of powers in any federation. Accordingly, powers are divided between the federal government and the states taking into account unity *versus* diversity, geographical, historical and cultural factors, and based on how the federation is established (whether aggregative or devolutionary). From among these guiding principles of the distribution of powers, the preservation of unity and accommodation of diversity, geographical, historical and cultural factors are *mutatis mutandis* applicable to the division of criminal legislative power between the federal government and the states. In the determination of criminal legislative jurisdiction, the law violated and parties involved should be taken into account.

But irrespective of these factors and principles, the current Ethiopian criminal law and policy is highly centralized. In the determination of criminal legislative jurisdiction as between the federal government and the states, there are many circumstances to be taken into account as pointed above. The first one is the nature of the crime; whether it is federal or regional crime. The US model is a typical example to this scenario. The US constitution lists those crimes which have the feature of federalness and leaves the others to the States. But Ethiopia has not complied with this federal crime and state crime scenario.

The second qualification to be taken into account in the determination of criminal legislative jurisdiction is the identification of which law is breached; which interest is at stake; which party or place is in question. In India, criminal legislative jurisdiction follows the three notable lists: the Union list, the State list and the concurrent powers. In Nigeria, the Federal government and the provinces have incidental and supplementary criminal clause over matters falling under the exclusive and concurrent jurisdictions. The provinces in Canada too, have the criminal power of imposition and determination of fines and penalty on crimes falling under the matters of their jurisdictions. In case of Ethiopia, however, even though the States have enumerated powers under Art.39 and 52 of the Constitution, the criminal wing thereof has been taken away by the Federal Government.

Thirdly, in the US model which is dual in approach, except those crimes which are designated to be federal crimes, other crimes fall under the States in accordance with the *locus* of the crime. Each State has an exclusive criminal legislative jurisdiction over crimes committed within its geographical location, hence called state crimes. Tested with the *locus* of the crimes, the FDRE Criminal Code has centralized all crimes which are probably committed far away from the reach of the Federal Government and which are totally under the geographical location of the States at the same time featuring regional character. A great number of crimes in the Criminal Code fall under this category.

The Ethiopian criminal legislative approach also departs from the principle of subsidiarity. The principle of subsidiarity advocates that legislative power should begin from the bottom. In the case at hand, the criminal legislative power should begin from the Regional States and should be transferred to the Federal Government in case it goes beyond the regional competence. This also takes us to the federal crime and state crime scenario in that the States should enact criminal law over matters reflective of their respective regional characters and those crimes which feature federal character should be transferred to the Federal Government. To the contrary, Art.55 (5) of the Constitution contemplates a top-down approach over criminal legislative power in that it is after the Federal Government exhausts criminal laws that the States come into the scene. This is visibly against the principle of subsidiarity.

Generally, the Ethiopian criminal legislative approach departs from the guiding principles of the distribution of powers, the principle of subsdiarity and the experiences of other federations such as US, Canada, Nigeria, and India because it is highly centralized.

The arguable place of the Ethiopian criminal legislative jurisdiction as compared with other federations as may it be, at this juncture, one may be tempted to ask a question as to what is the scope of the criminal legislative jurisdiction of the States taking into account the Criminal Code and other legislations? How is and should the right to self-determination of the NNP of Ethiopia be considered? Does/does not it extend to the criminal legislative jurisdiction? What is the impact of centralization of the criminal legislative jurisdiction on the regional autonomy of the

States? Does the centralization of the criminal legislative power by the Federal Government really achieve its purpose? Do all crimes enumerated in the Criminal Code feature or characterize only Federal characters? What is the policy behind the centralization of the criminal legislative jurisdiction in the presence of multiethnic societies in Ethiopia?

To address the questions posed hereinabove, let us begin from whether any room is left for the States so as to legislate on criminal matters. As stated in the above explanations, the Federal Government is constitutionally empowered to enact criminal code as well as criminal legislations. The States on the other hand, are empowered to enact only criminal legislations on crimes which are not specifically mentioned in the Criminal Code and other Federal criminal legislations. Thus, for the States to enact criminal legislation, they need to look to the Criminal Code and other federal criminal legislations. Let us see the Criminal Code and other Federal criminal legislations one by one as follows.

### 3.5. Federal Criminal legislative Jurisdiction

#### 3.5.1. The Criminal Code

The Special Part[167] and the part dealing with the Petty Offences[168] in the Criminal Code can easily indicate how far the acts the Federal Government penalizes are so extensive that the room left for the States is too insignificant. The acts that are criminalized under the Criminal Code range from crimes against the State or against national or international interests to crimes relating to proceedings of debt, execution and bankruptcy which are so called petty offences. In the midst of these are such crimes as those that are against the public interest or the community, against individuals and the family, and against property, in a very broad enumeration which are listed in the Special Part. The so called petty offences on the other hand, includes such crimes as ranging from petty offences against public interests and the community to petty economic, trade or maritime offences. The Code, among other things, criminalizes a petty theft which states that "Whoever, prompted by need or desire or by lack of conscience, takes a thing of small value belonging to another for his immediate consumption or use, is punishable with fine not

[167]Art. 238-733 deal with the Special Part in which case particular crimes together with their respective punishments are provided.

[168]Art.734-865 deals with petty offences and the general principles thereof.

exceeding fifty Birr or arrest not exceeding fifteen days.[169] This indicates how the Criminal Code is so exhaustive that there is little room reserved for the States so as to enact criminal laws on crimes which are unmentioned or unspecified in the Criminal Code.

The Criminal Code has incorporated matters which fall under the State jurisdictions. For instance, Art.238 (1) stipulates that whoever, intentionally, by violence, threats, conspiracy or any other unlawful means: a) overthrows, modifies or suspends the Federal or State Constitution; or b) overthrows or changes the order established by the Federal or State Constitution, is punishable with rigorous imprisonment from three years to twenty-five years. In principle, the Federal Government is empowered and mandated with the protection and defence of the Federal Constitution.[170] The Federal Government is the guardian of the Federal Constitution and not that of the State Constitutions directly. Art.74 (13) of the Constitution reaffirms this proposition in that the Prime Minister shall obey and enforce the Constitution. The States are also the custodian of the Federal Constitution. This indicates that the duty and power of the protection and defence of the State Constitution is vested in the State itself, and not in the Federal Government subject to the principle of mutual power respect as between the Federal Government and the States. Art.52 (2) (b) of the Constitution confirms this in that the States have the power to enact and execute the State constitution and other laws. But in the guise of the power of the enactment of the Criminal Code and other criminal legislations, the Federal Government has taken over the power and duty of the State Constitution guardianship. Thus, the Criminal Code has penalized an overthrow, modification, or suspension of the State Constitution.

Art.239 of the Criminal Code also provides that whoever, by violence, threats or any other unlawful means, restrains or prevents any official or body constituted by the Federal or State Constitution from exercising their powers or forces them to give a decision, is punishable with rigorous imprisonment not exceeding fifteen years. The State constitutions have organized different institutional or administrative structures which incorporate various officials performing different functions. The States are allowed and constitutionally guaranteed to have constituted such administrative structures as a means of the reaffirmation of the right to self-determination. But the criminal aspect of the proper functioning of the officials, whether they are restrained,

[169]Id, Art.852

[170]Supra note at 1, Art.51(1)

prevented from exercising their powers, or they are forced to give decisions, by violence, threats or any other means, is vested in the Federal Government. This tells us something of the fact that although the States are allowed to constitute their respective administrative structures within their realms, they do not have a say on the criminalization of acts done to the officials in the exercise of their powers and functions.

Moreover, Art.244 (2) states that whoever, maliciously, or with contempt or any other similar intent, publicly tears down, sets on fire, destroys, injures, defaces, insults or in any other way abuses an officially recognized national emblem such as the flag or insignia of Federal Ethiopia or the Regional States, is punishable with simple imprisonment for not less than three months or fine. This provision on the other hand, criminalizes malice or contempt done, in any manner so mentioned, to the emblem such as the flag or insignia of the Regional States. Art.3 of the FDRE Constitution establishes two types of flags: the Ethiopian flag and the flags of the States. The details of the flags and emblems of the States are determined through their respective legislatures. The States may, on the determination of the particulars of their respective flags and emblems by their legislatures, enact the criminal legislations pertaining to the respect and protection thereof. However, the Federal Criminal Code has criminalized acts done on the States' flags and emblems.

Furthermore, there are crimes that are incorporated in the Criminal Code but found to have characterized the States or the NNP within their respective realms. For instance, bigamy is prohibited in the Federal Family Code.[171] Art.650 of the Criminal Code also criminalizes bigamy. But Art.651 puts an exception to the crime of bigamy. It states that [Art.650] shall not apply where bigamy is committed in conformity with religious or traditional practices recognized by law. Since the Federal Government does not have its own religious or traditional practices, the exceptional provision to the crime of bigamy refers to the States or the NNP whose practices concerning the religious or traditional aspects are recognized by law. This implies that in

[171]Proclamation No.213/2000, the Revised Family Code, Federal *Negarit Gazeta*, 6th year, Extra ordinary issue No.1, 4th Day of July, 2000, Art.33 states that the dissolution of a bigamous marriage shall be ordered on the application of either of the spouses of the bigamous marriage or the public prosecutor. But this dissolution may no longer be applied for where the former spouse of the bigamous marriage has died.

accordance with their respective culture, custom, tradition, and religion, the States may criminalize or do not criminalize bigamy as they are diverse in culture, custom, and religion, provided that the criminal legislative power were vested in them on matters which constitute or characterize regional affairs. Thus, a close reading of Art.651 gives an impression that as per recognized laws on the religious or traditional practices with respect to bigamy, the States are at liberty to admit the criminality or otherwise of bigamy. That is to say that the crime of bigamy does not bind the State or NNP that is accustomed to the bigamous marriage by traditional or religious practices recognized by law. This shows that there are crimes which are capable of featuring regional character but totally centralized by the Federal Criminal Code. It is for this reason that Donova and Getachew suggest that the persons responsible for the revision [of the Penal Code] do not appear to have considered the alternative of reducing the coverage of the federal code in order to permit the states the independence they need to write state penal codes providing space for the operation of customary law systems.[172]

As discussed in detail in chapter two, the doctrine of the distribution of power is determined by such factors as geographical, historical, economic, linguistic, cultural, and demographic spheres. From among these determinant factors of the doctrine of the distribution of powers in respect to the criminal legislative jurisdiction, geographic, historical, and linguistic factors are found to be the glaring ones in the Ethiopian case. Especially, one should pay more attention to the diverse cultures which is the composite of many things in Ethiopia in the division of criminal legislative jurisdiction between the Federal Government and the States. This takes us to the caveat propounded by Ronald Watts, the more the degree of homogeneity within a society the greater the powers that have been allocated to the federal government, and the more the degree of diversity the greater the powers that have been assigned to the constituent units of government.[173] Deference to this suggestion may lead us to ponder upon the undeniable Ethiopian multi-ethnicity and multiculturalism which has a connection with the criminal legislative jurisdiction as well. Diversity in culture, language, religion, tradition, geography and other related factors should be taken into account on top of this. The fact that the Constitution is

[172]Donovan and Getachew, Supra note at 166

[173] Watts, Supra note at 21, p.102

supposed to take into consideration these and other factors may be of help in speculating whether an act constitutes a criminal offence or not in each State or NNP in Ethiopia.

As discussed above, in the US model of criminal legislative jurisdiction, since the States are empowered to make criminal laws within their geographical location subject to the federal supremacy clause and those areas which are reserved for the Federal Government, an act which constitutes a criminal offence in one state may not necessarily be so in other states and/or the Federal Government. Thus, criminal diversity is recommended to correspond with the existing multicultural societies within the limits of the minimum requirements as provided in the Constitution, such as constitutional supremacy and human rights sacredness.

### 3.5.2. Other Federal Criminal Legislations

The Federal Government, with its legislative organ, the HPR, has enacted other criminal legislations which deal with crimes of different types over various matters. These criminal legislations are backed by Art.3 of the Criminal Code which provides that regulations and special laws of a criminal nature, so far as they are complied with the general principles of the Code, are prescribed. Accordingly, Anti-Terrorism Proclamation,[174] Offences against the Safety of Aviation Proclamation,[175] the Anti-Corruption Proclamation,[176] Federal Courts Advocates Licensing and Registration Proclamation,[177] Election Proclamation,[178] Forest Proclamation[179] are

[174] Proclamation No.652/2009, Anti-Terrorism proclamation, Federal *Negarit Gazeta*, 15th year, No.57, 28th August, 2009

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

[176] Proclamation No.433/2005, Revised Federal Ethics and Anti-Corruption Commission, Federal *Negarit Gazeta*, 11th year, No.18, 2nd February, 2005, Art.27

[177] Proclamation No.199/2000, Federal Courts Advocates Licensing and Registration, Federal *Negarit Gazeta*, 6th year, No.27, 9th March, 2000, Art.31

[178] Proclamation No. 532/2007, The Amended Electoral Law of Ethiopia, Federal *Negarit Gazeta*, 13th year, No.54, 25th June, 2007, Art. 97-100

[179] Proclamation No.542/2007, Forest Development, Conservation and Utilization, Art.20

some of the federal criminal legislations which contain penalty clauses. These federal criminal legislations have also an impact of narrowing down the scope of states' criminal legislative jurisdiction. As the number of crimes incorporated by the Federal Criminal Code and other criminal legislations increases, the scope and extent of crimes to be enacted by the States will become thinner and thinner; and eventually they are left empty-handed.

### 3.6. The State Criminal Legislative Jurisdiction

As hinted on in the foregoing discussions, the States are authorized to enact criminal legislations, provided that the crimes in view are not specified in the Federal criminal legislations. This prompts us to state that for the States to enact criminal legislations, they need to first look to the Federal criminal legislations, including the Criminal Code. At any rate, the States have made criminal legislations in their enactments concerning primarily with different matters but incorporating penalty clauses in some respects. For the sake of ease of accessibility and availability of legislations, the writer has chosen to provide as an example the case of the Oromia Regional State Laws.

Art. 27 of Proclamation No.130/2007 cross refers the penalty clause to 'the applicable laws'.[180] These 'applicable laws' are the Criminal Code and other Federal criminal legislations. This shows that the Oromia Regional State appears to transfer criminal legislative power with respect to land administration to the Federal Government. Thus, Oromia Regional State has not included a specific penalty clause in the above Proclamation, and a result, it is the Criminal Code and other legislations that are applicable to crimes related with the use of land.

The Forest Proclamation of the Oromia Regional State[181] also reiterates the penalties already incorporated in the Federal Forests Proclamation. Although the preamble of the Proclamation traces back to Art.49 of the Oromia Regional State Constitution which empowers the *Chaffee*

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[180]Proclamation No.130/2007, Proclamation to amend the Proclamation No.56/2002, 70/2003, 103/2005 of Oromia Rural Land Administration and Use, *Megeleta Oromia*, July 29, 2007

[181]Proclamation No.72/2003, Forest Proclamation of Oromia, 22nd June, 2001. Art.13,14 and 15 enumerate a long list of the prohibited acts in relation to the forest, some of which are cutting any tree, making charcoal, settling in the forest, keeping domestic animals in the forest, hunting, keeping beehive in the forest or harvesting honey, taking natural resources without written authorization from the concerned body

Oromia to enact laws in the Region, a mere copy of the penalty clauses from the Federal forest Proclamation does not seem to entitle the Region as if it has an inherent power over criminal legislative jurisdiction over forest issues. This is because since all acts criminalized by the Oromia Forest Proclamation are also penalized by the Federal counterpart. The Constitution also gives a priority to the Federal Government on criminal matters. Thus, the Regional States in general and Oromia in particular, have to first consider the Federal Forest Proclamation and criminalize acts which are not mentioned therein or directly applies it by a cross reference method. Otherwise, the States do not have an inherent criminal legislative power while the Federal Forest Laws exhaust crimes against forest.

There are also other laws in the form of proclamation or regulation at State levels which incorporate penalty clause. At any rate, however, it must be noted that while the States enact criminal laws, they are made to wait the Federal Government until it first exhausts all areas of crimes.

### 3.7. Criminal Procedure Legislative Jurisdiction in Ethiopia

In the foregoing discussions, we have been looking at the criminal legislative jurisdiction in Ethiopia and abroad a regard having mainly been had to the substantive aspect of the criminal law. In this very section, we will emphasize on the power of the criminal legislation over the criminal procedure code in Ethiopia, having a comparative perspective in different federations.

Broadly speaking, there are two major approaches to the criminal legislative power with respect to a criminal procedure code: dual approach (the US model) and an integrated approach (the Swiss model). In the US model, both the Federal Government and the States have their own criminal procedure code. The duality of the criminal procedure code of the US model is highly influenced by the dual nature of the substantive criminal code in which case the Federal Government and the States have their respective criminal codes. The duality of the US federalism has played a great role or influence in the duality of criminal law in both substantive and procedural issues.

On the other hand, the Swiss model differs from that of the US model in that the Federal Government centralizes a criminal procedure code. The Swiss Constitution makes an express provision towards this stipulation. It provides that legislation in the field of criminal law and criminal procedure is a federal matter.[182] The Cantons do not have their own criminal procedure code, and as a result, they administer criminal cases by the Federal criminal procedure code. This has also got something to prompt us to think of the genesis of the Swiss federalism in that it is administrative or executive in type. And this administrative nature of the federalism extends also to the criminal law both in its substantive and procedural aspects.

Having all this in mind, let us see the Ethiopian case of the criminal procedural law. To which model−the US dual or the Swiss integrated model−can the Ethiopian criminal procedural legislative power correspond? Which approach should fit the Ethiopian actual circumstances in the area of the criminal legislation on criminal procedure code? Is the criminal legislative power with respect to the criminal procedure code the Federal or the State power? What factors determine the power of criminal procedural legislation? What is the trend purported by the Constitution? Is there any reference as to whose power should the criminal procedural law be, based on the criminal substantive law in the Constitution? Does the substantive criminal law have an impact on the criminal procedure code in Ethiopia, compared with other federations mentioned above?

Before making an attempt to address these questions, let us first consider what is meant by criminal procedure code and what its purpose is. From the outset, it is better to first define what is meant by criminal law in general. Accordingly, Black's Law Dictionary defines criminal law as follows:

> *Criminal law is the body of law defining offenses against the community at large, regulating how suspects are investigated, charged, and tried, and establishing punishments for convicted offenders. Often the term 'criminal law' is used to include all that is involved in 'the administration of criminal justice' in the broadest sense. As so employed, it embraces three different fields, known to the lawyer as (1) the substantive criminal law, (2) criminal procedure, and (3) special problems in the administration and*

[182]Federal Constitution of the Swiss Confederation, 2002, Art.123(1)

*enforcement of criminal justice. The phrase 'criminal law' is more commonly used to include only that part of the general field known as the substantive criminal law.*[183]

From this definition which is accorded to criminal law, we can generate that the term is broader, and it includes all processes required for the administration of justice. Hence, it includes, *inter alia*, the substantive and procedural criminal laws. Moreover, the definition makes clear that the phrase "criminal law" refers more to the substantive criminal law. While this is the broader definition given to the phrase "criminal law", the same Dictionary defines criminal procedure separately as the rules governing the mechanisms, under which crimes are investigated, prosecuted, adjudicated, and punished.[184] This gives an impression that criminal procedure code, together with the criminal substantive law which are supposed to deal with different aspects of criminal law, exists under the umbrella of criminal law. However, the two terms albeit within the same family, concentrates on different spheres of crimes: substantive and procedural.

Some argue that Art.55 (5) of the Constitution includes not only the criminal substantive law but also criminal procedure law.[185] In view of this line of argument, the power to enact the criminal procedure code would unquestionably be vested in the Federal Government. But as stated above, even though the notion of criminal law embraces both substantive and procedural criminal laws, it is more of inclusive of criminal substantive law on the one hand, and Black's Law Dictionary defines criminal procedure in a quite different way on the other. Moreover, the Constitution uses the phrase "penal code" which is related to the substantive aspect of criminal or penal law as we can find the notion of criminal procedure code on the other side. The two are different things although they lie in the concept of criminal law. Art.123 (1) of the Swiss Constitution also distinguishes between the notions of criminal law (intended to mean criminal code) and criminal procedure code. Even though the power of enactment of both criminal code and criminal procedure code is vested in the federal government, the constitution treats the two legislative powers differently.

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[183]Supra note at 77, p.1131

[184]Id, p.1132

[185]Yenenesh, Supra note at 3

With regard to the purpose of criminal procedure law, it establishes a framework for preventing wrongful convictions, discovering the truth, striving for justice, investigating crimes and addressing victims' rights.[186] The object of the criminal procedure code is to ensure that an accused person gets a full and fair trial along certain well established and well understood lines that accord with notions of natural justice.[187] In these propositions pertaining to the purpose of criminal procedure law, one should bear in mind that it is the means to an end of the criminal substantive law, in a way that the constitutionally guaranteed rights of accused persons and victims are respected. It is for this reason that Sedler asserts that procedural and evidentiary laws are adjective laws.[188] But this does not mean that procedural law in general, and the criminal procedure code in particular, is limited only to enforcing and administering substantive laws but it may also include other subjects.[189]

Now, let us be back to the questions posed hereinabove as to whose criminal procedure legislative power in Ethiopia. In principle, the Constitution provides that the Federal and State powers are defined by the Constitution itself.[190] Accordingly, the Constitution lists the exclusive federal powers, and concurrent powers (though the concurrent powers are not separately specified), and leaves the residual powers to the States. There is no express provision in the Constitution with respect to the criminal procedure legislative power. Having this as an input in mind, the writer would like to forward the following arguments for the fact that the criminal procedure legislative power should be exercised by the States in Ethiopia.

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[186] What Is the Purpose of Criminal Procedure Law? www.ehow.com/facts_5825245_purpose-criminal-procedure-law_.html, Accessed on 21/10/2013 at 2:27 PM

[187] What Is The Object And Purpose Of The code Of Criminal Procedure, 1898?, Munir Ahmad Mughal, www.academia.edu/1261803/What_is_the_Object_and_Purpose_of_the.., Accessed on 21/10/2013 at 2:31 PM

[188] Sedler, A.Robert (1968). Ethiopian civil procedur*e*, Haile Sellasie I University, Addis Ababa, p.1

[189] Proclamation No.185/1961, Criminal Procedure Code of the Empire of Ethiopia, *Negarit Gazeta,* 21st year, No.7, Addis Ababa, 2nd November, 1961, Art.4-10. Book I of the Code provides for criminal jurisdiction of courts (Art.4), persons to be tried (Art.5), public prosecution department and police together with their powers and duties (Art.8-10)

[190] Supra note at 1, Art.50(8)

The first argument pertains to the constitutional *lacuna* as to the criminal procedure legislative power. As discussed in the foregoing discussion, powers which do not fall under the federal exclusive list and concurrently by the Federal Government and the States are reserved for the States, hence the criminal procedure law being one of these. One may counter argue that since the legislative power of the criminal code is vested in the Federal Government, so should the criminal procedure law be. But the co-extensiveness of the criminal code and criminal procedure code is not a matter of necessity in the Constitution. Even though the Federal Government centralizes the criminal legislative jurisdiction, the States have the power to enact the criminal procedure code of their own by the benefit they would derive from the residual power.

Secondly, the impact of the apparent duality of the criminal legislation as enunciated by and in the Constitution determines the enactment power of the criminal procedure law. Notwithstanding that the Federal Government is at liberty to exhaust the criminal legislation as entrusted with by the Constitution to do so, theoretically speaking, the States may enact criminal legislations subject to the coverage by the former. This enunciation, though illustrative of concurrency, may give an impression that the States may enact their own criminal procedure code in accordance with their respective contexts.

Although the Federal Government centralized criminal law in terms of enactment of the Criminal Code and other federal criminal legislations, and as a result, the States' power of criminal legislation is considerably watered down, the Constitution envisages the concurrent approach to the criminal policy. The concurrency of criminal legislation envisioned by the Constitution does not overlook the federal character and the State character of crimes, hence federal crimes and state crimes in Ethiopia. This takes us to the US and the Swiss scenarios whereby the duality and unified nature of the criminal code results in the duality and uniformity of criminal procedure code respectively. It may be strongly argued here, therefore, that the apparent duality of criminal substantive legislative power has an impact on the duality of criminal procedure legislative power in Ethiopia too. It does not seem to be the intent of the drafters of the Constitution to deny the States of enacting the criminal procedure code of their own as the States are empowered to enact penal laws which are not covered by the Federal criminal legislations.

Thirdly, considering the scope of the right to self-determination accorded to the NNP, one could easily observe that it, *inter alia,* includes developing and promoting culture. The scope of culture goes to the extent of the respective NNP's attitude towards how different phenomena take place within their jurisdictions. This may include, among other things, how witnesses take oath on the event of giving their testimony before the bench or judge in court, which is one component of the criminal procedure code. This is to say that oath is one element of culture. Culture is NNP-specific. What is binding and forceful in one NNP may not be the case in other NNP. If a witness in one NNP does not feel that the oath he/she takes is baneful or dangerous to him/her or his/her descendants, it is highly likely that false statements and perjury will abound among the society, and as a result, the very purpose of criminal procedure, which is justice attainment in its broader sense, will be jeopardized.

On top of this, it is of importance to raise the Oromia Courts bench administration system directive. The oath clause stipulated in the Directive reads, in *Afaan Oromoo*, as follows:

> *"Dhugaa malee dhara hin dubbadhu. Yoon dhara dubbadhe Waaqni/Rabbi dhala naaf hin kenniin, yoo naaf kenne hin guddatiin, yoo guddate hin dubbatiin, yoo dubbate hin mul'atiin, ykn dhugaan dubbadha, dhugaa hin haalu, yoon dhugaa haale qe'ee koo bofti haa dhaalu; qe'een koo qe'ee booyyee! dhalli koo dhala yuuyyee haa ta'u! ykn dhugaa malee soba hin dubbadhu, yoon soba dubbadhe kanan dhale naaf hin guddatiin, kanan facaase naaf hin margiin, kanan nyaadhe naaf hin sifaayiin"*[191]

The English version (translation mine) of the oath clause may read as: *I shall speak the truth, and not the lie; if I speak a lie, may God deprive me of offspring, if He gives me, let my offspring not grow 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 grow up, let the seed of my grain not germinate, let what I eat not comfort my body.*

[191]Directive No.6/2012, the directive governing the Oromia Regional State Courts Bench System Administration, Art.7(4)

As stated above in the oath clause, it seems frightening for a witness in the Oromia State to give a false testimony after taking the oath under such a powerful and scary swearing process. This is what appears to be the case of the Oromia Regional State courts bench system in relation to the attestation of the testimony of witnesses. It may not necessarily be the case in other NNP in Ethiopia. No modern legislation which does not have its roots in the customs of those whom it governs can have a strong foundation.[192] The importance of oath and its perceived or actual consequence in the discovery of the truth in criminal enforcement and adjudication is not something to be downplayed in the field of criminal justice administration.

Fourthly, the fact that there is no constitutionally guaranteed regional representation in the federal law-making and policy formulation in general, and in the criminal law with specific reference to criminal procedure code in particular, the likelihood of the involvement of the interests of the States or the NNP in the adoption process of the code is very less. For example, in the launch of the study on the draft criminal procedure code which is not yet put in force, the committee was selected from the Federal Supreme Court, Ministry of Justice, Ministry of capacity Building, Federal Customs Authority, and Civil Service College.[193] All these entities are drawn from the Federal Government regardless of the regional participation in the study on the preparation of the draft criminal procedure code.

Fifthly, the overall change of regime which is also supplemented by the Constitution is the high expectation of the writer to give rise to change in criminal law in general and criminal procedure code in particular. The two regimes which preceded the current federal system are known for their high centralization and unity in terms of uniformity, whereby nationality question was overlooked.[194] Consequently, there was and there is a monolithic criminal procedure code. Thus, due to the fact that the change of regime took place, the Constitution has adopted a federal form of government, and recognized ethno-linguistic and multiculturalism of each NNP in Ethiopia,

[192]Fisher, Stanley Z, *Traditional Criminal Procedure in Ethiopia,* The American Journal of comparative law, Vol. 19, No. 4,1971, P.709

[193]Yenenesh, Supra note at 3, p.40

[194]Proclamation No.1/1987, the Constitution of PDRE, Art.2 (2) & (5) which recognized the equality of nationalities and which ensured the equality, development and respectability of the languages of nationalities. Compared with the monarchical regime, the PDRE constitution gave recognition to the nationality question.

hence the States should be empowered to exercise the power of enacting the criminal procedure code of their own.

Furthermore, since some Regional States such as Oromia have unique features that are capable of differentiating it from other States in Ethiopia, the criminal procedure legislative power should be vested in each of them. The Constitution enshrines that the special interest of the State of Oromia in Addis Ababa, regarding the provision of social services or the utilization of natural resources and other similar matters, as well as joint administrative matters arising from the location of Addis Ababa within the State of Oromia, shall be respected.[195] Finfinnee is the capital city and the seat of the Oromia Regional State Government. The jurisdiction of criminal cases on crimes which are committed against the interests of the Oromia Regional State Government, crimes committed or omitted by the employees and officials thereof in Finfinnee should be determined by criminal procedure code of Oromia, not by that of the Federal Government's. Which police should conduct criminal investigations, which public prosecutors should prosecute offenders and which court should adjudicate crimes committed by any person against the interests of Oromia in Finfinnee or crimes committed by the employees and officials of the Oromia Regional Government must be set out by and in the criminal procedure code which Oromia would enact.

Accordingly, the Oromia Regional State has made an attempt to enact its own criminal procedure code.[196] This State government requested the Ministry of Capacity Building Minister[197] so that the draft criminal procedure code of the FDRE which is not yet put into force should include the Oromia Regional State unique features, 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 of Capacity Building permitted all Regional States including Addis Ababa and Dire Dawa City Administrations to enact their own respective criminal procedure code.[198] By the way, the reasons provided by the Oromia Regional State in the request are so sufficient that it can enact its own criminal procedure code.

[195] Supra note at 1, Art.49(5)

[196]The Draft Criminal Procedure Code of the Oromia Regional State, 2011, Finfinnee

[197]Read Annex 7, [p.1-4]

[198] Read Annex 8

However, the question which ought to be posed here is that, is it mandatory for the States to ask for the Federal Government in order to enact laws or exercise powers they derive from the benefit of the constitutionally guaranteed residual powers? How do the States exercise the powers they derive from the enactment of criminal procedure code of their own? What if they simply enact or exercise powers which are residually reserved to them in general and criminal procedure code in particular? What is the constitutional status of the role of the Federal Ministry of Capacity Building in resolving constitutional disputes? As per Art.62 and 83 of the Constitution, the power of constitutional interpretation is vested in the HOF but the Oromia Regional State requested the federal executive organ, the Ministry of capacity Building (presently known as the Ministry of Civil Service and Good Governance). This shows that there is a political inconvenience for the States to exercise their powers which the Constitution has already conferred upon them under the residual category in general and criminal procedure code in particular.

In spite of the fact that there are sound and feasible arguments as have been stated above, the federal government is moving toward centralization of the criminal procedure code.[199] The preamble of the FDRE Draft Criminal procedure Code traces the power of enacting the criminal procedure code back to Art.55 (1) and 55(5) of the Constitution especially the latter provision which deals with criminal code and other criminal legislations. Concerning the difference between the criminal code (the substantive one) and criminal procedure code, we have seen in the foregoing discussion, as they are two different issues. But the FDRE Draft Criminal Procedure Code has equated the two themes and made the power of enacting criminal procedure code the federal legislative power. One may be tempted here to question by what authority (constitutional interpretation) is the Federal Government enacting a unified criminal procedure code? Is it not the fact that the Federal Government is centralizing and unifying a criminal procedure law against the Constitution (as the residual power is vested in the States)?

The writer emphatically argues that the FDRE Draft Criminal Procedure Code is unconstitutional. Firstly, Art.55 (5) which is the establishing constitutional provision of the Draft Criminal Procedure Code deals with only criminal code and other criminal legislations. It does not include criminal procedure law. In such cases, as per Art.52 (1) of the Constitution, the

[199]See the Draft Criminal Procedure Code of the FDRE.

power of criminal procedure code enactment is vested in the States in the name of residual power. Secondly, the justifications raised hereinabove concerning the fact that the States should enact their respective criminal procedure code is also supplementary reasons to the claim of the unconstitutionality of the Draft Criminal procedure Code. Thus, there is a claim and counterclaim between the Federal Government and the States with respect to the criminal procedure legislative power. Moreover, the preamble of the FDRE Draft Criminal procedure Code states that the aim of the Criminal Procedure Code is to harmonize the Ethiopian criminal justice system with the human rights guaranteed in order to protect and respect them in discharging obligations and responsibilities imposed on government of any level. The right to self-determination is one of the rights guaranteed by the Constitution, as a group right, to each NNP in Ethiopia. While the Draft Criminal Procedure Code has in view the duty of respecting and protecting human rights and fundamental freedoms, it has violated the right to self-determination of each NNP in centralizing and unifying almost criminal procedure issues thereby denying the States the right to exercise their right to self-determination in respect of criminal procedure law.

### 3.8. The Tradeoff of Uniformity and Diversity in Respect of Criminal Legislative Power in Ethiopia

Even though the Preamble of the Constitution provides a 'one economic community' clause as a necessity for the creation of sustainable and mutually supportive conditions for ensuring respect for the human rights and fundamental freedoms and for the collective promotion of the interests of the NNP, the overall constitutional implication on the other hand recognizes diversity and legal pluralism. The notion of uniformity should be able to be put a par with that of diversity or legal pluralism. This is also the suggestion and ideology of the Constitution. This holds true in criminal legislative jurisdiction as well, as there is nothing that distinguishes criminal law from other subjects. Many academics, especially those who are the advocates of centrist or unitarist view, bother about uniformity where there is a claim for legal pluralism in criminal law.

Probably, there is a potential fear that if criminal legislative power is granted to the States, disparity in criminal law will take place that puts human rights at risk; there may be a discrepancy or disproportion of penalties over the same crimes committed or omitted within different States. Even, what constitutes a criminal offence in one State may not be the case in another. Despite all these and other perceived trepidation, the Constitution itself has already designed how uniformity and diversity or legal pluralism in general and criminal law in particular, should be kept in equilibrium. These are presented as follows.

### 3.8.1. Constitutional supremacy

Art.9 (1) of the Constitution states that the Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect. The doctrine of the constitutional supremacy dictates any law (federal or regional), customary practice (practices that are inbuilt in cultural settings and tradition of each NNP in Ethiopia), and decision of a government organ to be in conformity with the Constitution. In case they are found to be against the Constitution, the consequence entailed is voidness. This indicates that if the States are empowered to make their own criminal laws, the constitutionality or otherwise thereof will be tested by the doctrine of the constitutional supremacy. If the criminal laws enacted by the States contradict with the Constitution, no doubt, they will become void or of no effect.

Sub-Article 2 of Art.9 also stresses that all citizens, organs of state, political organizations, other associations as well as their officials have the duty to ensure observance of the Constitution and to obey it. This shows also that while the State government organs, more particularly, the State Councils enact criminal laws, they must obey the terms of the Constitution. This enables the State Councils to be vigilant enough not to enact criminal laws which are against the Constitution. Thus, a prior watchfulness of the State Councils in a business of criminal legislation by observing the Constitution is a preventive mechanism in which case criminal laws so enacted by the States will be saved from a declaration of unconstitutionality.

### 3.8.2. The principle of Human Rights

The principle of human rights is another way of keeping the uniformity and diversity in criminal law in balance. Art.13 (1) of the Constitution provides that all Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this [Chapter Three]. Thus, the State Councils should take into account the duty and responsibility of respecting and enforcing human rights while they enact their own criminal laws. This shows that the duty and responsibility of respecting and enforcing human rights is not imposed only upon the Federal Government which currently centralized criminal law in Ethiopia but it is also imposed upon the States. Thus, there is no a constitutional claim that the Federal Government is in a better position to respect, protect, and enforce human rights than the States. Rather, there are scholars who argue that the States are at liberty to guarantee better protection to their people through their Bills of Rights.[200]

Accordingly, the States are expected to guarantee a better human rights protection subject to the minimum standards stipulated in the FDRE Constitution in the regime of human rights catalog while they are in a position to enact their criminal laws. The marked benchmark is, therefore, the State Councils must meet the requirements so demanded in the protection of human rights if they are empowered to enact the criminal laws of their own.

### 3.8.3. The Federal Cassation

The Federal Supreme Court has a power of cassation over any final court decision containing a basic error of law.[201] The law and practice reveals that the Federal Supreme Court reviews the final decisions of the federal and state matters which are exhausted at both Federal and State Courts. Putting aside the debate of the fact that the Federal Supreme Court reviews the final decisions over state matters goes against the principle of federalism, this precedent developed by the federal cassation over any final decision may be helpful in maintaining uniformity in criminal legal pluralism.

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[200]Yonas Birmeta,(2011). *Bll of Rights in Sub-national Constitutions in Ethiopia*. In Yonas Birmeta (ed.), Some Observations on Sub-national Constitutions in Ethiopia (p.22-59), Ethiopian Constitutional Law Series, Vol. IV, AAU School of Law, p.24

[201]Supra note at 1, Art.80 (3, a). Art.10 of Proclamation No.25/96 also elaborates the cassation power of the Federal Supreme Court in case there is a basic error of law. These are final decisions of the Federal High Court rendered in its appellate jurisdiction; final decisions of the regular division of the Federal Supreme Court; final decisions of the Regional Supreme Court rendered as a regular division or in its appellate jurisdiction.

### 3.8.4. The Criminal Code

No wonder, the fact that the Constitution vests the power of enactment of a criminal code in the Federal Government is very important in maintaining the uniformity of criminal laws in Ethiopia. But this does not mean that the criminal code purported by the Constitution should incorporate as many crimes as possible like the one of the present day FDRE. Rather, it is of importance in setting general guidelines and standards with regard to criminal rules and principles such as the provisions dealing with the General part of the Criminal Code.

This implies that the States can enact their criminal laws within the minimum standards set by the Criminal Code in the General Part as a whole. Thus, the General Part is capable of maintaining uniformity of criminal activities where the States are empowered to enact the criminal laws of their own.

### 3.8.5. The Scenario of Art.55 (6)

Art.55 (6) of the Constitution has an impressive scenario in the determination of criminal legislative power in Ethiopia. It states that the HPR shall enact civil laws which the House of the Federation deems necessary to establish and sustain one economic community. In principle, civil law is the power of the States. But for the sake of establishment and sustainability of one economic community, upon suggestions as provided by the HOF, the HPR enacts civil laws. This is intended for the maintenance of uniformity within the multicultural and multiethnic societies of Ethiopia. There is no reason why this very provision is not applicable to the criminal law as well.  A similar move can be taken by the HPR to enact a criminal law that is capable of establishing one economic community upon the suggestion provided by the HOF recognizing the criminal legislative power of the State.

## 3.9. Consequences of Centralization of Criminal Law and Policy in the FDRE

In the previous discussions, we have seen that although there are justifiable reasons based on the Constitution, general guiding principles of the distribution of powers and experiences of different federations on criminal legislative power that it should be divided between the Federal Government and the States, criminal law and policy in Ethiopia has been pursuing centralized and unified approach. This centralized trend of criminal law in its substantive and procedural spheres has its own consequences. The major consequences are mentioned and discussed as follows.

### 3.9.6. Dependence of the States on the Federal Government

In the tenet of federalism, there is no superior-subordinate relationship between a central government and the constituent units nor is their relationship a way that one order of government becomes dependent over the other. Rather there must be an interdependent relationship between them. This applies to the criminal law and policy as well. However, in Ethiopia, both criminal code and criminal procedure code has been taken over by the Federal Government and the States have become dependent upon it for criminal issues. Although the States have their respective unique features in respect of cultural, historical, linguistic, identity and administrative spheres, they are made to look to the Federal Government for the criminal legislative power.

If the Regional States depend upon the central government for criminal affairs, it would mean that they cannot determine the criminality or otherwise of a certain act within their own jurisdiction. Neither do they determine the jurisdiction of their courts, how the police and public prosecutors investigate and prosecute crimes and criminals which occur within their geographical location, crimes committed against their interests, and crimes committed or omitted by their employees and officials. In all these and other related subjects, the Regional States are made to wait for the Federal Government in order for the latter to enact criminal laws and policy for the former one.

The fact that the States are made to become dependent upon the Federal Government for the criminal legislative power reveals itself in the breach of regional autonomy of the States. In the doctrine of the distribution of powers in federations, the constituent units are autonomous to exercise those powers which are vested in them by the constitution. The fact that the states are autonomous in exercising powers which they are conferred with also extends to criminal law as well. If such a power is dominated by a central government, it results in a breach of regional autonomy and predisposes the states to a mere entity that cannot determine its own affairs on the area of criminal matters. The federal government at any time intrudes into the jurisdictions of the states. Criminal law and policy in Ethiopia is highly centralized and the criminal code and criminal procedure code is unified so that it would be applicable across the whole Country irrespective of cultural, historical, and administrative unique features underlying each State. This is obviously against the regional autonomy of the States in respects of criminal legislative power over matters falling under their jurisdiction.

If the doctrine of regional autonomy is not respected by the federal government as enshrined by the constitution, it is hardly possible to assert that there exists a federal system. Successive breach and arbitrary removal of regional autonomy from the states is a reflective of the feature of a unitary state because in the latter type of state, there is no constitutionally guaranteed distribution of powers. The provinces in a unitary state are the extended arms of the central government. Every decision making and policy formulation including criminal matters is conducted by the central government. Hence, concerning criminal law and policy in the present day Ethiopia, since criminal legislative power is dominated by the Federal Government, the Regional States are not much more than the administrative provinces in the unitary state of the past regimes.

### 3.9.7. Dilution of the Scope of the Right to Self-Determination of the NNP

A superficial reading of Art.39 of the FDRE Constitution which deals with the right to self-determination, including the right to secession and those rights which also extend to the preservation and promotion of history, culture, language and identity may surprise one that every Regional State in Ethiopia has a broad power. But when these issues are closely looked into by the litmus test of criminal legislative power, they are empty provisions as the criminal wing thereof has been taken over by the FDRE Criminal Code and Draft Criminal Procedure Code. The States do not have a say on criminal legislative power over matters enumerated hereinabove as an extension of the right to self-determination of the NNP. The FDRE Criminal Code has almost exhausted crimes which are capable of featuring regional character as well.

Consequently, the scope of the right to self-determination of each NNP in Ethiopia, *inter alia*, is the difference of the pack of it minus the criminal legislative power. Hence, the right to self-determination guaranteed by the Constitution is thinned down. Whoever wants to talk of the right to self-determination granted to the NNP in Ethiopia may do so by excluding the criminal legislative power from the right taking into account the exhaustiveness of criminal law and domination of the Federal Government in criminal policy and the political landscape of the day.

The dilution of the right to self-determination may also be reflected in the breach of self-rule which is one an inherent element of federalism. Ignorance of the principle of self-rule in favouring shared rule results in an unbalanced treatment as between the Federal Government and the States. The States have the power to govern their own affairs including criminal matters under the self-rule principle. However, since criminal legislative power has been taken away from them by the Federal Government, the probability of the States' self-rule in respect of criminal law and policy is less and as a result, the notion of federalism in terms of criminal laws turns to be centralization rather than federalization.

Centralized legislative power in general and criminal law in particular, though some federations such as Switzerland are the main examples, is the characteristic feature of a unitary state or centralized government. Thus, in terms of criminal law and policy in Ethiopia, there is a trend of progressive centralization.

### 3.9.8. Creation of Power Conflict between the Federal Government and the States

The Constitution has provided that the States shall respect the powers of the Federal Government and the Federal Government shall likewise respect the powers of the States.[202] This mutual respect of power between the Federal Government and the States governs the constitutional and proper way of exercising of powers between the two orders of government as per the Constitution more particularly, one order of government is expected to exercise powers over matters granted to it under the distribution of powers. Accordingly, while the Federal Government should exercise powers, including criminal law, over matters falling under its jurisdiction (Art.51, 55, and 77 of the Constitution), the States should exercise powers over matters falling under their respective jurisdictions (Art.39 and 52 of the Constitution). It is a strong belief of the writer, as explained in the previous discussion, that the States should enact criminal legislations and criminal procedure code over matters falling under their jurisdictions.

Nevertheless, transgressing the constitutional tenet of the mutual respect of power as between the Federal Government and the States, the former is moving toward centralizing and unifying a criminal procedure code which results in constitutional dispute. For instance, Oromia Regional State claims that the criminal procedure legislative power is conferred upon the Regional States and then it is

[202]Supra note at 1, Art.50(8)

striving to enact its own criminal procedure code taking into account its unique regional features. The Federal Government, on the other hand, apparently counterclaims that the criminal procedure legislative power should belong to it as per Art.55 (5) of the Constitution. Thus, such a claim and counterclaim between the two orders of government results in power conflict.

### 3.9.9. Denial of Adaptation of States to Exercise Criminal Jurisdiction of Their Own

Like that of the HPR of the Federal Government, the State Councils of the Regional States are the lawmaking organs which are empowered to make laws concerning the regional affairs. Criminal affair is one of the subjects concerning regional matters within the limits of their jurisdictional powers. The practice however shows that the HPR dominates exercising criminal legislative power at the expense of the State Councils even over crimes which characterize regional features. This trend denies the State Councils to adapt themselves to enacting criminal legislation on matters falling under the jurisdiction of the States. Moreover, downplaying the State Councils in the area of criminal legislative processes may cause them to be reluctant even in the future to enact criminal laws of the Regional States.

Accordingly, they become weak in technicalities, skill and experience of criminal legislative activities. They remain to become strange to making criminal laws of both substantive and procedural dimensions. They are left limited only to civil matters as far as lawmaking power is concerned. This is the other way of making the Regional States to become dependent upon the Federal Government as discussed above with regard to criminal legislative power.

### 3.9.10. Imposition of Criminal Laws Which the States Would not be Ready to Accept

Ethiopia is characterized by the presence of multicultural, multilingual and multiethnic societies. It is the home for NNP which are diverse in culture, language, tradition, religion and custom. Criminal law is also inbuilt in these subjects and relative to each NNP in Ethiopia. On the contrary, the Federal Government has centralized criminal law at the expense of this diversity. The centralized and unified criminal law and policy may or may not conform to each NNP as they have as diverse cultures and traditions as their number. This indicates that although the Federal Government centralized criminal law so that it would be applicable across the whole country, its effectiveness is dubious. To this end, Abera has clearly propounded in the following words:

> *A legal system of a given society can be effective only if it is reflective of the character of the society. The Ethiopian criminal justice system can also be more effective if it becomes responsive to the needs of the pluralistic character of the Ethiopian society. In order to make it more responsive, there has to be a shift of policy away from the current monistic approach towards more pluralistic criminal justice approach. Today more and more countries and people are looking for a better criminal justice model within their existing traditions and cultures and finding culturally appropriate practices that can be used in criminal justice process. In view of this global trend, one would wonder why in Ethiopia, where there are multiplicities of legal norms, the previous exclusivist and centralist criminal policy is being maintained. As things stand, the Ethiopian formal criminal justice system seems to remain faithful to its old 'one-size-fits-all' criminal policy.*[203]

Thus, in order for the Ethiopian criminal law and policy to be effective, it should be able to respond to the diverse cleavages of the NNP. Otherwise, it appears to be an imposition on the Regional States which may not fit and reflect their respective contexts. The 'one-size-fits-all' adage cannot be applicable to the criminal law as there are pluralistic societies in Ethiopia.

To date, we have been looking at the criminal legislative jurisdiction in Ethiopia and elsewhere in other federations. In the subsequent chapter, an attempt will be made to discuss the criminal enforcement jurisdiction in Ethiopia.

[203] Abera, Supra note at 158, p.148

# Chapter Four

## Criminal Executive Jurisdiction in Ethiopia

### Introduction

In chapter three, an attempt has been made to explicate the notion of the criminal legislative jurisdiction in some federations including Ethiopia. A discussion has also been made in the consideration of the criminal procedure legislative power in addition to that of the substantive criminal legislative power under the umbrella of criminal law. Criminal laws, whether they are enacted by the Federal Government or the States do not make sense unless they are enforced or executed by the concerned agencies at both federal and state levels. It is therefore, the aim of this chapter to deal with the execution or enforcement of criminal laws in Ethiopia.

The term “executive” herein used is meant to delineate the distinction between the criminal legislative and adjudicative jurisdiction of criminal laws as provided for by the Constitution and in this very thesis. We could find the notion of the criminal executive jurisdiction in the middle of criminal legislative and adjudicative jurisdictions. More particularly, this chapter is devoted to the discussion of those institutions which are supposed to carry out criminal investigations such as police, and criminal prosecution such as public prosecution and other related institutions which have direct or indirect relations with criminal administration both at federal and state levels.

To begin with, how is criminal law executed by the Federal Government and the States? What is the demarcating line between the Federal criminal actors and the State ones as far as the criminal enforcement jurisdiction is concerned? How do they apportion the function of criminal execution? More particularly, how do the Federal Police and the State Police carry out criminal investigation? What guidelines do they use to identify the power of the Federal Police or that of the State Police? What about the public prosecutors of the two tiers of government? How are the State criminal justice actors executing the Federal Criminal Code as it is the federal law? Are they enforcing it by delegation with funded mandate or unfunded mandate? Are they doing it arbitrarily or is there any law which governs the relationship between the federal criminal justice actors and that of the States? What is the stand of the Constitution, and what is dominant trend taking root on the ground? These and other questions are worth arising before the commencement of the discussion.

**4.1. The Constitutional Basis of Criminal Executive Jurisdiction**

As hinted on in the foregoing discussion, the powers of the federal government and of the States are defined by the constitution under the doctrine of the distribution of powers. This caveat is *mutatis mutandis* applicable to criminal enforcement jurisdiction. Both the Federal Government and the States have their respective executive organs in general and criminal executive organs in particular which results in parallel justice actors. Accordingly, while the Federal Government is empowered to establish and administer national defence, public security forces and federal police force,[204] the States are empowered to establish and administer their police force and public security.[205] Consequently, the HPR enacted laws which regulate these institutions and the State Councils also enacted laws which establish the state police force and security. From this, we could observe that both the Federal Government and the States have their own police forces and security forces, notwithstanding that the defence force is the exclusive jurisdiction of the former. These institutions together with others such as the Ministry and Bureau of Justice, the Ministry of Federal affairs and the Anti-Corruption Commission are responsible for the maintenance of peace, security and order of the state and the peoples. This responsibility is reaffirmed by the Criminal Code, hence the very purpose of it.

The parallel criminal justice actors that exist at the federal and state levels which are also constitutionally grounded may raise such questions as provided in the above discussion. If the federal criminal justice actors execute the Criminal Code and other federal criminal laws, and the state criminal justice actors execute criminal laws made by the States, the issues of the scope of application, the fact that the Criminal Code monopolized nearly all acts that are capable of constituting criminal offences hence centralized criminal law under the federal jurisdiction, and whether the Federal criminal justice actors are able to execute all crimes under the Criminal Code on the one hand, and how the state criminal justice actors share such duty from the federal criminal justice actors on the other, become questions at stake. Before launching to address these

[204]Supra note at 1, Art.51(6)

[205]Id, Art.52(2,g)

questions, let us first describe the federal and state criminal justice actors that are beholden with criminal enforcement responsibility.

### 4.2. The Federal Criminal Justice Actors

In the general function of maintaining peace, security and order of the state and the people as a whole, there are many institutions which are responsible for the enforcement or execution of criminal laws at federal level. Some of these are mentioned and discussed in the following manner.

#### 4.2.1. The Federal Police Force

The Federal Police Commission is one of the criminal justice actors established at the federal level for the purpose of serving the public, respecting, ensuring the observance of human and democratic rights, and maintaining peace and welfare of the public at large. The objective of the Commission is to maintain peace and security of the public by complying to and enforcing the Constitution and other laws of the country, and by preventing crime through participation of the people.[206] It is provided that the Police Commission of the Addis Ababa City Administration and the Police Commission of Dire Dawa City Administration shall be established under the Federal Police Commission. Thus, the criminal enforcement jurisdiction in the two Cities with that of the Federal Government is not an issue at stake *pro tem,* as the police forces of the two Cities are unified with the Federal Police Commission. The question of criminal enforcement jurisdiction remains an issue in the nine Regional States with the exclusion of the two Cities vis-à-vis the Federal Police Commission.

To this effect, the Proclamation has set out two mechanisms in an attempt to identify the criminal enforcement jurisdiction of the Federal Police Commission from that of the Regional States'. 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.[207] In view of this provision, the Federal Police Commission

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[206] Proclamation No. 313/2003, Federal Police Commission Proclamation, 9th year, No.30, *Negarit Gazeta*, 4th January, 2003, Art.6

[207] Id, Art.5(3)

carries out criminal enforcement of the federal matters as its branches are established at the regional levels. This shows that the Ethiopian criminal enforcement jurisdiction is dual in principle. Whether the establishment of the branch of the Federal Police Commission in each or some of the Regional States is feasible or not, whether such an attempt has been made or not to date is some of the questions to pose in the meantime. Assuming that the Federal Police Commission establishes its branches in each Region; can they work without the Regional Police Commission as the crimes which are covered under the Criminal Code all belong to the Federal Government, hence federal law? What is the Regional Police Commission left with, then? That is to say, if the Federal Police Commission is there in the Regions to enforce the Federal criminal laws which are nearly exhausted in the Criminal Code, then what is the fate of the Regional Police Commission? Is it possible to avoid the Regional Police cooperation in the criminal enforcement anyway? All these and other related questions may lead us to opine that if the Federal Police Commission enforces the Federal criminal laws and the Regional Police Commission enforces the State criminal laws, one could easily deduce from the point of view of the scope of criminal legislative jurisdiction of the two orders of government that the Regional Police Commission will be left with an insignificant place in the criminal enforcement jurisdiction. But from the practical point of view, this does not hold true. The Regional Police Commission is exercising the criminal enforcement jurisdiction whose criminal legislative jurisdiction already belongs to the Federal Government. The question comes by what authority, law, or system is the Regional Police Commission exercising the Federal criminal laws? This question will be addressed as the discussion goes on.

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 matters or powers.[208] The illustrative method is strongly connected with the enumeration of subject matters that are supposed to fall under the jurisdiction of the Federal Police Commission. For instance, prevention of any activity that may violate the Constitution and that may endanger the constitutional order, prevention of violence against public peace, hooliganism, terrorism, trafficking in and transferring of drugs, safeguarding the security of borders, airports, railway lines and terminals, mining areas, and other vital institutions of the Federal Government. The

[208]Id, Art.7

other method strongly related with this category is the mechanism that qualifies the interest or the institution. Accordingly, prevention of crimes against the interests and institutions of the Federal Government, giving security protection to higher officials of the Federal Government and dignitaries of foreign countries, execution of orders issued by the Federal Public Prosecutor in regard to investigation of crimes, *inter alia*, are the criminal enforcement jurisdiction of the Federal Police Commission. The other criminal enforcement jurisdiction that falls in the Federal Police Commission is the prevention and investigation of crimes that fall under the jurisdiction of Federal Courts. This takes us to the notion of criminal adjudicative jurisdiction of Federal Courts and the State Courts which is the main theme of chapter five.

From the above description of the criminal enforcement jurisdiction of the Federal Police Commission, we can easily consider that not all crimes enumerated in the Criminal Code fall under the Federal Government in the area of the criminal execution jurisdiction. This is justified by the fact that the criminal enforcement jurisdiction of the Federal Police Commission is qualifiedly presented in the Proclamation on the one hand, and putting all crimes listed in the Criminal Code in the Federal Police Commission for their execution with the exclusion of the Regional Police Commission is impracticable on the other. Thus, crimes which are not described any way in the above discussion (or in the Proclamation) to be designated as the power of the Federal Police Commission may fall under the Regional Police Commission for their enforcement jurisdiction. But how do the State criminal justice actors enforce the Federal Criminal Laws?

The constitutional and legal mechanism through which the Regional Police Commission enforces the criminal laws on behalf of the Federal Police Commission is delegation. The notion of delegation in criminal enforcement jurisdiction has gained constitutional background[209] in general and statutory root[210] in particular. We have seen, in the previous discussion, that the doctrine of delegation under the FDRE Constitution entails the reimbursement of financial

[209]Supra note at 1, Art.50 (9) provides that the Federal Government may, when necessary, delegate to the States powers and functions granted to it by Art.51 of the Constitution.

[210]Supra note at 205, Art.7 (15) provides that the Federal Police Commission may delegate, when it is deemed necessary, the powers given to it by this Proclamation to Regional Police Commissions. Sub-Article 16 of the same Article extends the delegation to other organs and civil servants for the execution of certain functions.

expenditures by the delegating party (the Federal Government). Compensating budget is required in the areas of human resource fulfillment, institutional set up and proper and accessible implementation of criminal laws. For instance, Art.123 (3) of the Swiss Constitution provides that the Confederation may grant subsidies to the Cantons for the construction of institutions and the improved carrying out of penalties and measures. This is because criminal administration is conducted by the Cantons even though it is legislatively centralized. In the discussion at hand, if the Federal Police Commission wants to delegate some of its functions to the Regional Police Commission, it should, in the first place, be able to cover the financial expenditures so required for the criminal enforcement. This is a mandatory provision until and unless otherwise agreed between the Federal and Regional Police Commission so that the delegation would be gratuitous. This is supposed to be regulated by a statutory law. But the Federal Police Commission establishment Proclamation overlooks the financial expenditure clause after the delegation stipulation.

One may be tempted to question as to whether it is only the Federal Police Commission, i.e. not the Regional Police Commission, or both, which should be in charge of the criminal enforcement, on their part, especially in the execution of the Criminal Code. Actually, the Constitution does not clearly, in a separate provision, specify the criminal enforcement jurisdiction and whose power and function it should be. But there are constitutional inferences which enable us to conclude that in principle, criminal laws made by the HPR should be enforced by the Federal criminal justice actors and criminal laws, if any, enacted by the State Councils are to be enforced by the State criminal justice actors. Thus, the principle follows the duality of criminal enforcement jurisdiction, because the Federal Government and the States have their own criminal law-making organs, and criminal law-enforcing organs. This leads one to state that as the Federal Government centralizes the criminal law, the duty of enforcing it turns against itself unless the issue is alleviated through the law of delegation.

### 4.2.2. The Ministry Of Justice

The Ministry of Justice is one of the Federal institutions that are meant to take part in criminal enforcement task at the federal level. It serves the Federal Government representing it in criminal cases falling under the jurisdiction of the Federal Courts.[211] The question which crimes fall under the jurisdiction of the Federal Courts and which ones in the State Courts will be addressed in the next chapter. The Ministry of Justice is the superior authority to direct and supervise the Federal Police Force and prison administration. It instructs 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 cause.[212] Moreover, the Ministry of Justice has other functions and powers which are vested in it.

### 4.2.3. The Federal Anti-Corruption Commission

As one criminal justice actor, the Federal Anti-Corruption Commission (hereinafter referred to as the Commission) deals with special type of crimes involving corruption offences. These corruption offences are enumerated under the Criminal Code.[213] The corruption offences are made to be administered and enforced by special criminal justice actor called the Ethics and Anti-Corruption Commission, and also to be followed up and processed by its own special procedure and evidence rules and principles. The objective of the Commission is mainly three-folds: awareness creation about corruption and its consequences, prevention of corruption offences, and exposition, investigation and prosecution of corruption offences.[214] Without prejudice to the powers and functions of the Commission which also pertains, *inter alia,* to the investigation and prosecution of corruption offences, it is noteworthy to question as to what is the scope of the corruption criminal enforcement jurisdiction of the Commission. Is it limited only to the corruption offences involving the Federal officials and employees? Or does it include those of the regional officials and employees? As it will be discussed in the following, what is the status of the regional anti-corruption commission over corruption offences? What is also the scope of their corruption criminal enforcement jurisdiction when seen from the federal perspective?

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[211]Supra note at 206, Art.23(2)

[212]Id, Sub-Article (4)

[213]Art.407-442 of the Criminal Code deals mainly with corruption offences in their various respects and manifestation.

[214]The Revised Federal Ethics and Anti-Corruption Commission Establishment, Proclamation No.433/2005, *Negarit Gazeta*, 11th year, No.18, 2nd February, 2005, Art.6

All these and other related questions are strongly connected with setting the borderline of the criminal enforcement jurisdiction of the Federal and Regional Anti-Corruption Commissions over corruption offences. It seems that the Federal Anti-Corruption Commission enforces corruption criminal law which is related with the federal officials, employees, enterprises and offices, and the Regional Anti-Corruption Commission on the other hand enforces those corruption offences related with the regional officials, employees and offices. But a close reading of the Proclamation under consideration may lead us to the conclusion that the Federal Anti-Corruption Commission enforces (i.e., conducts investigation and prosecution) corruption offences which are related with both the federal and regional officials, employees and offices.[215] If this holds so, then how is the regional anti-corruption commission established, by delegation or as an inherent power of the States? As far as the delegation is concerned, the Commission may delegate the investigatory power of corruption offences to the Federal or Regional crime investigation bodies. Apart from this, the Federal or Regional crime investigation bodies have the power only of commencing the investigation of corruption offences upon notification of same to the Commission forthwith. This is all about the delegation of crime investigation bodies other than the regional anti-corruption commission.

With respect to the prosecution of corruption offences, the Commission may delegate it to the Federal or Regional prosecution offices or regional anti-corruption institutions. One may question as to how the regional prosecution offices and the anti-corruption institutions go about the prosecution of corruption offences? How does the Commission identify which institution it is going to delegate and which kind of corruption offences? And what are the parameters to do so? Here, one must bear in mind that although the general principle is that the Commission may delegate the power of corruption offence prosecution to the Federal or Regional prosecution offices or regional anti-corruption institutions, there is an exceptional provision relating to the

[215] Art.7 (4) provides that the Commission has the power to investigate and prosecute or cause the investigation and the prosecution of any alleged or suspected corruption offences specified in the criminal code or in other laws where they are committed by public officials or public employees or other persons in Public Offices or Public Enterprises, or in the Regional offices relating to subsidies granted by the Federal Government to the Regions. Art.2 (5, 6) of the same Proclamation defines the terms “public officials or public employees” those officials and employees who are involved in the Federal and the State governments, and the Addis Ababa and Dire Dawa City Administrations.

federal subsidies. Accordingly, regional anti-corruption or prosecution offices may institute corruption offence proceedings in the regional offices relating to subsidies granted by the federal government to the regions; and the Commission, when it deems necessary, may at any time substitutes the Regional anti-corruption office or prosecutor and enters into the proceeding.[216] The Regional prosecution and anti-corruption institutions shall be accountable to the Commission when they investigate and prosecute in accordance with the delegation given to them.

#### 4.2.4. The National Anti-Terrorism Coordinating Committee

This Committee is established for the purpose of prevention and control of terrorist acts. It comprises the respective heads of the Ministry of Justice, National Intelligence and Security Service and Federal Police. The Director General of the National Intelligence and Security Service shall lead the Committee. Terrorism cases are followed up by special or qualified personnel and specialized departments as the case may be.[217] The National Intelligence and Security Service shall select and assign officers who follow up cases of terrorism. Like the Ministry of Justice and the Federal Police, it shall also organize a separate specialized department which follows up terrorism cases.

Having said all this, it is noteworthy to speculate whether the Federal Government is able to prevent and control terrorism cases by its own selected bodies aforementioned with the non-involvement of the regional actors is an issue at stake. This is because the Proclamation dealing with the terrorist acts nowhere provides for the delegation clause as to whether the States could process the terrorist acts which are probably committed within their jurisdiction. It seems that all terrorism cases are entirely carried out by the Federal Government alone with its terrorism case

[216]Id, Art.9(2)

[217]Proclamation No.652/2009, Art.28 (1) provides that a public prosecutor or police officer who follows up terrorism cases in accordance with the powers conferred up on by law shall: a) have more than five years of relevant work experience and the appropriate training and be hard working; and b) have obtained testimonials from the relevant senior officials of the Ministry of Justice or the Federal Police as to his professional competency and ethics. Sub-Articles 2 and 3 of the same Article go to state that the Ministry of Justice and Federal Police shall organize a separate specialized department which follows up terrorism cases within their respective institutions.

actors. Although the law appears to be that the Federal Government alone is entrusted with the prevention and control of terrorist acts, and, investigation and prosecution of terrorism cases, the practice reveals that the Federal Government delegates the Regional Prosecution and Police Commission in certain circumstances for the investigation and prosecution of terrorism acts.[218]

Although the investigative, prosecutorial and adjudicative jurisdiction of terrorism cases fall under the Federal Government alone within special bodies only, the practice reveals that it becomes difficult to avoid the regional involvement in the cooperation of the Federal anti-terrorism actors in investigation, prosecution and adjudication.[219] The Anti-Terrorism Proclamation does not incorporate a delegation clause. On the other hand, however, it becomes inevitable for the States to take part in terrorism cases. This deadlock encounters the State Justice actors in controlling and preventing terrorism acts within their jurisdiction. Consequently, what the Ministry of Justice and Justice Bureau are doing is that they circulate an application letter in demanding and granting delegation power as between themselves in each occasion of terrorism cases. This is because there is no a law-based delegation clause over terrorism cases in that the Ministry of Justice, the Federal Police Commission and the Federal High and Supreme Courts delegate the Regional Justice Bureau, Police Commission and Supreme Court respectively.

Since there is a gap between the law and the practice with regard to the criminal enforcement authority of terrorism cases, we could observe that there is a day to day contact between the Ministry of Justice and the Justice Bureau on each case.[220] In light of the law, terrorism cases fall under the federal jurisdiction but the Regional Justice Bureau requests the power of delegation from the Ministry of Justice while the latter should have delegated the former with appropriate budget. It is after the Regional Justice Bureau puts forward a request that the Ministry of Justice

[218]An interview conducted with *Obbo Mul'isaa Abdiisaa,* a Public Prosecutor of the Oromia Regional State Justice Bureau. The interview was conducted on 07/11/2013

[219]Annex 1. In this annex, the content of the letter states that since the accused of the terrorist act objected the jurisdiction of the Oromia Justice Bureau over the prosecution of terrorism crimes, the latter requested the Ministry of Justice the express power of delegation over the specific case. Not only is the question of delegation at stake with respect to the Justice Bureau it also raises a question against the Oromia Supreme Court, the Southern Bench, whether it does have jurisdiction over terrorism cases anyway.

[220]Read Annex 3.

furnishes it with the power of delegation so that the Justice Bureau accomplishes the investigation and prosecution of terrorism cases.[221]

Nonetheless, the practice reveals that delegation does not appear to be a precondition for the Regional Police Commission to accomplish an investigation on terrorism cases provided that this is notified to the Federal Police Commission and through the Regional Administrative and Security Councils to the internal national security office.[222] This indicates that the Regional Police Commission is not expected to wait for the delegation from the Ministry of Justice to deal with terrorism acts upon the fulfillment of the above requirements. But it is of importance to state here that the delegation power is not only required for the authenticity of the criminal investigation power of the Regional Police but it also helps same in demanding expenses that is incurred in conducting the investigation, from the Federal Government.

### 4.3. The State Criminal Enforcement Actors

Parallel to the Federal Government, the States have their respective criminal enforcement actors. The regional criminal justice actors are supposed to carry out functions and powers related with criminal enforcement within the regional jurisdiction. The question to be addressed at the end of this chapter is how we can draw a line between the federal and regional jurisdiction in the area of criminal enforcement especially in relation to the Ministry of Justice (the Federal Public Prosecutor) and the Justice Bureau (the Regional Public Prosecutor) on one hand, and the Federal Police Commission and the Regional Police Commission on the other.

In principle, the Constitution does not expressly dictate the States to enforce federal laws in general and criminal laws in particular. Consequently, the Constitution sets out the doctrine of delegation.[223] Thus, the Regional criminal enforcement agencies execute criminal laws of the Federal Government by delegation. The issue of delegation on the other hand entails the fiscal

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[221]Read Annexes 1 and 2.

[222]Read Annex 4.

[223] A cumulative reading of Art.50 (9) and 51 of the FDRE Constitution contemplates delegation of powers by the Federal Government to the States. This delegation is not limited to legislative powers only but it also includes enforcement as a long list of powers of the Federal Government under Art.51 clearly demonstrates it.

consequence in which case the Federal Government should cover the financial expenditures so required by the State criminal enforcement agencies for the execution of the criminal laws.

However, as discussed in the previous chapter, the constitutions of all the Regional States in Ethiopia have incorporated the enforcement clause of the federal laws in their context.[224] Actually, this is helpful for the Federal Government as it reduces the financial expenditures it must have covered for the Regional Government in the enforcement of federal laws in general and criminal laws in particular. Thus, we can draw two perspectives as regards the federal laws enforcement by the States. From the Federal Government's perspective, the doctrine of delegation followed by the financial expenditure reimbursement is a mandatory requirement unless there is an exceptional concession otherwise on the expenditure clause. From the Regional States' perspective, however, the States may enforce federal laws with the reimbursement of expenditure by their own budget because it is their constitution which stipulates the enforcement of federal laws at free or without the need for any reimbursement from the Federal Government. The question comes can the Federal Government refuse to refund the States, if the latter requests, in the enforcement of federal laws invoking that once the States have conceded to implement the federal laws by their constitutions? In either perspective, the following organs are the regional institutions which are entrusted with the criminal enforcement tasks at regional level.

#### 4.3.1. Justice Bureau

The Regional Justice Bureau has many powers and functions.[225] From among the powers and functions of the Regional Justice Bureau and which needs to be the subject of the discussion under this very subsection are those which revolve around the criminal enforcement. As a result, the Regional Justice Bureau is vested with the power to investigate criminal matters falling under

[224]Art.55(1) of the Oromia, Art.56(1) of the Afar, Ar.58(1) of the Amhara, Art.59(1) of the Benishangul/Gumuz, Art.61(1) of the Gambella, Art.62(1) of the Harari, Art.59(1) of the Somalia, Art.66(1) of the SNNP, and Art.54(1) of the Tigray Regional States Constitutions

[225]Proclamation No. 132/2007, A Proclamation to Provide for the Definition of Powers and Duties of the Executive Organs of Oromia Regional State, Art.16 enumerates the powers and duties of the Oromia Justice Bureau. Accordingly, among others, guardianship of the constitutional system and the rule of law, protection of human rights and fundamental freedoms, delivery of legal advice and legal education, drafting of laws and comment upon the draft laws, consolidation and codification of the regional laws.

the jurisdiction of the Regional Courts in collaboration with the police; lodge charge representing the government on criminal matters, withdraw charge where it is necessary; lodge appeals to higher courts when dissatisfied with decision of lower courts, petition for review by way of cassation; cause criminal investigation when it has reason to believe that a crime has been committed and for discontinuance of an investigation on good cause or for further investigation.[226] What kind of crimes are supposed to fall under the Regional Courts so as to indentify the criminal investigative jurisdiction of the Justice Bureau together with the Regional Police? Is there any law which clearly stipulates the crimes which fall under the Regional Courts? If any, in what form (delegation, concurrent or exclusive) can we find it? These issues will actually be considered in relation to the criminal jurisdiction of the State Courts which is the main theme of the ensuing chapter.

Whether the Regional Public Prosecutors investigate crimes and prosecute criminals as of an inherent power or in the capacity of delegate power on behalf of the Ministry of Justice is an issue at stake. The principle and the parallel existence of the Ministry of Justice at the federal level and Justice Bureau at the State level indicates the duality of criminal enforcement jurisdiction of the Criminal Code and other federal criminal legislations on one hand and the ostensible state criminal laws on the other respectively. But we have seen in the previous discussions that the Federal Government centralized the criminal law and the States are left with few or no crimes to enact laws upon same. Thus, it is more likely that the State Justice Bureaus enforce the Federal criminal laws concerning crimes committed within their respective jurisdictions. In such cases, delegation becomes a necessary tool together with its consequential aspect, i.e., the reimbursement of the financial expenditures.

The other question to be posed in the meantime is whether the Regional public Prosecutor or the Regional Justice Bureau can sub-delegate its criminal investigative and prosecutorial power to other organs within the State, and whether it is duty bound to cover the financial expenditures so incurred by the delegatee in the enforcement of the criminal cases on which it is delegated. To this end, it is noteworthy to raise the case of the Oromia Regional State Justice Bureau that delegates the Regional Revenue Bureau to prosecute criminals connected with the crime of

[226]Id, Art.16(19, 20, 26)

revenue collection in the Region.[227] The issue of delegation from the Regional State Justice Bureau to other executive organs is not included in the State constitutions. The FDRE Constitution itself specifies the delegate power relationship between the Federal Government and the Regional States in general terms without going deep into other specific State executive organs.[228]

### 4.3.2. Regional Police Commission

Being one of the criminal justice actors, the regional police commission does have many powers and duties in relation to criminal enforcement jurisdiction. Among others, it prevents occurrence of criminal act and traffic accidents; causes the criminal investigation to be conducted in accordance with the constitutional and legal rights of the suspected and detained persons; prevents criminal acts against the interest of government and its organizations; analyses cause of crime and devises means of prevention, educates the community to protect themselves from criminal acts, publicizes selected criminal investigation cases to the community; investigates crimes which fall under the jurisdiction of the regional courts in collaboration with public prosecutor; causes proper handling of criminal investigation, and traffic accident files and various documents in collaboration with the public prosecutor and concerned bodies; collects and examines information and statistics regarding crime, transfers to concerned body as it is necessary.[229] From these provisions, we could easily observe that the regional police forces effectuate many functions relating to the criminal enforcement. One of the typical powers is investigation of crimes which fall under the regional courts. Such kind of crimes will be discussed in the following chapter.

[227] Read Annex 6

[228] Art.50 (9) of the FDRE Constitution states that the Federal Government may, when necessary, delegate to the States powers and functions granted to it by Art.51 of the Constitution. Whether this provision is also applicable to govern the delegate power relationship between and among the State executive organs is an issue to raise here.

[229] Proclamation No.163/2011, Reorganization and Redefinition of the Powers and Duties of the Executive Organs of the Oromia National Regional State, *Megeleta Oromia*, Finfinnee, April 9, 2011, Art.34(1-23)

### 4.3.3. Regional Anti-Corruption Commission

The Regional Anti-Corruption Commission has a lot of similarities with that of the Federal one. The objective, powers and functions, accountability, independence of the institution, among other things, are areas of similarities. The area of difference, perhaps, lies in the scope of application; while the Federal Anti-Corruption Commission operates throughout the Country, the regional one operates within the respective States as regards the corruption offences. Nevertheless, can we put a watertight compartment between the Federal and State Anti-Corruption Commission as far as the criminal enforcement of corruption offence is concerned? What is the status of the regional anti-corruption commission seen in light of the Federal one, delegation or inherent? If either of the two notions is the case, then, how come?

As hinted on in the preceding discussions, the crimes incorporated in the Criminal Code and other federal criminal legislations in general and corruption offences in particular, belong to the Federal Government and are expected to be enforced through and by federal agencies. Notwithstanding the State concession to the enforcement of the federal laws through their constitutions, the States shall defer to the notion and rule of delegation in order for them to enforce federal laws including the criminal laws as well. Coming to the regional anti-corruption commission as one criminal enforcing institution, it should be established in the capacity of the delegatee of the Federal Anti-Corruption Commission. This helps the regional anti-corruption commission to demand from the Federal Government the refund of expenses so required in the enforcement of the federal criminal laws. This implies also that the Regional States do not have an inherent power to establish an institution, such as anti-corruption commission, to undertake the criminal enforcement of corruption offences. Nonetheless, a close reading of the Regional anti-corruption commission laws indicate that the States appear to have an inherent power to establish their own anti-corruption institution as there is no an indication of the reference of such an authority from the delegation obtained from the Federal Government.

On the other hand, the Federal Anti-Corruption Commission seems to dominate all regimes of the corruption offences occurred in the Regional States as well. As touched upon in the above explanation pertaining to the Federal Anti-Corruption Commission, we have seen that the scope of the Commission is so broad that it also extends to the regional public officials and employees.

If so, one may wonder, what is the relevance of the establishment of the regional anti-corruption commission for the prevention, investigation and prosecution of the corruption offences? Or is it the extended arm of the Federal Anti-Corruption Commission at the Regional level? The Oromia Anti-Corruption Commission, for instance, shall have the power to prevent, investigate, and prosecute corruption offences in the public offices and public enterprises found in the Region, private sectors and NGOs whereby the public offices and public enterprises of the Region participate.[230] Apparently, the likelihood of the creation of conflict of jurisdiction may be at stake. But the Regional States cannot have any constitutional power to claim an inherent authority, and as a result, the Federal Anti-Corruption Commission could easily intervene and take over the power at any time under the guise of the doctrine of delegation stipulated by the Constitution. Thus, it is a bit difficult to draw a line between the scope of application of the federal and regional anti-corruption commission over corruption offences.

Generally, the criminal enforcement jurisdiction under the Ethiopian Constitutional and other statutory laws is decentralized to the States although the issue of delegation and its consequence, financial expenditure, has not been clearly stipulated and not governed by a particular law in delegating the States to enforce the Federal criminal laws.

In the following chapter, the writer will discuss the criminal adjudicative jurisdiction of the Federal Courts and the State Courts in light of the Constitution and other statutory laws.

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[230]Proclamation No.71/2003, Oromia Ethics and Anti-Corruption Commission Establishment Proclamation, *Megeleta* Oromia, Finfinne, June 22nd, 2001, Art.3

## Chapter Five

## Criminal Adjudicative Jurisdiction in Ethiopia

### Introduction

In the preceding chapters, we have been looking at, among others, the criminal legislative and enforcement jurisdictions. In this very chapter, an attempt will be made to discuss the criminal adjudicative jurisdiction of the Federal and State Courts; how criminal cases are entertained by the dual structure of the courts, and an emphasis is also going to be placed on whether the three levels of the State Courts (the First-Instance, High and Supreme Courts) have a criminal jurisdiction and how they would assume it.

### 5.1. The Constitutional Basis of Criminal Adjudicative Jurisdiction of Courts

Both the Federal and State Courts of any level (the First-Instance, High and Supreme Courts) have a constitutionally rooted foundation for their establishment. The Constitution, however, does not stipulate criminal adjudicative power in isolation from such other matters as civil matters in the discourse of providing for the judicial power of the Courts. Thus, the provisions contemplated by the Constitution, as far as the jurisdiction of the Courts is concerned, may also be applicable *mutatis mutandis* to the criminal adjudication. Furthermore, the Constitution is complemented by other subsidiary laws so as to deal with criminal adjudicative authority, as is going to be discussed in the following as the explanation goes on.

A broad view of the constitutional provisions contemplate that since the Federal Government and the States have their own judiciary, federal laws are adjudicated by the Federal Courts and the State laws are adjudicated by the State Courts. This comes true when the Federal Courts (especially, the Federal High and First-Instance Courts) are established throughout the Country. Assuming the Federal High and First-Instance Courts are established throughout the Country, what will be the fate of the State Courts in the entertainment of criminal cases, taking into account the highly centralized criminal laws or the exhaustive nature of the Criminal Code? We have seen that as the number of crimes incorporated in the Federal Criminal Code and other legislations increases, the criminal legislative jurisdiction of the States decreases, hence the State Courts' criminal adjudicative jurisdiction. Strictly speaking, if the Federal High and First-

Instance Courts are established throughout the Country in the nine Regional States and be there to entertain the federal criminal laws, then the likelihood of the opportunity for criminal adjudication of the State Courts becomes fantasy. Since this arrangement may not become true for different reasons such as lack of resources, delegation becomes the alternative constitutionally designed or envisaged.

### 5.1.1. The Issue of Delegated Criminal Adjudicative Power

The Constitution has directly established the Federal Supreme Court and empowered the HPR to establish the other two tiers of Courts—the Federal High and First-Instance Courts—by two-thirds majority vote, nationwide, or in some parts of the Country only, as it deems necessary.[231] Until the establishment of the two orders of federal courts, the jurisdictions of the Federal High Court and of the First-Instance Courts are delegated to the State Courts. From these constitutional provisions, we could glean that the jurisdictions of the Federal High Court and of the First-Instance Courts are delegated to the three tiers of State Courts (the Supreme Court, High Courts and First-Instance Courts). The question comes to the fore that which court adjudicates what? How are criminal cases apportioned between and among the State Courts once delegated from the Federal High and First-Instance Courts? How is the form of delegation undertaken? Which government, the Federal or the State that should bear the responsibility of allocation of criminal cases among the State Courts? Is there a watertight compartmentalization between the Federal Courts and the State Courts as far as the criminal cases apportionment is concerned? Do/don't the State Courts have an inherent criminal adjudicative jurisdiction apart from the delegate criminal adjudicative authority? These are questions worth raising here.

Although the Constitution provides for the delegation of the jurisdictions of the Federal High and First-Instance Courts to the State Courts, it does not stipulate how the delegation should take place, its consequences (the issue of reimbursing financial expenditures) and the hierarchical apportionment of criminal cases. This requires other subsidiary laws which complement the Constitution. As far as the reimbursement of financial expenditures connected with delegation is concerned, Art.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

[231]Supra note at 1, Art.78(2)

financial expenditures incurred by the State Courts in discharging the jurisdictions of the Federal High and First-Instance Courts more particularly, the criminal jurisdiction.

### 5.1.2 The Issue of Concurrent Criminal Adjudicative Jurisdiction

One of the debatable and yet unsettled issues under the FDRE Constitution is the concurrency of judicial power of Courts as envisaged by the Constitution. The Caption of Art.80 of the Constitution states "Concurrent Jurisdiction of Courts". The substances of the Caption, however, transcend the notion of judicial concurrency and narrate the scope of the judicial power of the Federal and State Courts. Accordingly, the Federal Supreme Court shall have the highest and final judicial power over federal matters. It has also a power of cassation over any final court decision containing basic error of law. The State Supreme Court on the other hand, shall have the highest and final judicial power over state matters. They shall also exercise the jurisdiction of the Federal High Court. It has the power of cassation over any final court decision on state matters which contains a basic error of law. The State High Courts shall exercise the jurisdiction of the Federal First-Instance Courts in addition to state jurisdiction.

Having all this in mind *pro tem*, let us look into how significant the notion of judicial concurrency in the Constitution is, by placing more emphasis on the criminal adjudicative jurisdiction of courts. What is the notion of concurrent judicial jurisdiction of courts all about? Does it have any relevance in the Constitution? What was the intention of the drafters of the Constitution? What did the Constitution envision with regard to the concurrency of judicial power of courts? These and other related questions may be posed for the matter of discussion to be conducted in relation to the judicial concurrency under the Constitution. The State Supreme Court exercises the jurisdiction of the Federal High Court and the State High Courts exercise the jurisdiction of the Federal First-Instance Courts, in addition to the state jurisdictions they are conferred with. In the following paragraphs, the writer presents a relative look at the notions of judicial delegation and concurrency under the Constitution as supported by pertinent legal assumptions.

### 5.1.3. The Delegation-Concurrency Dilemma under the Constitution

While the Constitution has expressly stipulated and governed the notions of judicial delegation and concurrency in separate provisions, many scholars argue that the jurisdictions of the Federal High and First-Instance Courts are delegated to the State Supreme and High Courts respectively, and as a result, denying the State First-Instance Courts the power to receive and hear the criminal cases so delegated from the Federal Government.[232] Whether the Constitution is interpreted in order to deprive the State First-Instance Courts of the criminal adjudicative power is tenable, feasible and is in conformity with federalism, will be the subject of the debate as the discussion goes on. For the sake of refreshing the readers' memories, a question comes into picture whether delegation is interpreted to be concurrency, and whether they are used interchangeably under the Constitution.

In view of the scholars who equate delegation with concurrency in their interpretation, the two terms as provided in the Constitution over the judicial power, are conceived to be one and the same. But a cursory reading of the Constitution may give us the hint that the concepts of delegation and concurrency as far as the judicial power in general and criminal adjudicative jurisdiction in particular are treated differently and with differing phraseology. True, the ordinary definitions of these terms are different as well. If the Constitution wants to assimilate delegation with concurrency, why does it treat them under different Articles and in different wordings? Undoubtedly, the Constitution is subject to vagueness and ambiguity as far as the notion of judicial delegation and concurrency is concerned. But does using the two terms interchangeably as synonymous terms become a durable solution? Argued otherwise, does not it even suffice for the Constitution providing for the two terms under different Articles so that particulars on each theme, i.e., delegation and concurrency, will be determined and dealt with in detail by other subsidiary laws? At any rate, let us see the two terms in relation to one another as follows.

[232]Sileshi, supra note at 127, p.191, Assefa, supra note at 8, p.444. Van der Beken also equates the provisional delegation to judicial concurrency, and he states that the delegation which was supposed to be transitional in Art.78 (2) becomes permanent in Art.80 (2 & 4), p.33-34

Delegation is the act of entrusting another with authority or empowering another to act as an agent or representative.[233] From the very definition of the term “delegation”, one may comprehend that it is a temporary act and as a result, easily terminated by the delegator. Explained otherwise, the State Courts do not have an inherent adjudicative power in criminal cases so as to entertain same. This implies that upon the establishment of the Federal High and First-Instance Courts in the States, the delegation of criminal cases to the State Courts will. It is for this reason that Van der Beken states that Art.78 (2) of the Federal Constitution was conceived as a transitional provision.[234] Currently, the HPR has issued a statutory law which establishes the Federal High Court in five Regional States: Afar, Benishangul, Gambella, Somalia, and SNNP.[235] Based on the law as it stands, the presumption is that the jurisdiction of the Federal High Court which was constitutionally delegated to the five aforementioned Regional State Supreme Courts will be terminated and the Federal High Courts commence directly exercising their jurisdiction within each State, hence ends the delegated criminal adjudicative jurisdiction of the Courts. In sum, the delegated criminal adjudicative jurisdiction of the State Courts exists only until the establishment of the Federal High and First-Instance Courts in the Regional States.

The significance of the notion of delegation in federalism is as much needed as in the unitary form of government. It is one of the forms of the concept of decentralization in addition to deconcentration, devolution and privatization.[236] Delegation is needed for the sake of, *inter alia*, effectiveness, efficiency, and accessibility of public services. Thus, delegation is a necessary device to bring public services down to the people in case power is centralized by the federal government.

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[233]Supra note at 77, p.1291

[234]Beken, V.D.Christophe, *Constitutional Diversity in Ethiopia: A Comparative Analysis of Ethiopia’s Regional Constitutions*, Ethiopian Civil Service College, P.33

[235]Proclamation No.322/2003, The Federal High Court Establishment Proclamation, Federal *Negarit Gazeta*, 9th year, No.42, 8th April, 2003, Art.2

[236]Denis A. Rondinneli, R. Nellis, G. Cheema, *Decentralization in Developing Countries: A Review of Recent Experience*, (Washinton D. C., World Bank, Staff Working Paper, No. 581, 1984), p.15

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 file the action.[237] From this definition, we could easily observe that the concept of concurrency confers on both the Federal High and First-Instance Courts on one hand and the State Supreme Court and High Courts on the other an inherent criminal adjudicative power. We would find no delegation or temporary criminal adjudication authority in the notion of judicial concurrency.

The State Supreme Court can exercise the jurisdiction of the Federal matters concurrently with the Federal High Court which fall in the latter without prejudice to the State matters falling under the former. This holds true also to the State High Courts in the exercise of the jurisdiction of the Federal First-Instance Courts. This trend is expected to continue to exist even if the Federal Government establishes the Federal High and First-Instance Courts in the States. The question is what kind of crimes fall under the concurrent adjudicative jurisdiction? Which should prevail in case of conflict of jurisdiction between the Federal High and First-Instance Courts on one hand and the State Supreme and High Courts on the other respectively? These questions are answered by issuance of statutory laws by the HPR. This was also the suggestion of the Constitutional Assembly as deliberated in the minutes of the Constitution that particulars are to be determined by law.[238]

The notion of judicial concurrency under the Constitution is also contemplated in Art.79 (7) in terms of compensatory budgets. Accordingly, it is provided that the HPR shall allocate compensatory budgets for the States whose Supreme and High Courts concurrently exercise the jurisdictions of the Federal High Court and Federal First-Instance Courts. This Constitutional provision tells us something that like the judicial delegation, the judicial concurrency is also followed by a budgetary consequence. That is to say that the financial expenditures incurred by the State Supreme Court and High Courts in discharging or exercising the jurisdictions of the Federal high Court and First-Instance Courts respectively are covered by the Federal Government. This is because even though the State Supreme Court and High Courts exercise the jurisdictions of the Federal High and First-Instance Courts respectively in the concurrent

[237]Supra note at 77, P.2492

[238]The Minute of the Constitutional Assembly, Compilation 5, November 1995, Addis Ababa (Translation mine)

capacity, the criminal cases arise from and in the Criminal Code and other federal criminal legislations, hence federal matters.

While the delegation clause envisaged by the Constitution is conditional, i.e., it exists to be operative until the HPR, where it deems necessary, by two-thirds majority vote, establishes the Federal High and First-Instance Courts in the whole Country or in some parts thereof, the concurrency clause is not subject to any condition. For those whose argument pertains to the assimilation of the notion of delegation with that of concurrency, they should be cautious that the two terms are not expected to be used interchangeably. On the other hand, if delegation is to be interpreted to mean concurrency in the Constitution, no doubt, the State First-Instance Courts will be devoid of criminal adjudicative jurisdiction. But if such an interpretation is adopted, does it conform to the principles of federalism, particularly does it go in harmony with the rationales of federalism, especially bringing public services down to the people, hence ascertaining the right of access to justice? At any rate, the writer suggests the following explanations which revolve around these and other related questions.

### 5.1.4. Do the State First-Instance Courts Have a Criminal Jurisdiction Anyway?

In order to address this question, there are some explanations expounded by different writers on the theme. Basically, many authors, as discussed above, believe that the concept of constitutional judicial delegation is assimilated with that of judicial concurrency. As a result, the State Fist-Instance Courts are deprived of criminal jurisdiction. This is so because the State Supreme Court is delegated to adjudicate criminal cases falling under the Federal High Court and the State High Courts to adjudicate criminal cases falling under the Federal First-Instance Courts. Explained otherwise, there is no other federal court below the Federal First-Instance One which could delegate the State First-Instance Courts. Despite this suggestion as opined by different authors, it does not appear to be feasible to prevent the State First-Instance Courts from adjudicating criminal cases.

Firstly, the Constitutional parlance makes it clear that the judicial delegation clause includes all the three tiers of the State Courts. This comes true when we read Art.78 (2) in isolation from that of Art.80 (2 and 4) of the Constitution. As discussed in detail in the above explanations, delegation and concurrency are two different concepts. It is quite difficult to use them interchangeably. What should rather be done is that the HPR is expected to make law (s) which deals with these issues differently in order to reduce or avoid the controversy, vagueness and ambiguity which may be capable of complicating the issue. Leaving the judicial concurrency to the State Supreme Court and High Courts only, we could state that the judicial delegation as envisaged by the Constitution is extended to the State First-Instance Courts. In support of this line of argument, Jetu submits that the State First-Instance Courts can exercise the criminal jurisdictions of the Federal High and First-Instance Courts so delegated because the Constitutional delegation clause simply provides “State Courts” and as a result, does not specify only the State Supreme Court and High Courts to exercise the jurisdictions of the federal High and First-Instance Courts respectively, thereby depriving the State First-Instance Courts of the delegated criminal jurisdiction.[239] Thus, the delegated criminal jurisdictions of the Federal High and First-Instance Courts are exercised by the three tiers of State Courts. But the Federal Government through its legislative organ, the HPR, should enact law (s) which could determine and regulate such jurisdiction.

The Constitution excludes the State First-Instance Courts from exercising the concurrent judicial power and grants the State Supreme Court and High Courts to concurrently exercise the jurisdictions of the Federal High and First-Instance Courts respectively. In this respect, no doubt, the State First-Instance Courts cannot exercise judicial concurrent powers with any Federal Court counterpart, the criminal jurisdiction being the typical aspect. To this effect, Jetu holds the view that the State First-Instance Courts exercise delegated jurisdiction over federal matters which is not exclusively given to the Federal and State Courts concurrently.[240] The Constitution does not have a view to excluding the State First-Instance Courts from consideration of delegated criminal jurisdiction.

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[239] Jetu Edosa, *What Is Wrong with Criminal Jurisdiction of Courts in Ethiopian: Re-Thinking Ethiopian Criminal Jurisdiction*, available with the author, Unpublished, p.11

[240] Id, p.13

Secondly, there are some scholars who argue that the State First-Instance Courts have delegated judicial power in general and criminal jurisdiction in particular in accordance with Art.50 (9) of the Constitution.[241] This line of argument recognizes the delegated criminal jurisdiction of the State First-Instance Courts in view of the general delegation clause putting aside the delegation-concurrency dilemma as provided under Art.78(2) and 80(2 &4). But some counter argue that the delegation clause envisaged by Art.50 (9) is limited only to Art.51 which on the other hand does not incorporate the criminal adjudicative authority clause.[242] The same critic goes on to castigate the general delegation purported to be applicable for the workability of criminal jurisdiction by the State First-Instance Courts on the ground of procedural jumble. That is to say that if decisions rendered by the State Supreme Court on federal matters are appealable to the Federal Supreme Court, and decisions rendered by the State High Courts exercising the jurisdiction of the Federal First-Instance Court are appealable to the State Supreme Court,[243] then the question arises as to which level of court should the criminal cases rendered by the State First-Instance Courts be appealable? Again, the issue of procedural hodgepodge comes into picture when the judicial delegation is interpreted to mean judicial concurrency provided for in the Constitution. But having a scrutiny of the notions of delegation and concurrency as envisaged by the Constitution separately, the fear of the procedural mishmash becomes apparent because the criminal jurisdiction in relation to delegation power is expected to be issued by the HPR pertaining to first instance jurisdiction as well as an appellate jurisdiction of the three tiers of the State Courts.

Thirdly, the Constitution itself dictates that all Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of [Chapter Three] which deals with the human rights regimes.[244] In view of this Constitutional mandate, it is not an option but a necessity for the State First-Instance Courts to receive and entertain criminal cases so delegated to it by the Constitution as is to be complemented by other subsidiary laws. Thus, the human rights protection necessitates the

[241]Fasil Nahum, The Distribution of Powers between the Federal Government and the States under the FDRE Constitution, 4th round symposium, 1999, Bishoftu (Translation mine)

[242]Sintayehu, Supra note at 5, p.51

[243]Supra note at 1, Art.80(5 and 6)

[244]Id, Art.13(1)

assumption of criminal jurisdiction by the State First-Instance Courts. It is also 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.[245] Virtually, all human rights and fundamental freedoms constitutionally guaranteed are strongly and even entirely connected with the criminal laws.

The Constitutional mandate of the human rights sacredness to be respected and enforced by all levels of courts, the State First-Instance Courts being one of them, is also augmented by other aspect of human right which is the right of access to justice.[246] Thus, the State First-Instance Courts are duty bound to assume criminal jurisdiction because they are one of the levels of the State Courts on one hand and with a view to ascertaining the right of access to justice, they could be claimed (even as of right) to see criminal cases based on the apportionment of same.

Furthermore, the State First-Instance Courts are constitutionally rooted in their establishment. They are directly and expressly recognized by the Constitution. Moreover, Art.50 (4) states that State government shall be established at State and other administrative levels that they find necessary. It goes on to state that adequate power shall be granted to the lowest units of government to enable the People to participate directly in the administration of such units. A superficial reading of this provision may lead one to the implication that it stands for the executive organ of the States alone. But a close reading thereof could take us to the other side of the flip, the need for the State First-Instance Courts, not only to be established but also to be accessible to the people including consideration of criminal cases. The minutes of the Constitutional Assembly also confirms this suggestion.[247]

Fourthly, despite the above explanations and arguments, it could not be possible to avoid the practical necessity and actual disposition of criminal cases by the State First-Instance Courts. We

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[245]Assefa, Supra note at 8, p.447

[246]Art.37 (1) of the FDRE Constitution provides that Everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power.

[247]The Minutes of the Constitutional Assembly, Compilation 5, November 1995, Addis Ababa (Translation mine), p.11-12

know also for certain that the state courts do adjudicate criminal cases in the regular discharge of judicial duties, not in their delegated powers.[248] Even one might not believe that the State First-Instance Courts exercise criminal jurisdiction in their delegated capacity because there is no such an indication. For instance, there is no compensatory budget allocated for the State First-Instance Courts which is entailed by the delegation principle.

Fifthly, the overall Constitutional discourse and the need for introduction of federalism also necessitates and maintains the Constitutional status of the State First-Instance Courts in the assumption of criminal jurisdiction so delegated from the Federal High and First-Instance Courts. The Constitution focuses on devolution in order to make a departure from the past unitary state and centralized form of government. Even in the past unitary and centralized government, although monolithic or integrated court system, the *Woreda* Court was recognized and exercised criminal jurisdiction. Thus, the concept of devolution envisaged by the Constitution should also be applicable to the lowest level of the State Courts, the First-Instance Courts, over criminal jurisdiction. As touched upon in the preceding explanation, delegation is one aspect of the forms of decentralization. On top of this, criminal adjudicative decentralization becomes an issue for one to ponder upon.

Furthermore**,** the Constitution establishes three tiers of courts both at the Federal and state levels, hence dual courts system. The three tiers of Courts have their respective initial and appellate jurisdictions as the case may be. This also applies *mutatis mutandis* to the criminal jurisdictions as well in whatever capacity: inherent, delegated or concurrent jurisdiction. Criminal jurisdiction is not a jurisdiction or power that is characterized by a unique feature thereby capable of causing the lack of the Constitutional status of the State First-Instance Courts over criminal cases. This is also against the caveat that the Federal Government and the States are not placed in a superior and subordinate position. That is to say in as much as the Federal Courts are respected in their Constitutional status at the three levels, the State Courts at all levels should also be recognized in their Constitutional status with respect to the criminal jurisdiction taking into account the above possible justifications. There is no purpose to be served by the Constitution and other subsidiary laws if the State First-Instance Courts are to be deprived of criminal jurisdiction. Thus, if there is

[248] Assefa, Supra note at 8, p.447

no purpose to be achieved by the lack of criminal jurisdiction of the State First-Instance Courts, they should not be out of the game in criminal adjudication.

In fact, there are subsidiary laws which deprive the State Courts as a whole of some criminal cases such as terrorism cases. Terrorist acts are entertained by only the Federal High and Supreme Courts.[249] In this respect, both the Federal First-Instance Courts on one hand and the three tiers of State Courts on the other are devoid of criminal jurisdiction over terrorism cases. This raises such questions as what happens in areas where there has not been established the Federal High Courts yet? Will the suspects of the terrorism crimes be brought where the Federal High Courts are there? Or as the case may be, are they taken to Addis Ababa where the Federal Supreme Court is seated? How should this be considered in terms of ensuring the right of access to justice, which is constitutionally guaranteed? What justifications are there behind such judicial limitation only to the Federal Supreme and High Courts in relation to terrorism cases? Setting aside the issue of constitutionality or otherwise of the deprivation of criminal jurisdiction of terrorism cases of the Federal First-Instance Courts and the State Courts, unlike the Anti-Terrorism Proclamation in this manner, the Constitution does not expressly deprive the State First-Instance Courts of criminal jurisdiction. Nonetheless, with respect to the criminal adjudicative jurisdiction of terrorism cases, the practice shows that the Regional State Supreme Courts are exercising such a power.[250]

This holds true also for corruption offences. With respect to corruption offences falling under the jurisdiction of the Federal Government, it is the Federal Supreme and High Courts that have power to adjudicate corruption cases, whereas corruption offenses which fall under the jurisdiction of the Regional States are adjudicated by the State Supreme and High Courts which

[249]Supra note at 174, Art.31

[250]An interview conducted with *Obbo* Xuurii Qanaasaa, a judge at the Oromia Supreme Court and a criminal section leader, which was conducted on 11/12/2013. The interviewee responded that power that enables the Oromia Supreme Court to adjudicate terrorism cases emanates from the constitutional delegation of the jurisdiction of the Federal High Court to the State Supreme Court till the establishment of the former the States.

have first instance jurisdictions as the case may be.[251] The Federal and State First-Instance Courts do not have criminal adjudicative jurisdiction over corruption offences. This implies that unless the State First-Instance Courts are deprived of criminal adjudicative jurisdiction in such a clear manner, it does not appear to be tenable to argue that they do not have constitutional criminal jurisdiction.

To date in this subsection, we have been looking at the Constitutional status of the State First-Instance Courts in relation to the criminal jurisdiction. In the following subsection, an attempt will be made to scrutinize the criminal jurisdiction of the Federal and State Courts as supported by statutory laws which are supposed to be complementary to the Constitution.

### 5.2. Statutory Criminal Jurisdiction of the Federal and State Courts

Based on the nature of the Constitution that it is general in its parlance, other statutory laws which complement the constitutional provisions in general and criminal adjudicative jurisdiction in particular are required. Accordingly, Proclamation No.25/96 was established with a view to dealing with the judicial power of the Federal Courts in general and the criminal adjudicative jurisdiction of the same Courts in particular. This proclamation has been amended and reamended several times.[252] What are the guidelines that help us differentiate the jurisdictions of the Federal Courts from that of the State Courts? What about as between the Courts of one order of government, say for example, the criminal jurisdiction between the State Courts? Is the Proclamation aforementioned sufficient to address these and other related questions revolving around the allocation of criminal cases? These mind-refreshing questions will be addressed as the discussion goes on.

From the outset, the Proclamation has set out three subject matters for the determination of the common jurisdiction of Federal Courts.[253] These are case-based, party-based, and place-based

[251]The Revised Anti-Corruption Special Procedure and Rules of Evidence, Proclamation No.434/2005, Negarit Gazeta, 11th year, No.19, 2nd February, 2005, Art.7

[252]For instance, Proclamations No.138/98, 254/2001, 321/2003, and 454/2005 are the amendments and re-amendments of Proclamation No.25/96 as the case may be.

[253]Proclamation No. 25/1996, Federal Courts Establishment, 2nd year, No.13, *Negarit Gazeta*, 15th February, 1996, Art.3

mechanisms. With regard to the case-based subject matter, it is provided that cases involving or arising under the Constitution, Federal Laws and International Treaties would fall under the Federal Courts jurisdiction. Here, the “Constitution” refers to the Constitution of the Federal Democratic Republic of Ethiopia, and not that of the States. Federal Laws include all previous laws in force which are not inconsistent with the Constitution and relating to matters that fall within the competence of the Federal Government as specified in the Constitution.[254] International Treaties, no doubt, fall under the Federal Courts jurisdiction as it has a foreign element.

In connection with party-based subject matter jurisdiction, cases involving parties specified in the Federal Laws fall under the Federal Courts. Here, the term “party” refers to litigant parties or parties to a case before the courts. The most argumentative of all is the jurisdiction of the Federal Courts with respect to places specified in the Constitution or in Federal Laws. Which are these places? Are they only Addis Ababa and Dire Dawa? Are the nine Regional States or some of them included? Art.46 (1) in conjunction with Art.47 (1) of the Constitution contemplates that the Federal Democratic Republic of Ethiopia comprises of the nine States. Art.50 (1) goes on to state that the Federal Democratic Republic of Ethiopia comprises the Federal Government and the State members. Addis Ababa is the capital city of the Federal Government. 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.[255]

Thus, when we talk of the jurisdiction of the Federal Courts in relation to places specified in the Constitution and other federal laws, the Regional States (as the Federal High and First-Instance Courts are established therein), Addis Ababa and Dire Dawa are the forefront to be categorized under those places so envisaged by the Proclamation.  One should not, in the meantime, lose sight of the fact that the State Courts have exclusive judicial power over state matters.

[254]Id, Art.2(3)

[255]Assefa, Supra note at 8, p.459

Without sticking to the principle that the Federal Courts adjudicate Federal laws and the State Courts adjudicate state laws, the Federal Government has come up with a law that provides for the criminal jurisdiction of the Federal Courts in a listing method.[256]

The question comes into picture therefore, that what about crimes unspecified in the Proclamation? Are they exclusively left for the State Courts? Are they concurrently exercised by the Federal and State Courts? Does the fact that some crimes are enumerated under the Proclamation to fall under the Federal Courts cause the lack of criminal jurisdiction of the Federal Courts over those crimes which are not listed in the Proclamation? In addressing these and other related questions, there are two views propounded by scholars who have written on the theme.

Accordingly, Abebe argues that the areas that are not specifically mentioned to fall under the Federal Courts jurisdiction are presumed to be the jurisdiction of the State Courts.[257] This implies that although the Constitution delegates the State Courts over the federal jurisdictions that fall under the Federal High and First-Instance Courts, the Proclamation enumerates only some part of the crimes to fall under the Federal Courts. This line of argument also creates the Federal Courts exclusive jurisdiction on one hand and the State Courts exclusive judicial power on the other, concerning the jurisdictions of the two structures of Courts in relation to criminal jurisdiction. So crimes which are not enumerated under the Federal Courts belong to the

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[256]Art.4 of proclamation No.25/96 enumerates the crimes. These are offences against the Constitutional order or against the internal security of the 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 the international level, offences against the safety of aviation, offences regarding foreign nationals, 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, offences committed by officials and employees of the Federal Government in connection with their official responsibilities or duties

[257]Abebe Mulatu, *The Court System and Questions of Jurisdiction under the FDRE Constitution and Proclamation No.25/96 in Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution*, Organized by the Faculty of Law, Ethiopian Civil Service College and United States Agency for International Development (USAID), Volume I, May 19-20, 2000, Addis Ababa, p.129-130

exclusive jurisdiction of the State Courts. But this line of argument is not found to be immune from criticism. Assefa, on the other hand, counter argues that offences unmentioned in the Proclamation fall under the concurrent judicial power of the Federal and State Courts.[258] This line of argument may be justified by the fact that if those crimes mentioned in the Proclamation fall exclusively under the Federal Courts, and those crimes which are not mentioned therein fall exclusively under the State Courts, the conclusion becomes that the Federal Courts may lose the inherent jurisdiction over crimes which are enacted by the Federal Government, the HPR. Moreover, the caveat exclusive federal and exclusive regional courts' jurisdiction, if purported by the Proclamation, excludes the notion of concurrent judicial power in general and criminal jurisdiction in particular.

Furthermore, the Proclamation does not have any intention of ruling out the jurisdiction of the Federal Courts by enumerating only some of the crimes enacted by the Federal Government to fall under the Federal Courts. Nor does it have an intention of having left plenty of crimes unmentioned to be presumed to fall under the State Courts thereby ruling out notion of concurrent judicial power. This may be evidenced from the wordings of Art.3 of the Proclamation. In view of these provisions, in principle, all cases related with the Constitution, Federal laws and International Treaties, parties and places specified under the Federal laws fall under the Federal Courts. This implication is actually broad as far as those jurisdictions falling under the Federal Courts with corresponding with the Federal Legislative power is concerned. The corollary of this provision is that crimes related with the Constitution, Federal Laws, and International Treaties, parties and places mentioned in the Federal Laws fall under the Federal Courts' jurisdiction.

In the meantime, one may question as what about crimes involving State constitutions, laws, parties and places specified under the State laws? How can the State Courts exercise these and other powers which are not mentioned in the Proclamation? Do they have an inherent judicial power over such crimes? In chapter three, we have seen that the Criminal Code has nearly exhausted all crimes involving both federal and regional characters. In such cases, the State Courts do not have an inherent judicial power over these crimes as they are called federal laws.

[258]Assefa, Supra note at 8, p.461

Thus, the only legal way out will be delegation. But the Proclamation keeps silent as far as delegation is concerned. As discussed in the preceding explanations, the notion of delegation under the Ethiopian Constitution entails the quest for compensating budgets for the financial expenditures due for the adjudication of the federal laws such as criminal laws by the State Courts.

In principle, the State Courts have an inherent criminal adjudicative jurisdiction only over crimes enacted by the State governments. Apart from this, their criminal jurisdiction in relation to the Criminal Code and other federal criminal legislations is reduced to delegate power, and the State Supreme Court and High Courts have concurrent jurisdiction with that of the Federal High and First-Instance Courts.

While the above propositions are all about the Constitutional standpoint with respect to judicial relationship between the Federal and the State Courts in general and criminal judicial jurisdictional relationship between the two sets of Courts in particular, the Proclamation comes up with strange issues. It lists crimes which should fall under the Federal Courts and leaves other crimes unmentioned. This is in fact against the general provision in limiting what is provided by the Constitution. As discussed in the preceding explanations, the State Courts have concurrent criminal jurisdiction over crimes which are left unmentioned.  The State Courts do not only have delegate and concurrent criminal jurisdictions but they have also original or exclusive criminal jurisdiction over crimes which are potentially enacted by the State governments and crimes which are not covered under the Criminal Code and other federal criminal legislations.

#### 5.2.2.1. Apportionment of Criminal Cases among the State Courts

Setting aside *pro tem* whether the State Courts have delegate, concurrent and/or exclusive jurisdiction over criminal cases based on the Constitution and the Proclamation, let us see how criminal cases are apportioned among the State Courts. How are criminal cases allocated between the State Courts? Whose power is it to apportion criminal cases between the State Courts, of the Federal or of the State Government? Which law is being applicable in this respect, the Criminal Procedure Code or the States have their own laws? What does the practice in this respect look like?

From the preceding discussions, we could understand that until the Federal High and First-Instance Courts are established throughout the Country or in some part thereof, the jurisdictions of these herein mentioned Federal Courts are delegated to the State Courts. According to this Constitutional provision, it is the Federal Government that bears the responsibility to apportion criminal cases between and among the State Courts because the Criminal Code is the typical example of Federal law though it incorporates numerous crimes which are also capable of featuring regional identity, hence state crimes.

Contrary to the above principle, however, some Regional States have adopted their own laws regulating the apportionment of criminal cases between and among the three tiers of their Courts. For example, the Oromia Regional State established a proclamation which deals with, not entirely but in some of its provisions, allocation of criminal cases among the State Courts.[259] Art.27 (2) of the same Proclamation states that crimes whose initial punishment is more than ten years shall fall under the first-instance jurisdiction of the State High Courts. There is no other provision than this which deals with the allocation of criminal cases between and among the Regional Courts in the Proclamation under consideration. This leaves many issues unresolved with respect to the issues related with criminal cases within the Courts of the Region. The Proclamation makes the State High Court the relative point or a point of reference and the phrase "crimes whose initial punishment is more than ten years" to apportion criminal cases between the State Courts. But this mode of apportionment of criminal cases does not seem to be sufficient. One may question as to what about crimes falling under the State Supreme Court and First-Instance Courts? How are they apportioned between them? How many crimes are there, strictly speaking, whose initial punishment is more than ten years? What about crimes whose initial punishment is less than ten years and whose maximum punishment is more than ten years? Whose jurisdictions are such crimes? How is conflict of criminal jurisdiction resolved in such cases? Despite an attempt has been made to provide for the apportionment of criminal cases between the Courts of the three hierarchies, the practice shows that both the Criminal Procedure Code and the law under consideration are applicable[260] though the status of the law in terms of

[259]Proclamation No.141/2008 A Proclamation to Re-establish Oromia Regional State Courts

[260]An interview conducted with *Obbo* Dhuguma Nadhaa, President of the Oromia Special Zone High Court, conducted on 20/10/2013.

the Criminal Procedure Code as far as the apportionment of criminal cases is concerned is dubious.

On the other hand, the fact that the States have adopted their own laws governing the allocation of criminal cases raises questions revolving around the Criminal Procedure Code of Ethiopia which is in force since the monarchical regime. In fact, the regime has been changed from the unitary state to the federal state and from the centralized form of government to the devolutionary form of government. The Criminal Procedure Code, though enacted during the unitary and centralized form of government, is in force to date until the draft criminal code of the FDRE becomes operational. The question then is what is the status of the State laws regulating apportionment of criminal cases when seen in light of the Criminal Procedure Code? Does it mean that the State Courts are using entirely the laws enacted by their respective State government? Or do they use the Criminal Procedure Code? Do they use both laws? What if there is a conflict between the two laws? Which law should prevail? How? The First Schedule of the Criminal Procedure Code lists offences and the level of courts under which they fall. This was operating under the past system when the monolithic court system was prevailing. Nevertheless, nowadays the court system in Ethiopia is dual in structure in that the Federal and the State Governments have their respective Supreme, High and First-Instance Courts.

In connection with this issue, it is worth noting the Harari Regional State Courts experience. In Harari Region, the State First-Instance Courts are made to have assumed the initial criminal jurisdiction of the previous *Awradja* and *Woreda* Courts.[261] This gives an impression that the Harari Regional State Courts use the Criminal Procedure Code for the allocation of criminal cases with respect to the State First-Instance Courts thereof. Accordingly, crimes which fall under the *Awradja* and *Woreda* Courts during the past unitary state and centralized government would fall, in their initial jurisdiction, under the State First-Instance Courts of the Harari Regional State. Furthermore, the Harari Regional State High Court exercises initial criminal jurisdiction over crimes that would fall under the past High Court in accordance with the Criminal procedure Code.[262] In addition, the Regional High Court also exercises the criminal

[261]Proclamation No.3/96, the Harari Regional State Courts and Judicial Administration Council Establishment Proclamation, Harar *Negarit Gazeta*, 1st Year No.3, March 14, 1996, Art.17(1)

[262]Id, Art.16(1)

jurisdiction of the Federal First-Instance Courts in accordance with Art.78 (2) of the Constitution. The Harari Regional State Supreme Court does have an initial criminal jurisdiction over criminal cases that fall under the jurisdiction of the Federal High Courts.

From the experience of the Harari Regional State Courts, we could draw three scenarios as far as apportionment of criminal cases is concerned. The first scenario, which is solely connected with the First-Instance Courts, is the fact that the criminal jurisdiction thereof is determined by the Criminal Procedure Code, hence the jurisdictions of the *Awradja* and *Woreda* Courts of the Past regime. As is going to be discussed in the following paragraphs, the Harari Regional State law which governs the apportionment of criminal cases among its Courts at each level gives an impression that the State High and Supreme Court exercise respectively the criminal jurisdiction of the Federal First-Instance Courts and of High Courts as envisaged by the Constitution, hence ruling out the principle that the delegation stated therein is also applicable to the State First-Instance Courts.

But this again raises other questions such as how do the Harari Regional State First-Instance Courts adjudicate criminal cases that were under the past *Awradja* and *Woreda* Courts, by delegation, concurrently, or exclusively? Can we avoid the notion of criminal delegation which is already envisaged by the Constitution so as to include the State First-Instance Courts as well? This is because there are crimes which were under the jurisdictions of the past *Awradja* and *woreda* Courts but currently which fall under the Federal Courts jurisdiction. Namely, the Federal First-Instance Courts have jurisdiction over criminal cases under the jurisdictions of the *Awradja* and *Woreda* Courts pursuant to other laws in force.[263] The phrase “other laws in force” refers to the Criminal Procedure Code which is yet in force. So the Harari Regional State First-Instance Courts exercise criminal jurisdictions which are equated with those of the Federal First-Instance Courts. If the criminal jurisdictions of the *Awradja* and *Woreda* Courts fall under the Federal First-Instance Courts, then by the Constitutional provisions, it is the Harari Regional State High Court, not the First-Instance Courts thereof that should assume those jurisdictions. So there is a contradiction between the Harari Court establishment proclamation on one hand and the FDRE Constitution and the Federal Courts establishment Proclamation on the other.

[263]Supra note at 253, Art.15(2)

The second scenario, which is related with the Harari Regional State High Court, is the fact that partly the Criminal Procedure Code, and partly Proclamation No.25/96, the part dealing with the criminal jurisdiction of the Federal First-Instance Courts are used. With this scenario, as far as the apportionment of criminal cases is concerned, is the implication that the criminal jurisdiction of the previous High Court would fall under the Harari Regional State High Court in its first instance jurisdiction. From the Constitutional perspective, moreover, crimes falling under the Federal First-Instance Courts would fall under the Harari Regional State High Court in their first instance jurisdiction. Accordingly, Art.15 of Proclamation No.25/96 would be applicable. This tells us something that in the allocation of criminal cases, the Criminal Procedure Code and Proclamation No.25/96 is used by the Harari Regional State High Court.

The third scenario is solely related with the fact that without having regard to the Criminal Procedure Code, the Harari Regional State Supreme Court exercises the criminal jurisdiction of the Federal High Courts in an initial jurisdiction. Thus, Art.Art.12 of Proclamation No.25/96 is *mutatis mutandis* applicable to the Harari Regional State Supreme Court in the apportionment of criminal cases. Hence, the Constitution and the Proclamation dealing with the Federal Courts jurisdiction are the determinant guidelines for the allocation of criminal cases in the Harari Regional State Supreme Court.

Generally, there is no adequate law which is in charge of the apportionment of criminal cases between and among the State Courts, may as the criminal jurisdiction be delegate, concurrent and/or exclusive.

# Chapter Six

## Conclusion and Recommendation

### 6.1. Conclusion

Unlike in that of the unitary state and centralized form of government whereby power is concentrated around the central government, and decentralized to lower administrative units for administrative convenience only, a federal form of government is characterized by the distribution of powers between the central government and the constituent units. In the present days, federalism is more demanding than ever before because its advantage in bringing public services down to the public, among other things, is prevailing. Federalism is also characterized by the presence of written, rigid, and supreme constitution, and umpiring federation between the federal government and the States.

In the doctrine of the distribution of powers, we could find that there are different forms of division of legislative powers. These are exclusive, residual, shared and concurrent legislative powers. Exclusive powers may be specified for either one of the orders of the government (mostly for the federal government) or for both orders of governments. For instance, in such federations as Ethiopia and USA, exclusive powers are specified for the federal government. In other federations as India, both federal and regional exclusive powers are listed. Residual powers also follow different approaches in different federations. Accordingly, while in such federations as India they are vested in the federal government, in Ethiopia and USA, they are reserved for the regional states. Concurrent powers are also treated differently by different federations. While in some federations, they are expressly provided in their respective constitutions, in other federations, they are found scattered here and there throughout the constitution.

The doctrine of the distribution of powers is determined by such factors as the need for preservation of unity and accommodation of diversity, geography, history and culture, the time in which the constitution is drafted, the nature of the legal system (whether civil law or common law legal system) and the mode of the formation of the federal system (aggregative, devolutionary or the combination of the two). 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 granted to the federal government and the more prevalent heterogeneity the more powers to be granted to the regional states. This holds true especially for federations where the society is characterized by the fact of multiculturalism and ethnic diversity such as Ethiopia.

The principle of subsidiarity also takes a central stage in the distribution of powers between the federal government and the constituent units. It is the principle that advocates the bottom-up approach in the distribution of powers. Accordingly, in the doctrine of the distribution of powers, the federal government assumes power if it is believed absolutely that the states cannot exercise same effectively and which also goes beyond their competence. The principle of subsidiarity has gained its root in the Catholic teachings which focused on an individual freedom and is grounded in political, democratic, human rights and economics of federalism as its philosophical underpinnings.

In the doctrine of the distribution of powers, criminal matters or laws, being one aspect thereof, should be considered in federalism. In many federations, criminal law has not been differently treated as a different issue in their constitutions. But in Ethiopia, criminal law seems to be constitutionally centralized and as a result, such complementary statutes such as the Criminal Code incorporate many crimes including those which are regional or ethnic-specific in their very nature. In USA, the federal government and the states have their own criminal laws including the substantive and procedural aspects. As far as the substantive criminal law is concerned, the federal government is granted the power of enactment on only crimes which are specified in the Constitution applying the principles of federal supremacy and the necessary and proper clauses. Other crimes are enacted by the states based on the *locus* of the crimes where they are committed within their respective geographical location.

The German Basic Law provides that the criminal law falls in the concurrent power of the federal government and the *Lander*. The concurrency of criminal law in Germany is subject to the condition that for the purpose of equivalent living conditions throughout the federal territory, the maintenance of legal or economic unity for the purpose of national interest. The Nigerian Constitution specifies the power of criminal legislation in the form of incidental and supplementary matters clause. That is to say that based on the exclusive and concurrent lists, while the federal government enacts criminal legislations over powers falling under its exclusive lists, it enacts criminal legislations on concurrent lists together with the states. In Canada also both the federal government and the states have the power of enacting criminal legislations though the power of the latter is reduced to the imposition of such punishments as fine or imprisonment under their respective jurisdictions. In the Indian constitutional setup, the power of enactment of criminal law follows the three lists: the Union List, the State List and the Concurrent List. It is possible to deduce from all these propositions that in the theme of criminal legislation under different federations, regional states have a say in accordance with the power they are accorded with.

The FDRE Constitution together with other proclamations such as the Criminal Code centralizes criminal legislations under the Federal Government at the expense of the power of the Regional States in making criminal laws of their own. The fact that the Federal Government centralizes criminal law has an adverse effect on the regional autonomy of the States. The States could not exercise the right to self-determination, in the context of criminal laws, which has been already guaranteed by the Constitution. On other hand, the Regional States are not adequately represented in the federal law-making organ. There is no way out for the regional interests to be served in the federal law-making and policy formulation processes including the criminal laws. The centralized nature of the criminal law and policy in Ethiopia also makes the States dependent upon the Federal Government concerning criminal matters. The State Councils could not adapt themselves to enacting criminal laws over matters falling under the state jurisdictions.

On top of this, it is worth talking of criminal legislation in terms of the criminal procedure law in Ethiopia. The Constitution does not clearly specify whose power the enactment of the criminal procedure code should be. But in such cases, the Constitution grants residual powers to the States, the power of the enactment of the criminal procedure code being one of them. The appearance of the substantive criminal law under the Constitution also envisages the duality of the criminal procedure code. The change of regime from the unitary to federal form of government also has its impact on the change of criminal procedure code from the monolithic nature to diversity of criminal procedure law in order to accommodate diversity and assure the right to self-determination of each NNP which is contemplated by the Constitution. Moreover, the fact that some Regional States have their own unique administrative features such as Oromia in Finfinnee, necessitates criminal procedure code to be enacted by the States.

In the claim of adopting legal pluralism concerning criminal law in Ethiopia, the shadow of fear of the lack of uniformity may be alleviated through the principles of the constitutional supremacy, the human rights sacredness, the Federal cassation, and the General Part of the Criminal Code. The standards set in all these principles are capable of keeping the uniformity and criminal legal pluralism in equilibrium between the Federal Government and the States.

Although the legislative criminal power has been centralized by the Federal Government in Ethiopia, it is decentralized in terms of its execution and adjudication. Consequently, the criminal laws enacted by the Federal Government are executed and adjudicated by both federal and state criminal justice actors but there is no adequate law which sufficiently governs how the State criminal justice actors execute the federal criminal laws. In principle, the federal criminal laws are executed by the federal criminal justice actors and the vice versa for the state criminal laws, if any. In such cases, delegation is the best option and is also included in the Constitution and other subsidiary laws so that the state justice actors would execute the federal criminal laws. Nevertheless, the consequence of delegation, budgetary issue for the reimbursement of the financial expenditure has not been satisfactorily regulated. The Regional States execute criminal laws of the Federal Government as their own laws. Moreover, the practice shows that it is through circulation of letter of delegation that enables the Regional criminal justice actors such as the Justice Bureaus to act on behalf of the Ministry of Justice upon objection from the accused.

Conflict of jurisdiction in the execution of criminal laws between the federal and regional criminal justice actors namely, the Federal Police Commission and the Regional State Police Commission would also be at stake. It becomes a bit difficult to clearly demarcate the criminal jurisdiction of the Federal Police Commission and the Regional Police Commission in the criminal investigation and the Federal and Regional public prosecution in the criminal prosecution functions.

The other area of confusion in the law of criminal jurisdiction of Ethiopia relates to the adjudication thereof. Since the Federal Government and the States have their own judiciaries, the principle follows that the federal courts adjudicate the federal criminal laws and the State courts adjudicate the State criminal laws. Nonetheless, this principle has got other option in view −delegation−which is constitutionally provided. Accordingly, till the establishment of the Federal High and First-Instance Courts in the Regions, the jurisdictions of these courts are delegated to the States Courts. The Constitution also envisages the notion of concurrent judicial power in general and concurrent criminal judicial power in particular. While the issue of delegation and concurrency is expected to be explicated and defined by other subsidiary laws, some scholars assimilate the two terminologies to mean the same, thereby denying the State First-Instance Courts the power to adjudicate criminal cases.

However, the State First-Instance Courts cannot be denied the constitutional status of criminal jurisdiction. This line of argument may be backed by different justifications underlying constitutional and extra constitutional grounds. Constitutionally speaking, Art.78 (2) makes clear that the jurisdictions of the Federal High and First-Instance Courts are delegated to the State Courts which also embraces the State First-Instance Courts as well. In order for the Constitution not to exclude the State First-Instance Courts from the adjudication of criminal cases, it treats the issue of delegation and concurrency differently under separate provisions. The State First-Instance Courts are duty bound to receive and see criminal cases by the principle of the human rights as provided under Art.13(1) of the Constitution. They bear the duty and responsibility to respect and enforce the human rights so guaranteed by the Constitution. Art.37(1) also reaffirms the right of access to justice in which case even the people can claim the establishment and assumption of criminal jurisdiction of the State First-Instance Courts. This is again rooted in Art.50 (4) of the Constitution which supports the establishment of lower levels of administrative units thereby maximizing adequate public participation in administration which also includes the State First-Instance Courts. Hence, the Constitution tends to recognize the status of the State First-Instance Courts in criminal jurisdiction rather excluding it as it has not expressly prohibited the same from adjudicating criminal cases.

Extra constitutionally, it has been impracticable to deny the State First-Instance Courts the adjudicative power of criminal cases. Moreover, even during the regime of the unitary experience in the past, the *Woreda* Courts were not denied criminal jurisdiction. The principle of federalism *a fortiori,* should guarantee to the State First-Instance Courts the power to adjudicate criminal matters seen from the perspective of accessibility and cost-saving appearance of it. Thus, the change of regime *per se* should have a bearing on the fact that the State First-Instance Courts are not devoid of criminal jurisdiction.

The lack of clear laws which govern the allocation of criminal cases between and among the States Courts is another problem found while the inquiry was conducted. While some State Courts use the Criminal Procedure Code in force, others have made an attempt to make their own laws which gives a clue to the apportionment of criminal cases between the Courts but the laws has not adequately solved the problem of criminal jurisdictional conflict.

### 6.2. Recommendation

The current trend of centralization of criminal law and policy in the FDRE is not effective when tested in light of the guiding principles of the distribution of powers, the principle of subsidiarity and the experiences of other federations. The multicultural nature of the society in Ethiopia which is also applauded by the Constitution requires pluralistic criminal law and policy subject to the constitutional supremacy and human rights sacredness. At any rate, the writer recommends as follows.

Firstly, Art.55 (5) of the Constitution should be interpreted or amended in a way that the Federal Government enacts a criminal code and other federal criminal legislations which are capable of featuring federal characters and the States enact criminal legislations which are reflective of their respective regional identity. To this end, the HPR at the federal level and the State Councils at the state levels are expected to enact criminal laws over matters falling within the Federal Government and the State jurisdictions respectively. The US model of federal crimes and state crimes scenario should be adopted by the FDRE Constitution in order to strengthen and ensure the criminal legislative power of the States over matters falling under their jurisdictions.

Accordingly, the Regional States in the FDRE should be empowered to enact criminal laws on matters falling under their jurisdiction in accordance with Art.52 (2) of the Constitution. On one thing, the powers and functions listed in this article directly concerns the Regional States. It is the Regional State that knows well about the powers and functions more than Federal Government. On the other, in view of the litmus test of the *locus* of a crime, each Regional State is nearer to it than the Federal Government. Such kind of criminal legislative authority, if undertaken by the States, becomes more effective than the one entirely enacted by the Federal Government.

Secondly, the right to self-determination of the NNP as guaranteed by Art.39 of the Constitution should be able to extend to the right and power to exercise criminal legislative authority over the items enumerated therein namely, preservation and promotion of culture, language, history and identity.

Thirdly, the criminal procedure legislative power should be vested in Regional States. This argument may be justified on many grounds. In the first place, criminal procedure legislative power is one of the residual powers envisioned by the Constitution as per Art.52 (1). This is because Art.55 (5) of the Constitution deals with the substantive criminal law and not that of the criminal procedure. Furthermore, although criminal legislative power of the Regional States has been diluted by the Federal Government, apparently, the States have criminal legislative power over crimes unmentioned by the Federal criminal code and other legislations. Thus, the States should enact the criminal procedure law of their own. The fact that each Regional State has its own unique regional features, it should be empowered to enact its criminal procedure code in order to respond to matters in the areas of criminal proceedings, investigation, prosecution, and adjudication. For instance, the Oromia Regional State is expected to have its own criminal procedure code for determining criminal jurisdictions in Finfinnee as the former is the seat of Government of the latter.

The sum total of the above assertions or recommendations has to be carried out in a way and in order to adapt the Regional States to exercising criminal legislative processes within their respective jurisdictions. The most important of all is that the constitutional design of the distribution of powers must have a bearing on criminal legislative power in its substantive and procedural spheres. This holds true especially in such federations as US whereby duality of criminal law prevails; in India whereby the criminal legislative authority follows the three lists (the Union List, the State List and the Concurrent List). In Ethiopia too, this trend must be adopted in such a way that the Federal Government should have criminal legislative jurisdiction over powers and functions exclusively granted to it (Art.51,55, and 77 of the Constitution) and

States must be empowered to enact criminal laws over powers and functions enumerated under Art.52(2). This also complies with the tenet that one of the guiding principles of the determination of criminal legislative jurisdiction is the type of law violated.

Lastly, the issue of judicial delegation and concurrency dilemma which is provided in the Constitution must be clarified by other statutory laws as complementary to the Constitution. This is an area of the Constitution whereby a confusion, ambiguity and vagueness blurs the judicial delegation of the State Courts at all levels (Art.78 (2)) on one hand, and judicial concurrency (Art.80 (2, 4)) on the other. These two provisions should be complemented and clarified by other proclamation (s). In dealing with the issue of delegation in criminal enforcement by such criminal justice actors as police, public prosecutions and courts, the consequence of delegation, compensating budget should be taken seriously. In executing adjudication of the federal criminal laws, the States should be sufficiently refunded.

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**I. Interviews**

An interview conducted with an anonymous official in the Oromia Regional State Administrative Council, on 12/12/2013

An interview conducted with *Obbo Mul'isaa Abdiisaa,* a Public Prosecutor of the Oromia Regional State Justice Bureau, on 07/11/2013 at 10:00 AM

An interview conducted with *Obbo* Xuurii Qanaasaa, a judge at the Oromia Supreme Court and a criminal section leader, on 11/12/2013.

An interview conducted with *Obbo* Dhuguma Nadhaa, President of the Oromia Special Zone High Court, on 20/10/2013

## J. Annexes

Annex 1

Annex 2

Annex 3

Annex 4

Annex 5

Annex 6

Annex 7

Annex 8