CRIMINAL ADJUDICATION BY STATE COURTS UNDER THE FDRE CONSTITUTION: THE QUEST FOR COMPARTMENTALIZATION OF JURISDICTION

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ABSTRACT

With the introduction of federal arrangement with the FDRE Constitution, the issue of distribution of powers between the Federal Government and the states in general and that of criminal adjudicative jurisdiction between the Federal courts and state courts in particular has become a controversial point. This controversy has resulted in due to the fact that the Constitution has established a dual court structure. On the one hand, the dualism of the court structure presupposes that the federal courts adjudicate federal criminal matters, whereas state courts adjudicate state criminal matters. This principle is accompanied by an exception that the state courts adjudicate federal criminal matters by delegation power. On the other hand, since the federal government has centralized criminal legislative power, it has become controversial how the state courts are adjudicating criminal matters of the federal government: with delegation power or as an original power. This article explores how the state courts are adjudicating federal criminal matters, and how the criminal adjudicative jurisdiction of the federal courts and state courts is compartmentalized.

Keywords*: jurisdiction, criminal adjudication, compartmentalization, constitution, federalism*

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INTRODUCTION

As a complete departure from the previous form of state which was unitary in its approach and a centralized system of government, Ethiopia introduced a federal form of government with the formal promulgation of the 1995 Constitution whose nomenclature of the government is termed as the Federal Democratic Republic of Ethiopia (hereinafter referred to as the FDRE)[1]. It consists of the Federal Government and the State members[2]. The main and distinguishing hallmark of a federal form of government is the existence of the doctrine of the distribution of powers which is constitutionally safeguarded as between the central government and constituent units[3]. This holds true to the Ethiopia's federal set up as well. Accordingly, the legislative, executive and judicial powers are distributed between the Federal Government and the States[4].

[1]Art.1 of the FDRE Constitution unlike the former type of state under the monarchical and dictatorial regimes which was unitary and autocratic, the FDRE established a federal and democratic state.

[2]The cumulative readings of Art.50 (1) and Art.47 (1) of the FDRE Constitution spell out the nine Member States of the FDRE. These are Tigray, Afar, Amhara, Oromia, Somalia, Benishangul/Gumuz, SNNP, Gambella, Harar.

[3]The phrase 'Constituent units' is known by different nomenclatures in different federations. For example, it is called State in the US and Australia, Province in Canada and South Africa, *Lander* in Germany. In Ethiopia, it is named by various terms. For example, during the Transitional Period, it was called National/Regional Self-governments, and in the FDRE Constitution, it is termed as State Member or Member States, States, and there are also other authors who name it Regional State. Whatsoever its nomenclature, it denotes the building blocks of federal/central government in any federation.

[4]Art.50 (2) of the FDRE Constitution provides that the Federal Government and the States shall have legislative, executive and judicial powers. While HPR enacts laws on federal matters (Arts.51 & 55), State Councils enact laws on matters falling under the respective state jurisdictions (Arts. 39, 50(4), & 52). The executive wing of government also follows similar pattern in that the federal executive body implements federal laws (Arts.51, 71, 72, 74, 75, 77) and state executive organ executes state laws (Arts. 50(6), & 52). Furthermore, while federal courts adjudicate cases whose jurisdiction falls under the Federal Government, regional courts would adjudicate cases whose jurisdiction fall under the state jurisdictions notwithstanding exceptional circumstances such as delegation clause in which federal matters are delegated to state courts subject to consequences resulting from such as

The fact that powers of such kind are divided between the Federal Government and the States calls for a degree of compartmentalization that necessitates for the clear determination of jurisdiction in general and criminal adjudicative jurisdiction in particular. As a result, the legislative powers of the House of People's Representatives (hereinafter referred to as HPR) at federal level and the State Councils at the state levels, the executive and judicial powers of the federal and state executive and federal and state judiciaries, respectively should be demarcated as clearly as possible. This article concentrates on and is devoted to the discussion of the demarcation of criminal adjudicative jurisdiction between the Federal Courts and State Courts providing a more emphatic explanation as to how regional courts are adjudicating criminal cases under the current federal arrangement. A critical appraisal of the scope of the criminal adjudicative jurisdiction of the state courts will also be made in the discussions. Moreover, an in-depth scrutiny will be made as to whether the Regional First Instance Courts do have criminal adjudicative jurisdiction.

Before launching into the discussion of the theme under consideration, the writer would like to elucidate why compartmentalization of criminal jurisdiction between the Federal Courts and State Courts is required in the current Ethiopia's federal set up. In the above introductory statements, it has been touched upon that judicial powers are divided between the Federal Government and the States, namely the Federal Courts and the State Courts. Thus, litigant parties should be capable of being cautious and conscious to which court they would lodge their criminal file: to the Federal Courts or the State Courts. To do so *per se* requires the existence of a body of law that

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reimbursement of financial expenditures by the delegating party (the Federal Government) (Art.78(2) cum. Art.94 (1) of the FDRE Constitution).

clearly figures out the criminal adjudicative jurisdiction of the Federal Courts and State Courts.

Consequently, the need for a watertight compartmentalization of criminal adjudicative jurisdiction between the Federal Courts and State Courts on the one hand and among the courts of the same tiers on the other may be justified on different compelling grounds. The first rationale for the quest for a clear demarcation of criminal jurisdiction between the federal and state courts is necessitated for the avoidance or at least prevention of conflict of jurisdiction. A jurisdictional conflict may arise in many instances. For example, if there is no law that regulates or governs the issue under consideration; there is a regulatory law but ambiguity, vagueness, or unclarity that obstructs the proper interpretation and application of the law in determining the jurisdiction, or where there is a circumstance whereby a law appears to give power to both tiers of courts. In order to settle such potential conflict of jurisdiction over criminal cases, there must be a clear law that is capable of regulating the issue both at federal and regional levels.

The second rationale behind the need for a clear demarcation of criminal jurisdiction of the Federal Courts and State Courts is strongly linked with sparing litigant parties from confusion and uncertainty with which court they would file their cases, and thereby saving them from incurring unwanted costs. The more the litigant parties are certain of a specific court, in which they lodge their cases, the more economical, accessible, and well-timed they become. There are crimes which may be barred by period of limitation unless they are lodged with a competent court within the time specified thereof for prosecution[5]. So the time specified for prosecution of a certain

[5]Arts.213, 216, 218 of the FDRE Criminal Code indicate that crimes are subject to time limitation with the exception of Art.28 of the FDRE Constitution which denies period of

crime should not be expired or lapsed while the complainant or victim is toiling in search for which court is unequivocally competent to consider the case at hand. The fact that a litigant party may be perplexed and thereby subject to extra costs in lack of a specified court to which he/she would lodge his/her file may happen either at both tiers of courts or one of them. This concern may be complicated based on different factors. One among other factors is whether the case at hand is federal or regional criminal matter (the issue of subject matter jurisdiction) and then which court is competent to entertain and how.

The third *raison d'être* of the quest for a clear demarcation of criminal jurisdiction is built in the need for the baseline for the allocation and assignment of budgets in general and criminal adjudication in particular. Actually, budget is allocated not on the basis of case by case or subject by subject when it is meant for the judiciary whether it is at federal or state level. But the whole idea here is it is recommendable if criminal adjudicative jurisdiction is taken as a baseline in the process of allocation or assignment of budget for the judiciary. That is to say, if the criminal jurisdiction of the Federal courts appears to be more bulky than that of the State Courts, more budget should be allocated to the Federal Courts and the vice versa must be done if more criminal cases are adjudicated by the State Courts[6].

limitation for such crimes as genocide, summary execution, forcible disappearance or torture. However, the Constitution goes on to state that such offences may be commuted by amnesty or pardon of the legislature or any other state organ.

[6]As the detail will be discussed in the subsequent discussion, the FDRE Constitution stipulates the financial expenditure clause which is due for the enforcement and adjudication of federal laws and matters by the state agencies and courts (Arts. 78(2), 79(7) & 94(1)). Accordingly, the delegating party (mostly, the Federal Government) should take into account the bulkiness of the criminal jurisdiction while it allocates compensatory budgets for the Regional States regarding delegated criminal jurisdiction.

Furthermore and above all, the whole idea of a watertight compartmentalization of criminal adjudicative jurisdiction is required as a resultant phenomenon of one of the underlying principle (s) of federalism: distribution of judicial powers namely, criminal cases between the two tiers of courts[7]. As indicated above, this piece of writing also explores whether the Regional First-Instance Courts have criminal adjudicative jurisdiction which could be backed by constitutional provisions and principles of federalism.

Thus, the article surveys criminal adjudicative jurisdiction under the FDRE Constitution and other subsidiary laws; how criminal cases are allocated between the Federal Courts and State Courts on one hand and among State Courts on the other putting an emphasis on the State First-Instance Courts. Accordingly, the article consists of five parts. Part one, as described hereinabove, presents the introductory discussion and the rationales of the need for watertight compartmentalization of criminal adjudicative jurisdiction. Part two highlights judicial jurisdiction and court organization or structure in general. Part three deals with judicial power and jurisdiction, and court organization in the FDRE. Criminal adjudicative jurisdiction in the FDRE will be discussed in part four. The Constitutional and statutory basis of criminal adjudication will also be dealt with in this very part. Part five presents criminal adjudicative jurisdiction among State Courts. An adequate and in-depth speculation will be made on the legal regimes governing the criminal adjudicative jurisdiction of the State First-Instance Courts and the ambivalence surrounding same. To this end, the Oromia and Harar Regional State Courts have been selected based on the availability and accessibility of laws. Then, the paper will be wrapped up by conclusion.

[7]This imperative may not work for federations in which regional courts are responsible for adjudication of criminal laws enacted by the central government such as Switzerland (Art.123 of the Constitution).

1. JUDICIAL JURISDICTION AND ORGANIZATION OF COURT STRUCTURES

1.1. JUDICIAL JURISDICTION

Judicial jurisdiction could be defined as the legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it[8]. Just like that of the legislative body that enacts laws and an executive organ that implements same, courts adjudicate matters so defined by laws[9]. Any court possesses jurisdiction over matters only to the extent granted to it by the Constitution, or legislation of the sovereign on behalf of which it functions. The question of whether a given court has the power to determine a jurisdictional question is itself a jurisdictional question. Such a legal question is referred to as jurisdiction to determine jurisdiction[10].

There are different dimensions of jurisdictions. These are subject matter jurisdiction (the court's authority to decide the issue in controversy such as contracts issue, civil rights issue, etc), general jurisdiction (the fact that the courts can hear any controversy so defined except those prohibited by law), exclusive jurisdiction (a type of jurisdiction which is limited only to one order of courts), territorial jurisdiction (the court's power to bind the parties to the action), appellate jurisdiction (power of a court to correct the errors of another, lower court), concurrent jurisdiction (the notion that two courts might share the power to hear cases of the same type, arising in the same

[8]Black's Law Dictionary, P.2494

[9]In general, a jurisdictional question may be broken down into three components 1.whether there is jurisdiction over the person (*in personam*), 2.Whether there is jurisdiction over the subject matter (*in rem*), and 3.Whether there is jurisdiction to render the particular judgment sought.

[10]For instance, Art.35 (2) of Proclamation No.25/96 (hereinafter referred to as the Proclamation) states that where two or more Regional or Federal Courts claim or disclaim jurisdiction over a case, the Federal Supreme Court shall give the appropriate order thereon.

place), diversity jurisdiction (the power of Federal Courts to hear cases in which the parties are from different states)[11].

One of the frequently asked questions revolving around a federal system as a political arrangement is whether the underlying principles of federalism, more specifically, the doctrine of the distribution of powers, is applicable to judiciary. Regarding this question, Samuel shares his idea that a judiciary in a federal government must be seen and understood within the context of the basic principles underlying a federal system[12]. This indicates that there must be devolution of power between the two tiers (federal and state courts) and among the courts of various levels.

1.2. ORGANIZATION OF COURT STRUCTURE

As far as the organizational structure of courts in federal states is concerned, there are two approaches discovered up until now. These are dual court structure and single (integrated) court structure. The dual court structure is a type of system of organization of courts in which both the central government and the constituent units have their own tiers of courts which are competent to adjudicate or settle matters falling under the respective orders of governments or interpret and implement laws made by the respective governments as the case may be. Explained otherwise, the federal courts are there to adjudicate federal matters and laws, and the state courts are there to adjudicate state matters and laws[13]. The dichotomy of federal matters and state matters may be determined by the nature of law (whether it is a federal

[11] http://www.yourdictionary.com/jurisdiction, Accessed on 10/06/2014 at 3:00 PM

[12] Samuel Alemayehu,The Judiciary and Court Organization in Federal States: A Comparative Study (AAU, Law Faculty, unpublished, 1992).

[13] The genesis of the federal structure may have an impact on the duality of courts. The dualism of legislative and executive bodies of government may predetermine and influence the judiciary to have and follow a dual structure in an organizational set up.

law or state law), the nature of the matter itself (whether the matter falls under the federal and/or state jurisdiction), and other standards set by the Constitution of a certain federation. Example, USA and Ethiopia have set up dual court structure. The dual system of the organization of courts in federations may be found an ambivalent concern in the instance of concurrent jurisdictions. Litigant parties and their advisors may be confused in deciding which court has a jurisdiction over a particular matter[14]. But, this is more apparent than real fear if the subject matter is clearly demarcated between the Federal Government and the States over which their respective courts would have adjudicative jurisdiction.

The second approach to the organization of court structure in federations is single or integrated court system. The proponents of this approach assert that since decisions rendered by the state courts are subject to review by the Federal Supreme Courts at apex, federal interests may be maintained without the need for the establishment of any lower federal courts.They vindicate this opinion asserting that lower federal courts are unnecessary, expensive and likely to be an intrusion on the autonomy of the state governments[15]. However, when this view is tested in terms of the underlying principles of federalism especially, with the litmus test of the doctrine of the distribution of powers and self-rule, the trend tends more to a unitary system than a federal one. As the name implies, it turns to be a single or integrated court structure which at the end of the day boils down to denial of self-government on judicial affairs. Example, India, Germany, Switzerland.

[14] Brooke Groves, American Intergovernmental Relations, 1964, P.204.
[15] Sileshi Zeyonnes, Constitutional Law II, Justice and Legal Research Institute, 2009, P.189.

2. JUDICIAL POWERS AND COURT STRUCTURE UNDER THE FDRE CONSTITUTION

The FDRE Constitution clearly states that judicial powers are vested in the courts, both at Federal and State levels[16]. As touched upon in the foregoing discussions, Ethiopia's system of court structure is dual like that of the US counterpart. Accordingly, there are two tiers of courts each of them consisting of three levels of courts (Supreme, High and First-Instance)[17]. While the Federal Supreme Court is directly established by the Constitution, the Federal High Court and First-Instance Courts may be established by the HPR by two-thirds majority vote. Should the HPR deem it necessary to establish the Federal High Court and First-Instance Courts nationwide or in some States, there are many issues that are at stake[18]. For instance, working language, regional autonomy of the states and other concerns would become the subject of debate. Economic feasibility and institutionalization will also be the other issue in case the HPR establishes the Federal High Court and First-Instance Courts within the States.

3. CRIMINAL ADJUDICATIVE JURISDICTION UNDER THE FDRE CONSTITUTION

The Constitution, being a general law, does not treat criminal adjudicative authority in isolation from other subjects. Neither does it elaborate a specific jurisdiction of courts as far as criminal adjudication both at federal and state levels is concerned. Consequently, it is a state of necessity to opt for other

[16]Art.79 (1); This provision is also adopted by the constitutions of each Regional State.
[17]Art.78 (2) of the FDRE Constitution.
[18]Accordingly, Proclamation No.322/2003 established the Federal High Court within five States: Afar, Benishangul Gumuz, Gambella, Ethio-Somale and the SNNP. The Proclamation does not justify why these five States are selected.

subsidiary laws which should complement the Constitution[19]. Despite the fact that the constitution does not single out the criminal jurisdiction of courts, there are provisional premises that support us in the explanation of the theme at hand and also applicable *mutatis mutandis* to criminal adjudicative jurisdiction as well.

As discussed in the foregoing section, the Constitution already envisaged the dual court structure in Ethiopia under the federal set up. Accordingly, both the Federal Government and the States have their own judiciaries which are, in principle, beholden with adjudicating their respective criminal matters save in exceptional stipulations such as delegation. To put it in a clearer word, Federal Courts adjudicate criminal cases whose laws are enacted by the HPR and the Regional Courts entertain criminal cases if the laws made by the State Councils are breached. This principle is safeguarded by the Constitution under the mutual respect of powers between the Federal Government and the States[20]. Thus, non-interference of power in each other's authorities so defined by the Constitution is the rule to be observed between the two orders of government.

3.1. CONSTITUTIONAL BASIS

The FDRE Constitution, more or less, provides for the jurisdiction of courts in a way open to subjective views. This holds true especially for criminal adjudication which revolves around concurrent and delegated judicial jurisdictions that is envisaged by the Constitution. Let us see them one by one.

[19]With all its defects, Proclamation No.25/96, the Federal Courts Establishment, was enacted with a view to fill the gaps and for detailed contemplation of criminal jurisdiction of Courts.
[20]Art.50 (8) states that the States shall respect the powers of the Federal Government and the Federal Government shall likewise respect the powers of the States.

a. Concurrency of Criminal Adjudicative Jurisdiction

Before embarking on the discussion of this subsection, let us look at concurrency as a whole: its definition, attributes, and significance under the FDRE Constitution in the doctrine of the distribution of powers. Concurrent jurisdiction is a 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[21]. Concurrent adjudicative jurisdiction, thus, contemplates that within the limited judicial powers so determined by relevant laws, both Federal and State Courts have jurisdiction over a certain matter, a litigant party being granted the right to lodge her case to any competent court she wants.

The concurrency of judicial power under the Constitution is found in Art.80. It is captioned as 'Concurrent Jurisdiction of Courts". But the reading and wording of the whole substances go beyond the essence of judicial concurrency. Hesitantly, sub-articles (2) and (4) of the article might appear to convey the message of concurrency but these two sub-articles again do not appear to indicate the significance of judicial concurrency under the Constitution. Sub-article (2) states that State Supreme Court shall exercise the jurisdiction of the Federal High Court (*emphasis added*). Sub-article (4) on the other hand states that State High Courts shall exercise the jurisdiction of the Federal first-Instance Court (*emphasis added*). These sub-articles are also backed up by sub-article (7) of Art.79 which provides that the HPR shall allocate compensatory budgets for states whose Supreme and High Courts concurrently exercise the jurisdictions of the Federal High Court and Federal First-Instance Courts.

[21] *Supra* note 8, P.2492.

There are some debatable issues which can be drawn from the phrase "concurrent judicial powers" as provided by the Constitution. The first issue goes to the heart of the interplay of the usual meaning and attribute of concurrent judicial power on one hand and that is provided in the Constitution on the other. As touched upon in the above discussion, the caption and substances of Art.80 go slight far apart from each other. Sub-articles (2) and (4) of Art.80 *per se* are not sufficient provisions to help one reach the conclusion that the State Supreme and High Courts shall exercise the jurisdictions of the Federal High and First-Instance Courts respectively, concurrently with one another unless it is backed up by Art.79(7). This argument may be substantiated by different valid grounds. The first one is that there is no law that has been made concurrently by the Federal Government and the States so far over which the aforementioned Courts would have concurrent jurisdiction in general and criminal adjudicative jurisdiction in particular. This again is justified on the ground that, in principle, the Federal Courts adjudicate Federal matters and the State Courts adjudicate state matters which on the other hand vindicates the principle of duality of court structure adopted by the FDRE Constitution[22]. For example, the FDRE Criminal Code is utterly enacted by the HPR without the involvement of the States. Thus, the principle goes, crimes incorporated in the Code should be entirely adjudicated by the Federal Courts. On the other hand, the State Courts are, at least legally speaking, not duty bound to

[22]The dichotomy of federal matters and state matters has not adequately been defined by the Constitution. But a closer look at the provisions of the Constitution in general and Arts.51, 55, and 77 and Arts.39 & 52 in particular, depict the federal matters and state matters respectively. In connection with this concern, Abebe Mulatu (*infra at* note 48) holds two views here: firstly, the responsibility of dichotomizing matters as federal and state is borne by the legislator, and secondly, he asserts that a case is a federal matter if it arises on federal law and a case is a state matter if it arises on state law.

adjudicate criminal cases which arise from the Criminal Code because it is not a concurrent power and exclusively belongs to the Federal Government[23].

Thus, there is no criminal law concurrently enacted by the Federal Government and the States in order for the Federal High and First-Instance Courts, and the State Supreme and High Courts respectively exercise criminal jurisdictions concurrently[24]. As a result, the concurrency of jurisdiction with respect to criminal cases under the FDRE Constitution turns to be absurd as there is no criminal law so far enacted concurrently by the Federal Government and the States.

[23]Some people hold and question that whether all laws enacted by the HPR belong to and are categorized to be the Federal laws. However, the writer emphatically argues that any law made by the HPR and any other Federal Government agency belongs to and is said to be federal law because in accordance with Art.2 (3) of Proclamation No.25/96 defines the Laws of the Federal Government as "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". Thus, Federal laws include all previous laws which are consistent with the Constitution and all powers which are assigned to the Federal Government by the Constitution namely, powers provided and listed under Arts.51, 55, 71, 72, 74, 75, & 77, *inter alia,* belong to and are termed as Federal matters and laws and regulations issued on these areas are unquestionably called Federal Laws. The power to enact criminal code and other federal criminal legislations (as provided under Art.55 (5) is the typical and relevant example. Regardless of the dichotomy of Federal matters (crimes) and State matters (crimes), the new FDRE Criminal Code comprehensively incorporates a great deal of crimes which are also capable of featuring regional characters. This, in fact, is another issue. Read Chapter Three of the thesis done by the same author on the title "Criminal Jurisdiction of State Courts under the FDRE Constitution" which was submitted for the LL.M fulfillment at the Law Faculty of Addis Ababa University.

[24]Contrary to this assertion, Dr. Assefa Fisseha argues that Art.55 (5) of the Constitution is concurrent power as between the Federal Government and the States (*Supra* note 22 p.145). But the writer continues persisting in his stand that Art.55(5) of the Constitution in cumulative with the FDRE Criminal Code and other criminal legislations enacted by the Federal Government, indicates that all these aforesaid criminal laws are the exclusive powers of the Federal Government because we could not find any element of concurrency of powers such as the fact that the States exercise such powers until they gain federal importance and as a result, the Federal Government would step into centralize same. But rather the norm has dominantly become that the Federal Government has been given a priority and it can criminalize any act it wants and deems necessary, and the States enact criminal laws which are left unmentioned. This is not, typically speaking, concurrent but 'residual' power with a relative reference to criminal legislative power in Ethiopia. At this juncture, the author would like to unfold the potential readers about the dichotomy of concurrent and 'residual' criminal legislative that he compares the notion of residualism thereof not in view of general distribution of powers, but criminal legislative power *per se*.

b. Delegated Criminal Adjudicative Jurisdiction

In case the dual federal arrangement proper may not work appropriately, the Constitution has provided and stipulated delegation mechanism[25]. Delegation clause under the Constitution is entailed by financial effect[26]. From these two premises, we could safely deduce that delegation clause may be employed under the condition of necessity (as deemed by the Federal Government) and all financial expenditures incurred under delegated tasks shall be borne by the delegating party (*viz.* the Federal Government). This indicates that unless there is an agreement between the Federal Government and the States which excludes the financial expenditure clause on delegation, the States are not duty bound to discharge the powers and functions granted to the Federal Government by law[27].

Delegation clause is also provided in the Constitution in relation to judicial powers. The Constitution unequivocally delegates the jurisdictions of the Federal High Court and First-Instance Courts to the State Courts (*emphasis*

[25]Art.50 (9) of the FDRE Constitution enshrines that the Federal Government may, when necessary, delegates to the States powers and functions granted to it by Art.51. Powers and functions enumerated under Art.51 are so many and broad as well as they encompass legislative and executive spheres within themselves. Delegation in this sense is not an arbitrary act but an undertaking carried out by the Federal Government as a matter of necessity to delegate those powers and functions to the States.

[26]Art.94(1) of the FDRE Constitution provides that the Federal Government and the States shall respectively bear all financial expenditures necessary to carry out all responsibilities and functions assigned to them by law. 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.

[27]However, Abebe (*infra at* note 48) firmly argues that the States are duty-bound to enforce federal laws because they are considered as the laws of the whole country and as a result, should be taken as integral parts of the laws of the constituent states. His assertion is more assumptive and practice-based than constitutional backup. Unlike the US doctrine of federal supremacy, the FDRE Constitution keeps silent as to how federal laws are enforced by the States as their own laws except on the basis of delegation. Thus, unless the predominant practice dictates otherwise, it is the firm stand of the writer, that the States are not duty-bound to enforce federal laws as their own, taking into consideration Constitution as it is.

added)[28]. From this constitutional provision, there are at least two scenarios that we could draw up. The first one is that the jurisdictions of the Federal Supreme Court are not delegated to State Courts of any level anyway. While it is directly established by the Constitution, the other two levels of Courts, the Federal High Court and First-Instance Courts, are made conditional and to be established by the HPR upon the fulfillment of the requirements so set. The second scenario takes us to the most apparently debatable issue among scholars and legal practitioners which is the delegation of the jurisdictions of the Federal High Court and First-Instance Courts is undertaken to all the three levels of State Courts (Supreme, High and First-Instance). There are many writers who argue that the State First-Instance Courts[29] do not have a criminal jurisdiction[30]. All of them substantiate their arguments by using the

[28]Art.78 (2) of the FDRE Constitution The fact that the jurisdictions of the Federal High Court and First-Instance Courts are delegated to the State Courts are subject to the requirement that and until the aforementioned two levels of Federal Courts are established in each or some of the States, upon the fulfillment of the conditions set out in the Constitution namely, the two-thirds majority vote of the HPR and if it is convinced on the establishment of the Courts under consideration. The logical conclusion drawn from this premise is that if these requirements are not met, the delegation clause continues to be a permanent undertaking. Abebe *(infra note 48)* notes that the establishment of the Federal High and First-Instance Courts is not mandatory. If the establishment of the Federal High and First-Instance Courts is not mandatory, one may be tempted to pose a question as to what is the difference between the delegated jurisdiction and inherent power of the delegate courts provided that the delegation takes the form of permanence. Vander Beken, on the other hand, argues that Art.78 (2) is the transitional provision. This assertion awaits and presupposes the mandatory establishment of the Federal High and First-Instance Courts upon the fulfillment of the requirements (Christophe Van der Beken, Constitutional Diversity in Ethiopia: A Comparative Analysis of Ethiopia's Regional Constitutions, Ethiopian Civil Service College, P.33).

[29]As far as their nomenclature is concerned, constitutions of many Regions designate it as '*Woreda'* Courts. The Oromia Regional State Constitution terms them 'District Courts'. Anyhow, they are levels of courts established at the district administrative units below zonal level next to state high courts.

[30]Munir Abdullahi, Delegated Jurisdiction of State Courts on Federal Matters: Particular Reference to Harari Regional State*(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; 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 of Laws (LL.B) at the Faculty of Law, Addis Ababa University, June,2006, unpublished)*, P.73;Teklit

terms 'delegation and concurrency' interchangeably. However, the writer asserts that the two terminologies are far different from one another and the Constitution itself does not have the view of making them one[31]. At any rate, contrary to those who assert that the State First-Instance Courts do not have criminal adjudicative jurisdiction, the writer puts forward the following justifications that are capable of substantiating the argument that it does have a criminal jurisdiction.

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 (though absurd and disused), 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

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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; 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; Assefa Fisseha, Federalism, Teaching material, Justice and Legal System Research Institute (2009), Addis Ababa, P.462.

[31]While concurrency of judicial power denotes an inherent power (for the sake of the present discussion that the Federal High Court with the State Supreme Court, and the Federal First-Instance Court with the State High Court), delegation however, implies a temporary act. Delegation exists until the contract on a specific subject matter terminates but concurrency continues as it has no view of temporal act in itself. The notion of delegation clause follows the relationship between the principal-agent scenarios.

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[32].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[33]. The Constitution does not have a view to exclude the State First-Instance Courts from consideration of delegated criminal jurisdiction.

Secondly, there are some scholars who argue that the State First-Instance Courts have delegated judicial power in general and criminal jurisdiction in

[32]Jetu Edosa, What Is Wrong with Criminal Jurisdiction of Courts in Ethiopian:Re-Thinking Ethiopian Criminal Jurisdiction, (available with the author, Unpublished), P11.
[33] *Id,* P.13.

particular in accordance with Art.50 (9) of the Constitution[34]. 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[35]. The same critique 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, 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,[36] 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 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 more apparent than real 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.

[34]Fasil Nahum, The Distribution of Powers between the Federal Government and the States under the FDRE Constitution (*4th Round Symposium, 1999, Bishoftu (Translation mine)).*
[35]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 of Laws (LL.B) at the Faculty of Law, Addis Ababa University, June 2006, Unpublished)*,P.51.
[36]The FDRE Constitution, Art.80 (5 and 6).

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[37]. 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 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[38]. Virtually, all human rights and fundamental freedoms constitutionally guaranteed are strongly and even entirely connected with 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 rights which is the right of access to justice[39]. 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.

[37] *Id,* Art.13 (1).
[38] Assefa Fiseha, Federalism, Teaching Material, Sponsored by Justice and Legal System Research Institute, 2009, P.447.
[39] 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.

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 reaffirms this suggestion[40].

Fourthly, notwithstanding 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 know also for certain that the state courts do adjudicate criminal cases in the regular discharge of judicial duties, not in their delegated powers[41]. 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

[40]The Minutes of the Constitutional Assembly, Compilation 5, November 1995, Addis *Ababa (Translation mine),* PP.11-12.
[41]*Supra* note 38, P.447.

focuses on devolution of power in general and judicial power in particular in order to make a significant 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 it exercised criminal jurisdiction. Thus, the concept of devolution of power envisaged by the Constitution should also be applicable to the lowest level of the State Courts, the First-Instance Courts, over criminal adjudicative jurisdiction.

In fact, there are subsidiary laws which deprive the State Courts as a whole of some criminal cases such as terrorism cases. Terrorism cases are entertained by only the Federal High and Supreme Courts[42]. In this respect, both the Federal First-Instance Courts on one hand and the three levels 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

[42]Proclamation No.652/2009, Anti-Terrorism Proclamation, *Federal Negarit Gazeta*, 15th year, No.57, 28th August, 2009, Art.31.

terrorism cases, the practice shows that the Regional State Supreme Courts are exercising such a power[43].

Alongside the discussion of delegation and concurrency, it is noteworthy to consider the consequence stemmed there from, the fiscal effect. Art.79(7) of the FDRE Constitution states that the HPR shall allocate compensatory budgets for States whose Supreme and High Courts concurrently exercise the jurisdictions of the Federal High Courts and Federal First-Instance Courts. But, we have seen in the above discussion that the legal and practical significance of concurrent power in general and judicial concurrency in particular under Ethiopian law is dubious. On the other hand, the overall reading of the Constitution gives an impression that since dual federalism is adopted in Ethiopia on one hand and there is no principle of federal supremacy clause, the option would be, as already envisaged by the Constitution, delegation. This also holds true for judicial functional relations between the Federal Courts and State Courts. Even so, the Constitution spells out financial expenditure clause for concurrency and disregards that of the delegation clause. Thus, there is a sort of mishmash of provisions in the Constitution. However, this does not mean that the financial expenditure clause for judicial delegation is groundless. Rather, Art.94 (1) will be used by analogy for judicial delegation as a particular subject.

3.2. STATUTORY BASIS

Proclamation No.25/96 and its successive amendment proclamations are ones among those subsidiary laws which are supposed to govern criminal

[43]An interview conducted with Mr. Turi Kanassa, a judge at Oromia Supreme Court and a criminal section leader, which was conducted on 11/12/2013. The interviewee responded that the power that enables the Oromia Supreme Court to adjudicate terrorism cases seems to have emanated from the constitutional delegation of the jurisdiction of the Federal High Court to the State Supreme Court till the establishment of the former in the states.

jurisdiction of Federal Courts. The Proclamations are totally destined to regulate criminal jurisdiction of the Federal Courts excluding that of the State Courts. This indicates that State Courts need other subsidiary laws which deal with compartmentalization of criminal jurisdiction among the three levels of courts.

At any rate, there are three scenarios which can be drawn from the Proclamation as far as criminal adjudicative jurisdiction is concerned. These are: 1) common criminal jurisdiction of the Federal Courts as per Art.3, 2) specific criminal jurisdictions of the Federal Courts as pursuance to Art.4, and 3) criminal jurisdiction over crimes left unmentioned in the Proclamation or other relevant laws. With regard to the common jurisdiction of the Federal Courts, they have criminal as well as civil jurisdictions over cases arising in the Constitution, Federal Laws, International Treaties, parties and places specified in the Constitution and Federal Laws[44]. This stipulation contemplates and connotes that the Federal Courts have criminal jurisdiction over matters which are capable of featuring federal characters. That is to mean that they do not have criminal jurisdiction over crimes featuring regional behaviors, and as a result, State Courts are expected to entertain criminal cases which are supposedly made to be categorized under the state jurisdiction though this assertion has not been taken into consideration at the time the FDRE Criminal Code was enacted[45].

[44]Cases involving the Constitution, Federal Laws and International Treaties indisputably fall under the jurisdiction of the Federal Courts because issues arising in these lists are most of the time supposed to be federal matters and powers. The question will be what about criminal cases involving state constitutions and state laws, parties and places specified therein? How could the State Courts consider criminal cases arising in these laws provided that they are comprehensively packed and enacted by the federal agencies?

[45]This issue is being envisaged in the FDRE Draft Criminal Procedure Code. Arts.38 and 39 contemplate that the Federal Courts adjudicate 'federal crimes' and the state courts adjudicate 'state crimes'. The question is how could it be valid that the Draft Criminal

Secondly, the fact that the criminal jurisdictions of the Federal Courts are specified in a very limited manner has also its own problem[46]. This in turn raises a question as to which court (federal or state) adjudicates criminal cases which are not listed under Art.4 but may be found to be categorized under Art.3 of the Proclamation (matters and laws which are supposed to characterize federal (central) government's behaviors). This indicates that there is a contradiction between Arts.3 and 4 of the Proclamation regarding criminal adjudicative jurisdiction.The Proclamation does not either have any room to regulate the crimes left unspecified therein.

Thirdly, a question comes into picture as to which court (federal or state) that adjudicates criminal cases which are out of the regime of the Proclamation[47]. This comes true especially having a closer look at the FDRE Criminal Code which is so comprehensive that it incorporates crimes featuring regional characters as well. To this effect, there are two views as far as the adjudicative jurisdictions of crimes which are not specified in the Proclamation are concerned. The first view states that crimes which are not

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Procedure Code incorporates those issues which are not dealt with by substantive criminal law? Who or which body/organ does have such a power to dichotomize matters or crimes as 'federal crimes' or 'state crimes'?

[46]Art.4 of Proclamation No.25/96 lists a fraction of crimes over which the federal courts have adjudicative jurisdiction. 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.

[47]The Proclamation is designed to regulate only criminal cases arising in the FDRE Constitution, Federal Laws, International Treaties and parties and places mentioned in the federal laws, as a common jurisdiction of the Federal Courts, including criminal cases mentioned above under Art.3.

mentioned in the Proclamation are the exclusive jurisdiction of the State Courts[48]. The second view advocates that such crimes should be adjudicated by the Federal and State Courts concurrently[49]. However, a closer look at the two views in light of the Constitution may lead one to cause a hardly defensible attack on the views held by the commentators. Thus, the Proclamation barely solves the problem of criminal adjudicative jurisdiction between the Federal Court and the State Courts but rather it created other problem to the extent that it goes against the Constitution. Consequently, unless other mechanism is sought in order to alleviate this problem otherwise, the writer emphatically holds that State Courts exercise the jurisdictions of the Federal Courts in general and criminal jurisdictions over crimes which are not mentioned in the Proclamation and its subsequent amendments in particular, with the competence of delegation. This has a constitutional basis as expounded in the foregoing discussion. There is no

[48]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), Vol. I, May 19-20, 2000, Addis Ababa),* PP.129-130. He argues that crimes which are not specified in the Proclamation are the exclusive jurisdiction of the state courts. However, it is not clear how and why the state courts are supposed to assume an exclusive criminal adjudicative jurisdiction over crimes which are incorporated in the FDRE Criminal Code. This sort of practice defeats the very purpose of dual federalism which Ethiopia has currently adopted. Legally speaking, there is no way in which the State Courts do have an exclusive jurisdiction over federal laws or matters, the Criminal Code/law being one of such laws. This is against the principle of mutual respect of powers between the Federal Government and the States. This principle advocates the prohibition of unlawful encroachment of powers into one another's jurisdiction.

[49]Assefa Fisseha, Federalism, Teaching Material, P.461. He holds that with regard to the crimes which are not specified in the Proclamation, the Federal Courts and the State Courts would have a concurrent criminal adjudicative jurisdiction. He based his assertion on the fact that if the scenario of the federal courts' exclusive and state courts' exclusive criminal adjudicative jurisdiction is drawn, the Federal Government will lose its inherent power as envisaged in the Constitution, the Criminal Code and the Proclamation itself (Art.3). However, it has been noted, in the preceding discussion, that the essence and significance of concurrency in general and judicial criminal concurrency in particular is opaque in the Ethiopia's federal arrangement.

other way than delegation how State Courts exercise the jurisdictions of the Federal Courts as an inherent power so long as the laws are made by the HPR or other Federal Government agencies.

4. CRIMINAL ADJUDICATIVE JURISDICTION OF STATE COURTS: STATUTORY BASIS

It has been stated, in the foregoing discussions, that the dual court structure designed by the Constitution dictates both the federal and state courts to have their own laws which regulate criminal jurisdiction of courts within their respective jurisdictions[50]. The writer limits his inquiry to the Oromia and Harari States regarding laws regulating criminal adjudicative jurisdiction[51]. With regard to the State, it appears that the Criminal Procedure Code, Proclamation No.141/2008 (Oromia Courts Re-establishment),[52] and

[50]Art.78 (3) provides that particulars are determined by law as far as the three-tiered state courts are concerned. This includes also the adjudicative jurisdiction of state courts which await a law for compartmentalization of criminal jurisdiction.

[51]This is not a random selection but rather based on the accessibility of regional laws both on website and in hard copy. The writer has been working as legal practitioner in Oromia Courts and as a result accustomed to being conscious of and having had access to the laws enacted by the *Caffee* Oromia on subject at hand.

[52]Art.27 (1) of Proclamation No.141 reads, in Afaan Oromoo, as "[*Manni Murtii Olaanaa*] *akka adeemsa falmii sivilii, seera adeemsa falmii yakkaa, yookiin akka seera birootiin tumametti dhimmoota sivilii fi yakkaa sadarkaa jalqabaan ilaalee ni murteessa"*. Sub-article 2 goes on to state that "*kan keewwata xiqqaa 1 jalatti tumame akkuma jirutti ta'ee, Manni Murtii Olaanaa dhimmoota yakkaa ka'umsi adabbii isaanii waggaa 10 (kudhan) ol ta'e irratti aangoo abbaa seerummaa sadarkaa jalqabaa ni qabaata*."The English version (*translation mine*) of the above article (provision) reads as "The High Court shall have the first-instance jurisdiction over civil and criminal matters defined in accordance with the Civil Procedure Code, the Criminal Procedure Code or in pursuance of other laws enacted." Sub-article 2 may read as "Notwithstanding sub-article 1 of this Article, the High Court shall have the first-instance jurisdiction over crimes whose initial punishment exceeds 10 (ten) years." Art.28 (1) (a) also states, in Afaan Oromoo, as "*Manni Murtii Aanaa seerota adeemsa falmii sivilii, yakkaa yookiin akka seera birootiin tumametti dhimmoota sivilii fi yakkaa sadarkaa jalqabaan ilaalee ni murteessa*." That is to say that the *Woreda* (State First-Instance Court) shall have an initial jurisdiction over civil and criminal matters in accordance with the Civil Procedure Code, Criminal Procedure Code and other laws so enacted.

Proclamation No.25/96 (Federal Courts Establishment)[53] may be employed in compartmentalizing criminal jurisdiction of the Courts. The question is which law prevails in case of inconsistency while using these laws as a means to allocate criminal cases among the aforesaid Courts or whether the task of the allocation of criminal cases among the State Courts in general and the Oromia Courts in particular is carried out haphazardly.

In relation to an approach to criminal adjudicative jurisdiction of the State Courts making a cross reference to the Criminal Procedure Code, since there was a centralized court structure in the Country, jurisdictional question was rarely an issue at stake[54]. It becomes more problematic in the current federal set up which introduced a dual court system on one hand and which lacks a clear law that governs compartmentalization of criminal jurisdiction between the Federal Courts and State Courts as well as among the State Courts, on the other. Actually, this approach has been adopted by the Oromia Courts as a principle and in a generic expression. For example, while the Oromia First-Instance Courts and High Courts are supposed to adjudicate criminal cases in accordance with the Criminal Procedure Code, it is not clarified the

[53]Art.27 (4) also provides that [the High Court] shall exercise the jurisdiction of the Federal First-Instance Court over matters brought before it (translation mine). The Afaan Oromoo version reads as "*Manni Murtii Olaanaa aangoo Mana Murtii Federaalaa sadarkaa jalqabaatiin dhimmoota isaaf dhiyaatan ni ilaala; murtii ni kenna*." Art.26 (1) (b) also provides for the Oromia Supreme Court. Accordingly, it states that "*Manni Murtii Waliigala Oromiyaa dhimmoota Federaalaa ilaalchisee aangoo Mana Murtii Olaanaa Federaalaa bakka bu'uudhaan sadarkaa jalqabaatiin ilaalee murtii ni kenna*." If translated, it means "The Oromia Supreme Court shall, in initial jurisdiction, exercise the jurisdiction of the Federal High Court in delegation." There is an apparent contradictory expression here. While it is expressly stated that the Oromia Supreme Court exercises the jurisdiction of the Federal High Court in delegation, the High Court, however, shall exercise the jurisdiction of the Federal First-Instance Courts over crimes whichever are brought before it.

[54]The First Schedule of the 1961 Criminal Procedure Code of the Empire of Ethiopia (which is also in force up until now) presents the list of the crimes (which were incorporated in the Penal Code of the Empire) on the left hand side and the order of the courts (High, *Awradja*, and *Woreda*) on the right hand side in compartmentalizing the criminal jurisdiction of the then courts existing in the Country.

jurisdiction of which level of court(s) of the former unitary State, Ethiopia, they would substitute. Does it mean that the current First-Instance Courts of Oromia substitute the former *Woreda* Courts? In the same token, does it mean that the present Oromia High Courts substitute the former *Awradja* or High Courts? This and other pertinent issues have not been given a wide room for the matter of an unequivocal understanding of the clear determination of criminal adjudicative jurisdiction between the State Courts. As will be discussed subsequently, the criminal jurisdictions of the past *Awradja* and *Woreda* Courts shall fall under the current Federal First-Instance Courts[55].

The second approach adopted by the Oromia Courts as a means to determine the criminal jurisdiction among the courts of the three levels is the amount of punishment of imprisonment (the ten-year-punishment as an initial penalty). This method of standard-setting as a way of compartmentalization of criminal jurisdiction leads one to posit a couple of possible questions. Firstly, while crimes, whose initial punishment exceeds ten years, fall under the jurisdiction of the High Court, which crimes should fall under the jurisdiction of the Oromia Supreme Court? How many crimes, strictly speaking, are there whose initial punishment exactly begins from ten year? What other methods could be employed to determine the jurisdiction of crimes whose initial punishment ranges above and below ten years? Secondly, how can we determine the criminal jurisdiction of courts over

[55]Art.15(2) of Proclamation No.25/96 states that without prejudice to judicial power vested in other organs by law, the Federal First–Instance Courts shall have [other] criminal cases arising in Addis Ababa and Dire Dawa as well as other criminal cases under the jurisdictions of *Awradja* and *Woreda* Courts pursuant to other laws in force.

crimes whose punishment is other than imprisonment?[56] All these issues remained unsettled in the Proclamation.

Thirdly, the Proclamation makes an implied cross reference to Proclamation No.25/96 (the Federal Courts Establishment) with regard to the delegate jurisdiction of the Oromia Supreme Court and High Courts on behalf of the Federal High Court and First-Instance Courts respectively. The Proclamation (No.141/2008) clearly states that the Oromia Supreme Court exercises an initial jurisdiction of the Federal High Court in delegation[57].

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[58]. 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 were 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

[56]Arts.99-102 of the FDRE Criminal Code deal with one mode of ordinary punishment, fine, confiscation and sequestration, which exist in parallel or addition to imprisonment.

[57]Art.26 (1) (b) of Proclamation No.141/2008 (Oromia Courts Reestablishment) The first instance criminal jurisdictions of the Federal High Court are enumerated under Art.12 of Proclamation No.25/96. Thus, the rule here seems that the Oromia Supreme Court exercises a delegated criminal jurisdiction over these crimes being delegated by the Federal High Court. But, the Oromia Constitution does not clearly stipulate and identify whether the State Supreme and High Courts exercise the jurisdictions of the Federal High Courts and First-Instance Courts by delegation or concurrently, respectively. This is the verbatim copy of Art.80 (2 & 4) of the FDRE Constitution which deals with the issue of concurrent judicial powers. Art.78 (2) of the FDRE Constitution does not single out which level of State Courts exercise the jurisdictions of the Federal High and First-Instance Courts by delegation.

[58]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).

initial criminal jurisdiction over crimes that would fall under the past High Court in accordance with the Criminal Procedure Code[59]. In addition, the Regional High Court also exercises the criminal 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

[59] *Id*, Art.16 (1).

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[60]. 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.

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, the implication is 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 are used by the Harari Regional State High Court.

[60]Federal Courts Establishment Proclamation No.25/96, Art.15 (2).

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.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.

5. CONCLUDING REMARKS

From the commonplace understanding point of view, it is a plain fact that the issue of distribution of powers between and among different organs of government in general and of courts in particular becomes more problematic in a federal system than in that of a unitary system. In a federal system of governance, powers are divided between the federal government and the constituent units on the areas of legislative, executive and judicial functions. Such a system of division of powers is safeguarded by the constitution and mutual respect of the principle of non-interference between the two tiers of the government. No set of government would be allowed to unlawfully encroach into the powers of the other order of government because both are considered to be autonomous over matters falling under their respective jurisdictions. As a result and antecedent condition, matters should be divided between the central government and the states as unequivocally as possible.

The doctrine of distribution of powers that is an underlying principle of a federal system of governance may also work for judicial powers as between the federal courts and state courts on one hand and between the courts of different levels of government on the other. This is an undertaking that

should be regulated by laws as stemmed from the constitution. Actually, judicial system may differ from federation to federation based on the type of organizational set up of courts whether dual or integrated court structure. Ethiopia follows the dual court structure. Accordingly, both the Federal Government and the States have Supreme, High and First-Instance Courts. Judicial powers are divided between these two tiers of courts amongst the three layers at each level.

The FDRE Constitution attempts to provide for the jurisdiction of courts at federal and state levels. The overall reading of the Constitution implies that the Federal Courts consider federal matters and State Courts entertain state matters. In case this rule does not work, the Constitution has envisaged the delegation clause as entailed by the reimbursement of financial expenditure by the delegating party. The FDRE Criminal Code (Law) is one among the so called Federal laws. Based on the comprehensive nature of the Code, a sort of complication in relation to compartmentalizing criminal adjudicative jurisdiction between the Federal Courts and State Courts on one hand and amongst the State Courts on the other is inevitably created. The problem becomes more glaring with respect to the reading of the Constitution and the Criminal Code alongside with Proclamation No.25/96 which considerably restricts the scope of the criminal jurisdiction of the Federal Courts.

The Constitution provides for the delegation and concurrency clauses which are hardly clear and invites some scholars to have different views on criminal jurisdiction of courts. Some of them note that delegation and concurrency provided in the Constitution would mean one and can be used interchangeably. This mode of interpretation, while can easily be attacked on many valid grounds, will deprive the State First-Instance Courts of criminal adjudicative jurisdiction and this argument would defeat the very purpose of

federalism in general and judicial federalism in particular. Moreover, Proclamation No.25/96 and its successive amendment proclamations could not yet solve the problem of criminal jurisdiction of courts both at the federal and state levels. There is neither adequate law which clearly regulates the criminal adjudicative jurisdiction of the State Courts. Some Regions have issued laws which are not adequate enough to alleviate problems related to criminal adjudicative jurisdictions.

Therefore, taking into account the duality of courts structure and the purpose of federalism, a law which clearly identifies the criminal jurisdiction of the Federal Courts and State Courts should be enacted at both levels. Actually, the determination of the criminal adjudicative jurisdiction of courts may necessitate the issue of criminal procedure legislative power. As per Art.52 (1) of the FDRE Constitution, such a power belongs to states in the name of the residual powers reserved to them.

Moreover, in order to have a clear understanding of criminal adjudicative jurisdiction of federal courts and state courts (in situations where criminal cases are adjudicated with original power, delegation or concurrent), the provisions of the Constitution on the area must be clarified either through amendment or interpretation given by the House of Federation.