

**ST. MARY'S UNIVERSITY COLLEGE**  
**FACULTY OF LAW**  
**LLB THESIS**

**THE CRIMINAL JURISDICTION OF**  
**REGIONAL STATE OF ETHIOPIA**

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ADDIS ABABA , ETHIOPIA

July, 2008

# THE CRIMINAL JURISDICITON OF REGIONAL STATE OF ETHIOPIA

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**Submitted in Partial fulfillment of the requirement for the  
Bachelors Degree of Law (LLB) at the Faculty of Law,  
St. Mary's University College**

**ADDIS ABABA , ETHIOPIA**

**July, 2008**

## ***Acknowledgement***

Most of all thank that almighty God for giving me all the strength to accomplish one of my long set projects and for making me go through those wonderful experience in the past four years.

My advisor Ato Nikodims Getahun deserves vary special thanks for his tireless patience in going through this thesis and provide invaluable asset that contributed inspiring me to turn around and rethink from diverse perspective it is with sincere and out most pouring appreciation and respect that I acknowledge his unfailing support and encouragement.

Like every other time, the real and deepest thanks are due to my lovely father Tilahun Workineh and my mother Soreti Wendimu. The two have borne the burnt of my travails over the past four years and endured the inevitable pressures and have done so in a loving, caring and passionate manner.

My hear felt gratitude also goes to my brother Tesfaye Tilahun, Yasherag Teshome, Goshu Tilahun, Tekalign Tadese, Awoke Mangiste, Turuwork Tilahu, Desalegn Hailu and Bekele Tilahun for their material and moral support in accomplishing my university life.

Great thanks would deserve to my life long friends Tigist Assefa, Tilahun Dereje, Million Alemayehu and Roman Diriba who have assisted me both materially and morally. I am truly over whelmed by their love and concern in which I enjoyed all my life.

Last but not the least, my special thanks and deepest gratitude goes to Chaltu Hailu for patiently and seriously typing and editing this paper.

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## ***Introduction***

As its title may suggest this essay tries to address certain issues concerning the criminal jurisdiction of Ethiopian Regional state court. The core issue is: which courts (federal or Regional state courts) that have an exclusive/inherent judicial power over federal subject matter? Its ramifications being: (I) what is the authoritative power for regional state courts to exercise judicial powers and function over criminal matters? (ii) do Regional state courts have the exclusive/inherent jurisdiction to entertain an application pertaining to federal subject matters which are inclusive of criminal cases?; (ii) is there the need for ascertaining whether the subject matter of a given application for entertainment falls either within the ambit of federal courts or Regional state courts?; (iv) Do all levels of Regional state courts given the power to entertain criminal cases?; (v) What empowers Regional state first Instance courts to hear and decide on criminal cases?; (vi) What is (are) the advantage (s) of the assumption of criminal jurisdiction of Regional state first Instance courts?; (vii) what is (are) its disadvantage (s) and (vii) its impact on judicial independence?

The scope of the paper is primarily limited to attempting to offer answers for these questions:-

Primarily, the objective of the paper is designed to stimulate a further study in the area. Secondly, the paper may contribute to the development of literatures in the Ethiopian procedural law.

In order to attain the objectives of the paper, the writer has consulted literature and the experiences of other countries; cases decided by different Ethiopian Regional state first instance courts on criminal cases in exercising their judicial powers and function have been observed; and the opinions of certain judges, though it is not enough, have been sought.

The arrangement of the paper is as follows the first chapter discusses the judicial power in general, the impact of federalism on Ethiopia's judicial

power and judicial system, components of jurisdiction of Ethiopian courts in criminal cases and the jurisdiction of Ethiopian federal courts. Chapter two deals with the criminal jurisdiction of Ethiopia Regional state first instance courts chapter three dwells upon the current practice of Regional state first instance courts; its advantage (s); its disadvantage(s); and its impact on judicial independence.

## CHAPTER ONE

### JUDICIAL POWER OF THE FEDERAL COURTS OVER CASES ARISING UNDER FEDERAL LAWS

#### *1.1 Judicial power in General*

The term “judicial power” refers to the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision. Many choose to use terms “judicial power”. And” jurisdiction” interchangeably. Though this may be acceptable depending on the context. One must not confuse the two as distinct legal theories. The Black’s defines the term jurisdiction as:

***A term of comprehensive import embracing every kind of judicial actions. It is the power of the court to decide a matter in controversy, and presupposes the existence of a duly constituted court with control over the subject-matter and the parties. Jurisdiction defines the powers of a court to inquire into facts, apply the law, make decision and declare judgments.<sup>2</sup>***

Broadly defined, Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit. It has also been defined as the power to entertain the suit, consider the merits and render a binding decision thereon.

Jurisdiction is the authority of a court to exercise judicial power in a specific case and is of course, a prerequisite to the exercise of judicial power.<sup>3</sup> whereas jurisdiction is defined as the authority under which a court may exercise its judicial power is then defined as the authority of the court to act in a given controversy. In other words it means that unless a court has jurisdiction over a given case brought before it. Authority (judicial power) to act over such case is of no effect, i.e no assumption of judicial power without jurisdiction. Judicial power gives the court the authority of perform various acts necessary to a particular case.



Judicial power is only guaranteed when there is clear separation of power. The principal concern of the separation of powers principle is to prevent the concentration of authority in the hands of one person or body. The separation of judicial power from the two other branches of government (legislative and executive) is particularly crucial in a constitution such as that of the United Kingdom where the legislative and executive powers are fused, in the sense that members of the government sits in parliament and, through the governing political party, are effectively able to control the legislature.<sup>4</sup> There is no system of checks and balances' as there the president and National Assembly represent different political parties.<sup>5</sup> Besides the prevention of concentration of authority in the hands of one person or body, separation of the judiciary power from the legislature and executive is many folds. The concept of judicial power is largely associated with individual liberty. "There is no liberty if the judiciary power be not separated from the other two branches of government and if not, there might be arbitrary government."<sup>6</sup>

A liberal constitution should say something in broader terms about the functions or use a common legal term, the jurisdiction of the courts. Otherwise a government through legislative or executive order would be able, for example, to set up specialized institutions with judicial power to decide certain types of cases.

This indicates that ensuring the independence of the judges by itself cannot guarantee judicial independence unless the judicial function is clearly defined and only left for their jurisdiction. Here, ensuring independence of the judges and clearly defining judicial function of judges and leaving such judicial function for their (judges) jurisdiction means that to be free of judges form interference of any source of influence and listing the power of the judges and binding them to act within their boundary respectively.

For instance, under the FDRE constitution the distribution of power between the federal and regional state courts seems to be exclusive approach. It listed down the power of the federal Governments. The judicial functions of Federal and Regional States judges are said to be clearly defined and left for their jurisdiction. Federal judges do not entertain the case that is the function of state judges and vice versa. So, ensuring the independence of the judges by itself cannot guarantee judicial independence.

Therefore, under the separation of powers principle, constitutions should allocate judicial function to independent courts. It is not enough for them simply to guarantee judicial independence.

## ***1.2 . The Impact of Federalism on Judicial Power and Judicial system in Ethiopia***

Since 21<sup>st</sup> August, 1995 Ethiopia is longer a unitary state by a federal one. The change from the long standing history of Unitarianism in the country to a new Federal arrangement was officially proclaimed through the adoption of the new constitution. A federal system of government was established all over the country.<sup>9</sup> The adoption of this system of government, i.e. Federal Democratic Republic of Ethiopia greatly changed the judicial power and judicial system of Ethiopia since it is the federalism.

### ***1.2.1. Judicial power in Ethiopia***

When one party decides to take an action, i.e., judicial action (s), the first question that must be asked is: where may suit be taken? This is the question judicial power. Our constitution establishes a parliamentary form of government set up at the federal level.<sup>10</sup> The Federal Democratic Republic of Ethiopia comprises the federal Government and the state members. Both the federal Government and the regional states are entitled each to have judicial powers.<sup>11</sup>

Now answering the question as to where judicial power vests becomes necessary.

Judicial power is often vested in courts.<sup>12</sup> In light of this “ A Court is a judicial tribunal empowered by the state to hear and determine controversies respecting legal rights and invasion thereof; and to protect such rights and redress such wrong by enforcement of its decision <sup>13</sup> courts are created by law. <sup>14</sup> courts are an organ of the state, thus, judicial power is vested on them through the law<sup>15</sup>.

Every country has its own type of apparatus through which the system of justice operates. In Ethiopia, as provided under art, 79 (1) of the Federal constitution, judicial powers, both at federal and state levels, are vested in the courts. Here, it is good to distinguish between Regular courts and institutions empowered to exercise judicial functions. The latter are not courts properly so called. Coming back to Art.79 (1) of the FDRE Constitution, in effect, this sub-Article seems to be vesting judicial power only on regular courts. In particular the Amharic version of this very Article (Art. 79 (1) reads “ህግ አፈጻጸም ላይ የሚያገለግሉ ማንኛውም ግንኙነት የሌላውን ግዴታ ማሟላት ወይም ግዴታ ማሻሻል ያልሚችሉ ግንኙነት አሉ።” Both the English and Amharic version of article 79(1), as they are consistent, seem to vesting judicial power only on Regular courts. It is also provided under the constitution that the Amharic version of the Constitution has the final legal authority <sup>16</sup>. So, by relating Articles 79 (1) and 106 of the constitution it may be said that establishing institutions legally empowered to exercise judicial function other than regular courts is hardly possible in Ethiopia.

However, although articles 79 (1) and 106 of the FDRE constitution to be vesting judicial function only on regular courts, at this juncture it would be good to see other provisions of the constitution.

***“Every one has the right to bring a justifiable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power.” <sup>17</sup>***

The reading of this provision justifies the establishment of other bodies or institutions with judicial power out of the regular courts. Pursuant to this provision, Art. 78(4) of the constitution reads as “special or ad hoc

courts which take judicial powers away from the regular courts or institution legally empowered to exercise judicial functions and which do not follow legally prescribed procedures shall not be established” Additionally, Art. 34(5) of the FDRE constitution vis-à-vis Article 78(5) of the same constitution states that “The House of peoples’ Representatives and state councils can establish or give official recognition to religious and customary courts that had state recognition and functioned prior to the adoption of the constitution shall be organized on the basis of recognition accorded to them by constitution”. Generally, although Article 79(1) of the FDRE Constitution seems to be vesting judicial function only in the regular courts, reading it with the other provisions of the constitution; we can easily see that there are also other organs having judicial function. Hence the judiciary can be seen as constituted of regular courts and other bodies with judicial power.

One may ask as to what are the “Institutions empowered with judicial function?” some organs which are not regular courts but exercise some kinds of judicial function are:-

- a. Labor relations board: - in relation of collective labor disputes.
- b. Tax appeal commission: - contestation of tax assessment.
- c. Civil service tribunal: - concerning civil servants.
- d. Privatization Agency and its board: - concerning illegally expropriated houses.
- e. Sharia court as a religious one, etc.

There are some requirements to be fulfilled upon the establishment of institutions legally empowered to exercise judicial function. These requirements are:-

- A. Competence and
- B. Duty to follow legally prescribed procedures

The leading provisions from which we can infer the existence of such requirements are Articles 37(1) and 78(4) of the FDRE Constitution. Article 37(1) of the constitution provides that any competent body with

judicial power can decide or give a judgment on a give case. What matters here is that the qualified phrase” competent body... The word competent is defined to mean able, capable, efficient, fit clever, skillful, sufficient, adequate,...<sup>18</sup> from this we can infer that an entity to competent, it should be capable i.e. should possess legal capacity and the persons legally skilled or knowledge of those persons who are entitled to give decision or judgment on a justifiable matter brought to them .one may argue that such qualities of competence are not found in institutions legally empowered to exercise judicial function and with such narrow possibilities of competence it is not advisable to have them.

### ***1.2.2. Judicial system in Ethiopia***

The judicial system is one which is concerned with the organization of courts in a give legal system. The organization of courts has got much to do with the organization of the state and its government. The historical perspective brings about the division of court organization in a given legal system either into a full dual or unified one. This depends upon the division of jurisdiction between Regional state and Federal courts under a given legal system. The division of jurisdiction in a federal system is an aspect of the distribution of power between Regional states and Federal Governments.<sup>19</sup> Obviously, the nature of the division varies from one state to another although tree could be considerable resemblance among them. <sup>20</sup> But, one thing seems to be certain that the nature of the division of jurisdiction between state and federal courts in one state may not reflect the form of government in that state.<sup>21</sup> A federation of dual polity may adopt a unitary judicial system.<sup>22</sup> The literature has so far identified two kinds of federal court system: unitary and dual court stricture.

Under unitary form of government the nature and form of judicial system established, in many respect, though not exactly, is the unitary court structure. <sup>23</sup> In federal states which have adopted a unified scheme of administration of justice three is one national supreme court at the apex and high courts in the constituent States constituting the superior

courts having original and appellate jurisdiction over subordinate state court decisions.<sup>24</sup> Here the Supreme Court is basically a court of highest appellate jurisdiction over decisions rendered by superior State and Federal Courts.

However, in some states the jurisdictions of the Federal Supreme Court extend to concurrent and exclusive jurisdiction over certain specified cases.<sup>25</sup> Good example of the unitary scheme of administration of justice can be found in India, Canada and the Federal Republic of Australia.

The dual judicial system is a completely different arrangement. According to this system, each government, state and federal, establishes its own hierarchy of courts which is autonomous and self-contained.<sup>26</sup> In each federal and state court there exists Courts of First Instance and at the apex a Supreme Court of last resort.<sup>27</sup> The dual court character, however, does not imply the total demise of the relationship of the Federal and State Courts. The state and Federal courts may constitutionally be empowered to exercise concurrent jurisdiction over certain Federal matters.<sup>28</sup> and, to the extent state courts assert jurisdiction over federal matters, their final decisions may be taken on appeal to Federal Supreme Courts. The USA Federal Court system is often cited as a good representative of the dual court character.<sup>29</sup>

Coming back to the Ethiopian context, the introduction of federalism in Ethiopian political history have also changed the judicial system significantly. The arrangement of the courts up unitary system i.e. monolithic structure. This is characterized by vertical organization of courts at the country level. With the Transitional period and with the advent of federalism, the dual court organization systems come about. Courts are organized at two levels-Federal and State. At Federal level, the courts are the Federal Supreme, High and First Instance courts.<sup>30</sup> Likewise, at the State level there are the State supreme, High and First Instance courts.<sup>31</sup>



***“In cases where they contain fundamental error of law, the Federal Supreme Court shall have the power of cassation over final decisions of the Regional Courts.”***

Moreover, Regional laws confer this power to Federal Supreme court. Example, Article 25(5) of the Oromia National Regional State courts establishment proclamation No. 6/1996.

The FDRE Constitution which vests the Federal Supreme Court with the power of cassation over any final court decision containing a basic error of law also implies as the Federal Supreme court is the highest judicial organ of Ethiopia. Pursuant to this, Article 35(2) of proc.No25/1996 also provides that where two or more Regional or Federal Court claim or disclaim jurisdiction over a case, the Federal Supreme Court shall give the appropriate order thereon.

Whatever the case may be, experiences of other Federal States such as USA and Germany show that their respective Federal Supreme Courts do not review cases arising from matters allotted to the courts of the units.<sup>37</sup> The final decision of state Court would be subject to review by Federal Supreme Court only to the extent the State Courts exercise federal jurisdiction. This means that matters which are referred to as state matters are not subject to the review of Federal Supreme Court.

The nature of the division of jurisdiction between federal courts and state courts may not reflect the form of government as said earlier.

Adoption of a Federal form of government by a given country does not necessarily show as it has adopted a dual court structure.<sup>38</sup> As one feature of the unified scheme of administration of justice the FDRE Constitution requires Regional Supreme Courts to yield to the Federal Supreme Court. The only difference is on the scope of judicial power of the Federal Supreme Court.

In some federal states, which have established unitary court character, the appellate jurisdiction of the Federal Supreme Court extends to any final court decisions, without distinction between fundamental and non-



fundamental errors of law and between question of fact and questions of law. <sup>39</sup> Thus, we can conclude that the Federal Court system envisaged under the FDRE constitution is of a unique arrangement in the sense that it inherits features of both Federal Court system (dual and unified) and hence it is not capable of being characterized as fully dual or unified. As regards to questions of predominance, we may advance the view that the duality feature takes the largest posture in our Federal Court system. Because, the Constitution has empowered state councils to establish State Supreme, High and First Instance Courts which are not subject to interference by the House of peoples' Representatives.

Some objections may be raised against the action of the Cassation Division of the Federal Supreme Court over any final court decision.<sup>40</sup>

- a. Pragmatic Considerations like lack of trained manpower, budget, and the capacity of the Regional Courts to carry out the cassation Courts to carry out the cassation Power;
- b. Violation of the distribution of state power
- c. Historical factor-undue influence of the center. To put it in another way, up until the transitional period, for instance, the FDRE constitution which can be said to have followed a unitary system vested the Supreme Court with the power to control the judicial functions of all the courts in the country. When logically, the FDRE constitution empowers the cassation division of the Federal supreme court to act on any final court decision, it can be possibly said that it has reflected the spirit of this FDRE Constitution.
- d. There is not clear cut as to where such power is inclusive of state matters or relation to shared powers like under Article 98 of the FDRE constitution.
- e. Contradiction with the purpose of cassation. Because, A regional cassation may be expected to bring about uniform construction of Regional laws whereas the Federal Cassation could be said to

promote uniform interpretation of federal laws. In short, like cases shall be disposed alike.

- f. The possibility of establishing state cassation per, Article 80(3) (b) of the FDRE constitution and some has instituted it.

### ***1.3. The jurisdiction of Ethiopian Federal Courts***

After the courts are said to be empowered to exercise either principal or subsidiary jurisdiction over criminal acts, the next issue is how we go in determining cases falling within the jurisdiction of Ethiopian Federal courts and criminal jurisdiction federal courts.

#### ***1.3.1 Cases falling within the jurisdiction of Ethiopian federal courts***

In a given federal system the cases to which the jurisdictions of Federal courts extend are usually constitutionally defined <sup>41</sup>. In the federal organization of states, there is division of power between the federal and regional governments <sup>42</sup>. The FDRE constitution defines the powers and functions of both the federal and regional Governments. As the structure and organization of courts coincides with the organization of the states, there is division of power between the federal courts and state courts. In this respect, the approach of the FDRE constitution is to list down the powers of the federal Government exhaustively<sup>43</sup>, and to give those powers of functions not given to the federal Government to the Regional states <sup>44</sup>. In relation to the power of the courts too, we should expect the same approach.

The 1994 FDRE Constitution after establishing a dual court system has laid the basic principle of judicial jurisdiction between Federal and Regional governments based on the difference in subject matter jurisdiction, i.e; Federal subject matters Vs state subject matters as understood from the reading of Articles 80(1) and 80 (2). Concerning the jurisdiction of Ethiopian Federal courts Article 80(1) the FDRE constitution states that the federal supreme court shall have the highest and final judicial power over federal matters. But, our

constitution does not provide any clue as to what are federal matters and there is no enumeration of matters which falls under the jurisdiction of federal courts as opposed to the tradition of several federal constitutions like that of India, Switzerland, USA, etc.

Some federal constitutions are too strict that they put restrictions against any expansion of the federal courts' jurisdiction beyond the enumerations provided under the constitution (examples include, the constitution of the USA, and that of the federal Democratic Republic of Austria).<sup>45</sup> To the contrary, in other federal Constitutions, the parliament is empowered to go beyond the lists of federal jurisdiction expressed under the constitution.<sup>46</sup> For instance, Article 144 of the Switzerland Federal Constitution states that "other matters other than those which are mentioned under this constitution may be placed by federal legislation within the competence of the federal tribunal".

From the above paragraph we can conclude that as the method of determining Federal Courts' judicial power varies from state to state. Coming back to the position of the FDRE Constitution, it makes no enumeration of matters over which Federal Courts have jurisdiction. As mentioned earlier, Article 80 (1) simply states the phrase "Federal matters" and as the federal Courts have jurisdiction over them. Here, it is inevitable to raise some questions.

What is the definition of federal matter? Can we characterize a give matter as a "federal matter" depending upon the determination of the federal legislator (the House of peoples' Representatives)?

This creates a difficulty in ascertaining the scope of federal courts jurisdiction in the absence of explicit provision under our constitution. Probably, one may reach on the conclusion that cases arising under the federal laws falls with in the jurisdiction of federal Courts. And, hence, since the House of peoples' Representatives (HPR) is empowered to enact like a penal code.<sup>47</sup> And labor law.<sup>48</sup> Federal courts shall exercise jurisdiction when such federal laws are raised in specific cases. However,

this interpretation may deprive the power of Federal courts to assert jurisdiction over Regional states created rights. Moreover, it may pose confusion when a case arises under both state and federal laws.

In the absence of clear provision of our Constitution one may hold the view that since the House of people's Representative (HPR) is authorized to establish Federal Courts<sup>49</sup>, it can determine the scope of their jurisdiction. This implies that "the authority to establish Federal courts also extends to the power to determine the scope of Federal judicial Power". But, possible challenges may face against such assertion. To begin with, the federal Supreme Court is the creation of the constitution,<sup>50</sup> not one be established by the HPR hence, the argument "The authority to establish implies the power to determine Scope" could not be validly entertained. Secondly, matters determined as federal matters by federal legislation may be taken as regional state matters by matters by their legislation. Hence, since Federal laws are not constitutionally conferred an overriding effect over Regional state laws, the attempts of the HPR to determine the scope of Federal Judicial power may face serious problems of enforcement.

Having said this, as long as there is no developed indigenous jurisprudence as to the concept of federal matters, it seems natural and logical to hold the view that the HPR is the only authority which is authorized to determine the scope of federal judicial power. So far the HPR has enacted Federal Courts proclamation which determines the scope of Federal courts' jurisdiction. According to such proclamation (proc.No 25/1996), cases falling within the jurisdiction of federal Courts are governed by Article 3 of the proclamation. In stating the common jurisdiction of federal Courts (both civil and Criminal) in a general manner, Article 3 of the proclamation provides as follows:

## **Art. 3 Principles**

### **Federal courts shall have jurisdiction over:**

1. Cases arising under the constitution, Federal laws and international treaties;
2. Parties specified in federal laws; and
3. Places specified in the constitution or in federal laws.

From the reading of Article 3 above one can understand that the Federal judicial power is determined with reference to laws, parties and places. Generally, sub –Article 1 defined jurisdiction by reference to laws, sub-Article 3 by way of places.

- A] What are the places specified in the constitution or in federal laws (sub-art. 3)? When it is said that places specified in the constitution, it should not be taken to mean all places pointed out in the constitution in any way. These places must be places wherein the Federal Government is made to have an interest.

In the constitution Addis Ababa is made the capital city of the federal state <sup>51</sup>. And accountable to the federal government.<sup>52</sup> This seems to be the place specified in the constitution. Out of the federal laws, proc No 25/1996 itself makes an explicit reference to the town of Dire Dawa. The proclamation further puts cases arising in Addis Ababa and Dire Dawa under the jurisdiction of Federal Courts. So, the places over which the federal courts are empowered to exercise jurisdiction are Addis Ababa and Dire Dawa.

- B) Who are the parties specified in the federal laws (Sub-Art.2 ?) These parties are the officials of the Federal Government and employees of the Federal Government. <sup>53</sup> Officials of the Federal Government are defined as the members of the HPR and of the House of Federation, officials of the Federal Government above ministerial rank, ministers and judges of the Federal Supreme Court and other officials of the Federal Government of equivalent rank. <sup>54</sup> whereas, employees of the Federal Government are defined as including all employees, other than those referred to above (as

officials of the Federal Government) engaged in the activities of the Federal Government.<sup>55</sup>

Generally, the above are the parties (persons) referred to by Article 3(2) of the proclamation over which the Federal courts have jurisdiction involving the suits in their official or employees' capacity rather than individual capacity. Here, official/employees fault must be identified from personal fault.

- C) What do we mean by “cases arising under the constitution, Federal laws and International Treaties” in Article 3(2) of proc 25/1996? Cases arising under the constitution seem to mean cases having the constitution as their background or cases in which constitutional provisions are involved. It should not be interpreted as to mean cases of constitutionality (disputes concerning whether a certain law or decision is inconsistent with the constitution). Some possible challenges may be raised concerning the cases arising under the constitution which in turn implies the power of Federal Courts over the case as provided. Firstly, the constitution is the supreme law which lays down principles the applicability of which are deflected in lower laws designed to protect better administration of Justice.<sup>56</sup> Then, how do we expect one to base his claim on the provisions of the constitution? It is hard, for instance, to say that a claim for Habeas corpus (releases of illegal detention) is a case arising under the Constitution although such a right is guaranteed by the constitution.<sup>57</sup> Actually, the detailed rights and procedures for such an action are laid down in the procedure codes (for example Article 28(2) of Ethiopian Criminal Procedure Code and Articles 5(10) and 14 of proc. No.25/1996). The applicant will be expected to invoke the pertinent provisions of these detailed enabling laws. Secondly, it is the House of Federation which is vested with special jurisdiction to determine whether or not a certain act, law or decision is consistent with the constitution.<sup>58</sup> Such cases are out of the jurisdiction of regular courts.

Nevertheless, we may say that Article 3(1) of the proclamation applies with regard to provisions of the constitution in relation to which detailed

laws are absent, if any, concerning International Treaties, insofar as they are adopted by Ethiopia, they are indirectly made parts of our laws.<sup>59</sup> There might be rights guaranteed or duties imposed by different International Treaties to which Ethiopia is a signatory. If one intends to enforce these rights and duties, his/her case is one falling under the jurisdiction Federal Courts.

The remaining issue is relating to cases arising under the Federal laws. What are the Federal laws? This shall be discussed in the following subsection.

#### ***1.4. Criminal Jurisdiction of Ethiopian Federal courts***

As mentioned earlier, cases falling within the jurisdiction of Federal Courts, from the reading of Article 3 of proclamation No.25/ 1996, have in one way or another got to do with federal laws. Now, the very important issue relates to what federal laws are. So, defining such laws is important.

Examination of Article 2(3) of the proclamation will be of help in answering the question. This sub-Article reads:-

***Laws of the Federal Government includes all previous laws in force which Are not Inconsistent with the constitution relating to matters that falls within The Competence of the Federal Government as specified in the Constitution.***

Matters that fall within the competence of the Federal Government are specified under Article 51 of the FDRE constitution. Article 55(1) of the same constitution empowers the HPR to legislate in the areas of jurisdiction that are within the competence of the Federal Government. Clearly, this sub-Article cross-refers to Article 51 of the constitution. So, legislative power of the HPR consists of both the areas listed under articles 51 and 55 of the FDRE Constitution, i.e., laws legislated by the Federal Government in the areas of its legislative competence are Federal laws.

Logically, laws enacted by the Federal Legislator (HPR) are to be interpreted by the Federal Judiciary (Federal Courts). The question is, criminal cases fall within the competence of Federal Government? Under Article 55 of the Constitution, the HPR, among others, is empowered to enact a penal code <sup>60</sup>. However, the enactment of this penal code also extends to Regional States on matters that are not specifically covered by Federal Legislation. <sup>61</sup> Though the Federal Government has exercised its power of enacting a full-fledged Criminal Code which is cited as “The Criminal Code of the FDRE 2004”, the regional states have not yet exercised their power of enacting criminal code. This means that the new existing criminal code of 2004 is a federal law. So, by virtue of Article 3(11) of proclamation No.25/1996, cases arising under this criminal code fall within the jurisdiction of Federal Courts. The effect of this interpretation is that cases arising under the criminal code are given to the exclusive jurisdiction of Federal Courts.

The Federal courts establishment proclamation No 25/ 1996 and proc. No. 321/2003,<sup>62</sup> the law, however, beside to the three indexes (laws, places and parties) over which Federal Courts exercise jurisdiction provides that as the federal courts have jurisdiction only over limited lists of criminal cases. From the readings of Article 4 cum Article 2 (1-3) of proc. No. 25/1996 vis-à-vis the FDRE constitution on the apportionment of judicial power of federal matters, particularly relating to criminal cases creates confusion. The interpretation of Article 4 of proclamation No.25/1996 and Article 2(1-3) of proclamation No.231/2003 is that if offences other than those listed under these Articles (about 14 offenses) are committed in places outside of Addis Ababa or Dire Dawa, it will fall within the jurisdiction of Regional State courts. <sup>63</sup> This deprives the inherent /exclusive jurisdiction of Federal courts over criminal cases <sup>64</sup>. For instance, since crimes like Homicide, Robbery etc are not covered under the said provisions. (Art. 4 of proc. 25/96 and Art. 2(1-3) of proc. 321/2003, one can conclude that Regional State Courts have exclusive jurisdiction over such crimes and the others.



Generally, according to the perception of these Articles Regional State Courts have exclusive/inherent jurisdiction over majority of criminal cases that arises under the FDRE Criminal Code.<sup>65</sup>

Even reaching on such conclusion itself is against the principle of “Delegated jurisdiction.....<sup>66</sup>” It shadows the exclusion approach followed under the FDRE constitution in distributing power between the Federal Government and Regional state Governments. Shortly, the question is, is it actually the exclusive power of Regional State Courts to entertain majority of Principle of criminal matters in the present legislation? Is it in consonance with the principle of federalism as enshrined in the constitution? Why the need is then for delegation of jurisdiction of Federal Courts to Regional state Courts? Even if it is provided in the existing legislation, does the HPR have the power to revoke the inherent power of the Federal Courts and to make the jurisdiction of Regional State Courts without any constitutional authority? Otherwise stated, does the HPR have the power to dismantle the constitutional order once after judicial federalism is established in the constitution? These are questions that need to be properly addressed.

The constitution is the supreme law of the land and any law which contravenes this constitution shall be of no effect. So, proclamation No. 25/1996 seems to be unconstitutional to the extent it deprives federal courts of their conational judicial power over criminal cases arises under federal criminal laws.<sup>67</sup>

Yet, a close scrutiny of Article 4 of proclamation No. 25/1996 and Article 2(1-3) of proclamation No. 321/2003 reveals that the characteristic features of the cases falling within the jurisdiction of federal courts is that the interest of Federal Government is involved or is at stake, or such cases have international or national characteristic.<sup>68</sup> Some of them are cases involving more than one Region and others involve an international element (like a foreign nation). Criminal Jurisdiction of Regional State Courts shall be briefly discussed under the next chapter.

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## **CHAPTER TWO**

### **CRIMINAL JURISDICTION OF REGIONAL STATE FIRST INSTANCE COURTS**

#### **2.1 . Jurisdiction of Regional state courts under the FDRE Constitution over criminal cases**

From a historical perspective, the judicial system in Ethiopia before the country adopted the federal system was of a monolithic structure reflecting the unitary system of government<sup>1</sup>. With the advent of federalism and federal structure of government , the dual system of organization of courts has emerged and courts with three tiers are established both at federal and state level.<sup>2</sup> Then the question that could be raised is: what is the mode of distribution of power between federal and Regional Governments?

It is usually a common phenomenon in a federal tradition to provide a guideline as to the division of powers between Federal and regional governments as it is a basic feature of federalism .<sup>3</sup> By division of power in a federal context it is meant that there is by virtue of the Federal constitution, a vertical separation of power between the federal government and the governments of the constituting units. <sup>4</sup> Even if Ethiopia has been unitary state for a long period of time, the FDRE Constitution took away certain powers from the center and granted to the regional states. Actually, this leads to the center remaining with enumerated powers transferring the to the newly formed Regional Governments .<sup>5</sup>

Identifying enumerated and reserved powers under the FDRE constitution may help us to differentiate between federal and state subject matters. Regarding to enumerated and reserved powers as a mode of distribution of power between Federal and Regional Governments different federal countries' constitutions have different positions.

The most federal constitutions grant specific and enumerated governmental authority and function to the federal government and leave all powers to the member governments<sup>6</sup>. So, the power of the constituting states is extended to those which are not wholly specified or enumerated as the powers and functions of the federal government. That is why it is called a reserved or residual power<sup>7</sup>. For instance, the USA Constitution is taken as a model of this type of power distribution.<sup>8</sup>

The other method of distribution of power between the Federal Government and regional Governments is that which leaves the residual or reserved power to the Federal Government<sup>9</sup>.

The Ethiopian FDRE Constitution seems to follow the exclusion approach. It listed down the power of the Federal Government exhaustively and gives the remaining powers (over matters not listed down) to the Regional Governments. Article 55 of the FDRE Constitution cross-referenced to Article 51 of the same constitution which lists the powers and functions of the federal Government while Article 52 (1) of the constitution provides for powers and functions of Regional states.

Legislative power of the HPR is listed under Article 55 of the FDRE constitution. Under article 55(1) the House is given the power to legislate in the areas of all matters that are within the competence of the Federal Government.

Clearly, Article 55(1) cross-refers to Art. 51. Under Article 51 about 21 matters are listed as they fall within the competence of the federal Government. Therefore, legislative power of the HPR consists of exclusively both the areas listed under Articles 51 and 55 of the FDRE Constitution. This implies as the powers of the Federal Government extends only to those items enumerated under these provisions. All the residue of Federal Government power is left to Regional States.

***“All power not given expressly to the Federal government alone, or concurrently to the federal Government and the states are reserved to the states”<sup>10</sup>:***

The message of this provision is the power that is not given expressly to the Federal Government or concurrently to the Federal Government and the Regional states is given to the Regional Governments. This brings into consideration as the division of powers under the FDRE constitution is based on the difference in subject matters principle between Federal Government and regional states. “The Federal Supreme Court shall have the highest and final judicial power over federal matters <sup>11</sup>, and “state courts shall have the highest and final judicial power over state matters<sup>12</sup>. A case a state matter if it arises on state law. So, all powers not given expressly to the Federal Government alone, or concurrently to the Federal Government and State upon which the states council has the power of legislation on matters falling under states’ jurisdiction is called state subject matters and Regional state courts have jurisdiction over such matters exclusive of Federal courts. Here, all the provisions of the constitution should be enquired before saying all reserved powers are called state subject matters.

In the previous discussion it is clearly said that providing lists of matters in a federal legislation to which state judicial power extends is usually uncommon. The tradition followed under several Federal constitutions is to empower Regional state courts to exercise jurisdiction over any matters other than those which are expressly given to the exclusive jurisdiction of federal courts.

Proclamation No 25/1996 provides that cases arising under the federal laws fall within the jurisdiction of federal courts <sup>13</sup>. The definition of laws is observed from proc. No 25/1996 in the following way.

***laws of the federal government includes 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.***<sup>14</sup>

Even if this definition incorporates previous laws like the 1957 penal code that is in force being legislated before the promulgation of the FDRE constitution, pursuant to Article 55(1) of the FDRE constitution the

FDRE Criminal code, proc. No 414/2004 has been adopted coming into force as of the 9<sup>th</sup> of may 2005<sup>15</sup>. This is directly related to the distribution of legislative power between the Federal Government and the Regional states. As said above legislative power of the HPR consists of both the areas listed under Articles 51 and 55 of the FDRE constitution. Laws legislated by the Federal Government in the areas of its legislative competence are Federal laws.

By virtue of the FDRE Constitution, the FDRE Criminal code is a federal law and cases arising there under as a federal matter are within the exclusive jurisdiction of federal courts. This takes one to the tenet that Regional State courts lack jurisdiction over criminal matters except by way of delegation. Unless the HPR may., by two thirds majority vote, establish nationwide, or in some parts of the country only, the jurisdiction of the Federal High and first instance Courts are hereby delegated to the Regional State Courts <sup>16</sup>. Under our constitution Regional states supreme and High courts are give judicial power of federal High first Instance courts respectively <sup>17</sup>. This means that state first Instance courts cannot exercise criminal jurisdiction as they are not delegated. Is the practice in agreement with this constitutional provision? This is one that will be dealt with under chapter three.

The Relegate States are given a discretionary power to enact penal laws on matters that are not specifically covered by federal penal legislation.<sup>18</sup> Actually, though the federal Government has exercised its power of enacting a criminal code, the Regional. States, in the knowledge of this writer, have not yet exercised their power of enacting criminal code.

A controversy may be created because of the employment of two terms under the FDRE constitution-‘concurrent’ and ‘Delegated’ power. Concurrent jurisdiction means (refers to the possibility that) both the federal and state courts are empowered to see and decide all matters that fall within federal jurisdiction <sup>19</sup>. This enables a party who has a federal subject matter claim to take his case to whichever court he choose



federal or state court<sup>20</sup>.under the FDRE Constitution it is provided that “state supreme courts shall also exercise the jurisdiction of the federal high court”<sup>21</sup>, and state high courts shall, in addition to state jurisdiction, exercise the jurisdiction of the federal. First instance court.<sup>22</sup> From the reading this provision the controversy may be created as to whether the federal judicial power over federal matters including criminal cases is exclusive of Regional state judicial power. This is the end result of the wording of the caption of the English version of Article 80 of the FDRE Constitution-“Concurrent jurisdiction of courts” and the provisions of its sub-Articles. Additionally, the federal supreme court is excluded from reviewing federal matter cases that are originally decide by state High courts and affirmed by state supreme court on appeal <sup>23</sup>.

However, the exercise of concurrent jurisdiction both by federal courts and Regional state courts on federal matters, in the opinion of the writer, mat not sufficient because of the following:

1. Concurrent jurisdiction is exercised in a given federal state provided that there is no legislation that create exclusive federal jurisdiction<sup>24</sup>. Based on this preposition, could we say that there is no legislation that determines the areas of jurisdiction that fall within the competence of the Ethiopian federal Government in which the same approach may be expected in the distribution of jurisdiction over federal matters between the federal Government and the constituting states? This seems to be illogic because of the presence of Articles 51 cum 55 and 52 of the FDRE constitution.
2. The exercise of concurrent jurisdiction would be clear in situations where there are parallel federal and Regional state courts are the same time <sup>25</sup>. But under our constitution there is no any provision which entitles the establishment of the three tires of federal courts, i.e., supreme, high and first Instance courts in parts of the country. The HPR is given a discretionary power to establish only High and first Instance courts nationwide or in some parts of the country.

3. Allocation of compensatory budgets Article 50 (9) of the FDRE constitution empowers the federal Government to delegate its powers and functions to the Regional states. This reads:

***“The Federal Government may, when necessary, delegate to the States Powers and functions granted to it by article 51 of this Constitution”*** <sup>26</sup>.

Earlier it is said that the legislative power of the HPR consists of both the areas listed under Articles 51 and 55 of the FDRE Constitution including criminal cases. Since the focus of this paper is on the delegation of the powers and functions, i.e, judicial powers and functions of the Federal Government to the Regional States, these criminal cases are delegated to the states supreme and High courts based upon Article 50 (9) of the FDRE constitution. This means that such courts are exercising extra powers and functions in addition to the matters within their exclusive jurisdictions, i.e., state matters. In the carrying out of such extra functions it is inevitable to face financial expenditures. The question here is which party, i.e., the delegate or the delegating party, should bear all such financial expenditures necessary for the carrying out of all such responsibilities and functions.

It is provided that “The House of peoples’ Representatives shall allocate compensatory budgets for states whose supreme and High courts concurrently (in addition to ) exercise the jurisdictions of the federal High and federal first Instance Courts <sup>27</sup> .

4. Soliciting and obtaining the views of the federal Judicial administration council. The FDRE Constitution, after establishing a dual court system it also provides for the method of appointment of the judges who are working in federal courts and State courts <sup>28</sup>. The judges for the Federal Courts are selected by the Federal Judicial Administration council and are appointed by the HPR <sup>29</sup>. The judges of the Regional state courts are appointed by the respective state council. <sup>30</sup> The state judicial Administration council, before submitting

the nominees of the states supreme and High courts judges to the state council, has the responsibility to solicit and obtain the views of the federal judicial administration council on such nominees and to forward those views along with its recommendations <sup>31</sup>. This could be seen from the point of view of the functions of the state Supreme and High courts as delegates of the federal High and first Instance Courts respectively <sup>32</sup>.

5. The principle of revocability Article 78(2) of the FDRE Constitution presupposes the revocation of the power of the Regional states' supreme and High courts over federal matters upon the establishment of federal High and first instance courts nationwide or, in some parts of the country <sup>33</sup>. The clause “..unless decided in this manner...” seems to put the judicial power of state courts (supreme and High) over federal matters at the grace of the HPR. Thus, upon the establishment of Federal High and federal first Instance courts in Regional states, the HPR is free to divest the jurisdiction of Regional state courts over federal matters.
6. According to Article 80 sub-articles 2 and 4 of the FDRE constitution, the jurisdictions of Federal High and first Instance courts are given to the regional state supreme and High courts respectively. The discretionary power to assert jurisdiction over federal matters among state courts is not left to that of state council. The competence of federal High and first Instance courts is governed by the federal rules of allocation of jurisdiction. This is to mean the state supreme and High courts exercises judicial power over federal matters that are governed by the federal rules of allocation jurisdiction.
7. Contradictory nature of the captions of the English and the Amharic versions of Article 80 of the FDRE constitution.

The caption of the English version of Article 80 which reads “concurrent jurisdiction of courts” and the Amharic version of the same article which reads “ግዴታዎችን ለመፍታት ለግዴታዎች ሃይማኖት” Which means Judicial power and dual

structure of the courts,<sup>34</sup> are so different and even contradictory to each other. Concurrent jurisdiction exercised simultaneously by more than one court over the same subject matter and within the same territory, with litigant having the right to choose the court in which to file the action<sup>35</sup>. If we resort to the concurrent jurisdiction of both the Federal High and first instance courts and Regional state supreme and High courts as the English version provides, it becomes unnecessary to talk about delegation under Art.78(2) of the FRDE constitution in the areas of concurrent judicial power.

Here, the final legal authority of the Amharic version of the FDRE constitution needs to be given a weight. The Amharic version of the FDRE constitution shall have final legal authority<sup>36</sup>. So, the caption of the Amharic version of Article 80 of the FDRE Constitution has a final legal authority. For this one could say that the English version of Article 80 has a drafting problem but nothing else.

## ***2.2. Delegation of power in light with the Principle of Local Jurisdiction***

Generally, there are three elements of jurisdiction; judicial jurisdiction, material jurisdiction and local jurisdiction<sup>37</sup>. Local jurisdiction refers, to in the Ethiopian context, the area of Ethiopia in which the case is to be tried<sup>38</sup>. The courts shall exercise local jurisdiction in accordance with the provisions of Articles 99-107 of Ethiopian criminal procedure code. Under Article 99 of the code it is provide that every offence shall be tried by the court within the local limits of whose jurisdiction is was committed. Basically, Art. 99 puts forth a general principle of local jurisdiction. The place referred to in Art.99 may be termed as the principal place of local jurisdiction.

At Regional level the local jurisdiction of the courts goes hand in hand with the administrative system. High courts are established at zonal level, while first instance courts seat at each woredas. Thus, the “Local limits of whose jurisdiction” should be interpreted to mean within the

local limits of the zone or woreda in which the first instance or High courts is sitting. Thus, an offence committed in western Wellega zone should be brought before the High court sitting in this zone <sup>39</sup>. Unless there is an authorization for the exercise of local jurisdiction in another place <sup>40</sup>.

The purpose of empowering state supreme and High courts to exercise the criminal functions of Federal High and first instance court, in the opinion of this writer, may be one that is related to the issue of local jurisdiction. This may be the reason why it is said that till federal courts are established, the power of federal High and first instance courts is delegated to state supreme and courts.

The rules relating to local jurisdiction exist primarily for the convenience of the parties <sup>41</sup>, hence, the determination of local jurisdiction in each and every case takes into consideration factors that are relevant for the disposal of the case with lesser cost of energy and money and in order to reach at a just result so that the purposes and significance of procedural laws will be achieved. The purpose of procedure is to ensure that legal dispute will be handled in a fair and orderly way and as expeditiously and economically as possible <sup>42</sup>. Local jurisdiction of courts is established in a way so that it would be convenient, particularly to the accused and to all the parties that may be involved in the case. This facilitates gathering of evidence and witnesses at a lesser cost and minimum time that will help in achieving of a speedy trial in the interest of justices, i.e., in achieving the purposes of procedural laws. So, delegated power of the federal High and first instance courts to Regional states supreme and High courts, in the opinion of the writer, is designed for the achievement of such purposes.

### ***2.3 Revocation of Delegated Power and its Effects on Pending Cases.***

Regional courts as said in the previous study lack jurisdiction over criminal cases and exercises jurisdiction over them only by way of

delegation over which federal courts have exclusive jurisdiction. “Exclusive Jurisdiction” in this context is to mean that only federal courts are allowed of adjudicate suits arising under federal laws <sup>43</sup>.

Once we have reached on the argument that Regional courts have delegated power on federal matters, this power of delegation presupposes revocability as it is a term of agency. The preposition behind this is that the extinguish ability of the Regional courts’ jurisdiction over federal matters.

Because of the necessity of establishing Federal High court in some Regions per the provision of Articles 78(2) and 55 (1) of the FDRE constitution, the HPR has decided to established Federal High court in five states which is inclusive of he stats of Afar, Benishangul, Gambella Somali and Southern nations, Nationalities and peoples <sup>44</sup>.

Since the establishment of federal High court in these Regions is decide by two-thirds majority vote of the HPR, this leads to the conclusion that as the jurisdiction of the above Regions’ Supreme courts over federal matters ends starting form as of the 8<sup>th</sup> day of April, 2003. <sup>45</sup>

Upon the establishment of either federal High or fist instance courts nationwide, or in some parts of the country only, some case may not be heard and decided by the delegate courts because of different factors like the numerous numbers of cases that may be instituted. Because of this, the instituted cases in Regional state courts may not get final decision. These are called pending cases. Pending cases are cases which are instituted in courts but do not get final decision.

These pending cases may be heard and decided either by the delegate courts or by the established federal courts based upon the discretionary power of the federal supreme court <sup>46</sup>.

In the above five states because of the establishment of Federal High courts case pending in their supreme courts before the coming into force of proc. No 322/2003 shall be either heard and decided by the same

courts (which means such cases shall be heard and decided by the supreme courts of the regions in which they are instituted) <sup>47</sup>, or transferred to the federal High court to be heard and decided upon the decision of the federal supreme court<sup>48</sup>.

Where the case was pending in one court at the time of the enactment of the law organizing a new court which would have jurisdiction of the case, the jurisdiction of old court over the action to issue process therein was held to be continued until an order was made in transferring the cases to the new court. <sup>49</sup> Through the statute or constitutional provisions the case may be transferred from one court to another or from one division to another within the same court. Transfer of case from one division to another division is necessitated by instability on court structure <sup>50</sup>.

As a result of the establishment of federal High and first instance courts over all Ethiopia Regional state in which cases may be transferred from one court to another court results in delay of justice. Here, one question come into one's mind. This question is as to what is the effect of delay in justice?

Transfer of the case from one division to another division is one incident which is considered as a cause of delay of justice attributable to courts. The effects of delay of criminal proceeding as a result of the transfer of pending cases in Regional state courts to federal courts causes;<sup>51</sup> denial of the right to speedy trial, denial of the right to presumption of innocence and consequent economic loss to the accused and the society. The policy of criminal procedure code. Particularly is that criminal cases should be promptly disposed of and a person charged with crime shall have the right to speedy trial.<sup>52</sup> Stanley Z. Fisher argues that speedy disposition of cases is an element necessary in the determination what a fair trial is.<sup>53</sup>

In the same way the constitution of the federal Democratic Republic of Ethiopia guaranteed the accused to speedy trial. Article 20(1) of the constitution states that all persons have the right to a public trial before

an ordinary court of law within a reasonable time after having been charged. Article 19(3) of the constitution also guarantees the same right to an arrested person stating that the arrested person shall appear before a court of law within 48 hours of his/her arrest. Article 19(4) authorizes that a court can order a remand in custody of the accused for a period no longer than the time required in order to carrying out the necessary investigation.

From the above paragraph one can understand that as the right to speedy trial is of fundamental importance and it is the duty of the prosecution to prevent unreasonable delay and to see that the accused is tried within the time prescribed by the statute. Similarly the courts has a positive duty to see that the accused is protected in his right to speedy trial and the enforcement of such right ordinarily is not subject of the discretionary power of the court, although it has been held that there is a room for the existence of delay of speedy trial as a result of the transfer of cases <sup>54</sup>.

As tried to be pointed out previously, because of the transfer of cases it is inevitable to witness the lengthy delay in criminal proceeding. One of the effect of such delay in justice is the violation of the accused's right to speedy trial which is a fundamental human and constitutional right.

The other effect of delay in criminal proceeding is the violation of the right to be presumed innocent. Innocent people should be protected from the unjustified prosecution and delay of the trial proceeding which has an adverse effect on criminal trial. Unjustified Prolongation of the suspect's pre-conviction detention and thereby curtailing his liberty amounts in punishing the innocent which is not the purpose of the law. Pre-conviction detention in jail is not different from punishment. Detention by itself is punishment and punishment is imposed only if the court through procedures established by law finds the accused guilty of the offense charged.



Moreover, delay in criminal proceeding results in the consequent economic loss to the accused and the society at large. Criminal law is a public law. So, when a given criminal case happens to appear, in majority of the cases, it is the government that intervenes through the public prosecutor. When the public prosecutor files a charge against one person, the accused also presents on this side his defense. In the case of transfer of pending criminal cases in Regional state courts to federal courts upon the establishment of the latter in Regional states has an effect on the economy of the accused and the society at large.

Amharic is the official language of federal courts.<sup>55</sup> Assume that "A" is accused of being suspected in counterfeiting the currency in Borana Zone. Let us again say the public prosecutor has filed a charge in Borana High Court. Since the working language of Oromia Region is Afan Oromo, one should not forget at the case is instituted in Afan Oromo. Moreover, assume that the HPR, by two third majority vote, has decided to establish federal first instance court in Borana and the federal supreme court has decided for the transfer of the case of the newly established court. This has some consequent effects both on the accused and the society at large like economic loss. The aim of litigation is to bring about the truth and achieve justice with the minimum resource spent<sup>56</sup>. This purpose seems to be defeated when one takes into account both the private and public resource, time and money drained during the transfer of pending cases. For instance, in the above paragraph changing Afan Oromo to Amharic. Due to such process there occurs an economic loss to both the accused and the society at large.

Under the FDRE constitution every nation, nationality and peoples in Ethiopia is entitled to exercise an unconditional right of self-determination<sup>57</sup> and the right to use its own language<sup>58</sup>. The transfer of pending cases from the Regional states supreme courts to the federal High court by the decision of the federal supreme court upon the establishments of federal High court in Regional state, in the opinion of the writer, jeopardizes the right to self-determination and the right to use

one's own language. Under the same constitution it is provided that any law which contravenes this constitution shall be of no effect <sup>59</sup>. So Art. 3(2) or proct. No. 322/03,<sup>60</sup> which provides or the transfer of pending cases, seems to be unconstitutional and of no effect.

### ***End notes***

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## **CHAPTER THREE**

### **THE CURRENT PRACTICE IN REGIONAL STATE FIRST INSTANCE COURTS ON CRIMINAL MATTERS**

#### ***3.1 . An overview of the practice***

The mode how judicial power over criminal matters is apportioned between federal and regional state courts, and among the federal courts on the one hand and the regional state courts on the other is briefly dealt within the previous chapters .The apportionment of jurisdiction over criminal cases between the federal and regional state courts are two types, which are rival to each other. We have seen that cases which can be heard and decided by federal courts (cases falling within the jurisdiction of courts) may be brought to the regional state courts for adjudication. Since criminal matters under the FDRE criminal code are considered as federal subject matters, <sup>1</sup> Regional state courts cannot exercise exclusive jurisdiction over them except by way of delegation <sup>2</sup>.

Till the house of peoples' Representatives may by two-thirds majority vote, establish nationwide, or in some parts of the country only, Federal high and first instance courts, the gap of their jurisdiction is bridged <sup>3</sup> by the mechanism of delegation. Within the picture of delegation, the Federal Supreme Court's powers and function are not delegated and the Regional state first Instance courts have got no authorization to see and decide Federal matters. Since the Regional state first instance courts are not delegated, they are devoid of any criminal jurisdiction.

Event though the spirit of the law is as overviewed in the above paragraph, the practice, however, continued to be against this interpretations. Regional state's first Instance courts rather hear heap and decide criminal cases as though they themselves have jurisdiction over such matters. For instance, the Guduru woreda courts is entertaining criminal cases which may be punishable up to twenty years of rigorous imprisonment.<sup>4</sup>

In the above court of Oromia Regional state, the defendant was charged being suspected of raping the 7 years old girl. The court found the defendant guilty of the offence under art. 627 of the FDRE criminal code and sentenced him to 20 years of rigorous imprisonment.<sup>5</sup>

In another case the defendants were charged in the same court being suspected of committing robbery. The court found both the defendants guilty of the crime under Articles 32 (3) cum 670 of the FDRE criminal code. They were, each sentenced to 12 years rigorous imprisonment <sup>6</sup>.

Moreover the defendant was charged with abduction of a 12 years old girl. The court found the defendant guilty of the offence under 589(1) of the FDRE criminal code and sentenced him to 10 years rigorous imprisonment. <sup>7</sup>

In another case, for instance, in Tigray Regional State the defendant was charged in the Hintalowajrat Woreda court with rape of a 12 years old girl. The court found the defendant guilty of the offence and sentenced him to 10 years rigorous imprisonment in accordance with Art. 589 of the old penal code <sup>8</sup>.

In southern nations, Nationalities and peoples Regional state the defendant was charged in the Silte Woreda court with rape of 9 years old girl. The court found the defendant guilty of the offence and sentenced him to 10 years rigorous imprisonment per Art. 589 of the old penal code<sup>9</sup>.

Based on the above mentioned practices the writer conducted different researches as to form where the Regional state first Instance courts get the power of hearing and deciding criminal cases.

In an interview conducted with the president<sup>10</sup> of Guduru worda court, the writer asked the interview whether he knows the difference between Federal and state subject matters. He replied the writer as he knows the fact there is an absolute difference between such matters. The next question the writer presented to the interview is as to what is his legal

ground to entertain criminal cases which are federal subject matters? He tend to say that the jurisdiction of Regional state courts cannot be governed by the Federal courts proclamation. In his opinion proc. No 25/1996 cannot have the effect of excluding Regional state courts from exercising inherent jurisdiction over Federal matters. Rather it defines the jurisdiction of Federal courts. In his opinion, based on schedule 1 of the 1961 criminal procedure code of Ethiopia, woreda courts can keep on exercising their jurisdiction over criminal matters in the same way as before proc.No 25/1996.

IN other words, Federal as well as Regional state courts can exercise criminal jurisdiction as having the power by themselves. But the answer of the judge is inconsistent with the FDRE constitution.

The other reason for Regional state first instance courts to hear and decide a criminal case is the inconsistency of Art.4 of proc. No 25/1996 with Art.3(1) of the proclamation vis-a- vis the FDRE constitution . The interpretation of Article 4 of the Federal courts establishment proclamation which list criminal cases that fall within the jurisdiction of Federal courts is that if those listed offences are committed in places outside of Addis Ababa and Dire Dawa, it will fall within the exclusive jurisdiction of regional state courts<sup>11</sup>. But the proclamation is unconstitutional to the extent it deprives Federal courts of their constitutional judicial power over criminal case that arises under federal criminal law<sup>12</sup>. Because of the contradicting nature of Articles 3(1) and 4 of the proclamation, many Regional states have enacted their own courts establishments' proclamation as heaving jurisdiction over criminal cases. For instance, Oromia regional state has enacted its own courts establishment proclamation <sup>13</sup>. Based on this proclamation even Oromia Regional state social courts are entitled to adjudicate criminal cases <sup>14</sup>.

Article 3(1) of the proclamation (proc No25/1996) is a general law while Article 4 is a specific one. Therefore, one may argue that “special law prevails over the general law” Here, the contradiction is not only between

the two articles of the proclamation which calls for the application of the principle which says “special law prevails over the general law” in case of contradiction <sup>15</sup>. Article 4 contradicts with the constitutional provision which is the supreme law” of the country <sup>16</sup>. Which all laws shall be enacted without having inconsistency with it.

It seems illogical to establish Federal High and first instance courts nationwide, or in some parts of the country by two thirds majority vote when the country’s economic and man powers capacity permits to entertain only those limited criminal cases under article 4 of the proclamation when the principle of delegation is over.

According to the united state’s judicial system the federal government and the states have their own criminal jurisdiction. Lawrence M. Friedman, in his book titled “American law” states that every country and in the united state every state has its own special lists of crimes<sup>17</sup>. The list is part of an elaborate statute which is usually called the penal code <sup>18</sup>. The code describes conduct that is illegal and sets out punishments. The Federal Government has its own code, which is fairly specialized, it does not cover ordinary crimes but only crimes against federal laws. For instance, the district of Columbia has its own criminal code, much like that the state<sup>19</sup>. Hence, “judicial federalism” the distribution of power between national and sub national judiciaries remains a very significant principal element of American Federalism <sup>20</sup>. This is one important thing which calls for the consideration of United States judicial system in majority of federal structure states.

Ethiopia being a Federal Environment this day, under the constitution, in order to provide for the separation of judicial power of the Federal Government and the Regional States over criminal cases in accordance with many federal structure states like that of the American judicial system empowers both the federal Government and regional states to enact their own respective penal laws <sup>21</sup>.



Article 4 of proc. No25/1996 talk about a different thing form the above paragraph. The characteristic features of the cases falling within the jurisdiction of Federal courts per Article 4 of this proclamation seems to be putting at stake the interest of the Federal Government. This is somewhat similar with the American Federal Government penal code which covers only crimes against the federal government's interest. If the intention of Article 4 of the proclamation is to be interpreted in this way, it seems to be illogical and unconstitutional.

Moreover, Dr. Fasil Nahum answers in the following way to the question which says from where do the first instance courts of Regional states get the power of adjudicating criminal cases in the absence of delegation of powers?

At the fourth symposium held in Debra Zeit, <sup>22</sup> to discuss on the "Distribution of powers and functions between the Regional states and the federal Government" Dr. Fasil Nahum presented a research paper on the delegation of judicial power of the federal Government to the regional state courts according to Dr .fasil ,first instance court of regional states are still adjudicating federal matters (for instance in the areas of penal laws which is a federal matter). The reason why first instance regional state courts adjudicate and enforce federal matters including criminal cases, in the wordings of dr. Fasil, is because even though they are not explicitly delegated, they are delegated by law subject to Article 50 (9) of the FDRE constitution. Therefore, according to him, we can conclude that except adjudicating the laws of the concerned regional states adopted by its legislature, the three level courts of Regional states, one way or the other, adjudicate and in force federal laws, because they are delegated by Art 50(9) of the constitution based on the enacted laws subject to it. In his words, they are delegated by regular law. This is a confusing argument. In the opinion of this writer Articles 50(9), 51 cum 55, 78(2) and 80 (4) should be read cumulatively. When Article 50(9) empowers the Federal Government to delegate its powers and functions

including its judicial powers and functions is subject to Articles 78(2) cum 80(2) and 80(4).

Again when Dr. Fasil says regional state courts are empowered to entertain criminal cases by regular law, it is not clear as to what is meant by “regular law?” is it to mean that there is a legislated law that delegates the judicial power of Federal courts to the regional state first instance courts? If it is to mean this, still in the knowledge of the writer we do not have a “law” that empowers regional state first Instance courts to hear and decide on criminal cases even if it is enacted, it is unconstitutional and of no effect.

### ***3.2. Assumption of criminal jurisdiction of Regional State first instance courts and its advantage(s)***

#### ***3.2.1. A accessibility (Easy access)***

The rules of the law may not be applied as desired by the legislature and differences may be observed between the law and the practice. It is disheartening that the law be clear and intelligible to each and every citizen of our country, so that he/she may without difficulty become access to the organ having judicial power to ascertain his/her rights. Even though the regional state first Instance courts are not empowered to decide on criminal cases, their practice brings easy accessibility for majority of the people.

As it is known, the regional state first instance courts are situated at the central location of the districts. This enables the dwellers to get easy access to the court as they are established in each woreda. Residents usually find it easier to present their case, particularly in cases of accusation upon complaint or to defend the action brought to them in cases it is against the interest of the public in majority of the cases without the need of going to another place (zone). This means the courts (Regional state first instance courts) give service to residents near the gate of their home when it is compared relatively with the High court situated at the zone.

The FDRE constitution under its Art .37(1) also permits and facilitates the residents to get judicial service without the need of difficulty. It provides that:

***“Everyone has the right to bring a justifiable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power”.***

Easy accessibility in this context is effective or actual accessibility which means practical accessibility. Majority of the Ethiopian people are not access to the organ having judicial power because of different factors like Economic factor, Geographical factor, Psychological factor, etc...

When we say accessibility is affected by economic factor, it may involve the expenditure that is spent on for bringing the case to the authorized organ. This includes direct costs like stamp duty, advocate fees, etc and indirect costs like the cost of transport.

The other factor that affects easy accessibility is geographical one. This is to mean that location of justice providing institutions in some limited places affects easy accessibility. Moreover, Psychological factors like fear also affects accessibility.

All these factors led to delay of justice and cost of litigation. This causes the procedural laws not to achieve the purpose for which they are intended.

Having said all the above, in the opinion of the writer, the assumption of criminal jurisdiction of Regional State First Instance Courts brings easy accessibility.

### **3.3. Problems behind the judicial assumption of Regional State First Instance Courts over criminal cases**

#### 3.3.1. Qualifications of judges

As usually known, judges and courts are considered as not separable as one and the same. When we talk of courts, automatically brings the personnel's are the judges. In all level of the courts the important personnel are the judges. In general the judges are serving in all levels of the courts. However, Judges of all levels of the courts are not seen as the same have not any distinct points.

As mentioned in chapter two Ethiopia lacks trained manpower in the legal profession. This being the situation, It is very likely that there would arise difficult legal questions that require sound knowledge of the law while regional state first instance court judges are exercising the adjudication process of criminal cases.

Nationally, Ethiopia does not have qualified legal professionals unlike many federal structure countries like French, America, Etc which have enough qualified lawyers even in the lower courts <sup>23</sup>.

The regional state first Instance court judges are ill-trained lawyers. They could not satisfactorily have the necessary skill and knowledge and the capacity to analyze facts and evidences to give sound judgments.

The courts which are occupied by trained judges are expected to follow the law in receiving new claims with the appropriate formats, in adjudication procedures, in giving judgments, etc.. than those courts which are occupied by the untrained judges.

Of course, since the regional state first Instance court judges are not to be expected to have all the necessary legal knowledge. This is one problem attached to such courts.

### **3.3.2. Unstaffed institutionally of the courts**

The regional state first instance courts judges as provided above are not qualified. This limited ability of judges may create problems in facilitating such courts activities. One of such problems is regarding non documentation.

The regional state first instance courts has no possibility by which it could keep its documents in order to serve for a longer period of time. Since such courts do not have or equipped extra manpower and their judges are not able and as well as do not having extra-time to do that documentation the files which are in these courts are not in a good position. They are disordering thrown here and there.

### **3.3.3. Allocation of budget**

As it is know budget allocation goes with a defined purpose of the established body. Obviously, the regional state first instance court has been established with its own purpose of service. Their purpose is to decide on state subject matter as enshrined under the principle of separation or powers. However, the actual practice of the regional state first instance courts demands more than the expectation of the legislature in exercising criminal jurisdiction and that it I s in need of expense.

An issue to be raised here in relation to the powers and functions of regional state first instance courts over criminal cases is the financial expenditures required for the carrying out of such powers and functions. It is the duty of both The Federal Government and the regional states to bear all financial expenditures necessary to carryout their powers and functions assigned to them by law.<sup>24</sup> The same is true when the federal Government delegates its powers and functions to the regional states, i.e, it has to cover the financial expenditure of the regional states in carrying out the delegated powers and functions unless and otherwise agreement is made .<sup>25</sup>

But the regional state first instance courts are not empowered by the FDRE constitution to decide on criminal cases. The budget is allocated only for states whose Supreme and High courts concurrently exercise the jurisdiction of the federal High and first instance courts.<sup>26</sup>

So, from this we conclude that no compensatory budget is allocated for the regional state first instance courts in their functioning over criminal cases.

#### **3.3.4. Discrepancy between the law and the practice for the**

Enforcement of criminal suspect's right(s)

Criminal procedure is designed to facilitate the enforcement of criminal law by safeguarding extensive human rights that are provided under our supreme law of the land. <sup>27</sup> Chapter – three of our constitution contains extensive criminal procedure related human rights provisions like the right to be informed promptly, in a language they understand, of the reasons for their arrest and of any charge against them, <sup>28</sup> the right to remain silent, <sup>29</sup> the right to be brought before a court of law within 48 hours of their arrest, <sup>30</sup> the right not to be compelled to make confession or admissions, <sup>31</sup> etc.

Enforcing and respecting such and other constitutional rights of suspects is the responsibility and duty imposed among others upon both the Federal and state judicial organs. <sup>32</sup>

But this is unthinkable in the regional state first Instance courts. The writer has conducted an interview with two persons who were put in custody in Guduru Woreda court being suspected of participating in criminal acts.

The first interview was Ato Chalchisa Gizaw. He was arrested and brought to the Gurdur Woreda court because he was suspected of having participated in theft. In his words, he was arrested on Dec 6, 2000 E.C and he was not brought before the courts till this interview was conducted with him (Feb 4, 2000 E.C).

The second interviewee was Ato Kebede Yadata He was also put in custody in the same court. According to him, he was put in custody without knowing the reason why he was put in custody with out knowing its reason.

### ***3.4. The Impact of criminal jurisdiction of regional state first instance courts on judicial independence***

Independence is defined as “being free from the influence, guidance, or control of another or others; self reliant, not determined or influenced by someone or some thing else, not relying on others of support, care or found.”<sup>33</sup>

Judicial independence is manifested in two-ways:<sup>34</sup> Independence of the individual judge and institutional independence of the judiciary. The writer is interested in the latter manifestation of judicial independence, i.e., institutional independence of the judiciary.

#### ***3.4.1 Institutional Independence of the Judiciary***

Institutional independence refers to the autonomy of the judiciary to deal with its matters at its own.<sup>35</sup> It is manifested in different was like:

##### **A. Constitutional Recognition**

Institutional independence of the judicial organ must be constitutionally recognized. Under UN Charter it is provided that each and every country should recognize independent judiciary in its respective constitution. Ethiopia performed such duty under Art. 78(1) and Art. 79(2) of the FDRE constitution.

##### **B. The power to decide on the assigned matter**

The constitution should allow how the judiciary operates and administer itself. One of such is that the judiciary must give a decision on the assigned subject matter.

The FDRE Constitution under Art. 78(1), clearly establishes an independent an independent judiciary both at federal and State levels. Again Art. 79(2) provides that courts of any level shall be free from any

interference or influence of any governmental body, government official or from any other source.

However, this judicial independence seems to be only of a paper value to the extent the regional state first instance courts are made to decide on criminal cases. These courts are influenced in entertaining criminal cases that are not constitutionally granted to them to be exercised.

Article 9(2) of the constitution imposes a mandatory obligation on all residents of the county, government organs, and political organizations to respect the constitution. Moreover, the responsibility and obligation to enforce and respect the provisions of the FDRE constitution is imposed on the legislative, executive and judicial organs of the government at all levels as provided under Art. 13(1) of the constitution.

All these are another way round for recognition of an independent judiciary. But the current practice of Regional state First Instance courts, in the opinion of the writer, violates all the above principles of judicial independence.



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### **3.5 Conclusion**

For a long period of time Ethiopian was influenced by a unitary system of government. Because of this, before the early 1990's Ethiopia's judicial system was of a monolithic structure. Ethiopia had one supreme court, High courts and Awraja courts parallel to the Regional administrative and Awraja administrative units.

After the advent of Federalism Ethiopia's political system is completely changed. Subject to this, the organization of Ethiopian's judicial system was changed accordingly. The 1994 FDRE constitution created a two-tiered court system i.e, federal and Regional state courts. So, at a federal level the courts are the federal supreme court, the courts federal High court and the federal first instance court. At a state level we have the state supreme court, the state High court and the state first instance court.

Federal courts have jurisdiction over federal subject, matters while Regional state courts exercise judicial power over state subject matters. Regional state courts do not have exclusive or inherent judicial power and function over federal subject matters including criminal cases. So, Regional state courts, particularly state supreme and High courts per Art. 78(2) of the FDRE Constitution are allowed to exercise judicial power and function over federal subject matters which is inclusive of criminal cases by way of delegation. Within the delegation, the federal supreme court's powers and functions are not delegated and the Regional state first instance courts have got no authorization to see and decide federal subject matters. Since the Regional state first Instance courts are not delegated, they are devoid of any criminal jurisdiction.

Even though the Regional state first Instance courts are devoid of any criminal jurisdiction the practice, however, is against the interpretation of the FDER constitution .They hear and decide criminal cases as though they themselves have jurisdiction over such matters.

Assumption of criminal jurisdiction of Regional state first Instance court has an advantage of serving easy accessibility for majority of the Ethiopia people. However, it has some drawbacks like lack of trained manpowers, unstaffed institutionally of the courts, problems of financial allocation for their (woreda courts) criminal power and function, problems of the enforcement of criminal suspect's constructional and other subordinate law rights, etc.

Moreover, the assumption of criminal jurisdiction of Regional state Instance courts has an impact on judicial independence which is constitutionally recognized. Judicial independence is manifested in two ways. One is the institutional independence of the judiciary inclusive of constitutional recognition, the power to decide on the assigned matter, etc from all these, the assumption of criminal jurisdiction to Regional state first instance courts jeopardizes this instructional independence.

### **3.6 Recommendation**

- ❖ The FDRE constitution defines the power and functions of both the Federal and Regional governments. As the structure and organization of courts coincides with the organization of the states, there is division of power between the federal courts and regional state courts. In this respect, per Articles 80 (1) and 80 (2) of the FDRE constitution federal courts have jurisdiction over federal subject matters whereas regional state have jurisdiction over state matters. Per articles 80 (2) and 80 (4) of the same constitution it is only the regional state supreme and High courts that have delegated jurisdiction over federal subject matters. From this we could understand that Regional state first Instance courts have not given any jurisdiction over federal subject matters. But, the message of Article 4 of Proc. NO 25/1996 is different. According to this Proc. regional state councils are free to apportion court jurisdiction even to their first instance courts. But this Article is contradictory with the FDRE constitution. So, it should be amended in the way it coincides with the FDRE constitution.
- ❖ Even though Regional state first instance courts are not constitutionally empowered to assume jurisdiction over federal subject matters including criminal of cases, the practice is not consistent with the FDRE constitution. Though this is the case, the judicial assumption of regional state first instance courts over criminal cases enables the citizens to get easy access to the court as they are established in each woreda. So, assumption of criminal jurisdiction of Regional state first instances courts over criminal cases brings easy accessibility. This easy accessibility can be evaluated in terms of economic factor, geographical factors, psychological factors, etc.
- ❖ It is very likely that there would be difficult legal questions that require sound knowledge of the law while regional state first instance court judges are exercising criminal jurisdiction. Generally, Ethiopia lacks trained manpower in the legal profession. The Regional state

first instance court judges are ill trained lawyers. They don't have the necessary skill and knowledge and the capacity to give sound judgments. This creates a difficulty. So, a solution should be sought for it.

- ❖ The other problem attached to the judicial assumption of Regional state first instance courts over criminal cases is the problem regarding non documentation. The Regional state first instance courts have no possibility by which they could keep their documents in order to serve for a longer period time. Since such courts have the said problem, the concerned authority shall give a solution for it.
- ❖ Constitutionally Regional states first instance courts are not empowered to entertain criminal cases as dealt in the whole paper. However, practically they hear and decide criminal cases. This needs financial expenditure. But, the federal government is duty bound to allocate a budget only for states whose supreme and high courts concurrently exercises the jurisdiction of the federal high and first instance courts. From this the federal government is not duty bound to allocate compensatory budget for Regional state first instance courts when they entertain criminal cases. But, budget should be allocated for them.
- ❖ Judicial independency is manifested in one way by institutional independency of the judiciary. This institutional independency refers to the autonomy of the judiciary to deal with its matter at its own. Accordingly, Regional state first instance courts are given the power only on state subject matters. Hence, the judicial assumption of Regional state first instance courts over criminal case is against the institutional independency of the judiciary in which the independency of the judiciary is jeopardized. To alleviate such problem, Regional state first instance courts should be either constitutionally allowed to hear and decide on criminal cases or the practice should be avoided.

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