The Criminal Legislative Jurisdiction of Regional States under the Fdre[1] Constitution: The Need for Exploring the Magnitude

Abdi G. Amenu*

Abstract: - **In a federal form of state structure, criminal legislative power is one of the powers that are supposed to be divided between the federal/central government and the states. This holds true especially for those federations that follow dual federal structure such as USA. In such a dual federation, the criminal legislative power is divided between the Federal Government and the states as designated federal crimes and state crimes. Ethiopia's federal set up also resembles the US dual federalism in which case the criminal legislative power is expected to be divided between the Federal Government and the States. However, a quick look at the current criminal law and policy in Ethiopia reveals that the criminal legislative jurisdiction is highly centralized. This centralized criminal legislative power followed by Ethiopia has an adverse effect over the regional autonomy, and effective implementation of criminal laws among each regional State. This article discovers the extent of the criminal legislative jurisdiction of the States under the FDRE Constitution in juxtaposition with the guiding principles of the distribution of legislative powers and the experiences of other federations.**

Keywords: **Federalism, subsidiarity principle, criminal matters, legislative power, Constitution**

I. INTRODUCTION

In a federal form of state structure, the need for the distribution of powers is common whereas, the question of the scope thereof is not uncommon as well. It is easily discernible with the rule of thumb that in a federal form of government, powers are shared between a central government and the constituent units, and the two entities are said to be autonomous over their respective jurisdictions so identified and granted to them by the constitution. The powers that are divided between the central government and the states are defined by the constitution. Consequently, unlike in that of the unitary form of government, the central government cannot take away the powers of the states at its whims.

*The author received his LL.B from Jimma University and LL.M from Addis Ababa University in Constitutional and Public Laws stream. He has been serving as a Public Prosecutor and judge. Currently, while holding judgeship status at High Court, he is a trainer at the Oromia Justice Sector professionals Training and Research Institute.

[1] Refers to the Federal Democratic Republic of Ethiopia

One section of powers that are divided between the central government and the states is the power of legislation over criminal matters. While some federations such as US divides the criminal legislative power between the central government and the states, in other federations such as Germany, the central government enacts criminal laws and the states (*landers*) administer same. This categorization would take us to the other side of the flip: dual federalism and administrative federalism typologies.

More often than not, in a federal form of state, powers and functions are divided between the central government and the states in accordance with the nature of that power and/or the need for accessibility to the people. With regard to the nature of the power, there are some powers which are inherently characterized to feature the central government, and hence would fall within the jurisdiction of it. Some other powers feature regional characters, hence would fall within the jurisdiction of the states. From these propositions, we could safely deduce that in a federal form of state, power is not arbitrarily shared, nor is the categorization of powers to be federal and/or regional haphazard. Such a categorization is not something optional but a necessity in the light of the principles of federalism and effective implementation of such powers. Accordingly, powers which regional states are deemed to exercise closely and effectively are made to fall within their jurisdiction and powers which the central government would effectively accomplish are made to fall within the jurisdiction thereof. It is for this reason that in federalism, the nature of the powers (federal and/of regional) plays a fundamental role in identifying the bottom line for the convenience of dividing powers between the two tiers of governments.

Legislative power over criminal matters is one among the many powers which are divided between the central government and the states. It is thus expected that in dividing legislative power over criminal matters follows the same patterns abovementioned, i.e. criminal legislative power should be divided between the two tiers of governments based on their nature. Accordingly, if the nature of the crime causes it to fall within the ambit of the central government, the same must assume the legislative power thereof. Plus, if the nature

of the crime is characterized to be of regional feature, the regions are expected to exercise legislative power over same.

Having all this in mind, the article makes an attempt to discover whether the current criminal legislative power, under the Ethiopia's federal set up, adheres to the above patterns and in the juxtaposition with the experiences of other federations and theories which underlie the division of legislative powers in general and that of criminal legislative power in particular. It is also the aim of the paper to investigate whether the current centralized legislative power over criminal matters so opted by the Federal Government is effective in accomplishing the criminal justice system and policies, and whether the rule of one-size-fits-all is applicable horizontally to all regional states.

A point which must not be overlooked and needs a greater emphasis in this writing is the consequences of the centralized criminal matters with regard to its legislative aspect over states. The centralized criminal legislative power has an adverse effect over the regional states from the perspectives of the underlying principles of federalism, experiences of other federations, and the diversities of the regional states with their unique features. The article also makes a critical analysis on the current Ethiopian criminal legislative power in terms of the subsidiarity principle.

Furthermore, a discussion will be made on issues regarding the criminal procedure legislative power in light of the FDRE Constitution. One area of debatable issues under the FDRE Constitution is the power over criminal procedure legislation vis-à-vis residual powers so provided under the Constitution. To this effect, a critical analysis will be made in this writing.

The article consists of nine sections with the exclusion of the introductory part. Accordingly, section one deals with the criminal legislative jurisdiction and its guiding principles. Section two highlights the criminal legislative jurisdiction in some federations as a comparative analysis. Section three explores the criminal legislative jurisdiction in light of the FDRE Constitution. Section four touches upon the extent of the criminal legislative power of the Federal Government with a brief look on laws made in the area of criminal matters. Section five is all about the state criminal legislative jurisdiction with an emphasis on the assessment of the scope thereof as compared with that of the Federal Government. Section six discusses the power/jurisdiction of legislation of the criminal procedure code under the FDRE Constitution. The tradeoff of uniformity and diversity in respect of criminal legislative pluralism, the potential fear of some scholars, will be presented in section seven. In section eight, the consequences entailed by the centralized criminal legislation in the current Ethiopia's criminal discourse will be discussed in detail. Finally, the articles will be concluded with the conclusion and recommendation part.

II. CRIMINAL LEGISLATIVE JURISDICTION AND ITS GUIDING PRINCIPLES

8.1 Criminal Legislative Jurisdiction: Meaning and Significance

The FDRE Constitution and other subsidiary criminal laws have not yet defined what is meant by the phrase 'criminal legislative jurisdiction'. Consequently, it is worth resorting to define what is meant by legislative jurisdiction or power. Accordingly, legislative power is defined by the Black's Law Dictionary as follows:

> *Legislative power is the power to make laws and alter them at discretion; a legislative body's exclusive authority to make, amend, and repeal laws. A legislative body may delegate a portion of its lawmaking authority to agencies within executive branch for purposes of rulemaking and regulation.*[1]

Thus, legislative power is the power vested in the legislature subject to delegation by it to executive agencies so that they could exercise such a power in rulemaking and regulations. These powers may pertain to making, amending, and repealing laws. Black's law Dictionary on the other hand, defines legislative jurisdiction as a legislature's general sphere of authority to enact laws and conduct all businesses related to that authority, such as holding hearings.[2] From these two definitions rendered to legislative power and jurisdiction, we could easily understand that the definition given to the former is more specific than that of the latter, and in view of the latter definition, the scope is broader in that the term jurisdiction includes both lawmaking function and all businesses related to it. But for the matter and purpose of this writing, the author uses the two terms interchangeably.

Thus, the criminal legislative jurisdiction is not found different from the above definition although the subject matter in the criminal legislation is more specific, which basically discusses criminal matters. Accordingly, criminal legislative jurisdiction is the power of the lawmaking organ, and/or agencies (with delegated authority) to make or enact laws over criminal matters. This is the concern of the article under consideration with respect to the FDRE Constitution.

The understanding and knowledge of criminal legislative jurisdiction in general and that of the FDRE in particular serves much significances. In a federal form of state structure, the doctrine of the distribution of powers necessitates the need for knowledge of the criminal legislative jurisdiction for all practical and academic purposes. For the academia, knowing and identifying the criminal legislative jurisdiction of the Federal Government and the states under the FDRE Constitution is the area of research, subject of debate, and a teaching tool. For the practitioners of law, it is a mandatory requisite for them to identify the jurisdiction of each criminal case that appears before them. The organs of government also

[1] Black's Law Dictionary, eighth ed. P.911

[2] Id, p.856

need the knowledge of criminal legislative jurisdiction in the areas of making laws and framing policies.

8.2 The Guiding Principles of Criminal Legislative Jurisdiction

Actually, there are hardly any hard and fast separate principles that guide the criminal legislative jurisdiction in Ethiopia and elsewhere. But depending upon various inferences and other factors affecting legislative jurisdiction in the course of the distribution of powers between the Federal Government and the states, the following principles are assumed to be the guiding principles of the criminal legislative jurisdiction in federations including Ethiopia.

1.2.1. The Laws Breached

The test of the laws breached in the determination of the criminal legislative jurisdiction as to whether a legislative power over a certain criminal matter falls under the jurisdiction of the Federal Government and/or the states, gives emphasis to which laws are transgressed and hence punished by whom. In a simpler statement, which laws are violated and then which government (the central or the regional) that has to criminalize the act is the prime question underling this guiding principle.

Accordingly, the assumption is that if the laws of the Federal Government and international treaties are breached, the Federal Government has an exclusive jurisdiction over the criminal legislation thereof. In contrast, if the violated laws are those that fall under the state jurisdiction, then it is the regional states that have the criminal legislative power over criminalizing the acts that resulted in the violation of the laws.[3] This principle holds true especially in a dual federal system as will be discussed in the following comparative analysis.

1.2.2. The Nature of the Distribution of Powers

The nature of the form of distribution of powers as enshrined in the constitution affects the criminal legislative jurisdiction of many federations.[4] In as much as there are various forms of distribution of powers namely, exclusive, concurrent and residual powers, the criminal legislative jurisdiction is also made to follow the same pattern in many federations. For example, as will be discussed in the following section, the US constitution enumerates those criminal matters which should fall under the Federal Government. It does not list criminal matters which fall under the states. The fact that the constitution left other criminal matters apart from those which fall under the Federal Government implies that other criminal matters would fall under the state jurisdictions by the rule of residual power. This is the corollary that has sprung from the fact that the constitution vests the residual powers with the states.

The Indian constitution provides the criminal legislative jurisdiction in accordance with the three lists of the forms of the distribution of powers.[5] These are the Union list, the State list and the Concurrent list. The criminal legislative power also follows the same pattern. The Federal Government shall have criminal legislative power over the Union list; the States shall have criminal legislative power over the State lists and the two tiers of governments shall have concurrent criminal legislative power over those concurrent powers. The power of enactment of the criminal code and criminal procedure code falls in the concurrent power lists. The Nigerian experience also shows that the Federal government and the provinces have criminal legislative power in terms of incidental and supplementary clause.[6]

1.2.3. The Subsidiarity Principle

The subsidiarity principle is the other guiding principle of the determination of the criminal legislative jurisdiction as between the Federal government and the states. The subsidairity principle upholds the idea that a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level.[7] Watts also notes that the principle of subsidiarity is the notion that a "higher" political body should take up only those tasks that cannot be accomplished by the "lower" political bodies themselves.[8]

While the scope of the historical background, philosophical foundations of the subsidiarity principle, and the nexus

---

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

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

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

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

[7] http://en.wikipedia.org/wiki/Subsidiarity, accessed on 08/01/2014 at 4:10PM. Etymologically, the term subsidiarity is, more distantly, derived from the Latin verb subsidio (to aid or help), and the related noun subsidium (aid or assistance) Subsidiarity is an organizing principle of decentralization, stating that a matter ought to be handled by the smallest, lowest, or least centralized authority capable of addressing that matter effectively.

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

between it and human rights goes beyond this writing, the whole idea here is the criminal legislative power is transferred to the Federal Government provided that the area lies beyond the states, and the Federal Government is assumed to adequately regulate the matter. In any case, the Federal Government has a subsidiary, not a primary jurisdiction.

III. CRIMINAL LEGISLATIVE JURISDICTION IN SOME FEDERATIONS

3.1. USA

The US Constitution does not clearly stipulate the criminal legislative jurisdiction of the Federal Government and that of the States, but rather there are constitutional provisions which are used as an inference towards the dual system of the criminal legislative power. These inferences may contemplate that there are criminal legislative powers over which the Federal Government has an exclusive power on one hand, and that over which the States have their exclusive criminal legislative power on the other notwithstanding the federal supremacy and "the necessary and proper" clauses as provided in the US Constitution. In case of inconsistency between the Federal Government and the States with respect to the criminal legislative jurisdiction, the federal supremacy clause dictates that the Federal laws will prevail over that of the States' ones.[9]

With respect to the criminal legislative power of the Federal Government, it is provided that the Congress shall have the power to provide for the punishment of counterfeiting the securities and current coin of the US.[10] The presumption is, thus, that crimes apart from these ones are vested in the States in relation to the legislative power.

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

The typology of crimes so as to cause them fall under the two tiers of government in the US Constitution may take us to the Federal crimes and the State crimes scenario. As discussed hereinabove, there are crimes which the Federal Government has a monopoly power especially over those powers which are enumerated in the Constitution, and there are crimes which the States have an exclusive criminal legislative power especially taking into account the place where the crime is committed. Explained otherwise, crimes are divided as that of the federal and states crimes although it appears to be difficult to wholly identify which crimes constitute the federal and which constitute the state ones. However, it is of importance to determine the Federal crimes and the State crimes so as to identify which order of government together with its institutions, the Federal or the State, which has jurisdiction to entertain the criminal offences.[11] Thus, in order for one to bring his/her case to the Federal or the State criminal justice actors, he/she needs to first identify which crime has been committed, the Federal or the State one.

What benchmarks are used to divide crimes as federal or state in the US dual approach? The first criterion, as discussed above, is the fact that the constitution itself has enumerated those crimes which belong to the Federal Government[12]. Other crimes such as mail fraud (and other types of fraud), kidnapping (especially if the victim was carried across state lines), any crime involving interstate travel, including heists and transport of stolen property or illegal contraband, tax evasion, and immigration offenses are also federal crimes.[13] While these offences are federal crimes, those crimes which are not listed in the constitution are categorized under the state crimes based on where they are committed. This reminds us of the principle that the residual powers are reserved to the States. Thus, the States are empowered to legislate on crimes committed within their respective jurisdictions. To this end, one internet source notes that:

> *Each state has its own criminal code which governs the conduct of its citizens. So, something can be a*

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

[10]Art. I, section 8 (6) of the US Constitution. Section 8 (10) also goes on to state that the Congress shall define and punish piracies and felonies committed on the high seas, and offences committed against the Law of Nations. Furthermore, Art.III, section 3 provides that the Congress shall have the power to declare the punishment of treason.

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

[12]Namely, counterfeiting of money, piracies and felonies committed on the high seas and offences committed against the Law of Nations.

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

> *crime in one state, but not in another. Likewise, an action can be criminal under state law, yet not be characterized as a crime under federal law. Local law enforcement generally handles state crime investigation and prosecution. Crimes that occur locally and do not involve federal property are often handled by a state criminal court.*[14]

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

The second litmus test and which is closely related to the first benchmark in the demarcation of the federal crimes and the state crimes is the principle of "*locus*" or the place where the crime is committed. To this end, if the crime happens in one state, it is typically a state crime, unless it is expressly named federal crime whereas, if a crime occurs throughout many states, or crosses state lines, it often becomes a federal crime.[15]

Furthermore, when a certain crime violates the State laws, it becomes the state crime. State crimes are typically all conduct that violates state laws, such as murder, traffic violations, and other areas where conduct is completely encompassed in the state.[16] On the other hand, in the United States, a federal crime or federal offense is an act that is made illegal by U.S. federal legislation.[17]

In the meantime, it is important to note that the Federal Government and the States have their own criminal procedure codes in the administration of the criminal laws which they are entrusted with.[18] While the Federal crimes are administered by the Federal criminal procedure code, the State crimes are administered by the State criminal procedure code. State Criminal Procedure is defined by the state constitution, statutes, rules, and judicial decisions of each state.[19]

3.2. Switzerland

In contrast to the US model which is dual in nature, the Swiss criminal legislative jurisdiction is clearly constitutionally centralized. This is not an exaggeration as the federal government is responsible for the overall legislation whereas, the cantons are responsible for the administration of the federal laws. The criminal legislative jurisdiction is also made to follow the same trend in the Swiss Constitution. The fact that the Federal Government is empowered to legislate on criminal law unequivocally extends to both the substantive and procedural criminal codes.[20]

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

8.3 Germany

The German Basic Law states that the criminal legislative jurisdiction is the concurrent power of the Federal Government and the *Lander*.[21] Art.72 of the Basic Law of Germany provides for the guiding principle of the law of concurrency. It states that on matters within the concurrent legislative power, the *Länder* shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law. This gives an impression that although the criminal legislative jurisdiction is concurrent in Germany precedence is given to the Federal Government, and as a result, the *Lander* are authorized to legislate on criminal laws if the Federal Government has not exhausted the area.

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

[14]Ibid

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

[16]Ibid

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

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

[19]Ibid

[20] Thus, Art.123 (1) of the Swiss Constitution provides that legislation in the field of criminal law and criminal procedure is a federal matter.

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

throughout the federal territory, the maintenance of legal or economic unity for the purpose of national interest.

In the meantime, one should not lose sight of the fact that when laws in general and criminal laws in particular are made in Germany, there is a huge participation of the Second Chamber, the *Bundesrat*, which is the blend of the delegates of the Executives of the *Lander*.[22] Thus, the *Lander* would participate in the criminal legislation when enacted at federal level through the *Bundesrat*. Even the consent of the *Bundesrat* is required for a bill to be adopted by the *Bundestag*. This helps to maintain the regional interests of the *Lander* at the federal level in criminal legislation and policy.

8.4 India

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

However, the power of enacting penal code and Criminal Procedure Code is vested in the concurrent list in which case both the Union and the States have concurrent power over the Codes. The Indian Constitution thus distinguishes between the criminal legislative power on one hand and criminal (penal) code enactment power on the other.[23]

8.5 Nigeria

The Nigerian Constitution does not clearly and expressly provide for the criminal jurisdiction of the Federal Government and of the States with respect to criminal code and/or criminal legislations. However, even though the constitution is silent on whose criminal code enactment power is, it provides for the criminal legislative jurisdiction under the 'incidental and supplementary matters" clause.[24] Accordingly, in as much as there are exclusive lists and concurrent lists, the concerned governments (the Federal Government on matters exclusively enumerated for it, and with the States on matters concurrently enumerated for both), have the power to enact criminal legislations or offences.

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

8.6 Canada

The Canadian Constitution, as far as criminal legislative jurisdiction is concerned, sets out an approach that enunciates that the Federal Government is vested with the enactment of criminal code and criminal procedure code[25] whereas, the provinces are vested with the power of imposition of punishment of fine, penalty or imprisonment on laws which are exclusively enumerated for the Provinces.[26] Although the Federal Government is entrusted with the power of enactment of uniform criminal code and criminal procedure code, the Provinces are not precluded from legislating criminal matters; rather they are empowered to make criminal punishments in the form of fine, penalty or imprisonment on matters falling within their jurisdiction. This enhances the regional autonomy of the Provinces in the area of the criminal legislative power. Each Province may criminalize acts which it deems go against the law or matters which are under their respective jurisdiction independent of the other provinces and/or the Federal Government. On the other hand, the Federal Government also

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

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

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

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

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

enacts its own criminal code, within which acts which are deemed to go against the Federal exclusive powers are criminalized, and thereupon enacting criminal procedure code for the whole nation.

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

IV. CRIMINAL LEGISLATIVE JURISDICTION UNDER THE FDRE CONSTITUTION

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

To begin with, Art.55 (5) of the Constitution of the Federal Democratic Republic of Ethiopia (the FDRE Constitution) provides that the House of peoples' Representatives (HPR) shall enact a penal code. It goes on to state that the States may, however, enact penal laws on matters that are not specifically covered by the Federal penal legislation. From this constitutional provision, we can draw that there are two concepts as far as the criminal legislation herein provided is concerned. The first concept is related to the notion of criminal or penal code whose main issue has a strong connection with the principle of codification. Black's Law Dictionary defines the term 'code' as "a complete system of positive law, carefully arranged and officially promulgated; a systematic collection or revision of laws, rules, or regulations".[27] Thus, the power over criminal law to make a consolidated and properly and systematically arranged law, promulgating same is vested in the Federal Government. Accordingly, the power to define the object and purpose of criminal law, the principles of legality, the scope and nature of crimes, etc is vested in the Federal Government. Stated otherwise, the States are precluded from the power of enactment of law over criminal or penal code under the Constitution. In any matter so demanded within their criminal legislative jurisdiction, if any, the States are duty bound to follow and defer to the principles and rules provided for in the Federal Criminal Code. For instance, the notion of the principle of legality, scope of the application of criminal law, what constitutes and does not constitute a criminal offence, etc, are common for both the Federal and the State criminal legislations. It is for this reason that the Federal Government has set out the comprehensive Criminal Code.[28]

The FDRE Criminal Code (hereinafter referred to as the Criminal Code) being a codified law or simply a code, consists of, *inter alia*, object and purpose of criminal law, principle of legality, equality before the law, the scope of the application of the criminal law. It also consists of the general part, special part and the part dealing with the Code of petty offences. The general principles set out in the Criminal Code should be observed by any regulation or special laws of criminal nature except as otherwise expressly provided therein.[29] Such regulations or special laws of criminal nature, whether they are of the Federal Government's or the States' refer to criminal legislations as is to be explained in the following discussions.

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

[27]Black's Law Dictionary, P.774

[28]Proclamation No.414/2004, the Criminal Code of the Federal Democratic Republic of Ethiopia, 9th of May, 2005, Addis Ababa

[29]Id, Art.3

delineate, here, that the power over which the States are authorized to enact the criminal legislation is subject to whether the crimes are exhausted or not in the Federal criminal legislations and/or Code.

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

A close reading of Art.55 (5) of the Constitution may enable us to argue for and against the nature of centralized criminal law and policy in Ethiopia. The fact that a priority has been given to the Federal Government in enacting a criminal code and other criminal legislations will qualify it to have an upper hand over all criminal matters at the expense of regional autonomy. Accordingly, in his 'Monist Approach to Criminal Policy in Ethiopia (*emphasis added*)', Abera argues that despite the fact that Ethiopian society is characterized by multiple culture and normative orders, it still has highly centralized criminal justice system.[30] He castigates the Constitution stating that the latitude of legal pluralism allowed by the Constitution has not gone far enough to embrace the criminal justice system as a result of which the Constitution has made no departure from the old centralist and unitarist approach.[31] Consequently, the Federal Government is at liberty to criminalize or not any matter it deems necessary leaving the States with few or no criminal legislative power. The States are, thus, at the total mercy of the Federal Government as far as criminal legislative power is concerned. How far such a centralized criminal legislative power and policy in Ethiopia is adaptable to the Regional States; whether it enhances or constrains federalism and other related consequences thereof will be broadly discussed as the discussion goes on.

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

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

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

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

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

[31]Id, p.146

Fifthly, customary criminal justice system that is inherent in each NNP of Ethiopia dictates some crimes to be enacted by the States. Although the FDRE Criminal Code centralized crimes almost in its entirety, the customary criminal justice systems operate informally based on their own customary laws, procedures and institutions at the community level, and as a result, there is a divergence between the multicultural and diversified social structure and the centralist legal system.[32] In practice, even in the face of the unwelcoming Ethiopian legal climate for customary justice systems, the various non-state legal orders coexist along with the formal legal system.[33] The customary justice systems appear to have resisted and survived the sweeping and hostile abolition measures taken by the state against them.[34] Thus, although Art.3347 (1) of the Civil Code declared the repeal of customary practices before fifty years now, they are existing till today. Despite lack of official recognition, the customary justice systems are widely used in the area of criminal justice in most of the rural parts of Ethiopia.[35] Thus, while there are such concrete and practical circumstances alongside the existence of multicultural and multiethnic societies in Ethiopia, it does not seem feasible to centralize criminal law and policy.

In addition to the Constitutional foresight of the criminal legislative power as opined in the foregoing discussion, there are also other statutes which give a hint of dividing crimes between the Federal Government and the States, hence federal crimes and state crimes. Proclamation No.25/96 is a typical example to this end. In the determination of the jurisdiction of the Federal Courts, Art.3 of the Proclamation limits the jurisdiction of the Federal Courts to cases arising under the Constitution, Federal Laws and International Treaties, parties and places specified in the Constitution and Federal Laws. This shows that cases arising under the State Constitutions, laws, parties and places specified in their laws fall under the State Courts. The fact that the Proclamation left other crimes unmentioned indicates that the remaining crimes are regional in character and should be left to the Regional Courts. Moreover, the Proclamation nowhere stipulates the delegation clause. Thus, the question to be posed here is why do the States not enact laws on these crimes under their jurisdiction and which have regional importance inherently. Furthermore, crimes listed under Art.4 of the Proclamation are more federal than regional in nature. As a result, there is a presupposition that these crimes belong to the Federal Government, hence federal crimes and the remaining crimes would belong to the States constituting state crimes.[36]

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

There are also other scholars such as Dr. Solomon and Dr. Assefa who argue that Ethiopian criminal legislative jurisdiction is concurrent.[37] The latter writer adds that although the Federal Parliament, by virtue of Art.55 (5), exhausts the field, leaving no room for the States, this is not merely a paper power left for States, since they often include in their legislation specific offences which are not covered by the Federal penal code.[38] An analytical assessment will be made how far the States have included in their legislations offences which are uncovered by and in the Criminal Code and other federal criminal legislations, in the discussion which follows.

Donovan and Getachew have tried to place the Ethiopian criminal legislative jurisdiction somewhere in between the German model and the Canadian model.[39] According to the view of these co-writers, if we think of the Ethiopian criminal legislative jurisdiction in terms of concurrency, like that of the view of the above scholars, it appears to be equated with that of the German counterpart though the latter has expressly provided for but the former does not. However, if the Ethiopian criminal legislative jurisdiction is to be equated with that of the Canadian model, the conclusion may not take us further because in the Canadian Constitution, the Provinces have the power to impose punishments on acts committed or omitted on matters or laws falling under their jurisdiction. The Federal government is not allowed to encroach in matters falling under the exclusive jurisdiction of the Provinces on the issue concerning the imposition of punishments. But this does not work in Ethiopia as precedence is given to the Federal Government, and the States may enact criminal legislations only if the said offences are not specified in the Criminal Code and other legislations.

V. THE FEDERAL CRIMINAL LEGISLATIVE POWER: A BRIEF LOOK AT

[32] Id, p.147

[33] Ibid

[34] Ibid

[35] Ibid

[36] Arts.37(1, 2), 38, 39,41-53 of the FDRE Draft Criminal Procedure Code also has such a view.

[37] Solomon Nigussie, (2008). *Fiscal Federalism in the Ethiopian Ethnic-based Federal System*, Revised Edition, Wolf Legal Publishers, P.64-65, Assefa Fisseha, (2006). *Theory versus Practice: In the Implementation of the Ethiopian Ethnic federalism.* In David Turton (ed.), Ethnic Federalism: The Ethiopian Experience with Comparative Perspective, (p.131-159). Addis Ababa University Press, P. 145.

[38] Assefa Fisseha, (2006). *Theory versus Practice: In the Implementation of the Ethiopian Ethnic federalism.* In David Turton (ed.), Ethnic Federalism: The Ethiopian Experience with Comparative Perspective, (p.131-159). Addis Ababa University Press, P. 145

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

The Federal Government has enacted the Criminal Code and other criminal legislations.[40] As touched upon in the foregoing discussions, undoubtedly, Federal Government is expected to enact criminal code for sake of setting general principles over criminal matters. But it is easily visible from the provisions of the Code that there are great deals of crimes incorporated but having regional characters.[41]

VI. THE STATE CRIMINAL LEGISLATIVE JURISDICTION: ASSESSING THE SCOPE

As hinted on in the foregoing discussions, the States are authorized to enact criminal legislations, provided that the crimes in view are not specified in the Federal criminal legislations.[42] This prompts us to state that for the States to enact criminal legislations, they need to first look to the Federal criminal legislations, including the Criminal Code. At any rate, the States have made criminal legislations in their enactments concerning primarily with different matters but incorporating penalty clauses in some respects. For the sake of ease of accessibility and availability of legislations, the writer has chosen to provide as an example the case of the Oromia Regional State Laws.

With regard to the criminal legislative jurisdiction of the states, there are some important questions to be posed whether they actually are exercising such a power, and whether the laws made are in conformity with the respective legislations of the Federal Government and the FDRE Constitution. Let us see the following proclamations or regulations issued on specific areas in relation to penalty clause legislations.

6.1 Forest Laws

The Forest Proclamation of the Oromia Regional State has spelt out the penalties for forest crimes in the State. Accordingly, in all crimes relating to forest, the punishment ranges from 5 years to 15 years imprisonment.[43] On the other hand, the Federal forest law provides for penalty clause in differing versions of which the minimum penalty is 6 months and the maximum one is 15 years rigorous imprisonment and fine from 5000 birr to 30,000 birr.[44] For the matter of critical comparative analysis, let us see some points which are glaring in the Federal and Oromia forest laws.

The first point to ponder upon here is the fact that there is an obvious inconsistency between the two laws regarding the penalty clause. Accordingly, while the Federal forest law provides for the minimum penalty to be 6 months and fine Birr 5000 and the maximum penalty to be 15 years rigorous imprisonment and fine Birr 30,000, the Oromia forest law, on the other hand, provides for the minimum penalty 5 years and the maximum one 15 years imprisonment with the exclusion of fine.

In such a clear contradiction, one may be tempted to respond to a question which law should prevail. It is clear that the Regional states are beholden with administering and conserving natural resources including forest and land in accordance with the laws to be made by the Federal Government on the area.[45] This implies that the laws made by the regional states in lieu of the administration and conservation of the natural resources should be consistent with the federal laws, and if the regional state laws are found inconsistent with the federal law, it is easily discerned that the

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

[41] Great deals of crimes, which are capable of characterizing the regional features, are incorporated in the FDRE Criminal Code.

[42] The most surprising is the fact that all the regional state constitutions have opted silence on the criminal legislative power although it has been provided for by the FDRE Constitution. The constitutions of the regional states in Ethiopia have not expressly provided for the criminal legislative jurisdiction .

[43] Proclamation **no.72/2003**, the Oromia Forest proclamation, Art.15 criminalizes such acts as cutting tree from forest, taking forest resource product, preparation or utilization of forest product in any form, transporting the forest resource product, storing the forest resource product, destroying, erasing or falsifying the forest boundary mark, setting fire or damaging forest in any manner, and those prohibited acts mentioned in Arts. 13 and 14. On all these criminal acts, the Proclamation imposed the penalty which ranges from 5 years to 15 years without making any distinction between the acts with regard to severity or other circumstances. Leniency and severity of the acts have not been taken into consideration.

[44] Proclamation **no.542/2007**, Federal Forest Proclamation, Art.20 provides for the penalty imposed on forest crimes in **six** categories, probably, based on the degree of the crime committed against forest. Accordingly, in category one, cutting trees, removing, processing or using in any manner shall be punishable with not less than one year and not exceeding five years imprisonment and with fine Birr 10,000 (art.20(1). In Category Two, it is stated that destroying, damaging or falsifying forest boundary marks shall be punishable with not less than 1 year and not exceeding 5 years rigorous imprisonment (art.20(2). Category three states that setting fire to forest or any manner shall be punishable with not less than 10 years and not exceeding 15 years rigorous imprisonment (art.20(3). In category four, it is provided that settling or expanding farmland in forest area without permit or undertaking the construction of any infrastructure in a forestland without having a necessary permit shall be punishable with not less than 2 years imprisonment and with fine Birr 20,000 (art.20(4). In category five, the law provides that assistance in any form of the acts so prohibited in the proclamation shall be punishable with 5 years imprisonment and fine with Birr 5000 (art.20(5). Category six, which cross refers those forest crimes which are not mentioned in the above categories and, hence are punishable with not less than 6 months and not exceeding 5 years imprisonment and with fine Birr 30,000 (art.20(6).

[45] Arts. 51(5), 55(2)(a),&52(2)(a) of the FDRE Constitution provide that while the Federal Government enacts laws over the natural resources, the regional states administer same in accordance with the laws made by the former government. Furthermore, Art.18 of prco.542/2007 also requires the regional states to administer the forest in accordance with the proclamation under consideration. Thus, the corollary is that laws made by the regional states regarding the natural resources including forest law should conform to the federal laws on the area.

federal laws must prevail. Therefore, the Federal forest law prevails over the Oromia's one in this case.

The second point is the power of legislation of criminal matters of the regional states in general and the Oromia in particular: whether it is an original power or a mere translation of the Federal Forest law from Amharic and/or English to Afaan Oromoo. As discussed in the above explanation, once the Federal Government has issued the law, the Oromia Regional State should enact laws on the matter under consideration only if the Federal Government did not do that. However, all forest criminal acts which are punishable under the Federal Forest law are also provided and punishable in the Oromia Forest law though the amount of punishment is uniform in the latter case and diverse in the former one. Thus, as far as the crimes are stipulated in the Federal law, those penalty clauses included in the Oromia forest law are a replica and a mere translation; not an original power. But no inference to this end has been stipulated in the preamble of the Forest Proclamation of the Oromia regional state.[46]

6.2 Rural land laws

With respect to rural land administration, both Oromia Regional state and Federal Government have issued their respective laws.[47] Art. 27 and art.19 of the Oromia and Federal rural land administration respectively contain a penalty clause in which case both laws cross refer to the applicable criminal law namely, the FDRE Criminal Code.[48] This indicates that the penalty clauses of the Federal and Oromia rural land laws converge in the Criminal Code.

Having a cursory look at the two proclamations of the Federal Government and of the Oromia Regional State on the rural land, they did not include separate provisions which regulate criminal matters. At any rate however, the thumb rule is that the regional states enact criminal legislations on land matters provided that the same have not previously been made by the Federal Government. While this is the case, Oromia Region State issued a regulation (Reg.No.151/2014/ or simply the Regulation in this writing) which came up with rather detailed criminal provisions unlike that of the Oromia and Federal rural land laws in which case the penalty clauses have been cross referred to the Criminal Code. Actually, this is not prohibited *per se* in the Federal rural land laws.[49] But what is controversial is the Regulation itself and its contents, hence, the status of the Regulation in light of the FDRE Constitution, Federal land Proclamation and the Oromia land law (proclamation). To this end, it is worth making an analysis over the scope of criminal legislations made in the Federal rural land laws on one hand and the Oromia counterpart on the other with a special focus on the Regulation.

Accordingly, the Regulation has criminalized as many acts as are provided in it.[50] The crimes so stipulated and penalties imposed on each crime in the Regulation seem to have widened the horizon of the criminal legislative power of the Oromia Regional State on land matters. But a close scrutiny of the two laws reveals that nearly all crimes stipulated in the Regulation are already incorporated in the Criminal Code although they are not a facsimile in phraseology, and are found scattered here and there in the Code.[51] This does not however mean that the Regulation does not contain penalty stipulations which are unmentioned in the Federal criminal legislations and as the same time which are unique to the Region under consideration. There are crimes which are

[46]Towards the effectuation of healing the ills of the Oromia Forest Proclamation thus, the author proposes two options one of them to necessarily be executed: either expressly or impliedly cross referring to the Federal Forest Proclamation that a translation or verbatim copy thereof is adopted for the implementation of the Federal proclamation as it is or the Proclamation be adjudged unconstitutional.

[47] Proclamation no.130/2007, the proclamation of Oromia rural land administration,, Proclamation no.456/2005 the Federal Rural land Administration.

[48]The full version of art.19 of the Federal counterpart reads as any person who violates this Proclamation or the regulations and directives issued for the implementation of this Proclamation shall be punishable under the applicable criminal law. Accordingly, the pertinent provisions of the FDRE Criminal Code shall *mutatis mutandis* be applicable on the crimes relating land matters.

[49]Art. 17 of Proclamation no.456/2005 provides that each regional council shall enact rural land administration and Land use law, which consists of detailed provisions necessary to implement this Proclamation.

[50]Read Art. 33 of the Regulation. Under Sub-art. 1, such acts as unlawful rural land acquisition, building a house or a fence, and tilling of land and an attempt thereof are punishable ***with one year up to 5 years imprisonment and fine Birr 2000 up to 6000***. Under sub-art. 2, it is provided that any person (competent) or an authority who grants a false or fraudulent document evidencing rural land possession or alters or prepares same shall be punishable ***with 1 year up to 5 years rigorous imprisonment and fine Birr 3000-6000***. Sub-art.3 provides that unlawful donation of rural land use or its attempt, acquisition of rural land use through fraudulent document (title deed) and its attempt, preparing or getting fraudulent title prepared on rural land use, receipt of illegal title deed on rural land use or an attempt to do so shall be punishable ***with 1 year up to 3 years imprisonment and fine Birr 1000-3000.*** Under sub-art.4, it is provided that sloppy tilling of rural land (*irraangadee qotuu*), demolition of a bay (*daagaa diiguu*), building a bay at improper place, making a sloppy floodway (*karaa lolaa irraangadee baasuu*), bringing or permitting one's herds or flocks to protected areas such as trees, water, and soil shall be punishable ***with not exceeding 3 months simple imprisonment and fine not exceeding Birr 1000***. Sub-art.5 lists crimes related with the failure of the *kebele* administrator to discharge his/her duties. Accordingly, failure or refusal to receive any complaint in connection with rural land use, failure or refusal to select arbitrators after receipt of the complaint, failure or refusal to execute the arbitral award, failure to respond to relevant bodies within the required time shall be punishable ***with 1 month up to 3 months simple imprisonment and fine Birr 500-1000*** (translation mine). At the time of writing this article, since the author could not get the English version of the Regulation, he translated the words or phrases from Afaan Oromo to English with a bit difficulty. In such cases, the author put the words/phrases in brackets as they stand in Afaan Oromo. The words or phrases might have their own technical meanings. For sure, it is! Thus, the author would like to leave it to the readers.

[51] For instance, art.685 cum art.851 of the Criminal Code is similar with art.33 (4) of the Regulation. Even the provisions of the Code are wider in scope than the provisions of the Regulation on the area. Art.686 of the Code is similar with art.33 (1) of the Regulation. Art.33 (2) and (3)) of the Regulation are similar with arts.363-395 regarding falsification and fraudulency. Subject to the definition given to public office under relevant laws, art.33 (5) of the Regulation seems similar to art.416 of the Code regarding the discharge of one's duties.

included anew, to the extent the author's understanding went at the time of writing this article, in the Regulation. For instance, the penalty clause on terrace and cognate issues is a typical example which is penalized under the Regulation but not expressly included in the Criminal Code.[52] But the whole idea is that not all crimes stipulated in the Regulation are purely and new ones stated in the Regulation as if it were enacted by the Region as an original power. Rather only few of them are made anew by the Region whereas, majority of them are already incorporated in the Criminal Code whose legislative authority is traced back to the House of People's Representatives.

While both the Federal and Oromia rural land proclamations cross refer the penalty stipulations to the Criminal Code, the Regulation stood out taking up the power of criminal legislations over land matters. Bear in mind also that the Regions are beholden to administer land in accordance with the Federal laws.[53] This may invite two questions. One is once the Oromia rural land proclamation makes a cross reference to the Criminal Code over crimes relating rural land, why is the issuance of the Regulation needed to incorporate the crimes especially, those which are already included in the Criminal Code? Secondly, which law should prevail in case of inconsistency? With regard to the second question, it is easily noticeable that the penalties stipulated in the Criminal Code and the Regulation are clearly inconsistent although majority of the crimes are found in the two laws under consideration.[54] In such a situation, one may be tempted to identify which one should prevail. Although the question which rule of interpretations is required in this case may lie beyond the scope of this article, for the purpose of this writing, the Regulation is against the Constitution.

6.3 Tax Laws

The penalty clauses of income tax crimes of the Oromia Regional State and that of the Federal Government are identical in phraseology and the articles/provisions numbering.[55] With the rule of thumb that the Regional States enact criminal laws on areas that are not covered by the Federal Criminal Code and legislations, one may question as to how the Oromia Regional State enacted crimes which are punishable in the income tax laws which are already punishable in the federal counterpart. It is also questionable whether such kind of legislative function amounts to a real exercising of legislative power as the laws are verbatim copied from the Federal tax law. Here, there are two options the Oromia Regional State should choose from: either enacting criminal laws on this specific (tax) area by criminalizing acts which are not made so in the federal tax laws or simply making a cross reference to the federal counterpart and regulate and administer taxes accordingly without the need to imitate exercising an actual criminal legislative power over such issues.

This holds true also for coffee laws of the Oromia Regional State and that of the Federal Government.[56] The Oromia coffee law includes the penalty stipulations that are already included in the Federal coffee laws. No new crime in relation to coffee is enacted by the Oromia coffee laws.

Generally, in discussing the scope of the criminal legislative jurisdiction of the states in general and that of the Oromia Region in particular, the author draws three scenarios and accepts only one of them by rejecting the two remaining ones. The first scenario is the fact that the Regions simply copy the criminal legislations of the Federal Government in their own language. From the look at of such laws, the copying of criminal legislations is made in two forms: with indicating to the effect that the criminal stipulations are copied from the Federal Government's specific criminal legislations, and without the indication to such effect. This is undertaken, in most cases, in an implied manner. At any rate, the author is not convinced with the fact that the mere act of copying criminal legislations already made by the Federal Government into their (states') own language amounts to exercising the real criminal legislative power over the matters at issue. Neither does such a practice have a constitutional basis. In such cases, the states lack an inherent power but appear to enact as if it was their power. However, one should not be confused with the notion of legal transplantation in which case one country from the other and the states from the Federal Government, could transplant laws into their own contexts.

Secondly, it is observed that the states enact criminal legislations (namely penalty clauses) in such a way that goes

[52] Unless there is another technical meaning for the word 'terrace', the author would mean it to be '*daagaa or misooma sululaa'* in Afaan Oromo. It is a recently discovered agricultural development and advancement by the Oromia Regional Government, and whose operation needs popular mobilization and campaign. Utilizing infertile land for cultivation, prevention of land tearing, greening the bare land or areas are some of the purposes and advantages of the bay in the Region.

[53] In this case, it is of paramount importance to take a lesson from the land leaseholding laws. On one hand, Regulation no.155/2013, the regulation issued by Oromia to administer urban land leaseholding, and Directive no.9/2013, the directive issued by the same Region to administer urban land leaseholding, both make a clear and express cross reference to proclamation no.721/2011, the Federal urban land lease holding proclamation. On the other hand, art.35 of proclamation no.721/2011 Federal), art.59 of Regulation no.155/2013 and art, 77 of Directive no 9/2013 (Oromia) are identical. In such situations, nonetheless, it is the stand of the author that the penalty clause is simply a translation from Amharic and/or English to Afaan Oromo, and not an indication of exercising a criminal legislative power in its originality.

[54] Reread the above (footnote 9) the crimes together with the respective penalties imposed in the two laws with a comparative view.

[55] Federal Income Tax proclamation No.286/2002 and Oromia Income Tax Proclamation no.74/2003, in both proclamations, see arts.94-103.

[56] See art.23 of Proc.no160/2010, Oromia Coffee Quality proclamation, and art.15 of proc.no.602/2008, Coffee Quality Control and Marketing proclamation.

in contrary to that of the Federal Government's. Such a practice also lacks a constitutional and other statutory support.

Thirdly, in few cases, it is seen when the regional states make criminal legislations (criminal clauses) of their own which are not so far covered under the federal criminal legislations including the Criminal Code though the scope is very narrow. Despite its magnitude, the author argues that it is such a practice that amounts to exercising the real power over criminal legislations within the states.

VII. THE CRIMINAL PROCEDURE LEGISLATIVE POWER: WHOSE POWER IS IT ANYWAY?

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

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

On the other hand, the Swiss model differs from that of the US model in that the Federal Government centralizes a criminal procedure code. The Swiss Constitution makes an express provision towards this stipulation. It provides that legislation in the field of criminal law and criminal procedure is a federal matter.[57] The Cantons do not have their own criminal procedure code, and as a result, they administer criminal cases by the Federal criminal procedure code. This has also got something to prompt us to think of the genesis of the Swiss federalism in that it is administrative or executive in type. And this administrative nature of the federalism extends also to the criminal law both in its substantive and procedural aspects.

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

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

> *Criminal law is the body of law defining offenses against the community at large, regulating how suspects are investigated, charged, and tried, and establishing punishments for convicted offenders. Often the term 'criminal law' is used to include all that is involved in 'the administration of criminal justice' in the broadest sense. As so employed, it embraces three different fields, known to the lawyer as (1) the substantive criminal law, (2)* ***criminal procedure,*** *and (3) special problems in the administration and enforcement of criminal justice. The phrase 'criminal law' is more commonly used to include only that part of the general field known as the substantive criminal law.*[58]

From this definition which is accorded to criminal law, we can generate that the term is broader, and it includes all processes required for the administration of justice. Hence, it includes, *inter alia*, the substantive and procedural criminal laws. Moreover, the definition makes clear that the phrase "criminal law" refers more to the substantive criminal law. While this is the broader definition given to the phrase "criminal law", the same Dictionary defines criminal procedure separately as the rules governing the mechanisms, under which crimes are investigated, prosecuted, adjudicated, and punished.[59] This gives an impression that criminal procedure code, together with the criminal substantive law which are supposed to deal with different aspects of criminal law, exists under the umbrella of criminal law. However, the two terms albeit within the same family, concentrates on different spheres of crimes: substantive and procedural.

Some argue that Art.55 (5) of the FDRE Constitution includes not only the criminal substantive law but also criminal procedure law.[60] In view of this line of argument, the power to

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

[58]Black's Law Dictionary, p.1131

[59]Id, p.1132

[60]Yenenesh Bahiru, *The Power to Legislate Criminal Procedure Code under the Federal Systems: Issues in Ethiopia*, A Thesis Submitted in Partial Fulfillment of the Requirements for LL.M of Public Law and Good

enact the criminal procedure code would unquestionably be vested in the Federal Government. But as stated above, even though the notion of criminal law embraces both substantive and procedural criminal laws, it is more of inclusive of criminal substantive law on the one hand, and Black's Law Dictionary defines criminal procedure in a quite different way on the other. Moreover, the Constitution uses the phrase 'penal code' which is related to the substantive aspect of criminal or penal law as we can find the notion of criminal procedure code on the other side. The two are different things although they lie in the concept of criminal law. Art.123 (1) of the Swiss Constitution also distinguishes between the notions of criminal law (intended to mean criminal code) and criminal procedure code. Even though some authors argue that the power of enactment of both criminal code and criminal procedure code is vested in the federal government, the constitution treats the two legislative powers differently.

With regard to the purpose of criminal procedure law, it establishes a framework for preventing wrongful convictions, discovering the truth, striving for justice, investigating crimes and addressing victims' rights.[61] The object of the criminal procedure code is to ensure that an accused person gets a full and fair trial along certain well established and well understood lines that accord with notions of natural justice.[62] In these propositions pertaining to the purpose of criminal procedure law, one should bear in mind that it is the means to an end of the criminal substantive law, in a way that the constitutionally guaranteed rights of accused persons and victims are respected. It is for this reason that Sedler asserts that procedural and evidentiary laws are adjective laws.[63] But this does not mean that procedural law in general, and the criminal procedure code in particular, is limited only to enforcing and administering substantive laws but it may also include other subjects.[64]

Now, let us be back to the questions posed hereinabove as to whose criminal procedure legislative power in Ethiopia is. In principle, the Constitution provides that the Federal and State powers are defined by the Constitution itself.[65] Accordingly, the Constitution lists the exclusive federal powers, and concurrent powers (though the concurrent powers are not separately specified), and leaves the residual powers to the States. There is no express provision in the Constitution with respect to the criminal procedure legislative power. Having this as an input in mind, the writer would like to forward the following arguments for the fact that the criminal procedure legislative power should be exercised by the States in Ethiopia.

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

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

Accordingly, the Oromia Regional State has made an attempt to enact its own criminal procedure code. This State government requested the Ministry of Capacity Building Minister so that the draft criminal procedure code of the FDRE which is not yet put into force should include the Oromia Regional State unique features, and cultural and reform-based changes that have already taken root in the Region in different offices. In its response to the request, the Ministry of Capacity Building permitted all Regional States including Addis Ababa and Dire Dawa City Administrations to enact their own respective criminal procedure code. By the way, the reasons provided by the Oromia Regional State in the request were so sufficient so that it could enact its own criminal procedure code.

Governance in the Institute of Federalism and Legal Studies, Ethiopian Civil Service University, Addis Ababa, June 2011, Unpublished, p.44

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

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

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

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

[65] Art.50(8) of the FDRE Constitution

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

In spite of the fact that there are sound and feasible arguments as have been stated above, the federal government is moving towards centralization of the criminal procedure code.[66] The preamble of the FDRE Draft Criminal procedure Code traces the power of enacting the criminal procedure code back to Art.55 (1) and 55(5) of the Constitution especially the latter provision which deals with criminal code and other criminal legislations. Concerning the difference between the criminal code (the substantive one) and criminal procedure code, we have seen in the foregoing discussion, as they are two different issues. But the FDRE Draft Criminal Procedure Code has equated the two themes and made the power of enacting criminal procedure code the federal legislative power. One may be tempted here to question by what authority (constitutional interpretation) is the Federal Government enacting a unified criminal procedure code? Is it not the fact that the Federal Government is centralizing and unifying a criminal procedure law against the Constitution (as the residual power is vested in the States)?

The writer emphatically argues that the FDRE Draft Criminal Procedure Code is unconstitutional. Firstly, Art.55 (5) which is the establishing constitutional provision of the Draft Criminal Procedure Code deals with only criminal code and other criminal legislations. It does not include criminal procedure law. In such cases, as per Art.52 (1) of the Constitution, the power of criminal procedure code enactment is vested in the States in the name of residual power. Secondly, the justifications raised hereinabove concerning the fact that the States should enact their respective criminal procedure code is also supplementary reasons to the claim of the unconstitutionality of the Draft Criminal procedure Code. Thus, there is a claim and counterclaim between the Federal Government and the States with respect to the criminal procedure legislative power.

Moreover, the preamble of the FDRE Draft Criminal procedure Code states that the aim of the Criminal Procedure Code is to harmonize the Ethiopian criminal justice system with the human rights guaranteed in order to protect and respect them in discharging obligations and responsibilities imposed on government of any level. The right to self-determination is one of the rights guaranteed by the Constitution, as a group right, to each NNP in Ethiopia. While the Draft Criminal Procedure Code has in view the duty of respecting and protecting human rights and fundamental freedoms, it has violated the right to self-determination of each NNP in centralizing and unifying almost criminal procedure issues thereby denying the States the right to exercise their right to self-determination in respect of criminal procedure law.

VIII. THE TRADEOFF OF UNIFORMITY AND DIVERSITY

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

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

8.1 Constitutional Supremacy

The doctrine of the constitutional supremacy dictates any law (federal or regional), customary practice (practices that are inbuilt in cultural settings and tradition of each NNP in Ethiopia), and decision of a government organ to be in

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

conformity with the Constitution.[67] In case they are found to be against the Constitution, the consequence entailed is voidness. This indicates that if the States are empowered to make their own criminal laws, the constitutionality or otherwise thereof will be tested by the doctrine of the constitutional supremacy. If the criminal laws enacted by the States contradict with the Constitution, no doubt, they will become void or of no effect.

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

8.2 The Principle of Human Rights

The principle of human rights is another mechanism of keeping the uniformity and diversity in criminal law in equilibrium.[68] Thus, the State Councils should take into account the duty and responsibility of respecting and enforcing human rights while they enact their own criminal laws. This shows that the duty and responsibility of respecting and enforcing human rights is not imposed only upon the Federal Government which currently centralized criminal law in Ethiopia but it is also imposed upon the States. Thus, there is no constitutional claim that the Federal Government is in a better position to respect, protect, and enforce human rights than the States. Rather, there are scholars who argue that the States are at liberty to guarantee better protection to their people through their Bills of Rights.[69]

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

8.3 The Criminal Code

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

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

8.4 The Scenario of Art.55 (6)

Art.55 (6) of the Constitution has an impressive scenario in the determination of criminal legislative power in Ethiopia.[70] But for the sake of establishment and sustainability of one economic community, upon suggestions as provided by the HOF, the HPR enacts civil laws. This is intended for the maintenance of uniformity within the multicultural and multiethnic societies of Ethiopia. There is no reason why this very provision is not applicable to the criminal law as well. A similar move can be taken by the HPR to enact a criminal law that is capable of establishing one economic community upon the suggestion provided by the HOF recognizing the criminal legislative power of the State.

IX. CONSEQUENCES OF CENTRALIZED CRIMINAL LAW AND POLICY IN ETHIOPIA

9.1 Dependence of the States on the Federal Government

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

[67] Art.9 (1) of the Constitution states that the Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect.

[68] Art.13 (1) of the Constitution provides that all Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this [Chapter Three].

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

[70] It states that the HPR shall enact civil laws which the House of the Federation deems necessary to establish and sustain one economic community. In principle, civil law is the power of the States.

spheres, they are made to look to the Federal Government for the criminal legislative power.

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

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

9.2 Dilution of the Scope of the Right to Self-Determination of the NNP

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

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

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

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

9.3 Creation of Power Conflict between the Federal Government and the States

The mutual respect of power between the Federal Government and the States governs the constitutional and proper way of exercising of powers between the two orders of government as per the Constitution more particularly, one order of government is expected to exercise powers over matters granted to it under the distribution of powers.[71] Accordingly, while the Federal Government should exercise powers, including criminal law, over matters falling under its jurisdiction (Art.51, 55, and 77 of the Constitution), the States should exercise powers over matters falling under their respective jurisdictions (Art.39 and 52 of the Constitution). It is a strong belief of the writer, as explained in the previous discussions, that the States should enact criminal legislations and criminal procedure code over matters falling under their jurisdictions.

Nevertheless, transgressing the constitutional tenet of the mutual respect of power as between the Federal Government

[71] Art.50(8) of the FDRE Constitution provides that The Constitution has provided that the States shall respect the powers of the Federal Government and the Federal Government shall likewise respect the powers of the States.

and the States, the former is moving towards centralizing and unifying a criminal procedure code which results in constitutional dispute. For instance, Oromia Regional State claims that the criminal procedure legislative power is conferred upon the Regional States and then it is striving to enact its own criminal procedure code taking into account its unique regional features. The Federal Government, on the other hand, apparently counterclaims that the criminal procedure legislative power should belong to it as per Art.55 (5) of the Constitution. Thus, such a claim and counterclaim between the two orders of government results in power conflict.

9.4 Denial of Adaptation of States to Exercise Criminal Jurisdiction of their Own

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

Accordingly, they become weak in technicalities, skill and experience of criminal legislative activities. They remain to become strange to making criminal laws of both substantive and procedural dimensions. They are left limited only to civil matters as far as lawmaking power is concerned.

9.5 Imposition of Criminal Laws which the States would not be Ready to Accept

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

> *A legal system of a given society can be effective only if it is reflective of the character of the society. The Ethiopian criminal justice system can also be more effective if it becomes responsive to the needs of the pluralistic character of the Ethiopian society. In order to make it more responsive, there has to be a shift of policy away from the current monistic approach towards more pluralistic criminal justice approach. Today more and more countries and people are looking for a better criminal justice model within their existing traditions and cultures and finding culturally appropriate practices that can be used in criminal justice process. In view of this global trend, one would wonder why in Ethiopia, where there are multiplicities of legal norms, the previous exclusivist and centralist criminal policy is being maintained. As things stand, the Ethiopian formal criminal justice system seems to remain faithful to its old 'one-size-fits-all' criminal policy.*[72]

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

X. CONCLUDING REMARKS

The concern of the criminal legislative jurisdiction of central/federal government and the states is one of the aspects and subject matters of federalism in countries that have adopted a federal system of governance. Subject to the guiding principles of federalism and the subsidiarity principle, the constitution of some federations divides the legislative power of criminal matters as between the federal government and the states unless those federation which have opted to centralize the criminal code and criminal procedure legislations. Almost all federations which pursue a dual federal set up divide the criminal legislative jurisdiction between the federal government and the states in accordance with the general distribution of powers as provided in their respective constitutions either expressly or impliedly.

There are many factors which affect and principles which guide criminal legislative jurisdiction as to which tier of government should exercise such a power and to what extent. Accordingly, the laws breached, the nature of the distribution of powers, the subsidiarity principle, the self-rule and shared rule, the nature of crimes, are some of the factors and guiding principles that affect the criminal legislative power of the federal government and the states. This shows that the power of legislation over criminal matters is not arbitrarily distributed between the federal government and the states in federalism and there must be such factors and principles to do so.

Consequently, while few federations such as Switzerland centralized criminal code and criminal procedure law legislation, majority of federations such as USA, Canada,

[72]Abera, Supra note at 30, p.148

Nigeria, India, and Germany have divided the criminal legislative powers between the federal government and the states in accordance with their respective unique features and constitutional provisions.

The Ethiopia's criminal legislative jurisdiction, as provided in the Constitution, seems to have granted a broad power to the Federal Government and left the state power thereof under less likelihood. The current practice also evidences this proposition in that Federal Government has centralized criminal laws at the expense of regional autonomy. The author strongly argues here that even though the Federal Government has centralized criminal laws under the guise of the Constitution, centralization of the criminal laws is not the visualization of the Constitution and the currently introduced federal set up. Such a centralized nature of the criminal laws has its own adverse consequences upon the states. The implementation of such centralized criminal laws may not be effective across the whole nations of the Country.

On the other hand, the criminal legislative power of criminal procedure code is envisaged by the Constitution under the residual power that is reserved for the States. Since exercising residual powers in the current Ethiopian federal set up has not come true in practical cases to date, the states are hesitating to enact criminal procedure code of their own although the Constitution reserves such a power to them. Accordingly, the Federal Government is centralizing the criminal procedure law albeit its constitutionality is questionable.

Based on the above conclusion, the author forwards the following recommendations.

- That the federal crimes and state crimes dichotomy which is entrenched in the US experience should be adopted in the Ethiopian criminal legislative discourse.
- For the sake of effective implementation of criminal laws, its legislative jurisdiction must be decentralized so that the states take part therein on matters falling under their jurisdictions.
- The criminal procedure legislative power must be granted to the States under the principle of the residual power so designated under the Constitution.
- The Regional States, while making criminal laws, must observe the Constitution in that they should make criminal laws only over matters that are not covered in the Federal criminal legislations and Code, and if the crimes are already included in the Federal criminal legislations, the regional states must indicate that and copy same in their own contexts.