DIVISION OF POWERS OVER CRIMINALIZATION IN A FEDERATION: UNITED STATES OF AMERICA AND AUSTRALIA IN FOCUS*

Abstract
In a federal system of governmental powers are shared between the central government and the federating units in a manner that ensures both independence and co-operation in certain areas. This paper examines such power divisions in area of power over criminalization in a federation with United States of America and Australia as examples. It is found that both the Federal Government and the respective states have power to criminalize certain acts. However, the bulk or put differently the general power over criminalization lies with the states. The central government exercises power over criminalization largely in areas it has exclusive legislative power. Though conflicts may arise but there is an in-built mechanism implicit in judicial interpretation that keeps the federal and state government within their legislative competences. The achievement of balance in area of division power of criminalization between the Federal and State governments in USA and Australia is a lesson to the rest of younger countries like Nigeria that operate a federal system of government.

Keywords: Division of Powers, Criminalization, federation, United States of America, Australia

1. Introduction

Criminalization understandably refers to the action of turning someone into a criminal by making their activities illegal.[1] In criminology it is recognized as 'The process by which behaviour and individuals are transformed into crime and criminals'[2] respectively. In essence acts which are legal acts by operation of law through legislation or judicial decision can be transformed into crimes. Essentially based on the nature of a particular conduct and other variables it can be said that various reasons may be adduced for seeking to prevent particular forms of conduct. However a general rule is not available as litmus text for treatment of particular conduct as a crime. As stated 'particular conduct may involve an intervention in the political, civil, personal or proprietary rights of other citizens.[3] Whatever be the rationale or pretended rationale for criminalization of a particular conduct notwithstanding; certain conducts are deemed criminal because the legal system says it is to be so treated. Under our sense of morality, certain conducts criminalized may find justification. Also it can be strengthened on the further grounds that criminal law exists to enforce moral standards. In this wise, the law treats homicide as a crime because by dictates of morality taking of human life is forbidden. However plausible this statement founded on a general principle might be, it does not sail in smooth waters always. This is simply for the reason that law by its character often offends this moral principle when it accommodates justifiable homicide and allowing them to take place without criminal sanction[4]. Within the context of the foregoing this paper sets out to examine the division power over criminalisation in United States of America and Australian Federations. In comparative terms these two federations apart from Canada and Switzerland are categories as old federation with USA being the first to set the pace in 1787 after a confederal set up in 1776.

2. Criminalization in America

In American history certain acts and behaviours are criminalized. In this sense heavy reliance is placed on criminal law not only to prohibit but also to 'punish everything from murder to playing loud music'.[5] There is noticeable disparity in Criminalization of acts or behaviours in the United States. This is to say that from one State jurisdiction to another there are similarities as well as dissimilarities in the Criminalization of acts and even to the extent of punishments. Thus it has been observed that:

> In *Palo Alto*, California 'harboring overdue library books' is punishable by thirty days in jail. In Minnesota, it's a crime to fornicate with a bird. In some communities, its crime to park your car on your lawn, hang laundry out in your back yard, eat on a bus, or hang out in shopping malls.[6]

3. Nature of criminal law in America

The criminal law deals with the power of government to ban and punish behaviour. Essentially there are six fundamental attributes to criminal law namely:

i. It is a list of commands of don'ts telling people what they must do or refrain from doing…

***By Chukwura CHINWUBA, PhD,** Senior Lecturer, Department of Public and Private Law, Faculty of Law, Chukwuemeka Odumegwu Ojukwu University, Igbariam Campus. Email: chukwura2001@yahoo.com; ca.chukwura@COOU.edu.org

[1] https://en.oxforddictionaries;LH:11 www.austlii.edu.au/journals visited 6th August, 2017.
[2] R.J. Michalowski Order, *Law and Crime: An Introduction to Criminology* (New-York: Random House, 1985) 6.
[3] Hughes and Others, 76.
[4]Homicide occurring within an acceptable degree of action in self Defence is legally permissible and a complete bar to criminal liability though contrary to moral principle in our contemplation.
[5] Joel Samaha, *Criminal Law* 7th ed., (USA: Wadsworth, 2012) 2.
[6] *Ibid.*

ii. These commands are enacted into law
iii. The law prescribes a punishment to accompany the crime
iv. The do's and don'ts apply to everyone under the authority that created the criminal law.
v. Crimes injure both individual victims and society
vi. Conviction and punishments is a formal public condemnation backed up by weight of the whole community's moral judgment.

In these six categorized attributes of criminal law the first five is somewhat not unique. It shares the same thing with civil law in the nature of private rights such as contract, property and personal injuries which the law equally controls. In the sixth category the uniqueness of criminal law is expressed. Indeed, the force of moral condemnation gives a unique colour to criminality. The society in this wise joins the victim of crime to be regarded as the injured party. Little wonder the inherent nature of crime hurt not only the individuals and their property but notably undermine the ethos of the society as a whole. The power over criminalization principally rests with the States. As a corollary, the power of prosecution equally resides in the State; and the injured parties can as well sue. However, the actions of civil and criminal prosecutions are not considered as mutually exclusive responses to social harms as interested parties can respond differently to a single event. For instance, a good number of crimes are also tort. The implication therefore is that the State in a case of Burglary can prosecute for the crime of Burglary; while the burglary victims can sue burglars for trespass as burglary is a tort of trespass.

A form of categorisation of crime or put differently grading of criminal offences may be gleaned from the nature of punishments. The grading in this respect ranges from most severe to worst severe on one hand; and on the other hand the prescribed penalties are categorised in terms of capital felonies, felonies, gross misdemeanors, petty misdemeanors and violation. A reference to *Capital felony* is of varied connotations. In States that retain capital punishment it translates to death penalty. In States without death penalty, it means life imprisonment without parole. Death penalty in most States are increasingly becoming so extinct that largely the only capital felony punishable by death is aggravated murder; except possibly in one State Louisiana where the rape of a child of under 12years old attracted death penalty.[7]

The trend of our discourse shows the import of federalism in criminalization in American federal system of government. In this wise there are many criminal codes- a federal criminal code, fifty State criminal codes, and countless city ordinances containing myriad acts or omissions that are criminalized. The effect of those various criminal codes is that in criminalization there are Federal crimes, State Crimes and Local crimes. This is not to State that in practical terms there are no similarities in State codes. In fact, the term criminal law is a singular term that refers to the similarities in most State codes. One example of such similarities is the fact that all State codes include the most serious crimes- murder, rape, robbery, burglary, arson, theft and assault. Equally they have self-defence and insanity as common defences and all with imprisonment punish serious crimes. In definition of crime, the differences are however expressed. For example it is enough for the offence of burglary to be committed by mere entering without breaking or remaining unlawfully in a building entered lawfully. In this sense the elements of *actus reus* of burglary – breaking and entering, had undergone some metamorphosis to become a mere technical words. In this technical sense breaking can be prefixed with adjectives such *constructive breaking* not just a dwelling house, but a limitless array of structures such as 'unfinished houses'[8] 'any place'[9] where someone lived. In the foregoing senses, it is not just the act of breaking and entering that constitute the act of burglary – opening a door for an accomplice will come within the purview of constructive burglary. An instructive provision on the meaning of burglary is found in the provision of the *Model Penal Code* which criminalized unprivileged entry. It provides that:

> A person is guilty of burglary if he enters a building or occupied structure or separately secured or occupied portion thereof, with the purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed to enter. It is an affirmative defence to prosecution for burglary that the building or structure was abandoned.[10]

Interestingly, in adopting the foregoing codes 'breaking' and 'entering' as commanding words of burglary are stretched so much so that entering can be imputed to a man whose 'pistol crossed over the doorway'[11] or in Texas

[7]In *State v. Wilson* [1996] 685 So. 2d 1063, Anthony Wilson was charged by a grand jury indictment with aggravated rape of a five-year old girl. The Supreme Court of Louisiana in a majority opinion held that the appalling nature of crime, the severity of the harm inflicted upon the victim, and the harm imposed on society, the death penalty is not an excessive penalty for the crime of rape when the victim is a child under the age of twelve years old.
[8] R.M. Perkins and R.N Boyce, *Criminal Law*, 3rd ed. (Mineola, N.Y. Foundation Press, 1982) 201.
[9] Samaha (n 5) 430.
[10] American Law Institute, *Model Penal Code and Commentaries* (Philadelphia: America Law Institute, 1985), S 221.1.
[11] Samaha (n 5) 430.

to a man by means of the bullet.[12] Just as we observed earlier that from State to State acts are criminalized in differing terms; in the same way the penalties differ.[13] As noted, several States prescribe death for some convicted murderers, while others life imprisonment. Just as there is prescription as to whether murderers will live or die, there is further determination in case of those that will die the manner of death viz: by electrocution, lethal injection, the gas chamber, hanging or firing squad is equally prescribed.

4. Range of Criminal Offence/Sources

In Australia the first place criminal wrongs were originally classified into terms of felonies, misdemeanours and summary offences. In historical parlance felony could result in the penalty of forfeiture of land and goods and the imposition of death penalty. Currently, offences are classified in terms of indictable and summary offences. Indictable offences 'refer to those offences which require an indictment against the accused person and will normally be heard before a judge and jury'.[14] Summary offences on the other hand are offences which are less serious and triable without the necessity of an indictment. Coming to range of criminal offences it is evident that they are considerable and identifiable based on their distinctive features. In this direction offences against the person will include murder, manslaughter and other forms of homicide. Property offences on their parts will include larceny or stealing offences; burglary robbery, house breaking; a fraudulent misappropriation and embezzlement. Finally miscellaneous offences will accommodate offences such as treason, affray, traffic offences, assault and its cognate offences such as sexual assault occasioning bodily harm and so on. In *Moss and Phillips v. Onoghue*[15] – The Trading with the Enemy Act 1914 making it a criminal offence to trade, or attempt to trade, with the enemy after the imperial proclamation of 9th September 1914 is a valid exercise of the defence power. Also in *Welsbach Light Co. Ltd. v The Commonwealth*[16] – The Trading with the Enemy Act 1914, section (2) which provides that for the purposes of the Act a person shall be deemed to trade with the enemy if he performs or takes part in 'by any act or transaction which is prohibited by or under any proclamation made by the Governor – General and published in the Gazette' is a valid exercise of the legislative power of the Commonwealth parliament.

In USA at the earliest opportunity we noted instructively that crimes labeled Federal and State crimes reflect the very nature of federalism. An act or conduct is a crime if the law say so. To find the sources of these laws were the criminalized acts or behaviours are defined and punishment set we turn to the following:

i. U.S Constitution
ii. State Constitution
iii. U.S Criminal Code
iv. State Criminal Codes
v. Municipal Ordinances
vi. Common law of England and the United States
vii. Judicial decisions interpreting codes and common law.

The federal criminal law in the U.S Criminal Code and interpreted by the Courts are on the increase by leaps and bounds[17]. Nevertheless, the buck of criminal law rests at the door steps of the State's criminal codes and the State courts decisions interpreting them. No doubt in States the criminal law is largely made and enforced. The States legislations are not the nursery bed from where the State criminal codes were produced fully grown. Indeed in the common law crimes its evolutionary journey took root. Interestingly some of the offences that held sway at the rudimentary stage of criminal development like witchcraft, cursing parents, blasphemy, idolatry, and adultery seem odd or strange under the modern day dispensation. In fact acts that constitute crime cannot be found in an uncodified common law but in a distinct code. The initial drafts of the Model Penal Code abolished common-law crimes in the manner following: 'All offences defined by statute (1) No conduct constitutes an offence unless it is a crime or violation under this code or another statute of this State'.[18]

By specific acts as well, California included all of the common law felonies in its criminal code. The Supreme Court of California in the case of *Keeler v. Superior Court*[19] had to determine whether in its murder statute abortion of fetus is included. The facts of the case are that Keeler kicked his pregnant wife, whose pregnancy was for another man in the stomach causing her to abort the fetus. *The California Penal Code under Section 18* provided

[12] *Nalls v. State* [1920] S.W 473, Tex cr. App.
[13]For example in the case of '*Arson*' in North Dakota and Hawaii, the maximum penalty is ten years whereas in most other States such as Texas and Alabama the punishment is life imprisonment. See Samaha (n 409) 430.
[14] *ibid.*, 77.
[15] [1915] 20 C.L.R., 580.
[16] [1916] 22 C.L.R.
[17] The number of federal drug and weapons crimes gave impetus to said growth of U.S Code since the 1970's.
[18] Model Penal Code S. 1. 05; See Samaha (n 5) 20.
[19] [1970] 2 cal. 3d 619, 87 Cal. Rptr. 481, 470 p. 2d 617.

that, 'murder is the unlawful killing of a human being with malice aforethought'. From the common law perspective it was clear that a child must be born alive before subsequent death out of *battery* or any other cause before murder will result. The Court then held that from the definition of murder in the said *Penal Code Section 187* the legislature intended to exclude from its reach the act of killing an unborn fetus.[20] The implication of the judgment was that both under the common law and the code killing of unborn fetus was not criminalized as murder. However by legislative response to the gap in the law which the judgment exposed the criminal homicide statute was changed to specifically include foetuses.[21]

The place of common law crimes is evident in some American States. In this sense some acts are criminalized by operation of common law not by extant Statutes. Some of these crimes in some States without Statutory provision are:

> [C]onspiring, attempting, and soliciting to commit crimes; uttering grossly obscene language in public, burning a body in a furnace; keeping a house of prostitution; maliciously killing a horse; being a scold; negatively permitting a prisoner to escape; discharging a gun near a sick person; being drunk in public; using libel; committing an indecent assault; and eavesdropping.[22]

The U.S courts have explicitly recognized criminalization under the common law. In *State v. Mcfeely,*[23] it was held that the conspiracies not listed in a State conspiracy Statute remained common law crimes.

Criminal law in Australia just like in USA is a by-product of the common law as well as a creation of statute. Chiefly the bulk of criminal law is State based with a noticeable increasing body of federal criminal law. Most times the statutes at the state level expressed by codification what had already existed in case law or common law. It has been noted that from State to the degree of codification of common law provision varies considerably. In some situation it displaces the common law in others it supplements the common law.[24] Though much of the content of the Australian Criminal statues usually called crimes Act was derived from English Criminal Law differences existed. In the case of *Queensland* the model was the 19th Century Criminal Code of India. The Crimes Acts do not deal only with the creation of criminal offences they are also concerned with matters of procedure and evidence as explained by Hughes and other:

> [T]he provisions of the crimes Acts are not complete, in that certain acts or omissions are deemed to constitute criminal offences under statutes which deal specifically with particular subject matter. For example, local government legislation, the corporation law, environmental protection legislation, and the motor traffic statutes create criminal liability for a range of matters which fall within the purview of these enactments.[25]

5. Criminalization of Same Sex Marriage

The diversity of power over criminalization rears into the fore in area of Same Sex Marriage issue. The presumption is that since marriage is somewhat a residual matter it is for the States to set the templates in such matters. In this wise there is Same Sex Marriage bans in some US States and certain territories with about 37 U.S States like the districts of Columbia, Guam legalizing it.

To the aid of States that prohibited Same Sex Marriage the U.S. Supreme Court in *Richard John Baker v. Gerald R. Nelson*[26] held that limiting marriage to persons of the opposite sex did not violate the U.S Constitution. A further leverage to Same Sex Prohibition States came by way of Defense of Marriage (DOMA) Act 1996. By this Act the U.S Congress attempted to define marriage for the first time exclusively as a union between a man and a woman for all federal purposes[27]. In the process the States were equally armed with legislative weapon to derecognize Same Sex Marriage created in other States. However, the tone for legalisation of Same Sex Marriage started its evolutionary journey in 1970's under the guise of movement to obtain civil marriage rights and benefits for Same Sex Couple. This movement did not recede one bit but became vociferous when the highest executive authority in U.S then personified by President Obama gave it overt and tacit succour. It was President Barrack

[20] *ibid.,*
[21] *West's California Penal Code* (St. Paul: Minn. West Publishing Company, (1988) S. 187(a).
[22] La Fave and Scott, *Criminal Law* 68-69 referred to in Samaha (n 409)21.
[23] [1947] 25 N.J Misc. 303, 52 A 2d 823 (Quar. Sess.).
[24] Hughes, and Others, 76.
[25] *ibid.*
[26] [1971] 291 Minn 310, 191 N.W 2nd 185.
[27] A.I Umeike, *International Push Against – Gay Law in Nigeria An Antithesis – to Democracy* (Unpublished) A seminar paper presented to the faculty of law/ school of Post Graduates Studies Chukwuemeka Odumegwu Ojukwu University, Igbariam Campus on the 7th day of December, 2016, 26.

Obama who eloquently voiced his opinion on the issue on 9th May, 2013 when he said, 'I think same sex couples should be able to get married'.[28]

The vociferous campaign from the presidency for the repeal of DOMA which limited marriages to a union of man and woman; and encouraged States like California and North Carolina to maintain their constitutional bans on same sex marriages was quite unprecedented. However one may feel out of religious bias or other primordial sentiments against same sex marriage, it is still the law that defines parameters of civil rights. In any of such given situations it is the Constitutions we turn to, to show the light. In turning to the Constitution the U.S Supreme Court first in the case of *United States v. Windsor*[29] a landmark civil right case on 26th June, 2013 held that restricting U.S Federal interpretation of marriage and spouse to apply only to opposite – sex union (DOMA),[30] is unconstitutional under the Due Process Clause of the Fifth Amendments. Secondly, two years later on 26th, June 2015 the Supreme Court in *Obergefell v. Hodges* overruled its decision in *Baker v. Nelson* thus legalizing same sex marriage throughout the United States of America and all its incorporated territories. The end result is that any Statute that seem to have criminalized same-sex marriage cannot stand as same sex marriage has received the seal of legitimacy and constitutionality from the highest judicial authority in U.S.A.

> Under Australian Federal Law same sex couples can be recognized as de facto relationships but have no access to marriage, civil unions or other federal relationship registration….. A nationwide voluntary by postal mail on same sex marriage is being held between 12 September and 7 November 2017.[31]

Notably Australian States and territories are entitled to create their own laws with respect to Same Sex partnership schemes with most offering civil unions or other forms of domestic partnership to same-sex couples. Same-sex couples are prevented from marrying by amendments to the marriage Act 1961, passed in 2004 by the Howard Government and Mark Latham- led Australia labour party[32] same-sex couples who are married in countries where same-sex marriage is legal cannot divorce within Australia when they come back due to the same sex marriage ban. It is recorded that between 2004 and 2017; 22 same sex marriage related bills have been introduced in parliament of Australia to decriminalize it none was passed into law.[33] Even the law legalizing same sex marriage within the Australian Capital Territory was later to be struck out by the High Court on the basis that the law was inconsistent with the Federal legislation which defines marriage as between a man and a woman[34]. In an inexplicable turn of events as the table below shows the dawn of 2019 was not beheld before legislation legalising same sex marriage at the twilight of 2017 was passed for the reason that:

> Same Sex Marriage has been legal in Australia since 9 December 2017. The legislation to allow Same Sex Marriage the Marriage Amendment (Definition and Religious Freedoms) Act 2017 passed the Australian parliament on 7 December 2017 and received royal assent from the Governor-General the following day. The law came into effect on 9 December, immediately recognising overseas Same Sex Marriages. The first Same Sex Wedding under Australia law was held on 15 December 2017[35].

6. Conclusion

Power of State to criminalize any act or omission is an independent power such that 'by its very nature, exist in its own as separate and main power and not as a by-product or incidents of other matters being regulated by the State.[36] This is not to say that it cannot be a by-product of regulation of a specific activity. Indeed it can and has been as indeed offences can be and has been created in exercise of specified powers under legislative fields. However being made is that inherent capacity reposed in the States: '...to create general offences which, independently if 'the regulation of any particular social or economic activity need to be created in order to secure,

[28] *ibid.,*
[29] [2013] 570 U.S.
[30] *ibid.,*S. 3.
[31]Recognition- Wikipedia- https://en.wikipedia.org.wiki. Recognition of Same-Sex-Unions-in-Australia. Accessed 5th October, 2017.
[32] Marriage Amendment Act 2004. Com law.gov.au. Accessed on 5th October 2017.
[33]Mckeown Deirde, *'Chronology of Same-Sex Marriage Bills Introduced into the Federal Parliament: A Quick Guide* www.aph.gov.au.canberria: parliamentary library (Australia). Assessed on 5 October 2017.
[34] Marriage Equality (Same Sex) Act 2013. In November 2016 and August 2017 the Australian senate rejected a proposal by coalition government to hold plebiscite on same-sex marriage in 2017. Labor party the party presently in opposition in Australia in its national platform routs for same sex marriage. However parliamentary members are allowed a conscience vote on same sex marriage legislation until 2019. See ibid.,
[35] Source: www.the guardian.com/australia news/gallery/2018/Dec/07/Same Sex Marriage in Australia > assessed on 2 February 2019.
[36] *ibid.,* 88.

maintain and protect the peace, order, morals, health and safety of the State and its members'.[37] Although the bulk of power over criminalization lies with the State the Federal government is equally a competent authority to criminalize acts or omissions. In the first place flowing from federal governments' powers to maintain the Constitution[38] to defence of the nation, incidental power under for example exclusive list in Nigeria,[39] maintain and secure public safety and order under s. II, the National Assembly subject to limitations of constitutional guarantee of fundamental rights can criminalize any act or omission directed against its agencies, functionaries or property.[40]

In Australia, general criminalization power is not a power resident in the federal government but is derivable from the power that allows it to protect itself. Thus in *McKiernan* in *R. v. Sharkey*[41] it was stated that the federal government 'has no power to punish offences against itself'. Offences in these categories include treason, insurrection (mutiny), treachery, disclosure of and fraud on its property or revenue and sedition among others. In the case of offence of sedition it is usually viewed as being against the corporate existence of the nation State. In essence 'a sedition offence is in its nature an offence against the State'.[42] In *Burns v. Ransley*[43] the High Court of Australia sustained the constitutionality of statute of the Australian federal parliament making it an offence by utterance or publication, to excite disaffection against the head of State, the government or Constitution of the federation or against either House of the parliament. A fortiori it was *Dixon* in the same token who said that power also:

> Extends to making punishable any utterance or publication which arouses resistance to the law or executes resurrection against the Commonwealth government or is reasonably likely to cause discontent with and opposition to the enforcement of federal law or to the operation of federal government. The power is not expressly given but it arises out of the very nature and existence of the Commonwealth as a political institution, because the likelihood or tendency of resistance or opposition to the execution of the functions of government is a matter that is incidental to the exercise of all its powers.[44]

Griffith C.J in *Kidman's* case while concurring in judgment that upheld the power of the federal legislative to punish frauds against the federal government including conspiracies to defraud and thus sustained a statute to that effect Stated that the protection of the federal government against fraud is 'an essential attribute to the notion of sovereignty'.[45] In relation to punishment for the stealing of property belonging to the federal government it equally belonged to the realm of federal offence as fraud against it. To this, *Mr. Justice Isaac* said 'A man attempting to steal Commonwealth treasure may be resisted to death'.[46] The resistance is not in a manner of executive action. It is equally not expected that the State in this circumstances will be protecting the federal government, but by federal legislature imposing punishment against such acts. In this sense it will stand to reason that: 'The provision of the criminal code [or penal code] creating offence of stealing must therefore be deemed to be federal enactment in so far as they apply to the stealing of property belonging to the federal government'.[47] It does not extend to any matter whatsoever within the limits of the Commonwealth but as circumscribed by the placinta of powers granted by Constitution. The court held that though the Australian sedition law penalties utterances or publication which promote feelings of ill-will and hostility between different classes of His Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth'. Such peace, order and good government are those within the power of the Commonwealth as a government to protect the Constitution and not extending to any conceivable matter within the geographical limits of the Commonwealth.

Essentially, the power over criminalization reflects the exercise of powers in a federal arrangement applicable to USA and Australia. The point is that in areas where legislative powers are conferred, be it exclusive, concurrent or residual to any of the federal or State government or even power exercised by the local government in the Charter of State governments in U.S.A and Australia, from such powers flow the power over criminalisation. For example in the specified items of exclusivity placed under the federal government of USA and Australia it presupposes on a general plan, such that, matters are the sole responsibility of the federal government to the

[37]The general categories of offences contemplated is found in Nigeria namely the Criminal Code and Penal Code or (Sharia code) deemed to be America law made by the State assembly being existing law without the primary domain of the States exclusive field termed residual in America.

[38] See Per Lathan C.J in *Australian Communist Party v. The Commonwealth* [1950/51] 83 C.L.R 1 at 141.

[39] Under item 68 to be precise see *R. v. Hush, Ex Parte Devanny* [1932] 48 C.L.R at 506.

[40] See in Re Neagle, [1890] 135 U.S. 1; Per Isaac J. *R. v. Kidman* (n 739) 444.

[41] [1949] 79 C.L.R 121 at 158.

[42] Per McKiernan J. *ibid.*,

[43] [1949] 79 C.L.R 101.

[44] *R. v. Sharkey* [1949] 79 C.L.R 121at 148

[45] *R. v. Kidman* [1915] 20 C.L.R 425 at 436.

[46] *ibid.*, 440.

[47]B. O. Nwabueze *Federation in Nigeria under Presidential Constitution* (London: Sweet and Maswell, 1983) 91.

exclusion of State government. In relation to criminalization of an act or omission, touching on exclusive list, by the State:

> The test of exclusion may be said to be, not whether the prohibited act or omission relates to a matter on the exclusive legislative list, but rather whether by prohibiting it the State government can be said to have legislated with respect to 'the matter in the exclusive legislative list to which the act or omission relates. A State law creating an offence in relation to a matter on the exclusive legislative list is not necessarily a law with respect to that matter'.[48]

The point is that to find the appropriate authority to criminalize an act or omission and whether a statute exceeded the power of the legislature whether State or Federal which enacted it regard to the true nature and character becomes imperative.[49] It is to be noted that incidental power in relation to the creation of crime presupposes the power to punish violation of or non-compliance with the law and nothing more. It was *Chief Justice Griffith* of Australia who said:

> The very notion of law, in the sense of a rule of conduct prescribed by a superior authority connotes provisions as to the consequences, commonly spoken of as sanction, which are generally in the form of penalties, is in the strictest sense of the term incidental to the execution of the power to make law itself.[50]

From the point of view of *Chief Justice Marshall* of the Supreme Court put it this way: 'All admit that the government may legitimately punish any violations of its laws; and yet, this is not among the enumerated powers of the Congress'. By a detour, it will indeed amount to an absurdity if not an aberration to confine the power to create offences within the scope of incidental powers *simpliciter*. Such confinement will render a good number of federal offences in the criminal code (or penal code) except probably offences against public order and safety unconstitutional. Nwabueze posited a better view that federal offences in the criminal codes will be deemed to having been created by virtue of the power to make laws 'with respect to' the matters to which they relate.[51] Conceded that offences are largely a residual matter, in federal structure the powers exercised exclusively, concurrent and as residual power flow with the power over criminalization.

[48] Nwabueze, 94.
[49] See *Russell v. R* [1882] L.R 7 App Cas. 827 (P.C.; *Akwale v. R.* [1963] N.N.L.R. 105.
[50] *Kidman's* case (n 839) 433.
[51] Nwabueze,, 38.