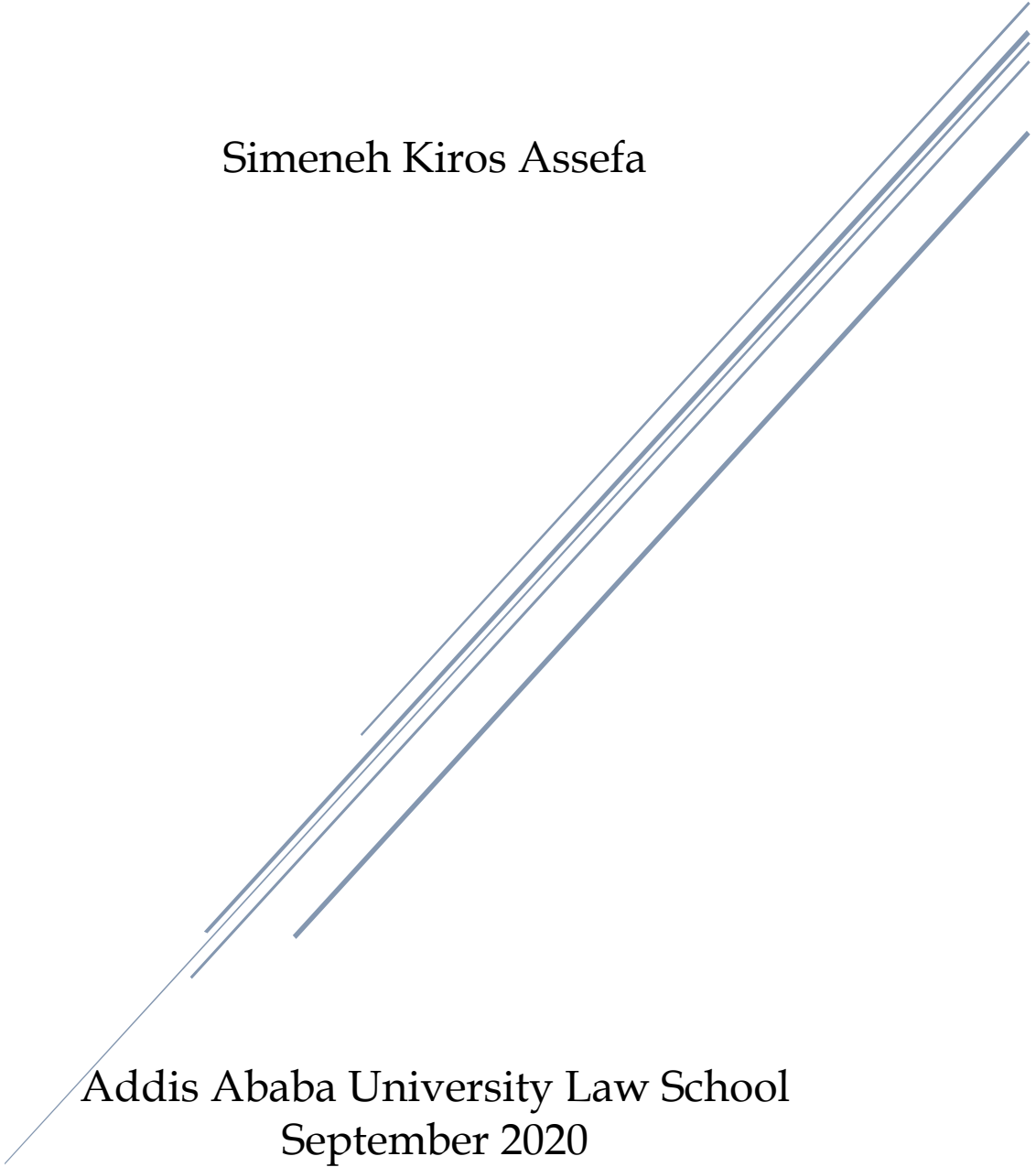


LIMITING CRIMINALISING POWER OF THE STATE IN ETHIOPIA

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Addis Ababa University Law School
September 2020

Limiting Criminalising Power of the State in Ethiopia

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Submitted in the partial fulfilment of the requirements of
Doctor of Philosophy (PhD) in Law

September 2020

Addis Ababa University Law School

Declaration

This is to certify that:

- (1) This dissertation comprises my original and independent scholarly work towards the partial fulfilment of the requirements of degree of Doctor of Philosophy. It has not been submitted before in this or any other institution for an award of a degree.
- (2) Other materials used are duly acknowledged;
- (3) This thesis complies with the OSCOLA rules of citation and is under 80,000 words in length exclusive of front matters, footnotes and bibliography.

A handwritten signature in dark ink, appearing to read 'Simeneh Kiros Assefa', with a stylized, flowing script.

Simeneh Kiros Assefa
September 2020

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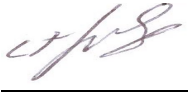
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Abstract

Criminal law is the most effective social control tool discovered yet. It prohibits certain conducts and punishes the violation of such prohibition. The legitimate end of criminal law in society is the protection of the 'common good'. As custodian of all public coercive power, the state adopts criminal law. However, the instrumental and positive nature of criminal law makes it malleable to excessive use; thus, in not few cases, criminal law is used to achieve other ends.

This study is about limiting the state's use of criminal law to achieve only the legitimate end of criminal law by finding normative and procedural (formal) limitations. The normative aspect of the doctrine of legal good is one substantive limitation that is meant to guide the exercise of such coercive lawmaking power. This doctrine maintains that criminal prohibitions and punishments could be justified by the protection of the common good, provided there is no other less intrusive means.

Both the prohibition and the consequence part of the criminal rule is a limitation to the individual right. The bill of rights is another substantive limitation which is given effect through the doctrine of legal good. In the adoption of public policies, including criminal lawmaking, the law of proportionality is used based on the principle theory of rights. The bill of rights give the doctrine of legal good a constitutional foundation making the latter beyond the reach of the lawmaker which might otherwise disregard it at will.

Despite the content of the doctrine of legal good may be subject to a reasonable disagreement, a fair and democratic lawmaking process helps to come up with criminal law that is not so disagreeable. The formal limitations to the use of criminal law relates to legislative and adjudicative methods in criminal law. Thus, legisprudential methods help the lawmaker to come up with a rational law while the jurisprudential methods help the court to render a fair judgment under the circumstances. The judicial method is particularly guided by postulates, such as the principle of legality, the principle of unity of legal system and the principle of lenity, which define both the content and application of the criminal law.

This study is legal research. It examines the content of the positive criminal law, the rules and processes of criminal lawmaking, and how the courts determine criminal guilt and punishment in individual cases. As such, it relies on the dogmatic interpretation of the positive criminal law, applying legal doctrines and principles. However, as the Constitution adopts a non-positivist theory of law, the positive criminal law is evaluated against those constitutional values. Because the legitimate end of criminal law is protection of the common good, judicial interpretation also uses

hermeneutic interpretation method in order to better determine the content of the common good.

The study finds that there is excessive use of criminal law by the lawmaker in order to also achieve administrative and political ends in Ethiopia. This is because of the excessive involvement of the executive in bill initiation and the lawmaking process, including delegated criminal law making and the passive role of the lawmaker. Besides, those doctrines, that guide the interpretation of criminal law would have eased the negative impacts of the criminal law, are disregarded by the court. This resulted in a situation of criminalisation by the court.

To
Yezabnesh (Mantefardo Asmamaw Hailu),
my mother,
the best human being I have ever known.

Preface

Criminalisation in Ethiopia has never been a subject of enquiry. I have, thus, authored and co-authored a few journal articles which form the background to this study. Some of the arguments in the background of this study have been included in publications listed below, which are also duly acknowledged:

Simeneh Kiros Assefa 'Methods and Manners of Interpretation of Criminal Norms' (2017) 11 Mizan L Rev 88;

___ ___ 'Sovereignty, Legitimacy and Fundamental Rights as Limitations to Criminalization Power of the State' (2018) 12 Mizan L Rev 127;

___ ___ 'Walking in the Dark: Lack in the Use of Criminal Statistics for Public Policy and Legislative Actions' (2018) 12 Mizan L Rev 371;

___ ___ and Cherinet Hordofa Wetere "Over-Criminalisation': A Review of Special Penal Legislation and Administrative Penal Provisions in Ethiopia' (2017) 29 J Eth L 49

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Acronyms

Art	Article
Arts	Articles
Cass File No	Cassation File Number
CM	Council of Ministers
Crim C	Criminal Code
Crim F No	Criminal File Number
Crim Pro C	Criminal Procedure Code
EC	Ethiopian Calendar
ENA	Ethiopian News Agency
ERCA	Ethiopian Revenue and Customs Authority
FDRE Const	Constitution of the Federal Democratic Republic of Ethiopia
FEACC	Federal Ethics and Anti-Corruption Commission
File No	File Number
HoF	House of Federation
HoPR	House of Peoples' Representatives
MoFED	Ministry of Finance and Economic Development
Pen C	Penal Code
Proc No	Proclamation Number
Reg No	Regulation Number
ICCPR	UN International Covenant on Civil and Political Rights
UDHR	Universal Declaration of Human Rights
VAT	Value Added Tax

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CHAPTER 1. - INTRODUCTION

1.1. Background of the Study

The state has a monopoly of 'justified' use of coercive power over its citizens.¹ Criminal law is one of the manifestations of such coercive power and is the most effective social control tool yet.² It is a branch of law where individual freedom and (sovereign) state power conflict.³ As such, it is a coercive code of conduct for the individual to make his conduct conform to the requirements of the law. However, the excessive regulation of citizens through criminal law would crossover to repression.⁴

Such coercive power of the state is practiced with extensive procedural safeguards, such as the presumption of innocence, the right to counsel, and other fair trial rights.⁵ There are also doctrines establishing the basic assumptions on the substantive aspects of criminal law which appear to be limited to methods, particularly interpretation, of criminal law. For instance, the principle of legality appears to operate as a method of interpretation and application of criminal law; however, it also helps define the nature, scope, and manifestations of criminal law. Thus, criminal law is exclusively positive

¹ Scott A Anderson 'How Did There Come to Be Two Kinds of Coercion?' in David A Reidy and Walter J Riker (eds), *Coercion and the State* (Springer 2008) 22; Nina Persak, *Criminalising Harmful Conduct: The Harm Principle, Its Limits and Continental Counterparts* (Springer 2007) 9; Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, Cambridge UP 1949) 21.

² Pen C, preface, para 2; Crim C, preface, para 3; Gabriel Hallevy, *A Modern Treatise on the Principle of Legality in Criminal Law* (Springer 2010) 2 – 5, 9. Also see Robert F Meier and Weldon T Jonson 'Deterrence as Social Control: The Legal and Extralegal Production of Conformity' (1977) 42 *Am Sociological Rev* 292; Gerald Gardiner 'The Purposes of Criminal Punishment: I. The Nature of Punishment' (1958) 21 *MLR* 117.

³ Alan Norrie 'Citizenship, Authoritarianism and the Changing Shape of the Criminal Law' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing 2009) 25.

⁴ Brian Z Tamanaha, *The Law as a Means to an End: Threat to the Rule of Law* (Cambridge UP 2006) 77 ff. Also see Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge UP 2004) 77 – 79.

⁵ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan tr, 2nd edn, Vintage Books 1991) 13 – 15, 35 – 37.

law; there is no crime and there is no punishment other than what is provided for in the positive law.⁶ Interpretation by analogy is prohibited. This principle also defines how such a declaration of criminal law may be made.⁷

As a social control device, the conventional purpose of criminal law, is the prevention of crime⁸ – specifically, positive general prevention.⁹ Criminalisation is the normative declaration of conduct criminal.¹⁰ Some consider it as a political decision that is not a subject of rational discourse.¹¹ Be that as it may, the Ethiopian criminal law is found scattered in a variety of legislation. These may be generally categorised into three.

The first category includes the Criminal Code and special penal legislation. The Criminal Code is a continental criminal code that is said to have contained criminal matters comprehensively.¹² When the 1957 Penal Code was revised into the Criminal Code, it is designed to include all possible criminal matters and, in not few cases, with

⁶ Patricia Margaret Warthon 'The Humanitarian Movement in European History' (1983) 48 II Politico 693; Philip Jenkins 'Varieties of Enlightenment Criminology: Beccaria, Godwin, de Sade' (1984) 24 British J of Criminology 112.

⁷ *The Federal Democratic Republic of Ethiopia Constitution Proclamation No 1/1995* ('FDRE Const'), art 22(1) provides that '[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offense at the time it was committed'. It further provides that the President of the Republic 'shall proclaim in the Negarit Gazeta laws and international agreements approved by the House of Peoples' Representatives'. *ibid* art 71(2). *Federal Negarit Gazeta Establishment Proclamation No 3/1995*, art 2(1) establishes the official Federal Negarit Gazeta; art 2(2) provides that '[a]ll Laws of the Federal Government shall be published in the Negarit Gazeta'.

⁸ Henrique Carvalho, *The Preventive Turn in Criminal Law* (Oxford UP 2017).

⁹ Markus D Dubber 'Theories of Crime and Punishment in German Criminal Law' (2005) 53 Am J Comp L 679, 681, 696 ff.

¹⁰ Criminalization has two aspects; the normative aspect and the practical aspect. The normative aspect is a declaration of conduct criminal and the practical aspect is whether the conduct criminalized is prosecuted or whether the conduct prosecuted is the one that is criminalized. Nicola Lacey 'Historicising Criminalisation: Conceptual and Empirical Issues' (2009) 72 MLR 936. Also see William J Stuntz 'The Pathological Politics of Criminal Law' 100 Michigan L Rev 505.

¹¹ Persak (n 1) 5, 23; Luc J Wintgens 'Rationality in Legislation – Legal Theory as Legisprudence: An Introduction' in Luc J Wintgens (ed), *Legisprudence: A New Theoretical Approach to Legislation* (Hart Publishing 2002) 2; Luc J Wintgens 'Legislation as an Object of Study of Legal Theory: Legisprudence' in Luc J Wintgens (ed), *Legisprudence: A New Theoretical Approach to Legislation* (Hart Publishing 2002) 30; A Daniel Oliver-Lalana 'Rational Lawmaking and Legislative Reasoning in Parliamentary Debates' in Luc J Wintgens and A Daniel Oliver-Lalana (eds), *The Rationality and Justification of Legislation* (Springer 2013) 135, 138, 139.

¹² One of the reasons for the adoption of the Criminal Code is the desire 'to adopt a comprehensive code by assembling the various criminal provisions published in the *Negarit Gazeta* in a disintegrated manner'. Crim C, preface, para 4.

increased punishment. This is assisted by a sentencing guideline that ‘help’ increase the sentence from what is provided for in the Criminal Code.¹³

There are also several special penal legislation that either modify the provisions of, or introduce new penal provisions to, the Criminal Code. This includes the *Vagrancy Control Proclamation No 384/2004*, *Prevention and Suppression of Terrorism Crimes Proclamation No 1176/2020*, *Prevention and Suppression of Money Laundering and Financing of Terrorism Proclamation No 657/2009*, *Corruption Crimes Proclamation No 881/2015*, *Prevention and Suppression of Trafficking in Persons and Smuggling of Persons Proclamation No 1178/2020*, and *Computer Crimes Proclamation No 958/2016*.

The second category includes sectoral regulatory legislation adopted by the House of Peoples’ Representatives (‘the HoPR’) in Proclamations (statutes) containing penal provisions. Those are so diverse that they need to be put under different sub-categories: (a) legislation governing financial business, such as *Banking Business Proclamation No 592/2008*, and *Micro-Financing Business Proclamation No 626/2009*; (b) legislation governing commercial activities, such as, *Commercial Registration and Business License Proclamation No 980/2016*, *Trade Practice and Consumers’ Protection Proclamation No 685/2010*; *Ethiopian Commodity Exchange Proclamation No 550/2007*, and *Coffee Quality Control and Marketing Proclamations No 1051/2017*; (c) legislation governing expression and the media, such as, *Broadcasting Services Proclamation No 533/2007*, *Protection of the Media and Access to Information Proclamation No 590/2008*; (d) tax laws, such as *Value Added Tax Proclamation No 285/2002*, *Income Tax Proclamation 286/2002*, *Excise Tax Proclamation No 307/2002*, *Turn Over Tax Proclamation No 308/2002*, *Tax Administration Proclamation No 983/2016*; (e) legislation governing public property and finance administration, such as *Federal Government of Ethiopia Financial Administration Proclamation No 648/2009*, and *Ethiopian Federal Government Procurement and Property Administration Proclamation No 649/2009*; (f) various legislation, such as transport, environment, and copyright regulation legislation.¹⁴

¹³ Simeneh Kiros Assefa and Cherinet Hordofa Wetere, *Criminal Investigation, Prosecution and Litigation Manual* (United Printers 2008 EC, in Amharic) 230 – 34; Nuru Seid ‘Problems of the Revised Sentencing Guideline No 2/2006 EC’ (2016) 5 Eth Bar Rev 119, 133 (in Amharic).

¹⁴ The diverse nature of those legislation containing penal provisions may be illustrated by *Transport Proclamation No 468/2005*, *Copyright and Neighbouring Rights Proclamation No 410/2004*,

The third category of penal rules includes those subsidiary (secondary) legislation, that is Council of Ministers Regulations and directives adopted by administrative agencies which raise a host of issues. The first and most important subject relates to delegation of the criminal lawmaking power. For instance, the *Money Laundry Proclamation No 657/2009*, article 2(1) provides for a list of ‘accountable persons’ with the legal duty to give information regarding their clients and/or report suspicious transactions at the pain of criminal punishment, article 17. However, the Financial Intelligence Centre is expressly authorised to modify this list to be published in a newspaper having a national circulation, article 22.

There are also indirect delegations. For instance, the *Banking Business Proclamation No 592/2008*, article 58(7) provides that:

Any person who contravenes or obstructs the provisions of this Proclamation or Regulations or directives issued to implement this Proclamation shall be punished with a fine up to Birr 10,000 and with imprisonment up to three years.

In such cases, it is the Council of Ministers or National Bank of Ethiopia is the one that defines the facts constituting a crime. For instance, the Federal Supreme Court Cassation Division in *ERCA v Daniel Mekonnen*¹⁵ took the Directive adopted by the National Bank of Ethiopia, published in English as the ground of prohibition of specific conduct and punished the defendant based on the Proclamation. This further raises matters of clarity of the prohibited conduct. Related to this is, the Regulations or the Directive is not, usually, adopted having criminal responsibility in mind. However, the court makes use of such material for the determination of the scope of criminal law. This borders normative criminalisation and practice of criminal law.

As directives are not published in the official *Negarit Gazeta*, the other major concern relates to the manner of declaration of criminal norms. Criminal Code, article 2 provides for the principle of legality, which also requires that criminal law need to be

Environmental Pollution Control Proclamation No 300/2002, Development, Conservation and Utilisation of Wildlife Proclamation No 541/2007, Biosafety Proclamation No 655/2009, and Census Proclamation No 449/2005.

¹⁵ *ERCA v Daniel Mekonnen* (21 July 2010 Cass File No 43781, 10 Decisions of the Cassation Division of the Federal Supreme Court).

published in the official *Negarit Gazeta*.¹⁶ There are also other provisions affirming the modalities of publication. Criminal Code, article 343, for instance, provides that:

[w]here a crime is committed in breach of legislation issued by an authorised public organ in accordance with the law and duly published in the Federal Negarit Gazeta [] concerning the control or protection of the fiscal or economic interests of the State, the punishment shall be determined in accordance with the principles in this Code.

However, in practice, such requirement is shrugged off and directives are given legal effect as though they form part of the criminal law.¹⁷

Those special penal legislation and the penal provisions that are included in those sectoral legislation are not governing new subject matters. The prohibited conducts and the respective punishments are already provided for in the Criminal Code. They are incorporated in those legislation with increased punishment and in few instances, the scope of the prohibited conduct is expanded. The third category of ‘crimes’ are not included in criminal law material and do not constitute criminal law.

As alluded to earlier, the legitimate end of criminal law is the prevention of crime.¹⁸ This instrumental nature of criminal law makes it malleable to abuse, apparently, far more than other branches of law.¹⁹ Criminal law is the first codified law in Ethiopia; however, it is also the most frequently amended law to meet the demands of the government of the day. The most important point of disagreement, which is the central question in this research is, what are those conducts that can be criminalised and why.

¹⁶ See (n 7). Also see Simeneh Kiros Assefa ‘Methods and Manners of Interpretation of Criminal Norms’ (2017) 11 Mizan LR 88, 104 – 107.

¹⁷ Daniel (n 15). Following the decision of the Cassation Division, a former judge in the Cassation Division lists directives as ‘laws’. Ali Mohammed Ali ‘Fundamental Error of Law’ in Muradu Abdo (ed) *Cassation Questions in Ethiopia* (Papers Presented at the Symposium Organised in Commemoration of the 50th Anniversary of the Founding of the School of Law, AAU April 29, 2014) 60, 66. Further, the *Federal Tax Administration Proclamation No 983/2016*, art 2(36)(h) lists ‘any regulation or directive’ made under any primary tax laws as ‘tax law’.

¹⁸ Dubber ‘Theories of Crime’ (n 9) 699 – 704; Werner S Landecker ‘Criminology in Germany’ (1941) 31 J of Crim L and Criminology 551, 554 – 57.

¹⁹ Simeneh Kiros Assefa and Cherinet Hordofa Wetere ‘Over-Criminalisation’: A Review of Special Penal Legislation and Administrative Penal Provisions in Ethiopia’ (2017) 29 J Eth L 49. Simeneh Kiros Assefa ‘Walking in the Dark: Lack in the Use of Criminal Statistics for Public Policy and Legislative Action’ 12 Mizan LR 371, 397 – 99. Also see Mauro Zamboni, *Law and Politics: A Dilemma for Contemporary Legal Theory* (Springer 2008).

The continental criminal law doctrine of 'legal good' helps in the determination of interests that require the protection of criminal law which, in its normative aspect, defines the utility and scope of criminal law.²⁰ 'Legal good' is an interest that requires the protection of criminal law.²¹

This doctrine of legal good is incorporated into the Ethiopian Criminal Code, article 1.²² However, it has not been discussed anywhere in the literature nor was it a subject of judicial litigation disposed of by a court decision.²³ As a legislative promise, it appears to be disregarded by the legislature itself. Criminal laws are adopted for a variety of other reasons. For instance, the anti-terrorism and money laundering proclamations were said to have been adopted to discharge international (treaty) obligations.²⁴ Likewise, the penal provisions contained in the tax legislation, such as the Income Tax Proclamation, and the VAT Proclamation, were part of the International Financial Institutions loan conditionality Ethiopia undertook in 2002.²⁵ Those tax legislation were also meant to maximise government revenue. However, the *Commercial Registration and Business License Proclamation No 980/2016* is also meant to maximise government revenue because, to have a trade license renewed, one is

²⁰ Santiago Mir Puig 'Legal Goods Protected by the Law and Legal Goods Protected by the Criminal Law, as Limits to the State's Power to Criminalize Conduct' (2008) 11 New Crim Law Rev: An International and Interdisciplinary Journal 409; Dubber 'Theories of Crime' (n 9); Simeneh and Cherinet 'Over-Criminalisation' (n 19).

²¹ See for instance, Mir Puig (n 20) 409, 411 – 12; Dubber 'Theories of Crime' (n 9) 683 ff.; Persak (n 1) 104 – 18.

²² Simeneh and Cherinet 'Over-Criminalisation' (n 19) 55 – 60.

²³ Graven only discussed the positive aspect of the doctrine. Philip Graven, *An Introduction to Ethiopian Penal Law: Arts 1-84 Penal Code* (HSIU 1965) 5 – 9. The first ever direct exposition on criminalisation in Ethiopia is made by Simeneh and Cherinet 'Over-Criminalisation' (n 19).

²⁴ *Anti-Terrorism Proclamation No 652/2009*, preamble, para 5; 'Brief Minutes of the Hearing with Stakeholders on the Anti-Terrorism Draft Bill Organised by Justice and Administrative Affairs, Foreign Relations Affairs, Defence and Security Affairs Standing Committees, June 24, 2009' ('The Minutes of the Meeting with Stakeholders on the Anti-Terrorism Bill', later adopted into law as *Proc No 652/2009*) 6; *Suppression of Money Laundering and Financing of Terrorism Proclamation No 657/2009* ('Proc No 657/2009') preamble, para 2.

²⁵ Ethiopia was said to have developed 'Poverty Reduction Strategy Paper' which is said to be drawn based 'on the recommendations of the [] IMF-World Bank report' and the strategy document had later been adopted by EPRDF Fourth Congress. Ethiopia had also been required to introduce tax reforms which include 'enhanced enforcement procedures and improved penalty regime' which was expected to be implemented by January 2003. 'Report and Recommendation of The President of The International Development Association to The Executive Directors on a Proposed Credit of SDR 96.2 Million to The Federal Democratic Republic of Ethiopia For An Ethiopia Structural Adjustment Credit (May 15, 2002)' 8 – 10, 14. This requirement was translated into stiff criminal rules with special rules and institutions for its enforcement.

required to produce a tax clearance.²⁶ The penal provisions contained in such statute are therefore meant to help achieve this objective of maximizing government revenue.²⁷

Those penal provisions contained in the various piecemeal legislation certainly are meant to achieve ‘illegitimate ends of criminal law’ simply because they do not conform to the doctrine of ‘common good’ as incorporated in the Criminal Code, article 1. However, the criminal lawmaking practice gives the impression that a given conduct turns a crime as long as there is a positive law to that effect; any conduct could be criminalised for a variety of reasons, and there does not seem to be a limit to the criminalising power of the lawmaker.

However, as the criminal lawmaking power is exercising the state’s coercive power, such power is not unlimited. The discussion on such limitation or the criminalising power of the legislature has to be based on a constitutional foundation. Those penal provisions were adopted, as invoked by the respective proclamations, based on the provisions of *The Federal Democratic Republic of Ethiopia Constitution* (‘the Constitution’), articles 55(1) and 55(5) or 55(11).²⁸ The structural limitations, such as separation of power and jurisdictional matters, and the bill of rights as normative limitations, have not been a subject of discussion by the legislature from the perspective of criminalisation.²⁹

²⁶ *Commercial Registration and Business License Proclamation No 686/2010* (‘Proc No 686/2010’) art 30(6). Also see ‘Explanatory Memorandum on Commercial Registration and Business License Draft Bill’ (later adopted into law as *Proc No 686/2010*) 9, 10; ‘Brief Minutes of the Public Hearing Organised by the Commerce and Industry Affairs Standing Committee on Competition and Consumers’ Protection, and Commercial Registration Bills, June 23, 2010 (later adopted into law as *Proc Nos 685/2010 and 686/2010*, respectively) 44 – 46.

²⁷ ‘Brief Minutes of the Public Hearing’ for *Proc No 686/2010* (n 26) 44 – 59.

²⁸ For instance, the *Anti-Terrorism Proclamation No 652/2009*, *Banking Business Proclamation No 592/2008*, *Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No 434/2005*, and *Proc No 657/2009* (n 24) invoked the provisions of art 55(1). Even when there is specific provision authorising a particular type of legislation, art 55(1) is invoked as a justification for the adoption of such legislation. Thus, while the provisions of art 55(11) authorise the House to legislate on tax matters, *Value Added Tax Proclamation No 285/2002*, *Income Tax Proclamation No 286/2002* and the *Stamp Duty Proclamation No 110/1998* were adopted as per the provisions of art 55(1) and 55(11). Likewise, *Corruption Crimes Proclamation No 881/2015* is adopted as per art 55(1) and (5). Also note that the Criminal Code claims to have been adopted as per art 55(1).

²⁹ The minutes of the public hearing organized by the committees do not show there was any such discussion at all. Records rather show that the discussions on those bills were made on the

The HoPR has the constitutional power to make criminal law. The nature of such law and the manner of such lawmaking power has never been a subject of parliamentary debate, and records do not show there were parliamentary debates regarding any of those penal provisions. Often, legislation are discussed in the respective committees and many of the penal provisions were not discussed at all. For instance, records show that the penal provisions of the VAT Proclamation were not included in the initial draft bill because the provisions of the Penal Code were deemed sufficient.³⁰ The *Income Tax Proclamation No 286/2002*, on the other hand, was drawn up with its penal provisions.³¹ However, on the recommendation of the experts (from the Ministry of Finance and Economic Development), the House Standing Committees decided that those penal provisions in the Income Tax Proclamation be incorporated into the VAT Proclamation too.³² As a result, a single conduct constitutes two crimes where such trader is a VAT registered trader. There is no record showing that this is the ‘desire’ of the lawmaker and there is no record showing there was any debate by the full House on the content of those provisions.

Further, the rules governing the lawmaking process provide that the Government is the principal initiator of legislation; others, such as the Speaker of the House, Members and Committees may also initiate bills.³³ The *Council of Ministers Working Directive 1996 EC* (‘CM Directive’, in Amharic) authorises every agency to initiate a draft bill in the area of its competence.³⁴ However, where the intended bill is new or would seek to make fundamental changes, it is compulsory that the Prime Minister be consulted

assumption that the HoPR has the power to adopt such law. Further, the *Council of Ministers Working Directive 1996 EC* (‘CM Working Directive’ in Amharic), art 46(1) requires that a draft bill be accompanied with a certification that it does not contradict with the Constitution.

³⁰ ‘Modifications made on the Value Added Tax Draft Bill’ (later adopted into law as *Proc No 285/2002*) 2.

³¹ ‘Brief Explanatory Memorandum on Income Tax Draft Bill’ (later adopted into law as *Proc No 286/2002*) 2, 9. There is no mention of criminal responsibilities in other documents submitted to the House, such as, ‘Documents Addressing Major Legal Issues’, forming part of the ‘Technical Document’ drawn up by the Ministry of Revenue, May 2002.

³² ‘Modifications made on...’ (n 30) 1, 2.

³³ *Federal Democratic Republic of Ethiopia House of Peoples’ Representatives Working Procedure and Members’ Code of Conduct (Amendment) Proclamation No 470/2005*, art 6(1) and (2).

³⁴ CM Working Directive (n 29), art 38(1). Despite the Directive does not invoke any constitutional authority for its adoption, it has an immense effect on the lawmaking process in the legal system.

first.³⁵ The legislation discussed in this research, with no exception, were initiated by administrative agencies; none were initiated by the lawmaker, the Speaker or Members of the House. One of the most important special penal legislation, the Anti-Terrorism Proclamation, is even initiated by the Federal Police and the National Intelligence and Security Services³⁶, and vests important powers on those agencies.³⁷ This gives the impression that, even in exercising its legitimate power, the legislature failed to discharge its obligation to legislate.

The Constitution, article 77(13) provides that the Council of Ministers 'shall enact regulations pursuant to powers vested on it by the House of Peoples' Representatives'. This delegation relates to administrative matters and is for the purpose of enforcing Proclamations adopted by the House. It is alluded to earlier, however, that several of those criminal rules are made on delegated power by government agencies, or some of the rules made by the HoPR are meant to enforce those rules made by those agencies.

1.2. Statement of the Problem

Criminal law is the manifestation of the coercive power of the state; as such, the state does not have a free hand in using criminal law. The normative aspect of the doctrine of 'common good' is meant to limit the criminalising power of the state. Thus, the legal interest must be one that requires the protection of criminal law and there are no other less intrusive means that effectively protect such interest, such as administrative measures and civil actions. Once the protection of criminal law is sought for the protection of a given legal interest, contemporary continental criminal law is scaffolded by four fundamental principles: the principle of legality, the principle of

³⁵ *ibid* art 9(5).

³⁶ Records show that the resource persons at such Committee Hearing were from Office of the Prime Minister, the Federal Police, and the National Intelligence and Security Services ('NISS'). 'The Minutes of the Meeting with Stakeholders on the Anti-Terrorism Bill' (n 24) 3. Further, the seal affixed to the Explanatory Memorandum is that of the National Intelligence and Security Services.

³⁷ Those investigation powers conventionally given to the police are vested on the National Intelligence and Security Services. *Proclamation No 652/2009*, art 14. Further, such information as are produced by the NISS are made 'admissible evidence' under art 23 deliberately deviating from the already established practice. Also see 'Brief Explanatory Memorandum on the Anti-Terrorism Draft Bill' (later adopted into law as *Proc No 652/2009*) 18.

conduct, the principle of culpability and the principle of personal responsibility.³⁸ From these fundamental principles, key substantive and structural limitations to the use of criminal law emerge. Further, the sole legitimate purpose of criminal law is the prevention of crime, which is defined based on the doctrine of legal good.

Contrary to those normative and formal limitations on criminalisation, however, the criminal rules discussed above in the background and those rules not discussed here, show particularly discernible trends of expansion of the criminal law that cannot be justified by the normative and formal limitations. Seen in historical context, the earlier use of modern criminal law had been for the maintenance of political power and to pursue a particular political ideology. The recent trends show that the state uses criminal law as an extension of the regulatory regime to achieve certain state objectives, such as maximizing government revenue, discharging international treaty obligations, and administrative convenience reflected by blanket criminalisation of conducts the content of which is never clear at all.

The universe of criminal law is fast expanding. The scope of conducts criminalised is expanding; some of the new ones exceed the substantive formal limitations to criminalisation;³⁹ punishments are constantly increased,⁴⁰ certain criminal rules, such as the requirement of a license to engage in a certain activity,⁴¹ forgery and bribery,⁴² are redundant. This gives the impression that there is no limitation to the use of criminal law and punishment to achieve any state end. Further, criminal rules are adopted by administrative agencies on delegation, and the court, in interpretation and

³⁸ Hallevy (n 2) 3 – 5.

³⁹ See for instance, *Commercial Registration and Business License Proclamation No 980/2016* ('Proc No 980/2016') art 49(4) criminalising transfer of commercial license in any manner to another person.

⁴⁰ See, *Commercial Registration and Business License Proclamation No 67/1997*, art 46(1); *Proc No 686/2010* (n 26), art 60(1); and *Proc No 980/2016* (n 39), art 49(2).

⁴¹ Crim C, art 433 punishes those who engage in activities without a license for which the law requires a license. However, there are several administrative regulatory legislation containing penal provisions for engaging in the respective activities without the required license.

⁴² For instance, bribery is punishable in Crim C, art 408, it is also provided for in other legislation such as, the *Federal Government Finance Administration Proclamation No 648/2009*, art 70(1)(a), (5) and the *Federal Government Procurement and Property Administration Proclamation No 649/2009*, art 77(3), (4). Likewise, falsifying documents and use of false documents are prohibited in *Proc No 649/2009*, art 77; *Customs Proclamation No 859/2014*, art 167; *Proc No 657/2009* (n 24), art 17(2). All those crimes are included in the Criminal Code or the subsequently adopted *Corruption Crimes Proclamation No 881/2015*.

application of criminal law, is resorting to using ‘materials’ that are not criminal rules, and that are not published in the official *Negarit Gazeta*.⁴³

In making those criminal laws, the lawmaker fails to discharge its constitutional obligation to legislate, and in some instances, it abdicates its obligation by delegating criminal lawmaking power to the executive. Those blanket criminal rules violate the principle of legality; others violate the principle of conduct and of personal responsibility by imputing criminal liability to another person, such as company managers, and violate the principle of culpability by introducing strict criminal liability. Such a presentation of criminal law gives the impression that the lawmaker is not bound by any rule as long as it adopts a criminal rule. It appears to have given the state a free hand to use criminal law to achieve any state purpose, which otherwise means in the protection of legal goods criminal law is used as first resort state action.

This study enquires into the problem of excessive use of criminal law and punishment.

1.3. Objective of the Study

1.3.1. General Objective

The state uses criminal law for various purposes some of which are not necessarily the ends of criminal law. Stated otherwise, the state uses the criminal law and punishment both for legitimate and illegitimate ends. While defining the legitimate ends of the criminal law, the general objective of this research is thus, to establish normative and procedural limitations to the criminalising power of the legislature in Ethiopia.

1.3.2. Specific Objectives

The specific objectives of the study are to:

- define the legitimate end of criminal law thereby marking the boundaries of the criminal law in Ethiopia;
- establish normative limitation to the criminalising power of the state using criminal law doctrines;

⁴³ See, for instance, the text to n 15 – 17.

- establish constitutional foundation for such criminal law doctrine as limitation on the criminalising power of the state;
- establish formal, both legislative and adjudicative, limitations to the criminalisation power which also give effect to the normative limitations;
- review the positive criminal law in light of those normative and formal limitations to criminalisation; and
- critically discuss the judicial practice of criminalisation and adjudication.

1.4. Research Questions

Based on those objectives, the core question the study addresses is how the criminal lawmaking power of the lawmaker can be limited. It specifically addresses the questions:

- what is the scope of the legitimate power of the state in using criminal law?
- how the bill of rights and other constitutional provisions can be used to limit the criminalising power of the state?
- whether there is any justification to delegate the criminal lawmaking power of the lawmaker to administrative agencies?
- how legislative theories limit the criminalising power of the lawmaker? and
- whether the court, adopting theories of law and legal method, can be used as a forum for easing the negative effects of overuse of criminal law and punishment by the legislature?

1.5. Theoretical Framework of the Research

Criminal law is the most intrusive state action against the rights of the individual. This coercive nature of the criminal law takes a central place in most legal theories. In prelude to the Enlightenment period, criminal law used to be treated under the natural law theory; thus, crime used to be treated as sin and punishment as expiation.⁴⁴ The Ethiopian criminal law was part of the *Fiteha Negest*, ecclesiastical text, which has

⁴⁴ Gardiner (n 2) 117 – 20.

significantly influenced the modern penal codes until 2004.⁴⁵ Criminal punishments were barbaric, which includes amputation, flogging, exile, and hanging;⁴⁶ some of those punishments were formally abolished only in the 2004 Criminal Code. The criminal process had also been flawed that torture was a legitimate method of investigation,⁴⁷ and often judgement is given by the deities that anyone can get wrongly convicted. For instance, the early days of investigation before the police was formally organised and even parallel to the police were *awchachign* (*aferesata*) and *lebashai*. *Awchachign* (*Afersata*) is community inquiry into a crime often used in murder, latter sanctioned by the *Aferesata Proclamation of 1933*, while *lebash*i (lit. thief seeker) is used to investigate into crimes of theft using a 'suitable boy' who is drugged by the local chief.⁴⁸

The content of the criminal law had been indeterminate; and worse, interpretation by analogy expands the scope.⁴⁹ There were various efforts to mitigate the negative effects of criminal law, one of which had been limiting the interpretation of criminal law to authoritative interpretation by the legislature.⁵⁰ Positivation of criminal law in the Enlightenment was not only secularisation but also humanisation of criminal law.⁵¹

⁴⁵ Jean Graven 'The Penal Code of the Empire of Ethiopia' (1964) 1 J Eth L 267, 268 – 288. Although it has not been implemented for several decades, flogging is formally abolished in the 2004 Criminal Code.

⁴⁶ The 'First Part' the 'First Chapter' of the 1930 Penal Code provides for the various forms of punishment – death, flogging, imprisonment, fine, exile, confiscation, and guarantor against violence. Further, amputation and perpetual imprisonment are specifically provided for under arts 173 and 175, respectively.

⁴⁷ James C Welling 'The Law of Torture: A Study in The Evolution of Law' (1892) 5 Am Anthropologist 193.

⁴⁸ Stanley Z Fisher, *Ethiopian Criminal Procedure: A Sourcebook* (HSUI 1969) 24 – 28; Stanley Z. Fisher 'Traditional Criminal Procedure in Ethiopia' 19 Am J Comp Law 709, 716 – 24; Aberra Jembere, *An Introduction to the Legal History of Ethiopia (1434-1974)* (Lit Verlag 2000) 244; Simeneh Kiros Assefa, *Criminal Procedure Law: Principles, Rules and Practices* (Xlibris 2009) 34, 35.

⁴⁹ *Fiteha Negest: The Law of the Kings* (Trans. Abba Paulos Tsadwa, Law Faculty, HSIU 1968) 251; the 1930 Penal Code, Preface paras 11, 12.

⁵⁰ Alicja Ornowska 'Introducing Hermeneutic Methods in Criminal Law Interpretation in Europe' in Joanna Jemielniak and Przemyslaw Miklaszewicz (eds), *Interpretation of Law in the Global World: From Particularism to a Universal Approach* (Springer 2010) 257; Jean-Louis Halperin 'Legal Interpretation in France Under the Reign of Louis XVI: A Review of the *Gazette des tribunaux*' in Yasumoto Morigiwa, Michael Stolleis, and Jean-Louis Halpérin (eds), *Interpretation of Law in The Age of Enlightenment: From the Rule of The King to the Rule of Law* (Springer 2011) 23 – 26, 43; Cesare Beccaria, *On Crimes and Punishment and Other Writings* (Bellamy r Tr, 1995) 14, 17.

⁵¹ Anieeto Masferrer 'The Liberal State and Criminal Law Reform in Spain' in Mortimer Sellers and Tadeusz Tomaszewski (eds), *The Rule of Law in Comparative Context* (Springer 2010). See also, Beccaria (n 50); Jenkins (n 6); Warthon (n 6) 697 – 704; Carl Ludwig von Bar, et al, *A History of*

The fundamental doctrines of criminal law evolved in this period, the most important being the principle of legality.⁵² The principle of legality defines the ontology and scope of criminal law – there is no crime and punishment other than what is provided for in the law. Positive nature of criminal law dictates both the interpretation and application of criminal law – it is interpreted strictly and that there is no crime or punishment by analogy; and criminal law is applied only prospectively.⁵³

It is, thus, the nature of criminal law that it initially admits positivist theory of law. This intellectual commitment, however, can only takes us as far. When the state had positivised criminal law, criminal law was lean.⁵⁴ In those early days, along with the principle of legality, the civil law tradition had further developed the doctrine of legal (common) good.⁵⁵ Criminal law is used to preventing conducts that are harmful to the social existence of the individual. The normative aspect of the doctrine guides the purpose of the criminal law.⁵⁶ However, the positive nature of the criminal law combined with this instrumental nature makes it malleable to abuse. The state, as the custodian of such public power, used such power for its own advantage; that is the reason some even argue that law is a war in another name.⁵⁷ Thus, both in its making and application, criminal law shows some deviation from the black letters of the law introducing some element of realism at least, and instrumentalism at worse.

Continental Criminal Law (Little, Brown and Company 1916) 415. Also see T Cizova 'Beccaria in Russia' (1962) *The Slavonic and East European Rev* 384.

⁵² Thomas Vormbaum, *A Modern History of German Criminal Law* (Margaret Hiley Tr., Springer 2014) 39 – 45, 63 – 5; Beccaria (n 50) 12, 17.

⁵³ Hallevy (n 2) 5 – 14.

⁵⁴ Initially, statutory laws were meant to replace common laws and customary laws. Reinhard Zimmermann 'Statuta sunt stricte interpretanda? Statutes and the Common Law: A Continental Perspective' (1997) 56 *The Cambridge LJ* 315, 315 – 20, 325. Also see Halperin (n 50). Beccaria argues for strict application of the criminal law. Beccaria (n 50) 12 – 14, 17.

⁵⁵ Vormbaum (n 52) 49 – 56; Dubber 'Theories of Crime' (n 9) 682 – 93.

⁵⁶ Beccaria (n 50) 10 – 11; Dubber 'Theories of Crime' (n 9) 696 – 703.

⁵⁷ For judicialization of politics, see in general John L Comaroff and Jean Comaroff 'Reflections of the Anthropology of Law, Governance and Sovereignty' in Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Julia Eckert (Eds.) *Rules of Law and Laws of Ruling: On the Governance of Law* (Ashgate 2009); Tamir Moustafa 'Law and Resistance in Authoritarian States: The Judicialization of Politics in Egypt' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge UP 2008).

Therefore, the core issue that is sought to be addressed in this study is limiting the criminalising power of the state. Because positivism is limited to initial validity of laws,⁵⁸ it is of little use in the determination of the moral content of criminal law both in interpretation and application of existing positive criminal law, as well as how criminal law should be made. On the other hand, the Constitution explicitly adopts a non-positivist theory of law. As one of its five cardinal principles, the Constitution provides that '[h]uman rights and freedoms, *emanating from the nature of mankind* are inviolable and inalienable'.⁵⁹ This provision positivised the constitutional appeal to natural law.⁶⁰ The principle of unity of legal system⁶¹ dictates that, the constitution is a standard against which the sub-constitutional rules, including the criminal law, are to be evaluated.

The study, thus, evaluates the existing criminal law based on such and similar constitutional principles as well as criminal law doctrines. Besides, taking Fuller's type of naturalism as a bridge between the judicial role in the interpretation of the existing criminal rules and how those rules are made by the legislature, the study makes use of legislative theory, legisprudence.⁶²

The criminal law is a social (normative) institution;⁶³ it exists in society and its effect is real. Thus, the black letters of the law are far too inadequate to answer a host of questions about criminal law. It is in its social nature that in the interpretation and application of criminal law, it is imperative to go beyond the positive law. Whether admitted or otherwise, an interpretation method called hermeneutics is constantly in

⁵⁸ HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 100 – 10; Hans Kelsen, *Pure Theory of Law* (Max Knight tr, The Lawbook Exchange, 2005) 10 – 15.

⁵⁹ (emphasis added) FDRE Const, art 10(1).

⁶⁰ Robert Alexy 'Discourse Theory and Fundamental Rights' in Augustin Jose Menendez and Erik Oddvar Eriksen (eds), *Arguing Fundamental Rights* (Springer 2006) 15 – 17.

⁶¹ Humberto Ávila, *Theory of Legal Principles* (Springer 2007) 84 ff.

⁶² Luc J Wintgens, 'The Rational Legislation Revisited: Bounded Rationality and Legisprudence' Luc J Wintgens and A Daniel Oliver-Lalana (eds), *The Rationality and Justification of Legislation* (Springer 2013) 22 – 26; Wintgens 'Legislation as an Object of Study' (n 11) 35 – 38.

⁶³ Weinberger makes a distinction between normative institution and real institution. Ota Weinberger, *Law, Institution and Legal Politics: Fundamental Problems of Legal Theory and Social Philosophy* (Springer 1991) 21.

use.⁶⁴ It is an interpretation method using materials that are not necessarily part of the positive law nor are intended to form part of the criminal law at all.

Criminal law is positive law. However, the formal criminalisation of conduct by the legislature, the informal criminalisation through enforcement and interpretation of the criminal law, and the determination of validity of such criminal norms, among others, is made by real institutions. Those institutions adopt their own theories of law and legal methods in the discharge of their responsibilities.⁶⁵ A given criminal norm may only be seen in the context of interactions between the rules, institutions and their methods. The institutional theory of law, particularly institutional positivism, therefore, takes a central place in the discussion.⁶⁶ The courts' decisions, those binding on lower courts and otherwise, are discussed in order to depict the pattern of application of those principles and the respective criminal rules.

1.6. Locating the Study in Existing Literature

Literature on the practice and theory of criminalisation in Ethiopia is conspicuously absent. There is, however, a modest collection of literature that appreciates the problem of over-criminalisation in other jurisdictions since as early as 1967.⁶⁷ Almost all of them deal with criminalisation in the US.⁶⁸ Often, discussions are made by comparing the US system with other systems, such as Europe. For the most part, the literature does not establish the problem of over-criminalisation because it does not establish 'a standard' or 'a theory' of criminalisation; it just assumes the problem.

⁶⁴ See generally Ornowska (n 50); Simeneh 'Methods and Manners of Interpretation' (n 16) 104 – 12.

⁶⁵ Hans Petter Graver, *Judges Against Justice: On Judges When the Rule of Law is Under Attack* (Springer 2015) 208 – 12, 221; EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge UP 2005). Also see Robert S Summers, *Form and Function in a Legal System: A General Study* (Cambridge UP 2006) 241 ff.

⁶⁶ Weinberger (n 58); Massimo La Torre, *Law as Institution* (Springer 2010).

⁶⁷ Sanford H Kadish 'The Crisis of Over-criminalization' (1967) 374 *The Annals of the American Academy of Political and Social Science* 157.

⁶⁸ Stuntz (n 10); Douglas Husak, *Over-criminalisation: The Limits of the Criminal Law* (Oxford UP 2008); Fernando Molina 'A Comparison Between Continental European and Anglo-American Approaches to Overcriminalization and Some Remarks on How to Deal with It' (2011) 14 *New Crim LR* 123; Ellen S Podgor 'Introduction: Overcriminalisation: New Approaches to a Growing Problem' (2012) *J of Crim Law and Criminology* 529; Stephen F Smith 'Overcoming Overcriminalisation' (2012) *J of Crim Law and Criminology* 537.

Douglas Husak describes the US lawmakers as ‘offense factories’⁶⁹ where there is ‘almost no institutional checks on federal criminal power’.⁷⁰ Husak’s discussion on over-criminalisation in the US is based on comparison with some European countries and finding that the scope of conducts criminalisation and the consequent punishment are incomparable.⁷¹ He finds that in the United States the ‘terms of incarceration are roughly 5 to 10 times as long as those imposed in France and Germany for similar crimes’.⁷²

Over-criminalisation is manifested in various forms; such as overlapping criminal rules, protection of trivial interests or trivial harm to important interests, such as criminalisation of inchoate crimes or ancillary offences, vicarious and strict liability criminal rules, disproportionate sentence,⁷³ wider discretion to law enforcement and easy and cost effective conviction.⁷⁴

There may be a wide range of explanation for over-criminalisation; the one that is presented by William Stuntz, in his widely cited work, and which can be applied to almost all legal systems, is politicisation of the criminal law.⁷⁵ He classified the politicisation of criminal law in the US on two levels – the surface politics is where the public demands lawmakers do something every time a crime is committed somewhere that grips the public’s attention.⁷⁶ The deeper politics is the institutional link between the lawmaker and the prosecution and the police in an effort to save their face against public embarrassment. The lawmaker gives them discretion to selectively arrest or prosecute, or to make conviction much easier and cost effective.⁷⁷ In Europe, on the

⁶⁹ Husak, *Over-criminalisation* (n 68) 33.

⁷⁰ Rachel E Barkow ‘Separation of Powers and Criminal Law’ (2006) 58 Stanford LR 989, 995.

⁷¹ Husak, *Over-criminalisation* (n 68) 17 – 45.

⁷² *ibid* 19.

⁷³ *ibid* 36 – 43; Molina (n 68) 125 – 26.

⁷⁴ Stuntz (n 10) 520, 537 – 38.

⁷⁵ *ibid*.

⁷⁶ *ibid* 510, 523 – 25, 529 – 33.

⁷⁷ *ibid* 533 – 40, 546 – 52.

other hand, over-criminalisation is manifested through making administrative decisions criminal matters.

Rachel Barkow gives another perspective to over-criminalisation. She maintains that delegated criminal law legislation, like the delegated administrative rulemaking, is one of the main factors of over-criminalisation violating the constitutional principle of separation of power.⁷⁸ The complete 'indifference to distinction between criminal and non-criminal legislation' is also shared by Husak.⁷⁹ Husak maintains that the consequent punishment is thus unjust, and such 'unchecked discretion destroys rule of law'.⁸⁰

It is based on this injustice of punishment and threat to rule of law that Husak proposes to establish a theory of criminalisation. Although others also promise a theorising criminalisation,⁸¹ Husak's proposal approaches the subject systematically and in a relatively organised manner. He classifies those constraints on criminalisation in general into internal and external constraints. The internal constraints, as their name implies, include principles in the General Part of criminal law which is also shared by Fernando Molina.⁸²

Husak argues that in common law system, the principles in the General Part are abstracted from the Special Part of criminal law. He asserts that the general part of criminal law is not content neutral; it 'should contain doctrine with important implications for criminalisation and only conducts worthy of condemnation may be punished'.⁸³ Thus, trivial harm should not be criminalised; that the wrongfulness of the conduct is important; that punishment must be a just desert; and burden of proof should not be shifted onto the accused.⁸⁴ Another aspect of his internal constraint

⁷⁸ Barkow (n 70) 995.

⁷⁹ Husak, *Over-criminalisation* (n 68) 23.

⁸⁰ *ibid* 3, 14, 31.

⁸¹ Persak (n 1) 12 – 23, 31 – 33; Molina (n 68) 135 – 38.

⁸² Molina (n 68) 130 – 32.

⁸³ Douglas Husak 'Limitations on Criminalization and the General Part of Criminal Law' in Stephen Shute and AP Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (Oxford UP 2002) 19; Husak, *Over-criminalisation* (n 68) 15, 27.

⁸⁴ Husak, *Over-criminalisation* (n 68) 55 – 91.

argument includes matters beyond the criminal law and takes on a 'conditional right not to be punished'.⁸⁵ He argues that such a right is conditional on justification.⁸⁶

In his external constraints, Husak takes on the right not to be punished as a bridge to the criminal lawmaking. He argues a good theory of criminalisation cannot be complete without a theory of the state.⁸⁷ In justifying the use of criminal law by limiting that right not to be punished, the burden should be on those who propose criminalisation to show the conduct is the legitimate object of criminalisation. His argument is directed to the legislature than to the court.⁸⁸ In his argument, Husak discusses the US system of two level classification of constitutional rights; some are fundamental and some are not treated as fundamental.⁸⁹ Husak argues that freedom from punishment should be placed under fundamental rights. Consequently, when congress intends to adopt laws that threatens such a right, its actions should be subject to 'strict scrutiny' test which requires a 'compelling state interest' rather than 'a rational test' which is applicable to 'non-fundamental rights'.⁹⁰

Husak admits both of his arguments lack foundation. His argument for internal constraints is based on General Part of the criminal law. In common law tradition, the General Part is not written; it is rather abstracted from the Special Part.⁹¹ Molina maintains that 'there is a cultural element to the way in which we approach crime in Europe that is absent in America'.⁹² Thus, 'most of the overcriminalisation question that arise in the United States are completely unknown to' Europe; and they are 'already solved'.⁹³ She partially admits the problem of over-criminalisation that, even in Spain, 'the ruling political party [...] is] generally liberal, but not always liberal in the

⁸⁵ ibid 92 – 119.

⁸⁶ ibid 96 – 7; Husak 'The General Part' (n 83) 32.

⁸⁷ Husak, *Over-criminalisation* (n 68) 120.

⁸⁸ ibid 131.

⁸⁹ ibid 123; Husak 'The General Part' (n 83) 31 – 38.

⁹⁰ Husak, *Over-criminalisation* (n 68) 123; Husak 'The General Part' (n 83) 35 – 38.

⁹¹ Husak, *Over-criminalisation* (n 68); Husak 'The General Part' (n 83) 24 – 28. The deficiency of the general part of the Anglo-American criminal law is long recognised. Gerhard OW Mueller 'The Teaching of Comparative Law in the Course on Criminal Law' (1958) 11 J of Legal Edu 59.

⁹² Molina (n 68) 131.

⁹³ ibid 124.

context of the criminal law'.⁹⁴ Like Molina, the proponents of the doctrine of the legal good in the continental tradition do not seem to have faith in the doctrine as limiting the criminalisation power of the state for its vagueness. For instance, Markus Dubber maintains 'its bark turns out to be worse than its bite'.⁹⁵ Likewise, Santiago Mir Puig also admits that the 'question cannot be answered by appealing to a theory of legal goods' only.⁹⁶

Regarding the external constraint, the right not to be punished, Husak admits that freedom from punishment is not established in any jurisprudence and many justices disagree with his argument.⁹⁷ Yet, this freedom from punishment was taken up by JD Shepherd⁹⁸ who argued to its logical conclusion, from an international bill of rights perspective. He treats punishment as derogation of 'the right'. This would not take the argument any further because the US has a different legal culture even in interpretation of those constitutional rights.⁹⁹ Further, this is contrary to the fundamental view of Husak regarding punishment; he is a retributionist. The retribution theory of punishment depends on the nature of the crime not on the utility of punishment.¹⁰⁰

On the other hand, Nina Persak argues the continental system should adopt the harm principle in order to have a principled criminalisation.¹⁰¹ She does not assert that there is over-criminalisation in the continental system. She made a comparative study of the common law system harm principle and the continental doctrine of legal good. She concludes that the harm principle is superior to the continental doctrine of legal good

⁹⁴ ibid 129.

⁹⁵ Dubber 'Theories of Crime' (n 9) 690.

⁹⁶ Mir Puig (n 20) 412, 417 – 18.

⁹⁷ Husak, *Over-criminalisation* (n 68) 96, 101, 129.

⁹⁸ JD Shepherd 'A Human Right not to be Punished? Punishment as Derogation of Rights' (2012) 6 *Crime Law Philos* 31.

⁹⁹ Kai Moller, *The Global Model of Constitutional Rights* (Oxford UP 2012) 17 – 20. Stephen Gardbaum 'The Structure and Scope of Constitutional Rights' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing 2011) 387 ff. Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights Annex, UN Doc E/CN.4/1984/4 (1984).

¹⁰⁰ Husak, *Over-criminalisation* (n 68) 7.

¹⁰¹ Persak (n 1) 128 – 133.

and that the continental system should adopt it in criminalisation.¹⁰² Her conclusion is based on her assertion that the principle of *ultima ratio* is closer to the harm principle than the continental law doctrine of legal good and the latter does not limit criminalisation.¹⁰³

This study addresses the issue of criminalisation in Ethiopia in a holistic manner. In a blend of legal and political theory, it attempts to justify the use of criminal law. Taking advantage of the written doctrine of legal good (re-named: common good)¹⁰⁴ it attempts to limit the criminal law based on the ontology of the criminal law itself. Because the doctrine of common good is incorporated in the Criminal Code and makes is appear to be mere legislative promise, the study attempts to show the doctrine is beyond the reach of the lawmaker.

It then attempts to establish both normative and formal limitations to the use of criminal law. The formal limitation relates to jurisdiction and delegability of criminal lawmaking power and the lawmaking process, while the normative limitation relates to the content of the prohibition and the consequent punishment in light of the bill of rights. The study only takes on those rights that are constitutionally recognised – the right to life, liberty and property. Incorporating into the principle theory of rights, it argues for the consideration of the doctrine of legal good in the public policy decision making process both in its normative and procedural form. The study blends both criminal law theory and specific provisions of the criminal law.

1.7. Analytical Framework of the Study

Criminal law is meant to achieve legitimate ends, maintenance of law and order for the common good by preventing crimes, such as murder, robbery, harm to limb and honour, as well as the integrity of public offices. However, there are also crimes not so overtly meant to address such ends of public good, such as political, ideological and other ends, which are not legitimate ends of criminal law. The central question the study attempts to address is how to limit the criminalising power of the state to

¹⁰² *ibid.*

¹⁰³ *ibid* 121, 128 – 29

¹⁰⁴ Pen C, art 1; Crim C, art 1.

legitimate ends of criminal law. The study approaches the subject matter from two perspectives; it attempts to establish a normative standard for criminalisation, and integrates same into the formal lawmaking process.

In order to give context to the discussion, the study first discuss the legitimate end of criminal law in Ethiopia. The definition of the legitimate end of criminal law itself limits use of criminal law to only such ends. As already alluded to, the legitimate end of criminal law is the prohibition of crime for the common good, which is framed as the doctrine of legal good. The study endeavours to develop the doctrine of legal good as a solid tool for limiting the criminalising power of the state and charts the way how such doctrine may effectively be used for such end both in the legislative process as well as in judicial disposition.

The doctrine of common good is incorporated into the Ethiopian Criminal Code, article 1. The fact that it is not external (and ‘pre-existing’) to the criminal law makes it appear to be legislative promise of ‘self-regulation’ potentially to be disregarded by the lawmaker at will.¹⁰⁵ For the doctrine of legal good to be effective as limiting the criminalising power of the state, it has to be beyond the positive law and find a source in the Constitution.¹⁰⁶ The study argues that the doctrine of legal good may be given its worth through the balancing process¹⁰⁷ in the principle theory of rights,¹⁰⁸ because the bill of rights is incorporated into the Constitution.¹⁰⁹

¹⁰⁵ Vormbaum (n 52) 56.

¹⁰⁶ Persak (n 1) 109 – 10.

¹⁰⁷ Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Doron Kalir tr, Cambridge UP 2012); Bernhard Schlink, ‘Proportionality’ in Michel Rosenfeld and Andras Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (Oxford UP 2012); Jan Sieckmann ‘Rational Lawmaking, Proportionality and Balancing’ in Klaus Meßerschmidt and A Daniel Oliver-Lalana (eds) *Rational Lawmaking under Review: Legisprudence According to the German Federal Constitutional Court* (Springer 2016) 349 ff.

¹⁰⁸ Alexy ‘Discourse Theory’ (n 60) 15 ff.; Robert Alexy ‘On the Structure of Legal Principles’ (2000) 13 *Ratio Juris* 294; Ávila (n 61) 83 ff.

¹⁰⁹ Jan Sieckmann ‘Legislation as Implementation of Constitutional Law: A Foundation for the Demand of Legislative Rationality’ in Luc J Wintgens and A Daniel Oliver-Lalana (eds), *The Rationality and Justification of Legislation: Essays in Legisprudence* (Springer 2013) 107.

Thus, it is argued that the state has a monopoly of legitimate coercive power and makes criminal law for the protection of human dignity, which is a common good.¹¹⁰ However, the effect of such criminal law is limiting the rights of the individual both as prohibitions and in the punishment for the violations of such prohibitions. Therefore, criminal law is the area where the theory of utility and the categorical duty of the state to protect the rights of individuals is in constant conflict. In this weighing process, it is the common good that gives content to one of the conflicting values. On the other end of the balance, the study takes up only those constitutionally established rights in the argument – the right to life, liberty and property.

Stated directly, the normative limitations are used to define the content of ‘good criminal law’. However, the content of ‘good law’ is always a point of reasonable disagreement. Thus, once use of criminal law is justified and its scope is reasonably delimited, the research then goes on to the formal/procedural aspect which helps to come to a reasonably agreeable content of the law, provided such procedure is fair.

There are different formal procedures taken into consideration in order to give effect to the normative standard of criminalisation. The weighing process is the first formal process that gives effect both to the doctrine of legal good and to the bill of rights. The limitation to the state’s action are often manifested on its legislative power. Such power is governed by legislative rules intended to produce agreeable results. The study discusses duties of the legislature in the context of legislative theory in the pre-legislation, legislation and post-legislation stages.

Looking at criminalisation from theory to practice, the study also examines the judicial practice of criminal law. The court adopts a theory of law and its own interpretation methods which are assisted by criminal law and constitutional doctrines. Those doctrines help in defining the scope of criminal law in action but they are also seen helping limit the effects of excessive use of criminal law and punishment.

¹¹⁰ Alon Harel ‘The Duty to Criminalize’ (2015) 34 Law and Philosophy 1.

1.8. Research Methodology

This research is about limitations on the criminalisation power of the state. The limitations to such power is discussed at three levels. Inherent in the justification and legitimation of criminal law, the doctrine of legal good limits criminal lawmaking. However, as such doctrine is incorporated in the Criminal Code, it gives the impression that it is legislative promise destined to be disregarded at will. The research endeavours to find a constitutional foundation for such doctrine by looking at limitations to criminalisation which are beyond the positive criminal law. The common good prohibits abstract criminalisation. A given conduct may be criminalised if it has actual and substantial (threat of) harm to the individual. On the other hand, criminal law limits the rights of the individual both in the prohibition as well as in the consequences for violation of such prohibitions. Such conflict of values may be resolved by weighing. Central in the weighing process is the common good which finds its way into the constitution as a justification for the adoption of public policy. Further, in making laws, the legislature must make rational law. In the evaluation of the rationality of legislation, legal good plays a pivotal role in obliging the lawmaker to consider the bill of rights.

The external limitation to the criminalisation power of the state is governed by rules of legislation. This criminal lawmaking, involving political decisions, borders positive law and the things beyond or before the positive law. However, the enquiry remains legal research and employs legal research method. Because the study very much relies on the positive criminal law, the principal method is dogmatic interpretation; it is an interpretation of criminal norms through argumentation by explanation and justification.¹¹¹ In so doing, the study uses long-standing theories and principles, and doctrines, in the interpretation of those criminal rules. It also evaluates the moral content of the positive criminal law against non-positivist theory of law the

¹¹¹ Mark Van Hoecke 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) 4 – 11; Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (Bonnie Litschewski Paulson and Stanley L. Paulson tr, Clarendon Press 2002) 11 ff.

Constitution adopts. Further, it uses non-criminal law materials in interpretation of criminal rules.

A legal research method is highly influenced by a particular legal theory adopted by the study.¹¹² However, an attempt is made not to stick to any specific traditional legal theory. This study rather takes the law as an institution having both normative and practical aspect, particularly true of criminal law.¹¹³ It further endeavours to systematise and organise the criminal law based on those constitutional principles, the bill of rights and criminal law doctrines.

The argument for limitation on the criminalisation power of the state is based on the assumption that there is an overuse of the criminal law and punishment, which will be shown along with the establishment of standards of criminalisation. In order to prove such assumption, the criminal law, including those legislation containing penal provision published in the *Negarit Gazeta* are collected and reviewed; some of the provisions are thoroughly analysed for illustration purposes. Those Directives adopted by administrative agencies are only illustrated as they are not published in the *Negarit Gazeta*. In order to show the criminal lawmaking process, explanatory notes to draft bills, minutes of parliamentary (and committee) discussions are reviewed. Court decisions are also examined to show the theory of law the court adopts, the legal method it employs, the manner of interpretation of application of particular rules and doctrines.

Because the decisions of the Federal Supreme Court Cassation Division are binding interpretative decisions, those cases published in compilation are all taken when found relevant. The other cases are selected from the Federal High Court and First Instance Courts in Addis Ababa. The selection is made on the basis of their relevance to a particular legislation or application of a particular rule, such as tax crimes and crimes of engaging in commercial activities without a valid license, or doctrine, such as the principle of legality or of lenity.

¹¹² Wintgens 'Legislation as an Object of Study' (n 11) 18; Hoecke (111) 10 – 17.

¹¹³ La Torre (n 66) 25 – 27.

1.9. Significance of the Study

Beyond its legitimate end, criminal law is extensively used for maintaining political power, pursuing a particular political ideology, and creating administrative convenience. This undermines constitutional governance in Ethiopia, and rather created a criminal law state. Yet, the Ethiopian criminal law is not well researched to enquire into the ends it has been used. This study attempts to show the legitimate use of criminal law in a constitutional state and encourages others to engage in research and discourse on the nature and function of criminal law in Ethiopia. It attempts to bring to light how the political process negatively influenced the content as well as the effect of the criminal law. It does so by illustrating the fundamental deficiencies in the criminal lawmaking process as well as in criminal adjudication.

The core of the argument is limiting the criminal lawmaking power of the state. The study attempts to depict that instead of taking any criminal norm for granted, it may be subject to judicial litigation for its legitimacy, thereby keeping the lawmaker on notice that it should keep criminal rules up to date. It further shows that criminal law is subject to postulates that guide the continued validity and legitimacy of such a norm which requires the court to go beyond judicial formalism, to evaluate the legitimacy of a criminal norm.

It is a good coincidence that this research is done at a time where the political landscape is positively changing, and Ethiopia is engaged in significant legal reforms. One of the major areas of reform is the criminal justice system. This study will be a modest contribution to the criminal law reform part.

1.10. Scope of the Research

As the research is founded on the assumption of excessive use of criminal law and punishment, it evaluates the existing criminal law, which includes the Criminal Code, special penal legislation, sectoral regulatory legislation containing penal provisions, and subsidiary legislation adopted by the executive that are criminally sanctioned by the lawmaker directly or indirectly.

In order to also better diagnose the criminal lawmaking process that resulted in such a situation, the study examines the criminal lawmaking process. Further, the courts apply non-criminal law materials expanding the positive criminal law; and hence the practice of Ethiopian courts is also examined. However, because the ultimate objective is to establish normative and procedural standards for limiting the criminalising power of the state, the study focuses on the theory of criminalisation, constitutional legislative duties of the legislature, and the role of the bill of rights in criminal lawmaking. Besides, as those criminal law doctrines are borrowed from other jurisdictions, reference is made to the source country literature to further elaborate those doctrines.

1.11. Structure of The Study

This study attempts to establish normative and formal limitations on the criminalisation power of the state. The discussion is put in the following order. Chapter one introduces the study. Chapter two discusses the justification and legitimacy of criminal law. It explores the relationship between law and politics and the jurisdictional matters in criminal lawmaking. It argues that the state's use of criminal law is limited to achieving certain legitimate ends. The justifications for the use of the criminal law also define its scope both from the political doctrine of sovereignty as well as the criminal law doctrine of legal good perspective. However, this chapter finds that, for political reasons, both the doctrines of sovereignty and legal good have never been effective limitations in the criminal lawmaking.

Chapter three discusses the criminal lawmaking power. It first establishes the House of Peoples' Representatives has the constitutional criminal lawmaking power. Along with such power, the House has the obligation to make rational criminal law. It argues that the criminal law is a limitation to individual rights both in the prohibition of conducts and the consequences of such violations. It also argues that the adoption of the criminal law is required for the protection of human dignity or for promotion of other public goods. As part of the duty of the lawmaker to make rational criminal law, and in order to better resolve the conflict of values, the chapter applies the law of proportionality. Following the principle theory of rights, it argues that fundamental rights need necessarily be taken into consideration in the adoption of any public

policy. In that context, it argues that the bill of rights is used both as normative and procedural limitation to such criminal lawmaking power. It also argues that such rights are used as metanorms in the interpretation of the criminal law.

However, a growing number of 'criminal rules' applied by the courts or those norms sanctioned by the criminal law are adopted by the executive. Following such jurisdictional discussion, Chapter four discusses delegability of criminal lawmaking power to administrative agencies. It argues that the practice of either direct or indirect delegation of administrative rule making cannot be extended to criminal lawmaking. This is because the criminal lawmaking power of the House of Peoples' Representatives is an inherent power that cannot be delegated to any other organ.

The excessive use of criminal law and punishment by the lawmaker certainly calls for an enquiry for the lawmaking process where certain effective limitations to the criminalising power of the state may be found. Chapter five evaluates the criminal lawmaking process based on theories of legislation. It argues that one of the culprits is the decentralised bill initiation methods Ethiopia adopted. Almost every administrative agency tabling a bill to the Council of Ministers incorporates criminal rules in such administrative regulatory legislation. The study further argues that the lawmaker fails to comply with its own rules of lawmaking. It illustrates the lawmaking process for certain special penal legislation or legislation containing penal provisions.

Criminalisation is declaration of conduct criminal by the lawmaker. Thus, substantial part of the study is dedicated to the legislative criminalisation. Chapter six deals with the practice of interpretation and application of such criminal rules by the court. It argues that in interpretation of the criminal law, the court chooses legal theories and methods. If such choice is inspired by justice and rule of law, the court may limit the negative effects of the over-use of criminal law and punishment. However, the court disregards the long upheld doctrines and principles of interpretation, and there are instances where the court rather ends up expanding the scope of the criminal law. The study argues that this is criminalisation by the court.

Chapter Seven concludes the study and provides practical recommendations that are hoped to help limit the application of the criminal law to its legitimate ends.

CHAPTER 2. – JUSTIFICATION AND LEGITIMACY OF CRIMINAL LAW

2.1. Introduction

Criminal law is the state's coercive code of conduct for individuals to which they have to make their conduct conform. It is the most intrusive state action into individual freedom.¹ First, the prohibition restricts the individuals from acting as they would otherwise do. Second, where they violate such penal prohibition, the consequences are severe restrictions on their freedom.² The common punishment for violation of a criminal rule is incarceration, which is taken as a synonym to criminal law.³ Along with imprisonment, the law often imposes fine. In not few cases, where the crime is said to be serious, the punishment is death.⁴ Attached to specific types of offences, there are also secondary punishments which include restrictions on civil rights, such as, the right to vote and to run for public office, freedom of movement, the right to engage in certain professional activities, and suspension of license.⁵

The state has such criminal lawmaking power which needs to have a legal justification that is legitimate. Often, such justification and legitimacy find their roots in the theories of the respective subjects. This chapter discusses the justifications for such coercive state power in the doctrine of sovereignty. The central thesis of this chapter is the limitations to such criminal lawmaking power which are discussed in two levels.

¹ Nina Persak, *Criminalising Harmful Conduct: The Harm Principle, Its Limits and Continental Counterparts* (Springer 2007) 1, 6.

² Douglas Husak 'The Criminal Law as Last Resort' (2004) 24 Oxford J of L Studies 207, 233 – 35.

³ David Garland 'The Birth of Welfare Sanction' (1981) 8 British J of Law and Society 29, 30; Michel Foucault, *Discipline and Punish: The Birth of the Prison* (2nd edn, Alan Sheridan tr, Vintage Books 1991).

⁴ For an in-depth discussion on the death penalty, see section 3.4.3.1.

⁵ These are provided for both as protective orders while the proceeding is progressing as well as part of the final penal sentence. Crim C, arts 121 – 156.

The first level justification is found in sovereignty because the doctrine itself contains the notion of legitimacy distinguishing the legitimate use of violence from the illegitimate ones.

Sovereignty is a doctrine of power and its paradigm is the state. Both state and sovereignty explain each other because they are constituted of more or less the same elements – population, territory, government, and recognition.⁶ Further, law and state are two sides of a coin, one cannot exist without the other.⁷ Thus, both the notions of state and sovereignty are justified by the law. The particular law that constitutes and vests power on the state as a sovereign entity is a constitution. Constitutionalism is one form of organising society but the only form of 'legitimate' organisation.⁸

The second level of justification of such state coercive power, which swings away from justification to the realm of legitimacy, is the doctrine of 'legal good'. The criminal lawmaking power is guided by theories of crime which inherently limits the use of criminal law. The doctrine of legal good requires that criminal law is legitimate if the legal interest requires the protection of the criminal law, and other less intrusive state measures are proved ineffective. To be efficacious, the doctrine of legal good requires defining of the concept itself. Once legal good is defined, how it is incorporated into the Ethiopian criminal law, and its effectiveness as a means to limiting the criminalising power of the state requires an evaluation by taking specific penal provisions frequently prosecuted.

The proponents of the doctrine of legal good consider it as ineffective in limiting the criminalising power of the state because, they argued, it is not a constitutional principle. The chapter prepares the argument for the constitutional nature of the doctrine to be taken up in the following chapters.

⁶ Kriegel considers sovereignty is constituted of only the three elements short of recognition. Blandine Barret-Kriegel, *The State and the Rule of Law* (Marc A LePain and Jeffrey C Cohen tr, Princeton UP 1995) 29 ff.

⁷ Massimo La Torre, *Law as Institution* (Springer 2010) 26-33, 42-45, 137; Kriegel (n 6) 15.

⁸ Donald S Lutz, *Principles of Constitutional Design* (Cambridge UP 2006) 26 – 27.

2.2. Sovereign Power and Legitimacy of Criminal Law

2.2.1. Sovereignty (of the State)

The state is the highest and most complex form of socio-political organisation. It is a social construct or a legal fiction that is better explained by its constituting elements – territory, population, government (exercising control) and international recognition.⁹ Sovereignty is another instrumental concept that constitutes and vests a supreme power on such an entity, the state;¹⁰ as such, it is a ‘doctrine of power’.¹¹ It is the ‘ultimate’ or ‘supreme political power’ of a state beyond which there is none.¹²

However, sovereignty is not all about naked power; it is ‘a legitimate, rational and responsible exercise of power’¹³ for the ‘service of civil society’.¹⁴ However, as the doctrine came after the feudal system, it is inextricably linked with the notion of state that the two notions ‘mutually explain each other’.¹⁵ Thus, sovereignty is understood to be ‘the state under the rule of law’ which some consider a contradiction.¹⁶

The state uses the law both as a ‘source’ of power and as an ‘expression of power’.¹⁷ To better contextualise the scope and limitation of the criminal lawmaking power of the state, it is imperative to examine the justification of such power and its legitimacy. The

⁹ Simeneh Kiros Assefa ‘Sovereignty, Legitimacy, and Fundamental Rights as Limitation to Criminalisation Power of the State’ (2018) 12 Mizan LR 127. Also see Thomas J Biersteker and Cynthia Weber ‘The Social Construction of State Sovereignty’ in Thomas J Biersteker and Cynthia Weber (eds), *State Sovereignty as Social Construct* (Cambridge UP 1996) 1, 3, 11 ff; Thomas Gammeltoft-Hansen and Rebecca Adler-Nissen ‘An Introduction to Sovereignty Games’ in Rebecca Adler-Nissen and Thomas Gammeltoft-Hansen (eds), *Sovereignty Games: Instrumentalizing State Sovereignty in Europe and Beyond* (Palgrave 2008); John D Kelly and Martha Kaplan ‘Legal Fiction after Empire’ in Douglas Howland and Luise White (eds), *The State Sovereignty: Territories, Laws and Populations* (Indiana UP 2009).

¹⁰ Biersteker and Weber ‘The Social Construction of Sovereignty’ (n 9) 3 ff; Simeneh ‘Sovereignty, Legitimacy’ (n 9) 130 – 31.

¹¹ Kriegel (n 6) 15; La Torre (n 7) 9; Gammeltoft-Hansen and Adler-Nissen (n 9) 7. For Kelsen, sovereignty is the justification for the validity and efficacy of the national legal order. Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, Cambridge UP 1949) 255 ff.

¹² Lutz (n 8) 32 – 35; Gammeltoft-Hansen and Adler-Nissen (n 9) 3.

¹³ Kriegel (n 6) 17.

¹⁴ *ibid* 18, 21 – 24; Lutz (n 8) 26; La Torre (n 7) 19.

¹⁵ *ibid* 15.

¹⁶ *ibid* 17. Also see Luc J Wintgens ‘Rationality in Legislation – Legal Theory as Legisprudence: An Introduction’ in Luc J Wintgens (ed), *Legisprudence: A New Theoretical Approach to Legislation* (Hart Publishing 2002).

¹⁷ La Torre (n 7) 3 – 12.

traditional justification for the creation and maintenance of the sovereign power, which was also a justification for the creation of criminal law, was the social contract theory.¹⁸ Individuals, ceding a part of their freedom, constituted the sovereign as custodian of their rights.¹⁹ However, the social contract theory is rejected as ‘a fraud on the public’ or ‘a fiction’ for several reasons.²⁰ First, it is impractical to obtain ‘actual and unanimous consent’ from each individual to such a social contract; and there is no substitute for such positive assent to fulfil the social contract.²¹

Second, individual rights and freedoms are recognised by law in a civil society. Before the creation of the civil society, there can be no right that the rights the individuals were said to have ceded to create the sovereign did not exist in the first place.²² The various constitutional conventions undertaken so far have proven this fact – the 1991 Constitutional Assembly of Ethiopia, the Philadelphia and the Paris convention of the US and France, respectively – that the initial act was not based on consent or any other ‘legitimate’ act.²³ While Kant argues for a hypothetical contract, Rawls holds that a hypothetical agreement is not a sufficient condition for a public decision; there is an additional requirement – justice.²⁴ State action must not only be based on a social contract but such decision also must comply with the principles of justice, which are developed behind a veil of ignorance from an original position of equality.²⁵

¹⁸ Cesare Beccaria, *On Crimes and Punishments and Other Writings* (R Bellamy tr, Cambridge UP 1995) 9, 10.

¹⁹ *ibid.*

²⁰ Randy E Barnett ‘Constitutional Legitimacy’ (2003) 103 *Colum LR* 111, 112 – 30. Elia RG Pusterla, *The Credibility of Sovereignty – The Political Fiction of a Concept* (Springer 2016) 2, 10.

²¹ Alistair M Macleod ‘Coercion, Justice, and Democracy’ in David A Reidy and Walter J Riker (eds), *Coercion and the State* (Springer 2008) 66; Barnett (n 20) 115 – 27.

²² Jack Donnelly ‘Human Rights’ in John S Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory* (Oxford UP 2006) 603 – 06; Jack Donnelly, *Universal Human Rights: In Theory and Practice* (Third edn, Cornell UP 2013) 9, 13 – 15.

²³ Jon Elster ‘Constitutional Bootstrapping in Philadelphia and Paris’ in Michel Rosenfeld (ed), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Duke UP 1994) 64 – 68. The President of the Transitional Government of Ethiopia stated in his opening address that not all interested parties were invited to participate in the peace conference. ‘Editorial’ *Addis Zemen*, Addis Ababa, July 2, 1991 (in Amharic) 2; _____ ‘The Speech of the Provisional President of Ethiopia’ *Addis Zemen*, Addis Ababa, July 2, 1991 (in Amharic) 3 ff.

²⁴ Also see Walter J Riker ‘Democratic Legitimacy and the Reasoned Will of the People’ in David A Reidy and Walter J Riker (eds), *Coercion and the State* (Springer 2008); Jeremy Waldron ‘The Core of the Case Against Judicial Review’ (2006) 115 *Yale LJ* 1346; Macleod (n 21) 67 – 78.

²⁵ John Rawls, *A Theory of Justice* (Revised edn, Harvard UP 1999).

Hume holds, 'all governments which exist [] have been founded originally either upon usurpation or conquest or both, without any pretence of a fair consent or voluntary subjugation of the people'.²⁶ The coordination (dual convention) theory is a rather logically appealing explanation for the foundational legitimacy of the state. It holds that we join the already established constitutional convention not by positive assent but by acquiescence.²⁷ This is only for lack of coordination organising another constitutional convention opposing the ongoing convention because the already established constitution has 'the moral advantage'.²⁸ Further, the minorities' interests are better protected by the already established constitutional framework, because it is so costly to organise another constitutional convention.²⁹ In more or less the same strand, it is argued that the constitution is binding because we accept the metanorms that locate authority in the framers.³⁰ However, often, if not in all cases, the framers do not have legitimate power.³¹

Sovereignty is an instrumental concept which makes use of the law to justify power. It is often taken advantage of by a particular group which exercises such supreme power on the cloak of 'sovereignty'. Despite the difficulty of establishing foundational legitimacy of sovereignty, it might be considered legitimate where the subsequent exercise of such power is used for the common good.³² Thus, the coercive power of the

²⁶ David Hume quoted in Patrick Riley, *Will and Political Legitimacy: A Critical Exposition of Social Contract Theory in Hobbes, Locke, Rousseau, Kant, and Hegel* (Harvard UP 1982) 248, note 7; Kriegel (n 6) 23; La Torre (n 7) 51 – 52.

²⁷ Russell Hardin 'Constitutionalism' in Barry R Weingast and Donald A Wittman (eds), *The Oxford Handbook of Political Economy* (Oxford UP 2006) 297; Luc J Wintgens, *Legisprudence: Practical Reason in Legislation* (Ashgate Publishing 2012) 231 ff; Michael J Perry 'What is 'the Constitution'? (and Other Fundamental Questions)' in Larry Alexander, *Constitutionalism: Philosophical Foundations* (Cambridge UP 1998).

²⁸ Hardin (n 27) 298; Larry Alexander 'Introduction' in Larry Alexander, *Constitutionalism: Philosophical Foundations* (Cambridge UP 1998) 6; Frank I Michelman 'Constitutional Authorship' in Larry Alexander, *Constitutionalism: Philosophical Foundations* (Cambridge UP 1998).

²⁹ Hardin (n 27) 298.

³⁰ Richard S Kay 'American Constitutionalism' in Larry Alexander, *Constitutionalism: Philosophical Foundations* (Cambridge UP 1998). Michelman calls this 'authority syndrome.' Michelman (n 28).

³¹ For instance, the body who drew up *The Federal Democratic Republic of Ethiopia Constitution Proclamation No 1/1995* ('FDRE Const') was constituted by the EPRDF after taking power by force from the previously government lacking such 'foundational legitimacy'. Thus, however far back we can go, finding foundational legitimacy is as difficult.

³² Barnett made a distinction between initial legitimacy and subsequent legitimacy. For lack of proof of the initial legitimacy, he argues for the subsequent exercise of power by those who claim sovereign power. Barnett (n 20) 137 – 48. His fundamental argument revolves around the process

state may be justified if it is exercised within reasonable substantive and procedural bounds, which the constitution is meant to do.³³ Chapter three discusses the substantive and formal limitations on the power of criminalisation enshrined in the Constitution; chapter five discusses the procedural limitations in the lawmaking process taking those substantive limitations into consideration. This chapter discusses limitations inherent in the criminal law by demanding the public interest justification for the exercise of the state's coercive power manifested in the criminal law.

2.2.2. Criminalisation of Conduct

The criminal lawmaking power of the state is criminalisation, which is a normative declaration of conduct criminal. A criminal norm has both the operative and consequence parts.³⁴ The operative part is the penal prescription of conduct. However, when such a prescription is violated, the natural consequence is punishment and/or other measures.³⁵ Thus, the lawmaker also declares the consequence of the violation of the penal law.

2.2.2.1. Fundamental Assumptions of Continental Criminal Law

Criminal law and punishment are used to achieve purposes for which it is far too short to achieve; it is intended to prevent (threat of) harm to a legally protected interest, because other less intrusive state measures failed to achieve such objective. The supreme foundation of this purpose is the assumption that the individual is rational and responsible being making choices; he is capable of making such 'socially good' choices.³⁶ But he is also capable of making 'socially harmful' choices. The criminal law, as a code of conduct, is there to encourage and guide the individual to make choices

and institutions that guarantee the public interest nature of the decisions. That is one major reason that Waldron argues against strong judicial review. Waldron (n 24) 1376 – 95.

³³ Andrej Kristan 'Three Grounds for Tests of the Justifiability of Legislative Action: Freedom, Representative Democracy, and Rule of Law' in Luc J Wintgens and A Daniel Oliver-Lalana (eds), *The Rationality and Justification of Legislation: Essays in Legisprudence* (Springer 2013); Macleod (n 21).

³⁴ Humberto Ávila, *Theory of Legal Principles* (Springer 2007) 9 – 25.

³⁵ Gabriel Hallevy, *A Modern Treatise on the Principle of Legality in Criminal Law* (Springer 2010) 16 – 18; Gabriel Hallevy, *The Right to be Punished: Modern Doctrinal Sentencing* (Springer 2013) 8 – 9.

³⁶ Henrique Carvalho, *The Preventive Turn in Criminal Law* (Oxford UP 2017) 2 – 16. Also see Burton M Leiser 'On Coercion' in David A Reidy and Walter J Riker (eds), *Coercion and the State* (Springer 2008) 37; Werner S Landecker 'Criminology in Germany' (1941) 31 J of Crim L and Criminology 551, 553.

that are not harmful to the social existence of the individual.³⁷ Thus, the continental criminal law has four fundamental principles from which all sub-principles and rules sprang.³⁸ (1) the principle of legality³⁹ – as a rule of conduct, the criminal law has to define both the operative parts and their consequences clearly to give the individual a fair notice so that he could make his conducts conform to the requirements of the law. (2) the principle of conduct⁴⁰ – the criminal law prohibits conducts that are harmful to the human society, including gross inaction deliberately (threatening to) causing harm where there is a legal duty to act. Thus, there can be no crime in the absence of action. (3) the principle of culpability⁴¹ – the conduct that is harmful to human society and what criminal law prohibits is such guilty conduct. Therefore, there is no crime in the absence of guilt. In this context, it is intentional conduct that is punishable; only in rare situations where the individual is engaged in certain activities that negligence is made punishable where it is expressly provided for. And (4) the principle of personal responsibility⁴² – as a code of conduct, the criminal law prescribes the individual to behave in a certain manner. It does not require the individual to be a law enforcer. Consequently, he is responsible only for his own conducts, not for the conduct of others.

Those assumptions work for the operative part of the criminal law; however, the determination of the consequence is in the dark. There is no evidence punishment or the severity of punishment deters potential violators of the criminal law;⁴³ nor is there

³⁷ Beccaria (n 18) 11. The 1957 Penal Code states that 'one who witnesses the punishment of a wrong-doer will become prudent'. Preface para 2.

³⁸ Hallevy, *Principle of Legality* (n 35) 1 – 14.

³⁹ Crim C, art 2.

⁴⁰ *ibid* art 23.

⁴¹ *ibid* arts 56-58.

⁴² *ibid* art 44.

⁴³ Paul H Robinson and John M Darley 'The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best' (2003) 91 *The Georgetown LJ* 949. Also see Simeneh Kiros Assefa 'Walking in the Dark: Lack in the Use of Criminal Statistics for Public Policy and Legislative Action' 12 *Mizan LR* 371, 375; Hallevy, *The Right to be Punished* (n 35) 32 – 34. When pickpocket was once a capital offence in England in 1866, of the 167 persons 'prepared for death, no fewer than 161 had actually witnessed execution.' Nor had flogging reduced crime. Gerald Gardiner 'The Purposes of Criminal Punishment: I. The Nature of Punishment' (1958) 21 *MLR* 117, 121 – 22. Criminal statistics is a rate of non-compliance not a rate of compliance. Robert F Meier and Weldon T Jonson 'Deterrence as Social Control: The Legal and Extralegal Production of Conformity' (1977) 42 *Am Sociological Rev* 292, 294 – 95.

evidence that the good conduct of others is not the result of the punishment.⁴⁴ It is the threat of apprehension and conviction that would deter offenders.⁴⁵ It is for this reason that some argue, the law punishes to prove the promise of punishment is genuine.⁴⁶ In establishing the principle of parsimony, Cesare Beccaria argues, it is the certainty of punishment not the severity of a punishment that deters potential offenders, because sentient men are moved by the desire to avoid pain 'rather than the pursuit of pleasure'.⁴⁷ This argument holds even in contemporary arguments for punishment.⁴⁸ While there is still a valid moral argument that a person should be punished for his conduct, he should not be punished to teach others because that makes the punishment inhumane. Further, the theory of punishment is a contradiction in itself.⁴⁹ For that reason, it appears, some move the argument on the state's coercive power from one of legitimacy to that of moral defensibility.⁵⁰

2.2.3. Justification of Criminal Law

Sovereignty is the property of a state, a doctrine of power, vesting all supreme power on the state. Such power (and the notion of the state itself) is justified by and manifested through the law.⁵¹ Thus, the state 'has' monopoly of all legitimate coercive power,⁵² such as, criminal law, tax law and conscription;⁵³ but criminal law is the most intrusive of all state actions into the rights of the individual. Essentially, criminal law

⁴⁴ Macleod (n 21) 64.

⁴⁵ This conforms to Beccaria's principle of parsimony. Beccaria (n 18) 31; Hallevy, *The Right to be Punished* (n 35) 24 – 33. Also see Gardiner (n 43); Meier and Johnson (n 43).

⁴⁶ Thomas Vormbaum, *A Modern History of German Criminal Law* (Margaret Hiley Tr., Springer 2014) 40. Also see Landecker (n 36) 554; Carl Ludwig von Bar, et al, *A History of Continental Criminal Law* (Little, Brown and Company 1916) 429 – 31.

⁴⁷ Beccaria (n 18) 9; R Bellamy 'Introduction' in Cesare Beccaria, *On Crimes and Punishments and Other Writings* (R Bellamy tr, Cambridge UP 1995) xiv – xv; Kelsen, *General Theory of Law* (n 11) 17.

⁴⁸ Hallevy, *The Right to be Punished* (n 35) 32.

⁴⁹ *ibid* 33 – 36. Also see Landecker (n 36) 552 – 53.

⁵⁰ Macleod (n 21) 66 – 67.

⁵¹ La Torre (n 7) 16 – 18; Hans Kelsen, *Pure Theory of Law* (Max Knight tr, The Lawbook Exchange, 2005) 286 – 319.

⁵² Scott A Anderson 'How Did There Come to Be Two Kinds of Coercion?' in David A Reidy and Walter J Riker (eds), *Coercion and the State* (Springer 2008) 22; Kelsen, *Pure Theory of Law* (n 51) 30 – 49.

⁵³ David A Reidy and Walter J Riker 'Introduction' in David A Reidy and Walter J Riker (eds), *Coercion and the State* (Springer 2008) 6; Leiser (n 36) 37.

is a ‘violation’ of the rights of the individual, because the punishment is incarceration⁵⁴ and fine, in some instances, death, at least in the present Ethiopian criminal law.⁵⁵ Thus, the criminal law with such consequences must be justified by different legal theories.

Crime used to be treated as a sin against God and criminal punishment as expiation.⁵⁶ The methods in criminal law were not regulated, including the use of interpretation of criminal law by analogy.⁵⁷ Criminal law is positivized since the period of Enlightenment and, as a consequence, secularised based on the social contract theory and authority of the sovereign.⁵⁸ This is the beginning of the liberal criminal law including limiting the courts’ power of interpretation by analogy based on the principle of legality.⁵⁹ However, where the social contract theory is effectively disproved as a foundational legitimacy of sovereignty (of the state) and its powers,⁶⁰ the coordination theory became more palpable, it naturally follows that the criminal law may be justified by such coordination theory.

The limitation on criminal lawmaking may be seen from two points of view. First, if the justification for the doctrine of sovereignty is coordination theory and sovereignty is the power aspect of the state, then criminal law is a manifestation of such power and thus, needs to be justified by the coordination theory which must contain the common good. Yet, such an absence of foundational legitimacy of constitutions requires

⁵⁴ Garland (n 3) 30.

⁵⁵ There are several criminal provisions that entail the death penalty and it is still deemed constitutional. For an in-depth discussion, see section 3.4.3.1.

⁵⁶ Jean Graven ‘The Penal Code of the Empire of Ethiopia’ (1964) 1 J Eth L 267, 288; Hallevy, *The Right to be Punished* (n 35) 1 – 3; Gardiner (n 43) 117-119.

⁵⁷ Interpretation by analogy was a proper method in the *Fiteha Negest*; the ninth condition for one to become a judge is to know the law and being ‘able to draw analogies’. *Fiteha Negest: The Law of the Kings* (Trans. Abba Paulos Tsadwa, Law Faculty, HSIU 1968) 251. Also see Reinhard Zimmermann ‘Statuta sunt stricte interpretanda? Statutes and the Common Law: A Continental Perspective’ (1997) 56 The Cambridge L J 315, 316.

⁵⁸ Beccaria (n 18) 9 – 10; Bernard E Harcourt ‘Beccaria’s *On Crimes and Punishments*: A Mirror on the History of Foundations of Modern Criminal Law’ in Markus D Dubber (ed), *Foundational Texts in Modern Criminal Law* (Oxford UP 2014) 44; Garland (n 3) 32. However, Beccaria himself stated his reservations to the ‘social contract’. Beccaria (n 18) 11 – 14.

⁵⁹ Beccaria (n 18) 12, 14.

⁶⁰ Some even opine ‘universal consent cannot convert the unjust to the just’ and society is not empowered to legislate absurdities. La Torre (n 7) 15.

subsequent legitimacy for such a constitution to legitimize the coercive power of the state.⁶¹ The utility of the criminal law should thus be limited to basic and essential matters because even the principle of utility cannot override individual rights. Second, if the coordination theory is affording enough protection to the rights of individuals, the application of criminal law also implicates the bill of rights, which is the subject of the next chapter.

On the other hand, the arguments for the legitimacy of the use of power also developed a theory for the use of criminal law. This was defined by the individual rationality and individual responsibility which redefined the object of punishment.⁶² This theory is developed independent of constitutional principles but it now forms part of, or given effect through, those constitutional principles, such as the principle of proportionality, the principle of reasonableness and the prohibition of excess.⁶³ The justifications for constitutional developments and use of criminal law theory are seen together because they are both exercise of power by the state, the sovereign.

2.2.4. Sovereignty in Ethiopia

Despite the arguments for the legitimacy of sovereignty shifts from the social contract to the coordination theory, such arguments hold for constitutional systems claiming authority from their people. None of the Ethiopian constitutions adopted so far have such claim. The 1931 Constitution was 'granted' by the Emperor to his people wherein the Emperor is recognised as sovereign, 'elect of God'. The 1955 Revised Constitution continued 'the tradition' attaching sovereignty with 'the Crown', not the people. The subsequent constitutions made the notion of sovereignty even abstract. Under the *Constitution of the People's Democratic Republic of Ethiopia (Proclamation No 1, 1987)*, sovereignty belongs to 'the working People'. The Constitution, article 1(1) defines 'the working people' as 'workers and peasants and the [] intelligentsia, the revolutionary army, artisans and other democratic sections of society'. The *Constitution of the Federal*

⁶¹ Elster (n 23) 67, 74 – 80.

⁶² Carvalho (n 36) 23 – 35; Garland (n 3) 31 – 32. See, generally Hallevy, *The Right to be Punished* (n 35). Also see Alan W Norrie, *Law, Ideology and Punishment* (Kluwer Publishers 1991).

⁶³ Robert Alexy 'The Reasonableness of Law' in Giorgio Bongiovanni, Giovanni Sartor and Chira Valentini (eds), *Reasonableness and Law* (Springer 2009).

Democratic Republic of Ethiopia ('the Constitution') claims to be a pact among and vests sovereignty on 'the Nations, Nationalities and Peoples of Ethiopia'.⁶⁴

There is no role for the individual in the making of those constitutions. However, criminal law, adopted based on the power vested by such a constitution, applies only to the individual. Such criminal law, inspired by the classical concepts of individual rationality and responsibility, is a product of the social construct as part of the notions of state, sovereignty, and constitutionalism.

The source of sovereignty may be argued to be a limitation to the power to be exercised. For instance, the Constitution, article 8(1) provides that '[a]ll sovereign power resides in the Nations, Nationalities, and Peoples of Ethiopia'. The Constitution is a manifestation of their sovereignty which is to be 'expressed through their representatives elected in accordance with the Constitution'.⁶⁵ It is made clear that the House of Peoples' Representatives ('the HoPR') does not have inherent power but only delegated power. Therefore, an agent can only have as much power as is delegated to it.⁶⁶ The terms and conditions of the delegation are provided for in the Constitution.⁶⁷ The theories of the legitimacy of such sovereign power, as well as justifications of the criminal lawmaking power, remains to be unsettled in the Ethiopian constitutions. The political ideologies dominate the discourse. Yet we have criminal laws adopted based on the power vested by such constitutions. Consequently, such lack of settled foundational legitimacy in the constitution requires subsequent legitimation for the proper utilisation of the criminal law. However, in practice, because the political ideology pervades all aspects of life, including possible theories of subjects, the notion of sovereignty is rather used to justify the oppressive action by a particular group that controls the government.⁶⁸

⁶⁴ FDRE Const, art 8(1).

⁶⁵ *ibid* art 8(3).

⁶⁶ Luc J Wintgens 'Legisprudence as a New Theory of Legislation' in Luc J Wintgens, *The Theory and Practice of Legislation: Essays in Legisprudence* (Routledge 2005) 6 – 7, 25.

⁶⁷ FDRE Const, art 51, 55, 77(13).

⁶⁸ See, Simeneh Kiros Assefa and Cherinet Hordofa Wetere, 'Governing Using Criminal Law: Historicising the Instrumentality of Criminal Law in Ethiopian Political Power' (2019) 31 J Eth L (forthcoming).

2.3. Theory of Crime

The Constitution and criminal law have rules and principles. However, the rules and principles do not say everything about themselves. Rules are to be applied to the facts and are given effect by employing theories, doctrines, and metanorms.⁶⁹ This is because there is no direct access to reality, but only indirectly, through interpretation.⁷⁰ A theory is a 'potential model for solution' because it gives perspective to the discussion. It is a paradigmatic way of looking at a given issue making the enquiry scientific and intelligible.⁷¹ As criminal law is local in nature and influenced by factors in that specific locality, some argue that such theory is also local.⁷² There are substantial factors that affect the content of the criminal law, but there are also universal factors that come into play. Almost all of the grounds for limitation of the criminalising power of the state – the notion of sovereignty, constitutionalism and the bill of rights – are (near) universal. Thus, even though the criminal law theory may be developed on a local basis, its content is defined by a host of other factors that defy locality of views. Besides, a theory is very much aligned with the legal culture than the local culture.

The potential for limiting the criminalising power of the state comes in different forms; the theory of crime is a limitation of criminalising power of the state that is inherent in criminal law itself. In the common-law system, certain conducts may be punished to prevent 'harm to others'. In the continental system, on the other hand, conducts may be criminalised for the protection of a 'legal good' provided other less intrusive means proved ineffective. Unlike in the common-law system, the continental law doctrine legal good is a metanorm that also helps the judge in the interpretation and application of the criminal law. This section examines such theories of crime as they had evolved parallel to the various constitutional principles.

⁶⁹ Ávila (n 34) 83 – 127.

⁷⁰ Wintgens 'Legisprudence as a New Theory' (n 66) 14.

⁷¹ EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge UP 2005) 8-9; George P Fletcher 'The Nature and Function of Criminal Theory' (2000) 88 California LR 687, 689 – 90. Also see in general, RA Duff 'Towards a Theory of Criminal Law' (2010) 84 Proceedings of the Aristotelian Society 1.

⁷² Duff (n 71) 2 – 7.

2.3.1. The Anglo-American Harm Principle

In the Anglo-American system, there does not appear to be a theory of crime and thus criminalisation appears to be uncontrolled.⁷³ There is rather an extensive discussion on the theories of punishment which help develop the retributive theory and the desert theory.⁷⁴ The most frequently invoked theory is that of Mill's theory of 'harm to others'.⁷⁵ He contends that the state may use the criminal law justifiably where there is harm to others. Despite harm is the central concept justifying punishment, it leaves out several things that should be legitimately in the realm of criminalisation, such as, harm to the self and other non-harm offences, such as, threats of such harm.⁷⁶ Thus, the theory of criminalisation in the common law system is 'woefully inadequate'.⁷⁷

The preceding discussion depicts that debates in the Anglo-American system are very much focused on punishment⁷⁸ than criminalisation.⁷⁹ The discussion on punishment are backtracked as a theory of crime and may be argued that the Anglo-American system justifies criminal law based on the prevention of harm.⁸⁰ Intending to develop a proper theory of criminalisation, Douglas Husak only recently suggested Congress should consider whether there is a 'legitimate state interest' before adopting a criminal bill,⁸¹ which is unlikely to bear fruits because it is sown on the barren land wherein punishment is more supported by retribution than consequential theories of punishment. However, this harm principle is often seen at par with the continental doctrine of 'legal good'.⁸²

⁷³ Husak (n 2) 209; Rachele E Barkow 'Separation of Powers and Criminal Law' (2006) 58 Stanford LR 989, 995; Fletcher (n 71) 691. Also see Duff (n 71).

⁷⁴ Generally, see Malcolm Thorburn and Allan Manson 'The Sentencing Theory Debates: Convergence in Outcomes, Divergence in Reasoning' (2007) 10 New Crim LR 278.

⁷⁵ Markus D Dubber 'Theories of Crime and Punishment in German Criminal Law' (2005) 53 Am J Comp L 679, 682; Persak (n 1) 13 ff.

⁷⁶ Persak (n 1) 13 – 22; Dubber 'Theories of Crime' (n 75) 682 – 83.

⁷⁷ Husak (n 2) 209.

⁷⁸ Dubber 'Theories of Crime' (n 75) 681-83.

⁷⁹ *ibid* 681.

⁸⁰ Markus D Dubber 'Criminal Law in Comparative Context' (2006) 56 J of Legal Education 433, 433 – 34.

⁸¹ Husak (n) 209 – 212, 230.

⁸² Persak (n 1) 4, 95, 105 - 07; Dubber 'Theories of Crime' (n 75) 682 – 83; Markus D Dubber and Tatjana Hörnle, *Criminal Law: A Comparative Approach* (Oxford UP 2014) 113 ff.

2.3.2. The Doctrine of Legal (Public) Good

2.3.2.1. The Context of the Doctrine

In his *Crime and Punishment*, Beccaria attempted to include what kind of conducts deserve criminalisation and consequently punishment.⁸³ Basing his argument on the principle of utility⁸⁴ and the social contract,⁸⁵ Beccaria expands the justification for the existence of the sovereign to the exercise of its sovereign power, criminalisation of conduct and enforcement of such criminal law.⁸⁶ He argued for the prevention of harm for the common good as a justification. He classified crimes into three categories based on the degree of harm they (threat to) cause to the collectivity:⁸⁷

Some crimes directly destroy society or its representatives. Some undermine the personal security of a citizen by attacking his life, good or honour. Others still are actions contrary to what each citizen views public good, is obliged by law to do or not to do. The first, which are the greatest crimes, because the most damaging are those which are called *lèse-majesté* or sedition.

Drafting the Bavarian Penal Code in 1813, Paul Johann Anselm Feuerbach used general (deterrence) prevention as the objective of the criminal law.⁸⁸ However, the definition of interests protected revolves around 'subjective rights'. 'Subjective rights' meant traditional crimes such as murder, theft, bodily injury, excluding those so-called victimless crimes.⁸⁹ Even crimes against the government were treated as crimes against the king, including treason. Those other norms protecting beyond individual interests, he referred to them as police crimes for lack of an alternative.⁹⁰

⁸³ He argued for the positivisation (Beccaria (n 18) 12, 17), secularisation (ibid 5, 9, 11) and humanisation (ibid 8) of criminal law.

⁸⁴ ibid 7.

⁸⁵ ibid 9 – 10, 13.

⁸⁶ ibid.

⁸⁷ ibid 24 – 25.

⁸⁸ Dubber 'Theories of Crime' (n 75) 700; Landecker (n 36) 554; Vormbaum (n 46) 37 – 39.

⁸⁹ Dubber 'Theories of Crime' (n 75) 687. Vormbaum (n 46) 49.

⁹⁰ ibid.

Intending to fill the gap, Johann Michael Franz Birnbaum coined the phrase ‘legal good’ which also expands the scope of the criminal law.⁹¹ The concept was captured by the German term *Rechtsgut*. The term *Recht*, according to Dubber, is known for its vagueness. It ‘straddles the distinction between justice and law, rightness and legality, natural and positive law, and even rights and right’.⁹² Thus, in Feuerbach’s work the terms denote ‘right’ while in Birnbaum, it denotes ‘the law’.⁹³ Despite its pivotal role, because of its ambiguities, the concept was disregarded as ‘redundant’ until it was rediscovered by Karl Lorenz Binding to expand the reach of the criminal law.⁹⁴ The doctrine of legal good expands the protection from subjective rights to state interests, and from harm to legal interests to threats of harm to those interests.⁹⁵ However, when the criminal law incorporates threats of harm, it focuses on concrete dangerousness rather than abstract dangerousness. Such definition of the concept of the legal good captures only its positive or formal aspect,⁹⁶ the state’s right to obedience.⁹⁷

2.3.2.2. Defining the Doctrine of Legal Good

Legal good is an interest that is (requires to be) protected by law. In this sense, legal good is very broad as it covers the law in general. Thus, a distinction is made between those legal goods which are protected by law in general and those legal goods that are protected or need the protection of the criminal law.⁹⁸ Further, central to the present discussion, there is a distinction made between the formal or positive aspect and the

⁹¹ Dubber ‘Theories of Crime’ (n 75) 687, 688; Vormbaum (n 46) 49, 50; Simeneh Kiros Assefa and Cherinet Hordofa Wetere ‘Over-Criminalisation’: A Review of Special Penal Legislation and Administrative Penal Provisions in Ethiopia’ (2017) 29 J Eth L 49, 55.

⁹² Dubber ‘Theories of Crime’ (n 75) 686. Also see Markus D Dubber ‘Grounding Criminal Foundational Texts in Comparative Historical Perspective’ in Markus D Dubber (ed) *Foundational Texts in Modern Criminal Law* (Oxford UP 2014) 11 – 13.

⁹³ Dubber ‘Theories of Crime’ (n 75) 686, note 31. Even in contemporary literature, the term *Recht*, is used with adjectives, ‘objective law’ and ‘subjective right’. Julian Rivers ‘Translator’s Introduction’ in Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, Oxford UP 2010) xxiii – xxviii.

⁹⁴ Dubber ‘Theories of Crime’ (n 75) 687; Vormbaum (n 46) 50.

⁹⁵ Dubber ‘Theories of Crime’ (n 75) 688, 691 – 92.

⁹⁶ *ibid* 688; Vormbaum (n 46) 49 – 50.

⁹⁷ Dubber ‘Theories of Crime’ (n 75) 686 – 88, 697.

⁹⁸ Santiago Mir Puig ‘Legal Goods Protected by the Law and Legal Goods Protected by the Criminal Law, as Limits to the State’s Power to Criminalize Conduct’ (2008) 11 New Crim LR: An Int’l and Interdisciplinary J 409.

substantive or normative aspect of the theory of legal good.⁹⁹ The positive notion of legal good refers to interests that are protected by law,¹⁰⁰ that is, a legal good is one that is protected by criminal law. This is a circular statement that it does not help in the discussion on the limitation on criminalising power of the state. Thus, resort is made to the normative (substantive) aspect of the theory.¹⁰¹

The normative aspect of the theory of legal good helps the lawmaker determine what interests need the protection of the criminal law; stated otherwise, it helps in the determination of what conducts should be criminalised.¹⁰² There are positive and negative requirements to be complied with, the positive requirements being debatable.

2.3.2.2.1. The Positive Requirements of the Theory of Legal Good

To get the protection of criminal law, a legal interest needs to be one deserving of such protection. The basic purpose of the criminal law is the protection of the legal good which is important for the social existence of the individual.¹⁰³ In German criminal law, the doctrine of legal good is an aspect of the principle of legality.¹⁰⁴ And those legal goods are 'life goods' coming in two forms. The first category includes 'elementary life goods', such as life, limb, property, freedom, and institutional and operational integrity (incorruptibility) of public offices.¹⁰⁵ The second category of 'life goods' include 'deeply rooted ethical convictions of society', such as, 'prohibition of animal cruelty' and blasphemy.¹⁰⁶

Regarding the positive aspect of the concept of legal good, the illustration may be good enough. In its normative aspect, however, those illustrations raise more questions than they answer, because it is not what is defined as a legal good that is challenging to

⁹⁹ Dubber makes a distinction between 'positive' and 'normative' aspects of the doctrine of legal good, Dubber 'Theories of Crime' (n 75) 684 – 88, while Mir Puig makes a distinction between 'formal' and 'substantive' conception of the doctrine. Mir Puig (n 98) 410 – 12.

¹⁰⁰ Dubber 'Theories of Crime' (n 75) 684 – 85; Mir Puig (n 98) 410.

¹⁰¹ Dubber 'Theories of Crime' (n 75) 685 – 86.

¹⁰² *ibid* 685 – 88.

¹⁰³ *ibid* 684.

¹⁰⁴ Hallevy, *The Principle of Legality* (n 35) 12.

¹⁰⁵ Dubber 'Theories of Crime' (n 75) 684 – 85.

¹⁰⁶ *ibid*.

define. It is the normative aspect of legal good that guides the legislature in criminalisation of conduct.

To address the issue, Santiago Mir Puig forwards a few requirements for a legal interest to be protected by criminal law. The first subject that is worth considering is 'the social importance of the good'.¹⁰⁷ The end of criminal law is the protection of interests that are essential to the social existence of the individual. Therefore, he assumes that the criminal law is to be used to enforce such important interests, not trivial violations.¹⁰⁸ Thus, the interest must be determined to be 'fundamental to social life'.¹⁰⁹

It is relatively easy to agree on the general principle that the interest that is worth protecting through criminal law must be one that has an impact on the social life, but the difficulty is making the actual decision based on such general principles.¹¹⁰ He then went on considering other requirements. He reviews the importance of the interest and the seriousness of the harm caused to such interest. He considers whether the interest is guaranteed by the constitution, including those interests that are illustrated above – life, liberty, property, the integrity of the public office, and such other interests that make the individual personal development possible. But the harm to such interest must also be substantial.¹¹¹ This takes us to the issue of inchoate crimes, such as attempt, conspiracy to commit crime, and preparation, where harm did not occur but a threat of harm occurred. Thus, in such situation, the interest must be substantial interest and the threat of harm must be substantial and concrete¹¹² to help achieve the basic object of the criminal law – protection of legal good.¹¹³

¹⁰⁷ Mir Puig (n 98) 413 – 14. Roxin also focuses on 'the social system's ability to function'. Roxin 15 cited in Dubber 'Theories of Crime' (n 75) 690.

¹⁰⁸ Fernando Molina 'A Comparison Between Continental European and Anglo-American Approaches to Overcriminalization and Some Remarks on How to Deal with It' (2011) 14 New Crim LR 123, 125 – 26.

¹⁰⁹ Mir Puig (n 98) 413.

¹¹⁰ *ibid* 413 – 414.

¹¹¹ *ibid*.

¹¹² Dubber 'Theories of Crime' (n 75) 691 – 92.

¹¹³ Molina (n 108) 126; Dubber 'Theories of Crime' (n 75) 693.

The protection of the legal good is discussed in the context of a liberal society that desires to adopt a liberal criminal law. Collective interest cannot be protected in the abstract which is a manifestation of authoritarian society.¹¹⁴ Thus, in a liberal society, the collective interest may be protected by the criminal law if it has direct and serious consequences to the individual. If there is no 'concrete amount of [or threat of] harm caused to the individual', it is not an interest worthy of the protection of criminal law.¹¹⁵ To constitute a legal good that deserves the protection of the criminal law, the importance of a collective interest needs to be seen in the light of whether it is relevant to the social existence of the individual and whether harm to such interest substantially affects the individual. An important point that is worth mentioning is, political ideologies are not interests to be protected by the criminal law, because they only limit public choices rather than promote the social existence of the individual.¹¹⁶

This discussion must also be seen in the light of the already established fundamental principles of the criminal law: the principle of legality, the principle of conduct, the principle of culpability and the principle of personal responsibility.¹¹⁷ Those principles are based on the fundamental assumption that the individual is a rational being making choices.¹¹⁸ Therefore, those conducts that are criminalised should also be personally committed with the required moral element. Stated otherwise, there can be no criminal liability in the absence of violation of prohibited conduct, nor can there be strict criminal liability.

2.3.2.2.2. The Subsidiarity of Criminal Law

Unlike the positive requirements of criminalisation, the negative requirement of criminalisation is relatively straight forward; that is, criminal law may be used only if other less intrusive measures are proved ineffective for the protection of the legal

¹¹⁴ Mir Puig (n 98) 415, 416.

¹¹⁵ *ibid* 417.

¹¹⁶ Such is the nature of authoritarian criminal law denying the public alternative policy platform in a non-democratic state. Simeneh and Cherinet 'Governing Using Criminal Law' (n 68).

¹¹⁷ Hallevy, *The Principle of Legality* (n 35) 4-5; Simeneh 'Methods and Manners of Interpretation' (n 16) 94 - 95.

¹¹⁸ The utilitarian theory of criminal law is based on such assumption that individuals make choices and make the criminal law unappealing choice.

interest.¹¹⁹ This presupposes there are alternative measures to be considered before resorting to criminal punishment.¹²⁰ Only when such administrative measures or civil actions, for instance, are found to be ineffective for the protection of such legal interest, that resort to criminalisation may be made.¹²¹ The principle of *ultima ratio* has, at least, two scaffolding principles – from the criminal law realm, as it is the most intrusive state action, it is a last resort action.¹²² However, seen from the constitutional principle perspective, from the super-principle of rule of law, there is a need for state restraint in using such harsh measures.¹²³ This principle may, therefore, be seen in the context of constitutional principles, such as the principles of proportionality, necessity, the prohibition of excess, and subsidiarity.¹²⁴ The doubts that are reflected regarding the positive requirement do not exist in this negative requirement. It can be implemented with relative certainty. Obviously, the effectiveness of legislation may be seen only after they are tested based on statistical data regarding the implementation and failure of other measures.¹²⁵ Therefore, the state must prove that other measures are not as effective in protecting the legal good before resorting to using the criminal law.¹²⁶

The violation of this principle would certainly result in over-criminalisation.¹²⁷ This is because, such a principle can only work with the specific purpose of criminal law, prevention.¹²⁸ If the criminal law is used for other purposes, such principle does not work effectively in limiting the criminalising power of the state.

¹¹⁹ Mir Puig (n 98) 418; Persak (n 1) 22 – 23; Husak (n 2) 211 – 12.

¹²⁰ Husak (n 2) 214 – 15, 219 – 20.

¹²¹ Dubber ‘Theories of Crime’ (n 75) 692; Mir Puig (n 98) 417 – 18; Persak (n 1) 22 – 29; Luis E Chiesa ‘The Rise of Spanish and Latin American Criminal Theory’ (2008) 11 New Crim LR 363, 367.

¹²² In German Criminal Law, the principle of *ultima ratio* is a part of the principle of legality. Hallevy, *The Principle of Legality* (n 35) 12; Chiesa (n 121) 366 – 68.

¹²³ Dubber ‘Theories of Crime’ (n 75) 692; Husak (n 2) 230 – 33, 235.

¹²⁴ AMP del Pino ‘The Proportionality Principle in a Broad Sense and Its Content of Rationality: The Principle of Subsidiarity’ in Adan Nieto Martin and de Marta Munoz de Morales Romero (eds), *Towards a Rational Legislative Evaluation in Criminal Law* (Springer 2016) 264 ff; Dubber ‘Theories of Crime’ (n 75) 692; Husak (n 2) 217 – 18.

¹²⁵ Simeneh ‘Walking in the Dark’ (n 43) 387 – 99.

¹²⁶ Persak (n 1) 22 – 29; Husak (n 2) 212, 220.

¹²⁷ Molina (n 108) 129; Husak (n 2) 221 – 22.

¹²⁸ Husak (n 2) 217, 221; Molina (n 108) 125 – 26. Molina further argues that criminalisation should be related to ‘harmful’ and ‘dangerous’ conduct. *ibid* 132 – 38.

2.3.3. Significance of the Doctrine of Legal Good in General

The doctrine of the common good is discussed as a restriction on the state's use of the criminal law thereby establishing the legitimacy of such criminal law. However, those proponents of the doctrine of legal good do not have confidence in the effectiveness of the concept in limiting the criminalising power of the state or guiding the legislature in a rational way. Luis Chiesa outrightly rejects the doctrine for a potential limitation to the criminalisation power of the state.¹²⁹ Probably because of his Anglo-American background with no experience of limiting the criminalising power of the state. Markus Dubber on his part asserts 'its bark turns out to be worse than its bite'.¹³⁰ However, Dubber himself has doubts there is such constitutional limitation to the criminalisation power of the state.¹³¹ He rather opined that it is used for internal consistency, regarding defences to particular types of legal goods,¹³² and as 'analytical tool' which he did not push it to its logical limits particularly in light of constitutional foundations of criminal legislation.¹³³ Yet, he goes on to the balancing of interests in constitutional principles.¹³⁴

Mir Puig, on his part, holds that the issue of criminalisation 'cannot be answered by appealing to a theory of legal goods or legally protected interest'.¹³⁵ The constitution does not help in such delicate balancing of interests; legal good is one of the many principles that need to be taken into consideration to limit the criminalising power of the state.¹³⁶

Criminalisation is a public policy decision based on the principle of public (common) good. The result of such public policy decision to criminalise conduct is the restriction of fundamental rights both in terms of the prohibited conduct and the consequences of violation of such prohibition. This is a depiction of how the criminal law is an area

¹²⁹ See, Chiesa (n 121) 367 – 68.

¹³⁰ Dubber 'Theories of Crime' (n 75) 690.

¹³¹ Dubber 'Criminal Law' (n 80) 434.

¹³² Dubber 'Theories of Crime' (n 75) 692 – 94.

¹³³ *ibid.*

¹³⁴ *ibid.*

¹³⁵ Mir Puig (n 98) 418.

¹³⁶ *ibid* 414 – 18.

where the utilitarian and the moral imperative theories constantly collide against each other. Such conflicts may be resolved by balancing of the conflicting interests based on the principle theory. It is indicated by Mir Puig that conducts are not criminalised in the abstract; they need to have an actual and substantial effect on the individual; such decision is to prevent such (threat of) harm. Likewise, criminal law is a restriction on individual freedom and the consequence is a punishment. Therefore, the efficacy of the doctrine of legal good as restriction of the use of criminal law by the state may not be seen in isolation; it has to be seen in the larger context; it is only then legal good has a pivotal role in the balancing of conflicting interests.

2.4. Theories of Crime in Ethiopian Criminal Law

The state has shown effort in 'modernising' the legal system primarily in the area of the criminal law as manifested in the adoption of the first penal code in 1930, and later in the adoption of an extraordinarily modern penal code of its time in 1957 the first among those other codes.¹³⁷ Not too long ago, crime used to be treated as sin in this country and punishment is a condition of expiation.¹³⁸ Since the adoption of the 1957 Penal Code, the Ethiopian criminal law is fully secularised and took a continental turn. Article 1 incorporates the notion of the legal good.

2.4.1. The Doctrine of Legal (Public) Good in Ethiopian Criminal Law

If there is any branch of law that is frequently revised, to suit the politics of the day, on the pretext of 'modernisation' of laws, it is the criminal law. The *Fiteha Negest*, containing chapters on penal matters, is the longest serving legislation. The 1930 Penal Code, adopted on the coronation of Emperor Haile Selassie I, was said to be a revision of the *Fiteha Negest* even though their content is not in any way related. The 1953 *Federal Crimes Proclamation* was adopted subsequent to the federation of Eritrea with Ethiopia. The true modernisation of criminal law was the adoption of the 1957 Penal Code. Then the Special Penal Code was adopted as soon as the Provisional Military Government came to power in 1974 which was revised in 1981. The 1957 Penal Code was revised and the Special Penal Code was repealed by the 2004 Criminal Code. However,

¹³⁷ Generally, see Graven 'The Penal Code' (n 56). Ethiopia was making wholesale legal reform and the first of those was the 1957 Penal Code.

¹³⁸ *ibid* 271. The 1930 Penal Code states that it is a revision of the *Fiteha Negest*, a compilation of ecclesiastical rule. Preface, paras 1, 5 and 16.

between 1991 and 2004 there are several special penal legislation which took up the spirit of the Special Penal Code and which are fundamentally authoritarian.¹³⁹ Yet, the practice of criminal law can hardly claim to have given effect to those modern and liberal criminal law doctrines and theories.

The first part of the provisions of Criminal Code, article 1 provides that '[t]he purpose of the Criminal Code [] is to ensure order, peace and the security of the State and its inhabitants for the *public good*'.¹⁴⁰ The criminal law endeavours to maintain 'order, peace and security' of the institution of the state and its inhabitants. It does so not for the ends of order and peace for its own sake but for the public good which Philip Graven refers to as 'human collectivity'.¹⁴¹ The primary concern of the criminal law is maintenance of the collective existence of the society and regulating individual conduct as 'members of the group'. Thus, it protects private interests and punishes harm to the individual 'to the extent that, in addition to causing individual harm, they are a source of public disturbance and destroy or call in question the peace of the collectivity'.¹⁴² It is for this reason Graven further maintains that, the penal law is 'purely utilitarian';¹⁴³ and the Ethiopian criminal law adopts 'reformatory justice in all respects preferable to punitive justice'.¹⁴⁴

The doctrine of 'legal good' is incorporated into the Ethiopian criminal law as 'public good', which is closer to that had been desired by Beccaria.¹⁴⁵ However, the doctrine is incorporated in its entirety, both the normative and the positive aspects. For instance, the 1957 Penal Code is supposed to be comprehensive from which the judge and

¹³⁹ Simeneh and Cherinet 'Governing Using Criminal Law' (n 68). In *Zemenawi, et al*, defendants were convicted of violating the Revised Special Penal Code in August 2011. *FEACC v Zemenawi Fikir Atalay, et al*, (23 August 2011, File No 70051, Federal High Court)

¹⁴⁰ (emphasis added). The Ethiopian criminal law is unique in containing express provision incorporating the doctrine of 'legal good'. Philip Graven, *An Introduction to Ethiopian Penal Law: Arts 1-84 Penal Code* (HSIU 1965) 3, 5. In other continental systems from which the Ethiopian Penal Code is borrowed, have the doctrine in practice and never been stated in the law. *ibid*; Graven 'The Penal Code' (n 56) 282; Dubber 'Theories of Crime' (n 75) 683 – 84.

¹⁴¹ Graven, *An Introduction* (n 140) 5.

¹⁴² *ibid*.

¹⁴³ *ibid* 6.

¹⁴⁴ *ibid* 8.

¹⁴⁵ Graven makes specific mention of Beccaria and his reformatory penal reform. *ibid*.

litigants would find everything they need regarding the criminal law.¹⁴⁶ The penal provisions contained in the Penal Code are the positive aspect of the doctrine – that is, what is provided for in the Penal Code is meant for the protection of the legal (public) good. Further, in determining the appropriate punishment/measure, the judge may be guided by this doctrine of legal (public) good.¹⁴⁷

However, the Penal Code, article 3 also authorises the adoption of secondary legislation.¹⁴⁸ Those future legislation that may be adopted by the lawmaker need to comply with the doctrines of the General Part of the Penal Code, one of which is the ‘common good’. Such criminal law should, therefore, be adopted for the protection of legal (public) good provided other less intrusive methods failed to achieve such end.

This part of the provisions of article 1 is also incorporated in the 2004 Criminal Code, verbatim. However, there has never been any court decision wherein the content of the provision is litigated or found to be relevant for any form of decision or ruling. Because such doctrine is considered mere legislative promise, and there is no developed jurisprudence, it gives a wrong impression that the lawmaker is at liberty to adopt legislation that violates this doctrine, provided it expressly states such view in the new legislation.

2.4.2. Relevance of Harm in the Criminal Law

The normative aspect of the theory of the legal (public) good guides the lawmaker whether criminalisation is an appropriate response to the protection of a given common good because other less intrusive measures fail to help protect such interest. In this sense, the doctrine of legal (public) good defines the interest protected from harm or threat of harm in prohibiting certain conducts and the consequent measure; yet, in the continental criminal law, harm does not define both criminalisation and the appropriate response.

¹⁴⁶ Graven ‘The Penal Code’ (n 56) 281.

¹⁴⁷ Crim C, art 87, the last part.

¹⁴⁸ Art 3 provides that ‘[n]othing in this Code shall affect Police regulation and special laws of a penal nature: Provided that the general principles embodied in this Code apply to those regulations and laws except as otherwise expressly provided therein.’

Even in the determination of the sentence, the Criminal Code does not mention harm at all. At the sentencing phase, however, two provisions are invariably invoked. The Criminal Code provides that, in the determination of sentence, the court must be guided by ‘the spirit of [...the] Code and so as to achieve the purpose it has in view’.¹⁴⁹ Further, it is the duty of the court, based on the facts and the evidence, to determine guilt. Such determination is made:

taking into account the dangerous disposition of the criminal, his antecedents, motive and purpose, his personal circumstances and his standard of education, as well as the gravity of his crime and the circumstances of its commission.¹⁵⁰

This provision should be understood as intended to maintain a judicial determination of guilt taking into account the personal circumstances of the accused. The law further provides for the determination of sentence ‘in conformity with the provisions of the General Part of this Code and the special provisions defining offences and their punishments’.¹⁵¹ The Special Part of the Code, however, constituting the crime determines liability based on the harm caused. For instance, for corruption crimes, the law provides that degree of harm is used as a ground of aggravation of sentence.¹⁵² On the other hand, crimes relating to murder and bodily injury are seen in the light of the means used to cause the harm, the circumstances of the harm, which reflects the degree of harm that is translated into the consequent punishment.¹⁵³

In those provisions, harm is used for the simple reason of assessment of sentence. Harm as a justification for criminalisation and harm for determination of sentence have different utility. Harm, as used in the common law system in criminalisation, is a reason for the imposition of punishment.¹⁵⁴ In the continental system, on the other

¹⁴⁹ Crim C, art 87 the first part.

¹⁵⁰ *ibid* art 88(2).

¹⁵¹ *ibid* art 88(1).

¹⁵² *ibid* arts 407(2), 408(2), 411(2), 414(2), 415(2), and other places. Those provisions are incorporated verbatim in the *Corruption Crimes Proclamation No 881/2015*, arts 9(2), 10(2), 13(2), 16(2) and 17(2), respectively.

¹⁵³ *ibid* arts 539 and 540; arts 555 and 556.

¹⁵⁴ Hegel argues that punishment finds its justification in the crime itself; it is a negation of negation of rights. The criminal does service to the criminal law in that he gives life to the dead letters of the law. Landecker (n 36) 553.

hand, it is only a reason for the determination of the ‘marginal deterrence’ of punishment.¹⁵⁵

For instance, Beccaria classified crimes into three categories depending on their seriousness¹⁵⁶ to determine proportional punishment.¹⁵⁷ The Ethiopian Criminal Code is organised in the same manner – from the most serious to the less serious crimes. Seen otherwise, the principle of proportionality requires that the punishment must be measured against the degree of harm caused (threatened) to the legal good. Even though there is no naturally fixed amount of punishment for every specific conduct criminalised, crimes based on the *in rem* and *in personam* circumstances should certainly be of different consequences. The *in rem* qualities of crimes relates to the allocation of specific punishment for each crime which some referred to it as, cardinal proportionality. Such determination of punishment is based on the gravity of the harm caused (or threatened) to the legal good to determine effective marginal deterrence for each crime.¹⁵⁸ Once the court finds the defendant guilty of a crime, it determines the sentence based on the *in personam* qualities of the defendant which is referred to as ordinal proportionality.¹⁵⁹ There is one fundamental caveat that, harm as a ground of determination of sentence does not necessarily help achieve the ends of criminal law.

Despite the criminal law provides that the ‘penalties and measures shall always be in keeping with the respect due to human dignity’, it is conspicuously absent in practice of determination of sentence.¹⁶⁰

2.4.3. Efficacy of Legal Good Doctrine in Ethiopian Criminal Law

The doctrine of legal good is incorporated into article 1 of the Criminal Code. The efficacy of the doctrine may be seen by the extent it puts a limitation on criminalisation power of the state. The doctrine is an internal limitation of criminalisation by requiring

¹⁵⁵ Harcourt (n 58) 47 – 48.

¹⁵⁶ See text to (n 86).

¹⁵⁷ Harcourt (n 58) 31.

¹⁵⁸ Hallevy, *The Right to be Punished* (n 35) 57-64; Paul H Robinson and John M Darley ‘Intuitions of Justice: Implications for Criminal Law and Justice Policy’ (2007) 84 Southern California LR 1, 8-11.

¹⁵⁹ Hallevy, *The Right to be Punished* (n 35) 64 – 101; Thorburn and Manson (n 74) 284 – 86.

¹⁶⁰ Crim C, art 87 second part.

that legal good be one that requires protection of the criminal law and that other less intrusive means fail to afford protection of such good as discussed above. A substantial part of the Criminal Code is meant to protect legal goods that are traditionally protected through criminal law, such as, life, limb, liberty, property, the integrity of government institutions and their functioning. However, there are penal provisions that do not meet such liberal principles and standards as set forth in article 1 of the Criminal Code, which rather reflects the authoritarian nature of the criminal law. Those penal provisions may be seen in three categories.

2.4.3.1. Regarding Maintenance of Political Power

The criminal law is the most effective social control tool and the state is aware of such nature of criminal law.¹⁶¹ Some of the provisions of the Code do not follow the principle. For instance, the special protection afforded to the Monarch and his family in the Penal Code cannot be held legal (public) good. Graven justifies this not on the theory of legal good but on the tradition of Ethiopia that the king is the sovereign and elect of God.¹⁶² Other special penal legislation appear to be manifestations of such authoritarian nature of the criminal law. For instance, article 249 provides that a person who:

attempts to overthrow the Emperor or to break or modify the order of succession to the Throne, by violence, threats, conspiracy or other unlawful means, is punishable with rigorous imprisonment from five years to life, or in cases of exceptional gravity, with death.

The stability of the government and its institutions is a legal (public) good that requires protection of the criminal law. However, it needs no comment that a nation ruled under a single family, by the time the Penal Code was adopted, the protection of such rule is not a legal good because it is maintaining or promoting a particular political ideology.¹⁶³ The Imperial family had also been protected by a penal provision. Article 248 provides that:

¹⁶¹ Generally, see Simeneh and Cherinet 'Governing Using Criminal Law' (n 68).

¹⁶² Graven 'The Penal Code' (n 56) 291.

¹⁶³ Dubber 'Theories of Crime' (n 75) 689.

[w]hosoever, in any way, makes or attempts to make an attack on the liberty or security, or on the person or health, of the Emperor, or the Empress or of their children is punishable with rigorous imprisonment from five to twenty years

to be further aggravated based on the circumstances of the commission of the crime. Further, '[w]here the attack is against their life, the punishment is rigorous imprisonment from fifteen years to life, or death'.¹⁶⁴ This is an extension of the constitutional provision that maintains the dynasty. The 1955 Revised Constitution article 2 provides that '[t]he Imperial dignity shall remain perpetually attached to the line of Haile Selassie I.' Article 3 further provides that 'succession to the Throne and Crown of the Empire by the descendants of the Emperor and the exercise of power of the Regency' is according to what is provided for in the said Constitution.

This also continued in the post-Imperial period for the protection of the *Provisional Military Administration Council* ('PMAC'). The Special Penal Code of 1974, article 9(1), (3) provide that:

[w]hosoever attempts to abolish or destroy the institution of the Provisional Military Administration Council by violence, threats, conspiracy or other unlawful means, is punishable with rigorous imprisonment from five to fifteen years. [] The penalty shall be death where the offence [] resulted in death.

Sub-article (2) also provides that '[w]here the said offence was committed with violence the penalty shall be rigorous imprisonment from ten years to life or in cases of exceptional gravity death'.

Like the Imperial family, the families of members of the PMAC were also specially protected by the criminal law. The Special Penal Code of 1974, article 7(1) provides that:

[w]hosoever in any way makes or attempts to make an attack on the liberty or security of the person or health of the members of the Provisional Military Administration Council in connection with the execution of his or their official duties is punishable with rigorous imprisonment from five to ten years.

Sub-article (2) further provides that:

¹⁶⁴ sub-art (2).

[w]here the offence prescribed in sub-article (1) of this article is committed against the spouses or children of the members of the Provisional Military Administration Council, the punishment shall be up to ten years rigorous imprisonment.

It is evident that the maintenance of the anti-democratic government is not a legal good that requires the protection of criminal law, because it only limits the choice of the public in general.

Going further, the criminal law was also used to maintain a particular political ideology. The Special Penal Code of 1974, article 35 provides that:

[w]hosoever fails to comply with Proclamations, Decrees, Orders or Regulations promulgated to implement the popular Motto 'Ethiopia Tikidem' or hinders compliance therewith by publicly inciting or instigating by word of mouth, in writing or by any other means, is punishable with rigorous imprisonment from five to ten years.¹⁶⁵

In a subsequent amendment, the *Revised Special Penal Code Proclamation No 214/1981*, article 12 provides that:

[w]hosoever: (a) with intent to prejudice the Revolution, either directly or indirectly induces or encourages any sector of the population not to organize in accordance with the appropriate laws [] is punishable with rigorous imprisonment from [] 5 to [] 25 years.

When the punishment is aggravated it becomes 'imprisonment for life or death'.¹⁶⁶ The political ideology the criminal law protects is evident when read in conjunction with the constitutional provision which established a single party state. The PDRE Constitution, article 6 sub-article (1) provides that '[t]he Workers' Party of Ethiopia, which is guided by Marxism-Leninism, is a vanguard party dedicated to serve the working people and protect their interest'. Sub-article (2) further provides that '[t]he Workers' Party of Ethiopia charts the direction for the development of the country and is the guiding force of the State and the entire society'. A single party system can never

¹⁶⁵ The researcher attempted to find a meaning for the phrase 'Ethiopia Tikidem' which would be 'Ethiopia First', but with no avail. In fact, the *Proclamation for the Establishment of the PMAC*, art 8 provides that '[i]t is hereby prohibited, for the duration of this Proclamation, to conspire against the motto, 'Ethiopia Tikidem', to engage in any strike, hold unauthorised demonstration or assembly or engage in any act that may disturb public peace and security'. The penal provision is enforcement of this establishment proclamation but, the content is not clear.

¹⁶⁶ *Revised Special Penal Code Proclamation No 214/1981*, art 12(2).

be a legal good deserving of the protection of criminal law. This is because a political ideology or any belief system is not ontologically true.¹⁶⁷ Second, such a political structure denies citizens alternative political platforms in exercising their democratic right to self-governance, rather than enhancing the social existence of the individual.

There are other provisions which are not so expressly meant to protect the political power of a group in power, but which are misused as being selectively and conveniently applied against 'the other'.¹⁶⁸ However, the content of those provisions was meant to protect the public good, which gives them the impression of legitimacy. The 2009 anti-terrorism law is a good illustration.

2.4.3.2. Regarding Maximizing Government Revenue

The protection of the integrity of the state and its functions are legal good that need the protection of the criminal law. However, authoritarian criminal law goes beyond, under the guise of maintaining the state. In a similar fashion as discussed above, the content of those provisions meant for the protection of authoritarian regime are maintained in the Criminal Code after the necessary adjustments are made regarding phraseology and references. The present regime, however, does something more with the criminal law, treating it as part of administrative law. Criminal law is used to maximise government revenue by creating the sought administrative convenience by shifting the state's responsibility of regulation onto the individual making it a duty to comply with such regulations at the pain of criminal punishment. These are areas frequently reformed as part of the macro-economic reform for loan conditionality;¹⁶⁹

¹⁶⁷ Wintgens, 'Legisprudence as a New Theory' (n 66) 14.

¹⁶⁸ For instance, conducts alleged to be genocide committed by members of Oromo Liberation Front (OLF) and Islamic Front Liberation of Oromo (IFLO) in late 1991 and early 1992 were prosecuted only after the OLF was made to leave the Transitional Government of Ethiopia (TGE). See, for instance, *Public Prosecutor v Yahiya Zekaria* (23 July 2004, Crim File No 00586 Federal High Court) in which the TGE House of Representatives minutes of discussion on an enquiry into the widespread killings in *Beddeno* and *Weter* is attached as prosecution evidence; *Public Prosecutor v Beyan Ahmed, et al, 7 defendants* (15 October 2004, Crim File No 03139 Federal High Court); *Public Prosecutor v Mohammed Abdella* (15 June 2004, Crim File No 01137 Federal High Court); *Public Prosecutor v Ousman Abdella* (10 November 2004, Crim File No 01397 Federal High Court); *Central Public Prosecutor v Ahmed Nour* (26 March 2004, Crim File No 01121 Federal High Court).

¹⁶⁹ Report and Recommendation of The President of The International Development Association to The Executive Directors on a Proposed Credit of SDR 96.2 Million to The Federal Democratic Republic of Ethiopia For An Ethiopia Structural Adjustment Credit (May 15, 2002); African Development Fund - Federal Democratic Republic of Ethiopia Structural Adjustment Programme

however, as it is found to be successful in enhancing the collection of revenue, it continues to date.

The 1957 Penal Code had contained tax related penal provisions. For instance, article 360 punishes unlawful refusal to pay taxes and dues; article 362 punishes incitement to refuse to pay taxes. Likewise, article 362 punishes knowingly providing false information to save money to oneself or by fraud or concealment, or for knowingly misleading authorities. Those provisions of the Penal Code are directly adopted by the Criminal Code verbatim. See, articles 343 - 345, 349 - 351, and 352.

Despite those penal provisions, however, when the tax statutes were revised as part of the macro-economic reform of the country as a loan conditionality package, they are made to include penal provisions. The *Value Added Tax Proclamation No 285/2002* has articles 49, 50 and 56; the *Income Tax Proclamation No 286/2002*, had articles 96, 97, and 102, as most frequently prosecuted provisions. The routinely drawn up tax crime charges allege the violation of those provisions and business owners and managers are held criminally liability for mere being owners or managers.¹⁷⁰

Likewise, the *Excise Tax Proclamation No 307/2002*, the *Turn Over Tax Proclamation No 308/2002* and other tax statutes contain penal provisions. When the *Federal Tax Administration Proclamation No 983/2016* was adopted, it created a mini-encyclopaedia of tax crimes. One would see criminalisation in those legislation on several levels. It is not shown that those provisions are meant to protect legal good; nor was it shown that the legal good could not be protected effectively by other less intrusive means. Even if we agree that both requirements are complied with, the design of provisions those tax statutes violate the basic principles of criminal law, for instance, by imputing criminal

Project Completion Report, October 1997; Alemayehu Geda and Abebe Shimeles 'Taxes and Tax Reform in Ethiopia, 1990 - 2003' (2005) UNI-WIDER, Research Paper No 2005/65.

¹⁷⁰ The fact that the manager was not present at the scene by the time the alleged crime was committed, or he gave a power of attorney to somebody else, etc, is not a defence. *ERCA v Josabin Trading PLC and Yoseph Tesfaye* (4 December 2015, Cass File No 94913, 19 Decisions of the Cassation Division of the Federal Supreme Court); *Tarekegn G/Giorgis, et al, v ERCA* (17 December 2009, Cass File No 48850, 10 Decisions of the Cassation Division of the Federal Supreme Court); *Mesfin Shiferaw v ERCA* (7 May 2010, Cass File No 54061, 10 Decisions of the Cassation Division of the Federal Supreme Court).

responsibility to business managers or owners in the absence of conduct.¹⁷¹ Further, the aggressive prosecution of those provisions before a special bench in the Federal First Instance Court also made the violation of the principle of lenity possible¹⁷², because all those provisions contain severe criminal penalty while the provisions of the Criminal Code with milder punishment, adopted after those statutes, are still in force.

Regulation of business is also a part of the macro-economic reform in the country. In the face of a comprehensive Penal Code, trading without a license was criminalised in *Commercial Registration and Business Licensing Proclamation No 67/1997* punishable with fine equal to double the revenue the trader earned, and with imprisonment from 3 to 5 years.¹⁷³ The sentence was significantly increased when it was replaced by *Proclamation No 686/2002*. It was made punishable with rigorous imprisonment from 7 to 15 years, fine from Birr 150,000 to 300,000, and confiscation of production or service delivery equipment.¹⁷⁴

While there is a specific provision governing license in the Criminal Code adopted in 2004, the same punishment was maintained even when the law was revised in 2016. The criminal punishment is aggravated in that it goes beyond the aggravation process in the Criminal Code. For instance, Criminal Code article 184(1)(e) provides that ‘where the court orders the forfeiture of the criminal’s property in case of one of the concurrent crimes, it may not impose fine on account of the other crimes.’ Those who get convicted for engaging in business activities without a valid (renewed) license are sentenced to a term of imprisonment and fine.¹⁷⁵

¹⁷¹ *ibid.* In *Federal Public Prosecutor v Beyene Bahiru Geda and Hiwot Alemu Arbago* (19 February 2019, Federal First Instance Court File No 261712) first defendant was convicted for acts done by second defendant, in his absence.

¹⁷² The prosecution arm is established as per *The Re-establishment of the Federal Inland Revenue Authority Proclamation No 367/2003*, art 6(7), and later by *The Ethiopian Revenue and Customs Authority Establishment Proclamation No 587/2008*, art 6(10). Special tax division court is established by *The Ethiopian Revenue and Customs Authority Establishment Proclamation No 587/2008*, art 17.

¹⁷³ *Commercial Registration and Business Licensing Proclamation No 67/1997*, art 46(1).

¹⁷⁴ *Commercial Registration and Business Licensing Proclamation No 686/2010*, art 60(1).

¹⁷⁵ See, for instance *Bazezew Yihun v Amhara Regional State Prosecutor* (24 June 2012, Cass File No 86388, 15 Decisions of the Cassation Division of the Federal Supreme Court), *Federal Public Prosecutor v Belay Abebe Maru, et al*, 3 defendants (5 March 2019, Crim File No 194397 Federal High Court) and several other cases discussed here.

The new statute also criminally punishes transfer of business license which is a normal social and economic practice. *Commercial Registration and Business License Proclamation No 980/2016*, article 49(4) provide that:

[a]ny business person who have transferred his business license to a third party by way of sale, lease, donation or in a similar fashion shall be punished with fine from Birr 50,000 [] to Birr 100,000 [] and with rigorous imprisonment from 5 [] years to 10 [] years; if the business license has been transferred to a foreign national the fine shall be from Birr 200,000 [] to Birr 300,000 [] and the imprisonment shall be from 7 [] years to 15 [] years.

The records do not show the reason for the inclusion of such a provision. However, the Ethiopian Coffee and Tea Development and Marketing Authority under the Ministry of Trade had conducted an internal audit of coffee purchased through the Ethiopian Commodities' Exchange and whether the coffee was exported.¹⁷⁶ The audit shows two facts: first, the coffee that were purchased for export was not actually exported; it is believed the coffee was sold at home because it fetches a better profit. Second, those who obtained the coffee export license are not actually those individuals whose name appears on paper. The Government believes there were coffee traders behind the curtain evading regulation. Thus, at least some of those who were standing trial for economic crimes contrary to Criminal Code, article 454 are those whose name does not appear on the license. It can reasonably be argued that it is with a view to control such conduct that transfer of commercial license is prohibited.¹⁷⁷

The revision of the business regulation statute is closely linked with the tax collection objective of the state.¹⁷⁸ At the committee hearing, it was asserted that the regulation of business would facilitate the collection of government revenue. This is asserted at the

¹⁷⁶ The Ethiopian Coffee and Tea Development Marketing Authority 2001 – 2007 EC coffee purchase and export audit (February 2017).

¹⁷⁷ However, in the year this rule adopted by parliament, more than three-quarter of a million commercial license were returned to the state only in the city of Addis Ababa. 'Business license deactivation growing in Ethiopia' <<https://newbusinessethiopia.com/investment/business-license-deactivation-growing-in-ethiopia/>> last accessed 20 July 2019.

¹⁷⁸ Minutes of Hearing with Resource Persons Organised by Trade and Industry Affairs Standing Committee on Draft Bills of Competition and Consumer Protection, and Commercial Registration, 16 June 2010 (later adopted into law as *Proc Nos 685/2010* and *686/2010*, respectively) 24, 27 – 28; Brief Minutes of Public Hearing Organised by the Trade and Industry Affairs Standing Committee on Competition and Consumers' Protection, and Commercial Registration Draft Bills, June 23, 2010 (later adopted into law as *Proc Nos 685/2010* and *686/2010*, respectively) 45.

hearing for both *Commercial Registration and Business License Proclamation No 686/2010* and *Proclamation No 980/2016*.¹⁷⁹ Therefore, this second trend shows that the state criminalizes conducts that would be considered ‘legitimate ends’ of criminal law, such as terrorism, corruption, and tax fraud. The scope of those conducts that are criminalized go far beyond the call of duty, and in the adoption of any of the criminal laws discussed in this study, the doctrine of legal good has never been raised and never been discussed at all.¹⁸⁰

The trial of some of the cases for trading without a valid license does not show there is a legal good to be protected by the criminal law. For instance, in *Mehibuba Abdella*¹⁸¹ defendant was apprehended while selling *injera* and bread without securing the required commercial license contrary to the *Proclamation No 980/2016*, article 22(1) and 49(2). In her defence, defendant presented that she already obtained a Tax Identification Number, was paying her taxes, and was in the process of obtaining a trade licence. She was convicted for violating the said provisions of the law on the ground that by the time she was apprehended selling *injera* and bread, she actually did not have a trade license. She was handed a suspended 4 years and 5 months rigorous imprisonment and a fine of Birr 2,000.¹⁸²

Likewise, in *Bederu Negash*¹⁸³ defendant had a license for merchandise but was selling small varieties of cosmetics for which he is charged not having a commercial license. He was just opening his shop, and there is no evidence he actually sold those

¹⁷⁹ ‘Brief Minutes of Public Hearing Organised by Commercial Affairs Standing Committee on The Commercial Registration and Business License Draft Bill, 27 June 2016’ (later adopted into law as *Proc No 980/2016*) 10.

¹⁸⁰ Criminalisation of transfer of commercial licence punishable with such severe criminal punishment is the most important inclusion in the revision, art 49(4).

¹⁸¹ *Federal Public Prosecutor v Mehibuba Abdella* (19 April 2019, Crim File No 003716, Federal High Court).

¹⁸² *Addis Ababa/ Dire Dawa Administration Commercial Registration and Licensing Council of Ministers Regulations No 14/1997*, art 20(1) sets the threshold capital requirement of Birr 5,000 in order to make such commercial registration compulsory. In the above cases there is no evidence defendants did have more than Birr 5,000 working capital. The provisions of *Proc No 686/2010* were, of course, intended to do just that. Brief Minutes of the Public Hearing Organised by the Commerce and Industry Affairs Standing Committee on Competition and Consumers’ Protection, and Commercial Registration Bills, June 23, 2010 (later adopted into law as *Proc Nos 685/2010* and *686/2010*, respectively) 60.

¹⁸³ *Federal Public Prosecutor v Bedru Negash* (29 April 2019, Crim File No 003287, Federal High Court).

cosmetics. His defence was that, other traders in the vicinity also do carry small varieties of cosmetics on the side, but he was in the process obtaining certificate of competence which appears to be a requirement for trading in the cosmetics business. He was convicted and sentenced to 4 years of rigorous imprisonment to be served and a fine Birr 1,000.

In *Anteneh*, defendant was an on-off broker.¹⁸⁴ He related an individual providing transport services with another trader who desires to transport his goods from Addis Ababa to Semera for which defendant admitted receiving Birr 8,600. He also admitted he did not have a commercial license. He was then convicted on his admission and sentenced to 4 years rigorous imprisonment to be served.

While in *Mehibuba* the court imposed a suspended sentence, in both cases the fines are inconsiderable in view of what is provided for in the law (Birr 150,000 – 300,000) and the court did not order the confiscation of the property which is a part of the punishment provided for in the law.¹⁸⁵

2.4.3.3. Violation of the Principle of *ultima ratio*

The negative requirement in the doctrine of legal good is that criminal law may be used as a last resort measure. Such may be the case only when the alternative state measures are shown to have failed to effectively protect the legal good. In the adoption of those legislation, such alternatives were not discussed at all. This may be seen in respect of those legislation that were revised and replaced, for instance, in the tax laws, the commercial registration, and license regulation matters. Those penal provisions in other legislation were included criminalizing conducts for the first time, as in the case of trading without a business licence, or while there were a penal law and new conduct are criminalised or the sentences are increased. There is no background research indicating that the previous measures, such as administrative measures and/or civil actions have failed to help protect the legal good.¹⁸⁶

¹⁸⁴ *Public Prosecutor v Anteneh Getye Abebe* (26 March 2012, File No 114155, Federal High Court).

¹⁸⁵ *Proc No 686/2010*, art 60(1); *Proc No 980/2016*, art 49(2).

¹⁸⁶ See texts to (n 122) – (n 124).

Criminalisation of conduct and determination of sentence are political decisions. However, the specialisation of law would help the law is fairly insulated from unreasonable content control of the law by political considerations. This does not seem to be the case in Ethiopian criminal law. For instance, the death penalty is purely retributive.¹⁸⁷ In the presence of article 1, adopting a consequentialist theory of punishment, the maintenance of the death penalty only reflects how the political discourse could not be matched by the developments in legal theory. When liberal theories and authoritarian criminal law co-exist, they result in judicial formalism.¹⁸⁸ Probably, what is unique about those penal legislation was that, the Penal Code was adopted by the Emperor as per the power vested on him in articles 34 and 88 of the Revised Constitution of 1955 and the Special Penal Code was adopted by a PMAC as per the Definition of Powers of the *Provisional Military Administration Council Proclamation No 2/1974*, article 6, without any form of public participation. Where there has not been a constitutional limit to the power of the state, the positive law is deemed a rule of law. That is not changed in the FDRE Constitution. As discussed in Chapter Five, there is no meaningful compliance with the rules of lawmaking procedure in criminal lawmaking. Thus, most administrative matters are treated as criminal matters.

2.4.4. Determination of Punishment

The doctrine of legal (public) good guides the criminalisation of conduct. Such a decision is to be made based on positive and negative requirements. A criminal norm is complete, however, only when it has both operative facts and consequences.¹⁸⁹ When the operative facts are determined as prescriptions, the principle of legality requires

¹⁸⁷ Crim C, preface, para 8.

¹⁸⁸ See for instance, the reasoning of the Federal Supreme Court in *ERCA v Daniel Mekonnen* (21 July 2010, Cass File No 43781, 10 Decisions of the Cassation Division of the Federal Supreme Court). The Court held that the enabling *Monetary and Banking Proclamation No 83/1994*, art 59(2)(b) determines the punishment; the prohibited conduct is provided for in the directive adopted by the National Bank of Ethiopia as 'authorised' under such proclamation. The Court further held that 'no law requires the publication of Directives in the Negarit Gazeta, but this does not deny the Directive its quality as law.' Thus, once the prohibited conduct is established in the Directive, the punishment should be determined according to the Proclamation, art 59(2)(b).

¹⁸⁹ Hallevy, *Principle of Legality* (n 35) 16 – 18.

that the consequences are also determined to give effect to such penal prescriptions.¹⁹⁰ Therefore, the nature and magnitude of such punishment need also be determined.

Various factors come into play in the determination of criminal punishment. The 1957 Penal Code adopted the consequentialist purpose of criminal law. Thus, punishment is imposed for the 'reform of offenders and measures to prevent the commission of further offences'. There is no statistical evidence criminal punishment deters would-be offenders.¹⁹¹ However, the punishment needs to be imposed because it is a promise to be fulfilled so that the law may be complied with.¹⁹² Thus, Beccaria argues for the parsimony of punishment, ie, the most effective on society and less intrusive on the person who undergoes the punishment because, he further argues, 'men are moved more by the desire to avoid pain rather than by the pursuit of pleasure'.¹⁹³ There is also no evidence that compliance with criminal law is not because of the punishment imposed on offenders either.¹⁹⁴

The Criminal Code makes a fine modification in that punishment may be imposed 'in order to deter [...the offender] from committing another crime and *make them a lesson to others*'.¹⁹⁵ This is both specific and general deterrence. However, a person can only be punished for his conduct and imposition and enforcement of punishment to teach others raises question of legitimacy of the punishment and it is even treated as 'degrading'.¹⁹⁶ Further, the principle of *ultima ratio* requires that the criminal punishment must be considered as a last resort measure.

¹⁹⁰ In *Jemila Mohammed Hagos, et al v Federal Public Prosecutor* (26 February 2009, Cass File No 38161, 9 Decisions of the Cassation Division of the Federal Supreme Court); *Solomon Desalegn v Southern Regional State Prosecutor* (15 May 2014, Cass File No 95438, 16 Decisions of the Cassation Division of the Federal Supreme Court); *Habtu Tulu v Federal Ethics and Anti-Corruption Commission* (22 June 2015, Cass File No 103775, 18 Decisions of the Cassation Division of the Federal Supreme Court) the court held that only those conducts that are prohibited are crime and only those punishments legally provided for may be imposed.

¹⁹¹ Leiser (n 36) 37.

¹⁹² Vormbaum (n 46) 40; Landecker (n 36) 554.

¹⁹³ Beccaria (n 18) 31.

¹⁹⁴ See n 43; n 45.

¹⁹⁵ Crim C, art 1 (emphasis added).

¹⁹⁶ This is argued both by continental theorists and by those deontological punishment theorists such as Kant and Hegle. Hallevy, *The Right to be Punished* (n 35) 28 – 35, and Landecker (n 36) 552 – 53, respectively.

Punishment is rather the criminal law embodiment of the principle of proportionality. Contrary to this approach, there appears to be excessive use of criminal punishment. Those cases where criminalisation is not justified need no further discussion. However, there are cases where the lawmaker exceeded all manners of common sense. First, the lawmaker has expressly stated its preference to a more higher punishment – contrary to the principle of lenity. In administrative proclamations containing penal provisions, the lawmaker is consistent in making preference to the harshest punishment. Thus, it provides that the penal provisions of those administrative regulations are applied ‘unless the act entails higher penalty under the provision of the Criminal Code’ or ‘unless punishable by greater penalty as per any other relevant law’.¹⁹⁷ However, it is only recently that the Council of Ministers adopted ‘Legislative Drafting Manual’ which prohibits the insertion of such rules.¹⁹⁸

Some are contrary to the prohibition of excess, and they appear to be intended to destroy the offender. For instance, the *Commercial Registration and Business License Proclamation No 980/2016*, article 49(2) provides that where a person is engaged in commercial activity without a valid license (not having a license at all or not having it renewed), or beyond the scope of his license, in addition to any administrative measures against him, the ‘merchandise, service provision and manufacturing equipment’ would be confiscated, and such person would ‘be punished with fine from Birr 150,000 [] to Birr 300,000 [] and with rigorous imprisonment from 7 [] to 15 [] years’.

Trade Practice and Consumer Protection Proclamation No 685/2010, article 8 prohibit ‘acts of abuse of dominance’. Accordingly, article 35(1) provides that the Authority may ‘impose administrative and civil sanctions, and gets complainants compensated for damages they sustained’.¹⁹⁹ In addition to those measures, the business person:

shall be punished with a fine of 15% [] of his annual income or where it is impossible to determine the amount of his annual income with fine from birr

¹⁹⁷ See for instance, *Biosafety Proclamation No 655/2009*, art 21(1); *Banking Business Proclamation No 592/2008*, art 58.

¹⁹⁸ *Legislative Drafting Manual 2010 EC* (in Amharic), art 71(12).

¹⁹⁹ The administrative sanctions are listed under art 35(3) which include injunction, suspension or cancellation of the business license, and seizure of goods.

500,000 [] to birr 1,000,000 [] and with rigours imprisonment from 5 [] to 15 [] years.

Ideally, punishments should have been kept to the minimum, but legally they are kept at a high level. There appears to be a belief that the graver the punishment, it would deter more would be offenders, a theory which is not scientifically proven. One would rather find these punishments unreasonable and excessive.

2.5. Conclusion

The criminal law is used as an effective social control device in a state society. The law should state both the prohibited conduct and the consequent punishment so that the individual makes his conducts comply with the requirements of the law. As the positive and instrumental nature of the criminal law is taken advantage of by the Government, there is a need to find a limit to such criminalisation power of the state.

This chapter attempted to show that while both doctrines of sovereignty and legal good appear to have justified the coercive power of the state, they at the same time inherently limit such power. Sovereignty is a justification for exercising coercive power, but inherent in such doctrine, such exercise of power should be legitimate. Its legitimacy is manifested by exercising such power for the common good. Thus, in the adoption of the criminal law, the lawmaker makes such decisions for the common good which is embodied in the doctrine of legal good.

The doctrine of legal good has both positive and negative requirements that guide the criminalisation of conduct. The interest that is sought to be protected by the criminal law should constitute a legal good that requires the protection of the criminal law. Such protection is against substantial and concrete harm to such interest. The lawmaker should also determine that there is no other less intrusive means of protection of such legal good. Likewise, once the lawmaker decides to criminalise a particular conduct, in the determination of punishment for such violations, it should maintain cardinal and ordinal proportionality.

However, even the proponents of the doctrine of the common good do not have faith in the efficacy of such doctrine in limiting the use of criminal law for two reasons. First, the content of the doctrine is not clear and second, such doctrine does not appear to

have a constitutional basis. This appears to be manifested in the practice of criminal lawmaking in Ethiopia, that both the doctrine of legal good and the legitimacy of the criminal rules have never been discussed in any of the parliamentary and committee proceedings. Thus, both doctrines do not appear to have put limitations on the power of the legislature.

However, the fact that such doctrines are not complied with or are frequently breached by the lawmaker does not mean they do not exist or they are not effective limitations to the criminalisation power of the state. They are effective as the constitution is regarding limiting the power of the state, because in authoritarian regimes, constitutions are mere facade. The constitutional nature of the doctrine of legal good is discussed in the next chapter in the balancing process.

CHAPTER 3. - CONSTITUTIONAL LIMITATIONS TO CRIMINALISATION POWER OF THE LEGISLATURE

3.1. Introduction

A modern state is constituted by and its powers are defined by law – a constitution. The constitution is the document from which all government coercive powers emanate, directly or by interpretation. Criminalisation is the quintessential coercive power of the state against the individual. The doctrine of the common (public) good is discussed only as incorporated into the positive (criminal) law. For such doctrine to be useful as an analytical tool in criminal law, it has to find its place in a constitution or similar document. Thus, the study attempts to find a place in *The Federal Democratic Republic of Ethiopia Constitution* ('the Constitution') a foundation for the doctrine of legal good.

Bridging the doctrinal discussion in chapter two and the legisprudential evaluation of criminal law in Chapter Five, this chapter dwells on constitutional limitations to criminalisation power of the state from three perspectives. The first approach is constitutional limitations to criminalisation by referring to a jurisdictional matter which defines the scope of the power as the constitution vests such sovereign power. As the Constitution grants designated coercive powers, such government power is inherently limited power. One of the sovereign powers expressly vested on the Government, at least in Ethiopia, is criminalisation. Such power can only be understood in the prism of the doctrine of constitutionalism which also includes rationality of legislation.

The Constitution also included a bill of rights, the citizens' 'political expectations of living under' a constitutional government. Thus, the second approach is a review of criminal law against such specific rights included in the bill of rights. A criminal norm has an operative part and the consequence part, both of which are restrictions to

individual freedom. The operative part limits the individual right by providing for a prohibited conduct, such as limiting freedom of expression or doing business without a valid (renewed) licence or failing to declare and pay taxes due to the government. Such prohibitions are public policy decisions made by the government supported by justifications, such as the common good, utility, and public interest that is believed to foster the social existence of the individual. Administrative convenience and similar objectives cannot override individual liberty; however, the state is aware of some legislation are meant for regulation while it also include penal provisions in those legislation.¹ Thus, when a given conduct is criminalised, it is because such conduct ultimately has actual and substantial harm to the individual.

Further, the consequence part of the criminal norm is also a limitation to the individual right because it is against 'the right not to be punished' or 'freedom from coercion'.² However, because there is no specific and expressly developed jurisprudence on the right not to be punished both in Ethiopia and in the international bill of rights, the discussion is anchored on specific rights implicated by the punishment, such as the right to life and right to liberty.

A legal system is composed of not only rules and institutions, but also metanorms and methods, whether it is a lawmaking or adjudicative method. The third approach examines the significance of methodological postulates in limiting criminalisation by bridging the legislative and adjudicative process. Some of those postulates are hermeneutic postulates that help the legal actors to understand the content of the criminal norm and some are applicative postulates while still others are both. Those postulates are guiding the understanding regarding the nature, definition, and application of the criminal norms which the lawmaker cannot ignore if it desires its laws to be implemented.

¹ 'Minutes of Hearing with Resource Persons Organised by Trade and Industry Affairs Standing Committee on Draft Bills of Competition and Consumer Protection, and Commercial Registration, 16 June 2010' (later adopted into law as *Proc Nos 685/2010* and *686/2010*, respectively) 5.

² Luc J Wintgens 'Legislation as an Object of Study of Legal Theory: Legisprudence' in Luc J Wintgens (ed), *Legisprudence: A New Theoretical Approach to Legislation* (Hart Publishing 2002) 3; Henrique Carvalho, *The Preventive Turn in Criminal Law* (Oxford UP 2017) 3.

Despite a very good bill of rights in the Constitution, it is rarely litigated on and there is no developed jurisprudence. However, the international bill of rights forms the corpus of the Ethiopian bill of rights. Therefore, both for the definition of the content of the right as well as for the methodological part, resort is made to the international bill of rights jurisprudence. To make the discussion intelligible regarding the proper evaluation against those standards, specific penal provisions or legislation are examined; and those illustrations focus on those legislation that appear to have fallen short of the standard and should not give the impression that all criminal norms fail the standard.

3.2. Jurisdictional Matters/Separation of Power

When the constitution constitutes the state, it also vests power on its institutions. Such power is often designated power, but a state institution does not have the coercive power to exercise beyond what is provided for in the constitution either expressly or by interpretation; this is because the constitution is meant to limit the power of the state.³ In the modern sense, constitutionalism is based on the notion of popular sovereignty, and government power is delegated power.⁴ Thus, the constitution must achieve certain ends, such as it must contain 'precise, enforceable behavioural implications', such as separation of power and the bill of right,⁵ and 'enable the political system to make decisions and stick to them [by arresting] tyranny, as well as deadlock and vacillation'.⁶

³ Generally see Charles M Fombad 'An Overview of Separation of Powers under Modern African Constitutions' in Charles M Fombad (ed) *The Separation of Powers in African Constitutionalism* (Oxford UP 2016); Richard S Kay 'American Constitutionalism' in Larry Alexander, *Constitutionalism: Philosophical Foundations* (Cambridge UP 1998); Giovanni Sartori 'Constitutionalism: A Preliminary Discussion' (1962) 56 *The Am Pol Science Rev* 853; Louis Henkin 'A New Birth of Constitutionalism: Genetic Influences and Genetic Defects' in Michel Rosenfeld (ed), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Duke University Press 1994); Charles Howard McIlwaine, *Constitutionalism: Ancient and Modern* (revised edn, Cornell UP 1947).

⁴ Luc J Wintgens 'Legisprudence as a New Theory of Legislation' in Luc J Wintgens, *The Theory and Practice of Legislation: Essays in Legisprudence* (Routledge 2005) 6 – 9.

⁵ Sartori (n 3) 854 – 56.

⁶ Jon Elster 'Constitutional Bootstrapping in Philadelphia and Paris' in Michel Rosenfeld (ed), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Duke UP 1994) 63.

The state's coercive power is the manifestation of its supreme power. Such a monopoly of the coercive power of the state must have a legal basis, often constitutional and sub-constitutional norms. The constitution allocates power among the three branches of the government and defines such power. The constitution is meant to govern government powers, not private actions.⁷ Thus, the FDRE Constitution article 50(3) provides the House of Peoples' Representatives ('the HoPR') is the highest political organ; it is the organ that makes laws on matters that are apportioned to the Federal Government.⁸ And article 55(5) further provides that the HoPR 'shall enact a penal code. The States may, however, enact penal laws on matters that are not specifically covered by federal penal legislation'. The criminal lawmaking power of the HoPR is expressly granted in the Constitution.

Two essential points follow from these provisions. First, article 55(5) of the Constitution is the exclusive source of criminalisation power. Based on the argument of the economy of words for a constitution, if certain power is given to an entity, such power could not reasonably be given again under another provision. However, several special penal legislation and administrative legislation containing penal provisions were said to be adopted based on article 55(1).⁹ The provisions of article 55(1) do not authorise criminal lawmaking power. As discussed below, it is rather a limitation to the state's criminalisation power.

Second, the determination of the content and scope of the federal criminal law and thus this power of criminal lawmaking is left for the HoPR. However, if there are rules that grant unlimited power and unfettered discretion, they certainly are rules granting arbitrary power. Such criminal lawmaking power is, however, limited by several other limiting rules and principles. The one that readily comes to mind and relevant to the discussion at hand emanates from the nature of the federal structure. The provisions of article 51 provide for matters that fall under the federal jurisdiction. Article 55(1)

⁷ Jeremy Waldron 'The Core of the Case Against Judicial Review' (2006) 115 Yale LJ 1346; Jan Sieckmann 'Legislation as Implementation of Constitutional Law: A Foundation for the Demand of Legislative Rationality' in Luc J Wintgens and A Daniel Oliver-Lalana (eds), *The Rationality and Justification of Legislation: Essays in Legisprudence* (Springer 2013).

⁸ *The Federal Democratic Republic of Ethiopia Constitution Proclamation No 1/1995* ('FDRE Const'), art 55.

⁹ See, section 5.3.1.1. 'The Criminal Lawmaking Power' in Chapter 5.

provides that the HoPR has the power to legislate on matters that are falling under the federal government jurisdiction. This helps us define the scope of the federal criminal law – apart from other requirements, it must relate to any of those Federal Government powers as enumerated under article 51. Therefore, the federal criminal law must be one that concerns federal matters.

Closely linked with and defining jurisdictional matters, one can make the following general observations regarding criminalisation power of the lawmaker. These points put both direct and indirect limitations to the criminal lawmaking power of the HoPR. Starting with the formal limitation to the power of the HoPR to criminalise conduct, criminal law is a sub-constitutional norm that has to meet all constitutional requirements of lawmaking. This is evident from the provisions of article 9(1) which provides that '[t]he Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect'. The constitution, whose validity, Kelsen argues, is it to be presupposed, is the foundation of the unity of the legal system from which other principles, such as the principle of coherence, emanates.¹⁰

The second observation and which is related to the supremacy of the constitution is that the constitution also has a bill of rights. Because criminal law is a sub-constitutional norm, it has to comply with the requirements of the bill of rights in general. If all state actions have to have positive law justification, the bill of rights is a limitation to such 'positive legal authorisation'.¹¹

The third observation is that, as the constitution contains general normative judgments and the legal system contains a variety of potentially conflicting norms in a hierarchy, the law requires methodological solutions that are meant to augment the normative judgments and address potential conflicts. Such methodology is fundamentally guided by norms called principles (metanorms) that are found both in the constitutional and criminal law. Those principles, such as the principle of legality, the

¹⁰ Hans Kelsen, *Pure Theory of Law* (Max Knight tr, the Lawbook Exchange 2005) 30 – 31, 193 – 95, 205 ff; Humberto Ávila, *Theory of Legal Principles* (Springer 2007) 84 ff; Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, 1949).

¹¹ Kelsen, *General Theory* (n 10); Wintgens 'Legisprudence as a New Theory' (n 4) 10 ff.

non-retroactivity of criminal law, the principle of lenity, the principle of proportionality, by defining the temporal and spatial application of criminal law, also define the validity and applicability of criminal law.¹²

The fourth and final observation is that such methodology of interpretation and application of criminal law is not limited to the courts; because the lawmaker wants to make a law that would be applied by the court such methodology also affects the lawmaking process. This is because those principles define the application of criminal law, they also define the power of the lawmaker.¹³

The central idea of separation of power is functional. The lawmaker makes laws and supervise their execution. However, separation of power is diluted in different manners because naturally, the executive has an upper hand. A statute may be initiated by the executive but it is not an exclusive power. The fact is that all the legislation discussed in this research are, without exception, initiated by the executive. Likewise, their content is dictated by the executive to the extent rendering the legislature to approving organ.¹⁴ For instance, the *Commercial Registration and Business License Proclamation No 686/2010*, article 60 punishes engaging in business activities without a (valid) license with 7 to 15 years' imprisonment and fine with Birr 150,000 to 300,000, among others.

Such criminal punishments are maintained when the statute is revised and replaced with *Proclamation No 980/2016*. Because individuals are starting their business with small capital and a substantial number of those already in business have a capital far less than Birr 150,000, at the Committee hearing, Members of the Committee

¹² Robert S Summers, *Form and Function in a Legal System: A General Study* (Cambridge UP 2006) 37 – 39, 241 – 82.

¹³ Mauro Zamboni, *Law and Politics: A Dilemma for Contemporary Legal Theory* (Springer 2008) 134 – 36; Summers (n 12) 37 – 47, 136 – 41.

¹⁴ Assefa Fiseha 'Legislative-Executive Relations in the Ethiopian Parliamentary System: Towards Institutional and Legal Reform' in Jaap de Visser, Nico Steytler, Derek Powell and Ebenezer Durojaye (eds), *Constitution-Building in Africa* (Nomos 2015) 248 – 62; Samuel Rodriguez Ferrandez 'Legislative Evaluation in Spain: Its Necessary Application in the Approval of Criminal Law Reform' in Adan Nieto Martin and de Marta Munoz de Morales Romero (eds), *Towards a Rational Legislative Evaluation in Criminal Law* (Springer 2016) 78.

questioned the sensibility of maintaining the criminal punishments.¹⁵ The issue was raised at the public hearings both for the adoption of *Proclamation No 980/2016*¹⁶ and the previous *Proclamation No 686/2010*.¹⁷ The resources persons replied, they were aware of such facts and they had made criminal punishments milder; however, the proposed modification is rejected by the Council of Ministers opting for preserving the existing punishment. Thus, the provisions of article 49 of the *Commercial Registration and Business License Proclamation No 980/2016* are adopted as they had been in *Proclamation No 686/2010*.¹⁸ This depicts the natural dominance of the executive over the legislature.

Seen from another perspective, criminal norms are also adopted by government ministries either by direct delegation or by criminally sanctioning those directives and regulations adopted by those agencies with primary legislation, turning the former into criminal norms.

3.3. The Constitutional Requirement of Rationality of Criminal Law

Vested with the lawmaking authority, the lawmaker also assumes the obligation to be rational; if it is not a tautology, it may be understood to be the obligation to make ‘good laws’. This may be understood in two ways. In one sense, the obligation to make good laws may be understood to mean formally coherent law. Daniel Oliver-Lalana identified various forms of rationality, such as linguistic/communicative rationality of legislation which relates to the language used, legal/formal rationality which relates to validity of the norm, pragmatic or social rationality which relates to the degree of compliance by the public, goal rationality which refers to the means-end rationality of

¹⁵ ‘Minutes of Meeting of Commercial Affairs Standing Committee with Resource Persons from Ministry of Trade on the Commercial Registration and Business License Draft Amendment Bill, 29 June 2016’ (in Amharic, later adopted into law as *Proc No 980/2016*) 12.

¹⁶ ‘Minutes of Public Hearing Organized by Commercial Affairs Standing Committee on the Commercial Registration and Business License Bill, July 5, 2016’ (in Amharic, later adopted into law as *Proc No 980/2016*) 9, 10; ‘Minutes of Meeting on *Proc No 980/2016*’ (n 15) 12 – 13.

¹⁷ ‘Brief Minutes of the Public Hearing Organised by the Commerce and Industry Affairs Standing Committee on Competition and Consumers’ Protection, and Commercial Registration Bills, June 23, 2010’ (in Amharic, later adopted into law as *Proc Nos 685/2010* and *686/2010*, respectively) 51 – 53, 58 – 62.

¹⁸ *Proc No 686/2010* (n 18) art 60(1); *Commercial Registration and Business Licensing Proclamation No 980/2016*, art 49(2).

the norm, and ethical rationality relates to the constitutionality of the norms which she otherwise referred to as ethical correctness.¹⁹ Some of them crossover to the substantive content of the law.

However, it is this assumption of the rationality of both the law and the lawmaker that is the justification for the development of interpretation methodologies. Luc Wintgens argues for a 'regressive rationality' in that from the rationality of the law, the rationality of its maker is assumed. It is this assumption of rationality of the lawmaker that requires methods of interpretation to remedy faults or defects in the law.²⁰

Rationality is also 'a matter of aptitude'; thus, in the second sense, rationality or the obligation to adopt good law refer to the content of such law.²¹ There certainly is a reasonable disagreement regarding the content of the 'good law'. Therefore, there are procedural and substantive requirements to be complied with that naturally bring about a reasonably agreeable solution.²² One such substantive requirement the lawmaker needs to comply with in making criminal law is the bill of rights. Such a constitutional foundation of the requirement of rationality is succinctly argued for by Jan Sieckmann.²³

His argument is based on a chain of seven seemingly obvious theses based on the nature of a constitution, duties of lawmaking and contents of a bill of rights. Thus, his first thesis is that the constitution contains principles both that are of direct application and those used in the evaluation of such principles. Included is a bill of rights which is used as a standard of evaluation of the state's action. Second, as a standard of evaluation of actions of the state, a bill or rights is principally an instruction to the

¹⁹ A Daniel Oliver-Lalana 'Rational Lawmaking and Legislative Reasoning in Parliamentary Debates' in Luc J Wintgens and A Daniel Oliver-Lalana (eds), *The Rationality and Justification of Legislation* (Springer 2013).

²⁰ Luc J Wintgens, 'The Rational Legislation Revisited: Bounded Rationality and Legisprudence' Luc J Wintgens and A Daniel Oliver-Lalana (eds), *The Rationality and Justification of Legislation* (Springer 2013) 3, 9 – 12.

²¹ Lon L Fuller, *The Morality of Law* (revised edn, Yale UP 1969) 33 – 94.

²² Daniel Oliver-Lalana 'Rational Lawmaking' (n 19) 136 – 44; Jan Sieckmann 'Rational Lawmaking, Proportionality and Balancing' in Klaus Meßerschmidt and A Daniel Oliver-Lalana (eds) *Rational Lawmaking under Review: Legisprudence According to the German Federal Constitutional Court* (Springer 2016) 108 – 16.

²³ Sieckmann 'Rational Lawmaking' (n 22) 107 ff.

legislature.²⁴ The third thesis relates to the principle theory of rights and he opines that 'the interpretation of fundamental rights as principles and to be balanced against competing principles is a requirement of democracy itself'.²⁵ This third thesis is based on two basic assumptions which also form the fourth and the fifth theses. Democracy requires that 'all relevant interests be taken into consideration in making [public policy] decisions'²⁶ and fundamental rights are interests that 'must necessarily be taken into account'.²⁷ From the preceding arguments, Sieckmann made the following two cascaded conclusions which are aligned with proportionality theory. 'The balancing of fundamental rights or other constitutional principles must follow the principle of proportionality'²⁸ which 'presents [] requirements of rationality respecting normative decisions'.²⁹

The bill of rights is, unavoidably, seen from two perspectives regarding criminalisation. First, having taken note of the intrusive nature of the criminal law, it may justifiably be used only in limited conditions with a view to the protection of human dignity.³⁰ In this sense, Santiago Mir Puig, in defining legal good, argues that the conduct that is potentially criminalised must be one that has a direct impact on the individual, even when the criminal law is meant to protect collective interests, it must be shown that the criminal conduct has a direct and substantial impact on the

²⁴ Randy E Barnett 'Constitutional Legitimacy' (2003) 103 Colum LR 111, 115; also see Sieckmann 'Rational Lawmaking' (n 22) 113 – 14.

²⁵ Sieckmann 'Rational Lawmaking' (n 22) 109, 116 – 18. Also, see Robert Alexy 'On the Structure of Legal Principles' (2000) 13 Ratio Juris 294; Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Doron Kalir tr, Cambridge UP 2012) 2 – 6, 10, 30, 161 – 67, 214 – 26.

²⁶ Sieckmann 'Rational Lawmaking' (n 22) 109.

²⁷ However, beyond considering rights in the weighing process, Wintgens argues for rights as principium. Luc J Wintgens 'Legitimacy and Legitimation from the Legisprudential Perspective' in Wintgens Luc J (ed) *Legislation in Context: Essays in Legisprudence* (Ashgate 2007) 12, 23; Barak (n 25) 9; Robert Alexy 'Discourse Theory and Fundamental Rights' in Augustin Jose Menendez and Erik Oddvar Eriksen (eds), *Arguing Fundamental Rights* (Springer 2006) 18.

²⁸ Sieckmann 'Rational Lawmaking' (n 22) 111; Barak (n 25) 129 ff; Robert Alexy 'Rights and Liberties as Concepts' in Michel Rosenfeld and Andras Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford UP 2012) 291 – 97; Alexy 'Legal Principles' (n 25) 297 – 98; Bernhard Schlink 'Proportionality' in Michel Rosenfeld and Andras Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford UP 2012) 719 – 34.

²⁹ Jan Sieckmann 'Legislation as Implementation of...' (n 7) 119; Alexy 'Discourse Theory' (n 27) 25.

³⁰ Tatjana Hornle 'Criminalizing Behaviour to Protect Human Dignity' (2012) 6 Crim Law and Phil 307.

individual.³¹ On the other hand, the prohibition and the consequent punishment in criminal law are limitations to such constitutional rights as the right to life, liberty, and property.³² Their limitation in certain circumstances may be justified provided it is provided for in the law which complies with the principle of proportionality.

This is a clear situation of conflict between human right and another collective good, such as security, balancing is the best standard of application for a rational decision. In this sense, rationality is a normative decision to make a better judgment.³³ The lawmaker has the power to adopt laws, but it has to adopt a law that is coherent with the rest of the normative system and makes sense in the real world.³⁴ The requirement of rationality is not expressly provided for in the Constitution; however, each of those theses is provided for leading necessarily to such conclusion of rationality.³⁵

3.4. The Bill of Rights as Limitations to Criminalisation

Constitutions contain a bill of rights whose enforcement is understood as an aspect of constitutionalism.³⁶ The bill of rights is an important limitation to the exercise of the coercive power of the state. When it was initially introduced into the US Constitution by amendments, the bill of rights was treated as any of the structural limitations, such as separation of power and the federal structure.³⁷ Even though the bill of rights had been inspired by the Enlightenment thinking of the natural rights of the individual, it had been regarded as a protection of the collective public, in general, from the tyranny of the state, not the individual.³⁸ There had, thus, been an objection to the introduction

³¹ Santiago Mir Puig 'Legal Goods Protected by the Law and Legal Goods Protected by the Criminal Law, as Limits to the State's Power to Criminalize Conduct' (2008) 11 New Crim LR: An Int'l and Interdisciplinary J 409, 415 – 17.

³² Miriam Gur-Arye 'Human Dignity of 'Offenders': A Limitation on Substantive Criminal Law' (2012) 6 Crim L and Phil 187; Douglas Husak 'The Criminal Law as Last Resort' (2004) 24 Oxford J of L Studies 207, 212, 233.

³³ Wintgens 'Bounded Rationality' (n 20) 14 – 22; Oliver-Lalana (n 19) 168 – 69.

³⁴ *ibid* 16.

³⁵ Alexy 'Discourse Theory' (n 27) 17, 22 – 26; Sieckmann 'Rational Lawmaking' (n 22) 367 – 71.

³⁶ Michael Rosenfeld 'Modern Constitutionalism as Interplay Between Identity and Diversity' in Michael Rosenfeld (ed), *Identify, Difference, and Legitimacy* (Duke UP 1994) 9 – 10.

³⁷ Ashutosh Bhagwat, *The Myth of Rights: The Purposes and Limits of Constitutional Rights* (Oxford UP 2010) 32 – 4.

³⁸ Elster (n 6) 60; Bhagwat (n 37) 32, 35.

of the bill of rights on the ground that the structural limitations, such as separation of power were thought to be sufficient and effective protection of the public from the tyranny of the state.³⁹ The introduction of the bill of rights had rather been considered 'dangerous' in that what was not restricted by the bill of rights might be construed as granting expanded power for the state.⁴⁰

When the bill of rights had finally been incorporated, it essentially focuses on procedural rights, such as defendant's privilege against self-incrimination, freedom from torture, presumption of innocence which also requires conviction based on sufficient evidence, public trial of defendant, the right to confrontation of witnesses including access to other evidence, the right to counsel, and equality of arms. This is because the problems regarding the administration of justice had been related to the routine use of torture for investigation,⁴¹ secretive and haphazard hearings,⁴² conviction on insufficient evidence,⁴³ and barbaric punishment.⁴⁴ The problem appreciated regarding the substantive criminal law relates to the principle of legality and methodology, ie, the adoption of the principle of legality and prohibition of interpretation by analogy.⁴⁵ The punishment principally focused on the body of the condemned and hence barbaric, deprivation of food and drink, banishment and similar punishments.⁴⁶ Otherwise, over-criminalisation was not considered a problem,

³⁹ Bhagwat (n 37) 38-39; Waldron 'Against Judicial Review' (n 7) 1495 - 01. Rachel E Barkow 'Separation of Powers and Criminal Law' (2006) 58 Stanford LR 989, 994, 1031 argues otherwise.

⁴⁰ Bhagwat (n 37) 38; Elster (n 6) 60. The wording of the amendments gives that impression. For instance, the US first amendment provides that 'Congress shall make no law...'.

⁴¹ James C Welling 'The Law of Torture: A Study in The Evolution of Law' (1892) 5 Am Anthropologist 193,

⁴² Elio Monachesi 'Pioneers in Criminology. IX. Cesare Beccaria (1738-1794)' (1955) in 46 The J of Crim Law, Criminology and Police Science 439, 441, 447; Patricia Margaret Warthon 'The Humanitarian Movement in European History' (1983) 48 Il Politico 693, 700, 708.

⁴³ *ibid.*

⁴⁴ Monachesi (n 42) 441. For instance, Michel Foucault, *Discipline and Punish: The Birth of the Prison* (2nd edn, Alan Sheridan tr, Vintage Books 1991) 3 - 6 described anecdotal manifestations of barbarity of criminal punishment on 'the body of the condemned'.

⁴⁵ Interpretation by analogy made criminal law unpredictable. Thus, some object to interpretation entirely while others opted for interpretation by the lawmaker, the king. Michael Stolleis 'Judicial Interpretation in Transition from the *Ancien Régime* to Constitutionalism' in Yosutomo Morigiwa, Michael Stolleis, and Jean-Louis Halpérin, (eds), *Interpretation of Law in The Age of Enlightenment: From the Rule of The King to the Rule of Law* (Springer 2011).

⁴⁶ See n 44.

or so understood. Therefore, the reforms regarding the substantive criminal law were limited to secularisation and positivisation of criminal law, and humanisation of punishment.

3.4.1. Criminalisation and Implicating Fundamental Rights

Public policy decisions are made based on principles, such as, public good or common good and utility which are meant to justify particular state action. The bill of rights is, on the other hand, insulation from claims based on such principles of utility.⁴⁷ Thus, the grounds of criminalisation must be the protection of fundamental rights.⁴⁸ In the determination of such conflict, rights are treated as principles necessarily to be taken into account in making public policy decisions. This assertion has implications both regarding the resolution of such conflict and the burden of proof regarding the ‘validity’ or ‘correctness’ of each state action.⁴⁹

When rights are said to be principles, it is a description of their properties. However, the discussion on rules makes the discussion on principles easier. Rules are norms having the operative part and the consequence part. Referring to criminal rules, in particular, the operative part is a valid condition for the application of the consequence should those conditions be violated.⁵⁰ This is not what is unique about them though;⁵¹ rules are norms containing an absolute obligation to be implemented immediately.⁵² Further, when rules conflict, one of them will be given effect nullifying the other or putting one of them as exceptions using methods of interpretation.⁵³ Thus, conflict of rules is a matter of validity.⁵⁴

⁴⁷ Jack Donnelly, *Universal Human Rights: In Theory and Practice*, third edition (Cornell UP 2013) 7.

⁴⁸ Hornle (n 30) 315 – 23; Barak (n 25) 80 – 82.

⁴⁹ Alexy ‘Discourse Theory’ (n 27); Alexy ‘Legal Principles’ (n 25); Schlink (n 28).

⁵⁰ Ávila (n 10) 16 – 18.

⁵¹ Ávila argues that principles also may prescribe conduct or behaviour with certain consequences attached to it. Ávila (n 10) 14.

⁵² Ávila (n 10) 10, 35, 36, 40.

⁵³ *ibid* 3.

⁵⁴ Alexy ‘Legal Principles’ (n 25) 299; Ávila (n 10) 20.

Principles, on the other hand, are higher abstractions.⁵⁵ They may also have the operative part and the consequent part but when they come into conflict with each other, according to Ronald Dworkin, the principle with a relative higher weight would 'superpose the other' without nullifying the other nor treating it as an exception.⁵⁶ For Robert Alexy, principles are 'optimisation commands'. He bases his 'principle theory' on three theses – optimisation command, a collision of principles and balancing law. Thus, in the first thesis, he opines that 'principles are optimisation commands'⁵⁷ to be realized to the maximum level 'that is actually and legally possible'.⁵⁸ When two principles collide, in the collision thesis, 'conditional priority' is given to either of them based on the circumstances.⁵⁹ In his third thesis, the two conflicting principles are to be weighed based on appropriateness, necessity and the proportionality in the narrow sense.⁶⁰

In this sense, the central quality of principles appears to be the weight dimension.⁶¹ However, some would argue that weighing is not the only applicative method of principles nor is weight inherent quality of principles.⁶² Weighing is called for when two principles conflict; and the nature of public policy suggests that either the conflicting principles or their justifications need to be evaluated against each other to resolve such a conflict to the extent both can (not) be given effect. However, it is palpable that principles do not have weight, because they do not say anything about how they would be weighed; the weighing is rather conducted with the assistance of metanorms. Therefore, weight is not inherent about principles, such as

⁵⁵ Ávila (n 10) 17.

⁵⁶ *ibid* 9.

⁵⁷ Alexy 'Legal Principles' (n 25) 294.

⁵⁸ *ibid* 295. Ávila opines the 'maximum extent' is what is defined as 'strictly necessary to implement the goal specified by other principles, i.e., *to its necessary extent*'. (emphasis in the original). Ávila (n 10) 28.

⁵⁹ Alexy 'Legal Principles' (n 25) 296.

⁶⁰ *ibid*. This is in line with the argument made by Sieckmann in his rights as principles which is an established approach in the interpretation of constitutional law and international bill of rights. Sieckmann 'Legislation as Implementation of ...' (n 7).

⁶¹ Alexy 'Legal Principles' (n 25) 299; Ávila (n 10) 3.

⁶² Ávila (n 10) 21.

‘proportionality.’⁶³ What is to be weighed is ‘the reasons and goals’ which those principles refer to under specific circumstances and which in turn is given effect by the judge.⁶⁴

Alexy treated fundamental rights as *prima facie* principles which Aharon Barak disagrees for it denies their essential value and stature.⁶⁵ This might be justified by the fact that the weighing process requires proof of certain basic facts. Thus, if rights are implicated by the potential state action, those rights are treated as standing principles. It is incumbent upon the state to prove its actions are justified because they are proportional.⁶⁶

3.4.2. Weighing Principles and Conflicting Interests

The weighing process is not an empirical judgment but a normative judgment. Therefore, it follows a certain formal methodical process. The two-step analysis is a near-universal methodology applied in constitutional adjudication.⁶⁷ However, this is also the same interpretative method in the legislation process, except where the legislation process fails, the enforcement of rights falls back onto the adjudication process.

In the determination of the scope of the right implicated, there are two types of limitations to such rights: internal limitations and external (general) imitations. The Ethiopian bill of rights has only internal limitations.⁶⁸ A general limitation is included in other systems, such as the South African Constitution and the Canadian Charter.⁶⁹

⁶³ ibid 20 – 27; Alexy ‘Legal Principles’ (n 25); Barak (n 25) 58 – 60, 351 – 52.

⁶⁴ Ávila (n 10) 25-7.

⁶⁵ See (n 27); Barak (n 25).

⁶⁶ Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights Annex, UN Doc E/CN.4/1984/4 (1984) para 12; Barak (n 25) 13, 22.

⁶⁷ Stephen Gardbaum ‘The Structure and Scope of Constitutional Rights’ in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing 2011) 388; Barak (n 25) 8, 12; Ávila (n 10) 100.

⁶⁸ For instance, art 15 on the right to life, 17(1) on the right to liberty, art 26 on the right to privacy, art 29 on the right of thought, opinion and freedom of expression recognise a potential restriction to the respective rights where it is provided for in the law. Because the limitations were not specified, the discretion of limiting the scope of the right appear to have been left to the lawmaker.

⁶⁹ The South African Constitution section 36(1) provides that:

Thus, as part of the definition of a given right, the first step in the determination of the scope of the right is, therefore, limited to the consideration of internal limitations of the right.⁷⁰

External limitation, on the other hand, as it involves weighing of some sort, forms a part of the second step analysis, which is the evaluation of the legitimacy and justifiability of the state's public policy.⁷¹ Intrinsic in the first step analysis, it must be determined that such state actions are proper state purpose authorised by the constitution. The second step, thus, involves three-step evaluation of proportionality; that is, the means employed is appropriate to such state objective; that the measure is necessary such state objective cannot be obtained by other means; and that the harm to such right by adopting such state measure is proportional (not excessive) to the benefits to be achieved by the public.

Decades after its adoption, despite the jurisprudence on the bill of rights is virtually inexistent, the Explanatory Memorandum to the Draft FDRE Constitution on article 13(2) states that fundamental rights incorporated into Chapter III were taken from international instruments and principles. It thus holds that the interpretation of the provisions of the bill of rights should be in conformity with the international bill of rights.⁷² Further, resort to the international jurisprudence both for interpretation and methods of weighing of conflicting interests is imbedded in the Constitution itself for those international instruments form the corpus of the domestic law.⁷³

This research is about the use of criminal law to achieve the ends of the prevention of crime. Since what makes criminal law coercive is the punishment, both operative facts

[t]he rights in the bill of rights may be limited only in terms of law of general application to the extent that the limitations is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and the purpose; less restrictive means to achieve the purpose.

⁷⁰ Gardbaum (n 67) 388 – 89.

⁷¹ *ibid.*

⁷² 'Brief Explanatory Memorandum to the Draft Constitution Certified by Council of Representatives 28 October 1994' (in Amharic) 21.

⁷³ *ibid* 13 – 15, 20 – 21; FDRE Const, art 9(4).

and consequences have to be addressed separately.⁷⁴ Therefore, the evaluation of the appropriateness of criminal prohibition, its necessity, and proportionality, as well as the appropriateness of a particular criminal punishment, its necessity and proportionality have to be examined separate from each other.

3.4.2.1. Appropriateness of Criminalisation

Appropriateness or ‘goal rationality’⁷⁵ in criminalisation relates to whether the adoption of a criminal norm must be one that would help realise the end sought.⁷⁶ Thus, both criminal prohibition of conduct and the consequent punishment need to be separately evaluated for appropriateness. Legislation are adopted to be applied in the future. There are natural limitations to the decisions of the lawmaker in the determination of future circumstances. However, appropriateness is determined based on three enquiries. The first enquiry relates to the determination of ‘quantitatively’ whether the means (intended to be) employed would help more or less number of results in the end sought relative to the other available alternatives;⁷⁷ ‘qualitatively’ whether the means (intended to be) employed would help a less or better quality of the ends sought relative to available alternatives;⁷⁸ and ‘probability’ whether (intended to be) means is more or less certain in achieving the ends sought from among the available alternatives.⁷⁹ Therefore, the lawmaker needs to decide the strength of the means-end relationship based on those matrices. However, the decision is only based on the available information regarding the quantity, quality, and probability of the means-end relationship.⁸⁰ Thus, the lawmaker may not be choosing the most appropriate means but only ‘satisficing solutions’.⁸¹

⁷⁴ Alistair M Macleod (2008) ‘Coercion, Justice, and Democracy’ in David A Reidy and Walter J Riker (eds), *Coercion and the State* (Springer 2008) 65.

⁷⁵ Oliver-Lalalna (n 19) 167 – 70; Schlink (n 28) 724.

⁷⁶ Barak (n 25) 303 – 07. The end for such state coercive action is assumed to be legitimate. Schlink (n 28) 723 – 24.

⁷⁷ Ávila (n 10) 115.

⁷⁸ *ibid.*

⁷⁹ *ibid* 115 – 16.

⁸⁰ Wintgens ‘Bounded Rationality’ (n 20) 8, 14 – 22; Barak (n 25) 312 – 15.

⁸¹ Wintgens ‘Bounded Rationality’ (n 20) 15; Barak (n 25) 309 – 12.

How is the legislature choosing a means to achieving certain ends? For instance, the *Vagrancy Control Proclamation* states that the Proclamation is adopted 'to permanently dispel [the] threat' of 'an increasing and wide-spreading' vagrancy.⁸² The 2009 *Anti-Terrorism Proclamation* states that 'it has become necessary to legislate adequate legal provisions [] to prevent and control terrorism' and to 'enforce agreements that have been entered into under the United Nations and the African Union' that the special penal legislation is adopted.⁸³ Seen in conjunction with other regulatory legislation, such as the *Commercial Registration and Business License Proclamation*,⁸⁴ the principal end of the tax laws is to maximise state revenue. In the determination of criminal protection of the interest as appropriate means, there has not been evidence presented and in none of those legislation, statistical data is presented to show how the means and the intended results are connected.⁸⁵

The second enquiry relates to how the relationship between the means and end is to be analysed.⁸⁶ Humberto Ávila analysed this relationship in three dimensions. The first dimension is the abstract/concrete dimension is whether the purpose 'can be *possibly* relied upon by adopting' such measure or the adopting of such measure 'would be appropriate only if the purpose is indeed realised in actuality'.⁸⁷ The second dimension general/particular is whether the lawmaker may adopt a measure that is 'generally appropriate to advance the purpose' or the 'measure would be appropriate only if the purpose is realised in every particular case'.⁸⁸ In criminalisation of conduct, every criminal prohibition and every punishment need to advance the objective of the state. The third dimension is previous/subsequent refers to whether the measure is 'appropriate when it is adopted' or 'at the time of judgment'.⁸⁹

⁸² *Vagrancy Control Proclamation No 284/2004*, preamble, paras 1, 2; art 3.

⁸³ *Anti-Terrorism Proclamation No 652/2009*, preamble, paras 3, 5.

⁸⁴ 'Brief Minutes of the Public Hearing on *Proc No 686/2010*' (n 17) 44 – 45, 61 – 62; 'Explanatory Memorandum to the Draft Constitution' (n 72) 9 – 10.

⁸⁵ See section 5.3.2.2. in Chapter 5.

⁸⁶ Ávila (n 10) 115 – 17.

⁸⁷ (emphasis in the original). Ávila (n 10) 117.

⁸⁸ *ibid.*

⁸⁹ *ibid.*

Some opine that legislative action may be abstract and general, unlike administrative measures which have to be concrete and effective in every individual case.⁹⁰ Because criminal prohibitions and punishments are the most intrusive state measure, criminal norms have to be concrete in achieving the ends sought, even though they are general in a statement and the measure must be determined appropriate both at the time of the adoption of the rule and its application. It is to maintain such rationality and efficacy, that legislation are under potential revision because they have to justify their continued existence.⁹¹

The subject of enquiry is made clear seen in the context of penal provisions contained in the administrative legislation. For instance, the three main justifications for the adoption of the Commercial Registration and Business License are: to put in place a fair, modern, fast and accessible system of commercial registration system thereby increasing societal satisfaction in the service, to support commercial registration activities with modern technology in order to combat illegality, and to maintain transparency and accountability and good governance in the commercial registration.⁹² The several provisions in the statute may be justified by those objectives; but those objectives are not sufficient justifications for incorporating such severe criminal punishments.

The third question relates to ‘the degree of control over governmental decision’ which is analysed on two models as ‘strong control’ and ‘weak control’.⁹³ In some instances the state has strong control over matters; thus, where there is an already established strong control, the appropriateness of additional measures must be seen only based on the efficacy of such existing control as in the principle of *ultima ratio*.

⁹⁰ ibid.

⁹¹ Wintgens ‘Bounded Rationality’ (n 20) 19 – 30; Wintgens ‘Legislation as an Object of Study’ (n 2) 35 – 39; Kelsen, *Pure Theory* (n 10) 211 – 13.

⁹² *Proc No 980/2016* (n 18) preamble, paras 1 – 3.

⁹³ Ávila (n 10) 118. Ávila sees the control of each government branch by the other and how much they are free to engage in their activities. This is still a better way of looking at the matter, but I rather chose to see it from a different perspective, how much the state is in control of the subject matter it is legislating on.

One such example is tax laws. The government has a wide range of regulations regarding tax matters both through the tax legislation based on powers given to the tax office and other related agencies. For business registration, an applicant is required to obtain a tax identification number and a specific address of the potential business, which, in the event of the address change, is to be notified to such office.⁹⁴ The renewal of such commercial registration and business license also requires tax clearance which is made a requirement to maximise government revenue.⁹⁵ In the event such a trader fails to pay taxes by declaring his annual income, he would be liable to pay a hefty administrative fine (principal, interest, and penalty).⁹⁶ Tax duties have priority over other claims and, the tax office is given the power to freeze such tax payer's bank accounts, and garnish his property, including barring individuals from leaving the country before paying their tax dues.⁹⁷ It is worth noting that this is done by shifting the burden of proving error in the decision of the tax office to the taxpayer.⁹⁸ Such strong control mechanisms would help the state achieve its objectives – maximizing its revenue. In the face of such strong control by the state regarding tax matters, criminalising trivial matters, shifting the administrative burdens to the citizen under pain of criminal responsibility with hefty fines and long jail time is unreasonable.

3.4.2.2. The Necessity of Criminalisation

A particular measure may be held necessary where after having considered all the available alternative measures are found to be the least intrusive but the most effective measure helps to achieve the intended end, without which it is difficult or impossible to achieve.⁹⁹ This requirement is in harmony with the principle of *ultima ratio*, helping to narrowly tailor the measure to the state's objective.¹⁰⁰

⁹⁴ *Proc No 980/2016* (n 18) art 26(7).

⁹⁵ 'Brief Minutes of the Public Hearing on *Proc No 686/2010*' (n 17) 44, 45, 46; 'Explanatory Memorandum on Commercial Registration and Business License Draft Bill' (later adopted into law as *Proc No 686/2010*) 9 – 10; 'Minutes of Hearing on *Proc No 686/2010*' (n 1) 24.

⁹⁶ *Federal Tax Administration Proclamation No 983/2016*, arts 101, 104, 105.

⁹⁷ *ibid* art 33, 35, 38, 39, 41 – 44.

⁹⁸ *ibid* art 59.

⁹⁹ Ávila (n 10) 119 ff; Barak (n 25) 317 – 39.

¹⁰⁰ Barak (n 25) 333.

Likewise, once criminal liability is determined to be necessary, the nature of the punishment is seen separately. Punishments are to be evaluated progressively starting from the least intrusive to the severe one. Therefore, it gives the impression that criminal punishment should be avoided; where punishment is found to be necessary, fine should be of the first choice. Incarceration is the last resort action and the death penalty the last, last action. Both fine and incarceration are to be seen in that order. Once incarceration and fine are found necessary measures to achieve the intended objective, the determination of the magnitude is to be examined separately using the same standards of proportionality – appropriateness, necessity, and proportionality in the narrow sense.¹⁰¹

The Criminal Code also provides that the calculation of punishment is to be made in that order, progressively ‘from the lightest punishment to the most severe ones’.¹⁰² Despite such aspirations, however, the legislature has consistently shown its desire for severe punishment where there are provisions governing the same subject matter.¹⁰³ It is to be noted in a recently adopted Legislative Drafting Manual 2010 EC (Amharic) inclusion of such provision is specifically declared ‘inappropriate’.¹⁰⁴

3.4.2.3. Proportionality in a Narrow Sense

Proportionality in the strict sense refers to the balancing of the ‘marginal social benefit’ achieving the law’s end and the ‘marginal social harm’ of limiting the constitutional right of the individual.¹⁰⁵ The comparison is not between the right and the state objective of prevention of crime, rather it is a counterweight between the marginal social benefit and the marginal social harm of the two conflicting values; that is the examination is whether criminalisation and the consequent criminal punishment as

¹⁰¹ *ibid* 319.

¹⁰² Crim C, preface para 6. This is incorporated in the (2012 EC) Draft Criminal Procedure Code – which provides for determination of sentence, art 274(4).

¹⁰³ Simeneh Kiros Assefa and Cherinet Hordofa Wetere ‘Over-Criminalisation’: A Review of Special Penal Legislation and Administrative Penal Provisions in Ethiopia’ (2017) 29 J Eth L 49, 79 – 80.

¹⁰⁴ *Legislative Drafting Manual 2010 EC* (Amharic), art 71(12).

¹⁰⁵ Barak (n 25) 340 ff; Ávila (n 10) 121 – 26. Also, Bernard E Harcourt ‘Beccaria’s *On Crimes and Punishments*: A Mirror on the History of Foundations of Modern Criminal Law’ in Markus D Dubber (ed), *Foundational Texts in Modern Criminal Law* (Oxford UP 2014) 44; Garland (n 3) 47 – 48.

limitations to the right of the individual is proportional to the intended objective of the state, for example, marginal maximization of state revenue. In other words, whether the means used is reasonable to achieve the state's objective.¹⁰⁶ In defining the intensity of the interference, a 'triad scale' is used as 'light', 'moderate', and 'serious'.¹⁰⁷

A criminal rule has two elements – the operative part (prohibition of certain conduct) and the consequence (punishments). Because such a decision of criminalisation and determination of punishment implicates different interests, they have to be assessed separately. For instance, assuming it passes all other requirements of criminal lawmaking, if in blanket prohibition it is doubtful whether the marginal social benefit of protecting the rights of the individual is outweighed by the marginal social benefit of the state's objective, such state action is not justified. Further, regarding the consequences of such violations, if the said punishment, such as fine and incarceration, is not proportional to the objective to be pursued the state's action is not justified, particularly if the punishment is incarceration.

As there is an element of discretion in proportionality in the narrow sense, it is a subject where normative judgment comes into play. Thus, other postulates, such as reasonableness¹⁰⁸ and the prohibition of excess¹⁰⁹ help such normative judgment.¹¹⁰ However, proportionality binds both the legislator and the judge.¹¹¹

3.4.3. Criminalisation and Specific Rights

The protection in the bill of rights is afforded to the individual both from government direct actions and actions based on legislation. Individual rights govern both vertical and horizontal relationships. Regarding those rights, the state must protect, to

¹⁰⁶ Barak (n 25) 11 – 12.

¹⁰⁷ Alexy 'Discourse Theory' (n 27) 24 – 25.

¹⁰⁸ Robert Alexy 'The Reasonableness of Law' in Giorio Bongiovanni, Giovanni Sartor and Chiara Valentini (eds), *Reasonableness and Law* (Springer 2009); Ávila (n 10) 105 – 11

¹⁰⁹ Ávila (n 10) 98, 101 – 04.

¹¹⁰ *ibid* 98, 101 – 11, 126; Barak (n 25) 12.

¹¹¹ Sieckmann 'Legislation as Implementation of...' (n 7) 118 – 120; Sieckmann 'Rational Lawmaking' (n 22) 367 – 371; Barak (n 25) 12; Ávila (n 10) 112 – 22.

promote and to fulfil.¹¹² Such an obligation is imposed on all branches and all levels of the government.¹¹³ In the instant case, the discussion is focused on the vertical relationship between the individual and the state, and not all branches of the government but particularly the lawmaker.

When fundamental rights are asserted as limitations to the criminalising power of the state, it is discussed on the basis that the individual has freedom from government coercive action. This right is not established in the jurisprudence.¹¹⁴ However, instead of relying on a right that is not established in any jurisprudence, the discussion may be made based on rights constitutionally recognised. Criminal punishment is an essential element of any criminal norm; thus, the punishments may be the death penalty, imprisonment, fine or restriction of other civil rights. Those rights are fundamental rights incorporated into the Constitution. Fundamental rights and freedoms incorporated into the FDRE Constitution are classified into human and democratic rights. Human are those right that emanate from human nature. Thus, article 10(1) provides that '[h]uman rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable'. In an apparent elaboration of the content of human rights, article 14 further provides that '[e]very person has the inviolable and inalienable right to life, the security of person and liberty' because they emanate from human nature;¹¹⁵ each of the three rights are provided for in the subsequent provisions of articles 15 – 17. The drafters further had in mind the manner of enforcement as a negative action of the state.¹¹⁶

¹¹² 'The Explanatory Memorandum to the Draft Constitution' (n 72) 12, 20 – 21, elaborates that the three organs have the responsibility of respecting and enforcing the constitutional rights. What is unique about this view is that it asserts that the regular courts also have such duty in the interpretation and application of the Constitution, contrary to the widely held view that interpretation of the constitution is the exclusive jurisdiction of the House of Federation.

¹¹³ *ibid.*

¹¹⁴ Husak (n 32) 210, 233.

¹¹⁵ 'The Explanatory Memorandum to the Draft Constitution' (n 72) 19, 20, 21, explains the interrelation between the provisions of arts 10, 14 – 17. Further, the right to life is the only right that is described as 'inherent' in the International Covenant on Civil and Political Rights. ICCPR art 6(1).

¹¹⁶ 'The Explanatory Memorandum to the Draft Constitution' (n 72) 15 – 16.

There is no developed jurisprudence on the bill of rights either for lack of the institution, or its inaccessibility, or otherwise, which rendered the bill of rights almost irrelevant because it is not used in judicial litigation. Such a lack of jurisprudence is pervading both the content of those rights and the methods of interpretation of rights.¹¹⁷ Therefore, as per the provisions of the Constitution itself, resort is made to the international bill of rights to find guidance both for the determination of the content of a specific right and the methods of interpretation of the bill of rights.¹¹⁸

3.4.3.1. The Right to Life¹¹⁹

It is already alluded that the Constitution recognises human rights are natural rights. The three rights that are provided for together are the right to life, security of person and liberty.¹²⁰ The right to life is 'the supreme human rights'¹²¹ which includes a wide range of aspects to life, including protection from all foreseeable threats of life, and attack by ordinary criminals to disease, and provision of essential life goods, such as, food, shelter and medication.¹²² However, this section discusses the death penalty.

The death penalty has always been in the Ethiopian criminal law. One Surahe Krestos, the chief of Wolqait, rebelling against the king took refuge in the Etchege in Gondar. Tried according to the *Fiteha Negest*, had been declared 'a rebel [who] does not deserve

¹¹⁷ Yonatan Tesfaye Fesseha 'Whose Power is It Anyways: The Courts and Constitutional Interpretation in Ethiopia' (2008) 22 J Eth L 128; Assefa Fiseha 'Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HOF)' (2007) 1 Mizan LR 1; Gedion Timothewos 'Freedom of Expression in Ethiopia: The Jurisprudential Dearth' (2010) 4 Mizan LR 201; Getachew Assefa 'All About Words: Discovering the Intention of Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation' (2010) 24 J Eth L 139.

¹¹⁸ FDRE Const, art 13(2) provides that:

The fundamental rights and freedoms specified in [] Chapter [Three] shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.

'Explanatory Memorandum to the Draft Constitution' (n 72) 14 – 15, 19 – 21.

¹¹⁹ The right to life is provided for under UDHR, art 3; ICCPR, art 6.

¹²⁰ 'Explanatory Memorandum to the Draft Constitution' (n 72) 15 – 16, 21 – 24.

¹²¹ Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary* (2nd revised ed, NP Engel 2005) 121; Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge UP 2002) 243.

¹²² Nowak (n 121) 122 – 24; 'General Comment No 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, the right to life' CCPR/C/GC/36 ('General Comment No 36') paras 22 – 35.

to live'.¹²³ In the 1930 Penal Code, death penalty is one of the principal forms of punishment.¹²⁴ The 1957 Penal Code and the Special Penal Code of 1974 had an extended list of offences punishable with death.¹²⁵ Today, the 2004 Criminal Code and special penal legislation, such as *Prevention and Suppression of Terrorism Crimes Proclamation* maintained the death penalty.¹²⁶ The punishment is applicable to, at least, 28 crimes in the Criminal Code,¹²⁷ and not a few others in the *Anti-Terrorism Proclamation*. Several people were sentenced to death, whose sentence was later commuted to a life sentence or pardoned¹²⁸ or not executed.¹²⁹

The death penalty is not aligned with the modern purposes of punishment, which the Ethiopian Criminal Code also admits.¹³⁰ One may argue those penal provisions with the death penalty are constitutional because the FDRE Constitution, article 15 provides that '[e]very person has the right to life. No person may be deprived of his life except as a punishment for serious criminal offence determined by law'.¹³¹ There are global trends towards the abolishing of the death penalty.¹³² The Constitution takes the international

¹²³ *Fiteha Negest: The Law of the Kings* (Trans. Abba Paulos Tsadwa, Law Faculty, HSIU 1968) xxi-xxv. Further, death penalty is common for intentional homicide. *ibid* 291.

¹²⁴ Jean Graven 'The Penal Code of the Empire of Ethiopia' (1964) 1 J Eth L 267, 271.

¹²⁵ See section 2.4.3.1 in Chapter 2.

¹²⁶ The recently adopted *Prevention and Suppression of Terrorism Crimes Proclamation No 1176/2020 art 3(2)* maintains the death penalty that was originally introduced by the *Anti-Terrorism Proclamation No 652/2009*, art 3.

¹²⁷ Crim C, arts 238(2); 240(2), 241, 246, 247, 248, 251, 252(2), 258 (Cum. 257), 262(2) (Ref. 539), 269, 270, 275, 276, 278, 288(2), 298(3), 299(2), 303(3), 311(3), 312, 313, 316(3), 321, 521(1), 514(2), 539(1), (2), and 671(2).

¹²⁸ *Public Prosecutor v Brigadier General Tefera Mammo Cherkos, et al*, (46 defendants) (22 December 2009, File No 81406, Federal High Court).

¹²⁹ *Federal Public Prosecutor v Fitta Qereba Bedada* (5 January 2010, Federal High Court, File No 82718).

¹³⁰ The purpose of criminal punishment is rehabilitation and reformation. Nowak (n 121) 135. However, the Ethiopian Criminal Code states that:

punishment can deter wrongdoers from committing other crimes; it can also serve as a warning to prospective wrongdoers. Although imprisonment and death are enforced in respect of certain crimes the main objective is temporarily or permanently to prevent from committing further crimes against society. And in such cases except for the death sentence, even criminals sentenced to life imprisonment can be released on parole before serving the whole term.

¹³¹ (emphasis added).

¹³² Jayawickrama (n 121) 245; The Optional Protocol II to the ICCPR which abolishes the death penalty is one good example which Ethiopia has the potential to be a signatory.

bill of rights as its source for content and guidance for interpretation methods,¹³³ that latter is supposed to be the great influencer of the criminal law. This would make the death penalty unnecessary for any circumstance for whatever reasons.¹³⁴ This is further supported by the lack of evidence that the death penalty helps achieve the ends of the prevention of crime.¹³⁵ However, for those states which do retain the death penalty, such as, Ethiopia, they assume three levels of international obligations regarding the death penalty; in fact, such obligation forms the corpus of the domestic law.¹³⁶

3.4.3.1.1. The State may not Use the Death Penalty ‘arbitrarily’

What is prohibited under the ICCPR is ‘arbitrary deprivation of the right to life’; that is, for the state employing the death penalty, there are stricter requirements to meet. First, the punishment must be provided for in the law which itself is not ‘unjust’.¹³⁷ Arbitrariness is related not only to the ‘due process of law’ but also with ‘elements of *unlawfulness* and *injustice*, as well as those of *capriciousness* and *unreasonableness*’.¹³⁸ Further, the law has to be sufficiently precise to understand and the death penalty should not be mandatory because such provision is bound to be arbitrary.¹³⁹

It is evident from the provisions of articles 15, 17 and 18, the rights to life and liberty are subject to limitations while the protection to the personal security of the individual is absolute if it borders cruel, inhuman, and degrading punishment; because the constitution recognises death penalty and imprisonment as modes of punishment.¹⁴⁰ The right to life, for instance, may be limited by a judicial decision provided (a) the person committed a serious crime, and (b) it is provided for in such criminal law that such crime is punishable by death, and (c) the facts are established by an impartial

¹³³ ‘Explanatory Memorandum to the Draft Constitution’ (n 72) 20, 21.

¹³⁴ Regarding the practical and moral dilemma of allowing the death penalty and the difficulty of designing the provision in a manner not to condone the death penalty, see Jayawickrama (n 121) 243 – 245.

¹³⁵ See (n 43) in Chapter 2.

¹³⁶ FDRE Const, art 9(4), 13(2).

¹³⁷ Nowak (n 121) 138-39.

¹³⁸ (emphasis in the original). Nowak (n 121) 128; General Comment No 36 (n 122) para 18.

¹³⁹ General Comment 36 (n 122) paras 22, 41.

¹⁴⁰ ‘Explanatory Memorandum to the Draft Constitution’ (n 72) 22, 23.

court of law based on evidence.¹⁴¹ Obviously, one has to be able to read the ‘justice’ in the content of such criminal law imposing the death penalty.

Even though several crimes carry the death penalty, the death penalty is not mandatory. Criminal Code, article 117(1) provides that the death penalty may be imposed by the court only when the following conditions are met: (a) the crime for which the death penalty may be imposed is ‘grave crime’;¹⁴² and (b) the person convicted of the crime is ‘exceptionally dangerous’; and (c) the death penalty is stated in the law; and (d) the death penalty is imposed for ‘completed crimes’; and (e) there is no ‘any extenuating circumstance’; and (f) the person who is convicted has attained age of eighteen at the time of commission of the crime. Such penalty ‘must be applied in accordance with the spirit of this Code and so as to achieve the purpose it has in view (article 1)’.¹⁴³

There is no mandatory sentence in the Ethiopian Criminal Code; the judge exercises discretion in determining the sentence taking the nature of the crime and the special circumstances of the individual.¹⁴⁴ The gravity of the crime and the dangerousness of the criminal are subject to debate. However, whether an individual would not have any extenuating circumstance is doubtful based on the long list of grounds that could be invoked for mitigation. There are general and special mitigating circumstances (articles 82 and 83, respectively), ordinary and free mitigation (articles 179 and 180, respectively). Further, there are open extenuating grounds as are provided for under article 86. In practice, they include illness, age, family and social responsibility, political participation which the court routinely takes as mitigating grounds. Thus, it

¹⁴¹ *ibid* 21, 22.

¹⁴² ‘Grave crime’ is not defined anywhere in the Criminal Code. This is a Criminal Code provision whose interpretation is limited by the Code itself. However, the content of such provision may be interpreted for limitation of the right to life; thus, resort may be had to the ICCPR provisions, which would take us to the interpretation of ‘most serious crimes’ in the ICCPR, art 6.

¹⁴³ Crime C, art 87, para 2. The purpose of punishment, as provided for under Crim C art 1, is the prevention of crime. This is done by specific deterrence and, arguably, by general deterrence. If the death sentence is imposed for the absolute prevention of crime, it would amount to retribution.

¹⁴⁴ Crim C, art 88.

is almost impossible for the court to not find at least one mitigating ground, only without which the death penalty may be imposed.¹⁴⁵

It is further asserted that if data shows a certain section of society is 'disproportionately likely to face the death penalty', it is arbitrary.¹⁴⁶ With only limited information, it is not possible to establish a clear trend regarding the death penalty in Ethiopia in the judgments rendered so far; however, it appears it is those who are political figures that faced the death penalty. A country having genocide defined also around the political group, in addition to natural traits of a group,¹⁴⁷ this rough trend might hold to show arbitrariness.

3.4.3.1.2. Death Penalty Might be Used Only 'for the most serious crimes'

Related to the prohibition of arbitrary deprivation of life, the punishment must meet the requirements of appropriateness, necessity, and proportionality;¹⁴⁸ thus, such punishment may be imposed only for 'the most serious crimes'.¹⁴⁹ To define those crimes, the UN Human Rights Committee has given only two indications. First, the death penalty cannot be justified by 'crimes of property, economic crimes, political crimes or in general offences not involving the use of force' or those crimes the criminalisation of which 'violates the Covenant'.¹⁵⁰ Those conducts the criminalisation of which is contrary to the covenant include offending the head of state.¹⁵¹ This limitation may be seen in the light of freedom of expression, which is unjustifiably associated with serious crimes entailing the death penalty. ICCPR, article 19 encourages decriminalisation of the freedom of expression and the dissociation of the exercise of freedom of expression from such serious crimes. However, the Criminal

¹⁴⁵ In *Federal Public Prosecutor v Daniel Kebede* (16 March 2015, File N 124483, Federal High Court) despite the court find two accepted mitigating grounds, it still imposed the death penalty.

¹⁴⁶ General Comment No 36 (n 122) para 48.

¹⁴⁷ Crim C, art 269 defines genocide as crimes committed against 'a nation, nationality, ethnical, racial, national, colour, religious or political group'.

¹⁴⁸ General Comment No 36 (n 122) para 18.

¹⁴⁹ *ibid* para 37.

¹⁵⁰ *ibid* para 40; Nowak (n 121) 141.

¹⁵¹ General Comment 36 (n 122) para 40.

Code, article 44 provides for special criminal liability of an author, originator or publisher. Sub-article (1) provides that such a person may be responsible for specifically listed crimes including article 240 - armed rising or civil war, article 248 - high treason, article 252 - espionage, and 262 - outrages against foreign heads of state, representatives and other persons enjoying protection under international law, many of which carry the death penalty. What is worse, the provisions of article 43 provide for 'presumption of guilt' and precludes contrary evidence by the defendant.¹⁵²

Second, with a view to scaffolding what might not be considered arbitrary deprivation of life, it is stated that the state might be 'confined to intentional killings and the intentional infliction of grievous bodily harm'.¹⁵³ The state also must constantly review its laws to make sure that the death penalty is not imposed for crimes that 'do not qualify as the most serious crimes'.¹⁵⁴ While there are insignificantly few crimes of violence that carry the death penalty, the bulk of the crimes that carry the death penalty are those crimes which appear to have been used for the maintenance of political power.¹⁵⁵ Those who actually were sentenced to death are not proven to have committed any crime of violence.¹⁵⁶

3.4.3.1.3. The Death Penalty should be 'progressively abolished'

Ethiopia is a party to the ICCPR since 1993; but she is not a party to the Optional Protocol II which abolishes the death penalty. However, even for those states that are not parties to the OP II, they must progressively limit the application of such punishment by 'de jure and de facto moratorium' and progressively abolish the death penalty.¹⁵⁷ This is manifested in two approaches; first, for those who already have

¹⁵² art 41(5) provides that:

[i]n determining the liability of a person under this Article for the crime committed through the products of the mass media, the content of the matter shall be deemed to have been inserted, published or disseminated with his full knowledge and consent. No proof to the contrary may be admitted in such a case.

¹⁵³ Nowak (n 121) 142; General Comment No 36 (n 122) para 39.

¹⁵⁴ General Comment No 36 (n 122) para 39, 44, 45, 48.

¹⁵⁵ See n 127.

¹⁵⁶ In *Brigadier General Tefera Mammo*, (n 128) five defendants, Melaku Teferra, Dr. Birhanu Nega, Andargachew Tsige, Muluneh Eyuel, and Mesfin Aman were sentenced to death.

¹⁵⁷ General Comment No 36 (n 122) para 54.

abolished, they are precluded from reintroducing the death penalty. Whether this relates to the death penalty in general or relates to the already existing is not made clear. However, it could be argued that the narrow interpretation of restrictions on rights needs to be applied here too. Thus, if there is death penalty for crime X and there was no death penalty for crime Y, even when it qualifies as ‘the most serious crime’, death penalty may not be introduced for crime of Y for that would be expanding the death penalty in contradiction to the obligation to progressive abolition of the death penalty.

Second, the death penalty relates only to the taking away of life; it does not and cannot include cruel and degrading treatment in the process of killing. Thus, the second approach relates to a systematic interpretation of the right to life. Even though at the time of the drafting of the Covenant the death penalty was not regarded as ‘cruel, inhuman and degrading punishment per se’, the global perspective now has evolved to an agreement treating the punishment as contrary to article 7 of the Covenant, treating capital punishment as ‘cruel, inhuman and degrading’.¹⁵⁸ Thus, the provisions of article 18(1) of the Constitution may be interpreted in the same spirit.

Ethiopia is engaged in the broad range of reform including the criminal justice. However, the death penalty is maintained in statutes recently adopted as part of this reform. The *Prevention and Suppression of Terrorism Crimes Proclamation* and the *Prevention and Suppression of Trafficking in Persons and Smuggling of Persons Proclamation*, both retained the death penalty.

3.4.4. The Right to Liberty

The right to liberty is one of those rights recognised as natural rights.¹⁵⁹ The right to liberty relates to individuals ‘freedom of bodily movement’.¹⁶⁰ Because imprisonment is limited to restriction of individual freedom, the discussion on the right to liberty is

¹⁵⁸ Nowak (n 121) 135; General Comment 36 (n 122) paras 44, 55.

¹⁵⁹ FDRE Const, arts 10(1), 17; ‘Explanatory Memorandum to the Draft Constitution’ (n 72) 15 – 16, 21.

¹⁶⁰ General Comment No 35 on article 9 (Liberty and security of persons) of the International Covenant and Political Rights, CCPR/C/GC/35, para 3; Nowak (n 121) 212; ‘Explanatory Memorandum to the Draft Constitution’ (n 72) 23 – 24.

limited to the freedom of movement aspect only. The provisions of the Constitution conform with the provision of the ICCPR. Thus, FDRE Constitution, article 17 (1) provides that '[n]o one shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law'. Sub-article (2) further provides that '[n]o person may be subjected to *arbitrary arrest*, and no person may be detained *without a charge or conviction* against him'.¹⁶¹

The legitimate purpose of deprivation of individual liberty is only when there is a law that justifies arrest and there is a procedure by which such arrest may be effected.¹⁶² The principal punishment in the Ethiopian criminal law is imprisonment; in fact, criminal law appears to be synonym with incarceration. The international bill of rights does not have an interest in abolishing incarceration,¹⁶³ but only has a desire to regulate arbitrariness. Thus, what is prohibited is arbitrariness in the law. Arbitrariness in this sense is far beyond illegality; even when there is law, it should meet the requirements 'of reasonableness, necessity, and proportionality'.¹⁶⁴

This provision is seen in the light of the provisions of ICCPR article 11, which prohibits detention for money obligations.¹⁶⁵ For instance, tax obligations are treated as money debts except such obligation emanates from the law.¹⁶⁶ The tax collection office is given a wide discretion to enable the collection of such tax. However, a wide range of activities that are subject to the administrative power of the tax office is also made criminal conduct.¹⁶⁷ Some of those crimes, such as the *Federal Tax Administration Proclamation No 983/2016*, articles 116 – 133 are a clear violation of the requirements of non-arbitrariness.

¹⁶¹ (emphasis added). These provisions are taken from the ICCPR, art 9(1) verbatim, save they leave out few words.

¹⁶² General Comment No 35 (n 160) para 22.

¹⁶³ Nowak (n 121) 211.

¹⁶⁴ General Comment No 35 (n 160) para 12.

¹⁶⁵ *ibid* para 14.

¹⁶⁶ *G Agripack PLC and Getahun Asfaw v ERCA* (11 June 2012, Cass File No 84623, 15 Decisions of the Cassation Division of the Federal Supreme Court).

¹⁶⁷ *Proc No 983/2016* (n 96) arts 116 – 132.

3.4.5. Prohibition of Cruel, Inhuman and Degrading Punishment

The Constitution affords absolute protection to the right to personal security of the individual. However, because of the brevity of the provision of the Constitution, article 16, and the comments, it appears vague. The right it is given flesh through the provisions of article 18(1) which prohibit 'cruel, inhuman and degrading treatment or punishment'. Article 16 further provides that '[e]very one has the right to protection against bodily harm'. The provisions deal with both treatment and punishment. Even though the thinking framework and facts unavoidably might tilt to include both criminalisation and punishment, the specific objective of this section relates to the assessment of whether a particular punishment in its legislative determination complies with the dignity of the individual undergoing the punishment.

The ontological punishment theorists argue that the consequentialist purpose of punishment, deterrence, is degrading.¹⁶⁸ It is hard to argue against. However, criminal punishments may be seen in their nature and content. Thus, the death penalty, by the systematic interpretation, is already indicated to be cruel and inhuman for it involves several other things than the taking away of life. For instance, the Penal Code prescribes hanging for civilians and shooting for members of the armed forces and the court may order the sentence 'be carried out in public to set an example to others'.¹⁶⁹ The Criminal Code reverses these provisions by providing two fundamental limitations. First, the death penalty may 'not be carried out in public by hanging or by any other inhumane means'.¹⁷⁰ Second, the death penalty may be executed 'without any cruelties, mutilation or other physical sufferings'.¹⁷¹ It requires that the execution may be executed by 'humane means'. The determination of such humane means is left to 'the executive body having authority over the Federal or Regional prison

¹⁶⁸ Gabriel Hallevy, *The Right to be Punished: Modern Doctrinal Sentencing* (Springer 2013) 28 – 35; Werner S Landecker 'Criminology in Germany' (1941) 31 J of Crim L and Criminology 551, 552 – 53.

¹⁶⁹ Pen C, art 116 (1) para 3.

¹⁷⁰ Crim C, art 117(3) para 1.

¹⁷¹ *ibid* art 117(3) para 2.

administration concerned'.¹⁷² The researcher is not aware of any execution conducted after the adoption of the Criminal Code.¹⁷³

The inhumane nature of the death penalty essentially related to the excessiveness of the punishment. However, both incarceration and fine may also be excessive in which case imprisonment turn into cruel, inhumane and degrading. For instance, the *Stamp Duty Proclamation No 11/1998*, article 12, imposes imprisonment from 10 to 15 years' rigorous imprisonment and a fine between birr 25,000 and 35,000. The fact that the minimum stamp duty is birr 5 shows how cruel the punishment is. Yet, the *Federal Tax Administration Proclamation No 983/2016*, article 123 reduces the imprisonment to 3 to 5 years' rigorous imprisonment but increased the fine to from 25,000 to 50,000. It could also be argued that such a norm is contrary to the principle of the prohibition of excess because it goes far beyond the intended purpose.

Further, one of the punishments, as incorporated into the Criminal Code, is reprimand in open court (article 122). Such punishment may inherently be degrading.

It is indicated that human rights, as emanating from the nature of mankind, are inalienable and inviolable. However, both the right to life and the right to liberty may be restricted by state action which is based on law. The protection afforded to the security of person of the individual is absolute that does not admit any form of restriction. It is further shown that the drafters had in mind that such human rights may be respected by not violating them.¹⁷⁴ It follows from the foregoing premises that where the state justifiably limits such human rights, it has to show that the marginal social harm of limiting the rights of the individual is outweighed by the marginal social benefit of the state's action which is meant for the protection of human dignity.

¹⁷² *ibid* art 117(3) para 1.

¹⁷³ There are several cases wherein the death penalty was imposed on defendants. For instance, *Daniel Kebede* (n 145), *Tefera Mammo* (n 128); *Fitta Qereba* (n 129); *Federal Public Prosecutor v Mohammed Hassan Siraj* (24 March 2016, File No 149373, Federal High Court).

¹⁷⁴ 'Explanatory Memorandum to the Draft Constitution' (n 72) 15, 16.

3.5. Rights as Metanorms and Methodological Limitations

The criminal law is a code of conduct for the individual; however, it is also an instruction for the court to impose punishment.¹⁷⁵ Rules and principles are norms or objects of application.¹⁷⁶ They have to be properly understood in order to be applied; such understanding is possible only through interpretation. It is this what Gabriel Hallevy referred to as ex-ante interpretation.¹⁷⁷ Such interpretation and application of criminal norms is governed by another set of 'second-degree norms' or metanorms.¹⁷⁸ Metanorms are not directly applicable to a fact situation; they scaffold rules and principles in their application and are rather referred to as postulates.¹⁷⁹ Those postulates are of two types: 'hermeneutic postulates' are those related to the interpretation of norms and help the understanding of such norm while 'applicative postulates' are 'methodological guideline' about the application of those norms.¹⁸⁰ The postulates of 'proportionality, reasonableness, and prohibition of excess', for instance, are in this category.¹⁸¹

Principles are to be weighed when they conflict, and some principles help in the weighing process. Those principles are metanorms as they are about the norms while they are not directly applicable to facts. Those metanorms are methodological principles that govern the making, interpretation, and application of the norms – rules and principles. Some of them are constitutional principles enshrined as fundamental right and others are criminal law doctrines.

It might be argued that the application of applicative metanorm is limited to courts. However, the lawmaker wants its laws applied by the courts and it has to communicate its intentions to the court in a manner the latter understands. Therefore,

¹⁷⁵ This is what Hart calls secondary norms. HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 100 – 23.

¹⁷⁶ Ávila (n 10) 8, 83.

¹⁷⁷ Gabriel Hallevy, *A Modern Treatise on the Principle of Legality in Criminal Law* (Springer 2010) 144.

¹⁷⁸ Ávila (n 10) 83.

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid* 83 – 84, 94 ff.

¹⁸¹ *ibid* 92.

whether the metanorm is hermeneutic or applicative, it helps both in augmenting understanding and application of a given rule or principle, indirectly controlling the formal aspect of the limitation on the criminalisation power of the state.

3.5.1. The Principle of Legality/Non-retroactivity of the Criminal Law

In the positivisation of criminal law, the principle of legality is developed as one of the first few metanorm of criminal law. It has both a hermeneutic and applicative aspect. It defines both the scope of criminal law and how such criminal norms should be understood and applied. In different legal systems, it is interpreted to contain different things.¹⁸² In Ethiopian criminal law, the principle of legality as provided for in Criminal Code, article 2, has five elements some of which are separately provided for in the Constitution. (a) There is no crime and there is no punishment other than the one that is provided for in the law. Therefore, both the operative facts and the consequences have to be defined.¹⁸³ (b) The other face of the principle which is also incorporated in the Constitution is the temporal application of criminal law. That is the principle of legality requires only the prospective application of criminal law. Stated otherwise, the retroactive application of criminal law is prohibited.¹⁸⁴ (c) Criminal law is a code of conduct to be complied with, and the individual has the right to fair notice of what is prohibited. To make such declaration known, it must be published in the *Federal Negarit Gazeta*, the official gazette for publication of laws.¹⁸⁵ (d) Interpretation of criminal law by analogy is prohibited. And (e) double jeopardy is prohibited.¹⁸⁶

The application of the principle of legality is discussed only from two perspectives. First, there are criminal rules whose consequences are not defined in the law. Thus, while the prohibited conducts are provided for under article 58 of the *Urban Plans*

¹⁸² In some instances, the principle of legality also includes the spatial application of criminal law. See Hallevy, *Principle of Legality* (n 177) 11 – 14.

¹⁸³ For instance, in *Worku Fekadu and Shume Arrarso v Benishangul Gumuz State Prosecutor* (24 January 2013, Cass File No 75387, 14 Decisions of the Cassation Division of the Federal Supreme Court), the Cassation Division held that courts may impose only such punishment that is defined by the criminal law.

¹⁸⁴ FDRE Const, art 22.

¹⁸⁵ *Federal Negarit Gazeta Establishment Proclamation No 3/1995*; Crim C, art 343(1).

¹⁸⁶ FDRE Const, art 23.

Proclamation No 574/2008, the determination of punishment is left for ‘the regulations to be issued in accordance with [the] Proclamation’.¹⁸⁷ Likewise, in several Proclamations, the punishments are defined before the prohibited conducts are determined. Thus, the principal legislation provides that violation of the Proclamation, and Regulation and Directives to be adopted based on such Proclamation is punishable with terms of imprisonment and fine.¹⁸⁸

Second, the court also applies matters that are not ‘criminal law’ in the meaning of the law itself.¹⁸⁹ In *Daniel Mekonnen*,¹⁹⁰ The respondent was charged for violation of Directive CTG/001/97, issued by the National Bank of Ethiopia, for attempting to smuggle 46.96 kilos of gold to Djibouti. The Federal First Instance Court convicted and sentenced him to a term of imprisonment and fine as provided for under the *Monetary and Banking Proclamation No 83/1994*, article 59(2)(b). The Federal High Court reversed both the conviction and the sentence. The ground for such reversal was that the prohibited act was provided for in a Directive which was not published in the *Negarit Gazeta* and the Directive was written in English, which is not a working language in the country. The reversal was affirmed by the Federal Supreme Court.

However, the Federal Supreme Court Cassation Division reversed the decision of the Federal High and Supreme Courts and affirmed the decision of the Federal First Instance Court. The reason:

the prohibited acts are provided for in the Directive adopted by the National Bank as authorised by the Proclamation. No law requires the publication of Directives in the *Negarit Gazeta*, but this does not deny the Directive its quality as law. The Directive has to be interpreted to enforce the objective of the enabling Proclamation. Once the requirements of prohibition are established in the Directive, the punishments are to be determined according to the

¹⁸⁷ art 58(1), (2).

¹⁸⁸ For instance, *Banking Business Proclamation 592/2008*, art 58(7) provides that ‘[a]ny person who contravenes or obstructs the provision of this Proclamation or regulations or directives issued to implement this Proclamation shall be punished with a fine up to Birr 10,000 and with an imprisonment up to three years.’

¹⁸⁹ Following the decision of the Cassation Court, a former judge in the Cassation Court Ali Mohammed Ali ‘Fundamental Error of Law’ in Muradu Abdo (ed) *Cassation Questions in Ethiopia* (Papers Presented at the Symposium Organised in Commemoration of the 50th Anniversary of the Founding of the School of Law, AAU April 29, 2014) 60, 66 lists directives as laws.

¹⁹⁰ *ERCA v Daniel Mekonnen* (21 July 2010, Cass File No 43781, 10 Decisions of the Cassation Division of the Federal Supreme Court).

Proclamation, article 59(2)(b)¹⁹¹

In a manner showing that enforcement of directives is a consistent practice Cassation Division had already upheld conviction based on a violation of another directive of the National Bank in *Samson Mengistu*.¹⁹²

The practice is so widespread that the bulk of criminal cases for engaging in banking business and contraband are based on conducts prohibited in directives that are prosecuted and punished. For instance, the National Bank of Ethiopia issues directives on a broad range of matters. Thus, it also issues directives regarding the amount of foreign currency one would carry with him leaving the country. In *Zelalem Shiferaw*,¹⁹³ the defendant was charged for violation of article 168(1) of the *Customs Proclamation No 859/2014*, which is always read in conjunction with article 4 of the National Bank of Ethiopia directive adopted on 2 June 2017 for carrying USD 15,000 in his luggage. The court convicted the defendant for contraband and sentenced him to 4 years of rigorous imprisonment and fine Birr 40,000. Likewise in *Leeyu Lu*¹⁹⁴ the defendant was charged for the same crime and convicted in absentia. The court sentenced her to 5 years rigorous imprisonment and to a fine Birr 100,000.

Giving retroactively effect to those ‘non-criminal law’ materials, the *Federal Tax Administration Proclamation No 983/2016*, article 2(36) defines tax laws to include, among others, the *Federal Income Tax Proclamation*, the *Value Added Tax Proclamation*, the *Excise Tax Proclamation*, the *Stamp Duty Proclamation*, and the *Turnover Tax Proclamation*. The Proclamation further provides that tax laws also include ‘any regulation or directive made under a law referred to’ in the *Federal Tax Administration Proclamation*.

The principle of legality provides for the formal requirements of the criminal lawmaking and how such norms should be understood. Nevertheless, there is a

¹⁹¹ (translation mine).

¹⁹² *Samson Mengistu v ERCA* (7 February 2009, Cass File No 80296, 14 Decisions of the Cassation Division of the Federal Supreme Court).

¹⁹³ *Public Prosecutor v Zelalem Shiferaw* (8 November 2017, File No 256759, Federal First Instance Court).

¹⁹⁴ *Public Prosecutor v Leeyu Lu* (12 July 2018, Court File No 257687, Federal First Instance Court).

widespread practice that violates the principle of legality both in criminal lawmaking and application, leaving one to wonder what the proper scope of the criminal law is.¹⁹⁵

3.5.2. The Principle of Lenity

The principle lenity is another applicative postulate that a criminal norm that favours the accused be applied to a fact situation. This postulate governs only one situation when two or more conflicting rules govern the same conduct, to which the Federal Supreme Court Cassation Bench rendered a binding interpretative decision.¹⁹⁶ There are, however, several instances where the Criminal Code governs particular conduct but a special legislation provision is applied, but only two aspects are discussed here. First, there are cases where the lawmaker expressly provides for a severe penalty than that is already in the Criminal Code without repealing those provisions. We can see those frequently prosecuted cases under two categories: violations of tax laws and license regulations. For instance, the 1957 Penal Code contains provisions governing tax crimes, articles 360 – 365. However, the *Value Added Tax Proclamation No 285/2002* and the *Income Tax Proclamation 286/2002* were adopted containing penal provisions with a severe penalty with vague and broader conduct prohibited. Those proclamations do not repeal the provisions of the Penal Code, nor were the issues discussed in the preparatory works and parliamentary hearing.¹⁹⁷ When the Criminal Code was adopted in 2004 replacing the Penal Code, those criminal provisions of the Penal Code were incorporated in the Criminal Code, almost verbatim. However, tax related

¹⁹⁵ It is only recently that in the recently adopted *Federal Administrative Procedure Proclamation No 1183/2020* that directives are required to be published both as part of the process of adoption and subsequent to adoption, arts 8, 17.

¹⁹⁶ This principle is included in Crim C, arts 6 and 9. See *Solomon Desalegn v Southern Regional State Prosecutor* (15 May 2014, Cass File No 95438, 16 Decisions of the Cassation Division of the Federal Supreme Court); *Habtu Tulu v FEACC* (22 June 2015, Cass File No 103775, 18 Decisions of the Cassation Division of the Federal Supreme Court).

¹⁹⁷ ‘Minutes of Meeting of the Economic Affairs and Legal Affairs Standing Committees with Resource Persons on the Value Added Tax Draft Bill, 7 September 2002’ (later adopted into law as *Proc No 285/2002*); ‘Brief Explanatory Memorandum on Income Tax Draft Bill’ (later adopted into law as *Proc No 286/2002*); ‘Modifications made on the Value Added Tax Draft Bill’ (later adopted into law as *Proc No 285/2002*).

charges were brought under those proclamation provisions and the court disposed of those cases accordingly.¹⁹⁸

Likewise, matters relating to license to engage in certain activities are governed by the Criminal Code article 433.¹⁹⁹ There are rare instances where individuals are charged for violation of this provision.²⁰⁰ But there is special legislation governing license matters which severely punish engaging in certain activities without a license. *Commercial Registration and Business License Proclamations No 980/2016*, articles 49, *Coffee Quality Control and Marketing Proclamations No 1051/2017*, art 10, *Broadcasting Services Proclamation No 533/2007*, article 45, *Banking Business Proclamation No 592/2008*, article 58, etc. There are several cases brought under those special legislation.²⁰¹

For instance, in *Bazezew Yihun*, Petitioner was apprehended transporting animal hide using public transport bus which is, later, sold for Birr 2,432; and was charged for trading with a license that was not renewed at the time. The Jawi Woreda Court, in Amhara State, convicted him for violation of article 60(1) of the *Trade Registration and Business Licence Proclamation No 686/2010*, and sentenced him to 7 years rigorous imprisonment and fined him Birr 150,000.00. As the State High Court rejected his appeal, Bazezew petitioned the State Supreme Court Cassation Bench which reduces the imprisonment to 3 years and 6 months and the fine to Birr 5,000. The Federal Supreme Court Cassation Bench affirmed the decision finding no reason to interfere with the judgment of the State Cassation Court. In none of those cases the court changed the provisions of the law from those special provision of administrative

¹⁹⁸ *ERCA v Berti PLC*, et al, (March 13, 2013, File No 171851, Federal First Instance Court) the charges were drawn up as violations of the provisions of *Income Tax Proclamation No 286/2002*, art 96, 97(1)(b), *Value Added Tax Proclamation No 285/2002*, art 49, 50(1)(b), (3)(b); *ERCA v Abdurahman Idris*, et al, (File No 207153, Federal First Instance Court) the charges were *Proc No 286/2002*, art 96, 97, *Proc No 285/2002*, art 49, 55 *ERCA v G.D.G Construction PLC*, et al, (Federal First Instance Courts File No 206968 May 6, 2016) the Charge is *Proc No 286/2002*, art 96, 102(1), *Proc No 285/2002*, art 49, 56(1).

¹⁹⁹ Crim C, art 433 prohibits 'engaging in [a commercial] activity without or beyond the scope of a license' which is punishable 'with simple imprisonment or fine; or with rigorous imprisonment not exceeding five years and fine'.

²⁰⁰ *Worku and Shume* (n 183).

²⁰¹ *Bazezew Yihun v Amhara Regional State Prosecutor* (24 June 2012, Cass File No 86388, 15 Decisions of the Cassation Division of the Federal Supreme Court); *Public Prosecutor v Anteneh Getye Abebe* (26 March 2012, File No 114155, Federal High Court).

regulations to that of Criminal Code, article 433. In some instances, it merely imposed suspended sentence.²⁰²

Likewise, all the criminal cases for engaging in banking business without a valid license, such as, in the *Kerima*²⁰³ and similar other cases were drawn up based on the provisions of the *Banking Business Proclamation No 592/2008*, article 58.

The other situation is where the lawmaker routinely and expressly states its preference for a severe penalty to a mild one. For instance, the *Coffee Quality Control and Marketing Proclamation No 602/2008*,²⁰⁴ article 15 provides that a person who is engaged in coffee business, including coffee processing and transaction, compromising the quality of such export coffee ‘unless punishable by greater penalty as per any other relevant law, be penalised by a fine [] and an imprisonment of not less than one year but not exceeding three years’. The provisions of Criminal Code, article 354 ff. cover economic crimes that are punishable by up to 15 years of imprisonment. Whether conducts that violate the coffee quality control proclamation are also falling under those provisions in the Criminal Code is arguable. However, in *Ousman, et al*,²⁰⁵ who allegedly fail to export coffee purchased for export purposes only, were charged under the provision of the Criminal Code.

In some instances, defendants objected to the charges based on the principle of lenity as incorporated in the Criminal Code, articles 6 and 9. However, the Federal High Court rejected the objection and held that the Proclamation is adopted after the Criminal Code and the lawmaker expressly stated its intention that it deviates from such principle.²⁰⁶

²⁰² *Federal Public Prosecutor v Mehibuba Abdella* (19 April 2019, Crim File No 003716, Federal High Court).

²⁰³ *Federal Public Prosecutor v Kerima Abdulmejid Mussa* (8 November 2018, Crim File No 255845 Federal First Instance Court); *Federal Public Prosecutor v Qelemua Ousman, et al* (15 January 2019, File No 188831, Federal High Court).

²⁰⁴ This Proclamation is replaced with *Coffee Quality Control and Marketing Proclamations No 1051/2017* with the same content.

²⁰⁵ *Federal Attorney General v Ousman Ahmed, et al* (12 July 2018, File No 203050, Federal High Court); *Federal Attorney General v Elias, et al*, (File No 207274, Federal High Court).

²⁰⁶ See *Elias* (n 205); *Ousman* (n 205).

3.6. The Bill of Rights in the Context of Adjudication

The central thesis of this study is limiting the criminalisation power of the state. The constitutional provisions are principally addressed to the lawmaker. The lawmaker is supposed to apply the bill of rights in the lawmaking process. This is provided for in the Constitution – the legislature must respect and enforce the bill of rights. However, it is not effective enforcement of the rights. Thus, resort to the adjudication process may be inevitable. The method of interpretation of the bill of rights is the same both in the legislation and adjudication process. However, it is in the review of constitutionality that some penal legislation or provisions are nullified in other jurisdictions.

Thus, when particular legislation is adopted by the legislature contravening those constitutional provisions, the protection of rights could be effective only by resorting to adjudication of constitutional disputes. Where there is sufficient deliberation in lawmaking process and the bill of rights was taken into consideration, there is a likelihood of judicial deference rather than *de novo* review of facts.²⁰⁷ Yet, Ethiopia does not have such an effective constitutional dispute resolution mechanism.²⁰⁸

3.7. Conclusion

The doctrine of legal (public) good is discussed in the previous chapter as a limitation on the criminalising power of the state. For such limitation to be effective in criminalisation, it is indicated that such legal good has to be beyond the positive (criminal) law so that it can be beyond the reach of the legislature. Therefore, this chapter discussed such constitutional limitations in three categories.

All coercive power of the state has to have a legal justification and it takes different forms at different levels. The first justification is, therefore, the lawmaker need to have the constitutional power of criminalisation. It principally focuses on jurisdictional power as limited by the doctrine of constitutionalism. As the Constitution contains the

²⁰⁷ Oliver-Lalana (n 19) 168 – 69.

²⁰⁸ One might mention the Council of Constitutional Inquiry and House of Federation as having the power to interpret the Constitution. They are yet to render such a judgement declaring a criminal rule ‘unconstitutional’.

bill of rights, the second justification relates to harmonisation of the penal rules with the bill of rights. The relation between the bill of rights and criminal law takes two sides. Criminal law is meant for the protection of fundamental rights; however, it should also not limit the rights of the individual unreasonably. It is here that the two conflicting principles are weighed against each other based on the principle of proportionality. Thus, the criminal prohibition of particular conduct and the attached punishment must be appropriate, necessary and proportional in the narrow sense. As the bill of rights jurisprudence is limited in Ethiopia, resort is made to the international bill of rights both for the definition of the scope of the right as well as for methodology.

The third level limitation relates to methodological matters. Some of the fundamental rights and other principles operate as postulates helping the understanding and application of criminal law, such as the principle of legality and the principle of lenity. Thus, if the lawmaker desires to adopt laws that would be applied by the courts, it has to design those rules harmoniously using the language of those who administer it. However, the lawmaking process is less effective as a method of enforcement of specific fundamental rights. Thus, the adjudication process is a fall-back measure for the enforcement of individual rights.

CHAPTER 4. - (NON) DELEGABILITY OF CRIMINAL LAWMAKING POWER

4.1. Introduction

The previous chapters discuss the constitutional criminal lawmaking power of the House of Peoples' Representatives ('the HoPR'). Because modern life became more impersonal requiring extensive regulation, delegation became the way of effective governance. Thus, the HoPR delegates the Council of Ministers to adopt regulations and the respective administrative agencies to adopt directives.¹ However, those regulations and directives contain penal provisions or are criminally sanctioned by enabling statute. A substantial part of the criminal law is adopted by the HoPR. Yet, a significant portion of the criminal law is adopted by the executive on direct or indirect delegation.² The rules adopted by the executive are either directly applicable to criminal norms or are rules that are criminally sanctioned by acts of the HoPR.³ This expands the scope of the criminal law immeasurably.

This chapter examines whether criminal lawmaking power is delegable and those criminal norms adopted on delegation are legitimate rules by examining both the substantive and formal aspects. It first establishes the doctrine of delegation in the modern state governance, and the legislative delegation for the expedited discharge of administrative responsibilities of a government. After reviewing some prominent rules adopted by the executive on delegation, it dwells on the delegability of criminal

¹ The *Federal Administrative Procedure Proclamation No 1183/2020* ('Proc No 1183/2020') art 2(2) defines 'directive' as 'a legislative document that is issued by an administrative agency based on delegation power bestowed up on it by the legislature which affects peoples' rights and interests'.

² Simeneh Kiros Assefa and Cherinet Hordofa Wetere "Over-Criminalisation': A Review of Special Penal Legislation and Administrative Penal Provisions in Ethiopia' (2017) 29 J Eth L 49, 74 – 76.

³ See, for instance *Transport Proclamation No 468/2005*, *Copyright and Neighbouring Rights Proclamation No 410/2004*, *Environmental Pollution Control Proclamation No 300/2002*, *Development, Conservation and Utilisation of Wildlife Proclamation No 541/2007*, *Biosafety Proclamation No 655/2009*, and *Census Proclamation No 449/2005* which contain provisions that state violation of regulations and directives adopted pursuant to the respective proclamations is criminally punishable.

lawmaking power in light of the nature of the constitutional duty of the lawmaker to make criminal law, the criminal law doctrines and the very nature of the criminal law and the purpose of such criminal law.

In so doing it also makes a distinction between the content of the provisions of article 3 of the Criminal Code and other criminal norms based on primary criminal law and secondary criminal law distinction. Away from the lawmaking aspect of the criminal law, the utility of those rules is discussed in the context of a direct application as well as the application of hermeneutic interpretation of the criminal law, taking into account non-criminal law rules including directives and regulations. Finally, the effect of the non-delegation of such criminal lawmaking power is discussed.

4.2. Explaining Delegation

The state is a much more complex socio-political organisation. With industrialisation, urbanisation and population growth, relationships are highly impersonal⁴ and the government administration could only be possible through a chain of delegation.⁵ What is at stake is such power is delegated to a non-elected or non-majoritarian institution which raise issues of legitimacy and accountability.⁶ The basic units in a delegation are the political principal whose interest the agent is supposed to enforce, the agent, and the content of the delegation.⁷ Thus, assuming there is no conflict of interest, and the agent has full information regarding the interests of the principal, the agent acts in the name and on behalf of the principal.⁸ In this relationship,

⁴ When the interpersonal relations become more impersonal the relations take different forms and become so diverse, such relations may only be maintained by state rules.

⁵ Wolfgang C Muller, Torbjorn Bergman and Kaare Strom 'Parliamentary Democracy: Promise and Problems' in Kaare Strom, Wolfgang C Muller, and Torbjorn Bergman (eds), *Delegation and Accountability in Parliamentary Democracy* (Oxford UP 2003) 19 – 21; Arthur Lupia 'Delegation and Its Perils' in Kaare Strom, Wolfgang C Muller, and Torbjorn Bergman (eds), *Delegation and Accountability in Parliamentary Democracy* (Oxford UP 2003) 36 – 37.

⁶ Generally see Mark Thatcher and Alec Stone Sweet 'Theory and Practice of Delegation to Non-Majoritarian Institutions' in Mark Thatcher and Alec Stone Sweet (eds) *The Politics of Delegation* (Frank Cass and Co 2003); Mark Thatcher 'Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation' in Mark Thatcher and Alec Stone Sweet (eds) *The Politics of Delegation* (Frank Cass and Co 2003).

⁷ *ibid*; Kaare Strom 'Parliamentary Democracy and Delegation' in Wolfgang C Muller, and Torbjorn Bergman (eds), *Delegation and Accountability in Parliamentary Democracy* (Oxford UP 2003) 59 – 61.

⁸ Lupia (n 5) 37 – 42.

accountability is central and it is exercised through some process of control.⁹ Such control may be exercised *ex-ante* in determining the scope of delegated power, and *ex-post* through the traditional control, either by direct communication through supervision and reporting or via a third party, such as the courts, the Human Rights Commission and the Ombudsman.¹⁰ A delegation without accountability is an abdication of responsibility by the principal.¹¹

Accountability is impacted so much by the availability of information to the principal regarding both the quality and competence of the agent, selection ante, and how the agent is discharging its obligation after such delegation effected. Information may not be available either because the agent is not willing or able to deliver such information to the principal regarding its activities.¹² However, some argue that it is not so much more about whether the principal has information regarding the conduct of the agent, it is rather 'whether or not the principal can learn enough' whatever control it may have to exercise over the agent.¹³

Whether such delegated actions of the administrative agencies should also include legislative delegation is debated.¹⁴ Some argue that lawmaking should not be delegated, some hold it should be made under supervision.¹⁵ But there appears to be a consensus that the delegated power be defined in scope and purpose and there has to

⁹ ibid 44 – 51. Also see Assefa Fiseha 'Legislative-Executive Relations in the Ethiopian Parliamentary System: Towards Institutional and Legal Reform' in Jaap de Visser, Nico Steytler, Derek Powell and Ebenezer Durojaye (eds), *Constitution-Building in Africa* (Nomos 2015) 264 – 65.

¹⁰ ibid. Aron Degol and Abdulatif Kedir 'Administrative Rulemaking in Ethiopia: Normative and Institutional Framework' (2013) 7 *Mizan LR* 1, 14 – 18; Yemane Kassa Hailu 'Executive Usurpation of Judicial Power: In Search of Constrained Exercise of Delegated Legation in Ethiopia' (2015) 25 *J Eth L* 1, 5 – 8.

¹¹ Assefa (n 9) 264 – 65; Lupia (n 5) 41. Yemane argues the lawmaker delegated its power to the executive without some form of accountability to the extent it aggrandises the latter. Yemane (n 10) 25 – 28

¹² Lupia (n 5) 42 – 51; Thatcher and Sweet (n 6) 3, 12 – 15.

¹³ Lupia (n 5) 43.

¹⁴ Bogdan Iancu, *Legislative Delegation: The Erosion of Normative Limits in Modern Constitutionalism* (Springer 2012) 69; Assefa (n 9) 263 – 65.

¹⁵ ibid.

be a mechanism of accountability.¹⁶ In Ethiopia, the Constitution provides for the Council of Ministers may exercise such administrative rulemaking when delegated by the HoPR. The lawmaker goes beyond the provisions of the Constitution and routinely delegates, and criminally sanctions, administrative rulemaking both to the Council of Ministers as well as the concerned agencies.¹⁷ The *Federal Administrative Procedure Proclamation No 1183/2020* governs such administrative rulemaking where there is a delegation made by the lawmaker.¹⁸ The discussion on delegation, thus, revolves around the administrative responsibilities of the state.¹⁹

In modern governance the state's coercive action should be supported by legal rules. Having such rules which are of general applicability is fair than *ad hoc* adjudication of matters.²⁰ However, legislative delegation is justified by several grounds. Such rules which would help the state respond to an emergency cannot be made in the normal lawmaking process.²¹ Further, the regulatory power of the state is expanding, contemporary law is also getting highly technical and specialised; often, such rules at the lower level are detailed requiring frequent changes to adjust to the constantly changing realities.²² Thus, it can only be possible if such power is given to specialised agency which justifies restricted delegation for an effective and responsive

¹⁶ Iancu (n 14) 197 – 273; Martin Shapiro 'Judicial Delegation Doctrines: The US, Britain and France' in Mark Thatcher and Alec Stone Sweet (eds) *The Politics of Delegation* (Frank Cass and Co 2003); Lupia (n 5).

¹⁷ See for instance, *Trade Practice and Consumer Protection Proclamation No 685/2010* art 55; *Commercial Registration and Business License Proclamation No 980/2016* art 52; *Broadcasting Services Proclamation No 533/2007* art 47.

¹⁸ Proc No 1183/20202 (n 1) art 4(1).

¹⁹ Both Yemane, and Aron and Abdulatif implicitly argue that administrative rule making is limited to administrative matters. Yemane (n 10); Aron and Abdulatif (n 10).

²⁰ William West 'Administrative Rulemaking: An Old and Emerging Literature' (2005) 65 *Public Administration Rev* 655, 655 – 56.

²¹ Emergency is the justification for the American New Deal constitutional compromise. Iancu (n 14) 138 – 58.

²² Lupia (n 5) 33 – 34; Mauro Zamboni, *Law and Politics: A Dilemma for Contemporary Legal Theory* (Springer 2008) 134-36; Strom (n 7) 56 – 58; Fabrizio Gilardi, *Delegation in the Regulatory State: Independent Regulatory Agencies in Western Europe* (Edward Elgar) 29 – 30.

administration.²³ Such specialisation of institutions takes the law away from the politicisation of the law to specialisation.²⁴

Those executive rules take different names and forms. In Ethiopia, the Council of Ministers adopts Regulations and administrative agencies adopt Directives. Likewise, their sanctions take different forms; often, they are sanctioned by administrative actions.²⁵ In few cases, they are sanctioned by civil action expressly provided for in those regulatory legislation;²⁶ but in many cases they are criminally sanctioned by the regulations²⁷ themselves or by the enabling proclamation which is a more common approach. The regulations and directives are taken as providing for the prohibited conduct the violation of which is sanctioned by the enabling proclamation.²⁸

4.3. Primary and Secondary Criminal Law

In the continental legal system, criminal law is classified into primary penal law and secondary (administrative) penal law or contraventions.²⁹ The primary criminal law is the one that is included in the Penal Code and other special penal legislation.³⁰ The

²³ Rachel E Barkow 'Separation of Powers and Criminal Law' (2006) 58 Stanford LR 989, 1011. Also see Muller, et al (n 5).

²⁴ Zamboni (n 22) 132-39;

²⁵ Those administrative actions include suspension or cancelation of commercial license (*Commercial Registration and Business License Proclamation No 980/2016*, arts 11 and 29, respectively) or administrative penalties for various tax related (in)activities (*Federal Tax Administration Proclamation No 983/2016*, arts 101 – 115).

²⁶ *Trade Practice and Consumers' Protection Proclamation No 685/2010* art 34(10), 35, and 50.

²⁷ Unlike the extensive criminalisation in proclamation, there are few regulations making reference to penal responsibilities. *Ethiopian Seed Council of Ministers Regulation No 16/1997*, art 13(3); *Customs Warehouse Licence Issuance Council of Ministers Regulations No 24/1997*, art 11(3); *Film Shooting Permit Council of Ministers Regulations No 66/2000*, art 15 make reference to the Penal/Criminal Code; while *Federal Government Commercial Registration and Licensing Council of Ministers Regulation No 13/1997*; *Council of Ministers Income Tax Regulations No 78/2002*, art 24(4) make reference to the enabling proclamation.

²⁸ For instance, the *Commercial Registration and Business License Proclamation No 686/2010*, art 60(3) provides that 'any person who violates the other [sic] provisions of this Proclamation or the regulations or a public notice which the Ministry may issue pursuant to this Proclamation shall be punished with fine from Birr 30,000 [] to 60,000 [] and with rigorous imprisonment from 3 [] to 5 [] years'.

²⁹ Byung-Sun Cho 'Administrative Penal Law and Its Theory in Korea And Japan From a Comparative Perspective' (1993) 2 Tilburg Foreign L Rev 261, 261 – 64; it is otherwise called the law of infringements.

³⁰ The phrase 'special penal legislation' should not be confusing. In some legal systems where there is strict compliance to a comprehensive penal code, special penal legislation refers to secondary rules, or regulations containing administrative penalty. In the Ethiopian criminal justice, special

secondary criminal law is the criminal law that is adopted and/or enforced by administrative agencies.³¹ Administrative criminal law is quasi-penal law which authorises administrative agencies to impose sanctions of a penal nature.³² In the continental system, primary criminal law is made by the legislature and secondary criminal law is adopted by administrative agencies.³³

In the French Criminal law, crimes are classified into crimes, delicts, and contraventions. Crimes and delicts are violations of primary criminal law; and the punishment for violation of the primary criminal law is imprisonment and exorbitant fine.³⁴ Because the consequences on individual freedom are so severe, such punishments are imposed, should the defendant found to be guilty by regular courts after the regular hearing. Contraventions are usually heard by ‘police court’ or ‘administrative bodies’ and the sentence can only be fine and often there is no appeal against a conviction.³⁵ In Germany, the classification is between offences and contraventions, the latter involving less moral blameworthiness of the offender.³⁶ As a matter of both substantive and procedural laws, the sentences for contraventions are left to ‘social institution for the administration of justice’.³⁷

This is also reflected in the Ethiopian criminal law. In the hierarchy of laws, proclamations are primary legislation passed by the HoPR.³⁸ Regulations and Directives are passed by the Council of Ministers and the respective administrative agencies, respectively when there is an express delegation in the proclamation. The

penal legislation refers to those hardcore criminal laws adopted by the lawmaker in piecemeal legislation, outside the Criminal Code.

³¹ Cho (n 29) 261 – 66.

³² *ibid.*

³³ *ibid.*

³⁴ Catherine Elliott, *French Criminal Law* (Routledge 2011) 51 – 54.

³⁵ *ibid.* 45.

³⁶ Thomas Vormbaum, *A Modern History of German Criminal Law* (Margaret Hiley Tr., Springer 2014) 244.

³⁷ *ibid.*

³⁸ FDRE Const, art 71(2) provides that the President of the Republic ‘shall proclaim in the Negarit Gazeta laws and international agreements approved by the House of Peoples’ Representatives’ (emphasis in the original).

making of proclamations is governed by detailed rules of legislation.³⁹ The *Council of Ministers Working Directives 1996 EC* (in Amharic), recognises such distinction and all the reasonable caution in adoption is taken concerning primary legislation.⁴⁰ Such regulations may be adopted by administrative agencies to enforce administrative regulations. Unfortunately, the situation of contraventions in Ethiopia appears to be confusing. There is an extensive regulation incorporated in the Criminal Code forming another major book – Book III. It has its own basic principles as in the General Part of the Code.⁴¹ However, there are also regulations adopted by the Council of Ministers to be summarily enforced by an office of an agency, such as traffic regulations, or the Addis Ababa City Administration regulations.

Hearings of contraventions is governed by a special procedure in the Criminal Procedure Code with or without summary hearing.⁴² In this chapter we are not dealing with those types of regulations which are governed by such special procedures; this chapter rather deals with special penal laws adopted by the HoPR or administrative agencies which are tried in the regular criminal process.

4.3.1. Making Sense of article 3 of the Criminal Code

When the Penal Code was adopted in 1957, it was intended to be comprehensive where there is an answer for every question.⁴³ It has both the General Part and the Special Part. However, with foresight for possible regulations as in any other continental criminal law, article 3 was also included to empower adoption of rules for contraventions. As borrowed from the German system, such penal nature rules are only regulations. Other special regulatory offences which may be of serious consequences were indicated in the special part, such as, article 343 which provides that:

³⁹ See text for (n 4) chapter five.

⁴⁰ *Council of Ministers Working Directive 1996 EC* (in Amharic, 'CM Directive') arts 3(1)d), 9(2)(e), 36 – 46. In comparison, the process of adoption of Council of Ministers Regulations is governed by arts 47 and 48 only.

⁴¹ Simeneh and Cherinet (n 2) 69, 70.

⁴² Crim P C, arts 167 – 170.

⁴³ Jean Graven 'The Penal Code of the Empire of Ethiopia' (1964) 1 J Eth L 267, 281 – 82.

[w]here a crime is committed in breach of legislation issued by an authorised public organ in accordance with the law and duly published in the Federal Negarit Gazeta or the legal gazettes of the regional states, concerning the control and protection of fiscal or economic interests of the State, the punishment shall be determined in accordance with the principles of this Code.

The provisions of article 3 were originally incorporated in the 1957 Penal Code. The wording of Penal Code article 3 appears to be vague. The commentaries of Philip Graven is not clear either.⁴⁴ It is further complicated by the fact that rules of contraventions are also made a part of the Penal Code, because a comprehensive Penal Code would render article 3 redundant.

Book I and II of the Penal Code constitutes the General and the Special Part and thus a complete Penal Code. The Code must have assumed separate legislation on contravention in incorporating the provisions of article 3. This may be seen from two perspectives. First, it authorises the adoption of a special law of penal nature to which the General Part of the Penal Code is made applicable. Article 3 also provides that the application of the General Part may be set aside by such special legislation of penal nature. The General Part of the Penal Code provides for the fundamentals of criminal law: the principle of legality, the principle of conduct, the principle of culpability and the principle of personal responsibility. Thus, if the special legislation could set aside any of those requirements, it could be the requirement of the state of mind, or conduct, as the case may be. Certainly, those requirements could not be set aside in the primary criminal law both in the definition of crimes and application of the criminal law; thus, the provisions of article 3 of the Penal Code can only be understood authorising the adoption of rules on contraventions only. Further, should article 3 be interpreted otherwise, it would contradict the whole purpose of the Penal Code.⁴⁵

However, Book III does not appear to have been intended to be a part of the Penal Code because it has its own General Part. Even though the Penal Code was thought to be complete for all purposes, it was not meant to preclude the lawmaking power of the lawmaker. Article 3 was meant to only empower the lawmaker to adopt rules on

⁴⁴ Philip Graven, *An Introduction to Ethiopian Penal Law: Arts 1-84 Penal Code* (HSIU 1965) 12 – 13; Simeneh and Cherinet (n 2) 68 – 71.

⁴⁵ Graven 'The Penal Code' (n 43); also, the preface of the Penal Code states that it is meant to be complete.

contraventions in piecemeal legislation and the lawmaker may delegate such lawmaking power to agencies to adopt directives and regulations which also might contain provisions of penal nature. Those legislation, however, need to be of less impact on individual freedom.

While Book III is adopted as part of the 1957 Penal Code with its own general principles, article 3 gives a wrong impression that it authorised the adoption of special primary criminal law. It seems for this reason that up on revision, article 3 of the Criminal Code is made clearer, albeit wrongly, to give the impression that other primary criminal law may be adopted as special criminal law. As they stand, the provisions of article 3 of the Criminal Code are contradictions in themselves. First, one of the principal reason for adoption of the Criminal Code was to have a comprehensive Code absorbing all piecemeal penal legislation.⁴⁶ Thus, the provisions of article 3 are contrary to the very notion of having a Code. That appear to be the justification for adoption of several special penal legislation.⁴⁷

Second, as indicated in Chapter 2, the basic principles of a continental criminal law are: the principle of legality, the principle of conduct, the principle of culpability and the principle of personal responsibility, which are entrenched in the Criminal Code. The provisions of article 3 provide that the special laws may expressly set aside those basic principles of the criminal law incorporated in the General Part of the Criminal Code. Some of those special legislation have arguably done that, and for that reason such criminal law is not legitimate.⁴⁸ Therefore, the provisions of article 3 should be understood in their original form incorporated in the 1957 Penal Code, authorising the adoption of rules on contraventions.

⁴⁶ Crim C, Preface, para 4. It also expressly repealed the *Revised Special Penal Code Proclamation No 214/1981*.

⁴⁷ The Criminal Code was adopted in 2004. However, the *Anti-Terrorism Proclamation No 652/2009*, *Corruption Crimes Proclamation No 881/2015* *Prevention and Suppression of Trafficking in Persons and Smuggling of Migrants Proclamation No 909/2015*, and *Computer Crimes Proclamation No 958/2016* were legislated as special penal laws with special provisions, excluding countless administrative regulations adopted containing penal provisions.

⁴⁸ They establish the mental element by presumption. *Corruption Crimes Proclamation No 881/2015*, art 4; Crim C, art 41(5).

4.4. Delegated Criminal Legislation

There are substantial criminal rules adopted by administrative agencies on delegation. They may be put under two categories: some are adopted on a direct delegation to agencies to adopt such rules, and some are adopted on indirect delegation. However, some materials are not 'criminal rules' in the sense of the criminal law but that the court applies them as if they are criminal rules, either enforcing them directly or filling gaps in criminal norms.

4.4.1. Rules adopted on Direct Delegation

The distinction between direct and indirect legislative delegation is very thin. Those criminal rules that are treated as rules adopted on direct delegation are laws adopted on express authorisation by the lawmaker to the executive, and whose consequence the lawmaker foresaw. For instance, the *Suppression of Money Laundering and Financing of Terrorism Proclamation No 657/2009* is intended to control suspicious financial transactions. It identifies individuals who are designated as 'accountable persons'⁴⁹ having such obligation of keeping records of their clients' and reporting any suspicious activity to the authorities. The failure of such obligation entails a punishment of three to five years' imprisonment and a fine between Birr 5,000 and 10,000.⁵⁰ Such prohibitions and punishments are determined by the lawmaker.

The Proclamation under article 21(1) further provides that the Financial Intelligence Centre, with the power to enforce the provisions of the Proclamation, would be established by the Council of Ministers Regulations. Such Financial Intelligence Centre is granted the power to modify the list of such accountable persons.⁵¹ Thus, the Centre, at its discretion, may remove some institutions (and individuals) from the list and may include others. Such modification of the list of accountable persons is required to be published 'in a widely circulating newspaper in the country as legal notice.'⁵² The

⁴⁹ *Suppression of Money Laundering and Financing of Terrorism Proclamation No 657/2009*, art 2(2) defines accountable persons, to include, among others, financial institutions, customs authority, document authentication agency, licensing agencies, attorneys, auditors, brokers, and real estate business. Arts 3 and 4 provide for identification of clients and reporting duties, respectively.

⁵⁰ *ibid* art 17.

⁵¹ *ibid* art 22(1).

⁵² At the public hearing it was asserted by one of the experts that the modification of the list would be published in the *Negarit Gazeta*. 'Minutes of the Meeting of the Budget and Finance, and Law

natural consequence is that failing such record-keeping and reporting duties, such a person would automatically be criminally liable.

It is evident from the discussion that the delegation is not made to the Council of Ministers, which is accountable to the House of Peoples Representatives, but to an agency to be created by the Council of Ministers which is not directly accountable to the House of Peoples' Representatives; and the publication of such modification to the list is to be made in ordinary newspapers, not in the official *Negarit Gazeta*. Such conduct of the lawmaker lacks an essential quality of delegation, that is, accountability, and such rules violate the principle of legality because they are not published in the official *Negarit Gazeta*.

The *Urban Planning Proclamation No 574/2008* is meant to regulate urban planning. Thus, without authorising any organ to adopt regulations,⁵³ it requires that in order to support the implementation of urban plans there would be 'clear strategy, regulations, directives and organised executive organs.'⁵⁴ The Proclamation criminalises conducts, such as, granting 'permission for a plan which has not been prepared in accordance with this Proclamation' and implementation of 'a plan which has not been approved by the concerned body [...or] authorised' by the appropriate organ. However, the nature and extent of the penalty are left to 'the regulations to be issued in accordance with [the] Proclamation.'⁵⁵

On the contrary, in the *Mining Operations Proclamation No 678/2010*, article 78(1) to (3), the lawmaker defines a part of the prohibited conduct and the consequences, 'fine up to Birr 200,000 or imprisonment up to five years or both.' However, under sub-article (4) it provides that 'the degree of offence and the extent of the penalty to each offense

and Administrative Standing Committees on the Draft Bill on Money Laundering and Financing of Terrorism 21 October 2008' (later adopted into law as *Proc No 657/2009*) (n 49) 16.

⁵³ *Urban Planning Proclamation No 574/2008*, art 19 provides that 'in accordance with the regulations to be issued pursuant to this proclamation' chartered cities or urban administration are responsible for the implementation of the structure and local development plans. Further, there are several subject matters, urban development and permits, left to be governed by regulations.

⁵⁴ *ibid* art 18.

⁵⁵ *ibid* art 58.

shall be determined by regulation to be issued for the implementation of [...the] Proclamation.'

Taking a different approach, the *Federal Tax Administration Proclamation No 983/2016* works as a bridge to the indirect legislative delegation. Article 2(36) defines 'tax laws' to include, among others, the *Federal Income Tax Proclamation*, the *Value Added Tax Proclamation*, the *Excise Tax Proclamation*, the *Stamp Duty Proclamation*, and the *Turnover Tax Proclamation*. It further provides that tax laws also include 'any regulation or directive made under a law referred to in the above paragraphs.' This provision appears to have been included to save the courts from *ERCA v Daniel Mekonnen*⁵⁶ type decision embarrassments. Practitioners know there are countless directives adopted by MoFED governing different subject matters. On the other hand, the *Federal Tax Administration Proclamation* contains several penal provisions relating to the various activities governed by the Directives.⁵⁷ Making those Directives a part of the 'tax laws' and criminal sanctioning of the violation of such tax laws is large scale enforcement of the tax law through the criminal law, but most inappropriately because it is contrary to the principles of legal good and legality.

4.4.2. Rules adopted on Indirect Delegation

The various proclamations authorise the Council of Minster to adopt regulations and the concerned administrative agency to adopt directives. Such legislative delegation is deemed to be necessary for the implementation of the provisions of the enabling proclamation. For instance, the *Banking Business Proclamation No 592/2008*, article 59(1) provides that the 'Council of Ministers may issue regulations necessary for the implementation of this Proclamation'. Likewise, sub-article (2) provides that the 'National Bank [of Ethiopia] may issue directives necessary for the implementation of this proclamation and regulations issued according to sub-article (1) of this Article'.

One can read from those provisions that, first, the regulations and directives should fall within the Kelsenian validity pyramid. Second, they are meant to enforce the main

⁵⁶ *ERCA v Daniel Mekonnen* 21 July 2010, Cass File No 43781, in 10 Decisions of the Cassation Division of the Federal Supreme Court.

⁵⁷ For instance, arts 121 and 131 punish improper use of cash receipts and cash register machine, respectively. However, who is obliged to use such receipts and machines and the manner of use is determined by directives.

objective of the Proclamation. Third, they are deemed to focus on the technical aspect of the banking business that could not be provided for in the Proclamation, which might be changed from time to time to meet the demands of the day. Both the Council of Ministers in adopting Regulations, and the National Bank of Ethiopia in adopting the Directives, might certainly not intend to adopt criminal norms. This is because the sole purpose of the Banking Business Proclamation is to have ‘a comprehensive law for the licensing and supervision of the banking business’ with a view to maintaining a stable payment and settlement system in the economy.⁵⁸ Therefore, article 58 punishes those who violate this licensing and regulation procedures.⁵⁹ Sub-article (7) of article 58 of the Proclamation, however, punishes:

any person who contravenes or obstructs the [implementation of] provision of [the] Proclamation or regulations or directives issued to implement this Proclamation [...with] a fine up to Birr 10,000 and with imprisonment up to three years.

Leaving aside other principle-based issues, such as, the principle of legality, the consequence of this single provision is that it turns all the provisions of the Proclamation, the regulations, and directives into penal provisions. Before the content of such regulations and directives are known, they are criminally sanctioned by the HoPR. Those regulations and directives were adopted by the Council of Ministers and the concerned administrative agency on the delegation of the House of Peoples Representatives. Such blanket criminalisation has no exception, that, whatever is defined in the Regulations or Directive for the enforcement of the Proclamation, such content is criminally sanctioned.⁶⁰

Likewise, the *Biosafety Proclamation No 655/2009*, article 22 authorises the Council of Ministers to adopt Regulations and the Environmental Protection Authority to adopt Directives for the enforcement of the Biosafety Proclamation. Similar to the Banking

⁵⁸ The *Banking Business Proclamation No 592/2008*, preamble.

⁵⁹ For instance, engaging in a banking business without a license is punished with fine Birr 20,000 for each day of the contravention and rigorous imprisonment of 10 to 15 years. Those who refuse to provide the national bank with the required document for control and supervision of the banking business are punished with fine Birr 50,000 to 100,000 and rigorous imprisonment from 7 to 10 years. The nature of documents required for inspection are determined by the National Bank of Ethiopia.

⁶⁰ It is worth noting there are provisions governing license and engaging in illegal financial transactions in the Criminal Code, such as art 433.

Business Proclamation, article 21(1)(a) punishes those who violate the central objective of the purpose of the Proclamation.⁶¹ Further, article 21(1)(b) punishes:

any person who violates any provision of [...the] Proclamation or regulations or directives issued pursuant to [...the] Proclamation [] with a fine from Birr 4,000 to Birr 7,000 or with imprisonment from one to three years or both.

This state of affairs can only be described as an indirect legislative delegation. The indirect delegation is different from direct delegation in that in the latter, there is a clear resolution to give such power to the concerned administrative agency. In indirect delegation, the HoPR appears to be (if not deliberately) oblivious about the consequences of its delegation.

4.4.3. Non-Criminal Rules Enforced by Courts as ‘Criminal Rules’

The criminal law is a rule of conduct for the individuals to make their conduct conform to the requirements of the law. As dictated by the principle of legality, therefore, both the operative facts and the consequences have to be published in the official gazette. The *Federal Negarit Gazeta Establishment Proclamation No 3/1995* provides that judicial organs may be required to judicially notice such laws if published in the *Negarit Gazeta*. Where either of them is not provided for, the principle of legality requires that such criminal norm is inapplicable because neither the crime nor the punishment can be created by analogy.⁶²

The Federal Supreme Court Cassation Division made a binding interpretative decision in *Worku Fekadu and Shume Arrarso*.⁶³ Petitioners were charged and convicted for engaging in commercial activities without a valid license contrary to the provisions of

⁶¹ The objective of the Proclamation, as provided for under art 4, is ‘to protect human and animal health, biological diversity [] in general, the environment, local communities and the country at large by preventing or at least managing down the levels of insignificance the adverse effects of modified organisms.’ Thus, art 21(1)(a) punishes ‘any person who engages in any transaction with the intention of causing harm to human health, biological diversity, the environment or property [] with rigorous imprisonment from 10 to 15 years.’

⁶² The Federal Supreme Court Cassation Court in *Jemila* defined the elements constituting the crime that should be proved in order for one to be found guilty of a crime. *Jemila Mohammed v Federal Public Prosecutor* (26 February 2009, Cass File No 38161, 9 Decisions of the Cassation Division of the Federal Supreme Court).

⁶³ *Worku Fekadu and Shume Arrarso v Benishangul Gumuz State Prosecutor* (24 January 2013, Cass File No 75387, 14 Decisions of the Cassation Division of the Federal Supreme Court).

Criminal Code, article 433. The lower court imposed fines on both petitioners and the confiscation of their cattle. The Supreme Court Cassation Division held such punishment would have been appropriate if petitioners were found guilty under article 60 of the *Commercial Registration and Business License Proclamation No 686/2010*. The provisions under which petitioners were charged and convicted do not provide for confiscation; thus, it is contrary to the principle of legality.

However, there are several instances where either of them are not provided for in the law, where the court, including the Cassation Division, borrowed rules that are not criminal rules and apply them as though they are criminal rules. By giving effect to such rules as though they are part of the criminal law, the court circumvents principle of legality. In *Samson*,⁶⁴ petitioner brought with him 5,000 euros which he declared to the customs officials on arrival, when he had come to Ethiopia. He stayed in Ethiopia for more than six months. On his way out of Ethiopia, he was carrying the 5,000 euros in his luggage. He was arrested by the Customs Office for carrying a prohibited item, charged and convicted for contraband. The charges were brought under the provisions of the *Customs Proclamation No 622/2009*, article 99 which provides for ‘prohibited goods’,⁶⁵ and a directive adopted by the National Bank of Ethiopia. The *National Bank of Ethiopia Establishment (as Amended) Proclamation No 591/2008*, article 20(3) provides that:

[t]he terms and conditions for transfer of foreign exchange to and from Ethiopia, and the export or import of valuable goods or the transfer of other valuable goods across the customs boundaries or frontiers of Ethiopia in any manner, the return of such goods and the settlement of any foreign exchange that results, or that will result, from such export or import or transfer shall be determined by directive to be issued by the National Bank.

The Directive adopted by the National Bank of Ethiopia regulates the amount of foreign currencies travellers may carry with them, including a rule that a foreign currency declared beyond six months period may not be repatriated. *Samson*

⁶⁴ *Samson Mengistu v ERCA* (7 February 2009, Cass File No 80296, 14 Decisions of the Cassation Division of the Federal Supreme Court).

⁶⁵ *Customs Proclamation No 622/2009*, art 99 provides that:

any person who, knowing or ought to have known the fact, possesses prohibited or restricted goods [] shall, without prejudice to the forfeiture of the goods, be punishable with a fine equivalent to the amount of the customs duties and taxes payable on the goods and with rigorous imprisonment from three to five years.

petitioned the Cassation Division on the ground of fundamental error of law which the court rejected on the same grounds as in *Daniel*.⁶⁶

Unlike in *Samson*, the issue of publication of the directive is litigated in *Daniel*. Thus, the Federal High Court and the Supreme Court reversed the decision of the First Instance Court on the ground that the Directive of the National Bank is not published in the *Negarit Gazeta* as required by the *Federal Negarit Gazeta Establishment Proclamation* and, and the Directive was written in English only.⁶⁷ In *Daniel*, the Cassation Division, discussing the distinction between primary and secondary legislation, put the Directive under subsidiary legislation, while primary legislation is those legislated by the lawmaker. It further recognises that Directives have never been published in the *Negarit Gazeta* because there is no such law requiring Directives to be published in *Negarit Gazeta* but they are given effect in practice. It, thus, held that while there is no law requiring Directives to be published in *Negarit Gazeta*, the lower courts made a fundamental error in holding the Directive is inapplicable simply because it was not published in Amharic.

The other issue the Cassation Division addressed is whether the directive has a penal provision. The Court goes on to state that foreign exchange service and the circulation of gold have an important impact on the national economy. The Directive is adopted based on the power vested in the *National Bank in Proclamation No 83*, article 39(2). Where the provisions of such Directives are violated the consequences are provided for in the parent *Proclamation No 83*, article 59(1)(h). The Cassation Bench, thus, held the conduct of *Daniel* is contrary to the provisions of the Directives and the consequences are provided for in the Proclamation.

⁶⁶ *Daniel* (n 56); also see text for (n 190, 191) chapter 3. Likewise, Zelalem is convicted and sentenced to a suspended sentence of 4 years' rigorous imprisonment and 40,000 birr fine under *Customs Proclamation No 859/2014*, art 168(1), and NBE directive, for attempting to travel with \$15,000 in his luggage. *Federal Public Prosecutor v Zelalem Shiferaw* (November 8, 2017, File No 256759, Federal First Instance Court).

⁶⁷ The *Federal Negarit Gazeta Establishment Proclamation No 3/1995*, art 2(2) provides that '[a]ll laws of the Federal Government shall be published in the Federal Negarit Gazeta.' Sub-article (4) further requires that the laws be published both in Amharic and English, and where there is a 'discrepancy between the two versions the Amharic shall prevail.'

All foreign exchange related contraband criminal cases are brought based on directives adopted by the National Bank of Ethiopia.⁶⁸ The adoption of directives may be appropriate for regulatory purposes in order to adjust to the ever changing conditions relating to foreign exchange in this country. The recently adopted *Federal Administrative Procedure Proclamation* requires the publication of directives both by the agency adopting them as well as by the Federal Attorney General, both for the purpose of soliciting public opinion before adoption as well as for notice after adoption, albeit the publication is not in the official *Negarit Gazeta*.⁶⁹ The statute governs both administrative rules and decisions. It is alluded earlier that administrative rules substitute *ad hoc* administrative decisions. Therefore, in as much as the administrative agencies cannot render a criminal judgment, they cannot make criminal rules. The full reading of the statute makes it clear that such rules are meant to address only administrative matters.⁷⁰ Making or treating administrative rules a part of the criminal law is, thus, wrong both on substantive and formal requirements.

4.5. Delegability of Criminal Lawmaking Power

The House of Peoples' Representatives is the highest political authority of the Federal Government.⁷¹ It has the power to make laws, establish institutions⁷² and to supervise their enforcement.⁷³ The Council of Ministers has the principal responsibility of 'implementation of laws and decisions adopted by the House of Peoples' Representatives'.⁷⁴ Further, it 'ensure[s] the observance of law and order'.⁷⁵ It may 'submit draft laws to the House of Peoples' Representatives on any matter falling within [...the] competence' of the Federal Government.⁷⁶

⁶⁸ *Public Prosecutor v Leeyu Lu* (12 July 2018, File No 257687, Federal First Instance Court).

⁶⁹ Proc No 1183/2020 (n 1) arts 8, 15, and 17. The publication is required to be made both in Amharic and English.

⁷⁰ The proclamation is adopted with a view to regulate Administrative Agencies' encroachment on individuals' rights and 'to guarantee administrative justice'. *ibid* preamble paras 2 and 3.

⁷¹ FDRE Const, art 50(3).

⁷² *ibid* art 55.

⁷³ *ibid* art 55(17), (18).

⁷⁴ *ibid* art 77(1).

⁷⁵ *ibid* art 77(9).

⁷⁶ *ibid* art 77(11).

The delegated power of the Council of Ministers is provided for in an indirection; the Constitution, article 77(13) provides that the Council of Ministers ‘shall enact regulations under powers vested in it by the House of Peoples’ Representatives.’ This delegated legislative competence may be seen in the light of the general responsibilities of the Council of Ministers which is enforcement of laws adopted by the House. Seen in that context, the Regulations may only be adopted to enable the Council of Ministers to implement the parent legislation. However, the Council of Ministers power to adopt Regulations is not inherent constitutional power. It needs to be expressly provided for in the enabling proclamation that the Council of Ministers may adopt regulations.⁷⁷ Further, it stands to reason that if delegation is limited by the power the political principal itself has, and it is still within its discretion, the scope of delegation may be read from the legislation in which such delegation is granted.

The doctrine of delegation is discussed in section 4.2 above. It is also discussed that the fundamental circumstances that necessitate legislative delegation are: to enable the government to be able to effectively respond to emergencies, or because the details of the provisions require specialisation which is housed in those administrative agencies, or the facts to be governed requires frequent adjustment. The underlying point is that, it is fair for citizens to have rules that are fair and predictable than resolving administrative matters *ad hoc*. However, those requirements do not justify the delegation of the criminal lawmaking power.

The criminal lawmaking power is reserved for the HoPR as individual responsibility. The criminal law is the most intrusive state action, in its making, several factors need to be taken into consideration, often resolving conflicting public policy decisions. The consequence of criminalisation of conduct is a serious punishment, often imprisonment and fine. It is a fundamental decision that only has to be exercised by elected representatives. As criminal law is most coercive state power, the criminal lawmaking power, by its very nature, is not delegable.⁷⁸

⁷⁷ The requirement of express delegation for the adoption of administrative rules by administrative agencies is made clear in *Proc No 1183/2020* (n 1) art 4(1).

⁷⁸ All the administrative rulemaking power discussions, as is evidence from the name itself, is limited to administrative matters. See Federal Administrative Procedure Proclamation; Yemane (n 10); Aron and Abdulatif (n 10).

The other reason for legislative delegation is specialisation of entities. However, related to the argument made above, there is no entity more specialised than the lawmaker in criminal lawmaking. Further, the criminal law is a rule of conduct for the individual. The rules must be predetermined so that the individual may conform his conduct to the requirements of the criminal law; thus, the principle of legality requires that it has to be clear and be published.

As can be understood from the nature of the criminal law, it is a fairly stable part of the law. The history and theories of criminal law depict that it is very much stable and its development is a snail walk. The recent dramatic expansion of conducts criminalised in Ethiopia are only exceptions which contradict several fundamental principles of criminal law, including the principle of legality because, such rules are often not published in the *Negarit Gazeta* and in some instances, the practice is expanding the criminal law by interpretation. Further, the criminal law is only expanding in that, the decriminalised conducts, almost all of them in the western world,⁷⁹ are insignificant in number relative to the conducts criminalised. Thus, once adopted, provided it is a 'reasonable' criminal law, it is here to stay. Some even opine that it is difficult to amend the criminal law than to adopt a new one.⁸⁰ The bulk of the criminal law are shared across borders and cultures, and has been here for more than a century, such as murder, theft, treason, and piracy.⁸¹ On the other hand, crimes committed against or through a computer (network), and hijacking, are relatively recent. However, it took substantial time and a reasonable repetition of such unwanted conduct in order to be a proper candidate to be a subject of criminal law. The criminal law is, thus, not meant to address emergencies nor does it need frequent change to meet the demands of the day. These are justifications for authorisation of administrative rulemaking not for delegation of criminal lawmaking power.

⁷⁹ The ones that are decriminalized as all in the western world and they are all related to the individual right, such as, homosexuality under the banner of privacy, and prostitution, and laws of segregation in the apartheid government, or in the US as a result of the civil rights movement.

⁸⁰ Douglas Husak 'The Criminal Law as Last Resort' (2004) 24 Oxford J of L Studies 207, 209 and 214 note 34.

⁸¹ Paul H Robinson and John M Darley 'Intuitions of Justice: Implications for Criminal Law and Justice Policy' (2007) 84 Southern California LR 1.

In legislative delegation, authorities argue that delegation without accountability is an abdication of responsibility.⁸² However, despite the fact that the practice depicts extensive delegation of criminal lawmaking power to agencies, none of the delegated criminal lawmaking powers contained an accountability procedure. In not a few cases, the delegation is even made to agencies that are not directly accountable to the HoPR. For instance, the modification of the list of 'accountable persons' under the financing of terrorism proclamation is given to 'The Financial Intelligence Centre' which would yet to be established by the Council of Ministers Regulations.⁸³ It is for such reason that Rachel Barkow argues there should be a different standard in delegating legislative powers in civil and criminal matters.⁸⁴

A closer reading of some of the delegation rules shows that such delegation is made to the Council of Ministers to adopt Regulations and to agencies to adopt Directives to implement the enabling proclamation. The lawmaker follows two approaches. First, it criminalises violations of those regulations and directives.⁸⁵ The other approach is the lawmaker punishes serious violations. The court takes the criminal rules are found split in two parts; while the consequences are provided for in the proclamation, the prohibitions are provided for in the regulations and directives.⁸⁶

One unique delegation of criminal lawmaking power is the adoption of a sentencing guideline by the Federal Supreme Court. While the criminal law has always fixed a range of punishment, be it imprisonment or fine, the Federal Supreme Court adopted a sentencing guideline by delegation.⁸⁷ It is stated above that in delegation of power, there is a principal – agent relationship between the two and the power of the agent is within the full power of the principal; it cannot dictate the principal regarding the interests of the latter.

⁸² Lupia (n 5) 41; Yemane (n 10); Assefa (n 9) 264 – 65.

⁸³ *Proc No 657/2009* (n 49) art 21.

⁸⁴ Barkow (n 23) 1011 ff.

⁸⁵ See text for n 28.

⁸⁶ *Daniel* (n 56); *Samson* (n 64).

⁸⁷ Crim C art 88(4).

In this regard, the Sentencing Guideline may be seen in two ways. First, the HoPR delegated the Federal Supreme Court to adopt a sentencing guideline to make the sentences 'consistent' and 'proportional'.⁸⁸ Thus, the Federal Supreme Court cannot modify the decisions of the HoPR in fixing a particular sentence in the Criminal Code or other special penal legislation. Those decisions of the HoPR are made clear in reading the General Part of the Criminal Code. The Special Part fixes a range of punishment. There are both general and special mitigation and aggravation grounds provided for in the General Part. In the determination of punishment, preference is given to the least intrusive measure. Thus, if there are a fine and imprisonment in the alternative, fine is to be chosen; and if there is simple imprisonment and rigorous imprisonment, the court should go for the former.

Once the sentence is identified, the court should take the legal minimum sentence as a starting point. It is only from such legal minimum sentence that aggravation grounds are considered; once the sentence is determined by aggravation, then the court considers mitigation grounds to find the right sentence. This process of sentencing is entrenched both in the Criminal Code and in the practice of sentencing.⁸⁹

However, the Sentencing Guideline deviates from this practice and begins with the aggravation of the sentence. For instance, for those crimes not ranked in the Sentencing Guideline, the range is to be divided into four and depending on the manner of the commission of the crime, it is to be placed in one of the four boxes. It is only after that, evidence for aggravation is produced.⁹⁰ Further, it tabulated imprisonment and fine, and the practice is developed that both imprisonment and fine are imposed in almost every sentence.⁹¹

⁸⁸ *The Federal Supreme Court Sentencing Guideline No 1/2002 EC* (in Amharic) art 3; also see the preamble.

⁸⁹ The Draft Criminal Procedure Code, arts 152 and 274 attempts to entrench this approach in the determination of sentence as a consequence of plea bargain or trial, respectively.

⁹⁰ The Sentencing Guideline is borrowed from the US, sentencing guidelines adopted where there had been an indeterminate sentence and with a completely collapsed sentencing theory. See generally Malcolm Thorburn and Allan Manson 'The Sentencing Theory Debates: Convergence in Outcomes, Divergence in Reasoning' (2007) 10 *New Crim LR* 278.

⁹¹ The place of the guideline is vague in the Ethiopian normative structure. At the top is the Constitution. Proclamations are adopted by the HoPR. Based on such enabling Proclamation, Regulations are adopted by the Council of Ministers. At the bottom are directives issued by agencies. However, the role of the Guideline is just 'assumed' and established in the Crim C, art

Second, in the *Federal Supreme Court Sentencing Guideline No 1/2002 EC*, every mitigation ground would mitigate at least two ranks and in some instances three or four ranks.⁹² In the *Federal Supreme Court Sentencing Guideline No 2/2006 EC*, one mitigation ground would mitigate only one rank and one aggravation ground aggravates only one rank. The change of the value of a mitigation or aggravation ground is unjustified and shows the arbitrariness of the decision. The HoPR does not have a mechanism to hold the Federal Supreme Court account for this, or it is yet to be seen if there is one. The sentencing guideline has never been challenged before the Council of Constitutional Inquiry.

4.6. Hermeneutic Interpretation of Criminal Law and Other Matters

It is argued that the existing norms do not allow delegating the criminal lawmaking power of the HoPR to administrative agencies. It is also argued that the court may not enforce directives adopted by agencies and other non-criminal rules as though they are criminal rules. However, those non-criminal rules may be used in the interpretation of criminal rules because they give the context for the proper application of such criminal rule. Rules always need interpretation. The assertion that clear rules need no interpretation is only a platitude. As Jean-Louis Halperin maintains, when a rule is said to be ‘clear’ it only means ‘it is less obscure’.⁹³ It is argued that we use our ‘fore-understanding’ to give context to a criminal norm.⁹⁴ Those non-criminal rules form part of our fore-knowledge.

For instance, while the criminal law punishes abuse of powers and responsibilities by public officials, the power or the responsibility that is alleged to have been abused is

88(4). As a ‘guideline’ whether it is binding is not provided for in the provisions of art 88(4); yet, it is applied as though it is binding.

⁹² art 16(7) provides that where the legal punishment is 7 years and above, each mitigating ground lowers the punishment by three ranks; and sub-art (8) provides that where the legal minimum is life imprisonment, each mitigating ground lowers the punishment four ranks.

⁹³ Jean-Louis Halperin ‘Legal Interpretation in France Under the Reign of Louis XVI: A Review of the *Gazette des tribunaux*’ in Yasumoto Morigiwa, Michael Stolleis, and Jean-Louis Halpérin (eds), *Interpretation of Law in The Age of Enlightenment: From the Rule of The King to the Rule of Law* (Springer 2011) 37.

⁹⁴ Alicja Ornowska ‘Introducing Hermeneutic Methods in Criminal Law Interpretation in Europe’ in Joanna Jemielniak and Przemysław Miklaszewicz (eds), *Interpretation of Law in the Global World: From Particularism to a Universal Approach* (Springer 2010) 265 – 67.

not defined in the criminal law. Public power is exercised based on certain non-criminal legislation and other materials – proclamations, regulations, directives, manuals, letters of appointment, job description, etc. It is the violation of those legislation and rules that would constitute an abuse of power.

In *Wondwossen Gashaw, et al*, (4 individuals),⁹⁵ defendants were charged for abuse of power contrary to the provisions of *Corruption Crimes Proclamation No 881/2015* article 9(2). The first three defendants were working in Arada Sub-City Land Management Office and the fourth was a business person who is alleged to have illegally benefited from the alleged abuse of power by the three defendants. The fourth defendant had already acquired 600 meter square land on lease. However, adjoined to his land, there was a vacant plot, 343 square meters. He had been in possession of such land for a long time and requested Land Management Office to legitimise his possession. His request was granted; after paying the lease fee the land included into his title deed.

The charge states that the inclusion of the additional plot of land into the title of the fourth defendant was done contrary to the provisions of the Manual and Procedure No 4/2007 governing the legitimation of illegal possessions of plots. Defendants alleged that the transfer was made in accordance with Directive No 18/2006.

Prosecution witnesses testified that there is a contradiction between Directive No 18/2006 and Manual and Procedure No 4/2007 issued as per the Directive. They testified that when a contradiction occurs between the Directive and the Manual, the Directive is applicable. The court, therefore, finds that the transfer of the land is done in conformity with the requirements of the Directive and no violation of rules; thus, no abuse of power is committed by defendants.

Further, in *Goshu*,⁹⁶ petitioner was charged, along with others, for abuse of power contrary to Criminal Code, article 407 for authorising a sale of 3000 quintals of fertilisers in excess of his power. The public prosecutor alleged that the petitioner had

⁹⁵ *Federal Public Prosecutor v Wondwossen Gashaw, et al* (4 defendants) (1 February 2017, File No 17765, Federal High Court).

⁹⁶ *Goshu Yohannes Gebru v FEACC* (24 June 2015, Cass File No 97291, 14 Decisions of the Cassation Division of the Federal Supreme Court).

the power to sell a maximum of 500 quintals of fertilizers, the power defined in a 'sales manual'. In his defence petitioner argues that the 500 quintals of fertiliser sales power is granted to branch sales office. He produced a manual for the Sales and Marketing Main Division, where petitioner was working, allowing him to sell up to 10,000 quintals of fertilisers to large scale farms. The court takes this as an effective defence exonerating petitioner from that particular charge.

Government procurements are governed by various procurement rules – proclamations, regulations and directives. Those rules are not part of the criminal law but they are used in the interpretation and application of the criminal law. For instance, in *Molla Muche, et al*, (14 individuals),⁹⁷ defendants were charged for maladministration contrary to the provisions of Crim C article 411(1)(c) and (2). The charge relates to procurement of office furniture for different departments in Kirkos Sub-City. The first three defendants were technical committee members, the other five were tender committee members, and the rest were vendors.

The alleged facts were that the procurement was made without any technical specification contrary to the Addis Ababa City Administration Procurement Directive No 3/2002 in order to procure illegal benefit for the vendors. It was not contested by defendants (the first eight) the procurement was made without any technical specification other than the specifications stated in the purchase request from the respective departments. Defendants, however, contend in their defence that it is because the procurement were not substantial and the materials procured were not amenable to technical specification, that this particular procurement was not governed by the Procurement Directive. The court finds that the procurement is not covered by the Procurement Directive, and finds no violation of procurement rule.

4.7. The Effect of Non-Delegation of Criminal Lawmaking Power

Modern governance is made possible only based on delegation of authority from the lawmaker to the various administrative agencies. However, it is argued, both in this chapter and elsewhere, that the criminal lawmaking power of the HoPR cannot be

⁹⁷ *FEACC v Molla Muche, et al* (14 individuals) (8 November 2016, File No 157615, Federal High Court).

delegated to administrative agencies. The natural consequence of the non-delegation is that, first, only the lawmaker can make criminal law. It shall enact both the prohibited conduct and the consequence of such violation. Second, the criminal law can be adopted only in the form of primary legislation that is published in the *Negarit Gazeta* passing through the regular lawmaking process. Third, in making such criminal rule, the lawmaker makes the necessary investigation into the facts that justify legislative intervention, whether the criminal law is a necessary measure, and it is the least intrusive means to achieve the intended result.

Finally, those non-criminal rules may not be applied as though they are criminal rules both for lack of jurisdiction, other formal and substantive requirements. However, those rules may be used in the interpretation and application of the criminal law.

4.8. Conclusion

Effective government conduct is possible only through a chain of delegation in the executive and legislative power. However, such delegation is possible only for administrative purposes. Criminal law is not a part of administrative law; criminal lawmaking power cannot be delegated to a government agency simply because it is only inherent and non-delegable responsibility of the representative lawmaker. None of the justifications for delegation of administrative lawmaking justify delegation of the criminal lawmaking power. If at all the agency's actions are revealed relating to criminal responsibility it is only as materials used for interpretation of the criminal law. The simple assertions of this chapter are that those criminal norms adopted by administrative agencies on direct or indirect delegation are contrary to the basic principles of criminal law, such as the principle of legality.

CHAPTER 5. – LEGISPRUDENTIAL EVALUATION OF THE CRIMINAL LAW

5.1. Introduction

The state has various arsenal at its disposal to achieve its social, economic and political objectives; legislative intervention is just one last resort means to achieve those ends. This power is expected to be exercised in a manner reducing (or avoiding) arbitrariness. Thus, in as much as the legislature has the authority to make law, it also has the duty in making the law – to make laws that are not only formally valid but also coherent and that make sense in the real world.¹ At the pre-legislative stage, the legislature investigates the social circumstances requiring legislative intervention. Because the criminal law implicates fundamental rights, the lawmaker evaluates the available alternative measures to choose the least intrusive method first. The lawmaker also makes legislative impact assessment taking the existing and future circumstances into account.

To make an efficacious law, the lawmaker deliberates both in Committees and in the House; and the decision is made based on the available data. The initial stage of the validity of a norm relates to its formal validity; continuous validity of such norm may be maintained if the norm maintains their goal rationality. A norm may be invalid through time or as further information emerges. Therefore, continuous evaluation of

¹ Luc J Wintgens 'Legislation as an Object of Study of Legal Theory: Legisprudence' in Luc J Wintgens (ed), *Legisprudence: A New Theoretical Approach to Legislation* (Hart Publishing 2002) 26 ff; Luc J Wintgens, 'The Rational Legislation Revisited: Bounded Rationality and Legisprudence' in Luc J Wintgens and A Daniel Oliver-Lalana (eds), *The Rationality and Justification of Legislation* (Springer 2013) 3, 5 ff; Luc J Wintgens 'Legisprudence as a New Theory of Legislation' in Luc J Wintgens, *The Theory and Practice of Legislation: Essays in Legisprudence* (Routledge 2005) 18 – 22; Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (Bonnie L Paulson and Stanley L Paulson tr, Clarendon Press 2002) 85 – 88; Hans Kelsen, *Pure Theory of Law* (Max Knight tr, The Lawbook Exchange, 2005) 211 – 14. Also see Lon L Fuller, *The Morality of Law* (revised edn, Yale UP 1969).

such a norm is the post-legislation duty of the lawmaker. If there is such continuous assessment of the legislation, resort to judicial review would be less attractive because the court would defer to the decision of the lawmaker.

Based on the constitutional foundation of legisprudence, this chapter examines if such legisprudential requirements of the law are met in making the various criminal norms. It takes up specific legislation, as illustrations, reviews their drafting stages and makes an assessment. After such assessments, it finds that the legislation reviewed in this study do not meet several of the legisprudential requirements and, thus, the lawmaker failed its constitutional duties to make laws.

5.2. General Background

The principal duty of the legislature is enacting laws and supervising the executive to ensure that the laws are properly implemented.² In enacting such laws, the lawmaker is bound by legislation rules, such as those enshrined in *The Federal Democratic Republic of Ethiopia Constitution Proclamation No 1/1995* ('FDRE Constitution') and its lawmaking rules. The Constitution provides for a formal and material source of legislative power.³ As such, the federal lawmaker makes laws on matters that are reserved for the Federal Government and it is specifically authorised to adopt 'a penal code'. The current rules of lawmaking are the *Federal Democratic Republic of Ethiopia House of Peoples' Representatives Working Procedure and Members' Code of Conduct (Amendment) Proclamation No 470/2005*,⁴ *The House of Peoples' Representatives Rules of Procedure and Members' Code of Conduct Regulations No 6/2015*. The other and most important rule is the *Council of Ministers Working Directive 1996 EC* (in Amharic, 'CM Working

² *Federal Democratic Republic of Ethiopia House of Peoples' Representatives Working Procedure and Members' Code of Conduct (Amendment) Proclamation No 470/2005*, arts 4(1), (2), 6, 7, 19(1), (2); *House of Peoples' Representatives Rules of Procedure and Members' Code of Conduct Regulations No 6/2015*, arts 3, 49 ff, 73 ff.

³ For instance, the provisions of *The Federal Democratic Republic of Ethiopia Constitution Proclamation No 1/1995* ('FDRE Const'), art 51 provide for the powers reserved for the Federal Government while art 55 provides for areas of legislation for the HoPR.

⁴ The word 'amendment' in the title of the statute gives the impression that there are other already existing rules that are still in force; but that is not the case. *The House of Peoples' Representatives Legislative Procedure, Committees Structure, and Working Proclamation No 271/2002* is repealed. *Proc No 470/2005* (n 2), art 40(1).

Directive') governing policy and bill initiation and adoption procedure in the Council of Ministers. A Legislative Drafting Manual is also adopted in late 2010 EC.⁵

Complying with the requirements of these rules is the internal view of the legislature. Some have reservations about the legalistic view of such law.⁶ As is evident from the readings of those rules and the working of the lawmaker, the latter is adopting laws not for the law's good but as a means to achieve certain social, economic and political ends.⁷ Because the lawmaking process is also guided by principles in other disciplines the law is meant to address, those principles are used for the evaluation of the substantive validity of such law⁸ which constitute 'hermeneutic view of the legislature'.⁹

The nature of the lawmaking process defines the content of the outcome legislation. Even though there could not be disagreement that the lawmaker should adopt 'good law', the content of such 'good law' is a point where there is very little ideological and theory-neutral agreement. Thus, the procedure helps the lawmaker to come up with a reasonably agreeable result.¹⁰ Those processes also include taking into account important interests in a fair and participatory manner. The process fairly guarantees the quality of the outcome. Daniel Oliver-Lalana argues, it is possible to make good normative judgments only after a proper debate. Her argument is based on five assumptions: 1. Collective normative decisions require 'good reason' which could emerge only from an argumentation process; 2. As legitimacy grows slowly, rational lawmaking is impossible without argumentation; 3. There is a strong connection between the quality of law and its reasons; 4. The perspectives of those who participate may be incorporated through argumentation; and 5. The deliberations give us a

⁵ *Legislative Drafting Manual 2010 EC* (in Amharic).

⁶ Wintgens 'Legislation as an Object of Study' (n 1) 18 ff.

⁷ See the national policy principles and objectives in FDRE Const, arts 85 – 92. 'Brief Explanatory Memorandum to the Draft Constitution Certified by Council of Representatives 28 October 1994' (in Amharic) 123 – 24.

⁸ Wintgens 'Legislation as an Object of Study' (n 1) 31.

⁹ *ibid* 29 ff.

¹⁰ Jeremy Waldron 'Principles of Legislation' in Richard W Bauman and Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitution State* (Cambridge UP 2006).

vantage point of the justifications of the legislation.¹¹ However, the process needs to be complied with for its own sake, which Robert Summers refers to as 'process value'.¹² This is rather what may be referred to as the 'good law' making process.¹³

5.2.1. The Relation between Law and Politics

The practice of lawyers and the study of legal theorists very much takes on the positive law as a paradigm.¹⁴ This engendered a 'strong legalism' view of the law.¹⁵ Further, the positivists' distinction between law and non-legal matters appears to have dominated the internal view of lawyers which hold up for such tight distinction between the two disciplines. Thus, some even consign criminalisation to the realm of politics as 'not subject to a rational discussion'.¹⁶

However, the two disciplines are not as separate as they appear to be. Mauro Zamboni opines that politics is the social element and law is the technical element.¹⁷ Even Kelsen holds that power and law are two sides of a coin.¹⁸ The institutional thought of positivism sees the law as an instrument which shows a significant overlap between

¹¹ A Daniel Oliver-Lalana 'Rational Lawmaking and Legislative Reasoning in Parliamentary Debates' in Luc J Wintgens and A Daniel Oliver-Lalana (eds), *The Rationality and Justification of Legislation* (Springer 2013) 136 – 38.

¹² See generally, Robert S Summers 'Evaluating and Improving Legal Process: A Plea for Process-Value' (1974) 60 Cornell LR 1; Robert S Summers, *Form and Function in a Legal System: A General Study* (Cambridge UP 2006) 31, 45, 66 – 72, 116 – 18, 124 ff.

¹³ Wintgens 'Legisprudence as a New Theory' (n 1) 22.

¹⁴ Wintgens 'Legislation as an Object of Study' (n 1) 14.

¹⁵ ibid 19 – 24; Wintgens 'Legisprudence as a New Theory' (n 1) 5 – 9; Mauro Zamboni, *Law and Politics: A Dilemma for Contemporary Legal Theory* (Springer 2008). Also see Alicja Ornowska 'Introducing Hermeneutic Methods in Criminal Law Interpretation in Europe' in Joanna Jemielniak and Prezmyslaw Miklaszewicz (eds), *Interpretation of Law in the Global World: From Particularism to a Universal Approach* (Springer 2010) 257 – 71.

¹⁶ Nina Persak, *Criminalising Harmful Conduct: The Harm Principle, Its Limits and Continental Counterparts* (Springer 2007) 5, 23; Luc J Wintgens 'Rationality in Legislation – Legal Theory as Legisprudence: An Introduction' in Luc J Wintgens (ed), *Legisprudence: A New Theoretical Approach to Legislation* (Hart Publishing 2002) 2; Wintgens 'Legislation as an Object of Study' (n 1) 30; Oliver-Lalana (n 11) 135, 138, 139; Wintgens 'Legisprudence as a New Theory' (n 1) 6 – 7.

¹⁷ Zamboni (n 15) 1.

¹⁸ Kelsen, *Pure Theory of Law* (n 1) 284 – 90; La Torre describes the relationship between law and power (state) as the relation between 'chicken-and-egg'. Massimo La Torre, *Law as Institution* (Springer 2010) 4.

law and politics.¹⁹ Zamboni examines such relation on three levels, and depending on the degree of the relationship, he developed three models.

The static aspect is 'the law in relation to politics'²⁰ while the dynamic aspect is 'how the lawmaking relates to the political order'.²¹ The third is the epistemological aspect, 'the degree of the relation of legal discipline to the political material'.²² He observed that the legal theorists' argument range from the politicisation of law, where the state uses the law as part of the 'political machinery'²³ to the specialisation of law, where using principles and legal doctrines, such as the principle of legality and the rule of law, the law puts a limit to the power of the state.²⁴ Within this range, he identified three models of the relationship between the two disciplines. The *autonomous model*, which includes such schools as positivism, makes a clear distinction between law and politics at all three levels.²⁵ The *embedded model*, which includes schools, such as law and economics, and critical legal studies considers the 'law is embedded in politics'.²⁶ The third model, the *intersection model*, including the realist school, considers 'law and politics are intersecting phenomena'.²⁷

The general observation is that there is a strong relationship between law and politics. It is stating the obvious that the law can never be as 'pure' as traditional positivists would want it to be. It is influenced by other disciplines, such as economics and sociology, and the law is meant to address those social and economic issues.²⁸ Law is just an instrument to achieve those ends. In certain instances, even judges take political

¹⁹ La Torre (n 18) 3 – 7, 159 – 65.

²⁰ Zamboni (n 15) 1, 7 – 8.

²¹ *ibid* 2, 7 – 8; Kelsen, *Pure Theory of Law* (n 1) 193 – 205.

²² Zamboni (n 15) 2, 7 – 8.

²³ *ibid* 3, 7.

²⁴ *ibid* 7.

²⁵ *ibid* 2. Even in terms of interpretation of the law, positivists are guided by the exegetic method. However, in real life, the court is, inevitably, guided by hermeneutic interpretation. Simeneh Kiros Assefa 'Methods and Manners of Interpretation of Criminal Norms' (2017) 11 Mizan LR 88, 111. Also see Ornowska (n 15); Wintgens 'Legisprudence as a New Theory' (n 1).

²⁶ Zamboni (n 15) 2.

²⁷ *ibid*.

²⁸ Wintgens 'Legislation as an Object of Study' (n 1) 37; Wintgens 'Legisprudence as a New Theory' (n 1) 19 – 22.

material into consideration in the interpretation of positive norms.²⁹ It is a matter of fact that the nature of criminal law reflects the political realities; thus, in a liberal political culture, often, a liberal criminal law could be adopted.³⁰ Likewise, in authoritarian regimes such as ours, authoritarian criminal law is adopted.³¹ However, in as much as the politics appear to be dominating at the dynamic level, which is the lawmaking process, there is also an aspect of specialisation that helps regulate the government based on such law, as they cannot be easily manipulated by the political process.³² Therefore, when the lawmaker adopts a policy as a prelude to legislation, the lawyers, drafting the bill, are guided by such super principles as rule of law and constitutionalism, or principle of legality, the prohibition of excess, and similar other doctrines.³³

Further, the formal validity of the law is relevant only for the coming into force of a certain norm; however, its continued existence is justified by its coherence with reality.³⁴ The rule must be relevant in the real world and must continue to conform to the facts it is meant to address.

5.3. Pre-Legislative Phase Duties of the Legislature

5.3.1. The Criminal Lawmaking Power and Rules of Legislation

5.3.1.1. The Criminal Lawmaking Power

The pre-legislative phase first relates to the power and responsibilities of the government regarding lawmaking. The powers of the Federal Government are listed

²⁹ Ornowska (n 15) 260, 267 – 68.

³⁰ Samuel Rodriguez Ferrandez ‘Legislative Evaluation in Spain: Its Necessary Application in the Approval of Criminal Law Reform’ in Adan Nieto Martin and de Marta Munoz de Morales Romero (eds), *Towards a Rational Legislative Evaluation in Criminal Law* (Springer 2016).

³¹ Simeneh Kiros Assefa and Cherinet Hordofa Wetere, ‘Governing Using Criminal Law: Historicising the Instrumentality of Criminal Law in Ethiopian Political Power’ (2019) 31 J Eth L (forthcoming).

³² Zamboni (n 15) 134 – 36.

³³ Humberto Ávila, *Theory of Legal Principles* (Springer 2007) 96 – 102; Council of Ministers Working Directive 1996 EC (in Amharic, ‘CM Working Directive’), Annex 1 ‘Directive on manner of preparation of documents to be submitted to the Council of Ministers’, art 8.

³⁴ Kelsen argues that validity is ‘formal’ and effectiveness is ‘substantive’; thus, ‘effectiveness is condition of validity’. Kelsen, *Pure Theory of Law* (n 1) 10 – 11, 209 – 13; Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, Cambridge UP, 1949) 121; Alexy describes it as ‘social efficacy’. Alexy (n 1) 13 – 19; Wintgens ‘Legisprudence as a New Theory’ (n 1) 13 ff.

under FDRE Constitution, article 51. The rest of the powers are given to the States. Based on this allocation of power, the lawmaking power of the House of Peoples' Representatives (the HoPR) is provided for under article 55. The House is expressly vested with the power to 'enact a penal code'. Hans Kelsen would call this the immediate justification for the existence of such law.³⁵ This is provided for under article 55(5).

The proper reading of this provision may be, the House has the power to adopt a criminal law but its authority springs from the provisions of FDRE Constitution, article 55(5) and it shall enact such criminal law in a code form. Should it find it necessary to criminalise further conducts, it may do so by amending such code. A constitutional power of a government cannot spring from two different constitutional provisions, based on the nature of the constitutional economy of words.

However, the provisions of FDRE Constitution, article 55(1) is considered a catch-all basket to be invoked whether there is a provision authorising particular legislation or not.³⁶ Several special penal legislation and administrative regulatory legislation containing penal provisions were adopted invoking the provisions of article 55(1). See, for instance, *Anti-Terrorism Proclamation No 652/2009*, *Banking Business Proclamation No 592/2008*, *Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No 434/2005*, and *Prevention and Suppression of Money Laundering and the Financing of Terrorism Proclamation No 657/2009*. Even when there is specific provision authorising a particular type of legislation, article 55(1) is invoked as a justification for the adoption of such legislation. Thus, while the provisions of article 55(11) authorise the House to legislate on tax matters, *Value Added Tax Proclamation No 285/2002*, *Income Tax Proclamation No 286/2002* and the *Stamp Duty Proclamation No 110/1998* were adopted invoking on the provisions of articles 55(1) and 55(11). Likewise, *Corruption Crimes Proclamation No 881/2015* invoked article 55(1) and (5).

The provisions of article 51 concern public administrative matters vested on the Federal Government. Thus, the provisions of article 55(5) authorising to adopt a penal

³⁵ Kelsen, *Pure Theory of Law* (n 1) 221 ff.

³⁶ FDRE Const, art 55(1) provides that 'The House of Peoples' Representatives shall have the power to legislative in all matters assigned by this Constitution to the Federal jurisdiction'.

code is not, ideally, an unlimited power, but limited by their purpose as provided for under article 51. The provisions of article 55(1) should be understood to helping the Federal Government discharge its obligations and achieve its objectives as provided for under article 51. Therefore, article 55(1) does not authorise the adoption of penal provisions in every administrative bill. Even *Corruption Crimes Proclamation 881/2015* could only be justified by article 55(5) as an amendment to the Criminal Code.

5.3.1.2. The Form the Criminal Law is Declared

The principle of legality requires that the law be ‘declared’. In defining the legislative power of the HoPR, the Constitution provides that the HoPR may adopt a penal code.³⁷ Such code is adopted in the form of a proclamation and is published in the official *Negarit Gazeta*. The Federal *Negarit Gazeta* Establishment Proclamation No 3/1995, article 2(2) provides that ‘[a]ll laws of the Federal Government shall be published in the Federal *Negarit Gazeta*’. Even when a breach is said to be committed against ‘legislation issued by an authorised public organ’ it must be on that is ‘duly published in the Federal *Negarit Gazeta*’.³⁸ This is not a definition of what law is in the country, but how the criminal law should be published as notice to the public, short of which does not constitute a criminal norm.

5.3.1.3. Federal Legislation Rules

The principal legislative rule is found in the Constitution. Article 55 provides for the lawmaking power of the HoPR, and article 55(5) specifically governs the criminal lawmaking power of the House. The provisions of article 77(1) provide that the Council of Ministers may initiate bills on matters that are falling under the jurisdiction of the Federal Government.³⁹ These provisions are jurisdictional matters; however, their implementation is governed by subsidiary rules, such as *Proclamation No 470/2005*⁴⁰ and *Regulations No 6/2015* was adopted by virtue of article 59 of the FDRE

³⁷ FDRE Const, art 55(5).

³⁸ Crim C art 343(1). Also see Jean Graven ‘The Penal Code of the Empire of Ethiopia’ (1964) 1 J Eth L 267, 287.

³⁹ FDRE Const, art 51 lists those powers that fall under the jurisdiction of the Federal Government and art 55 provide for the lawmaking power on those subjects.

⁴⁰ The earlier legislation rules include, *House of Peoples’ Representatives Legislative Procedure Proclamation No 14/1995*, *House of Peoples’ Representatives Legislative Procedure (Amendment) Proclamation No 33/1995*, and *Proc No 271/2002* (n 4). The discussion is made based on the

Constitution. This includes the CM Working Directive. It governs the initiation of bills and adoption procedure in the Council of Ministers.⁴¹

As the political system is dominated by the executive,⁴² the Council of Ministers is the most important government organ in the lawmaking process, and the CM Working Directive is thus the most influential legislation rule. This assertion is supported by two facts. First, the principal entity empowered to initiate bills is the Government.⁴³ However, 'the House of Federation ('HoF'), the Speaker, Federal Supreme Court, Committees of the House, Members of the House, [and] other governmental institutions directly accountable to the House' are granted the power to initiate bill.⁴⁴ This is the case since 2002.⁴⁵ Likewise, the CM Working Directive authorises all government agencies to initiate policies and bills in their area of competence.⁴⁶ However, none of those legislation that are discussed in this research is initiated by the House or its members; all of the bills were initiated by the Government. The Federal Government agencies (Council of Ministers, in particular) are the most important source of legislation and, de facto, the sole source of bills.

Second, the CM Working Directive governs the essential part of the pre-legislative phase, such as, which organ initiates a bill, the adoption of a policy in order to guide the drawing up of the bill,⁴⁷ the instructions to be given to the experts drafting the bill from the concerned administrative agency, the required type and level of enquiry, the

applicable legislation rule at the time of the adoption of a particular legislation. While the CM Working Directive (n 33) stood fast for so long, the HoPR rules of lawmaking are changed substantially and repeatedly.

⁴¹ The CM Working Directive (n 33) does not state the authority on the basis of what it is adopted. There does not seem to be a constitutional mandate to adopt such a directive.

⁴² Assefa Fiseha 'Legislative-Executive Relations in the Ethiopian Parliamentary System: Towards Institutional and Legal Reform' in Jaap de Visser, Nico Steytler, Derek Powell and Ebenezer Durojaye (eds), *Constitution-Building in Africa* (Nomos 2015).

⁴³ *Proc No 470/2005* (n 2) art 6(2); *The House of Peoples' Representatives of the FDRE Rules of Procedure and Members' Code of Conduct Regulations No 6/2015*, art 51(1) - (3).

⁴⁴ *ibid.*

⁴⁵ *Proc No 271/2002* (n 4) art 4(2).

⁴⁶ CM Working Directive (n 33) art 38(1); *Proc No 470/2005* (n 2) art 6(3). However, 'financial draft laws' are exclusively initiated by the government. *ibid* art 6(4); *Regulations No 6/2015* (n 43) art 51(3).

⁴⁷ art 38(5) gives the impression that bills emanate from a policy which is provided for under arts 30 - 36.

required format of drawing up of the bill, the requirements of conformity with other legislation and doctrines including the Constitution,⁴⁸ and the nature of the debate to be had and approval by the Council.⁴⁹ In comparison, the legislation rules of the House are limited to the legislation stage in the House. The House limited its power of hearing and enquiry.⁵⁰

Apart from what the law has provided for, there are instances where the Council of Ministers dictated a particular type of rule. For instance, in the adoption of *Commercial Registration and Business Licensing Proclamation No 980/2016*, Members of the House enquired whether it was reasonable to keep those (severe) penal provisions. The resource persons replied, they understand the moral dilemma the judges face to impose such criminal punishment and they attempted to reduce the criminal punishments. However, the Council of Ministers rejected the proposal and decided to keep the provision as it had been. The provision was finally adopted as decided by the Council of Ministers.⁵¹

The proclamations adopted by the House sometimes authorise the adoption of Regulations by the Council of Ministers and directives by the respective agencies. Those regulations and directives are required to comply with the requirements of the Proclamation. To that extent, the proclamations are also legislative rules and they are dealt with in the previous chapter as the delegation of legislative power.

⁴⁸ CM Working Directive (n 33) art 34, 35, 42(5)(a), 46(1)(a), (b).

⁴⁹ art 3 defines the duties and responsibilities of the Council of Ministers one of which is deliberations of bills and passing over to the House of Peoples' Representatives. art 3(1)(d).

⁵⁰ For instance, the full House hearing is limited to reports and recommendations of the committees. See section 5.3.5.2.

⁵¹ 'Minutes of Public Hearing Organized by the Commercial Affairs Standing Committee on the Commercial Registration and Business License Bill, 5 July 2016' (later adopted into law as *Commercial Registration and Business Licensing Proclamation No 980/2016*, in Amharic) 9, 10; 'Minutes of Meeting of Commercial Affairs Standing Committee with Resource Persons from Ministry of Trade on the Commercial Registration and Business License Draft Amendment Bill, 29 June 2016' (later adopted into law as *Proc No 980/2016*, in Amharic) 12 – 13. *Commercial Registration and Business Licensing Proclamation No 686/2010* art 60(1), engaging in business without a valid (renewed) commercial license were made punishable with 7 to 15 years imprisonment, fine Birr 150,000 - 300,000 and confiscation of the property used for such activity. This punishment is maintained in the new *Proc No 980/2016* art 49(2).

5.3.1.4. Institutions Initiating Bills

All legislative rules authorise government agencies to initiate a bill in the area of their competence.⁵² However, the CM Working Directive requires that when a criminal provision is introduced in a bill, the (then) Ministry of Justice would have to be consulted.⁵³ The designation of institutions to participate in a particular subject matter is for reasons of specialisation. Thus, the Ministry of Justice is the Federal Government advisor on legal matters.⁵⁴ However, the Ministry of Justice did not participate in several regulatory legislative preparations. For instance, in those tax legislation that contained serious penal provisions, such as the VAT and Income Tax Proclamations, the principal actors were the Ministry of Finance and Economic Development ('MoFED') and the Ministry of Revenue, respectively.⁵⁵ The Government Finance and Property Administration Proclamations were drawn up by MoFED.⁵⁶ Anti-Terrorism Proclamation, the drafters and resources persons were only from the National Intelligence and Security Services, the Federal Police and the Prime Minister's Office.⁵⁷

⁵² *Proc No 470/2005* (n 2) art 6(3), (4); *Regulations No 6/2015* (n 43) art 51(2)(d); CM Working Directive (n 33) art 30, 38(1).

⁵³ CM Working Directive (n 33) art 42(5).

⁵⁴ *Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No 4/1995*, art 23(1); *Reorganisation of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No 256/2001*, art 15; *Federal Attorney General Establishment Proclamation No 943/2016*, art 6(2).

⁵⁵ Both the Ministry of Revenue and MoFED each established a Tax Reform Program Office which had worked on the VAT and the Income Tax Proclamation, respectively. 'Reports and Recommendation of Budget and Finance Affairs, and Legal and Administrative Affairs Standing Committees for the Adoption of the Value Added Tax Draft Bill into Law, Recommendation No 1/1994' (later adopted into law as *Proc No 285/2002*); 'Brief Explanatory Memorandum on Income Tax Draft Bill' and the accompanying 'Technical Document Containing Core Issues in the Draft Income Tax Bill, May 2002 (later adopted into law as *Proc No 286/2002*).

⁵⁶ 'Brief Explanatory Memorandum on the Revised FDR Ethiopia Procurement and Property Administration Draft Bill, April 2009'; 'Brief Explanatory Memorandum on the Revised Federal Government Finance Administration Draft Bill, April 2009'; 'Minutes of Meeting with Experts on the Revised FDR Ethiopia Finance Administration and Procurement and Property Administration Draft Bills Organised by Budget and Finance Affairs Standing Committee' (later adopted into law as Proclamation Nos 648/2009 and 649/2009, respectively); 'Report and Recommendation of the Budget and Finance Affairs Standing Committee that the FDR Ethiopia Procurement and Property Administration draft bill be adopted into law, Recommendation No 12/2001, 2 July 2009'.

⁵⁷ 'Brief Explanatory Memorandum on the Anti-Terrorism Draft Bill' (later adopted into law as *Proc No 652/2009*); 'Brief Minutes of Hearing with Stakeholders on the Anti-Terrorism Draft Bill Organised by Justice and Administrative Affairs, and Foreign, Defence and Security Affairs Standing Committees, 24 June, 2009' (later adopted into law as *Proc No 652/2009*).

Likewise, *Money Laundering and Financing of Terrorism Proclamation No 657/2009* was drafted by the National Bank of Ethiopia,⁵⁸ and *Corruption Crimes Proclamation 881/2015* was drafted by the Federal Ethics and Anti-Corruption Commission.⁵⁹

For the most part, each of the penal provisions contained in those piecemeal legislation are redundant, and in some instances, significant modifications to those provisions in the Criminal Code. The Ministry of Justice (Attorney General's Office) is most suitable to revise the penal provisions and to see to it that they are rationally integrated to the Code or help achieve the intended objective, and most importantly, to better assess the social and political impact of such provisions. Where there are changes to the existing rules, it is only expanding the scope of the criminal conduct and increasing the punishment.⁶⁰ The institution that is suitable to address the matter is not made a part of the process which certainly compromises the quality of the work. If there is no sufficient investigation conducted to establish the facts regarding the failed social interactions, no rational solution can be suggested. Therefore, those penal provisions lack both epistemic and object rationality.

5.3.2. The Lawmaker's Duty to Investigate into Facts

The most important pre-legislative activity is an investigation into the failed social interaction and contextualisation of the problem which Luc Wintgens referred to as 'the principle of alternativity'.⁶¹ When the hermeneutic view of the legislature is argued for, it is a quintessential instrumentalist view of law;⁶² the law is used to

⁵⁸ Records show that the representative from the Ministry of Justice would be in attendance of the house committee hearing but he was absent. 'Minutes of Public Hearing on Money Laundering and Financing of Terrorism the Draft Bill and Explanatory Memorandum, Organized by the Budget and Finance Affairs, and Law and Administrative Affairs Standing Committees, 30 October 2009' (later adopted into law as *Proc No 657/2009*, in Amharic). Even though at the Committee hearing the resource person from the NBE asserts that opinion was sought from the Ministry of Justice, that is not reflected in any record.

⁵⁹ 'Minutes of Meeting of Law, Justice and Administrative Affairs Standing Committee with Federal Ethics and Anti-Corruption Commission and the Ministry of Justice authorities on Corruptions Crimes Draft Bill Drawn up by the Ethics and Anti-Corruption Commission 10 December 2014' (later adopted into law as *Proc No 881/2015*).

⁶⁰ Simeneh Kiros Assefa and Cherinet Hordofa Wetere 'Over-Criminalisation': A Review of Special Penal Legislation and Administrative Penal Provisions in Ethiopia' (2017) 29 J Eth L 49, 78 – 81.

⁶¹ Wintgens 'Legisprudence as a New Theory' (n 1) 11; Ferrandez (n 30) 79.

⁶² Wintgens, 'Legislation as an Object of Study' (n 1) 13; Brian Z Tamanaha, *The Law as a Means to an End: Threat to the Rule of Law* (Cambridge UP 2006).

address specific social, political and economic objectives in want of legislative intervention. It is to find a proper link between legislation and the value it is intended to pursue that the investigation into the facts is required.⁶³ The background study of a given legislation needs to contain several things, including identifying the failed social interaction, the alternative measures available to the legislature,⁶⁴ and whether legislative intervention is warranted.⁶⁵ If there was a norm governing the social relation, it should also show how such norm fails⁶⁶ and, in the instant case, if a criminal norm is sought, in conformity with the principle of *ultima ratio*, it should also indicate that those identified alternative measures have failed to achieve the intended purpose and criminalisation is necessary.

The CM Working Directive requires that proposal and research documents submitted to the Council must be based on sufficient understanding of the subject matter, and include all information necessary to decide on the public interest.⁶⁷ The decision of the Council should reflect 'all government policies and procedures are thoroughly examined or looked into'.⁶⁸ Likewise, the HoPR Regulations require that the explanatory memorandum should state 'the necessity of the draft law' and 'the object of the bill'.⁶⁹

The various bills were drawn up by different government agencies, and their knowledge of the rules on legislation and legislative expertise are of varying degrees. Thus, the practice of compliance with those requirements is not consistent.⁷⁰ Several bills were adopted since the adoption of modern legislation rules in 2002. It is in

⁶³ Wintgens, 'Legislation as an Object of Study' (n 1) 12 – 15; Oliver-Lalana (n 11) 135 – 59; Ferrandez (n 30) 79.

⁶⁴ Philippe Thion 'Questioning Alternatives to Legal Regulation' in Wintgens LJ, *Legislation in Context: Essays in Legisprudence* (Ashgate 2007) 96 – 99.

⁶⁵ Wintgens 'Legislation as an Object of Study' (n 1) 12 – 13.

⁶⁶ Wintgens calls this 'normative density'. *ibid.*

⁶⁷ CM Working Directive (n 33) art 5(5).

⁶⁸ translation mine. *ibid* art 5(6).

⁶⁹ *Regulations No 6/2015* (n 43) art 51(10)(a), (b).

⁷⁰ The draft Press Proclamation was adopted before the adoption of the legislation rules, other than the *Transitional Government Charter*. The preparatory material only compiles the provisions contained in the Civil and Penal Codes relating to expression. There was no explanatory memorandum attached to it, nor a justification why Ethiopia needed such regulatory legislation containing severe penal provisions on the press.

response to such state of affairs that the Council of Ministers adopted *Legislative Drafting Manual 2010 EC* (in Amharic). The manual provides that where a criminal punishment is provided for, it should provide for 'proportional and clear penalty'. However, it prohibits drawing up provisions making preference to severe penalty.⁷¹

5.3.2.1. Rationality of Law, and of the Lawmaker

The proper link between the content of the idea of the relationship between law and politics, on the one hand, and the legislative rules on the other is the rationality of the legislature. In the insider view of lawmaking, the lawmaker is following rules as the judge does – the rules of legislation. The outsider view of lawmaking is addressing specific social, economic and political objectives. The legisprudential view of lawmaking is hermeneutic view. Consequently, rationality in legisprudence is about the aspiration to make 'good laws',⁷² which is depicted in the organisation, structure, and presentation of the positive law.⁷³ The rationality of the law is seen both in the substantive and the formal requirements of the lawmaking process. It is all about the coherence of the legal system, legal doctrines, principles and rules, and making sense in the application.

The discussion here focuses on what is a 'good' lawmaking process. This is principally done by examining the legislative duties of the legislature in enquiring into the facts demanding legislative intervention, in the preparation of a bill and in the lawmaking debate in the pre-legislation, and reviewing the law made in post-legislation. This is done based on the existing legislation rules, the nature of lawmaking and the practice of lawmaking.

5.3.2.2. Legislation with No Background Study

The criminal law includes the Criminal Code, special penal legislation, and administrative regulatory legislation containing penal provisions. They all are

⁷¹ *Legislative Drafting Manual 2010 EC* (in Amharic) art 71(12).

⁷² Fuller (n 1) 3 – 11. Wintgens reduces rationality to a choice to make 'good laws' except it is bounded by such time and circumstances. Wintgens 'Legisprudence as a New Theory' (n 1) 22; Wintgens 'Bounded Rationality' (n 1) 6, 8.

⁷³ Wintgens 'Bounded Rationality' (n 1) 6 – 12.

adopted by the House. In several of those legislation, including the Criminal Code, there is no background study justifying those legislative actions. For several of those bills, there were only explanatory memoranda. Even when those legislation were subsequently amended, no implementation information was presented showing the ineffectiveness of such legislation in the previous form and content.⁷⁴

5.3.2.2.1. The Vagrancy Control Proclamation

Vagrancy had been criminal conduct in Ethiopia for more than a half-century, first by special legislation, then in the 1957 Penal Code.⁷⁵ However, special legislation is adopted while there was such a provision in the Penal Code. The central justification for the adoption of the special legislation was treating it as a special crime to be run having a special procedure ‘in order to permanently dispel the threat of vagrancy’ and other crimes.⁷⁶ The bill was drafted by the Ministry of Federal Affairs and the Ministry of Justice.⁷⁷ The explanatory memorandum to the bill asserts that researches done by the Federal Police indicate that crime of vagrancy and related crimes were growing and were matters of urgent attention.⁷⁸ The media also portrayed vagrancy as a serious problem.⁷⁹ However, there is no evidence presented in support of the bill nor was such evidence presented at the House Committee hearing.⁸⁰

The bill focuses on two matters. On the procedural aspect, it adopts the special procedure of sorts – granting power to the police to detain suspects and to detain them

⁷⁴ Simeneh Kiros Assefa ‘Walking in the Dark: Lack in the Use of Criminal Statistics for Public Policy and Legislative Action’ 12 Mizan LR 371, 387 – 99.

⁷⁵ art 471. This is also taken over by the provisions of Crim C, art 477.

⁷⁶ *The Vagrancy Control Proclamation No 384/2004*, preamble, para 2.

⁷⁷ ‘Reports and Recommendations of Law and Administrative Affairs, and Social Affairs Standing Committees Regarding the Vagrancy Control Draft Bill 21 January 2004 (in Amharic) 2.

⁷⁸ ‘Explanatory Memorandum on Vagrancy Control Draft Bill’ (later adopted into law as *Proc No 284/2004*) 1, 4.

⁷⁹ _____ ‘Millions worth of asset damaged and looted by hooligans’, *Addis Zemen*, Addis Ababa, April 20, 2001 (in Amharic); _____ ‘Ethiopian Telecommunication Corporation reported property worth Birr 50 millions damaged’, *Addis Zemen*, Addis Ababa, April 21, 2001 (in Amharic).

⁸⁰ The bill was drafted by the Ministry of Federal Affairs and the Federal Police; ‘Explanatory Memorandum on Vagrancy Proclamation’ (n 78) states that researches conducted by the Federal Police indicate that vagrancy is a serious problem. However, the police did not have such recording keeping division until 2006 EC (2013/14). Simeneh ‘Walking in the Dark’ (n 74) 377.

without bail which forms part of the final bill.⁸¹ On the substantive part of the law, the punishment is made severe and those conducts covered by the Vagrancy Proclamation are not new conducts but conducts punishable in the Penal Code with fine or few days detention.⁸² There were discontents regarding the necessity of the bill and its motives. Some opine that the bill was meant to muzzle the opposition political parties.⁸³ This may be gathered from the news reports. On April 17, 2001, Addis Ababa University students had a meeting with the Minister of Education demanding academic freedom and other rights. The meeting came to an end without agreement, and on the following day, the students staged protest demonstration. Those youngsters outside the university campus had joined the students demanding for opportunities, as a consequence of which the security forces ‘overreacted’. Several students died and some public institutions were set ablaze by unidentified individuals.⁸⁴ The news reports blame opposition political parties and certain human rights groups for inciting the incident.⁸⁵ These incidents were found to be good excuses for the adoption of the bill into law.

However, at the public hearing on the draft bill, three points were outstanding: vagrancy reflects the socio-economic problem which could only be addressed by adopting a good economic policy, not by criminal law; second, the criminalisation of vagrancy is directed against the opposition political parties; and third, the conducts that are criminalised are already criminalised in the Penal Code, except where the

⁸¹ *Proc No 384/2004* (n 76) art 4, after defining what conducts constitute vagrancy, imposes a heavier penalty. Further, art 6(1) authorises the police to effect arrest without warrant, and sub-art (3) provides that such a person suspected of vagrancy may not be released on bail.

⁸² Simeneh and Cherinet ‘Overcriminalisation’ (n 60) 79 – 80.

⁸³ ‘Minutes of Public Hearing Organized by Legal and Administrative Affairs, and Social Affairs Standing Committees on the Vagrancy Control Draft Bill 12 January 2004’ (in Amharic, later adopted into law as *Proc No 384/2004*) 12 – 13.

⁸⁴ See (n 79).

⁸⁵ All the press releases made by the Federal Government, the Federal Police and the Ministry of Education blame the cause of the incident on the All Amhara People Organisation (AAPPO) and Ethiopian Democratic Party (EDP) and Ethiopian Human Rights Council (EHRCO) employing vagrants to implement their ‘policies’. Of those 31 people who, the Government admitted, died during clash, the police also alleged that 9 of them had prior criminal records. ENA ‘Police Announces 31 People Died as a Result of Clash Following Students’ Protest’ *Addis Zemen*, Addis Ababa, April 24, 2001 (in Amharic). Also see ENA ‘Police reported recovering a part of assets looted’ *Addis Zemen*, Addis Ababa, April 21, 2001 (in Amharic).

punishment is made severe and it is made status crime.⁸⁶ Yet the Committee had recommended the adoption of the bill into law by the full House without any modification.⁸⁷ As those issues were not made part of the report of the Committee, records do not show the full House had discussed those issues; but the bill was adopted into law as it was.

5.3.2.2.2. Money Laundering and Financing of Terrorism Proclamation

The bill on Money Laundering and Financing of Terrorism is drawn up by the National Bank of Ethiopia.⁸⁸ One would expect the National Bank of Ethiopia would present information gathered by the National Bank of Ethiopia in the course of its business showing problems relating to money laundering. However, the explanatory memorandum to the bill does not contain any data.⁸⁹ At the hearing with the two pertinent Standing Committees, the resource persons from the National Bank of Ethiopia asserted that there had never been a criminal prosecution on money laundering until the date of discussion.⁹⁰ However, other related questions, such as the reasons including attorneys in the list of accountable persons, were answered by conjuncture.⁹¹

Further, the explanatory memorandum does not state the reasons for such action but, it appears to have focused on the enforcement of the international conventions and

⁸⁶ 'Minutes of Public Hearing on Vagrancy Proclamation' (n 83) 10-14.

⁸⁷ 'Report and Recommendation on Vagrancy Proclamation' (n 77).

⁸⁸ The resource persons at the public hearing stated that the bill had been drawn up with the assistance of the Ministry of Justice. However, the explanatory memorandum was drawn up and submitted by the National Bank of Ethiopia (NBE). National Bank of Ethiopia 'Explanatory Memorandum on the Bill on Money Laundering and Financing of Terrorism' (2001 EC, in Amharic). All the three resource persons present at the discussion were from the NBE. 'Minutes of Public Hearing on the Draft Bill on Money Laundering and Financing of Terrorism organized by the Budget and Finance, and Law and Administrative Standing Committees' October 31, 2008.'

⁸⁹ Explanatory Memorandum by the NBE (n 88).

⁹⁰ 'Minutes of Public Hearing on Money Laundering Draft Bill' (n 58) 10 – 12. 'Minutes of the Meeting of the Budget and Finance, and Law and Administrative Standing Committees on the Draft Bill on Money Laundering and Financing of Terrorism 21 October 2008' (later adopted into law as *Proc No 657/2009*)

⁹¹ *ibid* 11.

resolutions.⁹² The bill rather does three things: it imposes an obligation on specified individuals and entities, including lawyers, referred to as 'accountable persons' to report suspicious activities relating to their clients, criminalising possession of unexplained property and international cooperation.

5.3.2.2.3. Tax Legislation

There were tax crimes included in the Penal Code. It is despite such provisions that those tax legislation were adopted containing penal provisions. Those penal provisions contained in those tax legislation, such as the *Income Tax Proclamation No 286/2002*, *Value Added Tax Proclamation No 285/2002*, were not commented on in the explanatory memorandum.⁹³ There is no mention of the tax crimes stated in the Penal Code; nor was there explanation why the tax crime provision in the Penal Code was believed to have failed to help achieve the objectives sought in the penal provisions of the draft bills. No record show penal provisions in the Income Tax Proclamation were discussed by the Committee to which the matter was referred for a thorough examination. In the discussion on the Value-Added Tax Proclamation, the experts from MoFED suggested the penal provisions that were already in the Income Tax draft bill be included in the VAT Proclamation too, and the Committees agreed. The penal provisions of the Income Tax bill were just included in the VAT bill and adopted into law.⁹⁴

The principal purpose of the penal provisions is to 'maximize revenue'.⁹⁵ The explanatory memorandum states that the objective of the revision the law and inclusion of severe penal provision is 'to prevent tax crimes and to have deterrence

⁹² Explanatory Memorandum by the NBE (n 88) 2 – 4, discusses the various international conventions and UN Security Council Resolution and such related requirements.

⁹³ 'Explanatory Memorandum on Income Tax Bill' (n 55); the penal provisions were incorporated into the VAT Proclamation later after the experts made such recommendation at the Committee hearing. 'Modifications made on the Value Added Tax Draft Bill' (later adopted into law as *Proc No 285/2002*) para 4.

⁹⁴ *ibid*; 'Minutes of Meeting of the Economic Affairs and Legal Affairs Standing Committees with Resource Persons on the Value Added Tax Draft Bill, 7 November 2001' (later adopted into law as *Proc No 285/2002*).

⁹⁵ 'Minutes of Meeting on VAT Proclamation' (n 94) 11.

effect’.⁹⁶ While those same penal provisions were reproduced in the Value-Added Tax bill, the principal discussion was on the effect of replacing the sales tax with such VAT and the constitutional power to adopt a VAT Proclamation.⁹⁷ There is only a decision that ‘penal provisions similar to that of income tax bill’ be incorporated. There is no record of discussion regarding the fate of those provisions in the Penal Code, the effect and content of those penal provisions and how they relate to the general principles of the criminal law.

The *Federal Tax Administration Proclamation* was adopted in 2016. Regarding the penal provisions, this proclamation does two things: it lists almost all tax-related crimes in one bill in an encyclopaedic manner; it also maintains other tax-related penal provisions⁹⁸ with minor modifications.⁹⁹ It elevated the directives, indirectly not unwittingly, to criminal law status.¹⁰⁰

5.3.2.2.4. The Anti-Terrorism Proclamation

In response to the UN Security Council Resolution 1317(2001), Ethiopia held that it had sufficient law to address acts of terrorism.¹⁰¹ Ethiopia, however, adopted the *Anti-Terrorism Proclamation No 652/2009*, changing its initial stance on the ground that the then existing law were not sufficient to deal with such ‘heinous crime’.¹⁰² The bill was drafted by the National Intelligence and Securities Services Agency and the Federal Police. After defining terrorist acts, it grants almost unbounded power to those agencies regarding the investigation and matters relating to the prosecution of such

⁹⁶ ‘Explanatory Memorandum on Income Tax Bill’ (n 55) 2.

⁹⁷ ‘Minutes of Meeting on VAT Proclamation’ (n 94); ‘Report and Recommendation of Economic Affairs and Legal Affairs Standing Committees Regarding the Value-Added Tax Bill, 7 December 2001’ (in Amharic).

⁹⁸ *Federal Tax Administration Proclamation No 983/2016*, art 116(2) provides that where a single conduct is criminalised in different proclamations, each shall be prosecuted as a separate crime.

⁹⁹ For instance, the punishment for violation the stamp duty rules is reduced from imprisonment 10 – 15 years under the *Stamp Duty Proclamation No 110/1998*, art 12(1) to 3 to 5 years under *Proc No 983/2016*, art 123(1) which is still unreasonable by any standard.

¹⁰⁰ The tax laws provide that violation of the tax laws is a crime; and in its definition, it included directives as tax laws. *Proc No 983/2016* (n 98) art 2(36).

¹⁰¹ Wondwossen Demissie Kassa ‘Examining some of the *raisons d’etre* for the Ethiopian Anti-Terrorism Law’ (2013) 7 Mizan LR 49, 52.

¹⁰² ‘Explanatory Memorandum on the Anti-Terrorism Draft Bill’ (n 57).

crimes. The explanatory memorandum states that the existing rules were not sufficient to deal with the matter.¹⁰³ It makes reference to international instruments for the definition of the crime and regarding Ethiopia's international obligation to adopt such a law. It does not state other reason that justify the adoption of the law.

The committee hearing was attended by standing committee members and a few ordinary members of the House. The resource persons were high ranking officials from the Ministry of Foreign Affairs, the Ministry of Defence, the National Intelligence and Security Services and the Ministry of Justice.¹⁰⁴ Unlike other bills, there is no record of a public hearing, and bill is recommended for adoption into law by 17 to 6 vote of Committee members.¹⁰⁵

The examination of the history of prosecution for terrorism reveals that there were two waves of action against alleged acts of terrorism. There were 214 individuals who were charged and convicted for terrorism between 1995 and 2004 in connection with the incidents in the transition period.¹⁰⁶ For instance, in *Beyan Ahmed, et al*,¹⁰⁷ *Abdulkader*

¹⁰³ *ibid*, 17 – 19.

¹⁰⁴ 'Minutes of Hearing with Stakeholders' (n 57).

¹⁰⁵ 'Report and Recommendation of Law and Administrative Affairs, Foreign, Defence and Security Affairs Standing Committees Regarding the Anti-Terrorism Draft Bill, Recommendation No 8/2001, 7 July 2009'.

¹⁰⁶ One of the witnesses in *Alemayehu* stated this clear. *Central Public Prosecutor v Alemayehu Tolosa and Ketma Abdeta* (29 November 2004, Crim File No 01153 Central High Court). Thus, there were also other cases, including *Central Public Prosecutor v Ahmed Nour* (26 March 2004, Crim File No 01121 Federal High Court); *Public Prosecutor v Yahiya Zekaria* (23 July 2004, Crim File No 00586 Federal High Court); *Public Prosecutor v Mohammed Abdella* (15 June 2004, Crim File No 01137 Federal High Court); *Public Prosecutor v Ousman Abdella* (10 November 2004, Crim File No 01397 Federal High Court); *Central Public Prosecutor v Jenda Mussa* (6 February 2004, Crim File No 01114 Federal High Court); *Central Public Prosecutor v Mohamed Nour Sheik Ibrahim AKA Muruto Hundie* (5 July 2002, Crim File No 12181 Federal High Court); *Public Prosecutor v Kumera Abdissa* (26 March 2004, Crim File No 01361 Federal High Court); *Public Prosecutor v Abdulrazak Ahmed* (26 March 2004, Crim File No 01393 Federal High Court); *Public Prosecutor v Sha'ib Adem* (2 June 2004, Crim File No 01374 Federal High Court); *Public Prosecutor v Ahmed Mussa Shanka* (1 December 2003, Crim File No 01141 Federal High Court); *Public Prosecutor v Jira Kumera Atomsa and Private Bedassa Eedo* (23 February 2005, Crim File No 01154 Federal High Court); *Public Prosecutor v Ibrahim Issac AKA Belisa Qumbi, et al, 5 defendants* (Crim File No 01129 Federal High Court).

¹⁰⁷ *Public Prosecutor v Beyan Ahmed, et al, 7 defendants* (15 October 2004, Crim File No 03139 Federal High Court).

Mohammed, et al,¹⁰⁸ *Ziyad Muhammed*,¹⁰⁹ and *Alemayehu Tolosa*,¹¹⁰ defendants were charged for conducts the OLF and IFLO did after exiting the Transitional Government of Ethiopia Council of Representatives. Terrorism was alleged in the context of genocide. However, the principal conduct they were charged for and convicted was those acts committed while the groups were members of the Transitional Government in May and June 1992.¹¹¹ The case of *Dinkinesh Deressa*¹¹² decided in 2005 only shows the continuation of such action of the Government. This is the first wave of prosecution for terrorism.

The second wave of anti-terrorism actions by the Government is the adoption of the 2009 Anti-Terrorism Proclamation and the declaration armed struggle by Ginbot 7 somehow coincided. The Government then to declare Ginbot 7 and OLF as terrorist organisations; the leadership of G7 were charged in absentia and several of them were sentenced to death and many were sentenced to life imprisonment.¹¹³

5.3.2.2.5. Administrative Regulatory Legislation Containing Penal Provisions

Several administrative regulatory draft bills were accompanied by a short explanatory memorandum. However, because they are on regulatory matters, their explanation is

¹⁰⁸ *Public Prosecutor v Abdulkader Mohammed, et al*, 7 defendants (16 January 2004, Crim File No 01392 Federal High Court).

¹⁰⁹ *Public Prosecutor v Ziyad Muhammed Oumer* (10 June 2004, Crim File No 01178 Federal High Court).

¹¹⁰ *Central Public Prosecutor v Alemayehu Tolosa and Ketma Abdeta* (29 November 2004, Crim File No 01153 Central High Court).

¹¹¹ The facts are stated in almost every case; but reports of the TGE Council of Representatives Enquire Commission report is attached to *Beyan Amhed* case (n 107) as evidence which constituted only one count, count 10.

¹¹² *Public Prosecutor v Dinkinesh Deressa and Negassa Negussie* (27 May 2005, Crim File No 13433 Federal High Court)

¹¹³ In *Federal Public Prosecutor v Brigadier General Teferra Mammo Cherkos, et al*, (46 defendants) (22 December 2009, File No 81406, Federal High Court) 5 defendants, Melaku Teferra, Dr. Birhanu Nega, Andargachew Tsige, Muluneh Eyuel, and Mesfin Aman, were sentenced to death; 33 were sentenced to life imprisonment and 2 were sentenced to 10 years rigorous imprisonment. The reason the court handed down the death sentence is defendants were involved in similar conduct for which they had been pardoned. Because they were found in the same criminal conduct which shows they had no remorse and no legal ground to mitigate the punishment. ENA 'Those Charged for Violating the Constitution by Force and Armed Violence were Sentenced to Death, Life Imprisonment and 10 Years Rigorous Imprisonment' *Addis Zemen*, Addis Ababa, 23 December 2009 (in Amharic) 1, 3.

on that part they deem important – the regulatory part. While they contain penal provisions, those provisions were not discussed at all because they are not deemed ‘essential’ to the subject. Therefore, there is no comment on the penal provisions.

Media Regulation Proclamations – while the statute appears to be for the enforcement of the rights enshrined in the Constitution – freedom of expression – and it is administrative regulatory legislation, it can properly be called penal legislation. There are more than necessary penal provisions in the Criminal Code, including those unconstitutional provisions, such as, those establishing guilt by presumption and precluding contrary evidence.¹¹⁴ Thus, there is no need for further penal provision. Those media regulatory legislation were meant to define such terms as, editor and producer in order to enhance the enforcement of the provisions of the Criminal Code.¹¹⁵ The explanatory memorandum does not touch upon the penal provisions, nor were such provisions discussed at the committee hearing.

Consumer Protection Proclamation – this statute is meant to protect both consumers and traders from unfair trade practices. There are several prohibited practices and several of those conducts are criminally sanctioned.¹¹⁶ However, there is no explanation presented why those conducts were criminalised, nor was there a data presented to the House to make it able to address the issue of criminalisation of conduct.

Federal Government Finance and Property Administration Proclamations – like the tax bills drawn up in 2002, both the Federal Government of Ethiopia Financial Administration and Ethiopian Federal Government Procurement and Property

¹¹⁴ Crim C, art 43(5) provides for proof of knowledge and consent of editor-in-chief of a periodical or producer or a broadcast by presumptions and precludes any ‘proof to the contrary’.

¹¹⁵ The Criminal Code provides for criminal liability for conducts committed through the media and the Mass Media Proclamation defines those responsible persons in order to make the prosecution and conviction easier. ‘Brief Explanatory Memorandum on Freedom of the Media and Access to Information Bill’ (later adopted into law as *Proc No 590/2008*) 12 – 14.

¹¹⁶ For instance, art 49(1) punishes the abuse of dominance ‘with a fine of 15% [] of his annual income or where it is impossible to determine the amount of his annual income with fine from birr 500,000 [] to birr 1,000,000 [] and with rigorous imprisonment from 5 [] to 15 [] years.’

Administration bills were drawn up by MoFED.¹¹⁷ Both bills were drawn up containing penal provisions. Those crimes included are bribery, conspiracy to commit a crime, falsifying documents, disbursing illegal payment, illegal collection of payment, and other corrupt practices.¹¹⁸ The provisions are redundant with those contained in the Criminal Code.¹¹⁹ Yet, there is no mention of the need and justification for the inclusion of those provisions in the respective proclamation, nor was there a discussion in the committee hearings.¹²⁰

5.3.2.3. Legislation with Limited Background Study

In some instances, there is an effort to present a background study investigating the facts that were said to require legislative intervention. However, few do refer to the penal provisions in their comments. One such legislation is the *Commercial Registration and Business License Proclamation 980/2016*. The explanatory memorandum refers to the five years' practice and trade promotion policy. This relates to the essential part of the Proclamation. It attempted to reduce the punishment for engaging in business without a license but for a refusal of the Council of Ministers.¹²¹ The crude comment of those provisions were that effort was made 'to elaborate' those penal provisions and to make them clear¹²² while the bill actually does something else more – criminalisation of other conducts previously not prohibited, and increasing punishments. For instance,

¹¹⁷ MoFED 'Explanatory Memorandum on the Revised Federal Government of Ethiopia Financial Administration, April 2009' (in Amharic); MoFED '[Explanatory Memorandum] Federal Government of Ethiopia Procurement and Property Administration, April 2009' (in Amharic).

¹¹⁸ *Federal Government of Ethiopia Financial Administration Proclamation No 648/2009*, art 70; and *Ethiopian Federal Government Procurement and Property Administration Proclamation No 649/2009*, art 77.

¹¹⁹ Crim C, art 404 ff. Those alleged illegal procurement and property management conducts were prosecuted under the provisions of the Criminal Code. See for instance *Federal Attorney General v Zayid W/Gabriel, et al*, (Federal High Court, File Nos 204242, 204153, 204154).

¹²⁰ 'Minutes of Meeting with Experts' on Proc Nos 648/2009 and 649/2009 (n 56); 'Report and Recommendation of the Budget and Finance Affairs Standing Committee that the FDR Ethiopia Procurement and Property Administration Draft Bill be Adopted into Law' (Recommendation No 12/2001, 2 July 2009).

¹²¹ 'Minutes of Meeting on Proc No 980/2016' (n 51) 12 – 14.

¹²² When the *Commercial Registration and Business License Proclamation No 67/1997* was adopted, no explanation was provided for including penal provisions in the regulatory provision. Yet again, not sufficient evidence was presented justifying the increased punishment when it was replaced with *Proc No 686/2010* (n 51). However, when it was replaced by *Proc No 980/2016* (n 51) there were researches apparently reviewing the practice.

passing a commercial license to someone in any form is criminalised in *Proclamation No 983/2016*, article 49(4) punishable with rigorous imprisonment from 5 to 10 years, fine from Birr 50,000 to 100,000. Where such transfer is made to a foreign national, it is punishable with 7 to 15 years imprisonment and fine from Birr 200,000 to 300,000.¹²³ The explanatory memorandum does not give any justification for such action nor was it discussed at both committee and public hearings.

5.3.3. Legislative Impact Assessment

As rules of conduct, legislation are of prospective application. The investigation into the facts also reviews the impacts of the legislation when applied in the future. This is the normative, social, institutional, and economic impact of the legislation. The legislature needs to take into consideration not only the existing circumstances but also future circumstances so that the rules may remain valid for a reasonably longer period depending on the nature of the law.¹²⁴ The Explanatory Memorandum to the Draft Constitution states that the criminal law has to be reasonably stable.¹²⁵ However, it has to consider several things which Wintgens refer to as ‘contingencies’.¹²⁶ First, it is in the nature of social facts that they change over time and, thus, the legislature needs to consider that possible future changes. However, such changes may also be the result of the legislation itself, therefore, the impact of such legislation or conduct of individuals should be reasonably predicted to have efficient rules.¹²⁷

Criminal legislation has an impact on the right of the individual.¹²⁸ The CM Working Directive requires certification that the intended legislation does not contradict the Constitution is one of the most pertinent aspects of the impact assessment because the lawmaker needs to make sure such a bill does not unjustifiably impact the rights of the

¹²³ *Proc No 980/2016* (n 51) art 49(4).

¹²⁴ Once criminal laws are adopted, it appears there is no political will to repeal them. The current situation in Ethiopia is an exception where the newly formed Abiy Ahmed’s Government understands the criminal law is used as a means of suppressing political dissent and any form of opposition, which starts with pardon, amnesty, and termination of charges.

¹²⁵ ‘Explanatory Memorandum to the Draft Constitution’ (n 7) 49 – 51.

¹²⁶ Wintgens ‘Bounded Rationality’ (n 1) 17 – 22.

¹²⁷ *ibid* 23 – 26.

¹²⁸ This conforms with the argument on rights as principium. Wintgens ‘Legisprudence as a New Theory’ (n 1) 11 ff.

individual. The other important aspect of the enquiry is the effect of the rules on other interests, such as social consequences, institutional and other resource demands.¹²⁹ The CM Working Directive requires that the bill presented to the Council decision should not be one that would demand reform before or soon after its adoption into law.¹³⁰ As an aspect of the investigation, there are different consultations required to be conducted by the proposing agency. Thus, before a matter is tabled in the Council for discussion the agency is required to conduct consultation with relevant organs and consider their opinion.¹³¹

The consultation is principally within governmental institutions;¹³² but it may also be with the public and professional associations.¹³³ Consultation is required to be made regarding financial matters, institutional matters, and or where there is a fundamental change in the existing rule.¹³⁴ Further, it is specifically provided for in the CM Working Directive that if a draft bill has an impact on other institutions' powers or has financial implications, other institutions, or for financial matters, the Ministry of Finance need to be consulted.¹³⁵ Likewise, for penal provisions, the Ministry of Justice be consulted.¹³⁶

Records do not show that any of those bills proposed and adopted into law had such investigation, nor was there a hearing on this subject. For instance, when the tax bills introduced imputed and non-fault liability, their effect on the business, on the government revenue, on individual freedom, is not discussed at all. When corruption offences were made non-bailable, their potential negative consequences were not foreseen.¹³⁷

¹²⁹ Wintgens 'Bounded Rationality' (n 1) 17 – 22; Ferrandez (n 30) 85 – 99.

¹³⁰ CM Working Directive (n 33) art 42(4)(b).

¹³¹ *ibid* art 5(3).

¹³² *ibid* art 10(1)(a), (3).

¹³³ The consultation with the public and interest groups may be conducted only upon the Council of Ministers' approval. *ibid* art 10(2), (4).

¹³⁴ *ibid* art 9(2).

¹³⁵ *ibid* art 31(7)(e).

¹³⁶ *ibid* art 42(1)(c), (5)(b).

¹³⁷ The amendment makes corruption crimes bailable unless they are punishable by at least 10 years imprisonment. However, several of the corruption offences were punishable by 7 to 15 years rigorous imprisonment and by a wrong interpretation of the bail provision, those offences are

5.3.4. The Duty to Maintain Coherence

One of the fundamental principles of legislation is the principle of coherence.¹³⁸ However, coherence connotes a wide range of things in the normative structure and legislative process.¹³⁹ For instance, Wintgens discusses various types of coherence which are more or less similar to those discussed by Oliver-Lalana: linguistic, legal, social, goal and value rationality (coherence). Linguistic rationality relates to clarity of the law; legal rationality relates to the Kelsenian type of validity of rules; social rationality relates to the effectiveness of those norms; goal rationality relates to whether the intended means would help achieve the objectives sought and value rationality is about constitutional values.¹⁴⁰

Apart from such sophisticated classification of the notion of coherence, for convenience reason, legisprudential coherence is discussed under two categories – the coherence of the legal system in general and coherence with reality.

5.3.4.1. Coherence within the Legal System (Internal Coherence)

The principle of unity of the legal system requires that the norms in a legal system need to cohere with one another, irrespective of the category they fall under.¹⁴¹ Thus, in making or amending such law, the lawmaker is required to comply with the existing system of norms. The CM Working Directive specifically requires that a bill be accompanied with a certification that it does not contradict with the Constitution.¹⁴² The bill should also be shown that it conforms with other legal doctrines, principles, the existing law, and international obligations.¹⁴³ To ensure such coherence, other agencies are also consulted, and if criminalization or punishment is included, the

also included in the non-bailable category that rendered the revision less useful.

¹³⁸ Wintgens 'Legisprudence as a New Theory' (n 1) 15 – 22. The other three principles of legislation include the Principle of Alternativity, the Principle of Normative Density and the Principle of Temporality. *ibid* 11 – 15.

¹³⁹ Summers, *Form and Function* (n 12).

¹⁴⁰ Oliver-Lalana (n 11) 140 – 44.

¹⁴¹ Ávila (n 33) 84 – 91. Also see Summers (n 12) 305 – 50.

¹⁴² CM Working Directive (n 33) art 42(5)(a)).

¹⁴³ *ibid* art 46(1).

Ministry of Justice (Federal Attorney General) would be consulted to make sure that it does not contradict the Criminal Code.¹⁴⁴ If the bill has institutional modification implications, the PM needs to be consulted before the draft is drawn up.¹⁴⁵ Finally, before the bill is presented to the Council for discussion, it is presented to the legal team to ensure that it conforms with the policy¹⁴⁶ and technical requirements.¹⁴⁷

There are, however, several rules that violate this basic requirement of coherence within the legal system. There are penal rules that contradict the constitutional principle of presumption of innocence¹⁴⁸ by establishing guilt by presumption or shifting the burden of proof on to the defendant. For instance, the *Corruption Crimes Proclamation No 881/2015*, article 3 presumes ‘intent to obtain an advantage or to injure’ and requires the defendant to prove otherwise. Likewise, the crime of ‘unexplained property’ provided for under article 15 of *Suppression and Prevention of Money Laundering and Financing of Terrorism Proclamation No 657/2009* is based on a presumption of guilt.¹⁴⁹

The provisions of FDRE Constitution, article 20(4) enshrines two fundamental procedural rights. The first part provides that ‘accused persons have the right to full access to any evidence presented against them, [and] to examine witness testifying against them’. The *Anti-Terrorism Proclamation No 652/2009*, article 23 provides that ‘intelligence report prepared in relation to terrorism, even if the report does not disclose the source or the method it was gathered; [and] hearsay evidence’ is admissible. This provision is repealed in the recently adopted *Prevention and Suppression of Terrorism Crimes Proclamation No 1176/2020*.

¹⁴⁴ ibid art 42(5)(b), 42(1)(c).

¹⁴⁵ ibid art 42(7).

¹⁴⁶ It is apparent that before a bill is drawn up the Agency needs to have a policy document to be adopted by the Council. It is based on such a policy document the bill would be drawn up. ibid art 40(5), 45.

¹⁴⁷ A bill presented to the Council should be prepared in Amharic and English languages accompanied by a brief explanatory memorandum. The language must be of a high standard, etc. ibid art 9(6), 43(2) 45. However, this is also the requirements when the bill is sent to the House.

¹⁴⁸ FDRE Const, art 20(3) provides that ‘accused person have the right to be presumed innocent until proved guilty according to law and not to be compelled to testify against themselves’.

¹⁴⁹ The punishment is ‘confiscation’ of the unexplained property, ‘imprisonment from three to five years and fine from Birr 5,000 to Birr 10,000’.

The second part of article 20(4) of the Constitution provides that defendants have the right 'to adduce or to have evidence produced in their defence, and to obtain the attendance of and examination of witnesses on their behalf before the court.' In the face of such fundamental right, the Criminal Code, article 43(5) provides that for crimes committed through the mass media 'the content of the matter shall be deemed to have been inserted, published or disseminated with [] full knowledge and consent' of the editor-in-chief, the printer, the author, editor, and publisher. It is further provided that '[n]o proof to the contrary may be admitted in such a case'.¹⁵⁰

The criminal law is based on four fundamental principles which are also incorporated in the Criminal Code – the principle of legality, the principle of conduct, the principle of guilt and the principle of personal responsibility.¹⁵¹ In not a few cases, contrary to the principle of legality, the criminalised conduct is just not clear. For instance, the *Suppression of Money Laundering and Financing of Terrorism Proclamation No 675/2009*, article 17(5) provides that 'whosoever contravenes any other provisions of this Proclamation shall be punished under the provisions of the Criminal Code.' The *Banking Business Proclamation No 592/2009*, article 58(7) provides that:

[a]ny person who contravenes or obstructs the provisions of [the] Proclamation or regulations or directives issued to implement [the] Proclamation shall be punished with a fine up to Birr 10,000 and with imprisonment up to three years.

The Mining Operations Proclamation No 678/2010, article 78(2) provides that:

[a]ny person who contravenes or fails to comply with any provision of this Proclamations, regulation[s], directives or the terms and conditions of a license, shall be punished with fines up to birr 200,000 or imprisonment up to five years or both.

Those provisions violate the principle of legality in different levels; as a rule of conduct for the individual, the conducts criminalised are vague and cannot be complied with. The conducts are not predefined, and they are (would be) defined not by the Executive

¹⁵⁰ What is worse is the said 'crime' may have not been committed by the accused, however, criminal liability is attached to status as 'editor-in-chief', or 'publisher', 'producer', or 'licensee' which are given meaning in *Freedom of Mass Media and Access to Information Proclamation No 590/2008* in order to give effect to those provisions of the Criminal Code. 'Explanatory Memorandum on Freedom of the Media' (n 115) 12, 14, 28, 29.

¹⁵¹ For an in-depth discussion on those principles, see Simeneh 'Methods and Manners' (n 25).

which has no criminal lawmaking power.¹⁵² In some instances, where the violation is against a directive, the criminal norms (the prohibited conducts and/or the punishment) is not published in the official *Negarit Gazeta*.

Contrary to the principle of conduct, the *Income Tax Proclamation No 286/2002*, article 102(1), and *Value Added Tax Proclamation No 285/2002*, article 56(1) provide that if a company is found guilty of tax crimes as defined in the respective proclamations, 'the manager of that entity at the time of the commission of the offence is treated as having committed the same offence and is liable to a fine and imprisonment' fixed for the company. Those provisions are also contradicting the principle of guilt.

Finally, the principle of lenity is an important principle of criminal law enshrined both in the Constitution¹⁵³ and the Criminal Code.¹⁵⁴ The penal provisions in those administrative regulatory legislation are drawn in a consistent manner preferring for a graver penalty. For instance, the *Broadcasting Services Proclamation No 533/2007*, article 45 provides for specific jail term punishment and fine to be imposed for persons violating the provisions of the Proclamation '[u]nless punishable with more severe penalty under the Criminal Code'.¹⁵⁵

Therefore, the system of norms is not coherent within itself, and some rules even contradict the basic doctrine of criminal law.

¹⁵² See text for (n 37). Further, *Forest Development, Conservation and Utilisation Proclamation No 524/2007* art 20(6) of the provides that a person who 'commits a fault that are not mentioned in sub-article (1) to (5) here in above and for which punishment is not imposed shall be punishable with not less than 6 months and not exceeding 5 years imprisonment and with fine Birr 30,000'. Likewise, *Proc No 980/2016* (n 51) art 49(8) provides that '[a]ny person who violates the other [sic] provisions of this Proclamation shall be punished with fine from Birr 10,000 [] to Birr 30,000 [] and with simple imprisonment from one year to three years.'

¹⁵³ art 22 provides for the non-retroactivity of the criminal law and punishment. However, 'a law promulgated after the commission of the offence shall apply if it is advantageous to the accused or convicted person'.

¹⁵⁴ art 5 provides for the non-retroactive application of criminal law. However, art 6 provides that the provisions of the Criminal Code apply to an accused person if 'they are more favourable to him than those in force at the time of the commission of the crime'.

¹⁵⁵ There are similar provisions in *Development, Conservation and Utilisation of Wildlife Proclamation No 541/2007*, art 16(1); *Forest Development, Conservation and Utilisation Proclamation No 542/2007*, art 20; *Biosafety Proclamation No 655/2009*, art 21; *Copyright and Neighbouring Rights Protection Proclamation No 410/2004*, art 36(1), (2).

5.3.4.2. The Coherence of Norms with the Reality (External Coherence)

The coherence of the legal system fairly relates to the validity of laws and the coherent co-existence of norms. However, formal validity is not sufficient for the continued existence of norms. Wintgens upholds that formal validity is a reason for the initial existence of a norm; its continued existence is justified by its coherence with reality.¹⁵⁶ The law must be reasonably complied with by the public and it must be able to be enforced by law enforcement authorities. This is what Oliver-Lalana refers to as 'social rationality' and 'goal rationality'.¹⁵⁷ The law adopted must be accepted and complied with by society and it must be one that helps achieve its intended goal.

However, certain criminal rules do not cohere with reality, and some are not clear. We can see this on two levels. First, an absolute contradiction to the social reality. For instance, the commercial registration and business license proclamation requires that a trader need to have a valid (renewed) license to conduct his business. When such a rule is violated a certain punishment may be imposed. The punishment is, among others, a fine between 150,000 and 300,000 Birr. If a person has an initial capital of less than 150,000 which is often the case, and his entire asset is less than 150,000 which happened, the punishment cannot be enforced at all. Such law is mere nonsense.

Excessive punishment – the cardinal purpose of the tax law is to maximise state revenue. There are various ways of obtaining such revenue. The tax laws incorporate penal provisions. Their sole justification is to strictly enforce the revenue collection activity. Further, in the discussion for the commercial registration and business license proclamation, the requirement of a license is to maximise state revenue.¹⁵⁸ The license requirement is enforced by a severe penalty. If a person is punished twice for the same

¹⁵⁶ See (n 33).

¹⁵⁷ Oliver-Lalana (n 11) 140 – 44.

¹⁵⁸ 'Explanatory Memorandum on Commercial Registration and Business License Draft Bill' (later adopted into law as *Proc No 686/2010*); Brief Minutes of Public Hearing Organised by the Trade and Industry Affairs Standing Committee on Competition and Consumers' Protection, and Commercial Registration Draft Bills, 23 June 2010 (later adopted into law as *Proc Nos 685/2010* and *686/2010*, respectively) 44 – 45, 61 – 62.

purpose, each of which, in their own right, is disproportionately severe punishment, it is excessive use of the criminal law.

For instance, all of those who (were alleged to have) engage(d) in trade without a valid (renewed) commercial license were sentenced to a term of imprisonment, some of which are suspended ones, irrespective of their personal predicaments. Yet, the court is not imposing the legally provided for punishments. The law determines fine between Birr 150,000 and 300,000. The court consistently imposes a fine not exceeding four thousand birr only. The researcher never encountered a case where property confiscation is ordered. On the other hand, after the provision criminalising transfer of commercial license was adopted, 737,930 business license were deactivated in the year 2018 of which 708,306 were in Addis Ababa.¹⁵⁹ It appears the law causes more harm than help.

5.3.5. The Duty of Deliberation and to Give Reason

The principal duties of the lawmaker are making laws and supervising the executive that its laws are properly implemented.¹⁶⁰ It is discussed in great length that legislation is normative judgments and they require good justifications. Such justifications may be developed only through the process of deliberation.¹⁶¹ Cognizant of such fact, deliberations are recognised in the rules of legislation. Such deliberation is even proper because there are conflicting interests and a mutually agreeable solution could be achieved by such deliberation and voting. However, deliberation is a method of obtaining both formal validity and political legitimacy.¹⁶² Deliberation is so central in

¹⁵⁹ 'Business license deactivation growing in Ethiopia'

<<https://newbusinessethiopia.com/investment/business-license-deactivation-growing-in-ethiopia/>> last accessed 20 July 2019.

¹⁶⁰ FDRE Const, art 51(1) provides that '[t]he House of Peoples' Representatives shall have the power of legislation in all matters assigned by this Constitution to the Federal Jurisdiction'. The following provisions provide for specific legislative powers. This is further provided for in *Proc No 470/2005* (n 2) art 4(1).

¹⁶¹ Oliver-Lalana (n 11) 136 ff.

¹⁶² *ibid* 138.

the lawmaking process in every democratic society that some even argue against a stronger judicial review based on their faith in the deliberative process.¹⁶³

The deliberation is one aspect of the process of justifying the norm; there are enquiries made based on proposals, policy documents, explanatory memorandum, expert recommendations, public discussion, etc. Thus, the deliberation is put under two general categories. The pre-legislative deliberation is arguably the longest deliberation that helps the bill to get the final shape as it is presented to the House. The legislative deliberation is conducted by the Committees and in the House.

5.3.5.1. Pre-Legislative Deliberation

Every agency has the competence to draw up a bill in its area of competence.¹⁶⁴ To get into the legislative drafting venture, however, such agency needs to have included in the annual legislative program¹⁶⁵ to be scheduled in the Council of Ministers and to be communicated by the President of the Republic at the first session in a joint session of both Houses.¹⁶⁶ It is imperative that prior consultations should be conducted and the reports should demonstrate that such consultations with other public agencies,¹⁶⁷ professional associations¹⁶⁸ and stakeholders¹⁶⁹ and members of the public were made.

The findings of the discussion would be presented to the Council of Ministers.¹⁷⁰ Where the Council finds it essential that the subject requires an in-depth study before the matter is tabled in the Council, it may refer the matter to a standing or *ad hoc*

¹⁶³ One of the reasons Waldron objects to strong judicial review is taking into the role of the lawmaker as a 'large deliberative body' which has the capacity to deal with difficult issues with sufficient safeguards, such as, bicameralism, strong committee scrutiny, multiple levels of consideration of the issues and debate. Jeremy Waldron 'The Core of the Case Against Judicial Review' (2006) 115 Yale LJ 1346, 1361.

¹⁶⁴ CM Working Directive (n 33) art 38(1); *Proc No 271/2002* (n 4) art 6(2)(a).

¹⁶⁵ CM Working Directive (n 33) art 38(2).

¹⁶⁶ *ibid* art 36(1).

¹⁶⁷ The report should indicate that such consultation with the relevant government agencies was conducted and what their view was and whether they express their agreement to the proposal.

¹⁶⁸ CM Working Directive (n 33) art 10(2), (3).

¹⁶⁹ *ibid* art 5(3), 10(1)(a)

¹⁷⁰ *ibid* art 9(4).

committee.¹⁷¹ Once such deliberations were made, 'a Green Paper' (policy discussion paper marked as 'only for discussion') will be drawn up by the proposing agency.¹⁷² 'A White Paper' (a policy document indicating government policy direction) may be drawn up by the proposing agency and needs to be approved by the Prime Minister prior to a discussion by Council.¹⁷³ The report of the discussion on the Green and White Papers would be presented to the Council for decision¹⁷⁴ and every effort should be exerted to obtain a proposal on which there is a consensus by every government agency which participated in such consultation.¹⁷⁵

The CM Working Directive requires specific consultations as compulsory. For instance, if the proposal has budgetary and financial implications, the Ministry of Finance and Economic Development should mandatorily be consulted.¹⁷⁶ Before drawing up a new bill or create a new institution or introduce fundamental changes in the already existing legislation or institutional structure, the Prime Minister has to be consulted.¹⁷⁷ If the bill relates to a contentious issue or affects the powers and responsibilities of an agency, that agency should be consulted¹⁷⁸ and such an agency should provide a written confirmation that the consultation was conducted.¹⁷⁹ If the bill contains penal provisions, consultations should be made with the Ministry of Justice to determine the propriety and to avoid contradiction with the Penal Code.¹⁸⁰

Once a policy opinion is accepted, a policy document will be drawn up and discussions will be conducted. The complexity of the bill to be drawn up will be determined. The

¹⁷¹ *ibid* art 9(11). One such bill was the first *Broadcasting Proclamation No 178/1999*. The initial draft was discussed by a technical committee composed of Ministry of Information and Culture, Ministry of Transport and Communication and Ministry of Justice. 'Brief Explanatory Memorandum on Draft Bill for the Regulation of Broadcasting Services' (later adopted into law as *Proc No 178/1999*) 2 – 5.

¹⁷² CM Working Directive (n 33) art 10(4)(b).

¹⁷³ *ibid* art 10(4)(c).

¹⁷⁴ *ibid* art 10(4)(e), 31(6).

¹⁷⁵ *ibid* art 31(8).

¹⁷⁶ *ibid* art 9(2)(b), 31(7).

¹⁷⁷ *ibid* art 9(5), 42(7).

¹⁷⁸ *ibid* art 33(1), 42(3).

¹⁷⁹ *ibid* art 33(2)-(4).

¹⁸⁰ *ibid* art 42(5)(b).

deliberations will be conducted to develop a guideline for the drafters of the bill. Once the bill is drawn up, it will be submitted to the legal affairs team regarding its presentation to the Council.¹⁸¹

The agency proposing the bill submits the draft to the legal affairs team certifying that the bill does not contradict the Constitution, other laws and doctrines, and international obligations or expressly state where those laws and doctrines are implicated.¹⁸² After making sure that the bill conforms with the policy adopted and meets the technical and quality requirements provided for in article 9, the bill is presented to the Council for a final decision.

The Council may deliberate on the bill or may refer it to the appropriate standing committee after the first reading for further examination and research.¹⁸³ Decisions are to be made after deliberations. The deliberation may be made on line-item, or words and phrases, or in general.¹⁸⁴ Where the matter is one that requires expertise the Council may be assisted by experts and resource persons.¹⁸⁵ At the end of the deliberation, decisions are made by consensus; where consensus is not possible or a member requests for voting, decisions may be made by voting.¹⁸⁶ The decision may be to adopt the bill, to send it back to the agency for further study, to suspend its hearing for a specific period, or to conduct the debate some other time.¹⁸⁷

Because the deliberations in the Council of Ministers is classified by such Working Directive, it is not possible to verify those procedures were complied with in the process of adoption of a bill before it is sent to the House for adoption into law. However, a few observations may be made. First, no policy documents are coming to the House along with the draft bills which gives the impression that the rules of

¹⁸¹ *ibid* art 40(1)-(8).

¹⁸² *ibid* art 46.

¹⁸³ *ibid* art 40(9)-(11).

¹⁸⁴ *ibid* art 27.

¹⁸⁵ *ibid* art 13(1), 21.

¹⁸⁶ *ibid* art 28.

¹⁸⁷ *ibid* art 22.

lawmaking are not complied with. Often, bills are coming to the House with short explanatory memorandum, the bill drawn up in Amharic and English languages.

5.3.5.2. Legislative Deliberation

The criminal norms discussed in this research have passed through the pre-legislation deliberation in the Council of Ministers with no exception. The bill is passed to the House for deliberation and adoption into law. There are two phases of deliberation in the House. The bill is presented to the House through the Speaker for first reading. The first reading is 'the reading and discussion process held on a draft bill to be endorsed by the House, before referring it to the pertinent Standing Committee for further inspection'.¹⁸⁸ The first reading is a simple reading of the bill followed by a general 'deliberations on the spirit of the draft bill in general'.¹⁸⁹

Where the House, by a two-thirds majority, decides to see the bill in its regular meeting, the bill would be deliberated on for adoption into law.¹⁹⁰ But none of those bills discussed here were seen in this manner. All of those bills discussed in this research have passed through the regular process. There was the first reading, presumably, because the records do not show anything; the bill is referred to a Committee or joint Committees.¹⁹¹

The Committee(s) conduct a public hearing which is the presentation of the bill to the 'public' by the resource person(s) from the proposing agency. Even though it is not provided for in the law, in a few instances, the Committees conduct 'closed' hearing probably to educate themselves. Thus, the Value-Added Tax bill was initially

¹⁸⁸ *Proc No 271/2002* (n 4) art 2(10).

¹⁸⁹ *ibid* art 3(9)(c).

¹⁹⁰ *ibid* art 3(9)(e).

¹⁹¹ For instance, the Value-Added Tax bill was referred to the Legal and Administrative Affairs, and Economic Affairs Standing Committees jointly. Likewise, the Anti-Terrorism Bill was referred to Law, Justice and Administrative Affairs, and Foreign, Defence and Security Standing Committees jointly.

discussed only in the presence of the Legal Affairs and Economic Affairs Standing Committee members.¹⁹²

The practice of the House regarding a public hearing is that individuals from invited institutions deliberate on a bill. With no or little change to such bill based on such public hearings, the Committee routinely recommends the bill to the House to be adopted into law. In some instances, such as in the case of *Anti-Terrorism Proclamation No 652/2009*, there is no public hearing at all.¹⁹³

When the bill comes back to the House, there is a second reading. The second reading is ‘the discussion on the recommendation and suggestions of the Standing Committee, to which the draft bill was referred for thorough inspection after the first reading’.¹⁹⁴ The House is not delving into the content of the bill for deliberation; it evaluates only the recommendations and suggestions by the Committee and the House is limited to an up or down vote only.

More or less the same provisions are contained in *Proclamation No 470/2005*. However, *Regulations No 6/2015*,¹⁹⁵ article 4 gives a different impression. Thus, article 4(1) provides that ‘the draft law shall be deliberated upon in detail.’ However, sub-article (2) provides that ‘the report and recommendation on the draft law prepared by the committee or committees concerned shall be caused to be read to the House.’ Sub-article (3) further provides that the deliberation shall be made ‘in detail based on the report and the recommendations.’ These provisions are equivocal in that, on the one hand, they appear to provide for detailed deliberations on the provisions of the bills;

¹⁹² ‘Minutes of Meeting on VAT Proclamation’ (n 94); the ‘Report and Recommendations from the Budget and Finance Affairs Standing Committee to have the Income Tax Draft Bill Adopted into Law 4 July 2002’ (in Amharic) indicates that there had been a public hearing three days earlier on 1 July 2002.

¹⁹³ There is no record of public hearing. Both the ‘Reports and Recommendation on the Anti-Terrorism Draft Bill’ (n 105) and the ‘Minutes of Meeting with Stakeholders’ (n 57) rather show the discussion was a closed one.

¹⁹⁴ *Proc No 271/2002* (n 4) arts 2(11), 4(11)(b). This is not the law in force currently. However, specific reference is made to this provision because the bulk of the legislation containing penal provisions were adopted after 2002 but before 2005 legislation. However, even after the legislation rule was replaced in 2005, the practice is not changed at all.

¹⁹⁵ *Proc No 470/2005* art 39 authorizes the House to adopted regulations. However, *Regulations No 6/2015* (n 43) claims to be adopted as per the provisions of the FDRE Const, art 59(2).

on the other hand, they give the impression that the deliberations, as they are based on the reports and recommendations, are limited to such reports and recommendations.

There are various legislation containing penal provisions adopted both after the adoption of the legislation rules in 2005 and the adoption of the legislative regulations in 2015. The practice continued in the same manner.¹⁹⁶ Therefore, the equivocation could be interpreted conforming to the established deliberation practice of the House. This deliberation should reflect the democratic nature of the process and every member, who has a view on the content of the bill, should be heard.

5.4. Post-Legislation Duties of the Legislature

5.4.1. Continuous Evaluation of the Law and Revision

So far, it is discussed how a bill may be adopted into law following certain standardised procedures. It is stated that the law is prospective and the information used is both established as well as predicted. As time goes by, facts change as they always do by themselves as well as because of the bill adopted into law. It is also stated that a norm remains valid if it continues conforming to the social reality.¹⁹⁷ To ensure that a norm continues conforming to social reality, each norm is evaluated continuously.¹⁹⁸ If such a norm is in want of revision, it would possibly be the investigation stage of the next bill. However, if a criminal norm in place, to justify its revision, its application must be seen in various forms, one of which is some criminal statistics.

There are several penal provisions revised over the years both expanding criminalisation and increasing sentence. For instance, when the tax laws containing severe penal provisions were adopted, there was already the Penal Code punishing certain conducts relating to tax. There was no data presented in support of the penal

¹⁹⁶ Both the Anti-Terrorism Proclamation and *Proc No 980/2016* (n 51) were adopted after 2005 as per the new legislation rules; however, the same practice continued.

¹⁹⁷ Wintgens 'Bounded Rationality' (n 1) 3, 5 – 13.

¹⁹⁸ Alberto Muñoz Arenas, 'Theoretical and Procedural Aspects of the Evaluation of Public Policies' in Adan Nieto Martin and Marta Muñoz de Morales Romero (eds) *Towards a Rational Legislative Evaluation in Criminal Law*, (Springer 2016).

provisions of the tax laws. Likewise, when the Commercial Registration and Business License Proclamation was revised repeatedly expanding its scope, there was no criminal statistics presented as a justification.¹⁹⁹ In simple terms, there was no any background research in support of those legislative actions.

One might argue, if the House is not debating the bills, it cannot demand evidence of the social reality and it does not have the quality control mechanism at its disposal. In the fact-finding stage, it was asserted that those laws adopted without proper investigation, or those rules which turn out to contradict reality should have been revised soon after their adoption. For instance, the tax statutes included unjustified criminalisation of conduct, such as strict liability and imputation of criminal liability. It is to avoid the threat of such ‘unjustified criminal responsibility’ that individuals obtain a business license and commercial registration through another person. For instance, the coffee export audit report shows that several of those coffee exporters were doing business under a commercial license obtained through another person who is not financially able to undertake such business.²⁰⁰ The lawmaker addressed the issue differently – it criminalises transferring one’s commercial license to someone else, which entails severe imprisonment. Even though there is no evidence regarding the causal connection, the number of commercial registration that were returned to the Ministry of Trade increased dramatically.²⁰¹

5.4.2. Review of Constitutionality

Those who argue against ‘strong judicial review’ principally base their argument on the democratic nature of lawmaking and the various forms of institutional and normative guarantees.²⁰² One can see the practice of constitutional review based on the level of justification. Taking Oliver-Lalana’s five levels of justification, linguistic rationality relates to the principle of legality which can be addressed by a criminal

¹⁹⁹ Simeneh ‘Walking in the Dark’ (n 74) 392 – 99.

²⁰⁰ ‘The Ethiopian Coffee and Tea Development Marketing Authority 2001 – 2007 EC Coffee Purchase and Export Audit (February 2017)’.

²⁰¹ See (n 159).

²⁰² Strong judicial review as identified by Waldron is ‘courts hav[ing] the authority to decline to apply a statute in a particular case [] or to modify the effect of a statute to make its application conform with individual rights.’ Waldron ‘Against Judicial Review’ (n 163) 1354.

court. Legal rationality, relating to hierarchy of norms along with value rationality could have been handled by the same court, but this power is said to be reserved for the HoF and CCI in the case of Ethiopia.²⁰³

A clear case of legisprudential aspect of constitutional review is social rationality (partly coherence with the reality) and goal rationality. Such legisprudential review is almost 'non-existent' in Ethiopia.²⁰⁴ In an ideal situation, constitutional review is not only maintaining a normative hierarchy, but also having a rationally made law; that is, whether the norms adopted by the lawmaker are well justified. In this sense, constitutional review enquires into whether the lawmaker made the necessary effort to adopt 'good law' by complying with a pre-legislative enquiry into the facts and making prior evaluation of those findings at the legislation stage.²⁰⁵ If a rule is justified, there would only be deference to the decision of the lawmaker.²⁰⁶

If the HoF or CCI does believe that the lawmaker does not have obligation to give a reason for the adoption of particular legislation, the lack of justification or poor justification may not be ground for striking out the rule.²⁰⁷ However, such legislation is suspect for 'arbitrariness'.²⁰⁸ This is particularly so in criminal matters because such rules implicate individual fundamental rights.²⁰⁹ This should not give the impression that the review is limited to mere meta-procedural review of legislation nor does the CCI review the justifications *de novo* for that would be tantamount to the CCI making policy decisions on behalf of the lawmaker; it is rather a mid-way between the two.²¹⁰

²⁰³ Assefa asserts that such power was not given to the courts because there was no trust in the courts of independence and impartiality. Assefa Fiseha 'Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HOF)' (2007) in 1 Mizan LR 1, 13 – 14.

²⁰⁴ The House of Federation and the Council of Constitutional Inquiry are constitutionally vested with the power to interpret the Constitution. In their more than two decades' life of constitutional interpretation, in the face of patently unconstitutional penal legislation, their presence could not even be felt positively impacting individual rights.

²⁰⁵ Wintgens 'Bounded Rationality' (n 1).

²⁰⁶ Oliver-Lalana (n 11) 177 – 78.

²⁰⁷ This would take us to the theory of legislation which is beyond the scope of this research.

²⁰⁸ Oliver-Lalana (n 11) 179.

²⁰⁹ As argued in the previous chapter, when two public policy decisions conflict, the lawmaker has to assess and make a determination of which one should be given priority. Where a fundamental right is implicated, the decision is made based on the principle of proportionality.

²¹⁰ Wintgens 'Bounded Rationality' (n 1) 27.

Thus, where the CCI finds the norm unconstitutional either because of the natural change of facts because the legislature failed to make rules up to date, the CCI would have to give the legislature time to make the necessary enquiry and take the appropriate measure.²¹¹

5.5. Conclusion

The previous chapters argued for the inherent limitations in the criminal lawmaking power of legislature and for the non-delegable nature of such power. In that context the doctrines of criminal law and principle theory of rights were taken as substantive limitations to the criminalisation power of the lawmaker. This chapter discussed the formal limitations to such criminalisation power. It argues the power to make criminal law carries with it the duty to make 'good' criminal law. The argument for a 'good' criminal law is pursued not by focusing on the content of the criminal law but arguing for a legislative process that would help come up with an agreeable result.

The discussion rather sees the criminal law from legislature centred point of view. It examines both the internal view of the legislature which requires him to comply with the rules of lawmaking, and the external (hermeneutic) view of the legislation which is the achievement of the end the criminal law is sought to achieve. The latter is looking at the external morality of the law in contradistinction to the Lon Fuller's concept of the inner morality of the law.

The lawmaker is required to adopt rules that are both internally and externally coherent. The internal coherence of the rules relate to the normative structure in the legal system which is governed by the supremacy of the constitution as the initial validity of the rule. The external coherence relates to the conformity of the rules with reality by making sense in the real world which would justify their continued validity.

In order to have such rules, the lawmaker should undertake investigation into the facts that requires the criminal law intervention and make a legislative impact assessment. It is based on the findings of such facts that the rules are adopted. Criminal lawmaking is a normative judgment requiring a good justification. Such rational justification for

²¹¹ ibid 26 – 27.

any legislative activity is achieved through argumentation and debate. As the decision is always made based on limited time, information and skills some rules may become in want of revision in order to make conform to the changed realities. Therefore, the lawmaker is required to make post-legislation assessment.

The review of the legislative process of the existing criminal rules for which such documents are found depicts that because of fragmented bill initiation, administrative agencies draw up special penal legislation or incorporate penal rules to draft regulatory bills presented to the Council of Ministers. Those bills are not supported by evidence of the facts they are meant to govern. The explanatory notes to those regulatory bills do not explain the penal rules because they are considered minor issues in the larger picture of the bill.

The Council of Ministers is authorised to discuss a draft bill in general or on line item, or word by word. As the minutes are confidential, it is not possible to verify the manner of the discussion. But records show that the bills are passed by the Council and sent to the House for adoption into law with no substantive change. Once the bill is passed by the Council of Ministers, it just gets passed by the House of Peoples' Representatives. This is because the HoPR even does not comply with its own rules of legislation. After first reading, a bill is referred to a pertinent committee(s). The committee conducts public hearings, with limited or no effect on the bill, and routinely recommends to the House the bill be adopted into law. The House examines reports and recommendation of the committee. Without a proper debate on the content of the bill, it is passed in to law.

Once rules are adopted, their efficacy may be changed either based on the wrong judgment of the facts on which the rules are adopted, or they have changed through time or as a result of the rules. Thus, the lawmaker is required to make constant evaluation of the validity of the rules and make the necessary revisions. This is not however the most effective mechanism. Thus, review of constitutionality may be a better way to make the rules conform to both other norms and the reality.

CHAPTER 6. – THE JUDICIAL PRACTICE OF THE CRIMINAL LAW AND PUNISHMENT

6.1. Introduction

This study is about the limitation on the criminalisation power of the state. The previous chapters argue for the substantive and formal limitations to such criminalisation power of the lawmaker. Legal interpretation methods are developed to maintain the edifice of the law on the assumption that the law is rational because the lawmaker is rational.¹ In the interpretation and application of the criminal law, the court applies metanorms that govern the application of criminal law.

Those metanorms (postulates) may be applicative, hermeneutic or both and are believed to keep the law within its rational bounds. For instance, the principle of legality is a postulate that facilitates communication between the lawmaker and the court augmenting knowledge of such criminal law. To that extent, it is hermeneutic in that it helps in the understanding of the criminal law. However, it is also applicative in that whatever rule does not comply with the principle of legality the court may not apply.

Further, the lawmaker increased the criminal punishment in different forms the net effect of which makes it ‘disproportionate’ to the conduct criminalised. The law is applied by the court. Thus, the court may ease the excessive impact of both criminalisation and punishment. In the interpretation and application of the criminal law, the court chooses a theory of law and method of interpretation. It has been alluded in the previous chapters that the court is a ‘positivist’ that is ready to apply whatever

¹ Luc J Wintgens, ‘The Rational Legislation Revisited: Bounded Rationality and Legisprudence’ Luc J Wintgens and A Daniel Oliver-Lalana (eds), *The Rationality and Justification of Legislation* (Springer 2013) 3, 9 – 12.

is ‘written’ as law.² This chapter, however, deals with the interpretation method the court employed in order to apply the criminal law made by the legislature. Those cases reviewed in this study are decided by the Federal Courts seating in Addis Ababa. They are selected based on their relation to legislation discussed in the previous chapters where it is argued the legislature overused criminal law and punishment, such as in the Commercial Registration and Business License Proclamation; there are also cases discussed because they are related to the argument that the state uses the criminal law to achieve other ends than the legitimate ends of the criminal law.

6.2. Doctrines as Assessment Tools

The substantive and formal limitation of criminalisation power of the legislature are discussed in the previous chapters. Those discussions were buttressed by criminal law and constitutional law doctrines which are also used in the interpretation and application of the criminal law. This chapter is set to evaluate the judicial application of the criminal law using those postulates as standards.

One of the five fundamental principles of the FDRE Constitution is respect for human rights,³ which is discussed as substantive limitation to criminalisation. The Constitution is also guided by one of the most fundamental postulates, the rule of law.⁴ It is in this context that the continental criminal law doctrine of legal good is employed as inherent limitation to the criminalisation power of the legislature. It is complementing this fundamental doctrine that the four principles are guiding the criminal law – the principles of legality, of conduct, of culpability, and of personal responsibility.

Interpretation of the criminal law is guided by these doctrines discussed as part of the legislative limitations to criminalisation. However, there are also other applicative

² Simeneh Kiros Assefa ‘Non-Positivist Higher Norms and Formal Positivism: Interpretation of the Criminal Law in Ethiopia’ (2020) 14 Mizan LR (forthcoming).

³ *The Federal Democratic Republic of Ethiopia Constitution Proclamation No 1/1995* (‘FDRE Const’) art 10(1).

⁴ *ibid* preamble para 1; Humberto Ávila refers to the principle of rule of law ‘superprinciple’ because it superpose all other principles. Humberto Ávila, *Theory of Legal Principles* (Springer 2007) 56, 81, 92.

postulates, such as the principle of proportionality and the principle of lenity. The judicial application of the criminal law and punishment are evaluated against those principles separately.

6.3. Judicial Practice Relating to the Principle of Legality

The principle of legality defines the nature and scope of the criminal law by requiring both the prohibited conduct and the consequence should clearly be stated in the law and such should be published in the manner that is accessible to the public in an official gazette.⁵ While all the required elements of the criminal rule are provided for in the criminal law, those provision demand resort to non-criminal law materials for the purpose of interpretation of the criminal law.⁶ This is not a breach of the principle of legality because all the required element are met; it is rather a process of access to reality. However, it is a routine practice of the court that this principle is violated. The non-compliance of the court with the principle of legality are discussed under two categories.

6.3.1. Utilising Undeclared Rules as Criminal Rules

The criminal law should provide for all the required conditions and consequent part which need to be provided for in the primary legislation and to be published in the *Negarit Gazeta*.⁷ However, in not few cases the prohibited conduct is provided for in

⁵ For details on the contents of the principle of legality see, Simeneh Kiros Assefa 'Methods and Manners of Interpretation of Criminal Norms' (2017) 11 Mizan LR 88, 104 – 08; Simeneh Kiros Assefa and Cherinet Hordofa Wetere "Over-Criminalisation': A Review of Special Penal Legislation and Administrative Penal Provisions in Ethiopia' (2017) 29 J Eth L 49, 63 – 65.

⁶ For hermeneutic interpretation of criminal law, see in general Alicja Ornowska 'Introducing Hermeneutic Methods in Criminal Law Interpretation in Europe' in Joanna Jemielniak and Przemyslaw Miklaszewicz (eds), *Interpretation of Law in the Global World: From Particularism to a Universal Approach* (Springer 2010); Simeneh 'Methods and Manners of Interpretation' (n 5). For coherence of rules with reality, see Luc J Wintgens 'Legislation as an Object of Study of Legal Theory: Legisprudence' in Luc J Wintgens (ed), *Legisprudence: A New Theoretical Approach to Legislation* (Hart Publishing 2002).

⁷ *Council of Ministers Working Directive 1996 EC* (in Amharic, 'CM Working Directive') art 37(3) makes distinction between 'primary legislation' and 'secondary legislation' clear. Arts 36 – 46 govern manner of drawing up and deliberating primary legislation all the way through adoption by the House of Peoples' Representatives while arts 47 – 48 govern the process relating to Council of Ministers Regulations. Further, the FDRE Const, art 71(2) provides that the President of the Republic 'shall proclaim in the Negarit Gazeta laws and international agreements approved by the House of Peoples' Representatives.' (emphasis in the original). *Federal Negarit Gazeta Establishment Proclamation No 3/1995*, CM Working Directives art 37(3).

secondary legislation. One conduct that is routinely prosecuted as contraband is carrying foreign currency beyond the amount fixed by the National Bank of Ethiopia in a directive adopted by the Bank which is not published in the *Negarit Gazeta*.

In *Zelalem*,⁸ for instance, the defendant was apprehended while carrying USD 15,000 in his luggage as he attempted to leave the country. He was charged and convicted for contraband for violating the provisions of article 168(1) of the Customs Proclamation and article 4 of the Directive adopted on 2 June 2017 by the National Bank of Ethiopia. This Directive is adopted pursuant to the National Bank of Ethiopia Establishment Proclamation, not pursuant to the Customs Proclamation. The Customs Proclamation regulates goods which also ‘includes money’⁹ which still may be argued does not include foreign currency. Setting aside all other arguments based on the principle of legality including the argument against interpretation by analogy, the Directive adopted pursuant to the National Bank of Ethiopia Establishment Proclamation cannot justify conviction for violation of the Customs Proclamation. If the Customs and Revenue Authority desires to enforce that part of the provision, it could adopt directives of its own in conformity with its own normative hierarchy. Yet, a criminal conduct cannot be defined in a directive.

However, such interpretation and application of the Customs Proclamation based on the National Bank of Ethiopia Directive is not an isolated one. For instance, the case of *Leeyu* was resolved in identical manner.¹⁰ The binding interpretative decision of the Federal Supreme Court Cassation Division in *Daniel*¹¹ and *Samson*¹² only indicates the policy of the court in using directives as part of the criminal law.

⁸ *Public Prosecutor v Zelalem Shiferaw* (8 November 2017, Federal First Instance Court, File No 256759).

⁹ *Customs Proclamation No 859/2019*, art 2(1).

¹⁰ *Public Prosecutor v Leeyu Lu* (12 July 2018, File No 257687, Federal First Instance Court).

¹¹ *ERCA v Daniel Mekonnen* (21 July 2010 Cass File No 43781, 10 Decisions of the Cassation Division of the Federal Supreme Court).

¹² *Samson Mengistu v ERCA* (7 February 2013, Cass File No 80296, 14 Decisions of the Cassation Division of the Federal Supreme Court).

In *Samson*,¹³ petitioner prayed the Cassation Division of the Federal Supreme Court against his conviction, a suspended sentence and confiscation of his 5,000 Euro, which the court rejected. He declared the foreign currency he had been in possession to be one he had come with to Ethiopia. On 17 June 2010, he was leaving the country when his 5,000 Euro was seized by customs officers. The charges were violation of *Customs Proclamation No 622/2009*, article 99 and the National Bank of Ethiopia Directive article 3 adopted on 29 May 2009 pursuant to *the National Bank of Ethiopia Establishment (as Amended) Proclamation No 591/2008*, article 20(3). The lower court convicted him for contraband, attempting to take such currency out of Ethiopia after the six months period had expired. Individuals who declare the foreign currency they come with have the right to take such amount when they leave Ethiopia within six month time.

The application of a directive as a criminal rule which is adopted for the purpose of enforcement of another statute is mere expansion of the criminal law beyond its scope at best, and it is criminalisation by the court at worst.

6.3.2. Interpreting of the Criminal Law by Analogy

The criminal law prohibits interpretation of the criminal law by analogy. However, those cases decided by the Federal Supreme Court Cassation Division several of which are cited in this study are said to be interpretative decisions binding on lower courts. This means that when similar cases occur, such criminal provision should be interpreted and applied to such case in the manner the Cassation Division interpreted and applied.¹⁴ This is a clear case of interpretation of the criminal law by analogy.¹⁵ The best the lower courts can do to avoid such a predicament is to distinguish the facts.

The above statement does not mean the court totally disregards the principle of legality. The court is very much conscious of a few aspects of the principle of legality. For instance, in *Tesfaye*,¹⁶ petitioner was convicted for possession of unexplained

¹³ *ibid.*

¹⁴ *Federal Courts Proclamation Reamendment Proclamation No 454/2005*, art 2(5).

¹⁵ Gabriel Hallevy, *The Right to be Punished: Modern Doctrinal Sentencing* (Springer 2013) 147 – 49.

¹⁶ *Tefaye Timiro v FEACC* (15 November 2012, Cass File No 73514, 14 Decisions of the Cassation Division of the Federal Supreme Court).

property and sentenced to a term of imprisonment, a fine and confiscation of such property as per Criminal Code, article 419(1)(b). It is established that petitioner had been a regional state employee between 1992 and 1996 EC. The Criminal Code came into force in 1997 EC. The Federal Supreme Court Cassation Division thus acquitted petitioner on the ground that the criminal law was not in force by the time the conduct was committed.

Likewise, in *Worku and Shume*,¹⁷ petitioners were charged and convicted for violation of the provision of Criminal Code, article 433 engaging in commercial activities without the required license. As part of the punishment, the lower court also ordered the confiscation of the cattle seized. The Federal Supreme Court Cassation Division held that confiscation is not provided for in the Criminal Code; and is thus contrary to the principle of legality.¹⁸ Such interpretation is also applied in the application of the Supreme Court Sentencing Manual.¹⁹

While the Federal Supreme Court Cassation Division is commanding the lower courts by a binding interpretative decision regarding the application of the criminal law, its interpretation of the principle of legality is so narrow. Such narrow interpretation of the principle of legality would only expand the scope of the criminal law beyond its rational scope.

6.4. Applying Criminal Rules Contrary to the Principle of Conduct

The other fundamental principle of criminal law that is incorporated in the Criminal Code is the principle of conduct, i.e., an individual may be responsible for harm/threat of harm he caused because of his action. Leaving aside the potential criminal liability for conducts as a result of inaction which would amount to active abandonment,²⁰ this principle requires that a person needs to positively act so that he could be held

¹⁷ *Worku Fekadu and Shume Arrarso v Benishangul Gumuz State Prosecutor* (24 January 2013, Cass File No 75387, 14 Decisions of the Cassation Division of the Federal Supreme Court).

¹⁸ Also see *Goshu Yohannes v FEACC* (24 June 2015, Cass File No 97291, 18 Decisions of the Cassation Division of the Federal Supreme Court).

¹⁹ *Solomon Desalegn v Southern Regional State Prosecutor* (15 May 2014, Cass File No 95438, 16 Decisions of the Cassation Division of the Federal Supreme Court).

²⁰ See for instance, Crim C, arts 314, 316, 517 and 656.

criminally liable. Contrary to this principle, the criminal law has clear provisions where action is not a requirement for criminal responsibility. The provisions that are frequently prosecuted are tax related crimes.

In *Tarekegn, et al*, (three individuals),²¹ petitioners petitioned the Federal Supreme Court Cassation Division against their conviction and sentence by the Federal First Instance Court which is affirmed by the Federal High Court. They were convicted for violation of the VAT Proclamation No 285/2002, articles 56(1) and 55, Proclamation No 609, articles 22(1) and 50(b)(1) that a sales transaction was undertaken without issuing a VAT (cash) receipt. *Tarekegn* is manager for the second petitioner, a company, and the third petitioner was employee of the second petitioner, the company, who conducted transaction without issuing a cash receipt. All of them were convicted; the first and third petitioner were sentenced to one year imprisonment and fined Birr 10,000.

The Cassation Division affirmed the decision of the lower courts on the ground that the third petitioner undertook the sell without a cash receipt. Where one of its employees committed an illegal act, a corporate entity may be held criminally liable in accordance with the provisions of Criminal Code, article 34(1). Further, where a company is held criminally liable for violation of the VAT Proclamation, the conduct of the company is deemed to be the conduct of the manager who is also subject to the same punishment. The court convoluted corporate criminal responsibility with imputed criminal responsibility of managers.

Manager's criminal liability is made clear in *the Twins Bar and Restaurant*.²² Petitioners were convicted for a similar crime, conducting business without issuing a VAT (cash) receipt. The manager was sentenced to 1 year imprisonment and fined Birr 20,000. The ground of the petition to the Cassation Division was that the manager was not at the

²¹ *Tarekegn G/Giorgis, et al, v ERCA* (17 December 2009, Cass File No 48850, 10 Decisions of the Cassation Division of the Federal Supreme Court).

²² *The Twins Bar and Restaurant and Tsige v ERCA* (22 December 2010, Cass File No 51090, 11 Decisions of the Cassation Division of the Federal Supreme Court).

scene when the said crime was committed. The Cassation Division affirming the decision of the lower courts and held that:

the provisions provide that a manager may be held criminally responsible where the company he manages is registered for VAT and conducts transactions without such VAT cash receipt, such criminal conduct is deemed to be committed by such manager who would be held criminally liable. Thus, where the responsibility of the company is established, the responsibility of the manager is *presumed*.²³

The court further held that the fact that ‘the conduct is committed without the knowledge or the agreement of the manager is no defence’.²⁴

In the above cases, the prosecutor is not alleging any criminal conduct on the part of the managers; the prosecutor is merely alleging a criminal conduct of the company (and that of an employee). If, at the conclusion of the hearing, the company is held guilty of a criminal conduct, the manager is automatically liable irrespective of the fact that he was not aware of the alleged criminal conduct of the company, or he was not at the scene when it was committed. This is purely criminalisation of status. Further, where the business entity does not have legal personality, the owner of the business is deemed the manager and is held criminally liable.²⁵ This is a clear case of interpretation by analogy.

Such legislative criminalisation is contrary to the basic principles of criminal law. However, the court could have limited such criminal law within its rational bounds by narrowly interpreting the criminal law assisted by those doctrines. Such interpretation could have eased the negative impact of the overuse of the criminal law. The court is rather complicit in the illegitimate expansion of the scope of the criminal law.

²³ (translation mine; emphasis added).

²⁴ *ibid*; also see *Tigray Revenue Development Authority v Bereha Redda* (1 October 2013, Cass File No 86597, 15 Decisions of the Cassation Division of the Federal Supreme Court).

²⁵ *Tigray Revenue Development Authority v Bereha Redda* (1 October 2013, Cass File No 86597, 15 Decisions of the Cassation Division of the Federal Supreme Court). *ERCA v Abdurahman Idris, et al*, (Federal First Instance Court, File No 207153 date check on calendar) *Federal Public Prosecutor v Abeba Melaku* (22 October 2018, Crim File No 255845, Federal First Instance Court).

6.5. Applying Rules Contrary to the Principle of Culpability

The Criminal Code is a comprehensive Code containing all the elements constituting a crime. However, it also recognises the possibility of adoption of a special penal legislation. Thus, article 3 provides that the General Part of the Criminal Code is applicable to such penal legislation unless expressly set aside. There are several special penal legislation and sectoral regulatory legislation containing penal provision. There is no legislation that expressly set aside the applicability of the General Part of the Criminal Code. Therefore, those principles incorporated in the General Part of the Criminal Code are applicable to those special penal legislation and sectoral regulatory legislation containing penal provision. Criminal Code, article 23 provides that a criminal conduct may be punishable only when all the legal, moral and material elements co-exist.²⁶ The Cassation Division rendered such binding interpretative decision in *Bekele and Zinash*.²⁷

The General Part of the Criminal Code articles 57 – 59 govern culpability. These principles provide that where negligence is not expressly provided for, the required moral element is intention.²⁸ This requirement of culpability is disregarded either by the court or by the special law. Thus, where the special legislation does not provide for the moral element, the logical interpretation should have been requiring proof of intention. However, it has been a normal practice that the court enters conviction only where the material elements are proved. This is particularly the case in tax offences and it is only recently that the Federal Supreme Court Cassation Division entered a binding interpretative decision that the prosecutor needs to prove the moral element.²⁹

Because proving state of mind was difficult and conviction was rarely obtained, the *Special Penal Code of 1974* was amended to waive the prosecutors duty to prove state of

²⁶ *Jemila Mohammed v Federal Public Prosecutor* (26 February 2009, Cass File No 38161, 9 Decisions of the Cassation Division of the Federal Supreme Court).

²⁷ *ERCA v Bekele Tessema and Zinash Zeyede* (2 October 2013, Cass File No 86672, 15 Decisions of the Cassation Division of the Federal Supreme Court).

²⁸ Peter L Strauss 'On Interpreting the Ethiopian Penal Code' (1968) 5 J Eth L 375, 395 – 96.

²⁹ *G Agripack PLC and Getahun Asfaw v ERCA* (11 June 2012, Cass File No 84623, 15 Decisions of the Cassation Division of the Federal Supreme Court); *ERCA v Abdi Moges* (4 March 2016, Cass File No 114043, 19 Decisions of the Cassation Division of the Federal Supreme Court).

mind.³⁰ That practice is carried over to the present regime. The Criminal Code article 403 and *Corruption Crimes Proclamation No 881/2015*, article 3, for instance, provides for the ‘presumption of intent to obtain advantage or to injure’. Likewise, regarding crimes committed through the mass media, Criminal Code, article 43(5) provides that ‘the content of the matter shall be deemed to have been inserted, published or disseminated with [...the] full knowledge and consent’ of the editor-in-chief, deputy editor, or the person in charge of such media.

Such provisions not only expand the reach of the criminal law, they are meant to expedite conviction. This is contrary not only to the basic principles of the criminal law made for a rational being, but also the constitutional principle of presumption of innocence.

6.6. Applying Rules Contrary to the Principle of Personal Responsibility

It was shown under section 6.4 above that a manager of a company may be held criminally responsible for tax crimes whether or not he had knowledge of such conduct, whether or not he agrees to such conduct, or whether or not he was at the scene when the conduct was committed by another employee of the company. This evidently is imputation of criminal liability of other employees of the company, especially those in the finance division, to the manager of a company. This is unreasonable expansion of the scope of criminal law which is scrupulously applied by the court.

6.7. Disproportionate Punishment and the Principle of Lenity

It was shown that from the criminal law doctrine point of view, a criminal rule may be adopted as a valid rule where the interest sought to be protected by the criminal law must be a legal good in want of such criminal law protection and there is no less intrusive means to achieve the intended purpose. On the other hand, criminalisation

³⁰ The *Special Penal Code and Special Criminal Procedure Code Proclamations Amendment Proclamation No 96/1976* provided that intention is presumed. This is elaborated by the Special Court in *Special Prosecutor v Lieutenant Goshime Wondimtegegn* (26 March 1983, Crim File No 7/75, Special First Instance Court).

discussed in the context of principle theory of rights, the measure should be appropriate, necessary and proportional in the strict sense. This is seen both for the prohibition of conduct as well as the consequence – the punishment. Once the prohibition is found to be justified, the determination of punishment is seen better in the context of the proportionality in the narrow sense.

Proportionality is seen from two perspectives, proportionality *in rem* and proportionality *in personam*. Proportionality *in rem*³¹ refers to the proportionality of the punishment to the moral reprehensive nature of the conduct criminalised which is also referred to as ‘cardinal proportionality’.³² There is no magical figure for every crime; but the seriousness of crimes is set in a continuum. Thus, if someone is considering crimes against life and limb, such as minor bodily injury, grave bodily injury, attempted murder, murder in the second degree, and murder in the first degree may be put in this order for their seriousness.

Thus, if a defendant is charged for minor bodily injury and sentenced to one year imprisonment, obviously, the one who is convicted of grave bodily injury would be sentenced to relatively heavier penalty.³³ Likewise, if a person who is convicted of negligent homicide is sentenced to 2 years imprisonment, the one that is convicted of first degree murder should be sentenced to more severe punishment. In the determination of punishment, the lawmaker should look at the matrix of the punishment along with other crimes.

The purpose of criminal law is protection of the common good, making the social existence of man possible. The more serious the challenge to such social existence is the more severe the punishment becomes. First degree murder is a more serious challenge to the social existence of the individual than minor bodily injury. The determination of punishment for those matters that should have been addressed through the administrative law need also be seen in this context. Therefore, the

³¹ Hallevy, *The Right to be Punished* (n 15) 57 – 64.

³² Andrew Ashworth, *Sentencing and Criminal Justice* (Fourth edn, Cambridge UP 2005) 84 – 87; Malcolm Thorburn and Allan Manson ‘The Sentencing Theory Debates: Convergence in Outcomes, Divergence in Reasoning’ (2007) 10 New Crim LR 278, 284.

³³ See generally, Paul H Robinson and John M Darley ‘Intuitions of Justice: Implications for Criminal Law and Justice Policy’ (2007) 84 Southern California LR 1.

determination of punishment for trading without a valid commercial license and obtaining a commercial licence based on fraudulent document have entirely different consequences.

Likewise, two individuals who are charged for the same crime need to be subject to the same punishment. However, the criminal law attempts to address each accused individually; their personal circumstance need to be taken into consideration in order to determined their degree of guilt. This is proportionality *in personam*³⁴ which is also called ordinal proportionality.³⁵

While proportionality *in rem* refers to the legislative determination of sentence, proportionality *in personam* is the judicial determination of punishment. Contrary to the principle of proportionality *in rem*, however, the lawmaker as exhibited its interest in disproportionately severe punishments. The court often applies the punishments as determined by the lawmaker, but there are instances where neither the public prosecutor demands such punishment nor the court imposes certain types of punishments.

6.7.1. Patterns of Aggravated Sentence

Where the criminal law is revised, the lawmaker increases the punishment. This pattern may be seen in different categories. For instance, there is a general trend in the increase of punishment in the 2004 Criminal Code in comparison to the 1957 Penal Code. The 2004 Criminal Code has included new crimes, such as harmful traditional practices, article 561 – 570. When it incorporates other fragmented legislation and revised some of the already criminalised conducts, the Criminal Code aggravated sentence. For instance, article 240 on armed uprising and civil war, article 241 on attack on the political and territorial integrity of the state, article 407 on abuse of power, article 408 on corrupt practices, article 409 on acceptance of undue advantages, article 411 on maladministration, article 543 on homicide by negligence, and article 555 on grave wilful injury carry heavier penalty.

³⁴ Hallevy, *The Right to be Punished* (n 15) 64 – 94.

³⁵ Ashworth (n 32); Thorburn and Allan Manson (n 32) 284, 295.

In the above and other similar provisions, the Criminal Code increased either the initial or the legal maximum punishment. In some instances, simple imprisonment is changed to rigorous imprisonment or a fine is changed to simple imprisonment, or in the same category of punishment varying degrees of increase are observed.

The Criminal Code, article 408 punishes a public servant who seeks or receives promise or advantage in consideration of the performance or omission of acts in the discharge of his duties with simple imprisonment for not less than one year and rigorous imprisonment not exceeding ten years and a fine not exceeding Birr 20,000. The sentence may, however, be increased based on the degree of the responsibility of the official, the extent of the benefit obtained and the gravity of the harm caused. In the *Federal Government Procurement and Property Administration Proclamation*³⁶ such conducts are made punishable by ‘a rigorous imprisonment for a term of not less than 10 years and not more than 15 years’ and a fine between Birr 25,000 and 35,000. Likewise, the same conduct in the *Government Financial Administration Proclamation* is punishable with ‘rigorous imprisonment for a term of not less than [] 10 years and not more than [] 20 years’ and fine not less than birr 50,000.³⁷

The Criminal Code, article 357 and 375 punish forgery and material forgery, respectively by rigorous imprisonment not exceeding 10 years. However, the *Ethiopian Building Proclamation No 624/2009*, article 55 (1), (2) punishes this conduct with 5 to 10 years and where the crime is committed by a public servant the punishment is 5 to 25 years rigorous imprisonment.

Where one form of punishment is not able to achieve the intended purpose the law may be revised to make the punishment more severe in order to help achieve the prevention of crime. However, there was no evidence presented at the parliamentary hearing in any of those revised criminal rules or legislation discussed above that the already fixed punishment failed to help achieve the intended purpose or that the newly determined punishment is necessary and proportional.

³⁶ *The Ethiopian Federal Government Procurement and Property Administration Proclamation No 649/2009* (art 77(1)(a); (b); (d)).

³⁷ *Federal Government of Ethiopia Financial Administration Proclamation No 648/2009*, art 70(1)(a); (b).

This is seen in the frequent revision of the Commercial Registration and Business Licensing Proclamation where the constant increase of punishment is seen in every revision of the statute.³⁸

It was asserted at the parliamentary hearing by the resource persons that the principal purpose of the commercial registration proclamations is maximizing government revenue.³⁹ Seen in light of such purpose, the cases disposed by the various courts give interesting perspective. For instance, in *Mehibuba*,⁴⁰ the defendant was trading without a commercial licence. However, in her defence, she presented witnesses that she is in the process of obtaining one, and that she is paying her turn over taxes. The court convicted her by stating that by the time she sold the *injera* and bread, she actually did not have a commercial license and sentenced her to a suspended four years imprisonment.

The *Genet* case⁴¹ gives perspective regarding the onerous licensing process. Defendant operates a grocery without a valid license. She admitted the fact that she had started operating without a license because she could not produce a notarised rent contract for the owner of the premises was not in the country. As soon as the owner came to Ethiopia, she was able to obtain the required commercial license. The court, however, convicted her and handed down five years suspended imprisonment and fine Birr 10,000 on the ground that:

until she fulfils all the requirements of the law to obtain a licence and until such time that she obtains a commercial license, she should not have been operating

³⁸ *Commercial Registration and Business Licensing Proclamation No 67/1997*, art 46(1); *Commercial Registration and Business Licensing Proclamation No 686/2010*, art 60(1); *Commercial Registration and Business License Proclamation No 980/2016* ('Proc No 980/2016') art 49(2). For in-depth discussion, see text for (n 173, 174) in chapter 2.

³⁹ 'Explanatory Memorandum on Commercial Registration and Business License Draft Bill' (later adopted into law as *Proc No 686/2010*) 9, 10; 'Brief Minutes of the Public Hearing Organised by the Commerce and Industry Affairs Standing Committee on Competition and Consumers' Protection, and Commercial Registration Bills, June 23, 2010 (later adopted into law as *Proc Nos 685/2010* and *686/2010*, respectively) 44 – 59.

⁴⁰ *Federal Public Prosecutor v Mehibuba Abdella* (19 April 2019, Crim File No 003716, Federal High Court).

⁴¹ *Federal Public Prosecutor v Genet Getaneh* (25 October 2017, Crim File No 121930 Federal High Court).

a business, because the law does not appreciate the reason for failing to obtain such license.

In some instances, the charges appear to be nonsensical. In *Belay Abebe, et al*,⁴² each of the defendants had commercial license obtained in 2002 EC for different business activities which they did not have renewed for 2006 and 2007. They rather had it renewed in 2008 EC. They were charged for engaging in commercial activity without a valid license. However, the commercial license office requires tax clearance for the budget year without which their commercial license cannot be renewed. The prosecution presented such tax clearance obtained from the tax office purporting to show defendants paid taxes of different amount. The prosecution argued that the defendants' payment of such taxes presupposes income from the business. The court held the alleged criminal conduct is not proved.⁴³

There are a few observations to be made from the preceding cases. The trade regulation regime is not a stable one; it is constantly changing. For instance, in many commercial activities, the law only requires commercial registration. However, the various streams of business require different forms of competence certificate from different institutions setting different requirements. Thus, in *Abraraw*, defendants alleged that when they request the office to renew their licence they were required to produce competence certificate to engage in house finishing works. The time lost without renewing the commercial license in its regular period is presumably meant to meet the everchanging requirements to obtain a license, not because they failed to meet the already established standards. There is no morally reprehensible conduct on the part of the accused.

Second, in *Abararaw*, those individuals were apprehended and charged only when they had renewed their license after two years. This negatively reflects upon the competence of the administrative agencies in supervising commercial activities. This

⁴² *Federal Public Prosecutor v Belay Abebe Maru, et al, 3 defendants* (5 March 2019, Crim File No 194397 Federal High Court).

⁴³ Also see *Federal Public Prosecutor v Abraraw Masersha* (28 August 2018, Crim File No 194265 Federal High Court).

strengthens the argument that objectives of the commercial registration could be achieved through administrative measures.

Third, both in the explanatory memorandum and in parliamentary hearings it had been asserted that the principal purpose of commercial registration is enforcement of tax regulations.⁴⁴ That purpose is already achieved when they are coming back to renew their commercial license by obtaining the required tax clearance, making criminal responsibility unnecessary.

Another regulatory area where excessive punishment is introduced is in the *Telecom Fraud Offences Proclamation No 761/2012*. This statute contains several criminal conducts; but the most frequently prosecuted crime is establishing telecom infrastructure other than the one established by Ethio Telecom, and rendering of telecom service bypassing the established Ethio Telecom infrastructure. Such conduct is made punishable with 10 to 20 years imprisonment and fine 10 times the revenue estimated to have been earned by the defendant.⁴⁵

In *Seid Abdullahi*,⁴⁶ defendant was charged for bypassing the Ethio Telecom network and providing international telephone call service for 1,441,644 minutes between 11 July and 19 October 2015, thereby denying Ethio Telecom Birr 5.83 million. He was tried in absentia. The income defendant obtained is not alleged nor proved by the public prosecutor. However, in the determination of the sentence, the court held that the lost income of the Ethio Telecom is presumed to be defendant's income. The court, thus, convicted and sentenced defendant to 12 years rigorous imprisonment and fined him Birr 1 million. In *Abdullahi Mohamednour*,⁴⁷ the defendant was charged and convicted for the same crime. However, in the determination of the fine, the court held the alleged loss of income by Ethio Telecom is not proved to be defendant's income.

⁴⁴ See (n 39).

⁴⁵ *Telecom Fraud Offences Proclamation No 761/2012* art 9(1)(a) and (b).

⁴⁶ *Federal Attorney General v Seid Abdullahi* (7 June 2018, Crim File No 189226, Federal High Court).

⁴⁷ *Federal Attorney General v Abdullahi Mohamednour* (5 July 2017, Crim F No 001896, Federal High Court).

6.7.2. Lawmaker's Preference to Severe Punishment

Special penal legislation and administrative sectoral regulatory legislation containing penal provisions are governing matters that are already governed by the Criminal Code. In those legislation the legislature has expressly opted for a more severe penalty. For instance, the *Environmental Pollution Control Proclamation No 300/2002*, article 12(3) provides that '[u]nless the provision of the Penal Code provide more severe penalties, the penalties laid down under the Proclamation shall be applicable.' Likewise, the *Coffee Quality Control and Marketing Proclamation No 602/2008*, article 15 provides that a person who is engaged in coffee business, including coffee processing and transaction, compromising the quality of such export coffee 'unless punishable by greater penalty as per any other relevant law, be penalised by a fine [] and an imprisonment of not less than one year but not exceeding three years'.⁴⁸

In *Elias*,⁴⁹ and *Eskinder*,⁵⁰ the defendants were charged for purchasing coffee that was supposed to be exported but alleged to have been sold at local market. However, despite the existence of a specific penal provision in the *Coffee Quality Control Proclamation* which is the most appropriate provision to apply in such cases, the defendants were charged under Criminal Code, article 353, and 354.⁵¹ The court entered a ruling that the case has to be heard under the Criminal Code rather than the Proclamation for two reasons. First, the Proclamation is adopted after the Criminal Code; second the lawmaker in the Proclamation, article 15 clearly has shown its preference of the more severe punishment in the clause 'unless punishable by greater penalty as per any other relevant law' to other penal provisions.

A number of other legislation incorporate similar provisions including, the *Apiculture Resources Development Protection Proclamation No 660/2009*, article 8, *Biosafety*

⁴⁸ The provision is reproduced when the Proclamation was replaced with *Coffee Quality Control and Marketing Proclamations No 1051/2017*.

⁴⁹ *Federal Attorney General v Elias Jemal, et al*, (File No 207274, Federal High Court,)

⁵⁰ *Federal Public Prosecutor v Eskinder Fikru et al*, (20 August 2019, File No 192313, Federal High Court).

⁵¹ Crim C, art 353 provides for crimes against the national economy and state monopolies while art 354 provides for aggravation of the crime which provides for an imprisonment 'not exceeding fifteen years'.

Proclamation No 655/2009, article 21, Broadcasting Service Proclamation No 533/2007, article 45, Pesticide Registration and Control Proclamation no 674/2010, article 33(1). The state tacitly admits that such is unreasonable provision. In *Legislative Drafting Manual 2010 EC* (in Amharic) under section 72(12) it provides that where a criminal punishment is provided for, it should provide for 'proportional and clear penalty'. But it prohibits the practice of making preference to severe penalty.

6.7.3. Summation of Punishments in Concurrent Offences

When an accused is charged and convicted for (notional and material) concurrent offences in the Penal Code, article 189(1)(b) provides that the punishment for all those crimes is subsumed in the punishment determined for the most serious crime, except where the punishment for the most serious crime is death which overrides all other punishment. However, those less serious crimes may be used for aggravation without going beyond the legal limit. In aggravation the court may increase up to half of the basic punishment.

The Criminal Code, article 184(1)(b) changed this into summation once the basic punishment for all the offences is determined separately, without exceeding the legal limit. In *Deputy Sergeant Ahmed*,⁵² the petitioner was charged for 6 counts of attempted trafficking of Ethiopians to work abroad contrary to Criminal Code, article 598, and convicted of 5 of them. The High Court determined the basic penalty for those five offences separately and summed them up to be 25 years, the legal maximum punishment. Taking into account mitigation and aggravation grounds, the court sentenced the defendant to 13 years rigorous imprisonment. The Cassation Division reduced the sentence to 11 years imprisonment, affirming both the conviction and the

⁵² *Deputy Sergeant Ahmed Legesse v Federal Public Prosecutor* (20 March 2014, Cass File No 96078, 16 Decisions of the Cassation Division of the Federal Supreme Court).

calculation of the sentence.⁵³ In *Mohammed*,⁵⁴ defendant was convicted of 10 counts and sentenced to 7 years imprisonment.

Likewise, in *Mohammed and Seid*,⁵⁵ the defendants were charged and convicted of attempted trafficking of 5 Ethiopians to work abroad. The punishment for each offence were summed up but as it was established the act was mere attempt, the court freely mitigated the punishment and for all the 5 counts each were sentenced to 5 years imprisonment and fined Birr 600. In *Abraham*,⁵⁶ defendant was charged for 7 counts of trafficking of Ethiopians to work abroad and got convicted for 3 counts. The court, invoking *Sergeant Ahmed* case determined the basic punishment for each conduct 5 years is added and with few mitigation grounds, he was sentenced to 11 years imprisonment and fined Birr 5,200.

The significant disparity among the sentences appears to have resulted from the ‘legal maximum’ sentence the court identifies. Often the legal maximum taken is that of the rigorous imprisonment which is 25 years, while in *Mohammed*, the court takes the legal maximum for the specific crime which is 10 years. The witnesses in those cases were the victims themselves. The court, thus, in several of those cases freely mitigates the sentence because the crime was only attempted while in few cases it was taken as a mitigation ground and still in fewer cases, the fact that it crime was merely attempted is disregarded.

6.7.4. Increasing Sentence Through the FSC Sentencing Guideline

The Criminal Code has a schematic approach to sentencing. The special part defines the floor and ceiling of the sentence in range. For instance, engaging in a commercial activity without a valid license entails imprisonment between 7 and 15 years. The

⁵³ Also see, *Andualem Arage, et al, (3 petitioners) v Federal Public Prosecutor* (1 December 2014, Cass File No 92296, 17 Decisions of the Cassation Division of the Federal Supreme Court); *Endeshaw Yilma v Federal Public Prosecutor* (11 March 2015, Cass File No 104715, 17 Decisions of the Cassation Division of the Federal Supreme Court).

⁵⁴ *Federal Public Prosecutor v Mohammed Ali Mohammed* (6 August 2018, Crim File No 003032, Federal High Court).

⁵⁵ *Federal Public Prosecutor v Mohammed Ahmed and Seid Mohammed* (11 January 2018, Crim File No 002909 Federal High Court).

⁵⁶ *Federal Public Prosecutor v Abraham Alemu* (25 July 2018, Crim File No 001002 Federal High Court).

sentence is to be determined progressively from the least punishment to the more severe punishment. In determining the punishment, the court should take the floor of the sentence, 7 years imprisonment, as its basic penalty. From there, it considers aggravation grounds all of which should not make the sentence exceed the ceiling, 15 years imprisonment.⁵⁷ The court finally considers mitigation grounds to determine the punishment to be executed.

The Federal Supreme Court Sentencing Guideline increases punishments in two ways. First, based on the wrong interpretation of the provisions of Criminal Code article 88(2), it increased the legally defined basic penalty. In the sentencing grid, the Guideline classifies offences into levels and categories of offences. Also for those crimes which are not classified into levels the Sentencing Guideline, taking the range between the basic penalty and the legal maximum divides into four. The court chooses from among those four categories as the basic penalty depending on the manner of commission of the crime. Where the court determines the manner of commission of the crime is less serious, it shall take the first category of the range as the basic penalty. Where it determines the manner of commission of the crime is mild, the court shall take the second range as the basic punishment. It is only after the determination of the manner of commission of the crime that the court considers aggravation and mitigation grounds. Were it not for the Sentencing Guideline, the court would have taken the legal minimum punishment as the basic punishment. The fact that the court takes a higher penalty as its basic penalty is obviously aggravation before considering the aggravation.

Second, the Sentencing Guideline reduced the effect of mitigating grounds. Federal Supreme Court Sentencing Guideline No 1/2002, article 16 provides that a single general mitigation ground could mitigate up to 4 levels. In Sentencing Guideline No 2/2006, article 23 provides that each general mitigation ground reduces the penalty by only 1 level. There is no explanation provided for such decision.

⁵⁷ See the *Federal Supreme Court Sentencing Guideline No 2/2006* arts 21 – 26.

For instance, in *Daniel Kebede*,⁵⁸ the defendant was charged and convicted of 3 counts of first degree murder contrary to Criminal Code, article 539(1)(a) and 1 count of attempted murder contrary to articles 27(1) and 539(1)(a). The court determined the basic penalty at level 39, the maximum in the Sentencing Guideline No 2. The court took death penalty as the basic penalty for 3 counts and life imprisonment for the 4th count. The court further accepted three aggravation grounds and two mitigation grounds. If the defendant were to be sentenced under Sentencing Guideline No 1,⁵⁹ article 16(9) provides that for those defendants whose basic penalty is capital punishment, each general mitigation ground would reduce the punishment 4 levels provided it does not go below 20 years imprisonment. Thus, the court held capital punishment as the basic penalty, the aggravation grounds would not have any further effect. But the two mitigating grounds would reduce the penalty by 8 levels to level 31. However, the 20 years caveat would keep the punishment in level 36 (18 years to 21 years and 8 months) or 37 (20 to 25 years).

In the present case, the court maintained the death penalty. It may be argued the court erred in calculating the punishment, yet, the Sentencing Guideline's aggravation effect is visible.

6.7.5. The Principle of Lenity

The lawmaker shows preference to a more severe punishment manifested in two ways: first, in the face of a comprehensive Criminal Code, it adopted special penal rules on matters that are already covered by the Criminal Code. Second, the lawmaker made specific preference to the more severe punishment over the mild ones. The principle of lenity is poorly incorporated in Criminal Code, article 6.⁶⁰ In the application of the criminal law, when there are two or more competing provisions, the court would have

⁵⁸ *Federal Public Prosecutor v Daniel Kebede* (12 March 2015, Crim File No 124481, Federal High Court).

⁵⁹ The court erred in two ways. First, the defendant committed the crime by the time the Sentencing Guideline No 1 was in force; thus, he should have been sentenced as per such Guideline. Second, the provisions of Crim C, art 184(1) provides that the aggravation cannot go beyond the legal maximum and the aggravating grounds could be considered only once before the mitigating grounds are considered, but the court reconsidered the aggravation grounds.

⁶⁰ As a fundamental doctrine of criminal law, the principle of lenity is not limited to comparing two laws specifically provided for in the law; as the criminal law is one body of law, it considers all competing applicable rule to a particular situation.

to apply the one that is milder to the accused. The two rules of interpretation, the latter prevails over the former and the special prevails over the general are still subject to the principle of lenity because this criminal law doctrine is at par with the principle of legality and the non-retroactivity of the criminal law which go to the ontology of the criminal law.⁶¹

However, the public prosecutor is consistent in prosecuting individuals under provisions that carry heavier penalty; the court is also consistent in following it through in full disregard to those doctrines incorporated into the criminal law itself. There are provisions in the Criminal Code criminalising certain tax related conducts; but all the criminal prosecutions are brought under those tax legislation that carry heavier penalty. Likewise, engaging in business activities without a valid license is a criminal conduct in the Criminal Code. However, in the cases discussed in this study are prosecuted under the respective commercial registration and trade license proclamations, except in *Bazezew*.⁶² Contrary to such practice of prosecution under special criminal rules, those charged for violation of the rules of Coffee Quality Control are prosecuted under the provision of the Criminal Code seeking heavier penalty.⁶³ Still others are prosecuted in less clear provisions only seeking heavier penalty.

As is the case in any country where foreign exchange is strictly regulated, foreign currency trading is strictly regulated in Ethiopia. Thus, illegal trading in foreign currency is punishable by fine and imprisonment. Accordingly, the Criminal Code article 346 provides that:

[w]hoever [] buys, imports or exports, accepts in trust, deposits, exchanges, sells or offers for sale without authorization or contrary to laws, regulations or rules, gold or any currency, whether national or foreign, the dealings with or rates of which are subject to limitation, restriction or measures of control or protection, is punishable with rigorous imprisonment not exceeding ten years, and fine not exceeding fifty thousand Birr, without prejudice to the confiscation of the subject matter of the crime.

⁶¹ Hallevy argues for the rule of interpretation that the special prevails over the general. Gabriel Hallevy, *A Modern Treatise on the Principle of Legality in Criminal Law* (Springer 2010) 145 – 47.

⁶² *Bazezew Yihun v Amhara Regional State Prosecutor* (24 June 2012, Cass File No 86388, 15 Decisions of the Cassation Division of the Federal Supreme Court).

⁶³ See *Elias* (n 49); *Eskinder* (n 50).

Even though the Federal Supreme Court is yet to give a binding interpretation on the application of the banking regulations, the Federal Supreme Court in ... ruled that mere sell of foreign exchange is not a banking business.⁶⁴ Foreign exchange is just one, among others, of the banking business activities. Where a person engages in a banking business without a valid license, the *Banking Business Proclamation No 592/2008*, article 58(1) punishes such entity 'with a fine of Birr 20,000 in respect of each day on which the contravention continues and with a rigorous imprisonment from 10 to 15 years.' The punishment under the banking proclamation is more severe than the one in the Criminal Code. Thus, the public prosecutor routinely prosecutes individuals under the banking proclamation and the court convicts them under this provision.⁶⁵ What is wrongly turned arguable is while the Proclamation punishes corporate entities, the prosecutions are against individuals.

Thus, those who transfer money internationally through individuals are also charged and punished under the same provision. For instance, in *Kerima*,⁶⁶ the defendant was charged and convicted for engaging in banking business between 16 September 2012 and 8 November 2014. The facts do not appear to be well established. It appears, she has a relative in Saudi Arabia; the person in Saudi receives the money from Ethiopians residing there who desire to send money to their relatives in Ethiopia. This person, using those *Saudi Reals*, buys merchandise and apparels and sends to Kerima. Kerima is in charge of an apparel shop in Addis Ababa where she sells those items. She also sends out the money in Birr to those in different parts of the country via the Commercial Bank of Ethiopia. The other person was not charged; but Kerima is convicted for engaging in banking business without a permit and sentenced to 6 years rigorous imprisonment and fined Birr 10,000.

⁶⁴ *Ayele Debela v ERCA* (11 April 2012, File No 60324, Federal Supreme Court).

⁶⁵ See *Federal Public Prosecutor v Girmay Gebrehiwot, et al* (12 defendants, File No 001103, Federal High Court).

⁶⁶ *Federal Public Prosecutor v Kerima Abdulmejid Mussa* (8 November 2018, Crim File No 255845 Federal First Instance Court).

In *Meron*,⁶⁷ defendant was charged and convicted for the same conduct (transfer of money from Saudi Arabia to Ethiopia between 26 December 2011 to 3 February 2014) and sentenced to 7 years rigorous imprisonment. Regarding fine, however, the court calculated the date on which defendant had engaged in such business from 26 December 2011 to 3 February 2014 (two years and two months). The court determined the fine for each day is Birr 20,000; and for the 780 days, it would be Birr 15,600,000. The court finally determined the fine to be executed to be Birr 7,500,000.

The lawmaker increased punishment in different forms and at different levels. The net effect of progressive increase in punishment in absolute terms, the preference to the severe punishment and the summation of the punishment for different crimes on the individual undergoing the punishment is immense. While overuse of criminal punishment and such 'irrational' conduct of the lawmaker could have been soothed by the application of the principle of lenity, the court rather scrupulously applied such criminal rules.

6.8. Lack of Coherence of Criminal Provisions with Reality

The principle of legality requires that both the condition and the consequence part of the a criminal rule should be clearly stated. Such criminal rules need to be clear in their statement both for compliance and enforcement. However, there are blanket criminalisation the lawmaker declared which the prosecution never applied. In addition to the initial validity, in order to maintain its continued validity, the principle of legislation requires that such rules cohere with the reality.⁶⁸ There are, however, criminal punishments that are not reasonable. Thus, there are rules the court consistently declined to enforce.

⁶⁷ *Federal Attorney General v Meron Desta* (24 November 2018, Crim File No 152748 Federal High Court).

⁶⁸ Hans Kelsen, *Pure Theory of Law* (Max Knight tr, the Lawbook Exchange 2005) 10 – 11, 209 – 13; Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, Cambridge UP, 1949) 121; Luc J Wintgens 'Legisprudence as a New Theory of Legislation' in Luc J Wintgens, *The Theory and Practice of Legislation: Essays in Legisprudence* (Routledge 2005) 13 ff.

6.8.1. Criminal Rules Disregarded by the Prosecution

The lawmaker is not showing restraint in criminalising certain conducts the content of which is not clear. Such criminal rules are regularly found in the regulatory legislation that are intended to create administrative ease. For instance, the *Banking Business Proclamation No 592/2008*, article 58(7) provides that:

any person who contravenes or obstructs the provisions of this Proclamation or regulations or directives issued to implement this Proclamation shall be punished with a fine up to Birr 10,000 and with an imprisonment up to three years.

Likewise, the *Biosafety Proclamation No 655/2009*, article 21(1)(b) punishes:

any person who violates any provision of [...the] Proclamation or regulations or directives issued pursuant to [...the] Proclamation [] with a fine from Birr 4,000 to Birr 7,000 or with imprisonment from one to three years or both.

The conduct that is prohibited in such provision is not clear at all, to say the least. However, there are several other legislation containing similar provisions including, the *Mining Operations Proclamation No 678/2010*, article 78(2); *Solid Waste Management Proclamation No 513/2007*, article 17(2); *Ethiopian Commodity Exchange Authority Proclamation No 551/2007*, article 29; *Civil Aviation Proclamation No 616/2008*, article 76; and *Commercial Registration and Business License Proclamation No 980/2016*, article 49(8).

The researcher does not find a case brought under any of those provisions. It could be argued the lack of clarity of the provisions makes them difficult for application. Yet, it is that nature of these provisions that makes them disregarded by the prosecution.

6.8.2. Criminal Rules Disregarded by the Court

It is shown in previous discussions that in not few criminal rules, the sentences fixed by the law are 'unreasonable'. It is also shown that the prosecution has a tendency to prosecute under provisions containing heavier penalty and the court follows it through. However, the criminal punishments attached to certain administratively regulated conducts is excessive by any standard. For instance, engaging in commercial activities without a valid license entails three types of criminal punishment: imprisonment, a fine, and confiscation of merchandise. In none of the cases discussed here in this chapter and elsewhere in this study where defendants were found guilty

of engaging in commercial activities without a valid license, were confiscated of their 'goods and/or service delivery equipment and/or manufacturing equipment with which the business was being conducted' as prescribed by the law.⁶⁹ Further, while the law provides for imprisonment is between 7 and 15 years and fine between Birr 150,000 and 300,000, the court routinely hands down 4 years imprisonment which is more often than not is a suspended sentence and a fine averaging Birr 4,000. Even the Federal Supreme Court Cassation Division sentenced *Bazezew* to 3 years and 6 months imprisonment and to a fine Birr 5,000.⁷⁰

Likewise, in the *Banking Business Proclamation*, article 58(1) provides for 10 to 15 years imprisonment and Birr 20,000 fine for each day the person is engaged in banking business. In all the cases, the imprisonment is milder and the fine is freely fixed. It is only in *Meron*⁷¹ that the court attempted to calculate the fine as strictly provided for in the law which obviously would not be executed. One can only abstract the court's moral dilemma in sentencing such individuals to that severe penalty while there is no 'morally reprehensible' nature in the conducts defendants were found to be guilty.

6.9. Conclusion

The central question in this study is how the state's power in overusing criminal law and punishment can be legally limited. The overuse of criminal law is established in the previous chapters. The potential doctrinal and formal limitations to criminalisation are also discussed. This chapter discussed the judicial practice of the criminal law. The court in applying the criminal law chooses legal theory and method. This chapter specifically focuses on the legal method the court applies in the interpretation and application of the criminal law. Those criminal law doctrines, such as legal good, principle of legality and lenity are essential in the interpretation of the criminal law. They not only limit the criminalisation power of the state, they also sooth the effects of the overuse of criminal law and punishment if properly applied by the court. The assessment of the judicial practice is made based on methods.

⁶⁹ *Proc No 686/2010* (n 38) art 60(1); *Proc No 980/2016* (n 38) art 49(2).

⁷⁰ *Bazezew* (n 62).

⁷¹ *Meron* (n 67).

The lawmaker has shown its preference to severe punishment over the milder ones. This is manifested through the increase of punishment when rules are revised or increasing the legal minimum penalty, or when there are two rules governing the same conduct, by preferring the more severe one, or where defendant is convicted of two or more crimes, by summing up by the penalty instead of one absorbing the other.

Despite the existence of, such as the principle of lenity as an essential criminal law doctrine partly incorporated into the Criminal Code, the court complied with the written rules rather than the abstract doctrines. However, there are rare instance where because of their vagueness, the prosecutor consistently disregards certain type of criminal rules. Likewise, there are specific types of punishment because of the disproportionate nature of the punishment and extreme negative effect on the defendant, the court consistently disregards.

This chapter generally finds that the overuse of criminal law and punishment by the lawmaker is given effect by the court contrary to the basic criminal law doctrines that would mitigate negative effect of such rules.

CHAPTER 7. – CONCLUSION

7.1. Introduction

The law is a means to achieving certain collective good.¹ This utilitarian nature of the law is coercively manifested in criminal law which is used for the protection of the common good. The efforts in the secularisation of criminal law is supposed to be a virtue and thus criminal law is positivised.² However, its positive and instrumental nature makes the contemporary criminal law malleable to abuse – it is used for the common good, as well as for other purposes. It is true that the universe of the criminal law is expanding everywhere. However, chapter two has depicted the circumstances under which criminal law had been used by the various governments in Ethiopia that successively came to power, and the enforcement of such criminal law is claimed to be a rule of law. It lays down the problem of the excessive use of criminal law and criminal punishment to achieve certain ends, some of which are not legitimate.

This study is an endeavour to find normative and procedural limitations to the state's use of criminal law. This is done by first establishing the justification for the state's use of coercive power the legitimate ends of criminal law. At the core of the justification and legitimation of criminal law is the inherent limitation in the use of the criminal law.³ both the constitutional doctrine of sovereignty and the criminal law doctrine legal good have at their heart the use of such coercive power for the common good of the civil society.

¹ Brian Z Tamanaha, *The Law as a Means to an End: Threat to the Rule of Law* (Cambridge UP 2006); Lon L Fuller, *The Morality of Law* (revised edn, Yale UP 1969) 145 – 51.

² Patricia Margaret Warthon 'The Humanitarian Movement in European History' (1983) 48 *Il Politico* 693; Cesare Beccaria, *On Crimes and Punishment and Other Writings* (R Bellamy Tr, 1995).

³ Blandine Barret-Kriegel, *The State and the Rule of Law* (Marc A LePain and Jeffrey C Cohen tr, Princeton UP 1995) 15 – 17.

7.2. The Unending Expansion of the Use of Criminal Law and Punishment

Criminal law is the most effective social control device discovered yet. The necessary corollary of such nature of criminal law is that before punishment is imposed, the prohibited conduct and the consequent punishment are provided for in the law clearly. However, these instrumental and positive nature of criminal law, make it amenable for use to achieve various ends including illegitimate ones. While the criminal law is the first codified law in Ethiopia,⁴ it is also the most frequently revised law. It is historically evidenced that governments come to power almost always through force; and political stability is an ever present challenge that the government maintains its power through the use of force. For ordinary citizens, this force is manifested through the criminal law. At the beginning of every new government, a criminal law is adopted that is meant to serve the ends of the government of the day.⁵ This is one of the most discernible patterns evident in the use of the criminal law.

His Imperial Majesty, Haile Selassie I, adopted the first Penal Code, which is deceptively claimed to be a revision of the *Fiteha Negest*,⁶ on the day of his coronation.⁷ It was effectively used to preclude Lij Iyasu from claiming the throne. This was further solidified by the 1931 Constitution which provides that only those descendants of the Solomonic dynasty (descendants of HIM) would have claim to the throne.⁸ The ambivalence between HIM and the nobilities supporting King Michael and Lij Iyasu continued for long but it had finally been brought to a close by amnesty and material grants to the nobilities and the people of the Province of Wollo when His Imperial Majesty had visited the Province for the first time on 3 November 1952.⁹ The 1953

⁴ Jean Graven 'The Penal Code of the Empire of Ethiopia' (1964) 1 J Eth L 267, 272.

⁵ For an in-depth discussion on using criminal law in authoritarian governance, see Simeneh Kiros Assefa and Cherinet Hordofa Wetere, 'Governing Using Criminal Law: Historicising the Instrumentality of Criminal Law in Ethiopian Political Power' (2019) 31 J Eth L (Forthcoming)

⁶ The 1930 Penal Code, Preface paras 1, 5 and 16.

⁷ Graven (n 4) 272.

⁸ The 1931 Constitution, art 1(3) - (5).

⁹ 'In the Town of Dessie - Amnesties and Grants by HIM to the Nobilities and People of the Province of Wollo' *Addis Zemen*, 3 November 1952 (in Amharic) 1, 3.

Federal Criminal Law was adopted to suppress opposition to the federation of Eritrea to Ethiopia.

The subsequently adopted 1955 Revised Constitution provides that the King is the sovereign, as a sovereign he has all the power of the state and his power is perpetual. Succession to the throne is through bloodline.¹⁰ Such consolidation of power in one person was still considered to be a 'rule of law' for it made succession to the throne predictable.¹¹

Likewise, as soon as the Provisional Military Government ('PMAC') came to power in 1974, it adopted a Special Penal Code with retroactive application¹² to be applied by a Special Courts-Martial and a Special Prosecution Office¹³ along with extra-judicial measures.¹⁴ The 1957 Penal Code recognises the crown or the monarch; it does not recognise other body in authority. Thus, members of the PMAC needed a criminal law for their protection befitting their status as 'revolutionaries'.¹⁵ However, the Special Penal Code was revised in 1981 with certain new crimes incorporated and the punishments increased and to be applied by a Special (civilian) Court.¹⁶ There was no constitution adopted by then; the Constitution of the Peoples' Democratic Republic of Ethiopia was adopted only in 1987.

The Ethiopian People's Revolutionary Democratic Front ('EPRDF') did not adopt a new criminal law soon after it seized power in 1991 because it was already 'rich' including using the Revised Special Penal Code. It rather dismantled justice institutions calling them instruments of oppression of the previous government while

¹⁰ The King is the sovereign; he has all the power of the state, and his power is perpetual and the protection is personal to him. The 1955 Revised Constitution, art 4, 26 – 36,

¹¹ 'Patterns of progress: Constitutional Development in Ethiopia, Book XI' (Ministry of Information 1968) 25, 32, 34.

¹² *The Special Penal Code Proclamation No 8 of 1974*, preface para 11.

¹³ *Special Courts-Martial Establishment Proclamation No 7 of 1974*, arts 3, 16.

¹⁴ Heinrich Scholler and Paul Brietzke 'Law and Politics in Revolutionary Ethiopia' (1975) 8 *Law and Politics in Africa, Asia and Latin America* 183; Paul H Brietzke, *Law, Development, and the Ethiopian Revolution* (Associated University Presses, Inc 1982) 179 – 99.

¹⁵ *ibid.*

¹⁶ *The Revised Special Penal Code Proclamation No 214/1981; Special Court Establishment Proclamation No 215/1981.*

it detained officials of the previous regime in military barracks in just few days.¹⁷ Initially, it was making use of the already existing criminal law, including the 1981 Revised Special Penal Code.¹⁸ The application of the already existing criminal norm had obviously been a continuation of the desire to maintain political power.

The criminal law adopted by the Emperor or PMAC was adopted by a person or an organ that had not been elected into office. However, the respective criminal laws were aggressively enforced in order to establish a 'rule of law'. This continued in the period of EPRDF.

The era EPRDF came to power is different from when PMAC came to power. EPRDF, thus, presented itself as a multi-party democratic government and remodelled the country multi-ethnic state. Along with such presentation surfaced different forms of challenge to the power of the ruling party, EPRDF, from opposition parties that get prominence in different election cycles. Thus, the state adopted, apparently innocent looking but repressive criminal law. For instance, the Vagrancy Control Proclamation was adopted when All Amhara People Organisation ('AAPO') and Ethiopian Democratic Party ('EDP') had been getting prominence.¹⁹ Because of a previously failed social and economic system, and widespread youth unemployment, the support base of the EDP had principally come from the unemployed youth. Thus, it became an easy target for mass arrest.

The *Anti-Corruption Special Procedure and Rule of Evidence Proclamation No 236/2001* was adopted when Tigray People Liberation Front ('TPLF') faced internal split and

¹⁷ _____ 'High Ranking Officials of the Previous Government Surrendered' *Addis Zemen*, Addis Ababa, 03 June 1991 (in Amharic) 1, 6. _____ 'Legese Asfaw Captured' *ibid.* _____ 'High Ranking Officials of the Previous Government Continue Surrendering' *Addis Zemen*, Addis Ababa, 05 June 1991 (in Amharic) 1, 5.

¹⁸ *Federal Public Prosecutor v Tamirat Layine, et al* (2000, Criminal File No 1/89, Federal Supreme Court); *FEACC v Abate Kisho, et al* (2002, Criminal File No 260/94, Federal High Court).

¹⁹ See 'Minutes of Public Hearing Organized by Legal and Administrative Affairs, and Social Affairs Standing Committees on the Vagrancy Control Draft Bill 12 January 2004' (in Amharic, later adopted into law as *Proc No 384/2004*) 12 – 13. The Federal Government, the Federal Police and the Ministry of Education blame the May 2001 unrest on the AAPO, EDP and Ethiopian Human Rights Council (EHRCO) allegedly employing 'vagrants' to implement their 'policies'. ENA 'Police Announces 31 People Died as a Result of Clash Following Students' Protest' *Addis Zemen*, Addis Ababa, April 24, 2001 (in Amharic). Also see, ENA 'Police reported recovering a part of assets looted' *Addis Zemen*, Addis Ababa, April 21, 2001 (in Amharic).

disobedience within its ranks was growing.²⁰ The first few victims of such legislation were former high ranking officials which even led to an immediate revision of the law.²¹ The Ethiopian Government resisted the adoption of a special anti-terrorism legislation for a long time.²² However, the adoption of the Anti-Terrorism Proclamation coincided with the creation of Ginbot-7 (G-7) as an opposition party declaring an armed struggle against the then government.²³

There are several other special penal legislation and sectoral regulatory legislation containing penal provisions meant to address different subject matters already governed by the Criminal Code. Those legislation contain severe criminal punishments and criminalised broader conducts.

The EPRDF government is the one that took the most advantage of the instrumental nature of the criminal law. Thus, in the second wave of criminalisation, the Government took the criminal law to another level by adopting extensive administrative regulations containing penal provisions which are traditionally considered exclusive realm of administrative law. This is specifically manifested in areas that were identified meant to maximize state revenue.

For instance, the conduct of commercial activities were regulated by *Domestic Trade Proclamation No 294/1971* where a person required to obtain a trade license unless he is a retailer with not more than Birr 1,000 capital, with at least a capital of Birr the violation of which is punishable with not exceeding Birr 1,000 or imprisonment not

²⁰ At the EPRDF Fourth Congress, soon after the internal split in the TPLF, the then PM Meles Zenawi emerged a victor. He then secured an international support including the International Financial Institutions. 'Report and Recommendation of The President of The International Development Association to The Executive Directors on a Proposed Credit of SDR 96.2 Million to The Federal Democratic Republic of Ethiopia For An Ethiopia Structural Adjustment Credit (May 15, 2002)' 4.

²¹ The Anti-Corruption Special Procedure law did not provided for bail. As soon as the former Defence Minister Siye Abreha was released on bail, the proclamation was amended by the *Anti-Corruption Special Procedure and Rules Evidence (Amendment) Proclamation No 239/2001*, making crimes of corruption non-bailable offences. art 2.

²² Wondwossen Demissie Kassa 'Examining Some of the *Raisons d'etre* for the Ethiopian Anti-Terrorism Law' (2013) 7 Mizan LR 49, 52.

²³ The Party is established on May 15, 2008 taking the date from May 15 2005 general election in Ethiopia. The Anti-Terrorism Proclamation was adopted in August 2009.

exceeding 2 month or both.²⁴ These regulation were in place under the overarching socialist economic ideology subsequent to the nationalisation of all major private businesses. Thus, *The Regulation of Domestic Trade Proclamation No 335/1987* and *The Domestic Trade Regulations No 109/1987* did not contain penal provisions.

This dramatically changed since 1997, in relation to the second round of loan from the International Financial Institutions ('IFIs'). The IFIs advised the Government, as loan conditionality, to revamp the economy by reigning on the trade and tax regimes.²⁵ Accordingly, the *Commercial Registration and Business Licensing Proclamation No 67/1997* was adopted to regulate commercial activities. Thus, a person who engages in commercial activities without a valid license would be punished with:

[a] fine equal to double the revenue estimated to have been earned by him during the period of time he operated the business without a valid business licence, and with [an] imprisonment from 3 up to 5 years

However, the *Addis Ababa/Dire Dawa Administration Commercial Registration and Licensing Council of Ministers Regulations No 14/1997* sets the threshold capital requirement of Birr 5,000.²⁶ Those provisions were not enforced for long. The Criminal Code is adopted in 2004 incorporating the provisions under article 433. In the 2002 loan negotiation, Ethiopia undertook to introduce 'enhanced enforcement procedures and improved penalty regime'.²⁷

The tax legislation is enforced in synergy with the commercial registration regime. The aggressive prosecution engaging in commercial activities without a valid license started after the adoption of *Commercial Registration and Business License Proclamation No 686/2006*. In this statute, trading without a license is made punishable with:

[a] fine from Birr 150,000 (one hundred fifty thousand) to Birr 300,000 (three hundred thousand) and with rigorous imprisonment from 7 (seven) to 15 (fifteen) years and the goods and/or the service delivery equipments[sic]

²⁴ *Domestic Trade Proclamation No 294/1971* art 15(1).

²⁵ 'Report and Recommendation of The President of The IDA' (n 20) 10 – 11.

²⁶ *Addis Ababa/Dire Dawa Administration Commercial Registration and Licensing Council of Ministers Regulations No 14/1997* art 20(1).

²⁷ 'Report and Recommendation of The President of The IDA' (n 20) 10.

and/or manufacturing equipments[sic] with which the business was being conducted shall in addition be confiscated by the government.

While the provision of the Crim C, article 433 are still in force, several individuals were prosecuted under the provision the *Proclamation No 686/2010*. Obviously, the state desires more stringent regulation of businesses. Thus, the *Commercial Registration and Business License Proclamation No 980/2016*, further criminalises transferring of business license to another person punishable with a 'fine from Birr 50,000 (fifty thousand) to Birr 100,000 (one hundred thousand) and with rigorous imprisonment from 5 (five) years to 10 (ten) years'. Where the license is 'transferred to a foreign national the fine shall be from birr 200,000 (two hundred thousand) to Birr 300,000 (three hundred thousand) and the imprisonment shall be from 7 (seven) years to 15 (fifteen) years'.

In several instances, the state asserts that such strict regulation of the trade license regime would maximise state revenue.²⁸ Thus, the requirement of license needs to be seen in this context. A person who desires to have a commercial registration need to obtain a Tax Identification Number first, which also means, he has to annually report his income. The business license may be renewed only on the presentation of a tax clearance for the previous budget year.

Further, the lawmaking power of the House of Peoples' Representative is non-delegable duty. However, there are Council of Ministers Regulations criminally sanctioned and countless directive the content of which is freely determined by those agencies and criminally sanctioned by the legislature.²⁹

There is also a consistent desire on the part of the lawmaker to increase criminal punishments. Almost always, those special penal legislation govern matters that were already governed by the Criminal Code. However, the punishments are more severe

²⁸ 'Explanatory Memorandum on Commercial Registration and Business License Draft Bill' (later adopted into law as *Proc No 686/2010*) 9, 10; 'Brief Minutes of the Public Hearing Organised by the Commerce and Industry Affairs Standing Committee on Competition and Consumers' Protection, and Commercial Registration Bills, June 23, 2010 (later adopted into law as *Proc Nos 685/2010* and *686/2010*, respectively) 44 - 59.

²⁹ See for instance, *Transport Proclamation No 468/2005*, *Copyright and Neighbouring Rights Proclamation No 410/2004*, *Environmental Pollution Control Proclamation No 300/2002*, *Development, Conservation and Utilisation of Wildlife Proclamation No 541/2007*, *Biosafety Proclamation No 655/2009*, and *Census Proclamation No 449/2005* which contain provisions that state violation of regulations and directives adopted pursuant to the respective proclamations is criminally punishable.

than the ones in the Criminal Code.³⁰ Second, those administrative legislation containing penal provisions give preference to the Criminal Code only if it has severe punishment. The punishments then provide for may be applied if it is more severe than what is provided for in the Criminal Code.³¹ Third, the criminal punishments are imposed are combined. For instance, engaging in commercial activities without the required commercial registration and license entails imprisonment, a fine and confiscation of the production or service rendering materials.³² Further, such criminal punishment is imposed notwithstanding the administrative measures that may be taken by the respective administrative agencies.³³

The foregoing discussion shows that the state uses the criminal law both for legitimate and other ends. The other ends include pursuing particular political ideology, maintaining political power and suppressing legitimate political opposition. Further, the state addresses all administrative matters through criminal law and the severity of the punishment is believed to make the administrative burden lighter and smoother.

7.3. The Central Question of the Study

Criminalisation is a declaration of conduct criminal by the lawmaker. The study has shown that there is an overuse of the criminal law to achieve various ends that are not the natural objectives of criminal law. The central question this study attempted to address is, thus, how the criminal lawmaking power of the state may be limited to its essential use – the prevention of crime – in order to avoid such overuse of criminal law. It established normative and formal limitations to such criminalising power of the lawmaker, presented in this study meshed with each other.

Criminal law is quintessentially coercive power of the state encapsulated in the doctrine of sovereignty. The doctrine of sovereignty makes the argument for the

³⁰ Simeneh Kiros Assefa and Cherinet Hordofa Wetere ‘Over-Criminalisation’: A Review of Special Penal Legislation and Administrative Penal Provisions in Ethiopia’ (2017) 29 J Eth L 49, 79 – 80.

³¹ See for instance, *Biosafety Proclamation No 655/2009*, art 21(1); *Banking Business Proclamation No 592/2008*, art 58.

³² *Commercial Registration and Business License Proclamation No 980/2016*, art 49; *Commercial Registration and Business License Proclamation No 686/2010*, art 60.

³³ *ibid.*

limitation on the state's use of its coercive power appear a tautology. However, because state's use of coercive power has to be justified, inherent in the doctrine of sovereignty is legitimacy.³⁴ An exercise of sovereign coercive power is legitimate only if it is exercised by the organ that has power to make use of such power and it is used for the common good.³⁵ This notion of common good is encapsulated in the continental criminal law doctrine of legal good; thus, criminal law may legitimately be adopted only for the protection of legal good.³⁶

Once it is determined that the use of criminal law is justified and legitimate, the House of Peoples' Representatives ('HoPR') has exclusive jurisdiction over federal criminal law.³⁷ The HoPR is authorised to adopt a penal code; all the penal provisions have to be incorporated in such penal code.³⁸ Because it is in the nature of coercive state actions, the criminal lawmaking power is inherent and exclusive jurisdiction of the HoPR which cannot be delegated to the executive.³⁹ Any rule adopted by administrative agencies including the Council of Ministers cannot contain penal provisions; and matters that are not published in the *Negarit Gazeta* cannot constitute criminal norms.⁴⁰

Some consider criminalisation is a mere political decision not subject to rational discourse.⁴¹ However, as an insulation from free political manoeuvring, the criminal law is a specialised field guided by postulates and principles both to augment knowledge of the criminal law itself and for the proper interpretation and application

³⁴ Barret-Kriegel (n 3) 15 – 17; Donald S Lutz, *Principles of Constitutional Design* (Cambridge UP 2006) 26 – 27.

³⁵ *ibid.*

³⁶ Santiago Mir Puig 'Legal Goods Protected by the Law and Legal Goods Protected by the Criminal Law, as Limits to the State's Power to Criminalize Conduct' (2008) 11 *New Crim Law Rev: An International and Interdisciplinary Journal* 409, 411 – 12; Markus D Dubber 'Theories of Crime and Punishment in German Criminal Law' (2005) 53 *Am J Comp L* 679, 683 ff; Nina Persak, *Criminalising Harmful Conduct: The Harm Principle, Its Limits and Continental Counterparts* (Springer 2007) 104 – 18.

³⁷ *Constitution of the Federal Democratic Republic of Ethiopia Proclamation No 1/1995* ('FDRE Const') art 55(5).

³⁸ *ibid.*

³⁹ *ibid* art 77(13).

⁴⁰ *ibid* art 71(2).

⁴¹ Persak (n 36) 5, 23; Luc J Wintgens 'Legislation as an Object of Study of Legal Theory: Legisprudence' in Luc J Wintgens (ed), *Legisprudence: A New Theoretical Approach to Legislation* (Hart Publishing 2002) 30.

of such norms. Those postulates, including the principle of legality and the principle of unity of legal system, are deeply entrenched criminal law doctrines that are beyond the reach of the lawmaker.

Besides, the exercise of such sovereign power results in both potential and actual limitation to the rights of the individual. The other substantive limitation to the use of such coercive state power is the bill of rights. That is, the potential consequence of the criminal law is punishment – incarceration, a fine, and in not few cases, death. This is a potential limitation of the rights of the individual because, the consequences follow when a criminal norms are violated. The actual limitation is that, as criminal law is a code of conduct, it requires the individual to comply with the requirements of the law and prohibit him from engaging in certain activities which he would have otherwise done so freely.

However, as the bill of rights is in conflict with the ontological duties of the state and the rights of victims of crime, such conflict naturally calls in methods of evaluation – weighing. This takes us to the methodological limitations to criminalisation. A legal system is constituted of not only of norms and institutions, but also of methods, those methods being methods of legislation and adjudication. Those rules and methods of legislation give effect to those substantive limitations on the use of criminal law.

7.4. Limitations to Criminalising Power of the State

7.4.1. Reasonable Criminal Law

Criminal lawmaking power is the sovereign power of the state. The doctrine of sovereignty requires that such power needs to be exercised legitimately. It is said to be legitimate if it is exercised by the organ that has power and for the common good. The notion of common good is given effect through the continental criminal law doctrine of legal good. The doctrine of legal good requires that a criminal rule is adopted for the protection of such legal good. This doctrine of legal good has both the positive and negative aspects.

The positive aspect of the doctrine has both positive (formalist) and normative (substantive) sense.⁴² The positive sense is that, a legal good as an interest that has protection of criminal law. The positive sense of the doctrine is a tautology and is not of interest to us. We are interested in the normative aspect of the doctrine, which is meant to limit the criminalisation power of the state. The normative sense of the doctrine requires that in order for a legal interest to be protected by the criminal law, such interest must be an essential life good or deeply rooted ethical conviction of the society, the harm or threat of harm makes the social existence of the individual difficult or impossible.⁴³

It is illustrated by some that essential life goods include life, limb, liberty, honour, and the incorruptibility of public offices while the deeply rooted ethical conviction of the society include blasphemy, and animal cruelty. Harm (or threat of harm) to those interests have direct and substantial negative impact on the wellbeing of the individual as a person as well as his existence in society.⁴⁴ Collective interests, however, may not be protected by criminal law unless they have direct and substantial negative bearing on the individual.⁴⁵

Such normative sense of the positive aspect of the doctrine of legal good helps the lawmaker decide what interests require protection of the criminal law. Only where the lawmaker is able to affirmatively answer this question that it may consider the negative aspect of the doctrine.

There appears to be a universal agreement on the negative aspect of the doctrine of legal good which is referred to as *ultima ratio*.⁴⁶ The negative aspect of the doctrine requires that the criminal law may be used as a last resort measure to protect the

⁴² Mir Puig (n 36) 410 – 12; Dubber (n 36) 684 – 86.

⁴³ *ibid*; Simeneh and Cherinet 'Over-Criminalisation' (n 30) 58 – 60.

⁴⁴ Dubber (n 36) 684 – 86.

⁴⁵ Mir Puig (n 36) 415 – 16.

⁴⁶ Persak (n 36) 121 – 24; Douglas Husak 'The Criminal Law as Last Resort' (2004) 24 Oxford J of L Studies 207.

interest provided other means, such as administrative measure and civil actions, are found to be ineffective to achieve the intended protection of the legal interest.⁴⁷

This study has shown that the doctrine of the common good has not been complied with in criminalisation of conduct by the legislature. In some instances, the interest may not constitute a legal good that requires the protection of the criminal law, as in the case of transferring commercial licence to a third person in whatever form.⁴⁸ In other instances, the use of the criminal law may be justified but it was not a last resort measure as in the case of tax legislation. In several instances, there are redundant rules governing the same conduct;⁴⁹ and almost always, the punishments are excessive both in relative and absolute terms.

7.4.2. Substantive Limitations to Criminalisation

The doctrine of legal good is an indispensable substantive limitation on the criminalisation power of the lawmaker. In this study, the doctrine of legal good is discussed as a postulate that is both normative and applicative.⁵⁰ Seen on its own, it is a normative postulate defining the nature of criminal law. The other substantive limitation on criminalisation is the bill of rights; it is given effect through the doctrine of legal good. In this context, legal good becomes normative applicative postulate because it helps in the application of other norms – the bill of rights.

The positive requirement of the doctrine of legal good is that the interest must be one that requires the protection of legal good, a legal interest whose harm (threat of harm) would threaten the social existence of the individual. Some even argue that criminalisation is justified by the protection of dignity of the individual.⁵¹ On the other

⁴⁷ Dubber (n 36) 692. Mir Puig (n 36) 417 – 18; Simeneh and Cherinet 'Over-Criminalisation' (n 30) 60.

⁴⁸ *Proc No 980/2016* (n 32), art 49(4).

⁴⁹ For instance, the provisions of *Federal Government of Ethiopia Financial Administration Proclamation No 648/2009*, art 70 and *Ethiopian Federal Government Procurement and Property Administration Proclamation No 649/2009*, art 77 are already covered by the provisions of *Crim C*, art 404 ff.

⁵⁰ For in-depth discussion for postulates (metanorms) see Humberto Ávila, *Theory of Legal Principles* (Springer 2007) 83 – 126.

⁵¹ Tatjana Hornle 'Criminalizing Behaviour to Protect Human Dignity' (2012) 6 *Crim Law and Phil* 307.

hand, the criminal law is a limitation to the fundamental right of the individual. The criminal rule has two parts – the operative part and the consequence part. The operative part of the rule contains the prohibition; it prohibit the individual from engaging in certain activities which he would have otherwise done so freely. The violation of the prohibition entails punishment, implicating individual fundamental rights, such as liberty and property and in few cases, at least in Ethiopia, life.

The adoption of a criminal rule is justified by the legal good and the implication of such rule is on individual freedom. Therefore, as in any public policy decision where the conflicting value is assessed against any implicated right, the conflict between two rights need to be resolved in criminalisation. In resolving such conflict, the method of interpretation of the bill of rights is of good help.⁵² However, as there is no constitutional litigation practice and culture in Ethiopia, resort to the method of interpretation of international bill of rights is justified which is also supported by the Constitution.⁵³ Therefore, whether the criminalisation of a particular conduct is an appropriate measure, whether it is necessary and proportional to the interest that is meant to be protected needs to be evaluated. This is to be done by balancing of interests. In the weighing process, rights are treated as principles and given effect as such.⁵⁴ Such balancing is to be made both for the prohibition and the consequence part.

This method of balancing interests is used both in the adjudication and legislation processes. The obligation of the lawmaker to legislate includes the obligation to respect individual rights; because individual rights are better protected through judicial review, often these process are considered a part of adjudication rather than the lawmaking process.

⁵² Robert Alexy 'Discourse Theory and Fundamental Rights' in Augustin Jose Menendez and Erik Oddvar Eriksen (eds), *Arguing Fundamental Rights* (Springer 2006); Stephen Gardbaum 'The Structure and Scope of Constitutional Rights' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing 2011); Bernhard Schlink, 'Proportionality' in Michel Rosenfeld and Andras Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (Oxford UP 2012).

⁵³ FDRE Const, art 9(4), 13(2).

⁵⁴ Alexy (n 52) 18; Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Doron Kalir tr, Cambridge UP 2012) 9; Luc J Wintgens 'Legitimacy and Legitimation from the Legisprudential Perspective' in Wintgens Luc J (ed) *Legislation in Context: Essays in Legisprudence* (Ashgate 2007) 12, 23.

7.4.3. The Formal Limitations to Criminalisation

The direct exposition of the discussion on limitation on the criminalisation power of the state is the content of good criminal law. Because there is very little agreement on such concept, this study peruses the argument from the normative and procedural perspective. Those normative limitations set the standard of criminalisation. However, they are given effect through the formal limitation – in the lawmaking process. There is a reasonable agreement on the duties of the lawmaker and lawmaking process.⁵⁵

7.4.3.1. Legislature's Duty to Make Coherent Criminal Law

When the Constitution vests the lawmaking power on HoPR, the Council of Ministers is empowered to initiate bills. It is shown that all the bills discussed in this study were initiated by the executive, with no exception. The process of initiation of bills and adopting them into law is governed by rules of lawmaking.⁵⁶ Those rules require certain lawmaking procedures be faithfully complied with so that reasonably agreeable results are achieved. The lawmaker has the obligation to make a coherent law – such coherence may be coherence within the legal system (internal coherence) and coherence with reality (external coherence).⁵⁷

In discharging its lawmaking obligations, there are certain things the lawmaker needs to take into consideration. The principle of unity of legal system is one of the postulates governing public law, and criminal law in particular.⁵⁸ All primary legislation are published in the official *Negarit Gazeta*. The HoPR is the custodian of the official *Federal Negarit Gazeta*. Therefore, it is deemed to know what it has published in the *Negarit Gazeta*. It has adopted a comprehensive Criminal Code. Every time it is making laws,

⁵⁵ Fuller (n 1) 6 – 8, 41 – 44; Luc J Wintgens, 'The Rational Legislation Revisited: Bounded Rationality and Legisprudence' Luc J Wintgens and A Daniel Oliver-Lalana (eds), *The Rationality and Justification of Legislation* (Springer 2013) 6, 8.

⁵⁶ FDRE Const (n 37), *Federal Democratic Republic of Ethiopia House of Peoples' Representatives Working Procedure and Members' Code of Conduct (Amendment) Proclamation No 470/2005*, *House of Peoples' Representatives Rules of Procedure and Members' Code of Conduct Regulations No 6/2015*, and *Council of Ministers Working Directive 1996 EC* (in Amharic) are the principal sources of legislative rules.

⁵⁷ Fuller (n 1) 36; Wintgens 'Legislation as an Object of Study' (n 41) 35 – 38. Luc J Wintgens 'Legisprudence as a New Theory of Legislation' in Luc J Wintgens, *The Theory and Practice of Legislation: Essays in Legisprudence* (Routledge 2005) 15 – 22.

⁵⁸ Ávila (n 50) 84 – 91.

it is required to make laws taking the already existing laws into consideration. Birdseye view review of the criminal law depicts that the Criminal Code is by far common-sense law whereas those special penal legislation and rules contained in administrative regulations are unreasonable seen in light of the provisions of the Criminal Code.

The formal validity of the rules may be a reason for their existence; however, the continued existence of those rules may be justified by their coherence with the reality, making sense in the real world.⁵⁹ Therefore, in order to better discharge its legislative duties, the lawmaker needs to undertake an investigation into the facts it intends to address. As the modern state acts only on the basis of legislation, the lawmaker determines whether such legislative intervention should be a civil or an administrative measure or a penal measure; it should also investigate into the failed social interaction, the existing norm, and the impact of any potential rule.⁶⁰ Despite such responsibilities, the vast number of penal provisions, particularly those contained in administrative and regulatory legislation were not discussed by the lawmaker, and even those special penal legislation including the Criminal Code are discussed in committees, not in the plenary session.

The last issue discussed regarding limiting the lawmaking power of the lawmaker is the delegability of the criminal lawmaking power. The criminal law is different from other administrative regulations in that, it is the most intrusive state action into the rights of the individual, it is stable, it does not requires specific qualification the lawmaker does not have, no emergency condition can be addressed by criminal law.⁶¹ Therefore, delegation of the criminal lawmaking power is limited.

Further, the Federal Attorney General is the legal advisor of the Federal Government. It is not required to provide legal advice to each agency, as almost all of them have a legal department of their own, apparently drafting those administrative regulatory

⁵⁹ Wintgens 'Legislation as an Object of Study' (n 41) 35 – 38.

⁶⁰ *ibid* 32 – 33.

⁶¹ Bogdan Iancu, *Legislative Delegation: The Erosion of Normative Limits in Modern Constitutionalism* (Springer 2012); Arthur Lupia 'Delegation and Its Perils' in K Strom, WC Muller, and T Bergman (eds), *Delegation and Accountability in Parliamentary Democracy* (Oxford University Press 2003).

bills containing penal provisions. However, once those bills are tabled in the Council of Ministers, as member of the Council, he is required to provide such effective and competent legal advice to the Council.⁶² In order to get the best service of the Attorney General's Office, the Council of Ministers should review draft bills passing first through the Attorney General office.⁶³

7.4.3.2. Legislative Impact Assessment and Continuous Revision of the Law

The lawmaker makes laws that comply with the lawmaking process. The justification and legitimacy of such law is dependent on the objective of protection of legal good which is a fundamental subject having a constitutional significance. The decision is made based on the available information and skills. The available information for the existing circumstances may be justified but it certainly is difficult to predict the future. The law is adopted to be applied prospectively; both in the natural course of things and as a result of the rules adopted, circumstances may change.⁶⁴ The initial validity of the law may change over time as a result of such changes in circumstances. In order to maintain the continued validity of the rule, the propriety, the necessity and the proportionality of criminalisation and punishment needs continuous evaluation. Stated otherwise, the legal good may no more be in want of protection of the criminal law either because it lose its importance and consequently not a legal good or other less intrusive effective measure may be available, or the punishment may turn out to be 'unreasonable'.⁶⁵

As the lawmaker is not the ideal institution to undertake such post legislation responsibility of on-going review of such laws, the Attorney General, as the legal

⁶² The Council of Ministers has a legal team – such legal team reviews whether those bills comply with the formal requirements, such as, whether they are drawn up both in Amharic and English version, and whether such bill is accompanied by a short explanatory memorandum, and that a certification the bill does not contradict constitutional values and that it does not snatch another agency power.

⁶³ *Federal Attorney General Establishment Proclamation No 943/2016*, art 6(5)(a).

⁶⁴ Wintgens 'Bounded Rationality' (n 54) 12 – 22; Wintgens 'Legislation as an Object of Study' (n 41) 35 – 38.

⁶⁵ For instance, sodomy is decriminalised by the US Supreme Court in *Lawrence v Texas*, 539 U.S. 558 (2003) based on the right to privacy. Other activities decriminalised in different jurisdiction include, sale of alcohol beverages, prostitution, gambling, drug consumption and blasphemy.

advisor of the Federal Government, should see to it that the existing laws are coherent within the legal system and with reality.⁶⁶ When a law is found to be non-conforming either to other rules or the reality, the Attorney General has to conduct study and present to the lawmaker for the revision and amendment of such laws, including proposing their repeal if they are not repealed already by non-application, which is rare in criminal rules.

7.4.4. The Role of Courts in Criminal Adjudication

The lawmaker has those substantive and formal requirement to comply with in practicing criminalisation. In so doing, whether the lawmaker discharges its constitutional responsibilities may be reviewed by the court. Stated otherwise, the criminal law may be given effect only if it complies with the formal and substantive requirements of validity. The court is assisted by those criminal law and constitutional postulates, such as the principle of legality, the principle of lenity and the principle of unity of legal system in making decisions. Those criminal rules are accordingly adjusted in order to make them cohere with each other and with the reality. This certainly helps in mitigating the negative impact of the overuse of criminal law and punishment by the lawmaker.

The review of several cases decided by different courts in different subject matter and different hierarchy indicates otherwise. Instead of adjusting any criminal rule that is contrary to those postulates, the court applies the rules directly. In this activity, the court rather expands the application of the criminal law and punishment. Contrary to the principle of legality enshrined in the Criminal Code of Ethiopia, the court enforced certain rules as though they are criminal rules while they are not published in the *Negarit Gazeta*. A case in point is enforcement of directives adopted by administrative agencies as criminal rules. Contrary to the principle of lenity, the court imposed the harsher sentence as indicated by the lawmaker. Contrary to the principle of unity of legal system, the court enforced special penal legislation outside the purview of the general part of the Criminal Code.

⁶⁶ Proc No 943/2016 (n 62).

7.5. Recommendations

This study has depicted there are clear instances where there is excessive use of the criminal law and punishment. Such use of criminal law and punishment is contrary to both the Constitution and basic doctrine of the criminal law. Such overuse of criminal law and punishment is not particular to any branch of the Government. However, the principal responsibility lies with the lawmaker. It makes the rules; it creates the institutions and it dictates the application of those rules. However, the courts could mitigating the negative effects of such criminal law by choosing the appropriate legal theory and method, which they do not. Thus, in order to address problem of over-use of the criminal law at each stage, the following recommendations are made.

7.5.1. Initiation of Bills

One of the causes of over criminalisation, at least in the current legislative process, is the fragmented bill initiation method. Every ministry is empowered to initiate a bill in its area of competence. Those ministries believe they have the power to include criminal rules in such draft bill. Often, the explanatory notes do not explain why the penal rules were incorporated or revised making them invisible. There is no criminal rule that is supported by research and evidence.

Therefore, criminal rules should be contained only in the Criminal Code. If any ministry desires certain conducts relating to its activities should be criminalised, it need to consult with the Office of the Federal Attorney General first, who makes a decision whether to include a criminal rule as requested or not. In doing so the Attorney General Office should investigate into the facts of the failed social interactions, whether they require legislative intervention and whether such legislative intervention should be in the form of a criminal rule. The research includes also jurisdictional matters, legislative impact assessment and alternative measures including those which failed to help the state achieve its ends.

There has to be sufficient public consultation and consultation with any other relevant government institution including the Ministry of Finance as it certainly has budget implications. The background study, the draft and the explanatory memorandum

should also be accompanied by a certification that the criminal rule does not violate a constitutional right.

7.5.2. The Legislation Process

The legislation rules are sufficiently clear and fairly complete. Thus, there are several things both the Ministry initiating the bill and the lawmaker need to undertake. The Ministries may still initiate bills in their area of competence; however, it is an exclusive competence of the Office of Attorney General to initiate criminal rules.

- The office of the attorney general should make sure that any rule adoption or revision should be made only as a part of the Criminal Code.
- Whoever makes the background study, should be able to help the lawmaker make appropriate decision. It must be made a determination that there is a failed social interaction and that social interaction needs legislative intervention.
- Once the legislative intervention is found to be appropriate means, there are crucial questions to be addressed.
- It must also include legislative impact assessment – the potential changes in the social behaviour as a result of the intended rules so that we can determined the extent of the intervention.
- Whether the appropriate measure is adoption of a criminal rule the violation of which is a criminal punishment. In order to address this question the lawmaker need to look at the constitutional duties of the lawmaker –
 - Whether the legal interest is one that requires the protection of the criminal law – in this regard, it must be able to answer whether the adoption of a criminal rule is an appropriate measure
 - In compliance with the principle of *ultima ratio*, it must be established the intended measure is necessary or there is no other less intrusive measure that would help the state achieve the intended result.
 - It must also be affirmed that the marginal social benefit of limiting the right of the individual outweighs the marginal social harm of limiting the right of the individual. Stated otherwise, whether it is necessary.

7.5.3. Judicial Application of the Criminal Rules

The Constitution adopts a non-positivist theory of law for the evaluation of the criminal law. The content of the criminal law may be evaluated for its conformity with such value. The court, in applying those criminal rules, should apply the Constitution. The court also need to adopt methods of interpretation that would help it to comply the constitutional cardinal principle of respect for human rights and maintenance of the rule of law.

It is not precluded from evaluating the criminal law against the constitution; it is precluded only in the nullification of a rule for unconstitutionality. Where the court finds the law not to comply with the constitution, it may refer the matter to the House of Federation for nullification.

7.5.4. Continued Evaluation of the Criminal Norms

The criminal law is a positive law. Such criminal rule is valid when it is adopted in accordance with the lawmaking process and complies with the constitutional requirements of the lawmaking. The rule has to remain valid always. The continued validity of a criminal rule is maintained by its conformity with the reality.

In order to ensure such continued validity of a criminal rule, therefore, the Office of the Federal Attorney General should continually evaluate the conformity of each criminal rule with the changing circumstances. Where any changing circumstance makes a criminal rule of unreasonable consequence, it should be changed to meet the requirements of the changing circumstances.

7.6. Subjects of Further Enquiry

It is alluded to in this study that the state adopts criminal rules and aggressively enforces them for a certain period, this is particularly true of special penal legislation. When questions are raised regarding the fairness of the enforcement of such laws, the Government argues that the enforcement of the criminal law is maintenance of rule of law. The criminal law interpretation is a judicial practice and those different doctrines define the content and scope of the criminal law. It is that sophistication on those doctrines that makes the criminal law milder in its negative effects on the rights of the individual. Rule of law is one of the constitutional supra-principles in the use of the

state's coercive power. The relation between the enforcement of criminal law and rule of law needs further investigation.

The constitution adopts a non-positivist theory of law which may be employed for the evaluation of those positive criminal law. However, it is reflected in those court decisions discussed in this study that the court does adopt an instrumentalist approach to criminal law the content of which is left to the Government to determine. This reflects very much on the independence of the judiciary. The relation between independence of the judiciary and the criminal law is another area which needs further enquiry. This may be seen from two perspectives: the first may be seen from the perspective of Ethiopian legal theory and the second enquiry may be if such legal theory could help insulate judges from politics.

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