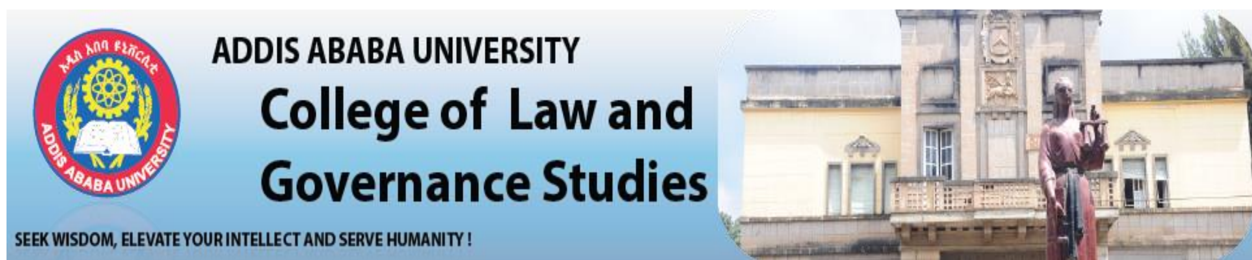


# Examining the Ethiopian Corruption Crimes Proclamation: Focus on Private Sector Regulation

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## Declaration Statement

I declare this work which is entitled -Examining the Ethiopian Corruption Crimes Proclamation: Focus on Private Sector Regulation is my own work that is independently produced by the devoted guidance of my advisor.

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## Acronyms

ACHPR ________________ African Charter on Human and People's Rights

AUCPCC _______________ Africa Union Convention on Preventing and Combating Corruption

CCP___________________ Corruption Crimes Proclamation

Cir. ___________________ Criminal Code of Ethiopia, 2004

CM ____________________Council of Minister

FDRE ___________________ Federal Democratic Republic of Ethiopia

FEACC __________________ Federal Ethics and Anti-Corruption Commission

HPR ____________________ House of Peoples Representatives.

ICCPR ___________________ International Covenant on Civil and Political Rights

NGO _____________________None Governmental Organizations

PMAC ____________________ Provisional Military Administration Council

UNCAC__________________ United Nation Convention against Corruption

OECD___________________ Organization for Economic Cooperation and Development

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## Abstract

*Since the drafting of the Corruption Crimes Proclamation, the rationale behind of the law has been challenged by objection in light of the private sector regulation. In this regard the major criticism has been the non-existence of administrative power in the private sector and necessity of the proclamation to the sector.*

*This study is aimed at examining the proclamation in general to assess the scope of its application, the law-making process, and to investigate whether it is consistent with criminal law principles and international bill of rights in which Ethiopia is a party.*

*Qualitative data gathering techniques are employed to undertake mixed research. Using purposive sampling technique, 2 drafters of the proclamation are selected for an in-depth interview, mainly to get adequate data that can enable the researcher to examine the purpose, the law-making process, and the scope of application of the proclamation.*

*The study has revealed that there is a discrepancy between the legal rationales stated in the preamble of the proclamation to justify its purpose with that of the similarity of the corruption crimes in public and private sector, the principle of necessity and the principles of ultima ratio (criminal law as a last resort).*

*Hence, the justifications are disproved due to the similarity of the acts and are found inconsistent with the CM Directive, the regulation of the HPR, and with accepted criminal law drafting/making process. Moreover, the law cited both AUCPCC and UNCAC to support its rationales, but they are found to be inconsistent.*

*The study also has concluded that the HPR has enacted this proclamation without deep examination, and has failed to fulfill the governing rules of the law-making process. The purpose of the proclamation is not compatible with international criminal law principles and with the international bill of rights which Ethiopia is a party and also with the FDRE Constitution, Article 17(1).*

# Chapter One

# Introduction

## I 1.1 Background of the Study

In Ethiopia, corruption is rampant in the public sector since a long time ago and currently it has become not only wide spread but also is a challenge to different institutions. Grand theft is the hallmark of official corruption and individual level corruption has in fact becomes a symbol of admiration instead of a stigma of shame and dishonour. As a State, the attempt to combat corruption is included in the 1957 Penal code of the Emperor[1] by criminalizing the act itself without labelling it as corruption.

Under the PMAC (*Derg)* regime, the Special Penal Code Proclamation was enacted on 16h November 1974.[2] One of the major aims of this proclamation was to confiscate any property or wealth obtained by illegal means.[3] Moreover, for the purpose of confiscating properties which were taken by the public officials illegally, the proclamation has disregarded the principle of criminal law and was applied both retroactively and prospectively[4].

Prior to the promulgation of Corruption Crimes Proclamation, corruption related crime was enforced only in the public sector and specifically on public servants[5], meaning that unless otherwise the private sector or its representatives and employees that may be engaged in the acts of corruption within the public sector, the Criminal Code provisions dealing with corruption were not applied on them private.

In this regard, the Federal Ethics and Anti-Corruption Commission was established in May 2001 and is legally capable to investigate, to prosecute, check, and prevent corruption and other improprieties as well as fighting corruption through the promotion of ethical values in the society. To be consistent with the Federal Criminal Law, the Special Procedure of anti-corruption

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[1] Title 3 Art. 410-437 of the Penal Code Proclamation of 1957 (Offences against Public Office).

[2] The Special Penal Code Proclamation no.8/1974

[3] Id preface paragraph 6.

[4] Id Article 2(1).

[5] The Cri. C of, 2004 Proc. no. 414,

Proclamation was enacted[6] and it was amended repeatedly. In order to make the law dealing with the crime of corruption include the private sector, the power of the Commission is extended through the amended Proclamation No_ 883/2015.[7] Just a year after the amended Proclamation, however, the Federal Attorney General was established.[8] Hence, the power to prosecute is transferred to the Federal Attorney General.[9] The power of the Federal Ethics and Anti-corruption Commission regarding prosecution of corruption cases is totally transferred to the Federal Attorney General[10] and investigation of corruption cases is also transferred to Federal Police Commission.

As such, the Federal Ethics and Anti-Corruption Commission has the power to gather evidence and report to the Federal Police Commission and has a duty to create awareness through educating the public about the effect of corruption and the promotion of ethics and other related matters.[11]

To eliminate corruption, various laws and regulations have been promulgated. For instance, the Anti-Corruption Special Procedure and Rules of Evidence Proclamation no. 236/2001 is one in the forefront. As per this Proclamation, the justification to enact it was to provide the relevant law that would make disclosure and investigation of corruption offences possible. It also aims to create an institution of criminal proceeding for such offences which is effective and to regulate a system under which any property acquired by corruption could be restrained, administered and confiscated. The major reason for the promulgation of this proclamation is to provide for the rules of evidence compatible with offences relating to corruption.

The anti-Corruption Special Procedure and Rules of Evidence (Amendment) Proclamation no_239/2001, contains only one Article and denies the bail rights of the accused. This proclamation is famously known by some members of the society as *Siye's* law.[12]

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[6] Anti-Corruption Special Procedure and Rules of Evidence Proclamation no. 236/2001

[7] Revised Federal Ethics and Anti-Corruption Commission Establishment (Amendment) Proclamation 883/2015.

[8] Federal Attorney General Establishment Proclamation, Proc. No. 943/2016.

[9] Id Art. 22/2/

[10] Id Art. 22/3/

[11] Id Article 22 and 23

[12] As spelled out by *Siye Abraha* (former defense minister of Ethiopia) in his book in page 92-93 regarding the how about of the making of this law stipulated that 'it was on Friday, 1st of June 1993 E.C that the *Arada* First Instance Court led by Judge *Birtukan Mideksa* made a judgment that my bail right is protected and I should be released with

The amended Rules of Evidence Procedure and Rules of Evidence on anti-corruption, Proc.432/2005, and the Revised Anti-Corruption Special Procedure Proclamation 434/2005, have had two major aims. Firstly, it is aimed to regulate on the right to bail of persons arrested for or accused of corruption offences and secondly, to provide provisions on restraining, administering and confiscating of properties of persons accused of corruption offences.

The Regulation to Provide for the Functioning of Ethics Liaison Units, Wealth Notification, and Registration Reg.144/2008, has established the ethics liaison office in the public service and public enterprises. The Disclosure and Registration of Assets Proclamation No.668 /2010, aspires the disclosure and registration of assets as an important tool to enhance transparency and accountability in the conduct of public affairs. Moreover, it has a paramount importance in the prevention of corruption and impropriety and helps to enhance good governance.

The Protection of Witnesses and Whistle-blowers of Criminal Offences Proclamation 699/2010, also gives wider protection to witnesses in case of corruption crimes. According to the Revised Anti-Corruption Special Procedure and Rules of Evidence (Amendment) Proclamation no.882/2015, it is necessary to include private sectors in the procedure and evidence laws as they are made part of the revised Corruption Crimes Proclamation. Similarly, the Corruption Crimes Proclamation indicated under its preamble that;

> Whereas, it has become necessary to include similar acts committed by the private sector particularly by those who administer funds collected from the public or collected for public purposes in the category of corruption offence; and it has become necessary to categorize as corruption acts of bribery, embezzlement and other similar acts committed by the private sector as the UNCAC and the AUCPCC which are ratified by Ethiopia impose such obligation on Member States.[13]

Seven-thousand-birr bail. While I was returned back to the prison, the *Meles's* party sent draft bill to the parliament for amendment of the Anti-Corruption Proclamation which was promulgated 17 days ago and yet the parliament accepted and amend the proclamation on that day and sent to the Court immediately…… as such they denied my bail right.' *Siye Abraha* 'Freedom and the Judiciary in Ethiopia' (year 2002 E.C) Amharic version at: 97-99. Translation mine.

[13] Preamble of the Corruption Crimes Proclamation no. 881/2015. (hereinafter the CCP)

Regionally, Ethiopia is a party to the AUCPCC[14] and internationally the UNCAC[15] is signed.[16] And then the House of Peoples Representatives ratified the Convention in its meeting held on the 3rd day of July, 2007.[17]

The Corruption Crimes Proclamation has also been governing criminal acts in the private sector related to corruption and this enforcement of the law is a new concept to the criminal law legal system of the country. This is because unlike the amended proclamations which were regulating only public servants and the three branches of government including public enterprises, this new proclamation tries to regulate some selected private sectors.[18]

In this regard, one of the major aims of this research is to examine whether the incorporation of the private sector into the proclamation is justifiable or not. It also aims to find out whether the principle of criminalization in the law making process to regulate the private sector, thirdly, the research aims to investigate the provisions the FDRE Constitution and the International Bill of Rights in light of the deprivation of Human Rights. The research is also focused on assessing the scope of application of the Proclamation.

## 1.2 Statement of the Problem

As clearly set out by prominent international anti-corruption institutions, corruption is defined as "the abuse of public office for private gain when an official accepts, solicits, or extorts a bribe."[19]

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[14] African Union available at <https://au.int/en/treaties/> Adopted in Maputo, Mozambique on 11 July 2003. Entered into force on 5 August 2006. Ethiopia signed the convention on 01/06/2004, ratified on 18/09/2007 and deposited the convention on 16/10/2007. Available at <https://au.int/sites/default/files/treaties/> last Accessed date on 12th Feb. 2020.

[15] The Convention was adopted by the General Assembly in October 2003 and entered into force in December 2005. Available at <https://www.unodc.org/documents/> it has been adopted by the UN General Assembly on 31 October 2003 and entered into force in December 2005. Ethiopia signed the convention on 10 Dec 2003, ratified on 26 Nov 2007 with a reservation on Article 44 of the convention in case of Extradition. Last accessed date on 16 Mar 2020.

[16] Article 9/4/ of the Constitution of the Federal Democratic Republic of Ethiopia Proclamation no.1/ 1995.

[17] United Nations Convention Against Corruption Ratification Proclamation No. 544/2007. Under Article 3 of this Proclamation the Federal Ethics and Anti-Corruption Commission is empowered to undertake all acts necessary for the implementation of this Convention.

[18] The CCP (n.13) Article 2/4/.

[19] Helping Countries Combat Corruption: The Role of the World Bank Available at <http://www1.worldbank.org/publicsector/anticorrupt/> last accessed date on 11 Feb.2020

It also defines as "the abuse of entrusted power for personal gain."[20] Here, what one can learn from these definitions is that to be a "public official" is ground common for the act of corruption. According to AUCPCC Article 1 Paragraph 9 of the Africa Union Convention on Preventing and Combating Corruption and Article 2 UNCAC United Nations Convention against Corruption to which Ethiopia is a party, the meaning of public official is any official or employee of the State or its agencies including those who have been selected, appointed (elected) to perform activities or who performs a public function or provides a public service in the name of the State or the service of the State at any level of its hierarchy. Accordingly, based on a common understanding from such Conventions, to establish a Corruption Crime against an individual it requires an offender to be in public administrative power and he/she abuses her/his power for private gain.

Contrary to the definitions stipulated in the two Conventions, however, the Ethiopian Corruption Crimes Proclamation has brought a new concept of Corruption by stretching its meaning even go beyond to the extent to include an individual who serves in the private sector despite the fact that she/he does not have public administrative power.

As it can be read from the rationales of the Corruption Crimes Proclamation, the reasons for the need to regulate corruption in the private sector are two. The first justification is similarity of the Corruption Crimes with in the public and private sector. In this regard, except the 'FEACC Second Corruption Perception Survey (2001)' in the public sector, the government of Ethiopia did not conduct a background study to assess the status of corruption crime in the private sector. Nevertheless, the law-maker without having any tangible data incorporated the private sector based on the above justification.

Due to the influence of Continental Criminal Law system in our Criminal Code,[21] it was important to consider the positive and negative requirement of the continental criminal law before criminalizing the conduct of an individual. As such, the positive requirement is that the law is intended to protect 'the legal good which include interests that are essential for the social existence of the individual. The negative requirement on the other hand, intends criminal law as last resort

[20] What is corruption? Available at <https://www.transparency.org/what-is-corruption/> last accessed date on 10 Aug. 2019

[21] Simeneh Kiros 'Over-criminalization: A Review of Special Penal Legislation and Administrative Penal Provisions in Ethiopia' 49-50.

(*ultima* ratio).[22] Although, a criminal law legislation process should be based on principles that justify the need to protect some socially important legal goods by criminal law, the Corruption Crimes Proclamation in Ethiopia has come to the picture without such procedural due process of law.

The second rationale of the law-maker states that 'since Ethiopia is a party to the AUCPCC and UNCAC, the country is obliged to regulate the acts of bribery, embezzlement and other similar acts in the private sectors must be treated as corruption crimes'. The question of the researcher is that as the conventions clearly imposed such obligations on states to apply and if they do so, how could make them consistent with the principle of criminal law, the FDRE Constitution and the international bill of rights must be examined and the validity of the justification should be weighted. Moreover, as both regulated and non-regulated private entities operate in Ethiopia, the scope of application of the Corruption Crimes Proclamation in the private sector will also, be critically assessed.

## 1.2. General Objective of the Study

The general the objective of this research is to examine the purpose and the scope of application of the corruption crime Proclamation in the private sector and to assess the justification behind regulating such a crime in private sector.

### 1.2.1 Specific Objective

- To identify the scope of application of the Corruption Crimes Proclamation.
- To assess the law-making process of the Corruption Crimes Proclamation in relation to the incorporation of the private sector.
- To examine the government is justification to regulate the private sector to be administered by the Corruption Crimes Proclamation.

## 1.3. Research Questions

- Which kinds of private sector are regulated by the Corruption Crimes Proclamation or which are not?

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[22] 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] Vol. 11 University of California Press, an International and Interdisciplinary Journal 409, 412.

- What are the processes to criminalize the private sector under the Corruption Crimes Proclamation?
- What is the major rationale of the legislature to incorporate the private sector under the Corruption Crimes Proclamation regulation?

## 1.4 Methodology of the Research

### 1.4.1. Research Design

The research employs a hybrid research method to show the purpose of the law, particularly in the private sector and the extent of the scope of application of the law under consideration. To this end, the research uses both primary and secondary data. Accordingly, the FDRE Constitution, the international bill of human rights, the crime of corruption Proclamation No_881/2015, and the Cri.C are to be considered as primary sources. To enhance validity of the research finding, the researcher will conduct an in-depth interview as a primary source. On top of this, other secondary sources such as minutes of the Corruption Crimes Proclamation, journal articles, and related documents will be used as an input.

### 1.4.2. Method of Data Collection

Beyond the relevant laws and legal texts, the researcher shall use an in-depth and semi-structured interview with stakeholders to this accomplishment. The researcher shall select participants purposefully. Accordingly, legal scholars, judges, practitioners, public prosecutors and policy makers will be included. Apart from this, extensive desk review will be conducted.

### 1.4.3. Modes of interpretation and analysis

The finding of this research are presented and analysed and discussed. In this regard, the analysis that is going to be presented would be based on the view points in the collected data from the study subjects and some others secondary sources.

## 1.5. Significance of the Study

Although this research will be conducted for academic purpose, it would add more:

- For the development of our legal literature in the area.
- To policy makers by showing them the gaps existing in the area.
- To those scholars who are interested to conduct comprehensive research in this issue.

### 1.6. The Scope of the Study

To examine the legal-rational that enables to apply the proclamation up on the Crime of corruption committed in the private sector on the one hand and to uncover legal loopholes that hinder its scope of application.

### 1.7. Ethical Considerations

Since data collection requires the consent of individuals or authorities', prior permission of the participants for the study is to be secured. In interpretation of the data, the researcher shall try to provide an accurate and unbiased account of information and refrain from using language or words that could offend people for different reasons.

### 1.8. Limitations of the Study

This research is challenged by a number of constraints. To mention but a few of them were non-cooperation from some responsible government organs and individuals, lack of the relevant literature, time and data collection constraints because of Corona Pandemic. The University and other libraries have been already closed and different key informants were not willing to conduct an interview. These would have an impact on the quality of this research.

### 1.9. Organization of the Study

This study structured into four chapters. The first deals with introduction and background. The second chapter reviews standard of criminalization. The third chapter identifies and determines the scope and application of the proclamation. In the fourth chapter, the law-making process of the proclamation to incorporate the private sector shall be investigated. In the fifth chapter, the different criminal law, international bill of rights, and constitutional principles are examined in detail in light of the private sector incorporation into the Corruption Crimes Proclamation. The final chapter includes conclusion and recommendations based on findings of the study.

# Chapter Two; Standard of Criminalization

## 2. Conceptualization of Crime, Criminal Law and Corruption

### 2.1. Crime, Criminal Law and Rules of Criminalization

#### 2.1.1 Crime

Smith and Hogan define the term crime as ‘an act or omission or a state of affairs that contravenes the law and which may be followed by the prosecution in criminal proceedings with the attendant consequence which could be followed by conviction and punishment’.[23] *Dejene* also defines “Crimes are public wrongs or the violation of the rights and duties to the public”.[24]

In short, the public nature of crime is clear because it consists of wrong doing which directly and seriously threatens the security or well-being of society, and because it is not safe to leave it redressable only by compensation of the party injured.[25]

#### 2.1.2. Criminal Law

In human history, the first civilization “did not create a distinction between civil law and criminal law”.[26] ‘It was after the revival of Roman law in the 12th-century classifications and jurisprudence provided the foundations of the distinction between criminal and civil law in European law from then until the present time.’[27]

Legal commentator Henry M. Hart Jr. Asked, “What do we mean by ‘crime’ and ‘criminal’?”[28] In answering his own question, Hart declared that criminal law, ‘like all law, is concerned with the

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[23] Smith & Hogan, *Criminal Law* (10th ed. 2002) 15.

[24] Dejene Girma Janka, *A handbook on the Criminal Code of Ethiopia* (2013) 4.

[25] Ibid.

[26] Law, Criminal Procedure," Dictionary of the middle Ages: Supplement 1, New York: Charles Scribner's Sons-Thompson-Gale, 2004: available at <http://legalhistorysources.com/Law508/CriminalProcedure.html,> pp. 309-20. As cited in Tekleweld Tilahun, Determination of Criminal Punishment under Federal Legislations in Ethiopia (2018, Unpublished, AAU Law Library) p. 9.

[27] Ibid.

[28] Henry M Hart, T*he Aims of the Criminal Law* (1958) 402.

pursuit of human purposes through the forms and modes of social organization.'[29] Therefore, criminal law is not so much a thing as a "method or process of doing something."[30]

### 2.1.3. Common Law Theory of Crime and Punishment

According to Jerom Hall, the purpose of criminal law is that, 'it represents the major social effort to eliminate serious conflict, and to do so not arbitrary, but in accordance with methods and direct towards ends that we are pleased to call 'rational'.'[31] 'The term 'rational' is used to show that criminal law controls harm against individuals and society which may be caused by offenders who pursue their inner drives of passion rather than restraint, self-control, and reason'.[32] Criminal law is "a tool of social control representing the agglomeration of powers, procedures, and sanctions".[33] From the point of view of social control and social morality, Michael stated that 'The purpose of criminal law is 'to preserve public order and decency, to protect the citizen from what is offensive or injurious and to provide sufficient safeguards against exploitation or corruption of others...........'[34]

Although criminal law has many objectives and goals, the often-cited purposes are 'the protection of persons and property, the deterrence of criminal behaviour, the punishment of criminal activity (retribution), and rehabilitation of the criminal'.[35] The purposes of criminal law 'should aim at attaining the government's objective, but it is only when the law in question is necessary to achieve a compelling government purpose'.[36]

This principle states that 'individuals should be given advance warning about conducts amounting to crimes, the penalties attached thereto, and the absence of defence based on ignorance of the law'.[37]

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[29] Ibid [403].

[30] Ibid.

[31] Jerom Hall, 'PROLEGOMENA TO A SCIENCE OF CRIMINAL LAW' (1941) Vol. 89 No. 5 University of Pennsylvania Law Review 550.

[32] Elias N. Stebek, Principle of Ethiopian Criminal Law, (2013), St. Mary's University College Faculty of Law, p.6.

[33] Michael Allen, *Textbook on Criminal Law* (8th edn, oxford university press 2005) 2.

[34] Ibid.

[35] Hart (n 28) 406. He argues that 'A constitutional guarantee to accomplish this could be readily drafted: No person shall be subjected to condemnation or punishment for violation of law, but only to curative rehabilitative treatment'.

[36] R A Duff, 'Towards a Theory of Criminal Law? In 84 Proceedings of the Aristotelian Society' [2010] 9.

[37] R La Fave Wayne and W Scott Austin, *Criminal Law: Handbook*, (west publishing Co, ST. Paul, Minn 1972) 5.

Thus, if the due notice principle is noticed by everyone, the peace, order, and security of the state and its inhabitants will be achieved thereby resulting in the promotion of public good.

Punishment is one of the purposes of "sentencing and may additionally serve instrumental functions, primarily the reduction of crime".[38] Punishment has been understood to serve four goals: deterrence, incapacitation, rehabilitation and retribution.

**2.1.3.1. Theory of Deterrence:** - the deterrence rationale goes back to "……at least around 2400 years ago".[39] Establishing what can be called the "classical" theory of deterrence, Plato wrote:

> No one punishes the evil-doer under the notion, or for the reason, that he has done wrong, – only the unreasonable fury of a beast acts in that manner. But he who desires to inflict rational punishment does not retaliate for a past wrong which cannot be undone; he has regard to the future, and is desirous that the man who is punished, and he who sees him punished, may be deterred from doing wrong again. He punishes for the sake of prevention.[40]

Moreover, Beccaria *et al* argues that:

> [I]t is evident that the purpose of punishment is neither to torment and afflict a sentient being, nor to undo a crime already committed……...The purpose of punishment….... is none other than to prevent the criminal from doing fresh harm to fellow citizens and to deter others from doing the same..[41]

**2.1.3.2. Theory of Incapacitation:** - the major objective of punishment according to this theory is 'protecting the public by constraining the criminal and sending him/her to prison or even execute death penalty so as to enable the public and get relief from possible future danger'.[42] Accordingly, the focus of such a theory is more of protecting the community instead of retribution.

**2.1.3.3. Theory of Rehabilitation:** - the justification of this theory is 'protecting well-being of members of the society by preventing the ex-criminals or criminal not to relapse into a previous

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[38] Esther van Ginneken, 'The pain and purpose of punishment: A subjective perspective' Howard League what is Justice? Working Papers 2016 <www.howardleague.org/> last accessed date on Dec. 12 2019.

[39] Giancarlo De Vero, Prevenzione Generalee Condanna dell'Innocente (990 RIV. IT. DIR. PROC. PEN. 1003 –04, 2005). As cited Mike C. Materni, 'Criminal Punishment and the Pursuit of Justice' (2013) 2 Br. J. Am. Leg. Studies 289.

[40] Ibid PLATO, PROTAGORAS 43 (Benjamin Jowett trans, Serenity Publishers, 2009). AS cited in Cited above at note 54.

[41] R Geus, and Q. Skinner, 'On Crimes and Punishments and Other Writings' [2012] Cambridge University Press 31.

[42] J A Inciardi, *Criminal Justice* (7th Edn, 1984) 425.

condition after a registered improvements instrumentality of educational, vocational and therapeutic treatments, the personal rehabilitation of those offenders should be achieved'.[43]

2.1.3.2. Theory of Retribution: - is an ancient one. Proponents of retributive justice argued that 'criminals must experience severe punishment for their criminal act with the aim of suffering the criminals to the extent of suffering the injured due to the danger acts of the offender'.[44] However, "the equivalence between the crime and its punishment is criticized for its unfeasibility".[45]

### 2.1.5. Rules of Criminalization in Continental Legal Systems

Criminalisation is understood to mean "the normative declaration of a conduct criminal by the lawmaker".[46] Such a decision is made 'based on choices and justifications the state makes, not based on the inherent qualities of such conduct'.[47] Indeed, one may argue that criminalization is typical form of institutionalized intolerance.

In continental criminal law, there are "positive and negative justifications for criminalisation".

> [T]he positive requirement is that the law is intended to protect 'legal good'. Such legal good covers interests that are essential for the social existence of the individual. The negative requirement is *ultima* ratio. Further, when the criminal law is used, the means-end proportionality is required to be maintained.[48]

In a broad classification of the legal systems, 'the continental legal system is characterized to hold the purpose of preventing the exclusive legal good in its criminal law; only the legal good that deserve protection is included the Criminal Law'.[49]

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[43] Dejene G. J. "The Relevance of Hobbesian Principles of Punishment in Today 's World in Light of the Ethiopian Criminal System," Jima University Journal of Law No.1(2012), p. 129

[44] T D Miethe and H Lu, Punishment: 'A Comparative Historical Perspective' [2005] Cambridge University Press New York 15, 16.

[45] Ibid

[46] Simeneh and Cherinet (n 21) 49, 56.

[47] N PERSAK, 'CRIMINALISING HARMFUL CONDUCT: THE HARM PRINCIPLE, ITS LIMITS AND CONTINENTAL COUNTERPARTS' [Springer 2007]. Simeneh and Cherinet (n 21) 49, 56.

[48] Simeneh and Cherinet (n 21) 49, 49.

[49] Geus, and Skinner (n 41) 11.

The concept of legal good serves several crucial functions, "most fundamentally it defines the very scope of criminal law".[50] By common consensus, in continental legal systems 'the function of criminal law is the "protection of legal goods," and nothing else'. In light of these considerations, one cannot expect that 'the formalistic conception of legal goods will impose meaningful limits on the state's power to criminalize conduct'.[51] Anything that does not qualify as a legal good falls outside the scope of criminal law, and may not be criminalized. 'The substantive approach to legal goods cannot adequately limit state power unless it is accompanied by a substantive concept of what types of legal goods deserve the protection of the criminal law'.[52] Thus, as per *Puig*, interference of the criminal law protection should come to

> ……Only those goods that are necessary for the proper functioning of our social system should be considered worthy of juridical tutelage. It is also adequate to postulate that legal goods should not only be of abstract societal importance, but of value for concrete individuals as well.[53]

Hans-Heinrich *et al*, in their bestseller "Textbook of Criminal Law", indicated that[54]"

> Criminal law has the objective of protecting legal goods," and then goes on to explain that legal goods, or "elementary life goods," come into vary, among "elementary life goods" that "are indispensable for the coexistence of humans in the community and therefore, must be protected by the coercive power of the state through public punishment.[55]

*Puig* argues in line with Hans's point and he says 'In order for a legal good to be considered worthy of protection by the criminal law, two conditions should be satisfied: The good must be of essential

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[50] Markus Dirk Dubber, 'Theories of Crime and Punishment in German Criminal Law'(2005) Vol. 53 The American Journal of Comparative Law 679,683

[51] Ibid [409, 411].

[52] Puig, (n 22) 4'09,412.

[53] Ibid. Moreover, Puig argues that 'not every interest or good that fits within this general description (i.e. is both socially important and of value for individuals) should be elevated to the category of a good that is in need of protection by the criminal law'.

[54] HANS-HEINRICH JESCHECK & THOMAS WEIGEND, 'LEHRBUCH DES STRAFRECHTS ALLGEMEINER TEIL' (5th ed. 1996) 7. Cited in Dubber (n 49) 679,684.

[55] Dubber (n 49) 679,684.

social importance and the adequate protection of the good requires the intervention of the criminal law'.[56]

### 2.1.6. State Power on Criminal Law

In any modern state, it is clear that the government has power to determine activities which are deemed to be criminal or de-criminalize at any given point of time, prevention of crime, investigation and conviction by court decision. To this effect, law making process should not be exercised in arbitrary manner. In order to respect and to ensure the constitutionality of the laws, the Legislator shall enact some binding criteria.[57]

The members of Parliament purposely should be focused on the rule of law, when applied to criminal law, has led to the "principle of legality."[58] This doctrine of criminal law deems that 'conduct is not criminal unless forbidden by law which gives advance warning that such conduct is criminal'.[59]

In principle the HPR which is the legislature in the Ethiopian context, is vested to make the law.[60] In continental legal system the lawmaker 'has a power to make law in general and make criminal law in particular'.[61] Based on this point of view the legislator's law-making process is governed by the law making procedural law. For instance, in Ethiopia, according to Article 59/2/ of the FDRE Constitution several rules and procedures regarding the organization of the legislator duties and of its legislative process will be enacted.[62]

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[56] Puig (n 22) 409,413.

[57] For instance, in Ethiopia 'The House of Peoples' Representatives Rules of Procedure and Members' Code of Conduct Regulation No_ 6/2015. The Council of Minsters Working Directive 1996 EC ('CM Directive', in Amharic) governing policy and bill initiation and adoption procedure in the Council of Ministers, and Legislative Drafting Manual 2010 EC (in Amharic)' is the major guidelines for law-making process.

[58] Principle of legality in criminal law is one of the most fundamental principle. Accordingly, only the law can define a crime and prescribe appropriate penalty.

[59] State v. Robbins, 986 So. 2d 828, 835 (2008).

[60] In our case according to the FDRE Constitution Article 55(5) the Federal Government, (HPR) shall enact the criminal law. And the State may however, enact criminal laws on matters that are not specifically covered by Federal criminal legislation.

[61] *Simeneh* & *Cherinet* (n 21) 49, 50.

[62] The specific article says "The house shall adopt rules and procedures regarding the organization of its work and of its legislative process."

In criminal law making process the law maker must be conscious and gathered different and tangible data about the legal good that presented for discussion in the parliament to give criminal law protection. This is because unlike civil cases, the consequence of criminal law will be served to limit the human rights and property[63]rights of individuals.

The concept of legal good and the principle of legality are now indispensable criminal law doctrines 'limiting the power of the State both in criminalising conducts and arbitrariness in the administration of the criminal law'.[64]

Generally, the State power in criminal law-making process must be passed through reasonable law-making procedure and should be performed with regard to the constitutional principles and in line with the international bill of rights principles. And often the State criminal law legislative power is governed by Constitutional, Regional and International Human Rights Principles.[65] In the pages to come, effort will be exerted to explain those fundamental principles in short.

### 2.1.7. Limitations on Criminal Legislative Power

In principle right and privileges are not absolute by their very nature. '…..They are limited or restricted by the same provisions that guarantee them or by a general provision that applies to all rights in a particular constitution'.[66]Limitations or restrictions are 'exceptions to the general rule that fundamental rights and freedoms should be protected'.[67] 'A written Constitution may restrict the competence of the legislation but by excluding altogether certain matters from the scope of its legislative competence, thus imposing limitations of substance'.[68] The mere existence of a

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[63] It is clear that the indivisibility of human rights in context to civil and political rights Vs. Economic, Social and Cultural rights. The partition is just only to give clarity for reader.

[64] T VORMBAUM AND M BOHLANDER EDS, 'A MODERN HISTORY OF GERMAN CRIMINAL LAW' [Springer 2014] as cited Simeneh & Cherinet (n 21) 49-55.

[65] Article 17 of the FDRE Constitution, Article 4 &6 of the AFRICAN (BANJUL) CHARTER ON HUMAN AND PEOPLES' RIGHTS (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986) and ICCPR Article 9.

[66] Abdi Jibril Ali Assistant Professor "distinction Limitation on Constitutional Rights from their suspension: A Comment on the CUD Case' Haramaya Law Review Vol.1, No.2, (2013) at 1:5.

[67] NIHAL JAYAWICKRAMA, 'THE JUDICIAL APPLKICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE' (2002) 184 Abdi, ibid.

[68] HLA Hart, The *Concept of Law* (Oxford University Press 1961) 67.

limitation clause does not justify the limitation on human rights. The ACHPR African Charter on Human and Peoples Rights) stipulated that the limitation on limitation principles. Abdi argues that;

> ACHPR laid down some of the requirements when it held that "the reason for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.[69]

Moreover, the Principle of *Siracusa*[70] and the ICCPR provide that limitation over limitation, i.e. principle of legality (prescribed by law), principle of legitimate aim (legitimate State interest), necessity to legitimate state interest and finally principle of proportionality.[71]

Principle of "prescribed by law" as per the principle of legality any restriction or limitation to human rights should be provided in domestic law in advance.[72] Therefore, the principle of legality is 'fulfilled only in such a case where it is provided by the law. Furthermore, the limitation should not be "arbitrary or unreasonable"[73] and the law which is in place is clear and accessible to everyone'.[74]

Principle of legitimate aim; based on this principle limitations or restrictions are not legitimate and acceptable when they are only provided by the law. And 'only when such limitations or restrictions are meant to serve a legitimate aim of the state'. 'Protection of national security, public safety, economic wellbeing of a country, public health, public moral, and rights of freedoms of others, and prevention of crime and disorder are some examples of legitimate aim or legitimate State interest'.[75]

As to the principle of necessity to protect legitimate State interest, the same author said that necessity implies the existence of a 'pressing social need', or a 'high degree of justification', for

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69 'Media Rights Agenda and Others v Nigeria' (2000) AHRALR 200 (ACHPR 1998), para 69 Abdi, (n 83)1, 6.

70 UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, 28 Sep 1984, E/CN.4/1985/4, (1984) Available at:<https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-.> last accessed date on 17 Nov. 2019

71 Id. I, A. General Interpretative Principles Relating to the Justification of Limitations.

72 ibid [15].

73 ibid [16].

74 Ibid [17].

75 Abdi, (n 66) 1, 6ff.

the interference in question'.[76] The author figuratively expresses that laws restricting rights are 'necessary only when there is no other alternative that preserve legitimate State interest without interfering in the enjoyment of fundamental rights and freedoms'[77] Abdi notes that 'where all available alternatives interfere with the enjoyment of the right in question, a State must choose an alternative that less restrict such rights'.[78] And he conclude the argument in the following valid and sound assertion '……if a compelling governmental objective can be achieved in a number of ways, that which least restricts the right protected must be selected'.[79]

In a criminal case, this principle of necessity has direct relationship to the principle of last resort (*ultima* ratio), the government should not have the power to criminalize the acts of the individual "unless otherwise other optional protection mechanism failed to prevent the pressing social need".[80]

The other principle is the principle of proportionality which in turn requires 'that a balance be struck between the requirements of the interests sought to be protected and the essential elements of the recognized right'.[81]

Any assessment as to the necessity of a limitation shall be made on objective considerations. According to Article 13/2/ of the FDRE Constitution, the provisions of the human rights shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Right, International Covenants on Human Rights and international instruments adopted by Ethiopia. Therefore, in Ethiopia, those *Siracusa* principle should be applied in all laws which have impediment in the common enjoyment of the individual human rights.

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[76] JAYAWICKRAMA (n 67) cited in Abdi (n 66) 1, 7.

[77] Abdi, (n 66) 1, 6.

[78] Ibid 1, 7.

[79] See e.g., ICCPR, Arts. 12(3), 18(3), 19(3), 21 & 22(2); FDRE Constitution, Art.27 (5).

[80] Jannemieke W. Ouwerkerk, 'CRIMINALISATION AS A LAST RESORT: A NATIONAL PRINCIPLE UNDER THE PRESSURE OF EUROPEANISATION?' (2012) Vol. 3, Issue 3-4 New Journal of European Criminal Law 228.

[81] Siracusa, (n 70).

## 2.2. Concept and Definition of Corruption

### 2.2.1. Definition of Corruption

Corruption is found in all societies, in both developed and developing countries although there is no globally accepted single definition of corruption.[82] It is difficult to define it 'in a succinct and consistent manner because it may not always mean the same to all groups and societies at all times'.[83] Wallis argues in his book[84]'corruption is not a new phenomenon, taking its roots in antique history'. 'First, documents on the existence and recognition of corruption date back to Greek philosophers such as Socrates, Plato, Polybius, and Aristotle'. Additionally,

> ...…. Archives recovered from the administrative centre of Middle Kingdom Assyria (c 1,400 B C) refer to civil servants taking bribes, with senior officials and a close relative of the head of state implicated. There are also references to bribery in the Old Testament Scriptures…..... Corruption must be exposed for what it is, a form of organized crime and a serious abuse of human rights.[85]

According to transparency international,[86] the word corruption means "the abuse of entrusted power for personal gain." The main forms of corruption are bribery, embezzlement, fraud and extortion."[87] The FEACC Second Corruption Perception Survey describes the ways of corruption when it stated that 'corruption occurs when public officials or employees misuse the trust placed

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[82] Ethiopian Corruption Perception Survey, (2013) p. 7.

[83] Eugen Dimant & Thorben Schulte, 'The Nature of Corruption: An Interdisciplinary Perspective' (2016) Vol. 17 German Law Journal 54, 57. As cited ibid.

[84] John Joseph Wallis, 'The Concept of Systematic Corruption in American History, in CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY,' [2006] available <https://www.nber.org/chapters/c9977.pdf> last accessed date on 10 Aug. 2019.

[85] Bryan R. Evans, 'the Cost of Corruption: A Discussion Paper on Corruption, Development and the Poor 20–21 Tear fund,'(Discussion Paper,1999)
available at <https://learn.tearfund.org/~/media/files/tilz/research/the_cost_of_corruption.pdf> last accessed date on 11 Aug. 2019

[86] Transparency International ('TI') is a non-governmental organization committed to reducing corruption in politics, public contracting, private sector, international aid and economic development across the world. <https://www.transparency.org/about/> last accessed date on 10 Aug. 2019

[87] Definition of Corruption Available at <https://www.transparency.org/what-is-corruption/> last accessed date on 10 Aug. 2019

in them as public servants for either monetary or non-monetary gain that accrues to them, their friends and relatives or for their personal or political interests'.[88]

Moreover, the World Bank also define the term as:

> Corruption is the abuse of public office for private gain when an official accepts, solicits, or extorts a bribe. It is also abused when private agents actively offer bribes to circumvent public policies and processes for competitive advantage and profit. Public office can also be abused for personal benefit even if no bribery occurs, through patronage and nepotism, the theft of state assets, or the diversion of state revenues. [89]

Corruption can take different forms and is not only receiving money as bribe.[90]There is no disagreement that 'corruption and impunity are antithetical to the enjoyment of economic, social and cultural rights and the enemy of the principle of good governance'.[91]

### 2.2.2. Nature of Corruption

Transparency International classifies the acts of corruption into three: grand corruption, political corruption and petty corruption.[92] In the following section, will briefly touch upon each type of corruption very shortly.

#### 2.2.2.1. Grand Corruption

It consists of acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good.[93] Grand corruption can extend to the extent of state capture that occurs when economic elites develop relationships with political officials and they exert undue influence over them and over public policy for their own personal gain.[94]

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[88] Survey (n 82) V.

[89] 'Helping Countries Combat Corruption: The Role of the World Bank' Available at <http://www1.worldbank.org/publicsector/anticorrupt/> last accessed date on 11 Feb.2020

[90]<http://www.corruptionwatch.org.za/the-rationale-for-fighting-corruption/> last accessed date on 11 Feb.2017

[91] *Kolawole Olaniyan*, 'Introductory Note to African Union (AU): Convention on Preventing and Combating Corruption' [2004] I.L.M. 3 As cited in Thomas R. Snider & Won *Kidane* 'Combating Corruption through International Law in Africa: A Comparative Analysis.' (2007) Vol.40 Article 4 issue 3 Cornell international Law Journal 692, 693.

[92] Transparency, (n 20).

[93] Ibid

[94] Survey (n 82) 8.

#### 2.2.2.2. Political Corruption

It is a manipulation of policies, institutions and rules of procedure in the distribution of capitals and financing by political decision makers, who exploit their position to endure their power, status and wealth.[95]

#### 2.2.2.3. Petty C*orruption: (Bureaucratic corruption)*

It refers to everyday abuse of entrusted power by low- and mid-level public officials in their interactions with ordinary citizens who often are trying to access basic goods or services in places like hospitals, schools, police departments, and other gov't agencies.[96]

### 2.3. Public Service and Corruption

The verbal meaning of the public sector is related to public administration power and duty. The three organs of government and other governmental institutions which are responsible for those the three branches are deemed to as a public sector.

Transparency international also defines the public sector as;

> The government and its decentralised units – including the police, military, public roads and transit authorities, primary schools and healthcare system – that use public funds and provide services based on the motivation to improve citizens' lives rather than to make a profit.[97]

From these definitions, a picture of corruption in the public sector begins to emerge as any kind of abuse of entrusted power for private gain that takes place within the government or government body's counts. Corruption symbolises "any conduct or behaviour in relation to persons entrusted with responsibilities in public office which violates their duties as public officials and which is aimed at obtaining undue gratification of any kind for themselves or for others.[98]

It is true that Public Sectors are often funded by taxpayers, then all members of the general public may have an interest in how the public sector organization operates. Therefore, the public sector

[95] Transparency, (n 20).

[96] Ibid

[97] Ibid

[98] Shikha Vyas-Doorgapersad, 'CORRUPTION IN THE PUBLIC SECTOR: A COMPARATIVE ANALYSIS' (2007) Vol.42 no 5. Journal of Public Administration 285.

is governed by structured checks and balances and kept in check by different public interest groups.[99]

As Stated in the above all definitions of corruption and the three major types of corruption are connected with public officials and directly to public service. The quality of infrastructure such as power supply, transportation facilities, telecommunications, water and etc., can play an important role in the pervasiveness and costliness of corruption.[100] According to the OECD's findings, the very nature of corruption has especial relationship to the public administrative power.[101] That is the reason almost all public sector organizations are governed by special regulations that ensure equal opportunities for everyone.

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[99] Available at <https://www.reference.com/business-finance/public-sector-organization last accessed date on 12 Feb. 2020

[100] Ana Maria Herrera and Peter Rodriguez, 'Bribery and the nature of corruption' [2007] University of Virginia 9.

[101] see <http://www.oecd.org/general/> last accessed date on 12 Feb. 2020

# Chapter Three

## 3. The Scope and Application of Corruption Crimes Proclamation in the Private Sector

### 3.1. Private Sector: Under the Corruption Crimes Proclamation

As stated in the previous chapter the crime of corruption more related with the public sector activities and administrative power. However, according to the corruption crime proclamation, the concept of corruption is broadened to include the private sector in disregard of the international definition and concept of corruption. According to the definition in the proclamation, all employees of juridical persons are responsible for corruption crimes that may be committed within their organizations. However, the proclamation purposefully selects one some types of private sectors and calls them "the private sector as a public organization" and excludes others without justifying.[102]

Before looking into a public organization which is subject to be governed by the proclamation, it is better to assess how the regional and international institutions define the term private sector. Though the UNCAC fails to define the private sector, the AUCPCC defines and explained the term Private Sector in the following detailed manner. Accordingly, the private sector is defined as:

> "The sector of a national economy under private ownership in which the allocation of productive resources is controlled by market force[103] rather than public authorities and other sectors of the economy not under public sector or government".[104]

The Ethiopian Corruption Crimes Proclamation however, calls those private Sectors "Public Organizations", and then the Proclamation defines Public Organization as follows:

> "Public organization is any organ in the private sector which in whatever way administers money, property or any other resource collected from members or from the public or any

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[102] Hereinafter the terms, Private Sector and Public Organization will be used interchangeably.

[103] Market force mean the way that the behavior of buyers and sellers affects the levels of prices and wages, without any influence from the government. Market forces in Economics topic.
available at <https://www.ldoceonline.com/Economics-topic/market-forces> last accessed date on a2 Feb 2020

[104] AUCPCC (n 14) Article 1, paragraph 7.

money collected for the benefit of the public which includes appropriate company but does not include religious organization, political party, international organization and *Edir, Ekub* or other similar traditional or religious associations"[105]

From the close reading of the proclamation, one can infer that firms should have to fulfil two cumulative requirements to be recognized as public organizations. The two cumulative elements are the requirement to collect contribution from members or from public at large and the requirement to administer the collected money (income).[106]

In related to a company's resource collection, resource may be collected for two reasons first, a company has been already collecting money form start-ups or old members. Second, established companies engaged in restructuring programs require new capital injection from the public at large.[107] Since they are established via public subscription or contribution,[108] the definition of public organisation in principle includes, companies limited by share,[109] appropriate companies,[110] and charities.[111]

Under the categories of companies which are established by share subscription by the public at large, for example, banks, insurance companies, micro finance institutions and other companies that may be established by share subscription or those that collect money by way of share subscription from the public at large for the purpose to expand the existing company capital (if it was share company between founders from the beginning) may be included under public organization.[112]

Share companies established by founders (not by share subscription) but which are collect money from the public in the way of deposit or saving, insurance premium, and are also administering

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[105] The CCP (n 13) Article 2(4)

[106] Ibid

[107] Ibid Article 2(6) see also Tikikile Kumulachew, "Regulation of Initial Public Offering of Shares in Ethiopia: Critics Issues and Challenges," Ethiopian business law Series School of Law, AAU, Vol. IV August (2011), at 3.

[108] Commercial Code 1960, article 317, Share Companies established by public funds.

[109] Ibid Article 304.

[110] የስነምግባርና ፀረ-ሙስና ኮሚሽን, የሙስና ወንጀሎችን እንደገና ለመደንገግ የወጣ ረቂቅ አዋጅ አጭር ማብራርያ, (2005), unpublished, ፌ/ስ/ፀ/ሙ/ ኮሚሽን ቤተ-መፅሀፍ) at 4. See also the CCP (n 13) article 2(6) (herein after the initial)

[111] The CCP (n 13) article 2(8).

[112] Ibid

this collected money e.g.,[113] insurance company, micro finance, domestic money transaction, unions, cooperative societies, development associations, endowments, NGO's and etc. are considered to as a public organization.

The phrase 'appropriate company' is defines as "any private limited company which is established through the contribution of shares by public organizations and includes joint venture established by such in association with others".[114] However; the law does not clearly stipulated that the PLC (Private Limited Company)[115] and companies by founders are taken to be public organization or not. As the private limited company do not sell share to the public at large, the definition of public organization does not incorporate the private limited company.[116] Nevertheless, by virtue of Article 2(6) of the proclamation, joint ventures that are established by public organizations in association with others included in the definition of public organization i.e. whole the private limited companies are established by share companies, those that are already regulated by the proclamation may be regulated as public organization.[117]

Based on this assertion, unless companies among founders subscribe share to expand the capital of the company and only established according to the commercial code [118] they are not covered by the definition of the proclamation.

Other public organizations that may collect resources from their members as membership fees, charities, and endowments also may collect resources from the public for public assistance, and resources may be collected in the way of saving, insurance premium, and telethon, etc.[119]

As Stipulated by the proclamation, a charity is an institution, which is legally registered and established exclusively for charitable purposes and gives benefit to the public.[120] According to this

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[113] Banking Business Proclamation No_592/2008, article 2(5) and 4(1-d)

[114] The CCP article 2(6)

[115] A private limited company is a company whose members are liable only to the extent of their contributions. See also Commercial Code (n 108) article 510(1) ff.

[116] The CCP (n 13) see also the initial (n 110).

[117] The initial (n 110)

[118] "Formation as between founders" Commercial Code (n 108) art 316

[119] The initial (n 110)

[120] The CCP (n 13) article 2(8)

the definition, charities are qualified as a public organizations,[121] due to their aim, resources of the charity has been collected in the name of the public, for the benefit of the public and they administered this money, therefore, charities are considered as a public organization and they are subject to the proclamation.[122]

Among the resource collectors for the benefit of public endowments, they are under the regulation of the proclamation. *Tigray* Development Association, *Amhara* Development Association, or *Oromia* Development Association, and NGO's (e.g. Macedonia rehabilitation centre and elderly association and Mary-joy International) also could be an example of charities.

Based on the this, the writer will try to explain the scope of application of the proclamation and how other organizations are excluded from the ambit of the proclamation and the possible justifications to exclusion will be also analysed.

## 3.2. Regulation of the Private Sector under the Corruption Crimes Proclamation

### 3.2.1. General Inclusion

In principle, all public organizations which collect money from their member and/or collect money from the public through share subscription are under the regulation of the proclamation.

Despite the two kinds of public-private categorization of those organizations, however, the excluded organizations will be included if they are engaged in the activity of issuing a competency license and certificate will be regulated by the proclamation.[123]

> The principle of the proclamation reads as,
>
> Any public servant or employee of a Public Organization or any other person who commits any one of the offenses characterized as corruption in Sub-Article 2 of this Article shall be subject to the punishments prescribed for such offenses shall be subject to the punishments prescribed for such offenses. [124]

Based on this provision, all public servants, all public organization employees, and any person who commits corruption crimes which are stipulated under the proclamation in the public service and the private sector will be penalized accordingly.

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[121] The CCP (n 13) article 2(4) and the initial (n 110).

[122] We can understand these points from the cumulative reading sub article 4,6,7,8 of article 2 of the proclamation.

[123] The CCP (n 13) article 20(2) see also the initial (n 110)

[124] Ibid (n 110) see also the CCP (n 13) article 4 (1).

**A) Public Servants;** all the proclamation provisions will be applicable over them.

**B) Public Organization Employees: -** as per the definition of the proclamation the employee of public organizations appointed or elected by members to work either temporarily or permanently in a public organization, any member of the board of directors or any person committee or involved in the formation of a share company or a charity is considered as an employee of a Public Organisation. Therefore, except article 9(4) and Article 14(1), 20(1) of the proclamation, all of the above are included under the definition of Public Organisation employees, and hence, the proclamation will have applicability over them.[125]

**C) Arbitrators or other Persons those that are Assigned by Court: -** as indicated under Article 12 of the same proclamation,

any conciliator, arbitrator, juror, trustee or liquidator, translator or interpreter engaged by the public authorities in their technical capacity or experts testifying before or giving his/her opinion to judicial or quasi-judicial proceedings or auditor or auditing incomes and expenditures or an engineer who verifies the construction according to the agreement, who solicits or accepts an advantage or gift from a person interested in the matter. Hence, any performance or omission of an act in violation of the duties entrusted to him are under the regulation of the proclamation.

**D) Any Individual but not the Employee of Public Servant or Public Organization Employees: -** An individual who may be neither a public servant nor employee of the public organization will be liable for the nine kinds of corruption crimes. In this regard, the issue of material forgery, suppression of official or organizational documents, giving bribe or undue advantage, giving things value without or with inadequate consideration, facilitating the act of bribery, use of pretended authority, traffic police in private influence and corrupt electoral practices, are respectively mentioned from Article 23 to 30 are included under the regulation of the proclamation.

**E) Juridical persons: -** in this proclamation, criminal liability of juridical person for crimes of corruption is prescribed. Its provision says, notwithstanding the provisions of Article 90 (3) of the Criminal Code, without prejudice to the individual responsibility of the officials or employees, a

[125] See the next Special exclusion topic.

juridical person other than administrative authorities involved in crimes of corruption shall be punishable with fine.[126]

According to Article 3,[127] Article 23(3) and Article 34 of the criminal code, a juridical person participating in such a crime, the juridical person will be liable by the proclamation and the general part of the criminal code will be applied on him/her.[128]

### 3.3.2. Special Inclusion

Any person who has the power to issue a license or a certificate is subject to the regulation of the proclamation since he/she is engaged in the ordinary acts of government although such a person is not categorized as a public servant and hardly be an employee of public organizations. For instance, those who have the power to issue a license or certificate, grants or approve a driving license, certificate of road worthiness of a vehicle, certificate of health of a person or a certificate of educational qualification, etc. are included in the application of this proclamation.[129] Therefore, educational institutions, medical boards (in hospitals), vehicle technical investigation enterprises, and other quality assurance certificate issuers are responsible as per Article 20(2) of the proclamation.

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[126] The CCP (n 13) article 5 and the initial (n 110).

[127] As per the Article the general principle of the Criminal code shall apply in Special Criminal Laws. The full ideas of the Article read as follows “Nothing in this Code shall affect regulations and special laws of a criminal nature: Provided that the general principles embodied in this Code are applicable to those regulations and laws except as otherwise expressly provided therein.”

[128] However, the penalty of juridical person in the proclamation is harsher than Article 90(3) of the criminal code. In sub-article (4) of article 90, where **only fine is provided** for in the special part of the Criminal Code, and **where the criminal is a juridical person**, the fine shall be fivefold. However, the Amharic version of Article 90 (4) of the criminal code is seems adds other kinds special laws, it reads as follows “**በዚህ ሕግ ልዩ ክፍል ወይም በሌላ ሕግ ላይ መቀጮ ብቻ በተደነገገ ጊዜና ተቀጪው የሕግ ሰውነት ያለው ድርጅት በሆነ ጊዜ መቀጮው አምስት ዕጥፍ ይሆናል።**” this mean if **the special part of the criminal code** or **if other special proclamations provided only fine** and if **the Criminal is juridical person** the fine will be fivefold.

[129] The CCP (n 13) article 20(2, article 20 (2) and the initial (n 110).

### 3.4. Exclusion of Private Sectors from Corruption Crime Proclamation

Contrary to the justification so far is given, however, the corruption crime proclamation excludes some private sectors, [130] like religious organizations, political parties, international organizations, and *edir* or other similar traditional or religious associations from the list of public organizations.

**A) Religious Organizations: -** one of the basic principles of the FDRE Constitution is that provided under Article 11 states, the non-interference of the government in the affairs of religion and *vise-versa*. Therefore, the rationale behind the exclusion of the religious organizations from the ambit of the proclamation is to prevent possible which government interference in religious organizations for the objective of fighting corruption might be considered as breaching of the constitution.[131] The source of income for the religious organizations is their respective worshipers and they pay tribute, not with the intention of getting material reward or saving. They rather do it for the sake of their belief and to fulfil one of their religious obligations. And also the income collection method is not suitable to control (they do not issue receipt) and the donors do not have proprietary interest for their contribution.[132]

Notably, a charity may be established in the religious organizations which would not be excluded from the regulation of the proclamation, since such charities have no religious purpose in on their establishment charter, therefore, they are regulated as a charity organization.[133]

**B) Political Party: -** As the same taken political parties are excluded from the application of the proclamation despite their collection of money from their members and supporters.[134]

Moreover, Article 2(4) & (10) leads the reader to reach in the conclusion that political parties are not regulated under the proclamation, because "political party means an organization registered under relevant laws of the country to promote political agenda."[135]

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[130] The CCP (n 13) article 20(2article 2(4) and the initial (n 110).

[131] The initial (n 110) 5.

[132] Ibid.

[133] The CCP (n 13) article 20(2article 2(8 &9) and the initial (n 110).

[134] The CCP (n 22) article 2(10).

[135] Ibid.

The AU Corruption Convention imposes a duty on the state parties to regulate the activities of the political parties in connection to illegal and corrupt practices to finance,[136] however, the proclamation excludes political parties from such a responsibility for their exclusion.

**C) International Organizations: -** The reason as learned from the minutes of the proclamation, the effort to combat corruption in international organizations may not be efficient, effective and may not benefit Ethiopia, and also the combating corruption in international organizations may create an impediment to the developmental state ideology of the state.[137] In short, the major reason is, to ensure the Ethiopian government's developmental effort and after making the cost-benefit analysis regarding combating corruption in the international organization, the government may have decided to exclude these organizations.[138]

**D) *Edir, Ekub* and other Similar Social settings:-** Because of their peculiar characteristics and the amount of capital, trade activities, micro, and medium enterprises, like *edir, ekub* and other that share a similar nature and religious groups are not included under the ambit of the proclamation.[139] The reason is the number of such institutions and the amount of capital is too minimal, and hence, the cost of investigation, evidence collection and court proceedings is not tantamount to the inclusion.[140] However, it should be noted that these sets do fulfil the prerequisite for being public organizations.[141]

### 3.4.1. Special Exclusion

**A) Human Resource Administration Power**

Abuse of power committed by an employee or by representatives of such public organization in connection with human resource administration, the hiring of an employee, promotion, an increment of salary, etc., shall not be considered as corruption offense unless the involvement of bribes is confirmed[142]. As per the draft document of the proclamation, the reason was that private sector owners are the source of job to their relatives, families or friends, therefore, in connection

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[136] The CCP (n 13) article 10.

[137] Ibid.

[138] ibid

[139] ibid

[140] ibid

[141] The CCP (n 13), the initial (n 110) and article 2(4)

[142] The CCP (n 13) article 9(4), the initial (n 110)5.

with human resource administration, without taking bribes, the public organization employee or manager can do any favour in relation to human resource decisions to the benefit of others.[143]

**B) Unlawful Disposal of Objects in Charge**

The English version of Article 14(1) of the same proclamation states both public servants and employees of public organization as liable to unlawful disposal of objects in charge. The Article reads as follows: - "Any public servant or employee of a Public Organization who, takes a parcel, envelope, document, valuable material or any other object whatsoever received on deposit or under seal; without lawful authority and without lawful intent to appropriate: -

I) Opens or permits to be opened, takes or permits to be taken, communicates or hands over to another; or

II) Makes use of such objects, or or authorizes another to make use of them; shall be punishable with fine not exceeding seven thousand Birr or simple imprisonment •not exceeding five years. However; the Amharic version states only "any public servants'' (ማንኛውም የመንግስት ሰራተኛ) as per the initial document (minutes) of the proclamation says

Unlawful disposal of objects in charge by public organization employees will not be punishable because, the employee of Public Organizations have no connection to such acts and those acts have no relation to the crime to obtain unlawful advantage for oneself and such acts are committed only by public servants.[144]

According to the Cri. C,[145] there is no crime and there is no punishment other than those provided for in the criminal law and there is no crime by analogy.[146] Therefore, according to the Amharic version of the proclamation and the general rule of the Cri. C, such specific Provision (Article 14(1)) of the Proclamation does not apply in relation to "unlawful disposal of objects in charge" in the public organization at all.

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[143] በኢፌድሪ 4ኛ የሕዝብ ተወካዮች ምክርቤት 5ኛ ዓመት የስራ ዘመን, (2007) ዓ.ም) <u>የፀደቁ አዋጆች፣ የሕዝብ ይፋ ውይይቶችና የውሳኔ ሃሳቦች</u> (ታህሳስ 1 ቀን 2007) ጥራዝ 1, ገፅ 000479.

[144] The initial (n 110) 6.

[145] Criminal Code (n 5 ) article 2(4)

[146] Ibid

### C) Granting or Approving license improperly

According to the initial document of the proclamation, granting or approving of a business license or work permit to an ineligible person or to a person not legally entitled to obtain such license or permit, or improper grants or permits a place where things are to be done, do not have any connection with the private sector.[147] Due to the exclusive power of public service on such kinds of works, the private sector do not have a connection to works and such then they are excluded from regulation of the proclamation.[148]

[147] The CCP (n 13) article 20(1)

[148] The initial (n 110)5.at 5

# Chapter Four

## 4. Assessment on the Law-Making Process to Criminalize the Private Sector under the Proclamation

### 4.1. Assessment of the Similarity of the Acts

The preamble of any law indicates the justification of the law-makers and pronounces the very purpose of that particular law too. As such, the preamble of the Corruption Crimes Proclamation does the same job by stipulating why the acts of crime committed by the private sector shall be categorized as corruption offenses.

As learned from the given rationales so far mentioned, the intention of the legislator to regulate the private sector and the need to incorporate the private sector crime of corruption with similar acts committed by the public servant. [149] As learned from the rationales so far mentioned, the intention of the legislator to regulate the private sector and the need to incorporate the private sector crime of corruption with similar acts committed by the public servant.[150] Hence, the firs rationales of this proclamation will be critically examined in this chapter in light of the human rights principle and the criminal law principles.

The learned scholar in the continental criminal law legal system, Santiago Mir Puig said that "For a legal good to be considered worthy of protection by the criminal law, two cumulative conditions should be satisfied. First, the Public good must be of essential social importance, and second, the adequate protection of the good requires the intervention of the criminal law."[151]

Based on the first requirement, it is clear to understand the need to conduct a fact-finding survey on the issue of failed social importance before criminalization.[152]

In this regard, the background study of given legislation needs to contain several facts and points to mention but a few are identifying the failed social interaction, the alternatives available to the

[149] The CCP (n 13) Preamble 2.

[150] Ibid

[151] Puig, (n 22) 409,418

[152] Wintgens calls this 'normative density'. LJ Wintgens 'Legisprudence as a New Theory of Legislation' (2005) 11.

legislature,[153] and whether legislative intervention is necessary.[154] Accordingly, if there was a norm that governs the social relation, then, how such norms failed, and if a criminal norm is required in conformity with the principle of *ultima* ratio, then it has to show that all alternative measures have failed to realize the intended purpose and hence articulates it's necessity. In this regard, the importance of the legal good will be determined based on gathered evidence by this pre-legislative investigation. The sky is not the limit, several rules and obligations operate to restrict the legislative powers of the legislator.[155]

According to the *Siracusa* principle, no limitation shall be applied arbitrarily. The same holds in the FDRE Constitution as stated: "no one shall be deprived of his or her liberty except on such grounds and under such procedure as are established by law."[156]

As per the first rationale of the Proclamation,[157] the government is expected to have empirical data as to how much the corruption in the private sector is consistent with those in the public. In this regard, no tangible data except the survey that is conducted in 2001 on public sector corruption,[158] however, neither FEACC nor any other concerned legal authority has made a research on the gap or the necessity of having specific law in line with the private sector corruption in Ethiopia.[159]

According to Mr *Haregot Abraha,*[160] different Whistle-blowers have submitted information to the anti-corruption Commission concerning corrupt practices in the private sector. Unfortunately, without any effort for fact-finding and empirical data, the Commission initiated the draft and

[153] The alternatives that are available to the lawmaker include non-regulation, information campaign, civil actions, and administrative regulations.

[154] DS Lutz, 'Principles of Constitutional Design' (2006) Cambridge University Press 12.

[155] Ouwerkerk (n 80) 228.

[156] Article 17(1), FDRE Constitution (n 16).

[157] The CCO (n 13) preamble paragraph 3

[158] Survey (n 82).

[159] The 2011 E.C Ethics Magazine stipulated the degree of corruption in the public sector but it fails to describe the private sector corruption. FEACC "institutionalized corruption crimes prevention," Ethics vol. 18 no.1 Sep.2019. P.10

[160] Director for Ethics Networks Facilitation Directorate at Federal Ethics and Anti-Corruption Commission. At the time of drafting the Corruption Crimes Proclamaitonno.881.15 initiation, he was one of the drafter of the Proclamation and member in board management.

submitted it to the CM and the CM approved the private sector to be regulated by the proclamation.[161]

The constitutional limitations on substantive criminal law may force the lawmakers to be based on the principle of criminal law.[162] The principle of criminal law also needs an investigation into the failed social interaction and contextualization of the problem before the individual liberty limits by criminal law.[163]

Directive of the CM requires that proposal or research documents submitted to it must be based on a sufficient understanding of the subject matter and relevant and necessary information to make decisions in accordance with public interest.[164] The same holds in the case of regulation of HPR draft laws submitted to the house [165] that state, every draft laws submitted to the House should be accompanied by explanatory memorandum [166] and the memorandum should include the necessity of the draft law, the objectives of the draft law, etc.[167]

According to such constitutional and criminal law principles and according to the CM and HPR governing rules, before restricting any particular act by criminal law, the duty to conduct impact assessment about the miscarried social interaction is essential and then based on this fact the lawmaker can give the status of socially important to the legal good and it can decide on the necessity for the criminal law intervention so as to protect this socially importance legal good.

The regulation of the private sectors by the proclamation does not yet take an impact assessment on the failed social interaction in connection with the private sector's corrupt practice so far. Nevertheless, the FDRE Constitution, Article 17, has clearly stipulated that the rights of the individual should not be arbitrarily deprived. Criminal laws are seen as restrictions on liberty, and it can be justified only when such restrictions are reasonable and proportionate.[168]

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[161] Interview with Mr. *Haregot Abraha*, conducted at his office on 25th February 2020.

[162] Ariel Bendor & Hadar Dancig, 'Unconstitutional Criminalization' (2016) New Criminal Law Review 1, 4.

[163] Puig (n 22) 409, 412.

[164] Article 5(5 &6) Council of Minster Directive no. 31.

[165] House of Peoples 'Representatives Regulation No. 6/2015

[166] Ibid, Art 51(9)

[167] Ibid, Art 51(10)

[168] Miriam Gur-Arye & Thomas Weigend, 'Constitutional Review of Criminal Prohibitions Affecting Human Dignity and Liberty: German and Israeli Perspectives' (2011) ISR. L. REV 79

As pointed out earlier, based on the principle of criminal law, impact assessment on the failed social interaction before the criminalization of the conduct is essential. Therefore, to avoid any criminalization that potentially affects the right of the individuals as provided in the constitution, the HPR is expected to follow the basic principles on limitation of human rights and principles of criminal law. However, HPR has failed to follow such principles. This will ultimately affect the constitutional rights of the people and one can raise constitutionality of the law. Therefore, the first justification of the proclamation is not supported by the principle of criminalization and arbitrarily limits individual human rights. Extending the proclamation to regulate the Private sectors is inconsistent with Article 17 of the FDRE Constitution, Article 6 of ACHPR and Article 9 of the ICCPR.

### 4.2. Assessment on the Proclamation in light of the AU Corruption Convention

As per the preamble of the proclamation, the second justification to incorporate the private sectors is based on the fact that the two international corruption conventions [169] have imposed a duty on the state parties to criminalize the private sector corruption. To examine this justification, the researcher aims to assess the contents of the specific provisions of the AUCPCC in light of the private sector regulation.

The AUCPCC under Article 11 states that the state parties shall "adopt legislative and other measures to prevent and combat acts of corruption and related offenses committed to and by agents of the private sectors

Notwithstanding the preamble of the proclamation, the state parties would criminalize "corrupt practice' in the private sector. The AUCPCC does not impose a direct duty on state parties to criminalize "corrupt" practice in this sector. It rather indicates a guideline that the member states shall adopt legislative and other measures to combat corruption in the private sector.[170] The provisions of the AUCPCC are written in non-mandatory language, and no particular penalizing scheme can be inferred for failure to comply with these requirements. The Convention made it abundantly clear that member states should undertake preventative measures that match with the

[169] AUCPCC (n 14), UNCAC (n 15).

[170] According to *Sinder et al* 'This absence of penal and deterrence schemes is one of the weaknesses of the AU Corruption Convention.' Thomas R Snider & Won Kidane 'Combating Corruption through International Law in Africa: A Comparative Analysis' (2007) Vol.40 Article 4 issue 3 fall Cornell international Law Journal 692, 712

private sector including the adoption of legislative and other measures."[171] According to this provision, member states are bound to take legislative measures to fight corruption and related offenses in the private sector.[172] Therefore, Ethiopia is expected to take legislative measures to prevent corrupt practices in the private sector. However, the Convention left a place to the state parties to take legislative measure based on their domestic realities, the specific article reads as follows "The State Parties undertake to adopt legislative and other measures <u>that are required to establish as offenses</u>, the acts mentioned in Article 4 paragraph 1 of the Convention."[173] The phrase "……that are required to establish as offenses….." impliedly requires the state parties to can take legislative measures up on the offense of corruption in the private sector based on their evidence.

As stated in chapter two of this study, human dignity should not be granted "absolute" protection but should be treated with the greatest respect when criminal laws are reviewed for their constitutionality.[174] If the necessity of criminal law intervention is so required, then the FDRE government has the power to limit the human rights by criminalizing the individual conducts under criminal law principles, based on the Federal Constitution, the Banjul Charter, and the ICCPR governing rules.

The justification of the proclamation in relation to the AUCPCC is not supported by the specific provisions of the later. The AUCPCC does not impose a duty on the State parties to criminalize 'corrupt' practice in the private sector. If the government of Ethiopia wants to obey the AUCPCC, other civil and administrative measures are there on the table before the criminal law. Thomas et al describes the weak sides of the AUCPCC and argues that ".…the AUCPCC does not have criminal provisions, unlike the UNCAC and the AUCPCC does not offer directly the criminal law preventive measures to the private sector even as an alternative."[175]

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[171] Preventative measures also include the 'establishment of mechanisms to encourage participation by the private sector in the fight against unfair competition, respect of the tender procedures and property rights.' AUCPCC (n 14) article 11(1) and as per sub-article (2) article 11 of the convention it calls for the adoption of "other measures as may be necessary to prevent companies from paying bribes to win tenders."

[172] Peter W. Schroth, 'the African Union Convention on Preventing and Combating Corruption' (2005) Vol.49 no.1 Journal of African Law 32.

[173] AUCPCC (n 14) article 5 emphasis supplied.

[174] Miriam *et al,* (n 168) 81

[175] AUCPCC (n 14), article 11 and UNCAC (n 15) article 12, 21 and 22.

Generally, the justification to regulate the private sector by Corruption Crimes Proclamation in light of the AUCPCC is not strong enough.

# Chapter Five

## Assessment on the Justification of the Proclamation to Incorporate the Private Sector in the Proclamation

### 5.1. Assessment on the Proclamation in light of the UN Corruption Convention

Chapter III of the UNCAC comprises a set of offenses that State Parties are authorized to take preventative measure from Article 6-14 the convention contains mandatory and non-mandatory provisions and criminal offenses are stated from Article 15-23 is mandatory and non-mandatory expressions.[176] Under preventive measures, Article 12 also stipulates in mandatory ways and the state party shall enact a law to promote the private sector financial standard and for the infringement of the legislation state parties should take the civil, administrative, and criminal measures. The provisions read as follows

> Each State Party shall take measures in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.[177] (Emphasis supplied)

Based on this provision, it is clear that the state party primarily shall take preventative legislative measures to prevent corruption in the private sector and to enhance accounting and auditing standards in the private sector. Then after doing that, member states could take civil, administrative, or criminal penalties respectively for failure to comply with such legislative measures. This point is also supported by the principle of criminal law as a last resort (ultima ratio). In relation to criminal legislation measure, Article 21 and Article 22 of the UNCAC proscribed the crime of bribery and embezzlement of property in the private sector respectively.[178] The state party

[176] Enhance ethics, integrity, and transparency in the private sector through, inter alia, promoting transparency among private entities, the adoption of accounting and auditing standards as well as the establishment of penalties at civil, administrative and criminal levels Article 12 (mandatory). See also 'UNCAC in a nutshell 2019' see also 'using the UNCAC against Corruption to advance anti-corruption efforts: A guide' Transparency International and UNCAC Coalition <https://necessaryandproportionate.org/> last accessed date on Feb. 19 2020.

[177] UNCAC (n 15) article 12 (1).

[178]Interview with *Ato Gebru Gebeyhu,* director of criminal informant and witness directorate in Federal Attorney General and at the time of drafting the Corruption Crimes Proclamaitonno.881.15 initiation, he was member of the

can establish as criminal offenses in case of bribery and embezzlement when committed intentionally in the course of economic, financial or commercial activities.[179] Albeit the proclamation stated that the state parties duty to imposition to the criminalization of bribery and embezzlement in all private sector activities, the convention articles articulated that the application of these provisions are only in the financial and economic transactions and the convention speaks in non-mandatory language.[180]

According to the accepted principle of criminal law, criminalization of any act should come as a last resort since a state has several alternatives to attain its ends. It should only use criminal sanction as a last alternative when there is no other non-punitive alternative and which are better to attain the objective of the legislator.[181] The last resort principle has long been considered to be a fundamental guideline in determining the scope of substantive criminal law.[182] If the interest can be successfully secured by the imposition of an administrative or civil penalty, criminal law intervention is not necessary.[183] Ouwerkerk, argues that, "The last resort principle requires the authorities to exercise reserve when turning in to the criminal law".[184] From this point of view, as stated above, the government of Ethiopia did not take pertinent criminal law-making processes in connection with an assessment of the ineffectiveness of administrative measures and civil laws in the private sector.[185] And also there is no justification for the insufficiency of the criminal code provisions to combat bribery and embezzlement in the private sector.

The major purpose of the UNCAC is therefore, to create an opportunity to develop a common global language against corruption and set universal standards to be used by both public and private

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drafter committee interview conducted on 11 Mar 2020, admitted that the UNCAC is imposed the duty on state party to criminalize only such acts in the private sector. However, at the time of drafting the proclamation the drafting committee decided to expand the types of criminal acts into private sector as much equal application in the government organ based on inherent governmental power to criminalize the conducts.

[179] UNCAC (n 15) article 21 and 22.

[180] Ibid

[181] D. Husak, 'The Criminal Law as Last Resort' [2004] Oxford J. of Legal Studies 214.

[182] Ouwerkerk (n 80) 228, 229.

[183] Ibid

[184] Ibid

[185] Interview (n 161), interview (n 180).

sectors to increase integrity[186] and to contain optional criminal intervention power.[187] For this aim, the criminal liability should be in line with its guideline, and, it should be only for failure to observe the preventive legislative measures [188]

As briefly stated in chapter two of this paper, the government should comply with the prerequisite to limit the human rights based on the principle of legality, legitimate state interest, necessity to protect legitimate state interest and principle of proportionality.[189] Failure to comply with those requirements is tantamount to breach of the human rights of the individual and will demonstrate the unconstitutionality of the law.

As such, the necessity of the law may justify 'the existence of social need', by proofing the non-availability of other alternative mechanisms to protect the legitimate state interest and "a state must choose an alternative that less restrict such rights."[190]

As far as the above prerequisite that empowers the lawmaker to limit human rights is concerned, the researcher accepts the legitimate state interest to regulate "corrupt practices" in the private sector in general terms and the principle of proportionality is not an issue at hand. However, the necessity of the law will be examined.

The UNCAC alternative criminalization provision has been already included in different laws in Ethiopia. For instance, Federal Criminal Code, The Banking Business Proclamation No_592/2008, The Federal Tax Administration Proclamation No_983/2016, the Insurance Proclamation, The Microfinance Business Proclamations, No. 626/2009, etc.

In this regard, as close reading of the UNCAC shows us that whatever measures to be taken by the state party to the acts of corruption committed in the private sector must be in accordance with the

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[186] United Nation Office on Drugs and Crime Fighting corruption with the private sector Available at <https://www.unodc.org/documents > last accessed date on Aug. 15/2019.

[187] Ibid. See also Thomas R *et al* also argues that 'the UNCAC's penalizing scheme relating to preventative measures is limited to the private sector' Thomas (n 172) 692, 719.

[188] Hannes Hechler, Mathias Huter and Ruggero Scaturro., Series editor: Jessica Schultz; 'UNCAC in a nutshell 2019' U4 Guide Available <https://www.u4.no/publications/uncac-in-a-nutshell-2019> last accessed date on Feb. 19 2020.

[189] Abdi (n 66)

[190] Ibid. 1, 7

fundamental principles of the domestic law of the state party. This includes however, the need to prevent corruption in the private sector and to enhance accounting standards.

Good protection mechanism to regulate the activities and all other responsibilities in the private sector can be enriched through corporate governance. Despite its difference across various jurisdictions regarding the definition of corporate governance, however, it is defined as a system by which companies are directed and controlled.[191] Moreover, as a system by which companies are directed and controlled in light of OECD principles, corporate governance involves a set of relationships between a company and the management, its board, stakeholders, and shareholders.[192] In addition to this it supports setting a system that guides the relationship between actors via clarifying the rules and procedures for making decisions on matters of corporate affairs, by whom the decision should be made and how should it be implemented. [193] According to Hussein, for a good practice of corporate governance to support and protect it from corporate scandals, frauds, and maintain financial system stability is worth mentioning.[194]

In this regard, in the Ethiopian legal system preventing corrupt practices and enhancing the accounting and auditing standards can be cited in the Ethiopian Banking Business proclamation as an example. In this proclamation, there are criminal liabilities whether by a high ranking official of a bank or an ordinary employee fails to comply with the restrictions set by law.[195]
If the employee of a bank obstructs the proper performance by an auditor of his duties and he/she violates the auditing process employed by the national bank he/she will be penalized with a fine

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[191] Sumaira Jan & Mohi-ud-Din Sangmi, 'The Role of Board of Directors in Corporate Governance' [2016] Vol-2 Issue 5 Imperial Journal of Interdisciplinary Research (IJIR) 707.

[192] Code of Corporate Governance of the Republic of Armenia, Attachment to the resolution N 1769-A of the Government of Republic of Armenia at 30 December, 2010 pp.3 Available at <https://amx.am/en/document?id=268> last accessed date on May 18 2020

[193] Hontz E and Shkolnikov, 'A Corporate Governance: The Intersection of Public and Private Reform' (2009) Center for International Private Enterprise available at <www.cipe.org/sites/default/files/publication-docs/CG_USAID.pdf > last accessed date on May 18 2020.

[194] Hussein Ahmed Tura, "Approaches to Reform Corporate Governance in Transition Economies: The Case of Ethiopia," p, 5. Available at SSRN: <http://ssrn.com/abstract=22933031> last accessed date on May, 18, 2020).

[195] Banking Business Proclamation No_592/2008 article 58(6(a),(b)

from Birr 50,000 to Birr100, 000 and with rigorous imprisonment from 10 to 15 years.[196] Additionally, if an employee of a bank with intent to deceive, makes any false or misleading statement or entry or omits any statement or entry that should be made in any book, account, report or statement of a bank he/she, will be penalized with the same punishment stated above.[197]

In Ethiopia, however, beyond the accounting and auditing standards and regulations, two proclamations and 31 directives do already exist in connection to licensing and supervision of the banking business. For instance, due of a company to act in accordance with the law, the action of suspension is to be taken against directors in the banking sectors. In this regard, what happened on 22nd Sep. 2015 on *Abera Deressa* (Ph.D.) was clear. He was suspended from his chairmanship due to his failure to dispose his obligation and in connection with the issue of tens of million $ and the international traders.[198] It was not the first time that officials of National Bank, executives and board of directors got suspended.[199] Back in 2010, senior executives of Awash international bank, including *Bekele Nedi,* board chairman, and *Mitiku Abeshu,* the vis president, have been suspended due to probes in the handling of letters of credits.[200] Therefore, no need for additional regulation to enhance accounting and auditing standards in the banking sector.

*Ato Haregot Abraha,* explained in his interview, at the time of drafting the proclamation, the major reason was the voice of few Whistle-blowers against the embezzlement acts of Awash International Banks, and then the Corruption Commission prepared the draft based on the effort of those Whistle-blowers only.[201]

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[196] Ibid

[197] Ibid

[198]Addis Fortune News Paper, [VOL 16, NO 804] published on Sep. 28, 2015 available at https://addisfortune.net/articles/storm-at-oromia-coop-bank/ last accessed date on May 15 2020.

[199] Ibid

[200] Ibid

[201] Interview (n 161) However, Ato. *Gebru Gebeyhu* refused the reason that gives by Ato. *Haregot* and he explained me in the interview, we used the name Awash Bank as an example to describe the similarity of the corrupt practice between private and Commercial Bank of Ethiopia and we used it to compare differences of the legal regulation in such similar financial organizations. And he accepts similarly with Ato Haregot the failure of taking impact assessment to categorize the private sector in to proclamation.

Indeed, there is no justification of the proclamation in line with the UNCAC to be implemented in the banking sector, because this is not in all law-making process documents.

In the Federal Tax Administration Proclamation, no_983/2016, there are several provisions referring to administrative and criminal liabilities from Article 100 up to 133. They refer to penalty for failing to maintain documents is one of which has a direct relation to accounting standard ideas of the UN corruption Convention, a taxpayer who fails to keep books of account prepared in accordance with the financial accounting reporting standards and maintain any document as required under tax law shall be liable for a penalty of birr 3,000 (three thousand birr) for each failure.[202]

As Stated in chapter two 2 of this study, one of the fundamental principles is the principle of necessity and the principle of compelling state interest can be achieved in various alternatives, the least restricting options on the right to be protected must be selected.[203] Moreover, based on the principle of necessity "where all available alternatives interfere with the enjoyment of the right in question, a State must choose an alternative that less restrict such rights."[204]

As provided by the criminal code, breach of trust,[205] mismanagement of private interest,[206] entails criminal, sanction on the criminal, and the civil code also states unlawful enrichment may cause civil liability.[207] In the cases of breach of trust, especially, the crime is committed against the property of the State or that of a public organization and,

> Where the criminal issues an offer for public subscription, or sells for himself, for his organization or for an organization in which he is a shareholder share, debentures, bonds or security of any kind in an association, banking or commercial

[202]Federal Tax Administration Proclamation No_983/2016 article 102(1)) and Federal Income Tax Proclamation No_979/2016, article 82(1). Additionally, by virtue of the repealed income tax proclamation 286/2004, article 97 making false or misleading statements was punishable fine of not less than twenty thousand Birr and not more than 100,000 Birr and imprisonment for a term of not less than three (3) years and not more than five (5) years.

Years and not more than fifteen (15) years.

[203] Abdi (n 66)

[204] Ibid

[205] Criminal Code (n 5) Article 676.

[206] Ibid (Article 702).

[207] Civil Code of the Emperor of Ethiopia, 1960, art 2162-2163.

organization, stock market or industrial firm; or where the crime is committed against public administrations or services.[208]

The penalty in case of breach of trust will be rigorous imprisonment from five years to fifteen years, and fine not exceeding one hundred thousand Birr [209]or in case of aggravated fraudulent misrepresentation, the punishment will be rigorous imprisonment not exceeding fifteen years, and fine not exceeding fifty thousand birr.

Mr. *Haregot Abraha* argues on the weak sides of these two provisions in their applicability in private sector corrupt practice is that they do not have a binding measure to return the property which is being taken by the criminals in illegal ways.[210] Nonetheless, the researcher argues that they could return the property obtained or fruits thereof or any property proportionate to the benefits obtained therefrom by civil suit for illicit enrichment, before the criminal bench decision or after, they can recollect the taken property. Moreover, the public prosecutor can take establishment of suit against the accused based on Article 154 Criminal procedure for an order that compensation is awarded for the injury caused.

Since such corporate governance laws, the tax administration proclamation and the criminal code is an adequate deal in the primary and related criminal laws with least restriction on the principles of human rights, no need for additional criminal legislative measure up on any acts in the private sector in related to accounting and auditing standard implementation.

Even though the government justifies that the existed laws to prevent, enhancing accounting and auditing standard measure are not enough, it can take additional preventative legislative measure to prevent the 'corrupt' practice in the private sector and it is not enough to enhance the accounting and auditing standards and faces the failure to fulfill its legislative measure, the government can impose criminal liability.[211] Thus, depending on the close reading of Article 12(1) of the UNCAC, it's possible to make a feasible argument that the establishment of a penalizing scheme is only a possible for failure to comply with preventative measures, but not for any acts in the private sectors.

[208] Criminal Code (n 5) Article 696

[209] Ibid Article 676

[210] Interview (n 161)

[211] UNCAC (n 15) Article 12.

The researcher believes that the purpose of incorporating a sequence of civil, administrative, and finally criminal penalty under the UNCAC is to emphasize on the principle of necessity to limit the human rights and to take criminal law intervention as the last alternative. Therefore, first and foremost, member states should deploy civil and administrative measures before resorting to criminalizing any act as a last resort. Therefore, the direct criminalizing of 'corrupt' practices in the private sector is inconsistent with the UNCAC.

According to the principle of *ultima* ratio, unless otherwise alternative mechanisms such as administrative measure, civil responsibility fail use to regulate the common conduct of the citizen, the criminal law has no room to regulate of the liberty of individuals.[212] Criminal prohibition must only be implemented when it is the only means of realizing a legitimate aim, or when there are manifold means, it is the means least likely to infringe human rights.[213]

Within the initial document prepared by FEACC, in the minutes of the standing committee and the minutes of the parliament discussion, the necessity of the proclamation in line with human right principles and criminal law principles was not even tabled as an agenda.

Moreover, the Council of Minster and the HPR failed to indicate the necessity of the law.[214] Hence, one can safely conclude that the proclamation lacks a 'high degree of justification'[215] for the criminal law to interfere and limit human rights. From the point of comparative analysis, however, it's possible to infer that unless and otherwise, there is pressing social need in criminalizing a certain act, the government should refrain from interfering on the human rights of citizens and the burden to prove the necessity of the limitation is on the shoulder of the government. The

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[212] Puig, (n 22)

[213] The International Principles on the Application of Human Rights to Communications Surveillance available at <https://necessaryandproportionate.org/> last accessed date on 16th Mar.2020

[214] According to *Gebru Gebeyeh,* the major policy justification was the loan procedure of the private bank is governed only by corporate governance however, the Commercial Bank of Ethiopia loan procedure regulated by corporate governance and also by anti-corruption proclamation. Due to this fact the Commercial Bank of Ethiopia's performance in relation to loan offering and collection of the loan becomes decrease owing to fearing of criminal liability in the anti-corruption-law therefore, we include the private banks to facilitate equal business arena among policy and private banks. Thus, the incorporation of the private sector into the proclamation is to maximize the Commercial Bank of Ethiopia loan business.

[215] JAYAWICKRAMA cited in Abdi (n 66).

government is expected to show the dangerousness of corruption in the private sector for the social well-being based on factual evidence and the existence of pressing social needs before resorting to limit human rights by criminalizing such an act which should become by as last resort.

Once again, the necessity of the proclamation is not discussed in the minutes of the standing committee, in the parliament discussion as well as in the initial documents of the Proclamation while drafting it. This also manifests that the incorporation of the private sector is not justified by the government.

In the UNCAC, the regulation of bribery and embezzlement of property in the financial sector are not mandatory provisions, and also such legal goods have been already regulated in Ethiopia. Article 675, 676, 696, and 702 of the criminal code and the corporate governance (the banking business proclamation and its 31 directives) by itself caused several harsh consequences over the financial sector. Therefore, the proclamation lacks the necessity requirement and the *ultima* ratio principles, due to this fact the regulation of the private sector by proclamation is unconstitutional and it contradicts the international bill of rights at all.

### 5.2. Public Administrative Power in the Private Sector

As clearly stipulated in chapter two of this study, the meaning of corruption crime is directly attached to public administrative power. Different works of literature have an almost similar definition of corruption crime. Accordingly, a corruption crime is simply defined as the abuse of public office for private gain…….[216] In this regard, public officials engaging in contrary to discharging the bestowed responsibilities and do something devious to obtain undue advantages are some of the essential elements to define corruption crime.

International institutions that are engaged in fighting corruption also argued that corruption has a direct relationship with public administrative power. The AUCPCC in Article 1 also defines what public officials mean, and it defines a "public official" means 'Any official or employee of the State or its agencies including those who have been selected, appointed or elected to perform activities or functions in the name of the State or the service of the State at any level of its hierarchy'. Moreover, Article 2 (a) of the UNCAC defines the term public officials for the purpose to take preventative measure against corruption "public official" means 'Any person who performs a public function or provides a public service as defined in the domestic law of the State Party and

[216] World Bank (n 19), Transparency (n 20).

as applied in the pertinent area of law of that State Party'. Hence, according to the above assertion and definitions, for the purpose to combat corruption which is required to establish as offenses in the private sector, the particular private sector mission, responsibility and functions should be connected with public service activities and the subjects under consideration must be public officials.

In the Ethiopian Corruption Crimes Proclamation, the only public administrative power exercised in the private sector tabled for discussion as obtained from the minutes of the parliament is about the "person" who has the power to issue a license or certificate. As discussed thoroughly in chapter two of this study, authorities such as the power to issue license or certificate, the power to grants or approves a driving license, issues certificate of building approves worthiness of a vehicle, issues certificate of health of a person or a certificate of educational qualification, etc. Albeit, owing to the development of the economy, such activities are transferred to private owners,[217] by their intrinsic nature those activities are the ordinary duty and functions of the power to the state. Accordingly, the definition of corruption and the necessary connection to the public service incorporation of this private sector is acceptable.

[217] The initial (n 5)

# Conclusion and Recommendation

## Conclusion

This section, as the last chapter, covers the conclusion and recommendation part of the thesis and it highlights the whole findings of the study. Unlike the global understanding of corruption, Ethiopia incorporated the corruption crime law to include the private sector as deceitful as the devil was the concern of this study. This was due to its uniqueness that the researcher decided to uncover the very purpose and its legal necessity as well as the scope of application of the law as spelled out now and then in the course of this research.

Previously different names were being used for the act of bribery, embezzlement, unfair enrichment, and the use of public power for private gain and had been categorized as a crime in the 1957 penal code. Even though the successive regimes of Ethiopia had used their respective criminal laws, it was the 2004 criminal code that categorized those acts as corruption crimes when committed in the public sector. Apart from the criminal code, however, the HPR enacted anti-corruption proclamation including proclamation no_ 881/2015 with the motive of protecting and penalizing corrupt practices in the private sector which is the melting pot of this study.

In this regard, the researcher has tried to answer the basic research question in line with the points raised in the specific objectives of the study to mention but a few are to examine the government's justification to regulate the private sector, to assess the necessity of the law in the private sector and to indicate the scope of the application were among others. As such, the researcher employed a doctrinal research method to show the legal rationales of the law, its purposes, and its necessity as well as the scope of application of the study subjects. To this end, both primary and secondary data were used. The required information collected from both sources were analyzed in light of the relevant criminal law principles, the international human right principles and the proclamation examined in line with the AUCPCC and UNCAC in which Ethiopia is a party.

As learned from the finding of this research, any government of a sovereign nation has a natural right to enact a law that may limit the individual rights of its subjects. The manifestation of a limited power of government, however, is its minimal power in the criminal law-making process. As far as criminal law is concerned, the legislative organs of government must play a pivotal role to qualify the law with the principles of criminal law, the constitutional and the regional, and international human rights instruments.

This researcher has tried to assess the foundations of the corruption crime proclamation that incorporated the private sectors and to examine whether or not this decision is consistent with the principle of the criminal law *ultima* ratio (as last resort). As argued by the law-makers, the need to incorporate the private sector into the ambit of this proclamation no_881/2015 indicated that the government is duty-bound to protect the legitimate interest of the public good and hence the private sector must be regulated by this law as stated in the preamble of the law. The other justification stated that since Ethiopia has ratified the international agreements as an integral part of the law of the land, then the private sector must be regulated consistent with the AUCPCC and UNCAC.

Keeping all these in mind, however, the scope of application of this law has been exposed for critics since the definition given for public organization is not clear enough to understand. Moreover, the logic of the law towards the need to consider some of the private sectors as public organizations and how it exempted others have been the bone of contention as far as the corruption crimes proclamation is concerned. In this regard, as learned from the proclamation, the minutes of the proclamation and the interview respondents, the researcher proved that the proclamation excludes religious organizations, political parties, international organizations, and small and micro enterprises from the ambit of the Corruption Crimes Proclamation. Moreover, although public organizations are within the ambit of the law, article 9(4), Article 14(1) and Article 20(1) of the proclamation states respectively that human resource administration, unlawful disposal of objects in charge and granting or approving license improperly are regulated by it.

The focus of the researcher is to make sure whether the initiation of the law-maker that wanted to incorporate the private sector and the justification given for that in light of the criminal law principles and international bill of rights ratified by Ethiopia is sound or not. Moreover, the law-making process of this proclamation had encountered several procedural drawbacks.

As per the code of conduct of the parliament, any draft law should be passed via clear procedures before the CM send it to the parliament. In this regard, the concerned authority must research the need to have such a law and the absence of other laws to regulate the subject matter. In addition to that some more empirical evidence should be include along within the draft law. However, the proclamation has come to full effect without such procedural requirements.

As clearly prescribed in the directives of the CM, the Council of Ministers or any other body that is entitled to draft the law is expected to conduct a comprehensive survey on the subject matter and such a body is responsible to address the gravity of the concern and hence, the need to enact

the law by the parliament. Nonetheless, the parliament enacted the proclamation regardless of checking all these procedural prerequisites.

According to article 17(1) of the FDRE Constitution, "no one shall be deprived of his/her liberty except on such grounds in accordance with such procedure as are established by law". However, the HPR endorsed the proclamation to regulate the private sectors arbitrarily and in disregard of abiding to the constitution.

So far the global understanding of corruption is highly attached to the public power and the act may be considered a crime of corruption when it is committed by a person who has a public authority or is a civil servant in such the public sector. However, the proclamation has been regulating in the private sector without any sufficient legal grounds.

The rationales of the law stated in the preamble are highly inconsistent with the AUCPCC, as indicated in article 11 with that of article 4(1). The same problem is observed when we read it in line with article 12 of the UNCAC. According to this article, the Ethiopian government must justify the necessity of enacting such a law and look for some other laws to check whether or not those laws can govern it.

As such, the federal criminal code, the Banking Business Proclamation no_592/2008, and its 31 directives, the federal tax administration proclamation no_983/2016, the microfinance business proclamation no_626/2009 could be mentioned as evidence that the procedures of the law-makers are inconsistent with the UNCAC conventions. Moreover, article 675,676,696 and 702 of the Federal Criminal Code are strong enough to regulate corruption crimes and hence, the principles of necessity of the law and the principles of *ultima* ratio (criminal law as last resort) in criminal law are violated in making the proclamation regulate the private sector.

## Recommendations

I recommend the followings:

- The concept of corruption in the proclamation should be redefined in line with the understandings with the international instruments.
- Due to failure to observe the essential principles of criminal law-making process and failure to comply with limitations of human rights principles, the Corruption Crimes Proclamation No_ 881/2015 should be amended and then should exclude the private sector except those which have administrative power.

- The government should create awareness especially, to the council of the minister and house of people representatives about the dangerousness of arbitrary criminalization of the life and liberty of citizens.
- The House of Peoples' Representatives Regulation No. 6/2015 should be amended and would incorporate a clear and consistent criminal law-making process with criminal law principles and international bill of rights.
- The Council of Minster Directive should incorporate the idea that any criminal law initiator should research the failed social interaction before drafting the criminal law.
- The House of Peoples' Representatives, the standing committee for legal, justice, and democracy affairs and the members of the house should examine any drafting of criminal law in line with the continental legal system criminal law principles and with universally accepted international human right principles.
- Generally, all stakeholders in the criminal law-making process should be professionals in the area of criminal law and human rights law. Moreover, they must be principled and committed to the rule of law.

# Annex

Interview Question

1) Would you tell me your role and position of participation in the drafting process of Corruption Crimes Proclamation please?
2) Would you explain me the law-making process of the Corruption Crimes Proclamation please?
3) Have you ever made survey that help to indicate the similarity between corruptions committed by the public sector and the private sector before drafting this proclamation?
4) Could you tell me the standard or criteria so far used to distinguish the private organizations to be included or excluded from the regulation of Corruption Crimes Proclamation
5) Please briefly explain the justification you used so as to govern the private sector under this proclamation.
6) Unlike the regional and international conventions against corruption that Ethiopia ratified, Corruption Crimes Proclamation 881/2015 has gone far to cover. Would you tell me why happen that please?

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የስነምግባርና ፀረ-ሙስና ኮሚሽን የሙስና ወንጀሎችን እንደገና ለመደንገግ የወጣ ረቂቅ አዋጅ፣ ፌ/ስ/ፀ/ሙ/ ኮሚሽን ቤተ-መፅሀፍ (2005)

በኢፌድሪ 4ኛ የሕዝብ ተወካዮች ምክርቤት 5ኛ ዓመት የስራ ዘመን (2007) ዓ.ም) የፀደቁ አዋጆች፣ የሕዝብ ይፋ ውይይቶችና የውሳኔ ሃሳቦች ጥራዝ 1 (ታህሳስ 1 ቀን 2007)