

**ADDIS ABABA UNIVERSITY GRADUATE PROGRAM  
SCHOOL OF LAW AND GOVERNANCE**



**Determination of Criminal Punishment under Federal  
Legislations in Ethiopia**

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**(APPROVAL SHEET)**

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**BY: TEKLEWELD TILAHUN**

**Approved by board of examiner**

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## **Declaration Statement**

I declare this work which is entitled “Determination of Criminal Punishment under Federal Legislations in Ethiopia” is my own work that is independently produced by the devoted guidance of my advisor.

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## Chapter One

### Introduction

#### 1. Background of the Study

Arbitrary determination of criminal punishment<sup>1</sup> stands against the purpose of punishment. To determine a punishment in legislation for a given criminal act, it is necessary to understand the purpose of Criminal Law in general and the purpose of punishment in particular. Generally it could be said that the purpose of a Criminal Law is to prevent behavior determined by a society to be undesirable.<sup>2</sup>

Based on historical records men were sought law for the protection of their common interest. Consequently they created a sovereign. This is well stated in the scholarly work of Beccaria in the 18<sup>th</sup> century, in the section where he tried to show where the origin of punishment lies, which reads as:

*“Laws are the terms under which independent and isolated men come together in society. Wearied by living in an unending state of war and by a freedom rendered useless by the uncertainty of retaining it, they sacrifice a part of that freedom in order to enjoy what remains in security and calm. The sum of these portions of freedom sacrificed to the good of all makes up the sovereignty of a nation, and the sovereign is the legitimate repository and administer of these freedoms.”<sup>3</sup>*

Therefore since the inherent purpose of a government is protecting the common interests of a society, it would be inevitable that a government has the power to enact a Criminal Law. As some scholars state that –Criminalization is an act of the state, an action, therefore, of that

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<sup>1</sup> Even though this research is mainly focused on the legislative determination of criminal punishment, because of the reason that I mentioned especially in this first chapter, hereinafter the terms criminalization and determination of punishment will be used together in this research.

<sup>2</sup> E. Daniel hall, (2009), Criminal Law and procedure, 5<sup>th</sup> Edition, Delmar , USA, p.26

<sup>3</sup> R. Geus, and Q. Skinner (eds.), (2012) *Beccaria, C. On Crimes and Punishments and Other Writings*, Cambridge texts in the History of Political Thought, Cambridge University Press, p. 9

institution which, ~~(successfully)~~ claims the monopoly of the legitimate use of physical force within a given territory”<sup>4</sup>

Obviously a Criminal Law would attain its objective mainly through its punishment, therefore it could be said that the purpose of punishment is nothing other than the purpose of Criminal Law in general. Concerning the purpose of punishment Beccaria mentions that, it ~~is~~ nothing other than to prevent the offender from doing fresh harm to his fellows and to deter others from doing likewise.”<sup>5</sup>

Therefore it is important to discuss about the theories and principles on the purpose of punishment. Among the theories on the purpose of punishment: the theories of expiation, retribution, incapacitation, deterrence and rehabilitation could be mentioned.

Whatever the theory and principles we adhere, it is necessary to have some way to control whether a government enacts a Criminal Law and determine punishments only to the extent of the purpose of the Criminal Law. It is important to underline that “To reach the greatest individual freedom & personal security, unchecked individual freedom must be balanced with governmental authority to prevent & punish harmful behavior”<sup>6</sup>

*“[n]o-one, including the State, should coerce others without good reason. The manipulation of people’s conduct calls for justification, especially when it is accompanied by censorious and punitive treatment of those who do not comply. Unless there are compelling reasons the Criminal Law should not be deployed by Parliament.”<sup>7</sup>*

From the above well stated paragraph, one can understand the fact that any determination of punishment especially when it is censorious and punitive, it is necessary to check the justification that the criminalization is based on. It makes no sense to discuss about determination of punishment without discussing criminalization. In addition, criminalization without determination of punishment would be meaningless. This indicates the inevitableness of the interdependence among the two concepts. Therefore, keeping in mind their interdependence,

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<sup>4</sup> Weber, in Gerth and Mises p.77 as cited in N. Persak, (2007) *Criminalising Harmful Conduct: The Harm Principle, Its Limits and its Continental Counterpart*, Springer, New York, p. 9

<sup>5</sup> Beccaria, *Supra* note 3, p. 31

<sup>6</sup> Daniel, *Supra* note 2, p.26

<sup>7</sup> Simester and Sullivan (2003), p. 5. As cited in N. Persak, (2007) *Criminalising Harmful Conduct: The Harm Principle, Its Limits and its Continental Counterpart*, Springer, New York, p. 10

it is rational to discuss principles of criminalization before delving in to determination of punishment. A thorough discussion on principles of criminalization helps to better understand determination of punishment. It is also because of the reason that it would be meaningless to discuss about the determination of punishment that it is based on non reasonable ground of criminalization, we need first to discuss principles of criminalization in a way that contribute for determination of punishment. Generally since determination of punishment overlaps with criminalization both of them will be discussed in this research.

In recent years, proliferations of criminal offences have become a worldwide problem. A census conducted in U.S. in the year 2010 shows that the U.S. Congress has produced greater number of criminal offences than the preceding years that even lack adequate *mens rea*.<sup>8</sup> Therefore it is unquestionable to identify and promote prominent principles and theories which have limiting effect on criminalization and determination of criminal punishment in a criminal legislation.<sup>9</sup>

Among the major limiting principles, the one with crucial role in the determination of punishment aspect of criminalization is the principle of proportionality.

*“The **principle of proportionality**—namely, that punishment should fit the crime—has an ancient history. The U.S. Supreme Court first applied proportionality as a principle required by the Eighth Amendment in *Weems v. U.S.* (1910). Paul Weems was convicted of falsifying a public document. The trial court first sentenced him to 15 years in prison at hard labor in chains and then took away all of his civil rights for the rest of his life. The Court ruled that the punishment was “cruel and unusual” because it was disproportionate to his crime. Weems banned disproportionate punishments in federal criminal justice.”<sup>10</sup>*

Beccaria also strongly argue on the necessity of proportionality between crimes and punishments.<sup>11</sup> It is also worth mentioning the principle of the General Part of Criminal Law as a limitation on criminalization.<sup>12</sup>

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<sup>8</sup> U.S. Census 2010, 2010 Census Briefs, The Black Population: 2010 at Table 1 (Sept. 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>, as cited in H. Metcalf and S. Sanneh, (2012) ‘Over criminalization and Excessive Punishment: Uncoupling Pipelines to Prison’, Report from the December 2011 Workshop at Yale Law School

<sup>9</sup> Hereinafter in this research ‘criminal legislation’ means a legislation that have criminal provision

<sup>10</sup> U.S. Census, Supra note 8, p. 60

<sup>11</sup> *Beccaria*, Supra note 3, p. 19

Along with the principle of proportionality, there are also other limiting principles which have Constitutional origin. Among them, the principle of legality could be mentioned.<sup>13</sup>

Among other principles of criminalization, one could recognize the contribution of the principle of legal good to the determination of punishment. "Amongst the limits that present-day European Criminal Law theory tends to impose on the state's power to criminalize conduct, the principle of 'exclusive protection of legal goods' occupies a prominent place. (This principle is the continental counterpart to H.L.A. Hart's 'harm principle.')" <sup>14</sup> According to this principle, only the Criminal Law is used on those legal goods which deserve protection by the Criminal Law. As it mentioned previously, the harm principle is the prominent principle in the common-law legal system. The proper use of this principle has limiting role on the state power of criminalization. <sup>15</sup> "It is a necessary condition of criminalization that the harm principle is satisfied, and that causing or risking the harm amounts to a wrong."<sup>16</sup>

The other important principle is the principle of Criminal Law as last resort, otherwise identified as negative principle, advocates that Criminal Law should be used as a last resort. <sup>17</sup> "*Criminalization should only be resorted to if it is the least restrictive appropriate response.*"<sup>18</sup>

In recent years, the Ethiopian Federal Democratic Republic House of People's Representatives (the Parliament) has been seen producing much legislation which criminalize different conducts and determine excessive punishments. Among the federal legislations, the stamp duty Proclamation No. 110/1998<sup>19</sup> could be mentioned as one of the legislation by incorporating punishment which ranges from 10-15 years of rigorous imprisonment and in fine from 25,000-35,000 birr, only for avoidance of stamping of a document those which should be charged with

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<sup>12</sup> S. Shute, and A. P. Simester, (Eds.) (2002) *Criminal Law Theory: Doctrines of the General Part*, Oxford University Press, Oxford, p. 13

<sup>13</sup> J. Samaha, (2011), *Criminal Law*, 10<sup>th</sup> Edition, Wadsworth, California, p. 39

<sup>14</sup> S. M. Puig, (2008) 'Legal Goods Protected by the Law and Legal Goods Protected by the Criminal Law as Limits to the State's Power to Criminalize Conduct', in *11 New Crim. L. Rev.*, No. 3., p. 409

<sup>15</sup> N. Persak, (2007) *Criminalising Harmful Conduct: The Harm Principle, its Limits and its Continental Counterpart*, Springer, New York, p. 13

<sup>16</sup> A. Ashworth, and L. Zedner, (2012), "Prevention and Criminalization Justifications and Limits" in *15 New Crim. L. Rev.*, No. 4, p. 549

<sup>17</sup> D. Husak, (2004) 'The Criminal Law as Last Resort', *Oxford J. of Legal Studies* No. 2., p. 207

<sup>18</sup> Ashworth and Zedner, *Supra* note 16, p. 552

<sup>19</sup> Even if this Proclamation is amended by Proclamation No. 612/2008, the punishments imposed were not amended. However, the punishments are partly reduced by the Tax Administration Proclamation No. 983/2016 Article 123 (1) reducing the imprisonment to 3-5 years whereas the ceiling for the fine increased to 50,000.

stamp duty<sup>20</sup> the main purpose of this research is therefore, to examine whether criminalization and determination of punishment in the federal legislation of Ethiopia is principled and in line with acceptable principles of criminalization and punishment.

## **2. Statement of the problem**

Arbitrary determination of criminal punishment in legislations seems a problem in many countries in various degrees. Even if there are ongoing debates on the purpose of punishment among scholars, it doesn't mean that there are no rational principles. Even while many scholars agreed on one or two of the purposes of punishment, they may differ on the way how to determine conducts which deserve criminalization and criminal punishment, and on the amount of criminal punishment which results in achieving the desired purpose. Because of its very nature, criminalization and determination of the exact punishment is an unresolved issue until today, but it does not mean that scholars couldn't come up with prominent and reasonable principles of criminalization and determination of punishment. Today, the legislators are seen tilting toward considering political pressure rather than determining criminalization and punishment based on objectively fixed principles.

In Ethiopia, the Parliament is seen producing many criminal offenses and many of them came up with excessive punishments. In order to see that something is going wrong, it would be enough to observe some of the criminalized conducts and many of the determined punishments in comparison one with the other and especially with the punishment determined for the gravest crime in the Criminal Code. Some of the criminalized conducts could have been regulated administratively. Many of the punishments fixed in the federal legislations seem as if they were fixed by the legislator of different countries with different morality. Now a day, it is normal to see the paradox, while gravest criminal acts deserve lesser punishment and in the contrary lesser criminal acts deserve highest criminal punishment. Therefore, after identifying reasonable principles, in this research, whether the criminalization and determination of punishment under the federal legislation is principled or not would be the issue to be assessed and reflected.

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<sup>20</sup> Stamp Duty Proclamation No. 612/2008, Article 12

### **3. Research Questions**

The main research question of this study is to analyze the extent to which the principles of criminalization and determination of punishment are employed with a view to minimize arbitrariness and abuse of Criminal Law in federal legislation in Ethiopia. Therefore the following are the specific questions for this study:

- What are the main principles of criminalization and determination of punishment those which have an effect of minimizing arbitrariness and abuse of Criminal Law and punishment?
- What are the legal frameworks applicable during criminalization and determination of punishment in the federal legislation?
- What are the practices of criminalization and determination of punishment under the federal legislation?
- What does the comparison of determined punishment in the federal legislation and of the Criminal Code indicate?
- What are the causes for arbitrary criminalization and determination of punishment in the federal legislation?
- What could be the potential solutions to solve the problems regarding criminalization and determination of punishment under the federal legislation?

### **4. Research Objectives**

#### **4.1 General Objective**

The general objective of this study is to explore whether those principles of criminalization and punishment which have an effect of minimizing arbitrariness and abuse of Criminal Law are applicable in criminalization and determination of punishment in the federal legislations or not.

#### **4.2 Specific objectives**

- To examine the practice of criminalization and determination of punishment in the federal legislation;
- To identify the main principles of criminalization and determination of punishment which have an effect of minimizing arbitrariness and abuse of Criminal Law and punishment;

- To examine the legal framework applicable during criminalization and determination of punishment in the federal legislation;
- To compare and examine the determined punishments for some criminal acts with others in the federal legislation and of the Criminal Code;
- To explore the causes of arbitrary criminalization and determination of punishment in the federal legislations.
- To explore potential solutions in order to minimize the arbitrariness and abuse of Criminal Law in the federal legislation.

## **5. Methodology**

In order to address the above mentioned problem and objective, in this research, both quantitative and qualitative research methodologies are employed. The data is collected from primary and secondary sources. Primary sources such as different federal criminal legislations, the Criminal Code, Proclamations, and minutes of federal legislations are consulted. Structured questioners and unstructured interviews are also employed. Different books, commentaries, journal and articles also are used as secondary sources. Owing to the nature of the research, purposive sampling of non-probability in composition of the interviewees is preferred. The interviews are collected from different stakeholders in the process of enacting criminal legislations.

## **6. Ethical Considerations**

Since data collection requires permission of individuals or authorities, consent of the participants of the study is secured and collected through formal cooperation letters of the head of school of law. In the interpretation of data, the researcher tried to provide an accurate and unbiased account of information and refrain from using language or words that could offend people for different reason.

## **7. Scope of the study**

The scope of the research is delimited on selected criminal legislation enactment by the federal legislator and other actors involved in the process of law making in light of principles of criminalization and determination of punishment. Even if the main focus of the research is determination of punishment, due regard has been given to principles of criminalization because of the fact that discussion of the determination of punishment inevitably leads us to a discussion of criminalization in a way that reflect its effect on determination of punishment. Since principle of criminalization chosen necessarily affects the punishment to be determined, the research has also focused on principles of criminalization with particular focus on its effect in the determination of punishment. However, the research will not address deeply the pros and cons of each principle and their specific applicability.

## **8. Significance of the Study**

This research will be helpful for legislators and other actors involved in the process of law making during criminalization and determination of criminal punishments. It will also serve as a stepping stone to similar researches that will be undertaken in the area. It will also have significance to those who have participation in the making of criminal legislation and for policy makers.

## **9. Limitations of the Study**

This research has time and resource constraint. The researcher has also encountered non-cooperation with some of the concerned government organs and individuals to give information to complete the research successfully.

## **10. Organization of the Paper**

This paper has four chapters. The first chapter deals with introduction, background of the study, statement of the problem, research questions, objectives, methodology, ethical consideration, scope, significance, and limitation of the study. The second chapter focuses on theoretical discussion of principles of criminalization and determination of punishment. In the third chapter, practical assessment of criminalization and determination of criminal punishment in the Ethiopian context has been addressed. In the last and the fourth chapter conclusion and recommendation of the research would be forwarded.

## Chapter Two

### Theoretical Discussion on the Principles of Criminalization and Determination of Punishment

#### 2.1 Definition of Criminal Law

Criminal Law is a body of law that defines offenses against the community at large and establishes punishments for its violation. From the very nature of this body of law, it is concerned with acts or omissions which affect the public at large and in principle, not those whose effect remain at the individual level.

Since a Criminal Law is a law (branch of law) it is needless to tell that it shares the tasks of law in general. Law can be defined as a body of rules prescribed and enforced by government for the regulation and protection of society.”<sup>21</sup> Therefore, a Criminal Law is also like other laws prescribed and enforced by a government having a nature of regulating and protecting a society. Hence, one can identify criminal law as a law prescribed and enforced by government and has the purpose of protecting and regulating a society.

At this juncture, it is quite rational to raise questions, how a government took such a power in history, how the purpose of Criminal Law achieve its purpose and how a government can be limited to enact such law only to the extent of achieving the purpose of Criminal Law?

#### 2.2. Historical Background of Criminal Law

In the human history, the first civilization did not create distinction between civil law and Criminal Law.<sup>22</sup> It was after the revival of roman law in the 12<sup>th</sup> century, 6<sup>th</sup> Century Roman classifications and jurisprudence provided the foundations of the distinction between criminal and civil law in European law from then until the present time.”<sup>23</sup>

As it has been discussed in the preceding Chapter, Beccaria states that men were sought law, (without classifying it), for the sake of protection of their common interest. It was for this end they created a sovereign which have the power to administer them based on their agreement

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<sup>21</sup> J. M. Scheb, and J. M. II Scheb, (2012), *Criminal Law*, 6<sup>th</sup> Edition, Wadsworth, California, p. 3

<sup>22</sup> 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

<sup>23</sup> Ibid

reflected in the law. John Locke also contends that a government power to punish those who violate the law of nature emanate from the agreement of a society which is composed of individuals in those each of them had the right to punish by themselves those who violate the law of nature in order to “preserve the life, liberty, health, limbs or goods” of his own or of another in a state of nature.<sup>24</sup>

It is reasonable to think that at least a history of law is as old as the history of human beings’ creation of society. Based on the very reason of creation of society, it seems that criminal kind of law was the first in the history of human being. And it is important to check that today’s Criminal Law not to be far from its historical rational unnecessarily.

### **2.3 The Purpose of Criminal Law**

From the historical background of law, the first purpose of criminal kind of law in general is to stop unending state of war and uncertainty of retaining freedom in the state of nature. It was aimed at preserving life, liberty, health, limbs and goods of each members of the society. In other words, its purpose had a lot contribution for the race of human being through keeping its basic structure consolidated. Apart from the aforementioned general purpose, one can raise many specific purposes of Criminal Law which could be considered as part and parcel of the general purpose.

A Criminal Law has nothing to do with private moral wrongdoing; rather it is properly concerned with public wrongs. For example the betrayal of friend’s confidence is out of the domain of public wrongdoing, and therefore we couldn’t have reason to criminalize such conduct. But in many cases the term public wrong is far from clear contrary to its being an old idea.<sup>25</sup>

The liberal Criminal Law, through its features of focusing on public wrongs and provision of procedure in which citizens called to account, aimed at mainly protecting the members of the polity from various kinds of harm. But, the reason behind criminalization of core wrongs, such

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<sup>24</sup> John a lock, second treaties of government, edited by C.B. MacPherson, Hackett publishing company, Indianapolis, Cambridge, 1980 Canada, p 9-14, 52-53. As cited in G. J. Dejene, (2012), ‘The Relevance of Hobbesian Principles of Punishment in Today’s World in Light of the Ethiopian Criminal System’, in 4 Jim. Univ. J. of L., No. 1., p. 38

<sup>25</sup> R. A. Duff, (2010) ‘Towards a Theory of Criminal Law?’, in 84 Proceedings of the Aristotelian Society (Supplementary Volumes). p. 9

as, murder, rape and other attacks do not depend on prevention of them. Rather, it depends on –what it is for a polity to take its defining values seriously, and for its members to take each other seriously as participants in the shared way of life who are bound and protected by those values.<sup>26</sup>

The above mentioned liberal features and purposes of Criminal Law could be reasonably said that many other kinds of polity share them. Therefore, the purposes of many Criminal Laws, especially the liberal kind of Criminal Law, is prevention of unwanted conducts those could be classified as a public wrongs and taking care of the defining values of the polity seriously.

The purposes of Criminal Law should also aim at attaining the government's objective. But, it is only when the law in question is necessary to achieve the compelling government purpose.<sup>27</sup>

In a broad classification of the legal systems, the continental legal system characterized holding the purpose of preventing the exclusive legal good in their Criminal Law; only the legal good that deserve protection of the Criminal Law. On the other side, the common law legal system relies on the purpose of prevention of harm.

#### **2.4. The Purpose of Criminal Punishment**

As it has been discussed in Chapter One, the purpose of punishment is nothing other than the purpose of the Criminal Law in general. Beccaria states that the purpose of criminal punishment is prevention of doing fresh harm by the offender to his fellows and to deter others from doing likewise.<sup>28</sup> It could be discerned that criminal punishment took the purpose of Criminal Law and that they are intertwined with each other. Some writers rightly put the issue under consideration in the following statements:

*“These preventive and punitive rationales are intertwined. It makes no sense to suggest that the Criminal Laws purpose is simply to declare the most serious wrongs and to provide for the conviction and punishment of those who commit them, as if the prevention of such wrongs is not also part of the rationale. Surely it is because these wrongs are so serious that it is important to reduce the frequency of their occurrence: the “backward*

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<sup>26</sup> Id, pp. 14-15

<sup>27</sup> Husak , last resort, Supra note 17, p. 211

<sup>28</sup> Beccaria, Supra note 3, p. 31

*looking” justification for making these wrongs punishable must imply a “forward looking” concern that fewer such wrongs should occur in the future.”*<sup>29</sup>

It would be nothing just to declare public wrongfulness without doing something about the wrongs when they are committed.<sup>30</sup> Therefore, it is fair to conclude that the purpose of Criminal Law is also the purpose of punishment as well. In other words, the purpose of punishment should work for the realization and achievement of the purpose of the Criminal Law, which could be different across legal systems and even in different countries within each system. Consequently, due consideration should be paid when punishment is set for a given wrongful conduct whether it is in line with the purpose of the Criminal Law that a given legal system or country advocate. To this end, it is quite necessary to examine different theories on the purposes of punishment.

## **2.5 Theories on Purposes of Criminal Punishment**

As it widely discussed in different scholarly works, there are different well known theories on the purposes of punishment. The one who carefully observe the theories through time, he/she can understand that different theories become prominent in different times.<sup>31</sup> Needless to mention that the theories have good lesson in understanding, formulating and preferring purpose of a Criminal Law in general and the purpose of criminal punishment in particular in a given system. The theories can be categorized into two broad categories. One of the categories of theories that justify punishment based on the balance of bad and good effects of it is quite well known as a view of utilitarian’s. These theories are well known for their consequential considerations. The other category is known as the theories of retributivists<sup>32</sup>. The widely held view which categorized in this group, focus on giving wrongdoers what they deserve. It is considered as backward looking, unlike that of the first category that focuses on the consequence of the punishment through its forward looking.<sup>33</sup> Hereinafter, the thesis tries to discuss the following first two theories i.e. expiation and retribution under the second category; and, the next three

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<sup>29</sup> Andrew Ashworth & Lucia Zedner, Just Prevention and the Limits of the Criminal Law, in *Philosophical Foundations of the Criminal Law* 297-303 (Antony Duff & Stuart Green eds., 2011), at 281 as cited in supra note 16, p. 554

<sup>30</sup> Duff, Supra note 25, P. 10

<sup>31</sup> G. Gardiner, (1958) ‘The Purposes of Criminal Punishment’, in *21 The Modern L. Rev., No. 2*, p. 117

<sup>32</sup> Dejene G. J. (2012), ‘The Relevance of Hobbesian Principles of Punishment in Today’s World in Light of the Ethiopian Criminal System’, in *4 Jim. Univ. J. of L., No. 1*, p. 34

<sup>33</sup> Ibid

theories i.e. deterrence, incapacitation and rehabilitation in reflecting features of the first category.

### **2.5.1. The Theory of Expiation**

Expiation is an oldest form of thought toward the purpose of punishment. According to this theory, it was thought that an offender would be free from his crime (Sin), when he/she passes through suffering for his crime. Based on this view, a punishment is needed for the sake of some sort of balancing with the crime done and clearing the imbalance. The concept in expiation and the concept in retribution have something in common concerning seeking balance between the crime and punishment. However, they have difference on the aim of balancing. While expiation concerned on balancing for the purpose of moral account and also for the purpose of personal account for the offender himself through giving him an opportunity to purge his guilt, on the other hand the retribution concept introduce the interest of the injured party in the balancing.<sup>34</sup>

### **2.5.2. The Theory of Retribution**

Like expiation, the theory of retribution is also an old one. This conception of justification of punishment focuses on punishing criminals because they deserve it. It aims at suffering the criminal to the extent of the degree of suffer he exerted on the injured one.<sup>35</sup> But, the equation between the crime and its punishment is criticized for its impossibility. For example, Grunhut says that –equality between crime and punishment is a legal fiction.”<sup>36</sup> Even though this theory is highly criticized for its backward looking, it was strongly favored by the eighteenth century philosophers like Kant<sup>37</sup>, and the nineteenth century lawyers like Sir James Stephen, in saying that –it is highly desirable that criminals should be hated, that the punishment should be so contrived as to given expression to that hatred and to justify it... by gratifying a healthy natural sentiment.”<sup>38</sup>

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<sup>34</sup> Gardiner, Supra note 31, pp. 117-119

<sup>35</sup> T. D. Miethe, and H. Lu, (2005), *Punishment: A Comparative Historical Perspective*, Cambridge University Press, New York., pp. 15-16

<sup>36</sup> Grinhunt (max), penal reform p. 4, as cited in supra note 31, p. 120

<sup>37</sup> (Kant (E.), meta physic dear sitten, as cited in supra note 31, p.119

<sup>38</sup> Quoted by page (sir leo), crime and the community pp. 70-71 as cited in Gardiner, supra note 31, p. 120

Though some of the older arguments like that of expiation and retribution may be consciously rejected, they have ~~a~~ habit, like wolves in sheep's clothing, of showing through in unexpected places"<sup>39</sup> Hence, one may find such theories reflected in the modern Criminal Laws.

### 2.5.3 The Theory of Deterrence

According to this theory, punishment is not aimed at suffering the criminal rather it focuses on protecting the society by transmitting message to the society to refrain from doing a criminal conduct.<sup>40</sup> In other words, this theory has the purpose of discouraging future similar acts.

If one couldn't take a lesson from the mere declaration of a certain act to be punishable, the next thing would be punishing him/her for his/her violation of the prohibition. Based on this theory, the intended deterrence has two aspects. On the one hand, it is about deterring the offender from doing the same act once again. On the other hand, it is also about deterring the rest of the society from doing the same act because of fearing of the punishment.<sup>41</sup> From the above mentioned intention of the theory of deterrence, it would be rational to expect the more deterrence effect of punishment when it becomes more serious. But, many historical instances witnessed that this is not the case as indicated in the following text:

*“Logically, it ought to follow that the more severe the punishment, the more certain that deterrent effect. Yet the whole history of penal law shows that severity of punishment did not curtail the volume of crime. In the time of Queen Elizabeth I, for instance, it was a capital offence to pick pockets. Yet the preamble of an act of her reign (8 Eliz. C. 4) sets out that pickpockets were to be seen busily plying their trade amongst the crowds which gathered to watch the executions of other pickpockets who had been caught and condemned to die. Or again, evidence was given before the royal commission on capital punishment, 1866, that a chaplain of Bristol Gaol had found that out of 167 persons whom he had prepared for death, no fewer than 161 had actually witnessed an execution.”<sup>42</sup>*

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<sup>39</sup> Gardiner, Supra note 31, p. 117

<sup>40</sup> Id, p. 121

<sup>41</sup> Ibid

<sup>42</sup> Ibid

The deterrence effect of punishment for the reason of fear of punishment is seen lesser rather than that of fear of social disapprobation. It also depends on the certainty of conviction.<sup>43</sup> This implies that mere imposition of punishment with a view to discourage others and the wrongdoers has to be questioned again.

#### **2.5.4 The Theory of Rehabilitation**

According to the Theory of Rehabilitation, the main purpose of the theory is protection of society by serious and sustained attempts to prevent further relapse into crime; it is also for personal rehabilitation of the offender.<sup>44</sup> This could be achieved through educational, vocational, or therapeutic treatments. Hence, because of the reason that this theory focus on rehabilitating the offender for the sake of protection of the society and for the benefit of the offender him/herself, it is precisely labeled as forward looking theory. It has also wide acceptance in many jurisdictions.

#### **2.5.5 The Theory of Incapacitations**

According to this theory, the main purpose of punishment is protecting the community by restricting the convict to some confinement or through death. Since the convict would be sent to jail or forced to live in exile or dead, the society would get relief from possible future danger.<sup>45</sup> Therefore, since the theory is focused on protecting the community rather than focusing on revenge, it is appropriately labeled as forward looking.

### **2.6 Limitations on Criminal Law**

Criminalization is state's intrusion (restriction) in individuals' autonomy by proscribing certain conduct.<sup>46</sup> In other words, criminalization is an act of producing a Criminal Law. At this juncture, it is important recalling the above discussion on the purpose of Criminal Law and punishment to underscore that proscription of certain conduct is nothing without providing punishment for the violation of the proscription. Therefore, criminalization is about both proscription of conducts and providing punishment for the violation of the proscription. Indeed, when one discusses about limitation on the Criminal Law in general or limiting principles of criminalization, it is discussing about both the proscription of conduct and providing punishment

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<sup>43</sup> Ibid, p.123

<sup>44</sup> Ibid, p.129

<sup>45</sup> J. A. Inciardi, (1984), *Criminal Justice*, 7<sup>th</sup> Edition, Harcourt Inc.p.425.

<sup>46</sup> Persak, Supra note 15, p. 9

in the Criminal Law in general or about both the limiting effect of the principles on the state's power to proscribe conducts and provide punishment for the violation of the proscription.

Since the main requirement of being a state rely on the monopoly of physical force, and in effect criminalization power enables a state to have such power, criminalization would be a legitimate use of physical force to the state.<sup>47</sup> But, such power needs to be checked not to coerce individuals without good reason.<sup>48</sup>

—According to George P. Fletcher, a society must have had some experience with political corruption of the Criminal Law in order to develop strong liberal sensitivities.”<sup>49</sup> It seems excess Criminal Laws and excessive punishment is a worldwide problem, even UK and US are found to be victims of the crisis of over criminalization.<sup>50</sup> It could be said that this problem emanates from the contemporary Constitutional law, for the reason that they have no adequate theory of criminalization which requires compelling justification to punish.<sup>51</sup> A true limitation on a Criminal Law is a particular and concrete aim of the Criminal Law, not the aim of law in general.<sup>52</sup>

Generally, one could add other limiting factors on Criminal Law in addition to its concrete aim. Appropriate understanding of the definitional aspect and historical background of Criminal Law and purposes of punishment in particular have limiting nature on Criminal Law in general.

## **2.7 Limiting Principles on Criminalization and Determination of Criminal Punishment**

The principles of criminalization and determination of punishment could broadly be categorized as positive and negative categories. Principles that direct the state on what kind of conducts to be criminalized on a specific justificatory basis are categorized under the positive ones. On the other hand, principles that restrain acts of criminalization of the state or that guide it what not to be criminalized or rather where to stop, are categorized under the negative ones and in effect, they have nature of limiting the positive ones.<sup>53</sup> Even if the positive ones are concerned more of

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<sup>47</sup> Id, p. 9

<sup>48</sup> Id, p. 10

<sup>49</sup> G. P. Fletcher, (2000), ‘The Nature and Function of Criminal Theory’, in 88 California L. Rev., No. 3., p. 699

<sup>50</sup> Duff, Supra note 25, p. 17 and Husak, last resort, supra note 17, p.208

<sup>51</sup> Husak, last resort, Supra note 17, p. 211

<sup>52</sup> Puig, Supra note 14, p. 411

<sup>53</sup> Persak, Supra note 15, p. 22

directing states about what kind of conducts should be criminalized, they have something to say about the state to refrain from criminalizing certain conducts, or they compel a state to have some justificatory basis to criminalize. Owing to this aspect of positive principles, the research prefers discussing them as limiting principles like that of the negative ones, those properly categorized among the limiting principles.

There are different kinds of principles that have limiting nature on the state's power to criminalize and determine punishment for a given conduct. Among many, the principle of legal good and the principle of harm could be categorized among the positive ones. Some writers categorize the principles of Criminal Law as last resort and the principle of legality as negative principles.<sup>54</sup> In addition, for the purpose of this research, the principle of proportionality and the principle of the General Part of Criminal Law are also categorized as negative limiting principles on state's power to criminalize and determine punishment. It could be said that each of the principles, in one way or another, has some relation and gap filling nature to each other.

But, here, we need to recognize that there are other principles that are proposed as having limiting nature. Among these, the following could be mentioned: balancing of reasons *pro* and *contra* are known as principles in the continental legal system; offence principle- advocate criminalization of conducts that have no harm but so unpleasant rightly need legal protection; legal paternalism- advocate criminalization of self harm; legal moralism- advocate that prohibition of conduct criminally that are inherently immoral even if they have no harm or offence to the actor or to others.<sup>55</sup>

### **2.7.1 The principle of Legal Good (Exclusive Protection of Legal Good)**

Based on the above discussion, the research prefers focusing on the limiting aspects of the principles, those that fall under the positive category. Here, the research tries to discuss the principle of legal good emphasizing its limiting aspect. According to this principle, a legal good is an interest which has an importance to be protected by law. Among these interests that have an

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<sup>54</sup> Ibid

<sup>55</sup> Id, pp. 10-20

importance to be protected by law, only some of them should be protected by Criminal Law exclusively when only using of it is necessary.<sup>56</sup>

According to this principle, not all legal goods require protection of Criminal Law. The protection of Criminal Law is employed when it is entirely necessary to do so. Criminal Law can only be used when there is no choice rather than using of it. Therefore, precisely, this principle could be taken as a principle which limits the state's power of criminalization and determination of punishment by compelling the state not to criminalize conducts whenever there is another choice rather than using Criminal Law. "If the interest can be effectively protected by the imposition of administrative or civil sanctions or remedies, there is no need for the Criminal Law to intervene."<sup>57</sup> Here, it is also rational to think that, according to the spirit of this principle, preferring the lesser possible sanction whenever it is found necessary to criminalize certain conduct.

Now, it would be necessary to have standards that measures which kinds of legal good deserve protection of Criminal Law and which kinds does not. Since the Criminal Law protection is reserved for some legal goods, it would be reasonable to think that these legal goods would have higher level of importance. Only those legal goods which have great and concrete importance for the proper functioning of the social system deserve protection of Criminal Law.<sup>58</sup>

When we see some of the ways that are helpful to identify which of the legal goods have great social importance that guarantee the protection of Criminal Law, according to the view of Santiago Mir Puig, the following could be taken as examples; that are:

- The one that has fundamental importance in preserving social life.
- The one that is an interest protected by the Constitution. But here, it should be underlined that each and every interest protected by the Constitution might not be sufficient by itself to impose punishment. It might be supplemented by other considerations.
- The one that the degree to which injuring the good or interest causes harm to an individual.

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<sup>56</sup> Puig, *Supra* note 14, p. 409

<sup>57</sup> *Id.*, p. 418

<sup>58</sup> *Id.*, p. 412

- The one that the amount of harm caused to an individual by injuring the good or interest is higher. In this case, for example, public health is a fundamental social interest, but in order to guarantee a Criminal Law protection, the reduction of it should be greater. In other words, a smaller reduction in the overall health of society could not warrant protection of Criminal Law.<sup>59</sup>

Keeping all its strength, like all other principles, this principle has its own short falls. There is no doubt to search and discuss further principles to have stronger understanding in the area.

### **2.7.2 The Principle of Harm**

Based on the same reason that is mentioned in the discussion of the principle of legal good, here it is also preferred to focus on the limiting aspect of the harm principle. According to this principle, in order to criminalize a given conduct, we need good reason whether the conduct wrongfully causes or threatens to cause harm to others.<sup>60</sup> Even if this principle is most commonly identified as a common law principle, it may have some relevance to have a better understanding of the principles of criminalization and determination of punishment.

According to Mill, the criminalization should avoid ~~–a~~ definite damage, or a definite risk of damage, either to an individual or to the public.”<sup>61</sup> One writer has convincingly put the aim of the principle of harm as follows:

*“It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is no other means that is equally effective at no greater cost to other values.”<sup>62</sup>*

Therefore, based on the above view, the main rationale behind criminalization, under the harm principle, is having the purpose of prevention of harm to others. Like that of the principle of legal good, it would be rational to search some means that help us to identify which ‘harm’ call for criminalization.

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<sup>59</sup> Id, pp. 413-417

<sup>60</sup> Duff, Supra note 25, p. 19

<sup>61</sup> Ashworth, Supra note 16, p.448

<sup>62</sup> Feinberg (1988) p.xix, as cited in Persak, supra note 15, p. 13

Apart from the above broader standard, the research found some of the standards fixed by Ashworth and Zender helpful.<sup>63</sup> These are:

- Causing harm or risking a harm of a given conduct should be categorized as a wrong first.
- Whenever the criminalized conduct is far from the harm that it is intended to be prevented and when that harm is less grave, it mostly need higher level of fault requirement e.g. Dishonesty, intention and the like.
- During criminalization of a given conduct, among the reasons of criminalization the cost and risk of criminalization should be taken into account in relation with the harm that intended to be prevented. Here, it would be logical to infer that if a given conduct is chosen to be criminalized, in order to minimize cost and risk of criminalization the lesser possible penalty or restriction of liberty is still preferred.
- As per Bentham, Mill's view of criminalization of a given conduct should only be used whenever there is no other least restrictive alternative. According to this principle, when it is preferred other alternatives other than criminalization, it is necessary to be sure to take into account the seriousness of the wrong, and simultaneously, it is also necessary to be sure not to treat differently the wrong from other wrongs that have the same level of seriousness.

Here, it is also important to note the logical inference of the least restrictive alternative concept. It would be clear that, according to this concept if it is preferred to criminalize a given wrong rather than using other alternatives, obviously the penalty or the restriction of liberty through criminalization and determination of punishment would be the least possible one.

*“Accepting that the state has a preventive responsibility (in terms of reducing the incidence of harms), and also accepting that for both utilitarian and retributive reasons, the Criminal Law should be used only where it is the least restrictive appropriate response, might other legal forms be deployed in the name of prevention? Prevention of harm in the broadest sense*

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<sup>63</sup> Ashworth, Supra note 16, pp. 549- 563

*could call for a wide range of regulatory and civil measures, from licensing to tortious liability, from regulation by supervisory bodies to contractual liability, and so on.*”<sup>64</sup>

### **2.7.3 The Principle of Criminal Law as Last Resort**

As Husak argue, since a state has a number of 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. Here, Husak recognizes that making distinction of criminal approach from non-criminal approaches is exceedingly difficult. He mentions that the last resort principle is a principle that advocates a resort alternative to punishment, not alternatives among modes of punishment.<sup>65</sup> Among other alternatives to punishment taxation, bans on advertising, educational programs and others could be mentioned.<sup>66</sup> If we suppose the only purpose of Criminal Law is to prevent, based on this belief Husak introduces the preventive interpretation of the principle. It is also similarly argued that ~~the~~ Criminal Law should be used only as a last resort to prevent given kinds of conduct. If non-criminal means to prevent the conduct in question succeed as well or better, the criminal sanction should not be employed.”<sup>67</sup>

Therefore, based on the above mentioned view, the principle of last resort is all about limiting the power of state to criminalize and determine punishment. It is whenever there is compelling reason that a state can prefer criminalizing a given conduct. Since Criminal Law is a coercive institution, a state should be more careful when it resorts to it. Here, it is necessary to note that based on the last resort principle, it is all about resorting to non-criminal sanctions from the criminal one. It is not about resorting to method of punishment among others. If an objective of a Criminal Law is conceived as prevention, according to the principle, whenever a non-criminal sanction is effective in preventing a given unwanted conduct, it should only be used to prevent it, rather than using criminal sanction.

Here, it is quite useful to extend the principle to deal with the amount or kind of criminal punishment of a given conduct. Hence, if we extend the principle to deal with the amount and

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<sup>64</sup> Id, pp.562-563

<sup>65</sup> Husak, last resort, Supra note 17, P. 214

<sup>66</sup> Id, P. 234

<sup>67</sup> Persak, Supra note 15, p.562

kind of criminal punishment, based on the spirit of the principle, the lesser possible punishment should be preferable as far as it can prevent the unwanted conduct.

#### **2.7.4 The Principle of Legality**

The principle of legality is a prominent and well recognized principle of the criminal justice reflected in many international human right covenants. On a document prepared by United Nations Office of High Commissioner for Human Rights (OHCHR) mentioned that the international jurisprudence uniformly emphasize on the importance of the principle of legality (*nullum crimen, nulla poena sine lege*)<sup>68</sup>. According to the principle –criminal conduct must be defined in law before an offence can be committed, and with sufficient precision so as to prevent arbitrary enforcement.”<sup>69</sup> Among various regional jurisprudences, the research found it is interesting to look at the Inter American human rights system, in which there is more elaborative decision on the principle of legality. It reads as:

*“The Court considers that crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense, thus giving full meaning to the principle of nullum crimen nulla poena sine lege praevia in Criminal Law. This means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment. Ambiguity in describing crimes creates doubts and the opportunity for abuse of power, particularly when it comes to ascertaining the criminal responsibility of individuals and punishing their criminal behavior with penalties that exact their toll on the things that are most precious, such as life and liberty.”<sup>70</sup>*

According to the above mentioned paragraph, the principle of legality requires a clear definition of the criminalized conduct; clearly establishing the elements, in a manner which differentiate it from other acts that have no criminal liability.

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<sup>68</sup> \_\_\_–Digest of jurisprudence of the un and regional organizations on the protection of human rights while countering terrorism” prepared by the United Nations Office of the High Commissioner for Human Rights (OHCHR), p. 63 available at [www.ohchr.org/Documents/HRBodies](http://www.ohchr.org/Documents/HRBodies)

<sup>69</sup> Ibid

<sup>70</sup> Ibid

The principle of legality is also reflected in the provisions of the International Covenant on Civil and Political Rights (ICCPR). According to the General Comment of the Human Rights Committee, it is mentioned that in relation with article 9 of the Covenant, ~~arrest~~ or detention that lacks any legal basis also arbitrary.<sup>71</sup> In other words, arrest or detention without any legal basis (which could be based on vague criminal provision), is against the right of liberty and security of person (Article 9 of the ICCPR). It is obvious that punishments based on vague criminal provisions endanger the life and liberty of people by potentially encompassing other non-criminalized conducts.

The principle of legality lays the basis for the right of non-retroactivity of Criminal Law. In addition, this principle ~~goes~~ beyond its simple caricature as a principle of negative rights, designed merely to prevent retroactive punishment, to one that captures its full contribution to justice, including equality before the law, consistency in punishment...<sup>72</sup>

According to the principle of legality, every offence should be drafted in a way that enables courts to adjudicate on a particular wrong.<sup>73</sup> Here, broader definition of a criminal conduct is against the principle. Because, non-criminal conducts and conducts that have lesser seriousness can be punished equally with the one that have higher seriousness and mainly intended to be punished by the legislator.

### **2.7.5 The Principle of the General Part of Criminal Law**

In a continental legal system, there is a systematic organization of Criminal Law by dividing the content into a general part and special part. Doctrines those categorized in the general part need to have a nature of applicability across different ranges or families of offences.<sup>74</sup> ~~General~~ part doctrines need not be mandatory- they may be advisory or, for that matter, permissive. They address not just adjudicators but also other officials, including legislators; the latter most obviously when they are doctrines of criminalization.<sup>75</sup>

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<sup>71</sup> CCPR/C/GC/35, p. 35

<sup>72</sup> S. Dana, (2009), Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing, in 99 Journal of Criminal Law and Criminology, p. 858 available at: <http://scholarlycommons.law.northwestern.edu/jclc>

<sup>73</sup> Ashworth, *Supra* note 16, p.560

<sup>74</sup> Shute and Simester, *Supra* note 12, p. 3

<sup>75</sup> *Id.*, p. 12

For example, the definition of knowledge, recklessness, legality, co-offender and the like are doctrines having general applicability across other offences in principle at least. It is necessary that a legislator, when it enacts a criminal legislation, to take into account for example the type of intention required for that specific offence by recalling the definition of different intentions found in the general part. It is because different intentions have different seriousness and usually different punishment. According to Husak, “rejecting the role of intention in evaluating moral permissibility threatens Criminal Law a fundamental level.”<sup>76</sup> There are also different maxims that have wide acceptance. Among these, “intentional, knowing, and reckless actions are worse than negligent conduct with respect to the elements of the offense.”<sup>77</sup> Other additional offences could be found in special legislation that complies with the rule laid down in the general part.<sup>78</sup>

The doctrines found in the general part are generalizations about offences. From these generalizations, we cannot drive direct and straight forward limitations on criminalization and determination of punishment. Any implication derived from the doctrines in the general part is less specific.<sup>79</sup> For example, Husak mentions some of the doctrines that might be included in the general part. Included in the lists, the following is one among them: “...the Criminal Law must be narrowly tailored to serve the state’s compelling interest; Criminal Laws should be neither over inclusive nor under inclusive.”<sup>80</sup> He believes that the General Part of Criminal Law is a source of additional doctrines to limit criminalization and determination of punishment.<sup>81</sup> He also indicates the difficulties to apply the doctrines found in the general part. Among those he mentions that, without legislature’s interest, the Criminal Law will find ways to evade the implication of the doctrines.<sup>82</sup> “A state that is not committed to ensuring that impositions of the criminal sanction, meet a demanding standard of justification has ample means to undermine and circumvent the limiting implications of any doctrine in the General Part of Criminal Law.”<sup>83</sup>

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<sup>76</sup> D. Husak, The costs to criminal theory of supposing that intentions are irrelevant to permissibility, 3 CRIM. L. & PHIL. 51, 54 (2009) as cited in W. R. Thomas, (2012) ‘On Strict Liability Crimes: Preserving a Moral Framework for Criminal Intent in an Intent-Free Moral World’, in 110 Mich. L. Rev., No. 4, P. 649

<sup>77</sup> Fletcher, *Supra* note 49, p. 702

<sup>78</sup> M. Bohlander, (2009), *Principles of German Criminal Law*, Springer, p. 16

<sup>79</sup> D. Husak, (2002), ‘Limitations on Criminalization and the General Part of Criminal Law’, in Shute, S. and Simester, A.P., *Criminal Law Theory: Doctrines of the General Part*, Oxford University Press, New York., P. 14

<sup>80</sup> *Id.*, P. 45

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*, P. 46

<sup>83</sup> *Ibid*

### 2.7.6 The Principle of Proportionality

The principle of proportionality, according to Beccaria's view, advocates that the punishment should be stronger when the attack on the interest of the public becomes more serious. He states that "the obstacles which repel men from committing crimes out to be made stronger the more those crimes are against the public good and the more inducements there are for committing them,[and] hence, there must be a proportion between crimes and punishments."<sup>84</sup> Here, the principle emphasizes the need to make the punishment proportional to the end of prevention of crime, in a way that shows forward looking. On the other hand, Puig forwards his opinion on the amount of punishment for a given attack on a legal good protected by Criminal Law. In his opinion, "a penalty as severe as punishment should only be administered when an equally severe infraction has been committed."<sup>85</sup> Here, the proposal seems backward-looking focusing on balancing the punishment and the infraction.

According to strict sense of this principle, it has been said that "it is a prohibition on 'taking a sledgehammer to crack a nut'. Proportionality is predicated on the relation between the means and the end that is sought, disproportion between both extremes responding to both causes."<sup>86</sup> Therefore, the punishment to be imposed should not exceed the appropriate amount. "The severity of penalties must not be disproportionate to the criminal offence." Here proportionality is understood in a way that show the necessity of "a finely balanced relationship between the factual circumstances—the offense—and the legal consequence—the punishments—through the prohibition of disproportion in its respective degrees."<sup>87</sup>

In the German Constitutional jurisprudence, the principle of proportionality is considered as a Constitutional principle that emanate from the rule of law. Accordingly, "given that Criminal Law inflicts the harshest attacks of the State on the liberty of the citizen, it should only intervene there where the softest of all measures fail to promise an acceptable result."<sup>88</sup> A related approach is also followed in Spain. In the Spanish legal order, in addition to having root in the rule of law,

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<sup>84</sup> Beccaria, Supra note 3, p. 19

<sup>85</sup> Puig, Supra note 14, p. 413

<sup>86</sup> Pino A. M. P., (2016), 'The Proportionality Principle in a Broad Sense and Its Content of Rationality: The Principle of Subsidiarity', in Martín, A. N. and Romero, M. M. (eds.) (2016), *Towards a Rational Legislative Evaluation in Criminal Law*, Springer., p. 271

<sup>87</sup> Id, p. 210

<sup>88</sup> Roxin1994, p. 24, as cited in Pino, supra note 86, p. 268

the principle takes liberty as the highest value and it is reflected as the ~~principle~~ of the prohibition on excessiveness constitutes a rule of maximization of liberty.”<sup>89</sup>

Now, especially for the purpose of this research, it is quite right to say that the principle of proportionality in a sense of ~~prohibition~~ of excessiveness or the principle of proportionality in a broad sense<sup>4</sup> is the main limiting principle to punitive power of state. One writer notes this sense of the principle as follows:

*“Assuming the principle of the exclusive protection of legal assets as the basis of its axiological constructions, part of the modern criminal doctrine redirects the idea of the limitation of punitive power to the principle of the prohibition on excessiveness or the principle of proportionality in a broad sense, complementing its content with the demands derived from the principles of legality and culpability. The contents traditionally attributed to the principle of minimal intervention are in fact redirected to the prohibition on excessiveness”.*<sup>90</sup>

According to the principle of minimal intervention, ~~the~~ punitive activity of the State should be kept to the indispensable minimum to maintain peaceful coexistence.”<sup>91</sup> The principle of the prohibition of excessiveness or the principle of proportionality in a broad sense is the most suitable frame work for the ends of crime prevention and minimization of criminal violence. It is also promising for the advancement of theories on legislation, since it has broad acceptance in many Constitutional courts of democratic countries and because of its high doctrinal dissemination.<sup>92</sup>

Since the principle lacks its content and independence, it is important to make it ~~encompass~~ the principles of suitability of means, the need for their use and proportionality in the strict sense, as well as the proportionality of their effects.”<sup>93</sup> Concerning the application of this three integrating principles, it is usually seen being applied in the order they are presented and ~~the~~ application of these steps is not feasible, in so far as following them might give rise to approaching the

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<sup>89</sup> Cobo del Rosal and Vives Anto´n 1996, pp. 75–76 as cited in Pino, supra note 86, p. 268

<sup>90</sup> Roxin 1994, p. 24 f., as cited in Pino, supra note 86, p. 268

<sup>91</sup> Pino, Supra note 86, P.264

<sup>92</sup> Id, Pp.267-268

<sup>93</sup> Id,P.269

appropriateness of the punishment as a protective measure for a particular legal asset before having determined whether or not its relevance justifies the measure in Criminal Law.”<sup>94</sup>

### **2.7.7. Cumulative Implications of the Limiting Principles and their Challenge**

All the above discussed principles definitely have limiting nature on the punitive power of state. The first two positive principles i.e. the principle of legal good and the harm principle have similar function in different legal systems i.e. in the continental and common law legal systems respectively. One is the counter part of the other. Both of them are concerned in protecting legal goods (protecting harms) that have higher value in the society of each system respectively. We could say that both of them intrinsically built on the principle of last resort. Because, both of them require using of Criminal Law when there are no other alternatives. Based on their basic feature, through representing them by the principle of a Criminal Law as last resort, the research would like to assess the implication of all the discussed principles.

Here, the author found that the four negative principles- at least for the purpose of this research- i.e. the principle of Criminal Law as last resort, the principle of legality, the principle of General Part of Criminal Law and the principle of proportionality have common feature of proposing only conducts that exactly need proscription and punishment should be proscribed and punished exactly.

The principles manifest this common feature in their own way. The principle of legality manifests it through prohibiting broad and vague definition of an offence. The principle of Criminal Law as last resort requires exclusion in criminalization of those conducts that could be prevented by other alternatives rather than criminalization. The principle of General Part of Criminal Law requires criminalization not to be out of the doctrines of the general part. And the last and the most relevant is the principle of proportionality. This principle demands the softest measures to be tested first.

–Given that Criminal Law inflicts the harshest attacks of the State on the liberty of the citizen, it should only intervene there where the softest of all measures fail to promise an acceptable

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<sup>94</sup> Id, P.277

result.”<sup>95</sup> It could be concluded that the principle of proportionality could be taken as a master principle by including the main aspects of other limiting principles.

Regarding the challenges of the principles, Ashworth and Zedner state that during criminalization, it is rare to see debate and even rare to acknowledge the existence of restraining principles.<sup>96</sup> The reality is seen far from being principled in both continental and common law legal systems.<sup>97</sup> For the reason that the principles have partly political nature and they are more of guidelines and their violation could not be sanctioned like rules, the actual compliance of them could not be guaranteed.<sup>98</sup> Here, the most important thing to be noted is ~~h~~however, even if, the application of the principles often comes down to politicians (their good will and belief in the rule of law) and the general political climate, theory remains important.”<sup>99</sup>

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<sup>95</sup> Roxin1994, p. 24, as cited in Pino, supra note 86, p. 268

<sup>96</sup> Ashworth, Supra note 16, p.570

<sup>97</sup> Persak, Supra note 15, p. 29

<sup>98</sup> Id, p. 30

<sup>99</sup> Ibid

## Chapter Three

### Assessment of Criminalization and Determination of Punishment in Ethiopia

#### 3.1 Assessment of the Legal Frameworks

This section is devoted to discussing the legal frameworks that have roles in enacting criminal legislations. The discussions mainly focus on inspecting the limiting aspects of the legal frameworks on different government organs that have direct participation in criminalization and determination of punishment. Hence, the Constitution of Federal Democratic Republic of Ethiopia, the Criminal Code, the Criminal Justice Policy, the Attorney General Establishment Proclamation No. 943/2016, the House of Peoples' Representatives Regulation No. 6/2015, and the Working Directive of the Council of Ministers of the Federal Democratic Republic of Ethiopia are discussed.

##### 3.1.1 The Constitution of the Federal Democratic Republic of Ethiopia

As Husak states contemporary constitutions around the world lack adequate theory of criminalization.<sup>100</sup> A similar observation could be made about the Constitution of the Federal Democratic Republic of Ethiopia that it lacks adequate theory of criminalization because it lacks direct and clear theory of criminalization. This does not mean that the Constitution has no other indirect limitations on criminalization and determination of punishment. Among the limitations, Article 18(1) and 22 of the Constitution could be taken as the strongest indirect limitation on the criminalization and determination of punishment power of government. For the reason that these articles are not crafted as theory of criminalization and determination of punishment proper, the research prefers discussing them as indirect limitations.

Article 18(1) of the Constitution imposes duty on a government not to impose cruel and inhuman punishment during exercising its power of criminalization and determination of punishment. It reads as "[e]veryone has the right to protection against cruel, inhuman or degrading treatment or punishment."<sup>101</sup> Article 22 stipulates the non retroactivity of Criminal Law, in which the principle of legality is reflected as its basic ingredient. It reflects the main aspects of the principle of legality, a principle discussed in the previous chapter. It reads as:

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<sup>100</sup> Husak, last resort, Supra note 17, p. 211

<sup>101</sup> Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, art 18

“(1) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it was committed. Nor shall a heavier penalty be imposed on any person than the one that was applicable at the time when the criminal offence was committed.

(2) Notwithstanding the provisions of sub-Article 1 of this Article, a law promulgated subsequent to the commission of the offence shall apply if it is advantageous to the accused or convicted person.”<sup>102</sup>

In the Ethiopian context, the above mentioned provision is seen practically working as precisely limiting. It has been observed in the decisions of the House of Federation in the prominent case *Melaku Fenta and others v. Federal Prosecutor*<sup>4</sup>, where the House referred back the case to the courts to resolve the case based on the right guaranteed under Article 22(2). Based on this decision, courts have been seen deciding cases by setting aside Article 182 of the Custom Proclamation No. 859/2014. The reading of the article is: “without prejudice to the provisions of other laws cases pending before the effective date of this Proclamation shall be disposed in accordance with the previous laws.”<sup>103</sup> It is because the Proclamation was enacted in a way that prohibit those being tried by courts, including *Melaku and others*, not to be benefited from it (the new Proclamation), in which decriminalization of some of previously criminalized conducts and minimization of the punishment of some others was provided.<sup>104</sup>

Based on internationally accepted jurisprudence on the principle of legality, to make some conduct punishable, it is not only about requiring previous declaration, it is also about tailoring the criminal offence narrowly in a way that enable courts to understand clearly what is prohibited from the one it is not. It is about protecting citizens from abuse of criminal law through its broad definition.

In the Constitution, there are so many provisions that could be taken as just indirect limitation. Especially the fundamental rights and freedoms, those provided under chapter three of the Constitution could be taken as the main ones. For example, the one who is punished based on a

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<sup>102</sup> Id, art 22

<sup>103</sup> Customs Proclamation No. 859/2014, art 182

<sup>104</sup> Ato melaku fenta case, house of federation, 4<sup>th</sup> parliament term, 4<sup>th</sup> year, 1<sup>st</sup> extraordinary meeting, tahsas 24 2006E.C

legislation that unfairly criminalize and determine punishment for a given conduct, obviously lose his/her life or liberty right guaranteed under Article 15 and 17 of the Constitution respectively. Here, in fact the mentioned articles seem left the rights to be limited by the legislator to any extent, but they should be understood in a way that they prohibit arbitrary and unfair criminalization and determination of punishment.

### **3.1.2 The Criminal Justice Policy of the Federal Democratic Republic of Ethiopia**

The current Criminal Justice Policy<sup>105</sup> has seven sections. These sections incorporate fundamental objectives, goals, principles and strategies of the policy, crime prevention, improving the criminal investigation and service of prosecution, improving efficiency and fairness of the criminal justice process, improving the fairness and efficiency of the execution of criminal sanction, criminalizing acts committed against common rights and improving justice system in response to vulnerable groups, and miscellaneous matters and direction.

From the whole reading of the Policy, one cannot find a separate section or sub-section devoted to the principles that have limiting nature on the criminalization and determination of punishment. Under the Policy, nothing is said about the necessity of limitation on the government power of criminalization and determination of punishment. It could be said that the Policy didn't take in to consideration the problem of over-criminalization in general and excessive legislative determination of criminal punishment in particular. The caption of the sixth section entitled '\_criminalizing acts committed against common rights...' seems the Policy gives due consideration to the issue but it is only concerned about the need for criminalization of acts that committed against common rights.

As it is mentioned above, the Policy was crafted in a way that pays no attention to of legislative criminalization. But when one observes the scope of application of the Policy, we find that shall be applicable to all criminal matters and on all organs involved in the criminal justice system.<sup>106</sup> Therefore, based on the aforementioned statement of the Policy, and mainly based on commonly identified purpose of any government policy, there is no doubt on the applicability of the Policy

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<sup>105</sup> The Criminal Justice Policy of the Federal Democratic Republic of Ethiopia, 2<sup>nd</sup> ed., The Ministry of Justice, Addis Ababa, 2015.

<sup>106</sup> Id, Section one, article 1.6

on the organs of government involved in the criminal legislation making, including the main stakeholder, the House of Peoples' Representatives. It is also mentioned under section seven, where the Policy provides direction in relation with laws, that the legislator is expected to conform to.<sup>107</sup> It reads:

*“(a) all the Proclamations, regulations, directives and any other guidelines shall be amended or reviewed in a way that fit in to or enforce or cause to enforce the policy;*

*(b) Any legislative amendment, enactment of new law or initiation of any other guide lines, shall be prepared in compatible with the principles of this policy since the date of approval by the Federal Democratic Republic of Ethiopia's Council of Ministers.”<sup>108</sup>*

Here, even if they are somewhat remote, it is important to use the provisions found in the Policy, through a broader interpretation, that have relevance to limiting the power of government on criminalization and determination of punishment as much as possible. For example, in setting its basic principles and strategies, the Policy provides that ~~decisions~~ made in the criminal justice system shall ensure prevention of crime, cause to respect the rights of all the concerned people and shall ascertain peace and security of the country and the people.”<sup>109</sup> From this principle, we can derive the basic intention of different limiting principles, which is keeping balance between the desire to prevent crimes and the desire to protect rights of people from unwarranted use of criminalization power of government in general. It is also important to understand and make use of other relevant parts of the Policy in the same way.

### **3.1.3 The Attorney General Establishment Proclamation No. 943/2016**

According to the Federal Attorney General Establishment Proclamation, one of the responsibilities of the Attorney General is to draft laws of the federal government and check the

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<sup>107</sup> Id, Section seven, article 7.1

<sup>108</sup> Id, Section seven, article 7.1

<sup>109</sup> Id, Section one, article 1.4( g)

drafts whether they are in compliance with the Constitution and other federal laws. Article 6(5)(a) reads as:

*“perform preparation of draft laws to be promulgated by the federal government; ensure that draft laws prepared by government organs are consistent with the Constitution and federal laws; provide legal opinion to concerned bodies; assist in the preparation of draft laws when so requested by the regional states;”<sup>110</sup>*

Therefore, according to the above provision of the Proclamation, it is clear that the Attorney General has significant role in the preparation of draft federal legislations. From the reading of the provision, not only the Attorney General, but also other government organs also can draft legislations. Hence, the Attorney General has the responsibility to check both the draft laws prepared by itself and other governmental organs, whether they are in compliance with the Constitution and other federal laws. The Attorney General, therefore, plays a vital role in checking of the legislations with the Constitution and other federal laws. But, it would have been better to include boldly the need to check the compliance with some expressly stated principles that have a limiting nature on the government power of criminalization and determination of punishment, during drafting and checking criminal legislations.

### **3.1.4 The House of Peoples’ Representatives Regulation No. 6/2015**

The House Regulation deals with the process from initiation up to publication of legislations. The Regulation declares that the House of Peoples’ Representatives have the powers and duties enumerated under the Federal Constitution, including legislating federal laws, ratifying the federal government budget, over-sighting and controlling governmental bodies and taking measures where necessary, establishing and organizing different committees and other necessary structures of the House, approval or appointment of government officials, and facilitating the conditions for members to meet with the electorate in their respective constituencies.<sup>111</sup>

The Regulation clarifies what does enactment of laws means. According to the Regulation, enactment of laws includes legislating new laws, amending or repealing existing laws, ratifying

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<sup>110</sup> Federal Attorney General Establishment Proclamation No. 943/2016, Art 6(5)

<sup>111</sup> House of Peoples’ Representatives Regulation No. 6/2015, art 4(1)

international agreements and passing resolutions.<sup>112</sup> The Regulation states that initiating laws is mainly the duty of the government.<sup>113</sup> In its definitional section, the Regulation defines the phrase ‘government body’ as any federal government organ financed totally or partly by the federal government budget.<sup>114</sup> Even though the Regulation leaves the main responsibility to the government, initiation of laws could also be the power of other bodies like members of the House, committees of the House, parliamentary groups and other bodies authorized by law.<sup>115</sup> Because the Regulation obliges every draft laws from the government to be authenticated with the seal of the Council of Ministers, all draft laws from the government should pass through the Council of Ministers.

Every draft laws submitted to the House should be accompanied by explanatory memorandum.<sup>116</sup> The memorandum should include the necessity of the draft law, the objectives of the draft law, the policy background of the draft law, the detailed contents of the draft law, participation and general opinion of the concerned organs in the preparation process of the draft law, and other relevant matters.<sup>117</sup> Here, it would have been better if the Regulation require the memorandum to be prepared in a way that give special attention for criminal legislation in a manner that obliges the government to show how it pass through different limiting principles of criminalization and determination of punishment.

There are three different stages of reading that a given draft law may pass through. These are the first reading, the second reading and the third reading.<sup>118</sup> The first reading is the stage where the House debate for the first time on the content and purpose of the draft law after a brief explanation of the initiator. At this stage, the House may prefer either to pass to the second reading without referring the draft law to relevant committee for further inspection or it may prefer to refer the draft to a committee.<sup>119</sup>

The second reading is the stage where the deliberation is carried out on the draft laws that pass to second reading without being referred to a committee or on the draft laws those that had been

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<sup>112</sup> Id, art 50 (1)-(4)

<sup>113</sup> Id, art 51(1)

<sup>114</sup> Id, art 2(7)

<sup>115</sup> Id, art 51(2)

<sup>116</sup> Id, art 51(9)

<sup>117</sup> Id, art 51(10)

<sup>118</sup> Id, art 52

<sup>119</sup> Id, art 53

referred to a committee and returns back to the House with the committee's report and recommendations. Here, when the House believes that sufficient deliberation is carried on, it may make its decision by voting. However, if the House found that the draft law requires further consideration, it may refer back to the committee for the re-consideration.<sup>120</sup>

The third reading is the stage where deliberation is carried on the report and recommendation of the committee to which the draft law had been referred back for re-consideration. After the House conducted sufficient deliberation on the report and recommendation of the committee, the House shall decide in this stage.<sup>121</sup>

Among the many other powers and duties of the standing committees of the House, it submits reports and recommendations to the House after examining the referred draft laws.<sup>122</sup> In examining the draft laws, the standing committee, it may prefer to discuss with source persons on the draft law, to set up public forums and gather the opinion thereof, to cause stakeholders or individuals concerned to give their opinion on the draft law, to cause the matter to be clarified and submitted to it by a sub-committee, to apply various experiences and practices.<sup>123</sup> Here, what is promising is the existences of alternatives allowing the standing committees to use various experiences and practices so that the committees could have the chance to endorse the practice of using limiting principles on criminalization during examination of criminal legislations. However, the above mentioned alternatives are crafted in the Regulation in the form of alternatives to the committees. The committees may not be bound to use one or another alternative. The alternatives should have been crafted in the Regulation in a way that binds the committees to use all or at least many of the alternatives. The debate which is made by the committees with source persons, experts and the public may be conducted repeatedly.<sup>124</sup>

Among the standing committees of the House, the Legal, Justice and Administration Affairs Standing Committee play the major role in the process of law making. Like other standing committees, the Legal, Justice and Administration Affairs Standing Committee examine draft laws referred to it by the House. However, different from other standing committees, it has the

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<sup>120</sup> Id, art 54

<sup>121</sup> Id, art 55

<sup>122</sup> Id, art163(1)(a)

<sup>123</sup> Id, art 166(1)

<sup>124</sup> Id, art 167(3)

power to examine any draft laws referred to other committees, if it find necessary, in order to check whether the drafts are in compliance with legislative drafting principles.<sup>125</sup> Here, it would have been better if it also check the draft laws in accordance with some limiting principles of criminalization during enactment of criminal legislations.

After draft laws ratified by the House, they should be presented for signature to the President of the Republic. After the ratified laws signed or after the lapse of fifteen days allocated to the signature, their publication under Negarit Gazette by the Speaker of the House is the last stage of law making.<sup>126</sup>

The Regulation has no separate section that deals with only criminal legislations enactment process. Since criminal legislations may endanger the life and liberty rights of citizens, and the injury inflicted by such laws could not be reversible and may not be compensable, the Regulation needs to give special attention and separate section which also incorporate limiting principles on the power of government to criminalize and determine punishment.

### **3.1.5 The Working Directive of the Council of Ministers of the Federal Democratic Republic of Ethiopia**

According to the Directive, preparation of draft laws passes through different basic steps and prerequisites. The first prerequisite is there should first be a decision made on the acceptance of the policy base of the proposed law. The steps and process that follows include policy crafting, conducting consultations with different stakeholders; evaluating the weight of the proposed draft law; ratifying the policy base of the proposed draft law; sketching directions for the preparation of the draft law; conducting additional consultations; preparing the draft law; checking whether the prepared draft law could be presented to the council, by sending the draft first to the legal issues advisory team; presenting the draft to the council; then the council may ratify the draft law as a draft or after making discussion (a kind of first reading) it may refer the draft law to a relevant committee; the referred committee, after conducting research on the draft law, it

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<sup>125</sup> Id, art 180(2)

<sup>126</sup> Id, art 58 and 61

presents the findings; and finally after examining the draft, including the findings, the council ratify the draft law as a final draft.<sup>127</sup>

The primary task of drafting is started by the experts found in a government organ in complying with government policies.<sup>128</sup> There are some details about how laws should be drafted under the Directive. One of the details that the Directive incorporates is the provision that gives special attention for draft legislations that have criminal provision. The Directive states that whenever draft legislation incorporates a provision that institute crime or determine punishment or improve situations, a consultation with the then Ministry of Justice (now the Attorney General) should be made in order to ensure that the provision is appropriate and in compliance with the Criminal Code.<sup>129</sup>

Even though the Directive gives due concern about the subject matter under consideration, the consultation should not only be made to check the appropriateness or the compliance of the provision with the Criminal Law, but also whether the criminalization and determination of punishment is in line with some selected limiting principles on such power of the government.

### **3.1.6 The Criminal Code of the Federal Democratic Republic of Ethiopia 2004**

The Criminal Code of the Federal Democratic Republic of Ethiopia states different purposes in its preface and under Article 1, where the purpose of the Criminal Law is mainly specified. The Criminal Code in its preface states that the Criminal Law has different purposes, but prevention of crime is the major one. It reads as:

*“... [T]he purpose of Criminal Law is to preserve the peace and security of society. It protects society by preventing the commission of crimes, and a major means of preventing the commission of crime is punishment. Punishment can deter wrongdoers from committing other crimes; it can also serve as a warning to prospective wrongdoers. Although imprisonment and death are enforced in respect of certain*

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<sup>127</sup> Working Directive of the Council of Ministers of the Federal Democratic Republic of Ethiopia 2004 (Amharic Version), Art 40

<sup>128</sup> Id, art 43

<sup>129</sup> Id, 42(5)(b)

*crimes the main objective is temporarily or permanently to prevent wrongdoers from committing further crimes against society.*”<sup>130</sup>

In addition to providing prevention of crime as the major purpose of Criminal Law, the preface of the Criminal Code states that the Criminal Law has the purpose of incapacitation, rehabilitation and reform of criminals.

Similarly, Article 1 of the Criminal Code, underlining the prevention purpose as a major one, states that the Criminal Law has more than one purpose. It reads as:

*“The purpose of the Criminal Code of the Federal Democratic Republic of Ethiopia is to ensure order, peace and the security of the state, its Peoples, and inhabitants for the public good.*

*It aims at the prevention of crimes by giving due notice of the crime and penalties prescribed by law and should this be ineffective by providing for the punishment of criminals in order to deter them from committing another crime and make them a lesson to others, or by providing for their reform and measures to prevent the commission of further crimes.*”<sup>131</sup>

From the discussion in the preceding Chapter, it is clear that the purpose of Criminal Law could serve as limitation on the criminalization power of government. The above mentioned purposes of the Criminal Code are forward looking as they focus on protection of the society through mechanisms other than backward looking mechanisms. Therefore, they could properly be used as limiting principles on the government power of criminalization and determination of punishment. Excessive criminal punishments determined by the legislator in criminal legislations would be out of the purposes of the Criminal Code, because it would more serve the purpose of retribution than other purposes of the Ethiopian Criminal Code.

In addition to the above discussed limitations, the Criminal Code incorporates also different limiting principles on the government power of criminalization and determination of punishment. Among these, it incorporates the principle of legality in a way reflecting the basics of the

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<sup>130</sup> Criminal Code of the Federal Democratic Republic of Ethiopia Proclamation No. 414/2004, Preface, paragraph 7

<sup>131</sup> Id, art 1

principle. Here, it is preferred to give attention to Article 2 sub Article 1 which has more relation with the legislator in requiring it in clearly specifying a crime and penalty.<sup>132</sup>

The other limiting provision incorporated in the Criminal Code is Article 5 which sets the principle of the non-retrospective effect of Criminal Law. It reads as:

*“(1) If an act, declared to be a crime both under the repealed legislation and this Code was committed prior to the coming into force of this Code, it shall be tried in accordance with the repealed law.*

*(2) An act declared to be a crime under this Code but not under the repealed law and committed prior to the coming into force of this Code is not punishable.*

*(3) No act shall be tried or punished where it was a crime committed under the repealed legislation but is not declared so to be under this Code. If proceedings have been instituted they shall be discontinued.”<sup>133</sup>*

It is important to notice that the principle of non-retroactivity of criminal law may have some exceptions as enshrined under Article 6 of the Criminal Code. Criminal law may apply retroactively if it is beneficial (favorable) to the defendant.<sup>134</sup>

From the discussions in the previous Chapter, the non-retrospective effect of criminal law is mainly established on the principle of legality. Therefore, the principle has a limiting effect derived from the principle of legality. In Ethiopia, this principle had been seen in practice having a limiting effect on the government power of criminalization and determination of punishment. As it is discussed in the above section, the House of Federation gave constitutional interpretation which gave green light to the courts to use the similar principle found in the Criminal Code in order to set aside the application of Article 182 of the Proclamation No. 859/2014, a provision which denied the defendants to benefit from the decriminalization of some and minimization of punishment for the same action that was harsher in the previous Proclamation.

The most important principle incorporated in the Criminal Code is the principle of General Part of Criminal Law, which is discussed in detail in the previous chapter. What makes the principle

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<sup>132</sup> Id, art 2(1)

<sup>133</sup> Id, art 5

<sup>134</sup> Id, art 6

more important is that it enables the above mentioned limiting principles and provisions of the Criminal Code and other important limiting principles found in the general part of the Criminal Code would be binding on the legislator whenever it enacts new criminal legislations. The provision for the principle of General Part of Criminal Law reads as: “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.”<sup>135</sup>

### **3.2 Assessment of the Practice of Criminal Legislative Making**

In this section, the research tries to show what it looks like the practice in the circle of direct participants in the making of criminal legislations. The practice is searched through conducting interview, examining minutes of three selected legislations found in the House of Peoples’ Representatives and by comparing the selected legislations among themselves and with the Criminal Code of Ethiopia. Out of the circle of direct participants of criminal legislations making, the observations and opinions of judges, public prosecutors, private lawyers and other legal experts is searched through distributing questioners.

#### **3.2.1 Assessment on the Practice of the House of Peoples’ Representatives Criminal Legislative Making**

As it has been mentioned above, the practice of the House of Peoples’ Representatives is assessed through analyzing the response gathered by interview and the data gathered from minutes on selected three criminal legislations. Hereinafter, the analysis on the response from the interview and the data found from the minutes will be presented in the following two sub-sections.

##### **3.2.1.1 Assessment Based on the Response Gathered by Interview**

The interview is conducted on three members<sup>136</sup> of the House of Peoples’ Representatives. The interviewees are also the members of The Legal, Justice and Administration Affairs Standing

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<sup>135</sup> Id, art 3

<sup>136</sup> All the three interviewee, hereinafter for the sake of anonymity they will be represented by the letter x, y and z. Two of the interviewees are LLB holders (interviewee x and y) and the other one MA holder in accounting (interviewee z). Two of the interviewees are serving as the member of the committee for the last eight years

Committee, which is the most responsible committee in the process of legislative making as compared to others.

From the interview that the author has made with the three Members, it has been identified that the draft laws mainly come from the executive organs of the Federal Government through a process that touches first the present Attorney General (previously Ministry of Justice), and then the Council of Ministers. After the draft laws are revised and scrutinized by the Attorney General and the Council of Ministers, the draft laws enter in to the circle of the House of Peoples' Representatives law making process.<sup>137</sup>

The House starts debating on the draft laws in the first reading after short briefing of the source body of the draft law. In this stage, the draft laws may pass to the second reading and be ratified without being referred to relevant committees. If the draft laws are referred to some committee for further consideration, the committee that the draft is referred to may make the draft law to pass through different sub-stages.<sup>138</sup>

The first sub-stage is the stage of calling the source body's experts and relevant persons for further explanation. After discussing on the draft law with the source body's experts, then the committee passes to calling all the concerned bodies and others for the public hearing. After discussion is made in the public hearing, the committee decides on the part of the draft law which should be altered, improved or added. Finally, the committee prepares its report and recommendations on the draft law, to the House.<sup>139</sup>

After the House discusses on the report and recommendations of the committee, it may ratify the draft law in accordance with the report and recommendations presented. However, some draft laws may pass to the third reading. When the House decides on the draft law to be reconsidered by the committee, it means that the draft law passes to the third reading. In this situation, after the committee reconsiders the draft law further, it presents its report and recommendations to the

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(interviewee x and z); and the other one served as a member of the committee for the last one year (interviewee y).

<sup>137</sup> All the three interviewee

<sup>138</sup> Ibid

<sup>139</sup> Ibid

House for the last time and the House should decide by voting and the law making process ends there. Technical corrections, signing by the Republic President and publication follows.<sup>140</sup>

Regarding the issue of whether a separate discussion is made on the criminal provisions, all the interviewees unanimously answered that there is no trend of discussing separately on criminal provisions of draft laws, other than discussing it similarly with other non-criminal provisions.<sup>141</sup>

The other important questions that the respondents were asked was whether criminalization principles are there and whether the principle of last resort of a Criminal Law, legality, General Part of Criminal Law, or proportionality are there in the practice. All the interviewees prefer to respond all the questions together. And they responded that they always check all the draft legislations generally whether they are in line with the Federal Constitution, ratified international covenants, general principles found in the Criminal Code and relevant policies. The Members responded that they never had an experience of using separate set of limiting principles of criminalization towards criminal legislations.<sup>142</sup> But, from the responses, one can understand that the principle of General Part of Criminal Law could be taken as a principle used in practice somehow even if the extent is not in full understanding of the principle.

All the interviewees agreed on the lack of consistency and proportionality of punishments in different legislations. They also observed that there are trend of preferring excessive punishment from the government bodies that draft criminal legislations. And they all advise that criminalization in general and legislative determination of criminal punishment in particular needs to be principled.

### **3.2.1.2 Assessment Based on the Data found in the Minutes of Legislations**

The author have referred to minutes of some legislations with a view to identify whether the principles of criminalization and determination of punishment are given due consideration. The first minute<sup>143</sup> that the research prefers to look in to is the minute of the Stump Duty Proclamation No. 110/1998. This Proclamation punishes 10-15 years of rigorous imprisonment

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<sup>140</sup> Ibid

<sup>141</sup> Ibid

<sup>142</sup> Ibid

<sup>143</sup> The minute of the stump duty Proclamation No. 110/1998, which found in the library of the House of Peoples representatives

and a fine from ETB 25,000-35,000 for avoidance of stamping of a document those which should be charged with stamp duty.

It has been tried to see what was the debate on the criminal punishment of the legislation? It could be observed from the minute that the above mentioned punishment provision is approved in the legislation without making any change from the initial draft legislation. It was copied word by word without slight technical correction. The minute shows nothing about whether there were debates on the whole provision of the draft legislation. The author found only the explanatory memorandum of the draft legislation, the draft legislation itself and the report and recommendation of Economic Affairs Standing Committee and the Budget Affairs Standing Committee. In the report, nothing is mentioned about the punishment. The discussions of the standing committees with the source body of the draft law and of public hearing could not be found in the minute. The reason could be it was not carried on because it was not mandatory to make such discussions based on the then regulation of the House like that of the present one or it could be because of the problem of documentation.

Regardless of these problems, the fact that the mentioned criminal provision is directly ratified without any change and the excessive nature of the punishment shows that the House didn't hold a discussion on the punishment and didn't use any limiting principles even the principle of General Part of Criminal Law.

The second minute<sup>144</sup> that is reviewed is the minute of Commercial Registration and Licensing Proclamation No.980/2016, which punishes any person engaged in business activity without having a valid license. Article 49 (2) of the Proclamation reads as:

*Any person engaged in business activity without having a valid license or any business person who has been engaged in a business out of the scope of his business license shall, without prejudice to the confiscation of merchandise, service provision and manufacturing equipments, be punished with fine from Birr 150,000 (one hundred fifty*

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<sup>144</sup> The minute of Commercial Registration and Licensing Proclamation No.980/2016, which found in the library of the House of Peoples representatives

*thousand) to Birr 300,000 (three hundred thousand) and with rigorous imprisonment from 7 (seven) years to 15 (fifteen) years.*<sup>145</sup>

Even though the penalty provision of the Proclamation (Article 49) has seven other sub-provisions of penalties, the author prefers to focus only on the above mentioned sub-provision of the Proclamation.

It is noteworthy the reason why this Proclamation came up with the penalty provision that was controversial in its predecessor Proclamation i.e. Commercial Registration and Business Licensing Proclamation No. 686/2010, which is repealed and substituted by the present Proclamation. The previous Proclamation's similar penalty provision reads as:

*“any person who engages in commercial activities without having a valid business license shall be punished with fine from Birr 150,000 (one hundred fifty thousand) to Birr 300,000 (three hundred thousand) and with rigorous imprisonment from 7 (seven) to 15 (fifteen) years and the goods and/or the service delivery equipments and/or manufacturing equipments with which the business was being conducted shall in addition be confiscated by the government...”*<sup>146</sup>

As it could be observed from the comparison of these provisions, the range of the penalties did not seem to take in to consideration persons who engage in a business activity with very low capital, and the penalties were grave when compared with morally reprehensible acts one can imagine. These situations were creating confusion among judges and other practitioners. For example, it may be odd to punish someone for not having license for his/her business activity with three different types of punishment. The excessive nature of the fine imposed on a similar act cumulated with confiscation of all he/she have in relation with that business and rigorous imprisonment ranging from 7 up to 15 years and in fine ranging from 150,000 up to 300,000 birr. Such kind of punishment could not serve any of the forward looking purpose of our Criminal Law purposes, found in our current Criminal Code. Such kind of punishment is more of retributive, especially in some situations.

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<sup>145</sup> Commercial Registration and Licensing Proclamation No.980/2016 , art 49(2)

<sup>146</sup> Commercial Registration and Business Licensing Proclamation No. 686/2010, art 49(1)

The newly enacted Proclamation came up with a harsher penalty. So it would be rational to question what the debate on the mentioned penalty provision was. The original draft of the Proclamation No. 980/2016 was referred both to The Legal, Justice and Administration Affairs Standing Committee and Trade Affairs Standing Committee.

The minute indicates that starting from the first reading in the House to the public hearing including the discussions made with the source body's experts and high officials of the draft law, it was more than five times that the issue of penalty provisions repeatedly asked. The frequent questions focused on why the penalty provision could not consider persons having very low capital by mentioning the potential difference in the gravity of the crimes in each case. The Members questioned by recalling the problems created on the practitioners in the justice system by the same provision found in the previous Proclamation.

During the discussions made by the referred committees with the draft law source body's experts and high officials, it is recorded that the draft law source body's experts and higher officials answered that they drafted the law first in the way that distribute proportional punishment for different faults, but the Council of Ministers didn't accept it.<sup>147</sup> The minute also indicates that the Members were convinced to avoid lesser punishment in order to protect fair competition and the economy of the country,<sup>148</sup> In the same forum at the second round of presenting questions the standing committees raised the same question once again. It was at this time the above mentioned respondents promised that they would try to reconsider the penalty provision again, by recalling that there were two stand among experts of them.<sup>149</sup> Finally, the report and recommendation of the committees was presented with five other amendments without amending the penalty provision. The Proclamation was ratified with no modification on the penalty provision of it.

In the view of the author, this is a good example to show that criminalization and determination of punishment is highly influenced by the politicians from the executive branch. Here, the politicians in the executive branch really need to see the endangerment of citizen's life and liberty. It should also be noticed that the legislator need to be highly committed and well

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<sup>147</sup> Minute of Commercial registration and Licensing Proclamation, Supra note 144, pp. 12-13 (by the library page numbering, 002877-002878)

<sup>148</sup> Id, p. 14 (by the library page numbering 002879)

<sup>149</sup> Id, p. 18 (by the library page numbering 002883)

equipped with different limiting principles on criminalization in general and determination of punishment in particular.

The third minute<sup>150</sup> that this thesis prefers to analyze is the minute of Customs Proclamation (Customs Proclamation No. 859/2014). Under this Proclamation, there are some provisions in the section of custom criminal offences and penalties of the Proclamation which fix the same penalties for criminal acts with different intentions. Article 168 and 169 provides the offence contraband<sup>151</sup> and fraudulent acts<sup>152</sup> respectively. Both offences are similarly punishable 5-10 rigorous imprisonment and 50,000-200,000 birr in fine, when they are committed either intentionally or negligently. Both the above mentioned articles start with a phrase –any person who, knowingly or ought to have been aware of the fact...” which indicates that it doesn’t matter whatever intention the offender possess to be punished with the same harsh punishment. This approach is completely out of the general principle of Criminal Law found in the general part of the Criminal Code.

The minute is found having only some indirect discussion on the matter of such harsh punishment for extremely different intention of crimes. No changes were made on the penalty provisions as they were ratified as they were drafted.

### **3.2.2 Assessment On the Practice of the Council of Ministers’ Criminal Legislative Drafting**

The practice of criminal legislative drafting of the Council of Ministers is analyzed through conducting interview with two higher officials<sup>153</sup> in the secretariat of the Council. Respondent A responded that the flow of draft legislation comes from the source government body up to the Council of Ministers. According to the Respondent A, first the draft law is prepared by the relevant minister office; then different discussions are made with different institutions and experts; then the Attorney General gives its opinion, where the Attorney General could reject the draft law; if the Attorney General accept the draft law then it would be presented to the Council

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<sup>150</sup> The minute of Customs Proclamation No. 859/2014, which is found in the library of the House of Peoples representatives

<sup>151</sup> Customs Proclamation No. 859/2014, art 168

<sup>152</sup> Id, art 169

<sup>153</sup> Two of the interviewee, here in after for the sake of anonymity are represented by the letter A and B. Both of them are L.L.M Degree holders, with an experience of one year (interviewee B) and nine years (interviewee A) in draft law making.

of Ministers' secretariat cabinet affairs law department and the department work on the draft law again. It is because drafting of laws assumed as the area of potential danger by the council. He states that at this stage draft laws' criminal provisions would be checked with similar wrongs found in the Criminal Code.<sup>154</sup> However, according to the other interviewee it is a similar flow with the other draft laws that the criminal legislations pass through.<sup>155</sup>

To the question that asks whether there is especial attention and discussion on the criminal provisions of draft laws, Respondent A answers that there would be special discussion especially with the Attorney General, and the Council of Ministers also usually gives special attention. He also mentions that the necessity and whether the punishable act under the draft law was not covered by the Criminal Code are also checked.<sup>156</sup>

Regarding the issue of whether there is criminalization principle, it is answered by the first respondent that there are researches conducted to identify whether a given conduct need to be criminalized or not. However, he didn't mention separate principles or already fixed criteria.<sup>157</sup> The other interviewee mentioned that usually it is only checked whether the new punishable conduct is covered by the Criminal Code. He also mentioned that it has not been observed enough attention is given whether a particular conduct need to be punishable or not.<sup>158</sup>

To the question that inquire whether there is a principle of using Criminal Law as a last resort, it is answered by the first interviewee that there is an experience of checking through conducting research whether there are alternatives other than criminalization.<sup>159</sup> The other interviewee also shares the fact that there is an experience of checking other alternatives.<sup>160</sup>

Concerning the question of whether there is an experience of using a principle of legality in order to make criminal provisions clear and specific, it is answered by the first interviewee that there is an experience of making criminal provisions clear.<sup>161</sup> The other interviewee answered the

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<sup>154</sup> Interviewee A

<sup>155</sup> Interviewee B

<sup>156</sup> Interviewee A

<sup>157</sup> Ibid

<sup>158</sup> Interviewee B

<sup>159</sup> Interviewee A

<sup>160</sup> Interviewee B

<sup>161</sup> Interviewee A

question that there is an experience of making clear the criminal provisions following the general provisions of the Criminal Code.<sup>162</sup>

The way the General Part of Criminal Law is employed in the process of drafting legislations is also another concern. The respondents mentioned that there is an experience of following the general part of Criminal Code.<sup>163</sup> The other interviewee also answered similarly, and he also mentions that, it is even the main duty of many stakeholders that the draft laws pass through them.<sup>164</sup>

As regards whether there is an experience of using the principle of proportionality in order to impose only the least possible punishment that could prevent the proposed criminal conduct, it is answered by the first interviewee that he agree with the principle of proportionality, but he mention that he couldn't hide the fact that the possible least punishment is not being imposed. He further mention that there is strong inclination to impose harsher punishment, believing that it is only when a harsher punishment can prevent crime.<sup>165</sup> The other interviewee also agrees on the fact that there is no trend of imposing the least possible punishment. He also mentions that there are no criteria that direct for what crime, what amount of punishment need to be imposed.<sup>166</sup>

To the question that inquire whether there are other principles followed by the council during drafting criminal legislations, it is answered by the first interviewee only by mentioning the need that serious attention should be given and what other things should be done toward criminal legislations.<sup>167</sup> The other interviewee answered that there is no other principles being followed.<sup>168</sup>

Both of the interviewees advise that the trend of criminalizing every conduct and imposing excessive punishment need to be curtained. The first interviewee mentioned that especially drafters of law need to be careful and follow human rights legislations, acceptable principles of Criminal Law, our Constitution and the Criminal Code. He also further advises that only the

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<sup>162</sup> Interviewee B

<sup>163</sup> Interviewee A

<sup>164</sup> Interviewee B

<sup>165</sup> Interviewee A

<sup>166</sup> Interviewee B

<sup>167</sup> Interviewee A

<sup>168</sup> Interviewee B

Criminal Law should be used as a last resort.<sup>169</sup> The other interviewee also mention that the need for principle for determination of criminal punishment.<sup>170</sup>

### **3.2.3 Assessment On the Practice of the Attorney General's Criminal Legislative Drafting**

The practice of criminal legislative drafting of the Attorney General is searched through conducting interview with two medium officials<sup>171</sup> of the Attorney General.

Concerning the flow of draft legislations, the first interviewee mention that based on the working directive of the Council of Ministers especially legislations which have criminal provision are seen by the Attorney General and be checked whether they are crafted in a way that comply with the general principles found in the general part.<sup>172</sup> The other interviewee mention that, first the source body of the draft law send the draft law to the Attorney General, then after the Attorney General gives its opinion, it will send back to the source body, then the source body send the draft to the Council of Ministers, then after correcting the draft if any, the council would send the draft to the House of Peoples' Representatives.<sup>173</sup> Both of the interviewees mention that there is an experience which gives especial attention to the criminal provision of legislations.

To the question that inquire whether there is criminalization principle, it is answered by the first interviewee that there is no any principle, but it is usually criminal provisions crafted in a way that following international experiences.<sup>174</sup> The other interviewee answered the question by mentioning that there should be first a policy decision. He also mentioned that if it is found necessary, any concerned body could insert criminal provisions and their proportional punishment based on the Constitution and the criminal policy.<sup>175</sup>

To the question that inquire whether there is a principle of using Criminal Law as a last resort, it is answered by the first interviewee that even though we have not a separate principle, we are working on it, giving special attention. He also mentioned that they actually had an experience of

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<sup>169</sup> Interviewee A

<sup>170</sup> Interviewee B

<sup>171</sup> Two of the interviewee, here in after for the sake of anonymity be represented by the letter C and D. Both of the interviewees are L.L.M Degree holder with an experience of nine years in draft law making.

<sup>172</sup> Interviewee C

<sup>173</sup> Interviewee D

<sup>174</sup> Interviewee C

<sup>175</sup> Interviewee D

avoiding criminal provisions of many draft laws.<sup>176</sup> The other interviewee similarly answered that there is an experience of checking other alternatives.<sup>177</sup>

To the question that inquire whether there is an experience of using a principle of legality in order to make criminal provisions clear and specific, it is answered by the first interviewee that even though they are not using separate principle, but he mentioned that they are using the general principles found in the Criminal Code.<sup>178</sup> The other interviewee answered this and the following questions by generalizing that all the drafting process should follow the Constitution, principles of Criminal Law and principles of drafting. He also mentioned that the practice follow all these.<sup>179</sup>

To the question that inquire whether there is an experience of using the General Part of Criminal Law during drafting criminal legislations, it is answered by the first interviewee that even though there is no identified principle but in the practice there is a high trend of following the general principles found in the Criminal Code.<sup>180</sup>

To the question that inquire whether there is an experience of using the principle of proportionality in order to impose only the least possible punishment that could prevent the proposed criminal conduct, it is answered by the first interviewee that punishments are seen usually imposed arbitrarily, but as to Attorney General, he mention that they are working on improving the situation whenever they are giving their opinion on draft legislations.<sup>181</sup>

To the question that inquires whether there are other principles followed by, when drafting criminal legislations, it is answered by the first interviewee that there are no other principles rather than using the general principles found in the Criminal Code.<sup>182</sup>

Finally the first interviewee advises that we need to notice strongly that the increment of punishment could not prevent crime, rather it affects the rights of citizens and it could not also go with the basics of drafting principles. Therefore he advises once again that it is definitely

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<sup>176</sup> Interviewee C

<sup>177</sup> Interviewee D

<sup>178</sup> Interviewee C

<sup>179</sup> Interviewee D

<sup>180</sup> Interviewee C

<sup>181</sup> Ibid

<sup>182</sup> Ibid

necessary that drafters to craft criminal provisions in a way that putting in place proportional punishment following the Criminal Code and international principles of drafting.<sup>183</sup>

### **3.3 Analysis Based on Comparison Among Punishments found In the Criminal Law and Other Criminal Legislations**

In this section I will try to discuss the trend of imposing punishments, by comparing the above selected legislations among themselves and with some grave crimes' punishment found in the Criminal Code of the Federal Democratic Republic of Ethiopia.

When we see the comparison carefully we can easily notice something is going wrong. For example on the one hand the crime of outraging against the Constitution or the Constitutional Order is punishable only 3-25 years of rigorous imprisonment. It reads as:

*“Whoever intentionally, by violence, threats, conspiracy or any other unlawful means:  
(a) Overthrows, modifies or suspends the Federal or State Constitution; or  
(b) Overthrows or changes the order established by the Federal or State Constitution,  
is punishable with rigorous imprisonment from three years to twenty-five  
years.”<sup>184</sup>*

On the other hand, the Stamp Duty Proclamation is punishable 10-15 years of rigorous imprisonment and in fine from 25000-35000 birr, only for avoidance of stamping of a document those which should be charged with stamp duty. The provision reads as:

*“1) Any person:  
(a) Executing or signing, otherwise than as a witness, a document chargeable with stamp duty without the same being stamped;  
(b) who, with intent to defraud the appropriate payment of duty, conceals facts bearing on the true nature of any instrument; shall be liable on conviction to a fine not less than Birr 25,000 and not exceeding Birr 35,000 and to rigorous imprisonment for a term not less than 10 years and not more than 15 years.”<sup>185</sup>*

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<sup>183</sup> Ibid

<sup>184</sup> Criminal Code, Supra note 130, Art 238

<sup>185</sup> Stamp duty proclamation, Supra note 19, Article 12

In this case the one outrage against the Constitution or the Constitutional order has a chance of being punished less than 10 years of rigorous imprisonment without any penalty in fine but in the contrary the one who only avoid stamping of a document those which should be charged with stamp duty, be punished definitely 10 or more than 10 years of rigorous imprisonment. We could also think that the chance of being punished less than 7 years of rigorous imprisonment the one who outrage against the Constitution or the Constitutional order, but on the contrary the one who is found engaging in business activity without having a valid license, it could be with a few hundred capital, at least be punished 7 years of rigorous imprisonment and 150,000 birr in fine. The provision reads as:

–Any person engaged in business activity without having a valid license or any business person who has been engaged in a business out of the scope of his business license shall, without prejudice to the confiscation of merchandise, service provision and manufacturing equipments, be punished with fine from Birr 150,000 (one hundred fifty thousand) to Birr 300,000 (three hundred thousand) and with rigorous imprisonment from 7 (seven) years to 15 (fifteen) year”<sup>186</sup>

It is also possible to see that a rapist or the one who commits ordinary homicide be punished with only 5 years of rigorous imprisonment. The provisions respectively read as follows:

–(1) Whoever compels a woman to submit to sexual intercourse outside wedlock, whether by the use of violence or grave intimidation, or after having rendered her unconscious or incapable of resistance is punishable with rigorous imprisonment from five years to fifteen years.”<sup>187</sup>

–Whoever intentionally commits homicide neither in aggravating circumstances as in Article 539, nor in extenuating circumstances as in Article 541, is punishable with rigorous imprisonment from five years to twenty years.”<sup>188</sup>

However, in the contrary the one who is found engaging in business activity without having a valid license, as I mentioned above with a very small capital, at least be punished 7 years of

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<sup>186</sup> Commercial Registration and Licensing Proclamation, Supra note 145, Art 49 (2)

<sup>187</sup> Criminal Code, Supra note 130, art 620

<sup>188</sup> Id, art 540

rigorous imprisonment and 150,000 birr in fine and the one who only avoid stamping of a document those which should be charged with stamp duty, be punished definitely 10 or more than 10 years of rigorous imprisonment. Therefore we can found the proposition that in Ethiopia whatever it is, the society could not tolerate to see being punished less than 7 years of rigorous imprisonment and 150,000 birr in fine, the one who engaged in business activity without having a valid license but the society could tolerate to see being punished less than 7 years of rigorous imprisonment but not less than 5 years of rigorous imprisonment the one who commit an ordinary homicide.

The other contrast is the fact that while causing evasion or understatement of duties and taxes or misusing of duty free goods, (we need to notice here that it could be in millions) is only be punishable with administrative punishment of a fine in the Ethiopian customs Proclamation No. 859/2014 under its chapter one, entitled as customs offences and administrative penalties. The provisions read as:

→/ Any person who causes the importation or exportation of goods or attempts to export such goods, without payment of duty and tax or with the payment of understated duty and tax, by not entering or correctly stating them in a declaration submitted for completing customs formalities shall, without prejudice to settlement of the duty and tax payable, be punishable with fine equivalent to twice the amount of such duty and tax.

2/ Notwithstanding the provisions of sub-article (1) of this Article, if the remaining duties and taxes payable are not more than 10% of the total duty and tax payable, the importer shall pay the remaining duties and taxes without the penalty.”<sup>189</sup>

→) Any person who, contrary to the provisions of this Proclamation:

- a) uses duty free goods or-goods imported on the basis of reduced rate of duty and tax for purposes other than which the duty relief is granted or transfers them to another person;
- b) places duty free goods or goods imported on the basis of reduced rate of duty and tax for personal use under the service or possession of other persons outside of his family; or

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<sup>189</sup> Customs Proclamation, Supra note 104, art 157

c) knowingly or ought to have been aware of the fact that the goods are imported duty free or on the basis of reduced rate of duty and tax, buys, receives, uses, transfers or places such goods under the services of others;

shall, without prejudice to settlement of the duty and tax payable assuming that the goods are imported at the time of seizure, be punishable with fine equivalent to 50% of the amount of such duty and tax.”<sup>190</sup>

However, on the other side engaging in business activity without having a valid license, (which could be enough to be punished administratively) be punished at least 7 years of rigorous imprisonment and 150,000 birr in fine. For example the one who imports duty free huge tones of iron for the purpose of investment, if he/she sold it without using it to the original purpose, after so many times if it could be caught, then he would only be punished administratively in fine, after he/she benefited much and disrupted the fair competition of the commerce. Therefore, based on the above all facts it could be rational to conclude that there is an arbitrary criminalization and determination of punishment in Ethiopia.

#### 3.4. Analysis of Other Legal Professionals Opinion

This section deals with the presentation, analysis and interpretation of data collected on criminalization and determination of punishment. 45 copies of questioner were distributed out of the circle of direct participants of criminal legislations enactment. The observation of judges, public prosecutors, private lawyers and other legal experts is assessed. Out of 45 copies of questioner, 39 (87%) were filled appropriately and returned. This figure by a research standard is optimum to present, analyze and interpret the data gathered in order to reach on conclusion.

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<sup>190</sup> Id, art 163

**Table1. Policy and legal framework regarding criminalization and determination of criminal punishment**

Availability of a Policy and legal framework regarding criminalization and determination of criminal punishment.	Strongly agreed		Agreed		Don't know		Disagreed		Strongly disagreed		Total	
	freq	%	freq	%	freq	%	freq	%	freq	%	freq	%
	-	-	3	7.7%	5	12.8%	23	59%	8	20.5%	39	100%
Federal legislations do observe principles of criminalization and the determination of criminal punishment	1	2.56%	2	5.1%	3	7.7%	22	56.4%	11	28.2%	39	100%

The above table shows the respondents opinion about the availability of a policy and legal framework regarding criminalization and determination of criminal punishment in Ethiopia. Accordingly 59% (23) of the respondents disagree and 20.5% (8) that there is no Policy and legal framework regarding criminalization and determination of criminal punishment in Ethiopia. Moreover, 20.5% (8) of the respondents don't know whether Ethiopia has a policy and legal framework regarding criminalization and determination of criminal punishment. Only 7.7% (3) respondents are of the opinion that such policy and legal framework exist. It can be concluded

that 79.5% (31) of the respondents are of the opinion that such policy and legal framework does not exist which could have been employed by the legislature in Ethiopia.

Similarly, 56.4% (22) and 28.2% (11) respondents disagreed that federal legislations do observe principles of criminalization and determination of criminal punishment. It can be inferred from these data that 84.6% (33) respondents are of the opinion that the House of Peoples' Representatives failed to observe even the basic principles of criminalization and the determination of criminal punishment. Moreover, 7.7% (3) respondents did not have information whether the federal legislator do observe principles of criminalization and determination of criminal punishment or not.

**Table 2. Using Criminal Law as a last resort as opposed to civil and administrative means**

The legislator should consider Criminal Law as a last resort in deterring unwanted social acts.	Strongly agreed		Agreed		Don't know		Disagreed		Strongly disagreed		Total	
	fre q	%	fre q	%	fre q	%	fre q	%	fre q	%	freq	%
	19	48.7 %	13	33.3 %	-	-	4	10.3 %	3	7.7 %	39	100 %
The legislator should consider civil and administrative means before resorting to Criminal Law	31	79.5 %	8	20.5 %	-	-	-	-	-	-	-	-

Source: Questionnaire 2018

As far as using Criminal Law as a last resort as opposed to civil and administrative means concerned, 48.7% (19) and 33.3% (13) respondents strongly agree and agree respectively that the legislator should consider Criminal Law as a last resort in deterring unwanted social acts.

Moreover, 10.3% (4) and 7.7% (3) respondents disagreed and strongly disagreed respectively that the legislator should consider Criminal Law as a last resort in deterring unwanted social acts. It can be concluded that 82% (31) respondents are of the opinion that criminalization of acts should be the last resort that the legislator should consider. Similarly, 79.5% (31) and 20.5% (8) of the respondents are of the opinion that the legislator should consider civil and administrative means before resorting to Criminal Law.

**Table 3. Cross checking the general provisions of Criminal Code against legislations with criminal effects**

Criminal acts included in the legislations are cross-checked against the general provisions of Criminal Code	Strongly agreed		Agreed		Don't know		Disagreed		Strongly disagreed		Total	
	fre q	%	fre q	%	fre q	%	fre q	%	fre q	%	freq	%
Criminal acts included in the legislations are cross-checked against the general provisions of Criminal Code	-	-	10	28.2%	4	7.7%	11	28.2%	14	35.9%	39	100%
Most legislations which incorporate criminal provisions often render excessive punishments	27	69%	5	12.8%	-	-	4	10.3%	3	7.7%	39	100%

Table 3 shows that 35.9% (14) and 28.2% (11) of the respondents strongly disagreed and disagreed respectively that criminal acts included in the legislations are cross-checked against the general provisions of Criminal Code. Only 28.2% (10) of the respondents agree that criminal acts included in the legislations are cross-checked against the general provisions of Criminal Code.

This can be concluded that 64.1% (25) of the respondents are of the opinion that criminal acts included in the legislations are cross-checked against the general provisions of Criminal Code which could have served at least a guideline in determining criminal punishments.

Moreover, the respondents are asked as to whether subsequent legislations after the coming in to effect of the revised Criminal Code do contain excessive punishments as compared to the Criminal Code. Accordingly 69% (27) and 12.8% (8) of the respondents strongly agreed and agreed respectively that most legislation which incorporates criminal provisions often render excessive punishments than provided under the Criminal Code. Only 10.3% (4) and 7.7% (3) disagreed and strongly disagreed respectively that most legislation which incorporates criminal provisions often render excessive punishments as compared to the Criminal Code.

**Table 4. Consistency and proportionality principles in criminalization and determination of criminal punishment**

Consistency and proportionality are ascertained in the criminalization and determination of criminal punishment process	Strongly agreed		Agreed		Don't know		Disagreed		Strongly disagreed		Total	
	freq	%	freq	%	freq	%	freq	%	freq	%	freq	%
	-	-	2	5%	1	2.6%	10	25.6%	26	66.7%	39	100%
criminalization and determination of criminal punishment process is characterized by arbitrariness and abuse of power	9	23.1%	13	33.3%	7	17.9%	5	12.8%	6	15.4%	39	100%

The above table shows the respondents opinion about criminalization and determination of criminal punishment process is in a manner which ascertain consistency and proportionality of the act and the respective punishment in Ethiopia. Accordingly, 66.7% (26) and 25.6% (10) of the respondents disagreed and strongly disagreed respectively that Consistency and proportionality are ascertained in the criminalization and determination of criminal punishment process. Moreover, only 5% (2) of the respondents are agreed that consistency and proportionality are ascertained in the criminalization and determination of criminal punishment process. This can be concluded that 92.3% (36) of the respondents are of the opinion that criminalization and determination of criminal punishment are not consistent and proportional with the act and the respective punishment in Ethiopia.

Moreover, the respondents are asked as to whether criminalization and determination of criminal punishment process is characterized by arbitrariness and abuse of power or not. Accordingly, 33.3% (13) and 23.1% (9) of the respondents agreed and strongly agreed that criminalization and determination of criminal punishment process is characterized by arbitrariness and abuse of power. Moreover, 15.4% (6) and 12.8% (5) of the respondents strongly disagreed and disagreed respectively that criminalization and determination of criminal punishment process is characterized by arbitrariness and abuse of power. This can be concluded that 56.4% (22) of the respondents are of the opinion that criminalization and determination of criminal punishment process is characterized by arbitrariness and abuse of power.

**Table 5. Criminalization of acts by legislations**

Legislations often should contain provisions regarding criminal acts and their respective punishments	Strongly agreed		Agreed		Don't know		Disagreed		Strongly disagreed		Total	
	freq	%	freq	%	freq	%	freq	%	freq	%	freq	%
	3	7.7%	13	33.3%	-	-	12	31.5%	11	28.2%	39	100%
Criminalization of acts should be the only instrument to secure peoples' obedience and coercive power of the law.	5	12.8%	4	10.3%	-	-	8	20.5%	22	56.4%	39	100%

As far as criminalization of acts by legislations are concerned, 31.5% (12) and 28.2% (11) of the respondents disagreed and strongly disagreed respectively that legislations often should contain provisions regarding criminal acts and their respective punishments. Moreover, 33.3% (13) and 7.7% (3) of the respondents strongly agreed and agreed respectively that legislations often should contain provisions regarding criminal acts and their respective punishments. This can be concluded that 59.7% (23) of the respondents are of the opinion that legislations often should not contain provisions regarding criminal acts and their respective punishments.

**Table 6. Limitations on Criminalization of acts by legislations**

	Strongly agreed		Agreed		Don't know		Disagreed		Strongly disagreed		Total	
	fre q	%	fre q	%	fre q	%	fre q	%	fre q	%	freq	%
The power of the legislator is limited with regard to criminalization of acts	3	7.7%	4	10.3%	-	-	3	7.7%	29	74.4%	39	100%
The power of the legislator should be limited with regard to criminalization of acts	-	-	36	92.3%	-	-	3	7.7%	-	-	39	100%

As far as a limitation on criminalization of acts by legislations is concerned, respondents are asked whether the power of the legislator is limited with regard to criminalization of acts or not. Accordingly, 74.4% (29) and 7.7% (3) of the respondents strongly disagreed and disagreed respectively that the power of the legislator is limited with regard to criminalization of acts. However, 10.3% (4) and 7.7 (3) of the respondents agreed and strongly agreed respectively that

the power of the legislator is limited with regard to criminalization of acts. This can be concluded that 82.1% (32) respondents are of the opinion that the power of the legislature is unlimited with regard to criminalization of acts and determination criminal punishment in Ethiopia. Moreover, the respondents are asked whether the power of the legislator should be limited with regard to criminalization of acts or not. Accordingly, 92.3% (36) respondents agreed that the power of the legislator should be limited with regard to criminalization of acts and determination of criminal punishment in Ethiopia.

## Chapter four

### Conclusion and recommendations

#### 4.1. Conclusion

Criminalization and determination of punishment is taken as necessary evil power of government. On the one hand, criminalization is necessary for co-existence of a society. On the other hand, since it endangers the life and liberty of citizens, it should be managed carefully. For the purpose of careful management, we need to assess what factors are important in limiting this power of government to be used only to the extent of the appropriate limit.

Mainly because of the nature and lack of understanding of the area, either the limiting factors could not be identified easily or their application becomes difficult. It is because of this, until today, either even we couldn't think over it or we couldn't find absolute means that make the exercise of criminalization power of government to be limited not to go further than necessary. These problems produce the current phenomena, over criminalization and determination of excessive punishments in many countries.

Even though there is no absolute limiting factors, there are many factors that have immense contribution in limiting the over extension of criminalization power of government. Among the limiting factors, proper understanding of historical reasons that necessitate use of Criminal Law by a sovereign, proper understanding of purposes of Criminal Law and criminal punishment, proper understanding of even definition of Criminal Law, and mainly proper understanding of other limiting principles is necessary. It is also important properly taking lesson from excessive punishments in history, for example it is important to take lesson from the historical fact in the time of Queen Elizabeth I, in which even though it was a capital offence to pick pockets but it was seen this offence being committed in the place where the execution of other pick pockets carried on and in other case it was also proved that among 167 person prepared for death 161 of them had actually witnessed execution.

There are different principles that have limiting nature on the criminalization power of government. The principles can be categorized as positive and negative principles. The positive ones can be characterize as principles that direct what to be criminalized. But since they direct what to be criminalized based on some justificatory bases, we could take them as limiting

principles, when they direct us what not to be criminalized while their justificatory bases could not be fulfilled. The negatives are those direct what not to be criminalized. Under the positive ones the principle of legal good and the principle of harm are mentioned. Under the principle of negatives the principle of Criminal Law as last resort, the principle of legality, the principle of General Part of Criminal Law and the principle of proportionality are mentioned.

In order to apply or use the above mentioned and the like principles we first need to understand the danger of the unlimited criminalization power of government on life and liberty of citizens. It is not only to understand the danger, it is also necessary to understand the applicability of the principles rely on politicians' good will and belief in the rule of law, because there are so many ways to evade them.

In Ethiopia the federal criminal legislative making involves mainly the first drafter or the source body, the Attorney General, the Council of Ministers and the House of Peoples' Representatives. First the source body draft the law, then the Attorney General would give its opinion on the draft legislation, then after making correction the source body send the draft to the Council of Ministers, then after the correction of the council be included, finally the draft would be send to the House of Peoples' Representatives.

Among the legal frame works that could have limiting principles the Constitution and the Criminal Code of the Federal Democratic Republic of Ethiopia have been seen incorporating a kind of some limiting principles. The Constitution under article 18 (1) prohibit cruel and in human punishment, and under article 22 it incorporates the principle of legality. In addition the Criminal Code incorporates the principle of legality and other limiting principles in the general part of it. The Constitution and the Criminal Code also have some other indirect limiting principles in general. The criminal justice policy, the Proclamation of the Attorney General (proclamation .No. 943/2016), regulation no. 6 of the House of Peoples' Representatives and the working directive of the Council of Ministers are the legal frame works that have role in criminal legislative making beyond possessing limiting principles on criminalization and determination of punishment.

Generally from the practice of the Ethiopian federal criminal legislative making, it could be said that the criminalization and determination of punishment practice is mainly unprincipled. It is

clearly noticed that arbitrariness overflowed the practice. But the principle of legality and the principle of General Part of Criminal Law are principles that have better trial of application. Even though these two principles are tried to be applied by different stakeholders in criminal legislative making, it could be mainly because of lack of clear understanding or/and lack of good will and belief in rule of law, they are not seen producing their usual effect of limiting on criminalization and determination of punishment in Ethiopia.

#### 4.2. Recommendations

Based on this research among the legal frame works around the legislative making of criminal legislation only some of them loosely incorporate some limiting principles on criminalization and determination of punishment, on the other hand the practice is mainly unprincipled, therefore I hereinafter recommend the followings:

- First there should be an awareness creation around the real danger of unlimited criminalization and determination of punishment on the life and liberty of citizens to all, especially to politicians
- The Constitution of the Federal Democratic Republic of Ethiopia should incorporate clearly the main limiting principles on criminalization and determination of punishment while it is amended
- Next to the Constitution the criminal justice policy should incorporate limiting principles on criminalization and determination of punishment clearly and boldly
- On their regulations or directives the Attorney General, the Council of Ministers and especially the House of Peoples' Representatives should incorporate some rational limiting principles, and they should comply with them during criminalization and determination of punishment and
- The politicians and their experts should have clear understanding on the limiting principles and the real danger of unwarranted exercise of the power of criminalization and determination of punishment
- Generally all the relevant legal frame works and especially participants in the criminalization and determination of punishment should be principled, and then the politicians mainly should have good will and belief in rule of law.

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