

# Enforcement of the Principle of Legality in Ethiopia after *Ethiopian Revenue & Customs Authority v Ato Daniel Mekonnen\**

Abebe Assefa\*\* & Wendmagegn Gebre\*\*\*

## Abstract

The principle of legality, that safeguards the freedoms and liberties of individuals in the administration of criminal justice, is being challenged by the increasing tendencies of administrative agencies to attach criminal “teeth” to the myriads of administrative regulations and directives. The proliferation in Ethiopia of such administrative regulations and directives in the last few decades have been worrisome. This article posits that delegation of criminal law-making power to administrative organs counter the persuasive rationales for delegation of law making power for that would defy the principle of legality. Conceiving the principle of legality as primarily relating to notice and fair warning, the article shows that the principle of legality is not properly enforced in Ethiopia.

## Introduction

Legality is a principle by which the justice or fairness of a state’s positive law can be assessed. It is “a principle of justice by which to criticize positive law for falling short of doing what it ought to do and to commend positive law for achieving what it ought to achieve.”<sup>1</sup> Scholars approach principle of legality in different ways. Some look for a single principle, i.e., the principle of legality.

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\*\*Assistant Lecturer, University of Gondar, LLM Candidate in Criminal Justice & Human Rights Law (Bahir Dar University, Ethiopia).

\*\*\*Assistant Lecturer, University of Gondar, LLM Candidate in Criminal Justice & Human Rights Law (Bahir Dar University, Ethiopia).

<sup>1</sup> Westen, P., ‘Two Rules of Legality in Criminal Law’, *Law and Philosophy*, Vol. 26, No.3, 2007, p. 233 [Hereinafter Westen].

But, “[t]here is no such thing as a single ‘principle of legality’.”<sup>2</sup> The principle is concerned with one or more of the following distinct rules:<sup>3</sup> (a) the rule against retroactive criminalization; (b) the rule that criminal statutes be construed narrowly; (c) the rule against the judicial creation of criminal offenses; and (d) the rule that vague criminal statutes are void.

In a democratic society, strict adherence to the principle of legality and separation of powers play paramount role to ensure that lawmaking, law-enforcement and law-interpretation be carried out by a distinct organ of a government.<sup>4</sup> In connection to this idea, John Locke proposed that the law making organ should not transfer its power to any other organ.<sup>5</sup> He argues the lawmaking organ itself is delegated the power of lawmaking from the people so that it cannot delegate such power over to others. Hence, the doctrine of non-delegation embraces that in a democratic system, in which separation of powers is recognized, one organ of a government may not delegate its power to another organ.<sup>6</sup>

The principle of legality, that safeguards the freedoms and liberties of individuals in the administration of criminal justice, is being challenged by the increasing tendencies of administrative agencies to attach criminal “teeth” to the myriads of administrative regulations and directives. The proliferation in Ethiopia of such administrative regulations and directives in the last few decades have been worrisome. This article posits that delegation of criminal law-making power to administrative organs counter the persuasive rationales for delegation of law making power for that would defy the principle of legality. Conceiving the principle of legality as primarily relating to notice and fair warning, the

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<sup>2</sup> *Ibid.*, p. 229.

<sup>3</sup> *Ibid.*

<sup>4</sup> Taylor, J. & Samples, J., ‘The Delegation of Legislative Powers’ available at:

< <http://www.cato.org>> (Accessed on 28 Dec. 2011) [Hereinafter Taylor & Samples].

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

article shows that the principle of legality is not properly enforced in Ethiopia. The immediately following section lays the ground for further discussion by introducing the doctrine of (non-)delegation of criminal law making. This would be followed by a review of the principle of legality in section two and Federal Supreme Court Cassation Bench decision in section three, respectively.

## **1. Authoritative Sources Of Criminal Law and the Doctrine of (Non-)Delegation of Criminal Lawmaking Power**

In contemporary world, the doctrine of non-delegation of lawmaking power is losing its currency owing to the complexity of the modern life. “Administrative state” with abundant regulations and massive delegation of law-making power to the administrative organ of a government looks the fashion of the day. The decline of the doctrine of non-delegation and the birth of Chevron Regime, particularly in common law jurisdictions, are supposed to be justified.<sup>7</sup> “Delegation is a good thing,” Dan Kahan posits, “if we want a successful regulatory state.”<sup>8</sup> The rationales, according to the chevron doctrine, for delegation of law-making power are related to agency expertise, nimbleness and flexibility of agency rule-making.

Notwithstanding the above rationales for delegation of law-making power to unelected agency, criminal law-making power remains controversial. It is argued criminal law should reflect and channel societies’ moral judgment.<sup>9</sup> The creation of criminal law must therefore be preceded by the inherent social condemnation against its provisions making conducts or forbearances crime. According to Kristen E. Hickman, social condemnation suggests that “deciding that particular actions should be criminally punishable is an act of collective

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<sup>7</sup> Myers, R., ‘Complex Times Don’t Call for Complex Crimes,’ *North Carolina Law Review*, Vol. 89, 2011, p.1857 [Hereinafter Meyers].

<sup>8</sup> *Ibid*, p.1885.

<sup>9</sup> *Ibid*, p.1855.

moral judgment and condemnation.”<sup>10</sup> As an avenue, *inter alia*, for social condemnation against a certain behavior, the democratic principle of checks and balance has paramount importance as it holds that there has to be a social consensus before a certain behavior is made crime.<sup>11</sup> Delegation, to the contrary, shifts the power of law making from a legislature – a representative of all the interests of a society – to the “sub-government” agency, which represents the whim and wish of a few having its disparate agenda.<sup>12</sup> This shows that social consensus, a prerequisite for crime creation, is said to be achieved where a criminal law is enacted by the elected representatives.

As noted before, one rationale for delegation of law making power is agency expertise in a particular field. It is assumed that regulators are better conversant with a particular subject matter than the legislature is. Despite that, some insist that delegation is not sound in criminal law context where the necessary and inherent prerequisite in the making of law is social condemnation which calls for social moral judgment instead of expertise. Moral judgment (which doesn't require expertise) is crucial in determining which behavior should be condemned as crime as well as in deciding on the form and extent of punishment prescribed in relation to the specified crime. Accordingly, Myers II argues that “crime is not the subject of expertise, or of elite views, but instead should be evidence of broadly and deeply held moral commitments.”<sup>13</sup> This is to say that agencies may be expert in their spheres of fields but whatever their expertise may be they are not the appropriate body to reflect the moral fabric of a certain society. Criminal law, by nature, should reflect the moral judgment of a society rather than the moral judgment of expert agents.

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<sup>10</sup> *Ibid*, p.1864.

<sup>11</sup> *Ibid*, p.1860.

<sup>12</sup> Taylor & Samples, *supra* note 4.

<sup>13</sup> Myers, *supra* note 7, p. 1864.

The other justification for delegation of law-making power relates to the enhanced flexibility. As far as the principle of legality is concerned, a state is constitutionally limited to convict someone for an act which was only made crime at the time the act was performed. Hence, delegation for the sake of flexibility is unconstitutional in criminal matters.<sup>14</sup> Delegation for flexibility makes the principle of legality, which is however essential in criminal law, redundant.

The other concern with regard to delegation is the very nature of regulation. Regulation is an instrument mainly serving as regulating behavior than meting out condemnation and punishment.<sup>15</sup> A distinction between criminal charge and civil regulations is thus needed as their implication(s) is/are quite different. Irrespective of the peculiar features between the two concepts, criminal-civil distinction has been diminishing due to concentration of power within agencies and the reluctance of courts to keep watch over the distinction and the inclination to favor strict criminal liability.<sup>16</sup> Agencies have been accused of increasingly using overabundant criminal law, in matters to which civil regulations would have been proper, believing that labeling undesirable behavior as crime enhances deterrence.<sup>17</sup> According to Myers, “moral condemnation attaches to someone convicted of a crime in a different way and to a different degree than it does to a tortfeasor.”<sup>18</sup> Similarly, Paul Robinson argues that adding criminal “teeth” to civil sanctions in cases merely civil weakens the moral force of a criminal law.<sup>19</sup> Sharing Robinson’s idea, Erik Luna states:

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<sup>14</sup> *Ibid*, p. 1858.

<sup>15</sup> *Ibid*, p. 1851.

<sup>16</sup> *Ibid*, p. 1855.

<sup>17</sup> *Ibid*, p. 1864.

<sup>18</sup> *Ibid*.

<sup>19</sup> *Ibid*.

“When the criminal sanction is used for conduct that is widely viewed as undeserving of the severest condemnation, the moral force of a criminal law is diminished, possibly to the point of near irrelevance among some individuals and groups.”<sup>20</sup>

Such overuse of criminal law, overcriminalization, not only undermines the moral demand of a criminal law, but also reduces the efficacy of the law more generally.

The other justification for delegation is related to time constraint. Yet, it is rightly argued that:

“a legislature has enough time to create fully articulated new crimes where they are truly warranted, but if a legislature cannot expend the time and energy required to make the moral judgments and to engage the political balancing inherent in creating crimes, it should be barred from farming out that responsibility”.<sup>21</sup>

Generally, the weight of commentaries firmly suggests that crime creation and specifying corresponding penalties to it should always be a legislative work than a regulatory judgment. That is, criminal law making power should be the business of the legislative body if the moral force of criminal law is to be kept.

Coming to criminal law making power in Ethiopia, it is helpful to assess the FDRE Constitution first as it is the ultimate source of powers of all the government organs. In this regard, Article 55(5) of the Constitution clearly stipulates, in a mandatory fashion, that House of People’s Representative (HPR) is vested with the power to enact a penal code. This constitutional provision takes into account the inherent social condemnation in the creation of crime which could be manifested through the device of elected representatives. Though the FDRE Constitution seems to keep criminal law-making within the power of the legislature, the 1957 Penal Code, under Article 3, stipulates that

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<sup>20</sup> *Ibid*, p. 1865.

<sup>21</sup> *Ibid*, p. 1876.

other penal legislations having a “penal law nature” do have the force of applicability if the general principles embodied in the Code are adhered.

## 2. The Notion of Principle of Legality

As seen already, legality is a principle by which the justice or fairness of a state’s positive law can be assessed. The principle relates to one or more of the following distinct rules:<sup>22</sup> (a) the rule against retroactive criminalization; (b) the rule that criminal statutes be construed narrowly; (c) the rule against the judicial creation of criminal offenses; and (d) the rule that vague criminal statutes are void.

All of the above elements of principle of legality, in one or another way, are related to the principle of fair warning and notice. The writers discuss the principle of fair warning and notice at some length for it has particular relevance to the thesis developed in this article.

Notice is the basic element of the principle of legality. It has also much to do with fairness. “Crimes must be defined in advance so that individuals have fair warning of what is forbidden: lack of notice poses a ‘trap for the innocent’ and ‘violates the first essential of due process of law.’”<sup>23</sup> The kind of notice required is strictly formal. That is, a state is required to publicize criminal statutes in certain official document and in understandable language. Publication in some official document, no matter how inaccessible, is all that is strictly required. “Law as a guide to conduct,” Benjamin Cardozo states, “is reduced to the level of mere futility if it is unknown and unknowable.”<sup>24</sup> It is therefore “reasonable that a fair warning should be given in language that the common

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<sup>22</sup> *Ibid*, p. 229.

<sup>23</sup> Jeffries, J., ‘Legality, Vagueness, and the Construction of Penal Statutes,’ *Virginia Law Review*, Vol.71, No.2, 1985, p. 205 [Hereinafter Jeffries].

<sup>24</sup> Myers, *supra* note 7, p.1865.

world [people] will understand, of what the law intends to do if a certain line is passed.”<sup>25</sup>

Accordingly, laws are published in most democratic societies. Publication of laws is an intrinsic element of rule of law. Jeremy Bentham explains the need to promulgate laws: to promulgate a law is to implant it into the memories of members of a society on whom the law will be applicable; and providing the necessary facility for consulting or referring it, if there is any doubt regarding what it prescribes.<sup>26</sup> To quote:

“That a law may be obeyed, it is necessary that it should be known: that it may be known, it is necessary that it be promulgated. But to promulgate a law, it is not only necessary that it should be published with the sound of trumpet in the streets; not only that it should be read to the people; not only even that it should be printed: all these means may be good, but they may be all employed without accomplishing the essential object. They may possess more of the appearance than the reality of promulgation. To promulgate a law, is to present it to the minds of those who are to be governed by it in such manner as that they may have it habitually in their memories, and may possess every facility for consulting it, if they have any doubts respecting what it prescribes.”<sup>27</sup>

The means of notification of laws to the general public is somehow similar in various jurisdictions. Most states announce newly enacted laws to their

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<sup>25</sup> *Ibid.*, at 206.

<sup>26</sup> Bentham, J., *The Works of Jeremy Bentham*, published under the Superintendence of his Executor, John Bowring (Edinburgh: William Tait, 1838-1843). 11 vols. Vol. 1. Chapter: *I. Essay on the Promulgation of Laws*. Accessed from

<http://oll.libertyfund.org/title/2009/139530>. (on 2012-08-23) [Hereinafter Bentham].

<sup>27</sup> *Ibid.*



people in their respective official gazette.<sup>28</sup> In Hungary, laws, after being promulgated by the President of the Republic, must be published in the Magyar Közlöny which is the national gazette. Similarly, in Hong Kong, all bills, after being signed and promulgated by the Chief Executive, have to be announced by the government by gazetting.<sup>29</sup> The same holds true for Turkey where all bills must be published in the official gazette, Resmi Gazzete.<sup>30</sup> Practices have also shown us that even laws passed by administrative organs are to be published officially. For instance, in Belgium, Decrees and Ordinances passed by different administrative organs are published and promulgated in the Belgian official journal. For a regulation to be said formally promulgated and have legal effect in the United States, it must appear in the Federal Register after uncurbed public-comment period lapsed.<sup>31</sup>

The medium of announcement is as important as the very publication of laws to notify the public regarding the coming into effect of a new law. Publication has to be made in a language understandable to the political community, at least to the majority of the members. Publication of enacted laws in official instruments presupposes the text of the law is to be written in an official language of a given political community on whom that text of the law will be applicable. In this regard, Bentham points out that if a political community by whom the law ought to be obeyed speaks different languages, the authentic translation of the law should be made by each of the languages; but it is also proper to translate the law into the language the majority of the community can understand.<sup>32</sup> Hence, the mere existence of a criminal law in

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<sup>28</sup> "Power to Enact Laws" available at < <http://promulgate.askdefine.com/>> [Accessed on 30 Dec. 2011]

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> Bentham, *supra* note 26.

written form is not sufficient in the adherence of the principle of legality unless it is publicized formally in a recognized means and understandable language(s).

The requirement of notice includes not only specification of crimes but also the full notification of the corresponding penalties. In the USA, for instance, “offences are not complete unless, in addition to specifying the conduct they mean to prohibit, they specify punishments or range of punishments for those who violate the prohibitions.”<sup>33</sup>

Generally, notice of illegality of a criminal conduct, through publication using understandable language, is an essential requirement to the fairness of punishment. At this juncture, it may be asked what should happen to an individual who violates a law that does not fulfil the requirements of the principle of fair warning and notice. It can strongly be argued in this scenario that principle of legality “imposes on the state the obligation to give fair warning of what is forbidden.”<sup>34</sup> Consequently, ignorance of the law is excuse if the government is responsible for misleading individuals that allegedly violated the law.<sup>35</sup> Conversely, ignorance of the law would be no excuse if the government is not at fault in properly notifying criminal statutes to the people. The underlying assumption of the principle of legality must be that “what is not expressly prohibited is allowed – that the individual is presumptively free to do as he or she pleases, and that in doubtful cases the burden of proof lies on the government.”<sup>36</sup>

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<sup>33</sup> Myers, *supra* note 7, p. 1865.

<sup>34</sup> Jeffrie, *supra* note 23, p. 209.

<sup>35</sup> *Ibid*, p. 208.

<sup>36</sup> *Ibid*, p. 209.

## 2.1. The Principle of Legality under the FDRE Constitution and the 1957 Penal Code<sup>37</sup>

The Constitution of the Federal Democratic Republic of Ethiopia recognizes the principle of legality (with its various elements). Crucially, it recognizes the right to protection against retroactivity of criminal law.<sup>38</sup> No person shall thus be held criminally liable and punished unless a criminal conduct was made crime at the time when it was committed or omitted.<sup>39</sup> Under Article 17, the Constitution further provides that no one shall be deprived of his liberty unless that is made in accordance with established or pre-existing law; that is, a person can only be lawfully arrested or detained for an act that is prescribed by law as illegal.

The 1957 Penal Code also embraces the principle of legality. The Code expressly provides that “[c]riminal law specifies the various offences which are liable to punishment and the penalties and measures applicable to offenders.”<sup>40</sup> It, in Article 77, further declares that “[a] person is not punishable for an act or omission not penalized by law... even though he acted intentionally in the mistaken belief that he was committing a criminal offence.” It is, further, clearly stipulated that “[t]he court may not treat as a breach of the law and punish any

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<sup>37</sup> The 1957 Penal Code, as opposed to the 2004 Revised Criminal Code, would be referred to in this article. This is because the court case analysed in section 3 involved the application/interpretation of the 1957 Penal Code. Incidentally, it must be noted that the 1957 Penal Code’s provisions on the principle of legality are identical with that of the 2004 Criminal Code.

<sup>38</sup> Article 22, the Constitution of Federal Democratic Republic of Ethiopia, 1995, *Federal Negarit Gazeta*, Proclamation No.1, 1<sup>st</sup> Year, No.1 [Hereinafter FDRE Constitution].

<sup>39</sup> *Ibid.*

<sup>40</sup> Article 2(1), Penal Code of the Empire of Ethiopia, 1957, *Negarit Gazeta*, Extraordinary Issue, Proclamation No.158, 16th Year, No.1.

act or omission which is not prohibited by law. It may not impose penalties or measures other than those prescribed by law.”<sup>41</sup>

Now, the question is which law – primary or subsidiary – should specify crimes and penalties or measures? The Penal Code authorizes regulations and special laws, which are (to be) enacted by the executive branch of the government as subsidiary laws, to specify crimes and penalties or measures. That is, it authorizes subsidiary legislation to specify criminal offences, albeit such an approach to criminal legislation is not, as seen in section one, necessarily justified. Of course, the Penal Code requires such legislation (subsidiary criminal laws) to manifest “penal nature” before considered part of the penal law. It is submitted subsidiary criminal laws acquire “penal nature” through adherence to the general principles embodied in the Penal Code,<sup>42</sup> including the principle of legality which requires any criminal law to specify the various crimes, penalties and measures that are to be applied to offenders.

The Penal Code has also given heed to fair notice. As stated under Article 1, a main objective of the Code is “to preserve order, peace and security of the state and its inhabitants for the public good.” The Code further ascertains that the prior means of prevention of crime is through notice: “prevention of offences *by giving due notice of the offences and penalties* prescribed by law.”<sup>43</sup> It is when “due notice” fails in preventing crimes that punishment as means of crime prevention follows. This can be inferred from the wording of Article 1 paragraph two which reads as: “...should [notice] be ineffective by providing for the punishment ...to prevent the commission of further offences.”

The notification of specified crimes and penalties serves as warning as to what would happen to anyone who behaved in contravention of the criminal law. That is, notice has a deterrence value as good as punishment. It is also

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<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid*, Article 3.

<sup>43</sup> *Ibid*, Article 1.

stated above that notice is a basic element of principle of legality that fosters fairness or justice. Thus, citizens are supposed to be notified of what conduct is prohibited/required through specification of the type of criminal conducts and the form and extent of punishment. Government is generally duty-bound to make criminal law, governing citizens, accessible. This is not to say that it should give a copy of each and every criminal law document to the citizenry. The government's formal publication of criminal statutes may suffice in fulfilling the requirement of fair notice.

Though ignorance or mistake of law is no defense in principle, the Code allows the reduction of punishment for offenders who committed crime ignorantly or mistakenly.<sup>44</sup> It, under Article 78(2), even allows for no punishment to be imposed against an offender who committed crime owing to absolute and justifiable ignorance of the law provided that there was no criminal intent and bad faith in committing the crime. One circumstance for absolute and justifiable ignorance of the law can, for instance, be lack of fair notice due to non-publication of the law at issue.

Apart from the Penal Code, other legislations require publication of penal laws. The first law requiring publication of approved laws was *the Establishment of the Negarit Gazeta Proclamation No.1/1950*. Accordingly, this Proclamation had made the Negarit Gazetta a law reporter until 1995 when *the Federal Negarit Gazetta Establishment Proclamation No.3/1995* replaces its 1950 predecessor. The latter law, under Article 2, clearly states that “[a]ll laws<sup>45</sup> of the Federal Government shall be published in the Federal Negarit Gazeta”.

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<sup>44</sup> *Ibid*, Article 78 (1) - (2).

<sup>45</sup> “Laws” refers to proclamations, regulations and directives. And, “laws of the Federal Government” include enactments by either directly by the HPR or other appropriate organs of the federal government; see generally Article 51, FDRE Constitution *cum* Article 2(1), Proclamation No. 14/1996.

Thus far, the literature as well as statutory provisions regarding the principle of legality is discussed. The practical enforcement of this principle in Ethiopia is seen below in light of Federal Supreme Court Cassation Division ruling, which the authors believe is compelling.

### 3. The Case: *Ethiopian Revenue & Customs Authority v Ato Daniel Mekonnen*<sup>46</sup>

#### 3.1. Synopsis

In 2004, Ethiopian Revenue and Customs Authority filed criminal charge against Ato Daniel Mekonen for possessing and transacting (for export to Djibouti) in 46.96 kg of gold before the Federal First Instance Court. The act of the accused was said violate the provisions of Articles 2(28) and 66(2) of *Revenue and Customs Authority's Proclamation No.60/1997*, as amended by *Proclamation No.368/2003*. Alternatively, the accused was accused for committing an offence on the national economy in violation of Articles 1 and 2 of *Directive No. CTG/001/97*, a directive issued by the National Bank of Ethiopia (NBE) for the control and transaction of gold in accordance with Article 59 (2) (b) of *the Monetary and Banking Proclamation No.83/1994*.

The Federal First Instance Court, to which the case was initially brought, acquitted the defendant for the first count (the offense of contraband) while convicting him for the alternative count. And, it imposed a punishment of five years imprisonment, forfeiture of the stated amount of gold, one million Ethiopian birr fine and deprivation of all civil and political rights for three years.

Dissatisfied by the ruling of the trial court on the alternative count, the accused appealed to the Federal High Court. The appellate court maintained

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<sup>46</sup> *Ethiopian Revenue & Customs Authority Prosecution v Ato Daniel Mekonen*, Federal Supreme Court Cassation Division, File No.43781 (14 Hamle, 2002 E.C.).

that Article 59 (2) (b) of Proclamation No. 83/1994 – based on which the lower court imposed the penalties – has nothing to do with the amount of gold (to be) possessed or transacted by individuals. Concerning the validity of Directive No.CTG/001/97, the Court argued that since the Directive does not have the status of law so as to entail criminal liability for it was neither published in the Federal Negarit Gazeta nor printed in Amharic as required by Proclamations No.3/1995 and 14/1994. The court thus reversed the decision of the Federal First Instance Court.

The prosecutor of the Authority appealed from the decision of the Federal High Court, albeit the Federal Supreme Court confirmed the latter's ruling for similar reasoning. Finally, the prosecutor sought cassation revision for fundamental error of law.

### 3.2. The Holding of the Federal Supreme Court Cassation Division

In its application for the cassation bench, the prosecutor argued publication (or non-publication) in the Negarit Gazetta does not affect the validity of the Directive; and the Amharic version of the Directive is lacking only due to the working nature of NBE. The prosecutor then requested the Bench to reverse the decisions of the lower appellate Courts and confirm the decision of the trial court. The accused, on the other hand, argued that the Directive may not be given a legal effect as it lacks the legal requirements for valid law. Accordingly, criminal liability cannot result from such a “non-legal” document. The accused then prayed the Bench to confirm the decision of the appellate courts.

In answering the questions (1) whether publication of laws in *Federal Negarit Gazetta* is mandatorily required before laws issued by an organ other than the House of Peoples' Representative (HPR) become and (2) whether such laws are mandatorily required to be written in Amharic, the Bench first discussed the making of both primary and subsidiary laws and hierarchy of laws

as well. Convinced that subsidiary laws can be made by an appropriate executive organ through delegation, it also pointed out that Proclamation No.14/1994 specifies working procedures (in enacting laws) only for HPR. Thus, the Bench reasoned that although laws – including proclamations, regulations and directives – must be published in the *Federal Negarit Gazette*, this is so if and only if they are authored by the HPR. As there is nothing mentioned in the proclamation about the law-making procedure of the subordinate organs when they issue regulations and directives, the Bench concluded that the publication of regulations and directives issued by an executive organ is not required by law to be published in *Federal Negarit Gazette*. By the same token, it is concluded that the non-publication in Amharic of directives may not affect its validity. Hence, the validity of Directive No.CTG 001/97 is confirmed notwithstanding publication in Amharic in *the Federal Negarit Gazette*. Accordingly, the Bench reversed the decisions of the lower appellate courts and confirmed that of the Federal First Instance Court for Articles 1 and 2 of the Directive prohibit the possession and transaction of gold exceeding 10 *Ounces* of gold without the authorization from NBE.

### 3.3. Comments

Based on the four issues framed hereunder, the writers would, in this section, reflect on the decision of the Cassation bench. The writers believe the following should have been framed as main issues by the bench before rendering its final decision:

- a) Whether the legislature in the primary legislation (Proc. No. 83/1994) delegated any criminal law-making power to the NBE;
- b) Whether Directive CTG/001/97, which is issued by NBE, not publicized in the *Federal Negarit Gazzeta* and not translated into Amharic, is “Penal Law” that can be invoked as establishing criminal conduct and entail punishment;



- c) Whether the type and extent of punishment provided under Article 59 (2) (b) of Proclamation No. 83/1994 is applicable to conducts that violate any provision in the so-called Directive; and
- d) Whether violation of any part of the Directive is punishable under Art.59 (1) (h) of Proc. No.83/1994.<sup>47</sup>

### 3.3.1. Whether NBE has been delegated criminal law-making power

Article 39(2) of Proclamation No.83/1994 stipulates that “[t]he Bank [NBE] may issue regulations and directives relating to gold.” Clearly, the NBE is delegated power to issue regulations and directives in governing activities relating to gold. What is not clear from the terms of this provision, however, is whether such regulations and directives can specify crimes and entail criminal punishments. Of course, the Penal Code, under Article 3, allows regulations and special laws to specify crimes and penalties provided the requirements of principle of legality are fulfilled. Here, the phrase “special laws” can definitely include directives. But, as argued above, none of the different justifications for delegation of law making power works for delegation of penal law. Rather, the justifications for delegation of law making power counter all the purposes and general principles of penal law. Accordingly, regulations and directives (to be) issued by an agency should not specify crimes and penalties other than providing administrative regulations. Though the NBE, in the case at hand, is delegated to issue directives, such delegation, it is submitted, does not include criminal law-making power.

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<sup>47</sup> The Cassation Bench reasoned punishment could also be passed as per Article 59(1) (h) of Proclamation No.83/1994.

### 3.3.2. Whether Directive CTG/001/97 is “Penal Law”

Even when one assumes that the NBE is delegated criminal –law making under Proclamation No.83/1994, it must be established whether or not the Directive, in the case at hand, can be considered as a “penal law” that can be invoked as establishing criminal conduct and entail punishment. The Directive, under Articles 1 and 2, simply prohibits the possession or transaction of gold beyond a certain amount without NBE’s authorization. It thus deals with regulation of activities relating to the possession and transaction of gold which is fundamentally different from crime specification.<sup>48</sup>It follows that since the Directive does not specify crimes as such, it would not be “penal law” as an important requirement, i.e., crime specification, is missing.

Any criminal legislation, primary or subsidiary, must specify crimes as well as corresponding penalties and measures for it to have a penal nature. As pointed out earlier, the Penal Code, under Article 2 (1), requires subsidiary penal laws to specify the corresponding penalties in addition to specifying the criminal acts. However, Directive CTG/001/97 does not specify penalties and measures to be taken against a person possessing or transacting gold in excess of 10 ounces. As noted in the synopsis of the case, the Cassation bench penalized the alleged offender based on the provisions of Proclamation No. 83/1994, instead of the directive itself; the punishment for violation of the Directive is not comprehensively found in one instrument (the Directive). Consequently, in the absence of specification of punishments and measures, the Directive cannot be invoked for having “penal nature” as required by the Penal Code.

In determining whether laws passed by an executive organ of the federal government must be published in official law gazette, the pertinent provisions

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<sup>48</sup> For more on the distinctions between the nature of criminal offenses and regulatory offenses, see Ashworth, A., ‘Conceptions of Overcriminalization’, *Ohio State Journal of Criminal Law*, Vol.5, 2007–2008, pp. 407 *et seq.*

of *Federal Negarit Gazette Establishment Proclamation No. 3/1995* must be consulted. This proclamation requires “laws of the Federal Government” to be published in the *Federal Negarit Gazette*. Since Directive CTG/001/97 was passed by the NBE, a federal executive body,<sup>49</sup> it is argued it forms part of the “laws of the Federal Government” for the purposes of Proclamation 3/1995. In the case at hand, however, the Federal First Instance Court and the Federal Supreme Court Cassation Division failed to identify and examine such laws on the basis of which both the Federal High and Supreme Courts justified their identical verdicts in favor of the defendant. The authors regret the courts failed to identify and examine penal laws subject to the principle of legality. Unnecessarily, they referred to Proclamation No.14/1996 which deals with the working procedure of the HPR and argued that this Proclamation does not require the same procedure, e.g. publication, as regards administrative organs enacting laws through delegation. Of course, Proclamation No.14/1996 does not deal with law-making procedures to be followed by government organs but the HPR. And, the publication requirement under this proclamation is only incidental, for the requirement of publication of laws (both primary and subsidiary) in the *Federal Negarit Gazette* is primarily governed by the Federal Negarit Gazette Establishment Proclamation No. 3/1995. Therefore, the conclusion of the Federal Supreme Court Cassation Division that there is no law governing the publication of subsidiary laws in the Negarit Gazette is not legally persuasive.

It must also be emphasized that the publication has to be made in the language required by law. In this connection, the Federal Negarit Gazette Establishment Proclamation No.3/1995, under Article 3, states that while laws are published in the Negarit Gazette, the text of the law has to be written both in Amharic and English versions. It further goes to stipulate that where there is discrepancy between the two versions, the Amharic shall have a prevailing

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<sup>49</sup> Article 77 (4), FDRE Constitution.

effect. In both requirements, the Proclamation employed the word “shall” to show the mandatory requirement of publication of laws in Amharic and English as well. The absence of publication of laws in either of these languages would fail the requirement of notice. Unless a law is published in the official law reporter, the *Federal Negarit Gazette*, in a language understandable to the public, no one can access it and be able to take notice to behave according to the will of the law. The requirement of the text of the law to be written in Amharic language, in addition to English, is not a matter of formality; it is rather a requirement safeguarding the fundamental freedoms and liberties of citizens.

Seen in light of this, the Directive, written only in English and unpublished in the *Federal Negarit Gazette*, do not fit with *Federal Negarit Gazette Establishment Proclamation* and, crucially, the principle of legality. The Federal Supreme Court Cassation Division, in making reference to only Proclamation No.14/1996, failed to identify and apply the relevant law, the Proclamation No. 3/1995 which explicitly and mandatorily requires laws, primary or subsidiary, to be published in Amharic, the working language of the federal government.<sup>50</sup>

### 3.3.3. Whether the type and extent of punishment provided under Article 59 (2) (b) of Proclamation No. 83/1994 is applicable to conducts that violate the Directive

It is recalled that specification of crimes with corresponding penalties and measures applicable to criminals is an important nature of penal laws. Offences would not be complete unless the conduct prohibited or required is accompanied by clearly stipulated punishments or range of punishments.

Proclamation No. 83/1994, particularly under chapter three, deals with matters relating to import and export of valuable goods which include gold. However, it does not stipulate the legal amount of gold while possessing or transacting the same. As a result, the punishments stipulated under Article 59 (2)

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<sup>50</sup> *Ibid*, Article 5 (2).

(b) of the Proclamation are only applicable to acts specified in the proclamation other than acts relating to the breach of the possession and transaction of gold beyond a certain amount. The type and extent of punishments provided under Art 59 (2) (b) of Proc. No. 83/1994 would not therefore apply vis-à-vis conducts that violate the provision of the Directive, albeit the Cassation Bench erroneously held to the contrary.

### 3.3.4. Whether violation of any provisions of the Directive is punishable under Article 59(1) (h) of Proclamation No. 83/1994.

Article 59(1) (h) of Proclamation No. 83/1994 stipulates that any violation of any directive (to be) issued under the authorization of the proclamation is punishable in accordance with the 1957 Penal Code. As seen already, the Directive regulates the legal limit of the amount of gold to be possessed or traded without the authorization of NBE. One may therefore arguably hold that this is crime specification. Nonetheless, the writers strongly maintain this is not crime specification for reasons discussed earlier. The Directive, which perhaps specifies a penal act without however the corresponding punishments, is contrary to the principle of legality anyway. For that reason, it is not in accordance with the 1957 Penal Code. It is thus submitted any violation of any part of the Directive is not punishable under Article 59 (1) (h) of Proclamation No. 83/1994.

## **Conclusion**

Government organs in Ethiopia must adhere to the principle of legality in enacting criminal laws through delegation. It is only when the principle of legality is ensured that the fundamental rights and liberties of individuals would be guaranteed.

It is unfortunate though that the supreme judicial authority in *Ethiopian Revenue & Customs Authority Prosecution v Ato Daniel Mekonen* set a precedent that subsidiary criminal laws may apply notwithstanding the requirement of the principle of legality that penal laws must be published in Amharic in *Federal Negarit Gazette*. The Directive, issued by NBE and applied by the court as valid criminal law, was neither published nor translated into Amharic from English; it was just put somewhere just like an ordinary literature. NBE that abandoned the Directive without concluding its publication tasks is similar to an “Ostrich among the most stupid birds that leaves its egg in the sand, heedless that the passage foot may crush them.”<sup>51</sup> Is it fair to punish a passerby who crushed but never knew or should have known whether there is egg buried somewhere in the sand? The authors are afraid not.

Finally, the authors believe the holding of the Cassation Bench that unpublished directives are valid laws is made without due analysis of relevant laws and principles. It is however hoped that the bench would revisit its holding with the view to restore the enforcement of the principle of legality as recognized under the Consitution and criminal laws of the country.

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<sup>51</sup> Bentham, *supra* note 26.