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“Over-criminalisation”: A Review of Special Penal Legislation and Administrative Penal Provisions in Ethiopia

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Abstract

*Criminalisation is the most intrusive state action; as such, it requires strong justification. Looking merely at the doctrinal justifications, in the common-law system, harm is the single most important justification for criminalisation. In the continental system, however, there are positive and negative requirements to be complied with. The positive requirement is that the law is intended to protect ‘legal good’. Such legal good covers interests that are essential for the social existence of the individual. The negative requirement is *ultima ratio*. Further, when the criminal law is used, the means-end proportionality is required to be maintained. The criminal law is one body of law. Thus, the General Part of the criminal law is applicable to offences stated both in the Special Part of the Criminal Code and those stated in special penal legislation or penal provisions contained in administrative regulatory legislation. The notion of legal good is incorporated into Art 1 of the Criminal Code in broader context as ‘common good’. However, the law maker adopted several pieces of penal legislation and extensive penal provisions contained in administrative regulatory legislation contrary to such ‘legislative promise’. In those penal provisions, the law maker criminalises conducts that were already criminalised in the Criminal Code, save they increase the punishment. The legislator criminalises conducts contrary to the principles of criminalisation, including the principles in the General Part of the Criminal Code, such as, the principle of legality and the principle of lenity. The legislator is consistent in choosing increased penal sentence both in absolute and relative standards. It is this excessive use of criminal law and excessive punishment that is presented as over-criminalisation.*

Key terms: Criminalisation, over-criminalisation, legal good, common good, *ultima ratio*, criminal law, special legislation.

Introduction

Criminal law is the most intrusive state interference into the autonomy and liberty of individuals; as such, criminalising any conduct requires a strong justification. In continental criminal law, there are positive and negative justifications for criminalisation. Once a conduct is criminalised, the lawmaker also determines the measure or punishment attached to such conduct. The positive reason for

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criminalisation of conduct is the protection of the “common good”. The common good is the physical and moral integrity of the social structure to which the individual is a member. The protection of the common good is only the necessary condition; it is the principle of *ultima ratio* that constitutes the sufficient condition for criminalisation of conduct, i.e., the state may use the criminal law as the last resort action for protection of the common good where other measures, such as administrative measures and civil actions, are ineffective.

Having regard to this theory of criminalisation, the amount of punishment is determined based on two principles - the principle of proportionality as a measure of punishment against guilt and the principle of parsimony for enforcing utility - only such amount of punishment having lasting impression on society in order to show the promise of punishment is genuine but the least painful on the individual undergoing the punishment. These principles are included in the General Part of the Federal Democratic Republic of Ethiopia (FDRE) Criminal Code. In fact, the General Part of the Criminal Code is a legislative promise of limited use of state coercive power limiting the state’s resort to the criminal law as well as the application of the criminal law itself.

The individual is subject to criminal punishment if she commits a criminal conduct with a guilty mind and her punishment is limited to the extent of her guilt. The centrality of guilt to the individual criminal responsibility and the individual nature of criminal responsibility are made sufficiently clear in the General Part of the Criminal Code.

Continental criminal law has two categories of criminal law: the primary criminal law, as contained in the criminal/penal code, and the secondary criminal law covering administrative criminal law. Despite the fact that our Criminal Code is purely continental, both in content and structure, we have common law influences in the statutory criminal laws. Therefore, we have three categories of criminal law: the primary criminal law is composed of those crimes covered by the Criminal Code and those contained in the special penal legislation, such as, *Proclamation to Control Vagrancy No 384/2004*, *Anti-Terrorism Proclamation No 652/2009*, and *Corruption Crimes Proclamation No 881/2015*. The second category of criminal law is that contained in Part III of the Criminal Code covering petty offences, which in the continental system are said to be administrative criminal law. The other category of criminal law includes those penal provisions contained in administrative proclamations which cannot fully be categorised under administrative penal law because almost all of them are punishable with imprisonment and fine and often they govern a subject that is already criminalised in the Criminal Code. It is those special penal legislation and this third category that are the subject of this article.

Despite the fact that there are several penal legislation (both contained in special penal and administrative legislation), criminal law is considered to be one body of law. Therefore, the principles in the General Part of the Criminal Code are also applicable to those other legislation. A review of legislation adopted by the House of Peoples’ Representatives (“HoPR”) indicates that there are penal provisions in all administrative regulatory legislation giving the impression that the state attempts to solve all administrative problem using criminal law. The lawmaker does not seem to have any restriction on its power of criminalisation. Furthermore, penal sanctions are getting tougher every time a legislation is revised again giving the impression that there is no rule governing the amount of punishment the lawmaker may impose for conducts that are legitimately criminalised, which results in over-criminalisation. It is this excessive use of criminal law and severe punishments we call “over-criminalisation.”

This article reviews the general principles of criminal law as included in the Constitution and the Criminal Code, a substantial number of penal legislation (both special and administrative), and decisions of the Federal Supreme Court Cassation Bench, and the literature pertinent to the topic at hand. Section 1 presents a brief history of the continental criminal law and how those criminal law doctrines incorporated into the Ethiopian criminal law have evolved in continental criminal law. Section 2 deals with criminalisation, doctrinal and constitutional limitations over the state’s power in using the criminal law for the purpose of achieving ends other than the protection of the common good. The doctrine of the common good is a significant limitation requiring both positive and negative justifications for use of criminal law. The doctrine of the common good is incorporated into the constitution relatively fairly, but there is also a ‘separation of power’ limitation. Other criminal law principles, such as, the principle of legality and the non-retroactivity of the criminal law are also discussed.

Section 3 discusses the application of those principles and doctrines to special criminal legislation and penal provisions contained in administrative laws. Based on those doctrines discussed in section 2, section 4 discusses over-criminalisation. Over-criminalisation is discussed both in terms of excessive use of the criminal law and the use of the criminal law to achieve other purposes than the protection of the common good, as well as the use of excessive punishment. Finally, there is a conclusion.

1. A Brief History of Continental Criminal Law

Criminal Law is the most intrusive state coercive action into the private life of the individual. Therefore, it requires a justification for its enactment and application. In fact, criminal law was once linked to the natural law theory that considered crime

as sin and that punishment was imposed for expiation.¹ However, alternative theories of criminal law have evolved since the age of enlightenment.

The advances in the natural sciences in the renaissance period did not have a counterpart development in the social sciences, particularly in law.² Because those crimes that were treated as serious were those committed against religion and property, the critics of the then existing criminal justice were extremists – arguing that criminal law was not necessary and that it was not justified under the then existing social conditions. The logical conclusion of this argument was that people were not responsible for their acts because they had been led to crime by the prevailing social injustices and punishment would be justified only after such social injustices were abolished.³ Even Beccaria's argument, although it appears to be based on the theory of utilitarianism and the social contract theory, was still based on the political economy of the state giving the theory an economic background.⁴

Some described the then existing criminal justice as “appalling.”⁵ The law was “confused, cruel and inconsistent”⁶ the punishments and their application “reached the limits of human inventiveness in its barbarism, ferocity and studied cruelty.”⁷ In France, which was considered to be “the most civilized and advanced country in Europe”, the penal law and its administration was described as barbaric.⁸ That appears to be the reason why the greater number of the well-

¹ G. Gardiner, *The Purposes of Criminal Punishment: I. The Nature of Punishment*, 21 THE MODERN L. REV. 117, 117-119 (1958). This has been the case in Ethiopia until the 1930 Penal Code was adopted. Before the adoption of the Penal Code the applicable law was the *Fiteha Negest*. Intimately connected with the Ethiopian Orthodox Church and the King, it commands legitimacy because it is said to have been inspired by the 318 Fathers meeting at Nicaea. In the *Fiteha Negest*, crimes (transgressions) “are against God, not against man.” As such, judgments are considered divine because the judge is judging the sin (crime) and in doing so he has the full power of God. FITEHA NEGEST: THE LAW OF THE KINGS xxi, 4 (Abba Paulos Tsadwa trans., Law Faculty, HSIU 1968). Graven holds that, despite the introduction of “new concepts” to the Ethiopian criminal law, the 1957 Penal Code did “not scarify the idea ...expiatory punishment.” J. Graven, *The Penal Code of the Empire of Ethiopia*, 1 J. ETH. L. 288 (1964).

² Unlike what was in the hard sciences, the discussions in the field of social sciences, including law, were not based on measurable and quantifiable concepts. Therefore, Beccaria's principle of ‘utility’, i.e., ‘the greatest happiness to the greatest (larger) number of people’, changes the abstract into the concrete. C. BECCARIA, *BECCARIA ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS* xix (R. Bellamy ed., Cambridge University Press 1995) (1764). B.Z. TAMANAHA *THE LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 22, 23 (Cambridge University Press 2006).

³ P. Jenkins, *Varieties of Enlightenment Criminology: Beccaria, Godwin, de Sade*, 24 BRITISH J. OF CRIMINOLOGY 119, 128 (1984).

⁴ Beccaria, *supra* note 2, at xvi, xv; Jenkins, *supra* note 3, at 115, 116.

⁵ P.M. Warthon, *The Humanitarian Movement in European History*, 48 IL PLITICO 700 (1983).

⁶ *Id.*

⁷ T. Cizova, *Beccaria in Russia*, 95 THE SLAVONIC AND EAST EUROPEAN REVIEW 384 (1962). Regarding judicial torture, generally, see J.C. Welling, *The Law of Torture: A Study in the Evolution of Law*, 5 AM. ANTHROPOLOGIST (1892). The barbarism of the day is dramatically described by Foucault about the public execution of the person who attempted to kill the king of France in 1757. M. FOUCAULT *DISCIPLINE AND PUNISH: THE BIRTH OF PRISONS*, 3 – 6 (A. Sheridan transl. Vintage Books 1995) (1975).

⁸ Warthon, *supra* note 5, at 701. Montesquieu published his *The Spirit of the Law* in 1748 and Helvetius published his *De L'Esprit* in 1758.

known critics of the criminal law, such as, Voltaire, Montesquieu, Helvetius and Diderot, were from France.⁹

Some opine that the reform in the criminal justice began in 1762 with the execution of Jean Calas¹⁰ who had been represented by Voltaire before the French *Parlement* (sovereign court).¹¹ However, because several of these theorists were atheists and their theory is based on materialism and determinism resulting in extreme propositions, they faced severe criticism from the ecclesiastics and the aristocrats, and their propositions for criminal justice reform were not heeded.¹²

In 1764 Beccaria published his book *On Crime and Punishment*¹³ in which he stated the appalling conditions of the criminal justice which moved him to seek for justification for use of the criminal law and punishment. In search of justification he acknowledged the influence of those French theorists.¹⁴ But the foundation of his theory was Rousseau’s social contract theory published in 1762 and Helvetius’ principle of utility.¹⁵

Beccaria argues, in the social contract, individuals yield a portion of their freedom constituting the sovereign in collective self-defence from the “war of all against all.”¹⁶ Punishment is, thus, justified by ensuring “the continued existence of society” by protecting men from disrupting their continued social existence.¹⁷ Explaining the utility of punishment, he argues that because law operates in the

⁹ *Id.*, at 703.

¹⁰ C.L. VON BAR, ET. AL, A HISTORY OF CONTINENTAL CRIMINAL LAW 1 (T.S. Bell, et. al. trans, Little, Brown and Company 1916). Jean Calas, a protestant merchant in Toulouse, and his entire family were wrongly convicted, for murder of his son who committed suicide, by the Toulouse *Parlement* and he was “broken on the wheel.” Voltaire defended this case and three years later in 1765 the Paris *Parlement* found Calas and family innocent. The surviving members of the family received financial compensation. Cizova, *supra* note 7, at 385 Footnote 5.

¹¹ S. Dauchy, *Legal Interpretation and the Use of Legal Literature in 18th Century Law Reports of the “Parlement” de Flandre*, in INTERPRETATION OF LAW IN THE AGE OF ENLIGHTENMENT: FROM THE RULE OF THE KING TO THE RULE OF LAW 45, 47 (Y. Morigiwa, M. Stolleis, and J.L. Halperin eds., Springer 2010). J.L. Halperin, *Legal Interpretation in France Under the Reign of Louis XVI: A Review of the Gazette des tribunaux*, in INTERPRETATION OF LAW IN THE AGE OF ENLIGHTENMENT: FROM THE RULE OF THE KING TO THE RULE OF LAW 21, 36 (Y. Morigiwa, M. Stolleis, and J.L. Halperin eds., Springer 2010).

¹² Jenkins, *supra* note 3, at 117.

¹³ Voltaire “recruited [this book] in his own campaign against various abuses perpetrated by the French legal system and prepared a *Commentary* on the text, which was regularly published along with the subsequent editions [...] in French and other languages.” Beccaria, *supra* note 2, at xxix.

¹⁴ Beccaria makes specific reference to Montesquieu in his Introduction and in Chapter 2 on “The right to punish”. His social contract theory discussion is obviously borrowed from Hobbes and the discussion on the principle of utility is from Helvetius. Beccaria, *supra* note 2, at xvi-xviii.

¹⁵ Jenkins, *supra* note 3, at 117.

¹⁶ Beccaria took the social contract theory for its theoretical explanation not in its historical context. Beccaria, *supra* note 2, at xviii. Jenkins, *supra* note 3, at 116, 117. E. Monachesi, *Pioneers in Criminology IX Cesare Beccaria (1738-1794)*, 46 J. OF CRIM. L., CRIMINOLOGY AND POLICE SCIENCE 439, 442 (1955).

¹⁷ Beccaria, *supra* note 2, at 9-11. Monachesi, *supra* note 16, at 445. He carefully crafted his theory bringing apparently contradictory theories of social contract and utility in harmony. Beccaria, *supra* note 2, at xviii, xx, xxi.

negative, individuals react more to avoid pain rather than pursuing pleasure, crime and punishment should be closely linked.¹⁸ He also argued for the least but effective punishment, i.e., it is certainty of prosecution that creates the greatest impact or “enduring impression” on society to prevent crime with “less pain on the individual” undergoing punishment,¹⁹ while he argues against corporal and death penalty as not to have formed a part of the social contract.²⁰

In order to determine the intensity of punishment Beccaria classified offences into three categories²¹, having regard to the relative importance of the good and the “harm” caused to society by such crime.²² The preventive aspect of punishment is succinctly stated by Hegel who said that the criminal law is never meant to be applied; the criminal, by committing crime, is doing service to the criminal law as he transforms it from abstractness to concreteness.²³ The state imposes punishment neither to torment the criminal nor to undo the crime but to show those would be offenders that the promise of punishment is genuine thereby to maintain the “continued social existence”.²⁴

As part of his proposal for a criminal law reform, Beccaria presents three propositions which he calls “consequences”.²⁵ First, punishment must be based on law applicable to the public in general (not to specific individuals) adopted by the legislature representing all the members of society; second, the laws are applied equally and the determination of violation is by a third-party magistrate; and third, no severe punishment may be imposed unless in the prevention of crime. He concluded that it is this type of government under which the protection of life, liberty and property of persons is possible.²⁶

The secular theories of materialism and determination were severely criticised by the church and the aristocracy; however, the religious reason for obedience to the law also failed among the public because, after suffering several natural and manmade disasters, it was seen that “there was no plan or purpose for humanity, no guiding hand of God or providence.”²⁷ This made Beccaria’s justification of the

¹⁸ Beccaria, *supra* note 2, at xvi, xvii. Even though he was praised by Bentham as a father of Sensorial Jurisprudence, Beccaria was also criticised for evaluating man as a pain and pleasure subject.

¹⁹ *Id.*, at xxii. Monachesi, *supra* note 16, at 443, 445.

²⁰ Beccaria, *supra* note 2, at 39-44, 66-72. Monachesi, *supra* note 16, at 446. Jenkins, *supra* note 3, at 119.

²¹ “Some crimes directly destroy society or its representatives. Some undermine the personal security of a citizen by attacking his life, goods or honor. Others sill are actions contrary to what each citizen, in view of the public good, is obliged by law to do or not to do.” Beccaria, *supra* note 2, at. 24-25.

²² *Id.*, at 19-23. Monachesi, *supra* note 16, at 445.

²³ W.S. Landecker, *Criminology in Germany*, 31 J. OF CRIM. L. AND CRIMINOLOGY 551, 553 (1941).

²⁴ *Id.*, at 554. Beccaria, *supra* note 2, at 31. Monachesi, *supra* note 16, at 445.

²⁵ Beccaria, *supra* note 2, at 12-13.

²⁶ Monachesi, *supra* note 16, at 444.

²⁷ *Id.*, at 114, 115.

criminal law on the social contract theory palatable²⁸ both to the ecclesiastics and the aristocrats.²⁹

Beccaria’s small book was so influential in continental Europe, except Russia, and Italy until sometime,³⁰ that some even opined that it “hastened” the approaching French Revolution.³¹ He influenced German criminal law significantly in the way it evolved to the level it has attained today. The 1813 Bavarian Penal Code used general prevention theory of punishment and included the principle of legality.³²

The interests that are protected by the criminal law in earlier German criminal law development were subjective rights of the individual. In 1834 Birnbaum developed the concept of “legal good” by criticising the concept of subjective rights as “narrow” in scope.³³ Although for some time following its development, the concept of legal good was considered redundant with subjective rights and had been abandoned it was later re-discovered in order to expand the scope of the criminal law including the protection of the state’s interest.³⁴ The concept of legal good and the principle of legality are now indispensable criminal law doctrines limiting the power of the state both in criminalising conducts and arbitrariness in the administration of the criminal law.³⁵

The European humanist movement that started in the mid-eighteenth century came to Ethiopia after 200 years and is incorporated in the 1957 Penal Code completing the positivistisation of criminal law.³⁶ The 1957 Penal Code states that the complexities of social life requires “effective, yet human and liberal procedures

²⁸ Jenkins, *supra* note 3, at 116, 119.

²⁹ Jenkins, *supra* note 3, at 114-17. Cizova, *supra* note 7, at 387. Beccaria completed the secularisation and positivistisation of the law by seeking a human justification for criminalisation and punishment as he made it clear in his note “To the Reader” appended to the fifth edition of his book.

³⁰ Russia was not able to adopt Beccaria’s humanist concept until 1926 because of the ‘serf system’. Cizova, *supra* note 7, at 390, 393-96. Warthon, *supra* note 5, at 716, 717. Some gave up their judicial career for not being able to implement Beccaria’s idea in Russia, some were imprisoned, some exiled, and some even committed suicide. Cizova, *supra* note 7, at 398, 401 and 403. Italy, on the other hand, had been a papal state and the public did not get awakening of national consciousness. Warthon, *supra* note 5, at 713.

³¹ Cizova, *supra* note 7, at 386. Jenkins, *supra* note 3, at 112.

³² Some (wrongly) attribute the development of the principle of legality to Feuerbach, who drafted the 1813 Bavarian Criminal Code. T. VORMBAUM AND M. BOHLANDER EDS. A MODERN HISTORY OF GERMAN CRIMINAL LAW 42 (Springer 2014).

³³ *Id.*, at 49-50, 56. M.D. Dubber, *Theories of Crime and Punishment in German Criminal Law*, 53 AM. J. OF COMP. L. 679, 687 (2005).

³⁴ Vormbaum and Bohlander, *supra* note 32, at 55.

³⁵ *Id.*, at 56, 175.

³⁶ The 1957 Penal Code in its Preface states that the Code is “inspired by the principles of justice and liberty and by the concern for prevention and suppression of crime, for the welfare and, indeed, for the rehabilitation of the individual accused of crime.” Further, Graven states that the 1957 Penal Code is borrowed primarily from continental penal codes. He even makes specific reference to Beccaria and the humanist movement in his commentary on Art 1 of the 1957 Penal Code. His comments reflect that the provision is very much influenced by the ideas of Beccaria in criminalization and punishment. P. GRAVEN, AN INTRODUCTION TO ETHIOPIAN PENAL LAW (ARTS 1-84 PENAL CODE) 2, 5-8 (Faculty of Law, HSIU 1965).

be adopted so that legislative prescriptions may have the efficacy intended for them as regulators of conduct³⁷

2. Criminalisation

Criminal law is one of the most effective social control mechanism discovered yet.³⁸ Because the state has the monopoly of such coercive power, modern (constitutional) criminal law requires a justification for the use of such power. Criminalisation is understood to mean the normative declaration of a conduct criminal by the lawmaker.³⁹ Such a decision is made based on choices and justifications the state makes, not based on the inherent qualities of such conduct.⁴⁰

This theory appears to be guided by two conflicting interests. Individual freedom is natural while criminal justice and social co-existence is a social construct. Therefore, when the state is pursuing an interest that is of social construct, it should not limit the natural right unjustifiably. Thus, the state's power to restrict the individual freedom through the use of the criminal law should be kept to the minimum.

However, the complexities of life, the urbanisation and impersonal nature of relationships demand the expansion of the criminal law in order to maintain the social existence.⁴¹ It is natural if one would then ask, in any constitutional state, whether the state is using the criminal law for legitimate purposes and if there is any limitation on such power.

2.1. Consequentialist vs. Deontological Theories

It is absolutely necessary to make a clear distinction between the consequentialist theory of criminal law, and punishment and the deontological arguments. As stated above, the theory of crime in continental criminal law is generally consequentialist,

³⁷ 1957 Penal Code, Preface, para. 2.

³⁸ Often the criminal law is described as social control mechanism; see generally, D. GARLAND THE CULTURE OF CONTROL: CRIMES AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (University of Chicago 2001). R.F. Meier and W.T. Johnson, *Deterrence as Social Control: The Legal and Extralegal Production of Conformity*, 42 AM. SOCIOLOGICAL REV. 292 (1977); N. Lacey, *Historicising Criminalisation: Conceptual and Empirical Issues*, 72 MODERN L. REV. 936, 950 (2009).

³⁹ There are also those, such as, Lacey, who argue for a broader understanding of criminalization and application of the concept of criminalisation both as a normative declaration as well as a judicial practice. See generally, Lacey, *supra* note 38. In this article, we are focusing on the normative declaration of a conduct criminal. However, sometimes, resort may be had to the broader understanding of the concept where the practical application of the law is found necessary, for instance, in tax cases.

⁴⁰ N. PERSAK CRIMINALISING HARMFUL CONDUCT: THE HARM PRINCIPLE, ITS LIMITS AND CONTINENTAL COUNTERPARTS 12 (Springer 2007).

⁴¹ Lacey, *supra* note 38, at 956. Also, the Penal Code states that the scope of the criminal law is expanding because of the "expanding frontiers of society brought about through the contributions of science, the complexities of modern life." Preface, para 2.

i.e., it justifies punishment on external factors, such as, prevention of crime; and the state imposes punishment neither to torment the criminal nor to undo the harm but to prevent such crime.⁴² Thus, punishment is not justified if it is not necessary to achieve this purpose.⁴³

The deontological argument is based on the theory of justice that punishment is inherent in the crime itself in retaliation. Kant argues that the harm caused to the individual “must find its equivalent in the harm done to” the offender; it is the harm that justifies punishment irrespective of any future consequences.⁴⁴ Also, Hegel argues from the perspective of justice that the state imposes punishment in order to counter the injustice caused by the criminal conduct. Punishment is a negation of the negation of law by the criminal in order to restore justice.⁴⁵ It is thus evident that while the consequentialist theory is forward looking the deontological theory is backward looking.

The provisions of Art 1 of the 1957 Penal Code indicate that the Code was consequentialist that both the theories of crime and punishment are guided by the purpose of prevention of such crime. This provision is taken over to be Art 1 of the 2004 Criminal Code.

2.2. Positive and Negative Justifications for Criminalisation

Whether it is in a continental criminal code or in a common-law statute, criminalisation has both positive and negative reasons in defining its scope.⁴⁶ The positive reasons are the considerations or a set of conditions the state may look into before using the criminal law as a means to achieving the state’s end. In the continental criminal law, the state may use the criminal law for the protection of the legal good by preventing crime. The use of the criminal law must be necessitated by the protection against a threat to or violation of such legal good from crime. It is a positive justification for the state to use its coercive power.⁴⁷ The negative aspect of criminalisation includes the principle of *ultima ratio* that the criminal law may be used for the protection of the legal good if other means, such as, administrative sanctions and civil actions cannot do as well or even better.⁴⁸

⁴² Beccaria, *supra* note 2, at 30.

⁴³ *Id.*, at 10-11.

⁴⁴ Landecker, *supra* note 23, at 522.

⁴⁵ *Id.*, at 553.

⁴⁶ The positive requirement for criminalization is a necessary condition while the negative requirement for criminalization is a sufficient condition. L.A. Zaibert, *Philosophical Analysis and the Criminal Law*, 4 BUFFALO CRIM. L. REV. 108, 109 (2000).

⁴⁷ G.P. Fletcher, *The Nature and Function of Criminal Theory*, 88 CAL. L. REV. 689, 690, 698 (2000).

⁴⁸ See generally, D. Husak, *The Criminal Law as Last Resort*, 24 OXFORD J. OF LEGAL STUDIES 207 (2004); Persak, *supra* note 40 at 22. Fletcher, *supra* note 47, at 700.

In continental criminal law, these theories of criminalisation are manifested in the positive and the negative aspect of the legal good. There is no well-developed equivalent analytical approach for criminalisation in the common law.⁴⁹ However, on the positive reason for criminalisation, a conduct is a criminal conduct if it causes or likely to cause harm (to others), which is sometimes referred to as public wrong.⁵⁰ On the negative reason for criminalisation, arguably, the principle *ultima ratio*, is in operation.⁵¹

Both the positive and negative reasons of criminalisation are included in the 2004 Criminal Code of Ethiopia in an elaborate manner as “common good”. They take two forms: the concept of common good, and other constitutional and institutional limitations.

2.3. The “Common Good” Doctrine

Art 1 of the Criminal Code provides that the purpose of criminal law is to “ensure order, peace and the security of the State, its peoples and inhabitants;” the law does so not for its own end of “order, peace and security” but for the “common good.”⁵² It is this concept of “common good” that incorporates both the positive and the negative justifications for criminalisation of conduct.⁵³ However, this concept is incorporated into the Ethiopian Criminal Code with broader notion as “common good,” appears to be close to the idea of Beccaria rather than the

⁴⁹ F. Molina, *A Comparison Between Continental European and Anglo-American Approaches to Overcriminalization and Some Remarks on How to Deal with It*, 14 NEW CRIM. L. REV. 123, 124 (2011). Dubber, *supra* note 33, at 681. Zaibert, *supra* note 46, at 104, 108, 109. Zaibert’s analysis on the justifications to criminalisation is very much aligned to the continental approach.

⁵⁰ See Persak, *supra* note 40, in general for an in-depth study of Mill’s and Feinberg’s harm principle justifying the criminal law. R.A. Duff, *Towards a Theory of Criminal Law* 84 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY (SUPPLEMENTARY VOLUMES) 1, 17-21 (2010).

⁵¹ The *ultima ratio* principle can only work with a criminal law based on theory of crime prevention. This is a continental criminal law theory, not a common-law theory. Further, principal theory of punishment in the Anglo-American system is the desert theory; there are those who advocate for expression theory of punishment. In those cases, the criminal law cannot logically be the last state action. See, for example, Husak, *supra* note 48, at 221, 222. Lacey calls this “intermediate scrutiny” analysis “imaginative” facing “serious political and institutional constraints.” Lacey, *supra* note 38, at 940, 941.

⁵² There is a stark difference between the Amharic and the English version of the reference to the criminal law. The Amharic version makes reference to *criminal law* in general while the English version makes reference to the specific *FRDE Criminal Code*. However, as discussed later, Art 3 makes the criminal law a body of one criminal law governed by the same basic principles rather than several criminal laws. Further, when such difference occurs, we opt for the Amharic version (Arts 5(2) and 106, FDRE Const.) which is a much better form of statement of the purpose of criminal law in this context.

⁵³ It is this idea that is incorporated into the German word *Rechtsgüter* which is literally translated to mean “legally protected interests” or sometimes referred to as “legal good”. A. PETRIG AND N. ZURKINDEN, SWISS CRIMINAL LAW 43, 44, 47 (Die Deutsche Bibliothek 2015). As our 1957 Penal Code was originally drafted in French and then translated into English, this concept is referred to as “common good.” We are using the phrases “legal good” and “common good” interchangeably.

German concept of “legal good” which is very narrow, for it actually addresses the common good of the society.⁵⁴

The positive aspect of criminalisation - it is indicated above by Beccaria that crime is a threat to or a violation of the communal existence of society.⁵⁵ There are those legal interests that need the protection of the law. However, not all interests that need the protection of the law need the protection of the criminal law. It is those interests that need the protection of criminal law that are called “common good.” In any social and democratic society, such interests, in order to be protected by criminal law, must be “fundamental to the preservation of social life.”⁵⁶ Those interests that are said to be fundamental to social life fall into two categories: “elementary life good” and “deeply rooted ethical convictions of society”.⁵⁷

Those interests that fall under the category of “elementary life good” include “life, liberty, limb, the incorruptibility of public office,” etc.⁵⁸ As the examples show, those elementary life goods are essential to the physical existence and integrity of the person in the society as well as the preservation of the social structures and public institutions.

Those interests that fall under the category of “deeply rooted ethical convictions of society” cover those social beliefs highly valued by the society and the violation of which makes communal existence difficult or impossible.⁵⁹ This aspect of the common good focuses on essential values of the society. However, the criminal law cannot be used for the protection or promotion of a political ideology, since that would turn the state into a tyranny.⁶⁰

In order to have clarity on the positive determination of the interest that need the protection of the criminal law, some opined that it is worth looking at whether the interest has constitutional protection, the gravity of harm caused or likely to be caused to the individual directly or indirectly.⁶¹ The ‘harm to the society’ is not meant for the protection of the ‘society’ in the abstract or a mere collective social order, which is a manifestation of an authoritarian criminal law. By the concept of

⁵⁴ Beccaria, *supra* note 2, at 22-27. Monachesi, *supra* note 16, at 445. This principle is a continental criminal law doctrine and is not expressly provided for in other jurisdictions. Graven, *supra* note 36, at 5. The German law concept of “legal good” is transplanted into the Swiss, French, Spanish and several other continental criminal codes as a legal doctrine. This concept also found its way into our Criminal Code, Art 1 and is translated to mean “common good.”

⁵⁵ Beccaria, *supra* note 2, at xviii, 19-25.

⁵⁶ S. Mir Puig, *Legal Goods Protected by the Law and Legal Goods Protected by the Criminal Law, as Limits to the State’s Power to Criminalize Conduct*, 11 NEW CRIM. L. REV.: AN INTERNATIONAL AND INTERDISCIPLINARY JOURNAL 409, 413 (2008).

⁵⁷ Dubber, *supra* note 33, at 684.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*, at 691.

⁶¹ Mir Puig, *supra* note 56, at 414-417.

legal good, the law is rather looking at the amount of concrete harm to the individual by violating the collective interest.⁶² In this sense the concept of “legal good” is protection of conditions whereby the individual “within the context of overall social structure” would be able to fully develop and realise his potential. That is the reason the state needs to protect the proper functioning of such system of social structure.⁶³

The normative aspect of the common good - the concept of legal good, in as much it is used to legitimise the state’s use of coercive power it also used to limit the state’s power of criminalisation by guiding the lawmaker what conducts to criminalise and what not.⁶⁴ That is, the lawmaker can use the criminal law legitimately only if it is meant to protect the “common good” and there is no other better way to deal with the matter, such as, administrative sanctions and civil actions.⁶⁵ The use of criminal sanctions must be a last resort mechanism; not the first response of the state.⁶⁶

If the criminal law is used for purposes other than the protection of the common good, or that there are other options to achieve that end as effectively, then the use of criminal law is not legitimate.⁶⁷ Read in connection with Art 3 of the Ethiopian Criminal Code, the concept of the common good stated under Art 1 of the Criminal Code does not make any distinction between the crimes in the Criminal Code and other legislation. (See section 3, below, for more on this)

2.4. Constitutional and Institutional Limitation to Criminalisation

The FDRE Constitution under Art 51 lists the powers allocated to the Federal Government. Under Art 55 the law-making power of the House of Peoples’ Representatives (HoPR) are listed. Accordingly, Art 55(1) provides that the HoPR has the power to legislate on matters that are allocated to the Federal Government. Sub-Article 2 provides for specific areas where the House may adopt detailed legislation. Sub-Articles (3) - (5) provide for the House’s competence in regards to specific legislation, namely, the labour law, the commercial code and the penal code. Further, the HoPR is given the power to make law on civil matters that are deemed necessary by the House of Federation to establish and sustain one economic community.

From the foregoing provisions, three things follow. First, criminal law is to be contained in a penal code and to be promulgated as a Proclamation. Determination

⁶² *Id.*, at 415.

⁶³ Dubber, *supra* note 33, at 685.

⁶⁴ *Id.*, at 685. Mir Puig, *supra* note 56, at 413, 418.

⁶⁵ L.E. Chiesa, *The Rise of Spanish and Latin American Criminal Theory*, 11 NEW CRIM. L. REV. 363, 366 (2008). Mir Puig, *supra* note 56, at 417, 418.

⁶⁶ In this sense, the concept of legal good or common good helps to combat over-criminalisation. Chiesa, *supra* note 65, at 368.

⁶⁷ Dubber, *supra* note 33, at 687, 689, 692.

of the scope of the penal code, regarding what is to be left to the states, is left to the discretion of the HoPR. The Regional States are also granted the power to adopt criminal legislation on matters that are not covered by the federal penal code.

Second, the HoPR in laws it makes on matters falling under the jurisdiction of the Federal Government may criminalize acts or omissions that are considered as serious violations of important interests. In criminalising such conduct, the HoPR may not include a penal provision in such administrative legislation. It rather has to cross-refer to the penal code and the punishment should be stated in the penal code. See for instance, the provisions of Arts 343 and 344 of the Criminal Code.

Third, this duty to legislate a penal code is bestowed on the HoPR as an institutional power; it cannot delegate this duty, which is inherently a legislative duty, to the executive.⁶⁸ The purpose of separation of power is limiting the power of the state from abuse. The threat to individual freedom is serious when there is a blend of power in the executive and it defeats the very purpose of separation of power.⁶⁹ In fact, it is the criminal law that necessitated the idea of separation of power in the first place.⁷⁰ Even though delegation is a common practice in administrative matters and the Council of Ministers is routinely authorised to adopt regulations for the implementation of a given proclamation, criminal law is different and thus, demands a greater and stricter separation of power in law-making and administration.⁷¹

One may still question whether the concept of common good, a concept developed in political theory outside the constitutional law, can be justified to limit the exercise of constitutional law-making power. Persak, for one, argues that for legal goods to perform their critical functions of restricting legislative power of the state, they need to be beyond or outside the positive law.⁷² If this argument is pushed to its logical limit, it also means that the principle of legality and the principle of non-retroactivity of the law do not serve their purpose while within the positive law. However, they are limiting the law-making and arbitrariness in administration of the criminal law. Thus, if those principles do their function while forming part of the positive law, the concept of the common good could do a better job if it is made part of the positive law, particularly the constitution, to be complied with.

Further, as noted earlier whether a particular conduct is a threat to or a violation of an important legal interest is determined by, among others, whether such interest

⁶⁸ R.E. Barkow, *Separation of Powers and the Criminal Law*, 58 STANFORD L. REV. 989, 1006 (2006).

⁶⁹ *Id.*, at 991.

⁷⁰ *Id.*, at 994.

⁷¹ *Id.*, at 1034.

⁷² Persak, *supra* note 40, at 12, 109, 110.

has a constitutional protection. The bill of rights is meant to protect life, limb, property, good name, etc. Other parts of the Constitution provide for important values, such as, the integrity of the constitutional state, the incorruptibility of public office (Art 12), the proper collection of duties and taxes, and the integrity of public transport and communications. Criminalisation has to find its positive justification in the Constitution as a founding document.⁷³ But it also finds its negative justification – in the rule of law.

2.5. Theory and Measures of Punishment

The purpose of criminal law is preventing crime. It does so by giving notice first about the nature of the criminal act and the consequent punishment or measure. The purpose of punishment is therefore achieving the ends of the criminal law - prevention of crime.⁷⁴ Beccaria argues “characteristically it is the prospect of pain rather than pleasure that moved us to act.”⁷⁵ He further argues that it is the certainty of prosecution rather than the severity of punishment that creates lasting impression commanding respect for the law; thus, in order to create a close link between crime and pain of punishment there has to be a speedy prosecution.⁷⁶ This theory of punishment is not based on determinism; it is rather based on human rationality. It considers human beings as rational beings making reasonable choices and complying with legal requirements, rationally.⁷⁷ Therefore, human beings want to avoid pain and pursue pleasure via a reasonable and legitimate means. That is, men can control and guide their passion and they can choose to do legally acceptable/required things.⁷⁸

If punishment is, thus, justified by the threat to or harm to the legal good, then it is justified to the extent of the degree of such threat to or harm to such legal good. Thus, measure of punishment for a particular crime appears to be *proportionality* to the threat to or harm caused to legal good.⁷⁹ Still bound within the principle of utility, the state should choose punishment that creates lasting impression on society and least painful on the person condemned for punishment - the principle of *parsimony*.

⁷³ The fact that it makes reference to the nations, nationalities and people appear to be difficult to comprehend how those categories can come together and decide on what grounds to hold the individual criminally accountable. The bill of rights is meant to protect the individual, at least, procedurally even though it is not as effective to protect him in matters of criminalisation.

⁷⁴ Beccaria, *supra* note 2, at 31. That is the only reason Beccaria links crime with the pain of punishment.

⁷⁵ *Id.*, at xvii. Elsewhere Beccaria argued that generally laws operate negatively to prevent harm than positively in promoting pleasure. *Id.*, at xxix.

⁷⁶ *Id.*, at xvii.

⁷⁷ *Id.*

⁷⁸ *Id.*, at xvi. Unlike Hume who believes men are slave to their passion, Beccaria believes men can control and guide their passion to do things rationally.

⁷⁹ See, *supra* note 21.

This is reflected in both the 1957 Penal Code⁸⁰ as well as the 2004 Criminal Code. The Preamble of the Criminal Code states that even when the death penalty is upheld in the Special Part of the Criminal Code, it is with a view to prevention of crime even though it does not give the convict a chance to reform.⁸¹ In so doing, the criminal law imposes penalty in a progressive manner. The three principal punishments are fine, imprisonment and death. Legislators have to use those penalties progressively and somehow ‘wisely’.⁸² Including judicial discretion, the law generally puts the upper and lower limits of the penalties giving the impression that it does so in a manner that maintains proportionality between the seriousness of the crime (guilt) and the penalty.⁸³

From the readings of the provisions of Art 1, the purpose of punishment appears to be positive general prevention.⁸⁴ In determining the punishment to be imposed on the convict both the law and the court looks at guilt. The principle of proportionality should not give the impression that the punishment is imposed for vengeance or the criminal law is retributive;⁸⁵ threat to or harm to legal good as a measurement for the determination of punishment is still outstanding problem.

2.6. The Principle of Legality

The principle of legality appears to be a limitation over administrative discretion rather than the legislative prescription. However, as one of the universally accepted manifestations of the rule of law it is included under Art 2 of the Criminal Code. The principle is bound between the criminalisation principle and the non-retroactivity of the criminal law. It is provided that the criminal law specifies the crime and the applicable measures or punishments. There is no crime and there is no punishment other than those provided for in the criminal law; and there is no crime by analogy.

⁸⁰ The preface of the 1957 Penal Code states that the complexities of social life requires “effective, yet human and liberal procedures be adopted so that legislative prescriptions may have the efficacy intended for them as regulators of conduct.”

⁸¹ Criminal Code, Preamble, para 8. In this regard, the authors should not be understood to have condoned the death penalty.

⁸² The Preamble of the Criminal Code, para 7 states that in order to help the judge selects from most suitable measure, those measures and punishments are put in a progressive manner from “the lightest to the most severe punishment.”

⁸³ It is made evident in the provisions of Art 1 that it is not only punishment the criminal law provides for; it also provides for measures which the court may order as it finds suitable under the circumstances, including, reprimand, suspended sentence, restraint order, suspension of license, etc.

⁸⁴ Dubber, *supra* note 33, at 696 ff. This is the theory of punishment adopted in the 1957 Penal Code which we believe is taken over by the 2004 Criminal Code. In his commentary on Art 1, Graven states that “...prisoners should be made to look forward rather than backward; they should be made to believe that they have a future as useful citizens and should be trusted accordingly rather than be distrusted by reason of what they have done in the past.” Graven, *supra* note 36, at 8.

⁸⁵ Some argue that in fixing the punishment, the lawmaker uses consequentialist standards while the court uses retributive standards. Beccaria, *supra* note 2, at xxiii.

This principle of legality has four manifestations. (a) *Prospective application of the criminal law* - the criminal law is prospectively applied which is the otherwise known as the principle of the non-retroactivity of the criminal law.⁸⁶ Some make fictitious distinction between substantive and procedural law and intend to limit the application of the principle to the substantive law.⁸⁷ However, the criminal law is about the crime and punishment. The procedural law to which the principle is not applicable is purely enforcement issues.⁸⁸ Also, where the criminal law is amended the one that favours the accused shall be applicable.⁸⁹ This rule providing for amended laws also includes that when there are two or more provisions governing the same transaction, the one that is most favourable to the accused should be applicable. The Federal Supreme Court Cassation Division, in *Worku and Shume*⁹⁰ and other cases,⁹¹ rendered a binding interpretative decision to this effect.

(b) *The body declaring the law and form the law is presented* - an essential part of the notice is that the criminal law must be made by the body that has the constitutional power to declare such law and it must be published in the official gazette, the *Federal Negarit Gazeta*.⁹² Therefore, an act is not criminal nor is it punishable unless it is criminalised by the organ having the power to make such law and it was already declared in the official gazette when the alleged act was committed.

(c) *Clarity of content of the law* - it is stated above that the purpose of criminal law is positive general prevention of crime. It does so by giving due notice of the crimes

⁸⁶ Petrig and Zurkinden, *supra* note 53, at 19, 20.

⁸⁷ *Anti-Corruption Special Procedure and Rules of Evidence Proclamation No 236/2001* had convoluted both substantive and procedural matters. It “defines” the crime of corruption under Art 2. This Proclamation is amended by *Proclamation No 239/2001* in mere 20 days’ time regarding two essential matters. It declares the crime of corruption as non-bailable and all under the jurisdiction of the court having material jurisdiction over the subject. The amending Proclamation was applied to already pending cases and the issue arose whether it can be applied retrospectively. “Because it is a procedural matter” some opined, it can be applied retrospectively without contradicting the constitutional principle of non-retroactivity of the criminal law.

⁸⁸ Petrig and Zurkinden, *supra* note 53, at 9-12.

⁸⁹ *Crim. C., Arts 6 and 9. In Solomon Desalegn v. Southern Regional State Prosecutor* (15 May 2014, Cass. File No 95438, in 16 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT), the Cassation Bench gave a binding interpretative decision on the doctrine of the criminal law that the rule that is favourable to the accused shall be applied. Also, see *Habtu Tulu v. Federal Ethics and Anti-Corruption Commission* (22 June 2015, Cass. File No 103775, in 18 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT).

⁹⁰ *Worku Fekadu and Shume Arrarso v. Benishangul Gumuz State Prosecutor* (24 January 2013, Cass. File No 75387, in 14 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT). Petitioners were charged for violation of Art 433 of the Criminal Code for trading in cattle without a licence. They were found guilty and sentenced to fine. The court also ordered for the confiscation of those cattle seized. The Cassation Bench, however, reversed the confiscation order on the ground that it is not a type of punishment stated under Art 433 nor is it justified under Arts 98, 100 and 140 of the Code; and therefore, it finds that the decision of the lower court is contrary to the principle of legality under Art 2(1) and (2).

⁹¹ *Ethiopian Revenue and Customs Authority v. Kebede Tesera and Lencha Zegeye* (01 October 2013, Cass. File No 81178, in 15 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT). *Abmed Besbir v. Ambara State Prosecutor* (19 February 2014, Cass. File No 91535, in 15 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT).

⁹² *Federal Negarit Gazeta Establishment Proclamation No 3/1995*, Art 2(2). FDRE Const., Art 71(2). Petrig and Zurkinden, *supra* note 53, at 21.

defined and the consequences for their violation in sufficiently clear manner so that the ordinary individual behaves according to the law.⁹³ The content of the declaration of a crime may be seen in light of the provisions of Art 23 which states the constituent elements of a crime⁹⁴ which the prosecutor is also required to prove to obtain a conviction.⁹⁵ Those elements need to be stated preferably in a self-contained legislation. The rules must be stated in general statements without referring to a particular individual or group.⁹⁶

(d) *Prohibition of interpretation by analogy* - criminal responsibility is based on pre-declared crime and punishment. If there is not such pre-declared crime or punishment, no such crime or punishment may be created by analogy. This does not, however, prevent the court from interpreting criminal law, although the rules of interpretation are not written nor are they subject to extensive academic discussion here in Ethiopia. In Germany and Switzerland from where our criminal law is borrowed, there are common rules of interpretation developed in practice.⁹⁷ Those rules of interpretation are only for the purpose of giving content to the provisions of criminal law.

2.7. Non-retroactivity of Criminal Law

Non-retroactivity of criminal law, a principle closely intertwined with that of legality, is adopted both in the Constitution (Art 22) and in the Criminal Code (Art 5).⁹⁸ This principle is also meant to limit the power of the state to use criminal law and to protect the citizen from unlimited and unpredictable power of the state. The principle is manifested in different ways. First, criminal law, both in terms of definition of crime as well as determination of the consequent measures and punishments, is applied only prospectively to crimes that are committed after the coming into force of such criminal law. Regarding the Criminal Code, for instance, if an act is committed before the coming into force of the Criminal Code and the act was not criminalised in the prior Penal Code, the act is not a criminal act; and such act is not punishable. But if the act was a criminal act in the repealed Penal Code, the accused would be tried in accordance with the repealed Penal Code. However, if the act is committed before the coming into force of the new Code

⁹³ Petrig and Zurkinden, *supra* note 53, at 23. However, what diffuses the requirement of clarity in the declaration of the law is that it is declared not only for notice purposes but also for adjudication purposes. There are two categories of readers of the law, the lay man for notice and the professional. The organisation and phraseology is always guided to benefit of the latter. See, for instance, R. Zimmermann, *Statuta sumstricte interpretada? Statutes and the Common Law: A Continental Perspective*, 56 THE CAMBRIDGE L. J. (1997).

⁹⁴ Kebede and Lencha, *supra* note 91. Ahmed, *supra* note 91.

⁹⁵ Crim. Pro. C., Arts 111 and 112.

⁹⁶ This was one of Beccaria's proposals. Beccaria, *supra* note 2, at 12-13. Petrig and Zurkinden, *supra* note 53, at 23. This is a prohibition of the bill of attainder as it is understood in the US system.

⁹⁷ Bohlander, *supra* note 32, at 15. Petrig and Zurkinden, *supra* note 53, at 24-26.

⁹⁸ The 2004 Criminal Code is replacing the 1957 Penal Code which had similar provision with a better statement of the law.

and such act was a crime in this new Code but a lesser penalty is imposed, the new Code applies in terms of the punishment. The new Code applies to the case whether the case is still pending or the person is convicted.⁹⁹ On the other hand, if the act committed before the coming into force of the new law and the new law decriminalises the act, the act is not a crime and therefore it is not punishable.¹⁰⁰

2.8. The Requirement of State of Mind for Criminalisation of Conduct

In criminalisation of conduct, guilt is an essential requirement because criminal law gives notice for prevention of criminal acts with a guilty mind, not accidents. It is such individuals the law logically demands to behave according to the law. The Criminal Code defines crime as a conduct “prohibited and made punishable by law.”¹⁰¹ It further provides that the commission of a crime is completed when “all its legal, material and moral ingredients are present.”¹⁰² Arts 57 ff. of the Criminal Code provide that a person may commit a legally prohibited act but he may be punished only if he acts with guilt.¹⁰³ A person cannot be subject to punishment for acts “without there being any guilt on his part, or for acts caused by force majeure, or occurred by accident.”¹⁰⁴

Guilt is either intention or negligence.¹⁰⁵ As much guilt is essential, criminal law is interested in intentional crimes than negligence. The Special Part defining a particular offence should also provide for the element of guilt. Where the criminal law does not provide for guilt, the law assumes the required guilt is intention. Negligent crime is punishable only if the law expressly provides for it.¹⁰⁶ The law further limits negligence in terms of scope; it is only those people who have a duty of care that may be punished for negligence.¹⁰⁷

The centrality of guilt to criminal law is further solidified by the principle of unity of guilt. Thus, where several same or a combination of criminal acts are done against the same protected right with the same state of mind, it is punished as one crime if one criminal provision covers all the acts.¹⁰⁸ Likewise, if successive or

⁹⁹ FDRE Const., Art 22(2). In *Solomon, supra* note 89, the Federal Supreme Court Cassation Bench, gave a binding interpretative decision on the provisions of Crim. C., Art 6, that even though the crime was committed by the time the Federal Supreme Court Sentencing Guideline No 1/2002 was applicable, as the Revised Sentencing Manual No 2/2006 favours the accused, the latter is applied to the case at hand.

¹⁰⁰ The recently adopted *Customs Proclamation No 859/2014*, maintained substantially all acts criminalised in the repealed *Proclamation No 622/2009*; but changed several previously imprisonment punishments into fine.

¹⁰¹ Crim. C., Art 23(1) para 1.

¹⁰² *Id.*, Art 23(2). *Jemila Mohammed Hagos, et. al. v. Federal Public Prosecutor* (26 February 2009, Cass. File No 38161, in 9 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT).

¹⁰³ Crim. C., Art 57(1), para 1.

¹⁰⁴ *Id.*, Art 57(2).

¹⁰⁵ *Id.*, Art 57(1), para 2.

¹⁰⁶ *Id.*, Art 59(2), para 1.

¹⁰⁷ *Id.*, Art 59(1)(b), para 2.

¹⁰⁸ *Id.*, Art 61(1).

repeated acts are committed against the same legally protected right, the person may be punished for one crime not for each repeated or successive acts as it is committed with the same intention or negligence.¹⁰⁹ Where a person commits two or more separate unlawful acts with a single purpose or for the same scheme, each act does not constitute a fresh criminal act; the acts are merged together by the unity of guilt and purpose.¹¹⁰ Further, where a single act violates several legal provisions¹¹¹ or a similar act is committed with a renewed intention,¹¹² it only aggravates the punishment and it does not constitute a separate crime.

Further, in modern criminal law, criminal responsibility is individual; it is guilt that personalises such criminal responsibility. This is provided for under Art 41 of the Criminal Code. Therefore, a person can be held criminally responsible only for his own act and to the extent of his guilt; equally, anything that helps the accused is to be used only to his own benefit.

It is based on this underlying philosophy that the Criminal Code, both in the principles and in the General Part, as well as the specific provisions, in the Special Part, does not recognise strict or vicarious criminal liability. Likewise, the guilt requirement necessarily precludes imputation of guilt or criminal liability. Therefore, the Criminal Code, as logically and rationally organised, does not impute criminal responsibility from one person to another, whatever the degree of participation those individuals may have in the commission of the crime.¹¹³

2.9. Presumption of Innocence

Presumption of innocence is not an ordinary presumption; it is a tool by which the public prosecutor is required to prove his case to a certain degree in order to obtain conviction.¹¹⁴ Therefore, the public prosecutor has the burden of proof of all those material facts constituting the crime and the accused is not required to participate. Traditionally, these principles discussed here are in one way or another meant to protect the defence not the prosecution; they are also meant to protect the fairness and integrity of the criminal justice administration. Here, they are meant to limit the formal criminalisation power of the state by using procedural

¹⁰⁹ *Id.*, Art 61(2), para 1.

¹¹⁰ *Id.*, Art 61(3).

¹¹¹ *Id.*, Art 65.

¹¹² *Id.*, Art 62.

¹¹³ The tripartite interpretation of the Criminal Code would make things clear. See Bohlander, *supra* note 32, at 16, 17. Petrig and Zurkinden, *supra* note 53, at 56, 91, 98.

¹¹⁴ For further detail on issues of presumption of innocence, see Simeneh Kiros Assefa, *The Principle of Presumption of Innocence and Its Challenges in the Ethiopian Criminal Justice System*, 6 MIZAN L. REV. 273 (2012); Worku Yaze Wodage, *Burden of Proof, Presumptions and Standards of Proof in Criminal Cases*, 8 MIZAN L. REV. 252 (2014).

aspect of the law, such as, shifting the burden of and lowering the standard of proof.¹¹⁵

3. Application of the Criminal Law Principles to Other Penal Legislation or Provisions

The Criminal Code is a continental code type; it is the whole corpus of law on the subject having a general part and a special part. The General Part contains general principles that govern the application of the Special Part. The Special Part cannot be enforced without the proper application of the General Part.

The Criminal Code under Art 3, para 1, recognizes the application of “regulations and special laws of criminal nature.” The second paragraph of this Article further provides that the basic principles discussed above and others as provided for in the General Part of the Criminal Code are applicable to those regulations and special legislation of criminal nature, unless their application is expressly set aside by such regulations or legislation. For instance, in criminalising conduct, the lawmaker needs to comply with the provisions of Art 1 of the Criminal Code by first establishing that such conduct is the subject of criminal law and that there is no other less intrusive but effective measure.

The nature of those laws the Criminal Code makes reference to and the possibility of precluding the application of the general criminal law principles to those legislation need serious consideration. Continental criminal law is composed of two categories of criminal law: the penal code sometimes referred to as primary criminal law and administrative criminal law which is also referred to as secondary criminal law.¹¹⁶ Our criminal law, on the other hand, is composed of the Criminal Code and special penal legislations, such as, proclamations for controlling vagrancy, terrorism, corruption, money laundry, and human trafficking¹¹⁷ which appear to be primary criminal law and Part III of the Criminal Code, governing petty offences. There are also administrative and regulatory legislation in which serious penal provision are include which may be considered the third category.¹¹⁸

¹¹⁵ See, Lacey’s argument, *supra* note 38 and 39, for a broader conception of the notion of criminalisation. D. HUSAK OVER-CRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 41 (Oxford University Press 2008).

¹¹⁶ Petrig and Zurkinden, *supra* note 53, at 10, 14, 20. Byung-Sun CHO, *Administrative Penal Law and Its Theory in Korea and Japan from a Comparative Perspective*, 2 TILBURG FOREIGN L. REV. 261, 264 (1993).

¹¹⁷ *Proclamation to Control Vagrancy No 384/2004, Anti-Terrorism Proclamation No 652/2009, Corruption Crimes Proclamation No 881/2015, and Prevention and Suppression of Trafficking in Persons and Smuggling of Migrants Proclamation No 909/2015*, respectively.

¹¹⁸ The continental classification of criminal legislation into primary and secondary is based on the severity of punishment and the power to make those laws. The classification of those legislation containing penal provision is only a matter of convenience. Based on those test, they can properly fall under the primary criminal legislation because, they carry severe penalty and often, they are adopted by the HoPR or by a delegation.

The provisions of Art 3 of the 2004 Criminal Code are copies of that of Art 3 of the 1957 Penal Code. The Penal Code makes reference to “Police regulations and special laws of penal nature.” The Penal Code was borrowed from continental system. In that system, Police regulations are regulations adopted and enforced by the police.¹¹⁹ The other part, “special laws of penal nature”, is about administrative criminal law. Administrative penal legislations are understood in two ways. The first understanding makes reference to those regulations adopted and/or enforced by administrative agencies. The second understanding refers to those regulations meant for the preservation of the role of administrative agencies coercively.¹²⁰

In continental criminal law, these rules, police regulations and administrative penal laws are known as the rules of infringements;¹²¹ with strict separation of power, their adjudication is given to the courts.¹²² The content of those regulations are not as detailed and strict as the ordinary criminal law and often do not require guilt.¹²³ Such rules are necessary because the penal code, as primary criminal law, contains only the general part and the special part adopted by the HoPR not as flexible to meet the needs of administrative agencies. Our Criminal Code contains, however, both the primary criminal law in the first two parts, and the secondary criminal law contained in Part III governing petty offences. The Code is making a distinction between criminal law and petty offences in defining petty offences as “a violation of mandatory or prohibitive rule issued by a competent authority or when the act is a minor offence not punishable under the criminal law.”¹²⁴

Following this distinction, in Part III, Art 734 of the Criminal Code makes specific reference to Art 3 para 2. It states that, unless expressly excluded by a provision in Part III, the general principles of the General Part are applicable to this Part too. For instance, guilt is an essential requirement of the liability of a person for punishment for committing a petty offence;¹²⁵ justificatory defences and excuses are applicable to petty offences too;¹²⁶ so do aggravation and mitigation grounds.¹²⁷ It makes reference to few general principles of criminal law, such as, the principle of legality, Art 736, equal application of the law, Art 737, and applicability of criminal responsibility, Arts 48 - 50.

¹¹⁹ Generally, see CHO, *supra* note 116, 268 ff.

¹²⁰ *Id.*, 261.

¹²¹ *Id.*, at 268.

¹²² *Id.*, at 272, 273. There are still exceptions. For instance, see the Austrian 1991 Administrative Penal Act, giving jurisdiction over administrative penal proceedings to administrative authorities, §26(1).

¹²³ CHO, *supra* note 116, at 269.

¹²⁴ *Crim. C.*, Art 735.

¹²⁵ *Id.*, Arts 734, 747(1), para 3.

¹²⁶ *Id.*, Arts 744, 745.

¹²⁷ *Id.*, Art 745.

Having regard to the minor nature of the violations, preparation and attempt to commit petty offences are not punishable;¹²⁸ likewise, incitement, complicity and accessory after the fact are not punishable;¹²⁹ corporate entities are not liable to punishment for incitement and complicity.¹³⁰ Where a person is held for committing a petty offence, she is not subject to the punishments that are imposed for violation of the criminal law.¹³¹ The punishments attached are arrest from 1 day to 3 months¹³² or fine from Birr 1 to Birr 300 or both.¹³³ These provisions made our Criminal Code Part III conform to the resolutions and recommendations of XIV International Congress of Penal Law.¹³⁴

Therefore, from the foregoing discussion, it is evident that the provisions of Art 3 are referring to such regulations as are contained in Part III of the Criminal Code.¹³⁵ It is an otherwise statement that these provisions do not anticipate a separate existence of a major penal legislation listed above. If Art 3, para 1, is understood to have allowed the adoption of major penal legislations, which results in the self-destruction of the Code, such impression is only the result of poor re-drafting of the provision and such legislation cannot preclude the application of the general principles of criminal law.¹³⁶

Second, Art 3 further provides that the general principles of the Criminal Code are applicable to those other regulations and special legislation of penal nature unless their application is set aside by such regulations or legislation.¹³⁷ However, as all of those special penal legislation form the corpus of the criminal law, and many of those principles of criminal law are constitutional principles, their application cannot be set aside. None of the legislation adopted so far sets aside the application of any of those principles; in fact, some of those special penal legislation expressly adopt the principles of the Criminal Code.¹³⁸ It continues from the foregoing argument that the possibility of exclusion of the application of those principles to these regulations is possible only if such regulations are minor

¹²⁸ *Id.*, Art 740(1).

¹²⁹ *Id.*, Art 740(2).

¹³⁰ *Id.*, Art 740(3).

¹³¹ *Id.*, Art 746(1).

¹³² *Id.*, Art 747, para 2.

¹³³ *Id.*, Arts 752(1), para 1; Art 752(2).

¹³⁴ XIV International Congress of Penal Law held in Vienna 2-7 October 1989, available at <<http://www.penal.org/sites/default/files/files/RICPL%201989.pdf>> (last accessed on October 7, 2017).

¹³⁵ That is the kind of regulation even Graven argues for. Graven, *supra* note 36, at 12.

¹³⁶ Some of the principles mentioned here are constitutional principles, such as, equality before the law and non-retroactivity of criminal law. Because of the constitutional supremacy clause, those principles cannot be set aside by a proclamation that may be adopted by the HoPR.

¹³⁷ Crim. C., Art 3, para 2.

¹³⁸ See for instance, *Corruption Crimes Proclamation No 881/2015*, Art 34; *Anti-Terrorism Proclamation No 652/2009*, Art 36(2); *Money Laundering and Financing of Terrorism Proclamation No 657/2009*, Art 26.

offences that either subjects the accused to fine or imprisonment for few days as in contraventions.¹³⁹

Further, as a continental system, criminal law constitutes a single body of law.¹⁴⁰ The application of the principles to those regulations and legislation of penal nature makes them a part of the Criminal Code to constitute that one body of law. That is one of the reasons for the revision of the Criminal Code, to adopt a comprehensive criminal code that incorporates fairly everything.¹⁴¹ Therefore, our contention is that the provisions of Art 3 should not be understood as allowing the adoption of major penal legislation nor the preclusion of the application of the principles of the Criminal Code to such legislation should the lawmaker chooses to adopt such special penal or administrative legislation with serious consequences. In fact, the integrity of the Criminal Code is one major tool in combating over-criminalisation in the continental system.¹⁴²

4. Over-Criminalisation

We are looking at criminalisation as a declaration of conduct criminal by the lawmaker. It is not always easy to determine whether a particular conduct should be criminalised and the discussion is intuitive for the most part. However, if the positive and negative reasons for criminalisation are indicated, then over-criminalisation is an excess of those rules of criminalisation.

Molina identifies three manifestations of over-criminalisation, which are, criminalising conduct that harms trivial interests, criminalising conduct that causes trivial harms and punishing conduct in a way that is not proportional to the harm caused.¹⁴³ In addition to these, however, there are other manifestations of over-criminalisation, such as, where criminal law is used as first resort measure, where the criminal law-making power is delegated to administrative agencies, where criminal law is used to achieve some other purposes than prevention of crime, which are not necessarily covered by the three manifestations. There are also other manifestations which do not seem to fit into theories of criminalisation, such as,

¹³⁹ Petrig and Zurkinden, *supra* note 53, at 50. The exclusion of the principles is regarding, such as, the requirements of criminal liability, and availability of defence. *Id.*, at 86, 87.

¹⁴⁰ It is with this in mind that the 1957 Penal Code was drafted that other legislation containing penal provisions would make reference to the Code. Graven, *supra* note 3, at 281 - 82, 287.

¹⁴¹ Crim. C., Preface, para 4. This is not contrary to Art 51 of the Constitution which provides that the HoPR may adopt criminal law and states may also adopt their own criminal code on areas that is not covered by the federal criminal law.

¹⁴² Molina, *supra* note 49, at 130, 131.

¹⁴³ *Id.*, at 125, 126. For Husak, over-criminalisation is manifested by (a) overlapping offences, (b) risk prevention offences, and (c) ancillary offences. Husak, *supra* note 115, at 36 - 40

shifting the burden of proof on to defendants¹⁴⁴ or lowering the standard of proof for conviction, because they appear to be procedural than substantive.¹⁴⁵

Over-criminalisation, whatever form it takes, is not tolerable because it is unjust¹⁴⁶ and because it is an unjustified intrusion into the individual's private sphere by the state's coercive power. Based on the identified grounds of criminalisation in Section 2.4, over-criminalisation and its principal manifestations are discussed under two categories, first when criminal law is used as a means other than for the protection of the common good; and second, when criminal law is used as a first resort action.

4.1. Criminal Law Used not for the Protection of the “Common Good”

Criminal law has to be used as a protection of the common good and there is no other means to achieve this purpose. It is indicated below that in several special or administrative penal legislation, either of those requirements or both are not met.

4.1.1. Imputing criminal responsibility

One obvious case of improper criminalisation is imputing criminal responsibility to another. The *Income Tax* and the *Value Added Tax Proclamations* prohibit tax evasion, providing false or misleading information and obstruction of tax administration entailing serious criminal punishment.¹⁴⁷ The respective proclamations further provide that the manager of a company is automatically criminally liable, without their being a need to establish a criminal act or guilt on her part, if the company is liable for such tax crimes. Thus, both proclamations provide that “...the manager of that entity at the time of the commission of the offence is treated as having committed the same offence and is liable to a fine and imprisonment” fixed for the company.¹⁴⁸ The imputation is too remote for the obvious reason that the manager is criminally liable for acts of other employees of the company where the company

¹⁴⁴ For instance, the *Corruption Crimes Proclamation No 881/2015*, Art 21(1) provides that “[a]ny public servant or employee of a public organisation...who (a) maintains a standard of living [...beyond what] is commensurate with the official income [...]; or (b) is in control of pecuniary resources or property disproportionate to that official income [...]” is guilty and is punishable “unless he proves satisfactorily before the court of law as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control.”

¹⁴⁵ *Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No 434/2005*, regarding standard of proof in confiscation procedure, under Art 33 provides that “[t]he standard of proof required to determine any question arising as to whether a person has benefited from criminal conduct, or the amount to be recovered shall be that applicable in civil proceedings.” This provision gives the impression that it is mere procedural matter. However, it has a substantive effect – confiscation of property for alleged corruption offence, for which the individual is probably not convicted. Also see Husak, *supra* note 115.

¹⁴⁶ Husak, *supra* note 115, at 3.

¹⁴⁷ *Income Tax Proclamation No 286/2002*, Arts 96, 97 and 97, respectively. *Value Added Tax Proclamation No 285/2002*, Arts 49, 50 and 51, respectively. These crimes are punishable by lengthy imprisonment and serious fine.

¹⁴⁸ *Income Tax Proclamation No 286/2002*, Art 102(1). *Value Added Tax Proclamation No 285/2002*, Art 56(1).

is found guilty. The Cassation Bench of the Federal Supreme Court gave, and is still giving, such binding interpretative decision of those provisions of the proclamations that lack of knowledge on the part of and the absence of the manager from the place of business at the relevant time is not a defence.¹⁴⁹

The two major changes introduced by these two proclamations were that, first, corporate entities are held criminally liable, and second, if the company is found criminally liable, then the manager is presumed to be guilty. Adopted after those proclamations, the Criminal Code includes both corporate criminal responsibility under Art 34 and tax crimes, such as, those provided for under Arts 349-351. Thus, according to Art 34 of the Criminal Code, a corporate entity may be held criminally liable if “one of its officials or employees commits such crime [...] in connection with the activity of the juridical person with the intent of promoting its interest [...]”¹⁵⁰ It further provides that such juridical person is criminally liable if “one of its officials or employees commits a crime as a principal criminal, an instigator or an accomplice in connection with the activity of the juridical person with the intent of promoting its interest by an unlawful means.”

It is made sufficiently clear that this provision of the Criminal Code provides for the liability of corporate entities for the actions of its employees when they acted for the interest of the company and they violated the clear provisions of the law. The justification for such decision by the lawmaker is that, it is the employees that are the eyes and minds of the company and their guilt is imputed to the company. To this extent, it is tolerable because corporate entities do not have natural rights. Even though the Criminal Code does not expressly repeal the provisions of Proclamations, it is these provisions of the Criminal Code that govern corporate criminal responsibility. Therefore, the penal provisions of those proclamations are substituted both in terms of the scope of conduct criminalised and proper determination of guilt of the manager by the Criminal Code. As such, the manager may be guilty of his own conduct committed with guilty mind; he cannot be guilty of company’s criminal liability because of actions of other employees of the company.

As the root of the criminal law is the Criminal Code, if the Cassation Bench would have to address the provisions of the Criminal Code first, and interpret the penal

¹⁴⁹ *Tigray Revenue Development Authority v. Berba Reda* (01 October 2013, Cass. File No 86597, in 15 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT). *Ethiopian Revenue and Customs Authority v. Abkale Endeshaw* (29 October 2012, Cass. File No 74237, in 14 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT). *The Twins Bar and Restaurant PLC and Tsige Wolde v. Ethiopian Revenue and Customs Authority* (22 December 2010, Cass. File No 51090, in 11 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT). *Tarkegn G/Giorgis, et. al., v. Ethiopian Revenue and Customs Authority* (17 December 2009, Cass. File No 48850, in 10 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT).

¹⁵⁰ As **guilt** is central in the continental criminal law, it is logically difficult to hold corporate entities criminally liable and its justification requires further study.

provisions of those Proclamations conforming to the basic principles of criminal law incorporated in the Criminal Code via Art 3, those provisions would have been without effect.¹⁵¹ Unfortunately, the majority in *Ouqubay Bereha*¹⁵² treated the provisions of Art 34 of the Criminal Code and the provisions of those proclamations conforming to each other.

A closely related issue we find very curious is the criminal prosecution and conviction for tax crimes. In the ordinary courts, the charges and the evidences never state and prove the required mental state for committing the crime. For one who believes the moral element is an essential element of such crime might only want to accept the court presumes the existence of such moral element. It is only recently that the Federal Supreme Court Cassation Bench gave a binding interpretative decision that the moral element required for tax crimes is intention.¹⁵³

4.1.2. Delegating criminal law-making power to administrative agencies

It is a principle proposed and adopted since Enlightenment that criminal law be adopted by the lawmaker representing the public.¹⁵⁴ It is the constitutional power of the House of Peoples' Representatives to make criminal law.¹⁵⁵ When it declares a conduct a crime it should declare both the material and moral elements constituting the crime. This is a non-delegable responsibility of the lawmaker. However, the lawmaker generously delegated the criminal law-making power to several administrative agencies. This delegation is effected either directly or indirectly.

Direct delegation: - Art 2 of *Money Laundering and Financing of Terrorism Proclamation No 657/2009* lists "accountable persons", individuals or corporate entities, such as, banks, lawyers, and accountants who have the obligation to collect their clients' information and report suspicious activities and transactions (Art 3) the failure of which is a crime punishable by 3 to 5 years' imprisonment and with fine 5,000 to 10,000 Birr (Art 17(3)).

The Financial Intelligence Centre, which would have to be established by Council of Ministers Regulations (Art 21(1)), is authorised to modify this list of individuals

¹⁵¹ Many believe the nullification of law is based only on constitutional justifications and such power is given to the House of Federation not to the court. We are not pursuing a constitutional argument here; it is purely technical interpretation of the criminal law. However, for the disagreements on the scope and authority of constitutional interpretation, see Getachew Assefa, *All About Words: Discovering the Intention of Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation*, 24 J. ETH. L. 139 (2010).

¹⁵² *Ouqubay Bereha v. Ethiopian Revenue and Customs Authority* (13 March 2015, Cass. File No 100079, in 17 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT).

¹⁵³ *G. Agripack PLC, et. al., v Ethiopian Revenue and Customs Authority* (11 June 2013, Cass. File No 84623, in 15 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT).

¹⁵⁴ Beccaria, *supra* note 2, at 12-13.

¹⁵⁵ FDRE Const., Art 55(5).

and institutions (Art 22(1)). The modified list is required to be published “in a widely circulating newspaper in the country as legal notice.” (Art 22(2)). The effect of this modification is criminalisation or de-criminalisation when a person or entity is included or excluded from the list, respectively.

Likewise, the *Urban Planning Proclamation No 574/2008*, foresees the adoption of Council of Ministers Regulations and delegated several matters, including criminal punishments, to be regulated by such Regulations. Thus, Art 58 provides that a person who grants permission which is not properly approved and a person who implements such plan which is not appropriately approved “shall be punished in accordance with the regulations to be issued in accordance with [the] proclamation.” In this delegation, the lawmaker delegated the definition of a part of the conduct that constituted the crime as well as the punishment.

In the *Mineral Resources Proclamation No 678/2010*, the lawmaker defined the punishment and left the elements constituting crime to be defined by the Council of Ministers. It provides that submitting inaccurate and misleading information in connection with information required to be submitted to the government “shall be punished with a fine up to Birr 200,000 or an imprisonment up to five years or both.” (Art 78(3)). It also provides that “the degree of the offence and the extent of penalty for each offence shall be determined by regulations to be issued for the implementation of [the] Proclamation.” (Art 78(4)).

Indirect delegation: – almost all administrative or regulative legislation authorise administrative agencies to adopt regulations and directives. For instance, Art 22(1) of the *Biosafety Proclamation No 655/2009* authorises the Council of Ministers to adopt regulations for the implementation of the Proclamation. The Authority is also authorised under Art 22(2) to adopt directives for the implementation of the Proclamation and the Regulations. Art 21(1) (b) further provides that “any person who violates any provision of [the] Proclamation or regulations [sic] or directives issued pursuant to [the] Proclamation shall be punished with a fine from Birr 4,000 to Birr 7,000 or with imprisonment from one year to three years or both.” Regulations and directives adopted by the executive do not appear in criminal legislations as such. However, when they are sanctioned by a Proclamation with criminal punishment, those Regulations and directives are then used as a criminal law defining elements of the crime. Such act of criminalisation and punishment is becoming a norm, not an exception.¹⁵⁶

The HoPR may delegate other law-making power for the efficient administration of government based on specialisation. The criminal law-making is not one of those delegable duties of HoPR for various reasons. First, criminal law is the most

¹⁵⁶ See for example, *Banking Business Proclamation No 592/2008*, Arts 59 and 58(7). *Apiculture Resources Development and Protection Proclamation No 660/2009*, Arts 9 and 8(7). *Radiation Protection Proclamation No 571/2008*, Arts 29 and 28(5). *Development, Conservation and Utilisation of Wildlife Proclamation No 541/2007*, Arts 17 and 16(1)(b).

intrusive state action; it has to be adopted by the HoPR representing the public. It is the essential duty of the HoPR that it cannot be delegated to a non-elected organ. Further, the executive does not have a better specialisation than the HoPR in making criminal law. The universe of criminal law is limited and it does not need frequent action. Therefore, the delegation of such criminal law-making power is unconstitutional.

4.1.3. Criminal law is used to achieve some other purposes than protection of the common good

It is provided for under Art 1 of the Criminal Code that the purpose of criminal law is prevention of crime. The punishments in the Criminal Code are meant to achieve this purpose. The purpose of those special penal legislation and administrative legislation is not prevention of crime. For instance, the reasons for the adoption of *Commercial Registration and Business Licensing Proclamation No 67/1997* were “to create conducive environment” for commercial activities “in line with the free market economic policy”, to “improve the registration and licensing procedures” to promote free market economy, “to restrain illegal commercial activity,” to change “the law enacted to serve the previous regimes which are not consistent with the on-going free market economic system,” to consolidate the laws “into one proclamation”, etc.¹⁵⁷ From this Preamble, one would read at least two things: the new economic ideology, and government administrative efficiency.

Substituting this Proclamation, *Proclamation No 686/2010* maintained the same economic ideology; but it added one thing; that the efficiency in the registration and license system should “enable to attain economic development.” It also promises to “tackle illegal activities” by using “international business classifications and by putting the necessary criteria in place.”¹⁵⁸

It would be stating the obvious that the penal provisions included in the proclamation are guided by such objective. That is what the prosecutor has in mind when enforcing the penal provisions of the Proclamation. In fact, after conviction of the accused, when the court determines the sentence it is guided by the purposes of punishment in the Criminal Code which gives a wrong impression that the penal provisions of the administrative regulations are guided by the object and purposes of criminal law. The criminal punishments are included and later increased in order to help the efficiency of the government commercial registration and business licence responsibilities. A bird’s eye view of the penal legislation relating to taxes, government finances and property, gives the impression that they promote a certain political ideology, which is not the scope of this paper. These penal provisions are, therefore, meant to enforce that political and economic

¹⁵⁷ Preamble of the Proclamation.

¹⁵⁸ Preamble of the Proclamation. *Proclamation No 686/2010* is repealed by and replaced with *Proclamation No 980/2016* with no substantive change to the penal provisions; see Art 49(2).

ideology. The adoption of some of the special penal legislation appears to be for a different reason. For instance, the preamble of *Anti-Terrorism Proclamation No 652/2009* provides that one of the justifications for the adoption of the proclamation is to enable Ethiopia to discharge her treaty obligations.¹⁵⁹ A purpose other than the protection of the common good is not an acceptable justification; and thus, makes criminal law illegitimate.

4.2. Using Criminal Law as First Resort State Action

It is an aspect of the principle of legality that the statement of crime has to be as clear and specific as possible. However, many of the administrative regulations have blanket criminalisation. The proclamations authorise the Council of Ministers to adopt regulations for the proper implementation of the proclamations and a specific agency is authorised to adopt directives to implement both the proclamations and the regulations. The proclamations finally provide for a specific penalty for violation of the provisions of the proclamations, the regulations and the directives without any specific reference to conduct. Usually, such provision is included as a catch-all-basket after the essential conduct that is deemed to be serious is criminalised and severely punished.

For instance, Art 58 of the *Banking Business Proclamation No 592/2009* provides for penalties, the maximum being 15 years, for various activities the lawmaker could foresee at the time of the drafting of the law. Art 79 authorised the Council of Ministers and the National Bank of Ethiopia to adopt regulations and directives, respectively. Art 58(7), then, provides that “[a]ny person who contravenes or obstructs the provisions of [the] Proclamation or regulations[sic] or directives issued to implement [the] Proclamation shall be punished with a fine up to Birr 10,000 and with an imprisonment up to three years.”

Other proclamations make reference to the provisions of the Criminal Code. However, even when the administrative law refers the criminal liability to the Criminal Code, the criminalisation relates to the whole of the provisions of the respective proclamations.¹⁶⁰ The conduct these proclamations proscribe is not clear. When the criminalised conduct is not clear, the individual cannot behave in conformity with the law nor can the judge decide whether a person accused of violation of such proclamations, regulations and directives is guilty.¹⁶¹

A related, but serious, problem is only proclamations and regulations are published in the official gazette, the *Federal Negarit Gazeta*, directives are not published in the

¹⁵⁹ For an in-depth discussion on the validity of the justifications for the adoption of the Anti-Terrorism Proclamation, see Wondwossen Demissie Kassa, *Criminalisation and Punishment of Inchoate Conducts and Criminal Participation: The Case of Ethiopian Anti-Terrorism Law*, 24 J. ETH. L. 147 (2010).

¹⁶⁰ See, for instance, *Transport Proclamation No 468/2005*, Art 29, and *Rural Land Administration and Use Proclamation No 456/2005*, Art 19.

¹⁶¹ Beccaria, *supra* note 2, at 17-18. Petrig and Zurkinden, *supra* note 53, at 20 and 23.

Federal Negarit Gazeta nor are they widely circulated; often they may not be written in Amharic. The rule of convenience that *ignorance of law is no excuse* works only when such publication requirements are met. Such measures are contrary to the principle of legality and other basic principles of the criminal law. However, the Federal Supreme Court Cassation Division gives such directives effect, as though they are laws published in the official *Negarit Gazeta*.¹⁶²

4.3. Excessive (Disproportionate) Punishment

Under Section 2.5 above, we discussed that punishment has utility and is fixed based on the principles of proportionality and of parsimony.¹⁶³ Those punishments that do not comply with the principle of utility or parsimony are excessive. The proposition that a certain punishment is excessive presupposes that there is a fixed punishment for a particular offence in proportion to its severity. There is no such scientific measure of punishment. So far the discussion on the objective and relative determination of punishment is intuitive established by trial and error.¹⁶⁴

However, looking at the relative changes of punishment through time and among similar or related offences, as well as other objective factors, we can make a reasonably objective discussion on the excessiveness of the punishment. There are at least four relative ways we can show the excessiveness of punishments in some of the administrative and special legislation.

4.3.1. Preferring more severe sentences to less severe ones

It is an established principle in the criminal law that where there are two competing punishments for the same conduct, the one that favours the accused shall be applied.¹⁶⁵ Contrary to what is provided for in the Constitution and in the General Principles of criminal law, however, the lawmaker consistently opts for excessive punishment. For instance, Art 53(1) of the *Food, Medicine, and Healthcare Administration Proclamation No 661/2009* provides for specific punishments. However, those punishments would be applicable “[u]nless a higher penalty is

¹⁶² Respondent was charged for violation of the Directives adopted by the National Bank of Ethiopia, written in English. The Federal High Court and Supreme Court declared him ‘innocent’ but the Cassation Division found him guilty. The court reasons that Directives are also treated as laws wherein the prohibited conduct is provided for and the punishment is provided for in the proclamation. *Ethiopian Revenue and Customs Authority v Daniel Mekonnen* (21 July 2010, Cass. File No 43781, in 10 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT).

¹⁶³ Beccaria, *supra* note 2, at xxii.

¹⁶⁴ *Id.*, at 7. Although it is about the retributive punishment measurement, the research indicates that such measurement of punishment is fairly intuitively shared across cultures. P.H. Robinson and J. Darley, *Intuitions of Justice: implications for criminal law and justice policy*, 81 SOUTHERN CAL. L. REV. 1 (2007).

¹⁶⁵ FDRE Const., Art 22(2). Crim. C., Art 6.

provided under the Criminal Code.” This is the consistent drafting pattern of the penal provisions of administrative proclamations.¹⁶⁶

4.3.2. *Providing for a more severe sentence for the same or similar crime*

There are various provisions governing different acts; there are more than one provision governing, for instance, license, tax and bribery. There is unstated agreement between the prosecution office and the courts that the civil law rule of interpretation which states the special derogates over the general is applied. Thus, while there is a provision in the Criminal Code that prohibits and punishes doing business without a permit from the appropriate agency, it is the *Commercial Registration and Business Licence Proclamation* punishment that are applied.¹⁶⁷ Often, those special legislation after providing for what constitutes the offence were expected to refer the matter to the Criminal Code for the punishment.¹⁶⁸ While there are criminal law rules governing tax evasion and providing false or misleading information, it is the rules in the special proclamations according to which cases are prosecuted by the Ethiopian Revenue and Customs Authority and are applied by the courts.¹⁶⁹ Evidently, the punishments fixed in those special legislation are much severe than the one in the Criminal Code.

Others appear to have taken a different ‘form’. For instance, the *Vagrancy Control Proclamation* defines vagrancy having three elements: that the suspect is (a) able-bodied; (b) has no visible means of income, and (c) does any of those listed activities which is punishable with one and one-half year to two years, and in exceptional gravity, with three years’ imprisonment. While vagrancy is a prohibited conduct in the Criminal Code, the Proclamation lists activities. Those activities listed in the *Vagrancy Control Proclamation* are also found in Part III of the Criminal Code as contraventions punishable with fine or detention for few days. See, for instance, Art 842, 846, 854 of the Criminal Code. The major defence in vagrancy

¹⁶⁶ There are similar provisions in several other administrative proclamations, such as, Art 8 of *Apiculture Resources Development and Protection Proclamation No 660/2009*, Art 12(3) of *Environmental Pollution Control Proclamation No 300/2002*, Art 16(1) of *Development, Conservation and Utilization of Wildlife Proclamation No 541/2007*, Art 28 of *Forest Development, Conservation and Utilisation Proclamation No 542/2007*, Art 20 of *Radiation Protection Proclamation No 571/2008*, Art 14 of *Census Proclamation No 449/2005*, Art 19 of *Central Statistics Authority Proclamation No 442/2005*, Art 36 of *Copyright and Neighbouring Rights Proclamation No 410/2004*, Art 20 of *Immigration Proclamation No 354/2003*, Art 45 of *Research and Conservation Proclamation No 209/2000*, Art 20 of *Forest Development, Conservation and Utilisation Proclamation No 542/2007*, Art 21(1) of *Biosafety Proclamation No 655/2009*, and Art 60 of *Business Registration and Trade License Proclamation No 686/2010* which is preserved under Art 49(2) of the newly issued *Proclamation No 980/2016*.

¹⁶⁷ *Bazegaw Yibun v Amhara Regional State Prosecutor* (24 June 2012, Cass. File No 86388, in 15 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT).

¹⁶⁸ See, for instance, the provisions of Crim. C., Art 432, 433 and 434. Also see Graven, *supra* note 1, at 284, 287.

¹⁶⁹ The various prosecution institutions are brought under one institution - The Federal Attorney General - established by *Proclamation No 943/2016*. However, the substantive criminal laws - both the Criminal Code and various special penal and administrative legislation - remain as they were. The recently adopted *Tax Administration Proclamation No 983/2016*, Art 116(2), gives the impression that the lawmaker has the desire to preserve those penal legislations in the tax proclamations.

proceedings is the accused has employment which clearly indicates vagrancy is a status crime in Ethiopia and thus, discriminatory contrary to the provisions of Art 25 of the Constitution. It is obvious that the criminal law in those special legislation and administrative proclamation is providing for a more severe punishment than there is in the Criminal Code for the same conduct.

4.3.3. Increasing punishment over time without showing any justification

In many instances when legislations are revised or replaced, the lawmaker increases the sentence excessively. For instance, the *Commercial Registration and Business License Proclamation No 67/1997* Art 49 penalises a person who engages in commercial activity without a license by “fine equal to double the revenue estimated to have been earned by him during the period of time he operated the business without a valid business license, and with imprisonment from 3 up to 5 years.” Likewise, Art 433 of the Criminal Code punishes such person “with simple imprisonment or fine; or with rigorous imprisonment not exceeding five years and fine.”

The *Commercial Registration and Business Licensing Proclamation No 686/2010* expressly repealed Proc No 67/97. However, Art 60 punishes a person doing business without a valid license “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 equipment and/or manufacturing equipment with which the business was being conducted shall in addition be confiscated by the government.”¹⁷⁰

When Proc No 686/2010 increases the minimum punishment from 3 to 7 years and the maximum punishment from 5 to 15 years, there is no justification provided anywhere in the legislation. These punishments are maintained in the recently adopted *Commercial Registration and Business Licensing Proclamation No 980/2016* which introduced additional punishable conduct.¹⁷¹

There are few exceptions to the above general statements of increased sentence; cases in point are violation of the Stamp Duty and Customs Proclamations. Use of specific documents without paying a specified amount of stamp duty was made punishable with 10-15 years’ rigorous imprisonment and fine Birr 25,000 to

¹⁷⁰ In *Bazzew*, *supra* note 167, Petitioner, as he was caught transporting animal hide using public transport bus which is, later, sold for Birr 2,432, was charged for trading with a license that was not renewed at the time. The Jawi Woreda Court, in Amhara State, convicted him for violation of Art 60(1) of the *Trade Registration and Business License Proclamation No 686/2010*, and sentenced him to 7 years’ rigorous imprisonment and fined him Birr 150,000.00. As the State High Court rejected his appeal, Bazzew petitioned the State Supreme Court Cassation Bench which reduces the imprisonment to 3 years and 6 months and the fine to Birr 5,000. The Federal Supreme Court Cassation Bench affirmed the decision finding no reason to interfere with the judgment of the State Cassation Court.

¹⁷¹ Art 49(1) provides for prohibition of use of “false certificate of commercial registration, business license or special certificate of commercial representation.”

35,000.¹⁷² In the Tax Administration Proclamation, the imprisonment punishment is reduced to three to five years’ rigorous imprisonment while the fine is increased to Birr 25,000 to 50,000.¹⁷³ Likewise, the *Customs Proclamation No 859/2014* made several acts that were punishable with imprisonment in the previous law substituted with fine.¹⁷⁴

4.3.4. Criminal punishments are imposed in conjunction with administrative measures and civil actions

In all the administrative or regulatory legislation, the respective agencies are given power to take ‘appropriate’ administrative measure that is suitable to their administrative responsibility. The administrative measure for tax authorities, for instance, is collection of the principal tax with the power of seizure of property of the tax payer,¹⁷⁵ collection of interest on the unpaid amount (the highest commercial lending interest rate plus 25%) and penalty based on certain calculation for late filing, for non-filing and for late payment.¹⁷⁶ There are similar provisions in the VAT Proclamation.¹⁷⁷ Likewise, the Consumer Protection Proclamation has a court to adjudicate administrative and civil matters.¹⁷⁸ The administrative measures provided for under Art 35(3) include, the suspension or cancellation of business license, payment of compensation to the victim to bring him back to his previous competitiveness, the seizure and/or sell of goods, the discontinuance or injunction of the act declared inappropriate.

It is above and beyond these administrative measures, and sometimes civil actions, that criminal liability is to be imposed. Art 49 of the Consumer Protection Proclamation expressly provides that the courts shall impose criminal punishments provided for therein against any person who violates the provisions of the Proclamation on top of the administrative and civil measures by the Authority. Criminal sanctions for doing business without a license, in addition to those administrative measures by the agency, are (a) a fine between Birr 150,000 and Birr 300,000, (b) rigorous imprisonment from 7 to 15 years, and (c) confiscation of the goods and services delivery equipment and/or manufacturing equipment with which the business was being conducted.¹⁷⁹ While those administrative measures would help the agency accomplish its mission, such criminal punishments are plainly disproportionate to any harm that may have been caused by the person.

¹⁷² *Stamp Duty Proclamation No 110/1998*, Art 12(1)(a).

¹⁷³ *Federal Tax Administration Proclamation No 983/2016*, Art 123(1).

¹⁷⁴ See the provisions of Arts 156 ff.

¹⁷⁵ *Income Tax Proclamation No 286/2002*, Art 77. *Value Added Tax Proclamation No 285/2002*, Art 31.

¹⁷⁶ See, *Income Tax Proclamation No 286/2002*, Arts 76, 86-88, respectively.

¹⁷⁷ *Value Added Tax Proclamation No 285/2002*, Arts 45-47.

¹⁷⁸ *Trade Practice and Consumer Protection Proclamation No 685/2010*, Art 35.

¹⁷⁹ *Trade Registration and Business Licence Proclamation No 686/2010*, Art 60(1). *Proclamation No 980/2016*, Art 49(2).

Conclusion

In the traditional sense, the constitution is meant to limit the power of the state both in organisation and separation of power as well as by the incorporation of the bill of rights. The bill of rights is principally meant to guarantee the fairness of the process than to regulate criminalisation and punishment. The latter is rather directly governed by the doctrines of criminal law - the purpose of criminal law is protection of the common good by preventing crime.

The continental criminal law tradition, to which Ethiopian criminal law belongs, requires both the positive and negative justifications for criminalisation; short of either of those requirements, the criminal law is not legitimate. Further, other doctrines, such as, non-retroactivity of criminal law and the principle of legality limit the power of the state from using retroactive or vague criminal law; the requirement of guilt also limits the use of criminal law in the absence of such guilt.

The purpose of punishment follows the purpose of criminal law. Punishment is imposed neither to torment the guilty nor to undo the harm; it is imposed in so far as it helps in the prevention of crime. In order to achieve this purpose, the continental criminal law adopted the principles of proportionality and of parsimony - only punishments that has lasting impression on the society and the least painful on the person who undergoes the punishment may be imposed. Therefore, it is not the severity of the punishment but the certainty of prosecution that has such effect.

The examination of the special penal legislation and provisions show that the state uses criminal law, at least at enforcement level, in the absence of guilt, or to achieve some other purposes than the protection of the common good, or as a first resort measure. The punishments are excessive in that they do not seem to consider the relative significance of the good, or the lawmaker explicitly shows preference to severe punishments without justification, and, often such punishments are used in addition to administrative measures and civil actions.

Those legislative actions are contrary to criminal law doctrines, normative and institutional constitutional limitations. In not few cases, those legislation disregard the fact that the criminal law is one body of law, more so, in our case, the criminal law is a codified law. In those legislation, the lawmaker does not show its wisdom regarding the relationship between the General Part of the criminal law and the Special Part. In sum, the lawmaker every time it enacts criminal legislation/provision, it does not seem to have memory of other similar/identical criminal legislation/ provision, the Criminal Code, or a provision contained therein. This resulted in both quantitative and qualitative over-criminalisation.

In order to address the problem of over-criminalisation, the lawmaker should consider that first, the Criminal Code covers almost all matters that are provided

for by the special penal legislation or provisions that are discussed here and several others not mentioned here. Further, the Constitution recognises that the Ethiopian criminal law is codified criminal law. Therefore, the lawmaker should repeal all legislation or provision whose matter are covered by the Criminal Code; where the lawmaker believes the Criminal Code does not cover or does not effectively address a certain ‘legal good,’ it should govern such conduct by an amendment to the Code. In doing so, the lawmaker would maintain the integrity of the Code. Second, even for those crimes that are intended to be included into the Criminal Code, the lawmaker must first determine, criminalisation is effective as a protection of the legal good intended to be protected by the criminal law, and other measures, such as, administrative measures and civil actions are not as effective. Third, once the lawmaker decides a certain conduct needs to be criminalised, it should clearly state the material and moral elements constituting the crime and make sure such criminal legislation are published in the *Federal Negarit Gazeta*, because in the absence of such action, criminalisation would not be legislative action; it would rather become executive action. Fourth, in determining punishment the lawmaker should be guided by the principles of proportionality and of parsimony; i.e., properly evaluate the relative significance of the good, and determine the punishment that creates lasting impression on the society and is the least painful on the person undergoing the punishment. Fifth, as criminal law is one body of law, in criminalisation of conduct and determination of punishment, regard must always be had to the General Part of the Criminal Code. Finally, the criminal law-making is the institutional responsibility of the House of Peoples’ Representatives. As it is its non-delegable responsibility, the criminal law-making power cannot be delegated to any organ.

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