

Non-Positivist ‘Higher Norms’ and ‘Formal’ Positivism: Interpretation of the Ethiopian Criminal Law

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Abstract

The criminal law is adopted as a means of achieving the common good; it is interpreted and applied by the court. The judge chooses the type of legal theory and method to employ in the interpretation and application of the criminal law. Such theories may be acquired from higher norms or from the decision of the Supreme Court. Because such choice of theory and method determines the outcome of the case, the judge is also expected to be guided by the doctrines in criminal law inspired by the values of rule of law and respect for fundamental rights, enshrined in the Constitution. This article examines how courts harmonise the application of the positive criminal law with the non-positivist theories of higher norms. After reviewing various criminal rules and their judicial application, it finds that the court applies the criminal law as it is written in disregard of the non-positivist theories of higher norms, at times in contradiction to the basic doctrines of the criminal law itself.

Key terms

Non-positivism · Criminal law · Judicial method · Theory of law · Higher norms · Judicial formalism

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Introduction

In Ethiopia, the criminal law and criminal justice institutions were often instruments of choice of the government of the day. Emperor Haile Selassie adopted the Penal Code of 1930 (የወንጀለኞች መቅጫ ደንብ) on the year of his coronation, and although the Code was indeed a landmark in legislation, it was also used to fend off contenders to power (via Articles 170- 174 which specifically protected the Emperor, the Crown Prince, the Prime Minister and others). In the 1931 Constitution, the Emperor vested perpetual sovereign power in himself. The post-1974 Military Government established a Special Court-Martial to apply a Special Penal Code Proclamation No. 8 of 1974 which was principally meant to punish officials of the Imperial regime. The EPRDF Government (1991 onward) used the law and institutions in a much vigorous way, including to achieving administrative ends. It is also a consistent practice of those regimes that the constitution incorporates a non-positivist higher norms to legitimise its laws.

On the other hand, the laws that were sought to be justified are, often, ‘excessive’ or ‘unreasonable’ contrary to those higher norms. However, disregarding those higher norms that were sought to justify the criminal law, the courts apply the criminal law, almost always, unscrupulously. This article enquires into judicial practice in the interpretation and application of such excessive criminal law in the face of such higher norms as ‘natural justice’, ‘human conscience’, ‘human (fundamental) rights’, that are sought to justify the ‘validity’ or ‘correctness’ of such criminal law. It attempts to review the theory of law the court may have and the judicial method it employs in interpreting the criminal law.

It finds that the court appears to have adopted an ‘instrumentalist’ view of criminal law under the overarching ‘positivist’ legal theory, leaving the determination of the ends of the criminal law to the government. In the interpretation of criminal law, the court never considered constitutional principles, such as rule of law, justice, proportionality, and reasonableness. The court rather gives the impression that it employs basic principles in the criminal law, selectively. Yet, the court is very reluctant to employ principles that are meant to benefit the accused.

Review of published decisions of the Federal Supreme Court Cassation Division and other courts discussed in this article reveals that the court can hardly be called formalist in its judicial method. If there is any discernible pattern in the decision of the court, it is its usual practice against the interest of the accused. This appears to be the result of pervasive influence of political ideology.

This article enquires into the theory and judicial method the court adopts in interpretation of the criminal law. The court does not state the theory of law it follows or the method of interpretation it applies; it is rather abstracted from the decisions of the court that contain interpretative argument. Because the political nature of the criminal law is made evident in the two regimes, the article reviews the decisions of the Special Court (both First Instance Special Court and Appellate Special Court) seating in Addis Ababa and Asmara involving interpretative methods on the Revised Special Penal Code. Likewise, the Cassation Division of the Federal Supreme Court renders binding interpretative decisions since 2004. A few decisions of the Federal High and First Instance Courts are also examined to show their compliance with those Cassation Division decisions. Even though every criminal decision involves matters of interpretation, the cases involve potentially divergent interpretation to the provision under consideration either because of potential non-conformity with a higher value or another competing provision. These judicial decisions are highlighted for the purpose of illustrating the arguments forwarded in this article, and are not meant to be used as representative samples towards generalization to all courts.

Section 1 deals with background matters on higher norms. The second section highlights the consequence of the fundamental nature of rights. Both sections aim at providing context to the discussion. Section 3 discusses selected legislation whose excesses (unreasonableness) is not subject to serious disagreement, and the practice of the court in its implied choice of legal theory and method. In Section 4, proposals regarding legal theory and method that may need to be taken into consideration by the court are presented, along with the consequence of such choice.

1. General Background: Higher Norms in Ethiopian Legal System

In Ethiopia, the appeal to a higher norm is driven by two fundamental factors. Legitimacy of the government of the day is always an issue;¹ Secondly,

Acronyms

EPRDF	Ethiopian People’s Revolutionary Democratic Front
FDRE	Federal Democratic Republic of Ethiopia
ICCPR	International Covenant on Civil and Political Rights
PDRE	People’s Democratic Republic of Ethiopia
PMAC	Provisional Military Administrative Council
UDHR	Universal Declaration of Human Rights

governance is made possible under coercive law, particularly, the criminal law.² Therefore, the government always appeals to a non-positivist higher norm in order to justify its laws. As ecclesiastic law, the *Fiteha Negest* is a traditional natural law; crime used to be treated as sin against God and the judge is the representative of God on earth and punishment is expiation.³ In order to maintain its legitimacy, the Crown made sure that *Fiteha Negest* does not depart from such traditional belief. Thus, although its content significantly departed from the *Fiteha Negest*, the 1930 Penal Code was not stated to be positive law; it was rather adopted to be a revision of the *Fiteha Negest*.⁴

Article 23 of the Administration of Justice Proclamation No. 2/1942 recognises “the hearing and settlement of minor disputes in any manner traditionally recognised by Ethiopian law until such time as regular courts [would] be established for the hearing of such disputes by judges duly appointed.” Article 24 further provided that the courts would not “give effect to any existing law which would be contrary to *natural justice* or *humanity*,⁵ or which makes any harsh or *inequitable difference*.”

In late 1950s and early 60s, laws were codified, thereby positivised. But their legitimation was a different non-positivist justification; the law was considered an indispensable “instrument of social change”. Thus, in the preface of the 1957 Penal Code, the Emperor had stated that codification of law “must be profoundly grounded on the life and traditions of the nation” and at the same time be responsive to juridical, social, economic and scientific influences “which are in the process of transforming the nation and our lives and which will inevitably shape the lives of those who come after us.”⁶ Yet, “the point of departure [would...] remain the genius of Ethiopian legal traditions and institutions which have origins of unparalleled antiquity and continuity.”⁷ He further stated that the primary purpose of the penal law would

¹ Simeneh Kiros Assefa (2018), ‘Sovereignty, Legitimacy and Fundamental Rights as Limitations to Criminalising Power of the State’, 12 *Mizan LR* 127, 131-136.

² See in general, Burton M Leiser (2008), ‘On Coercion’ in David A Reidy and Walter J Riker (eds), *Coercion and the State* (Springer 2008); Alistair M Macleod (2008), ‘Coercion, Justice, and Democracy’ in *ibid*.

³ Jean Graven (1964), ‘The Penal Code of the Empire of Ethiopia’, 1 *J Eth L* 267, 270 – 72. It is to be noted that Orthodox Christianity had been the official religion until 1974.

⁴ The 1930 Penal Code, Preface paras 1, 5 and 16.

⁵ The Amharic version rather refers to ‘human conscience’. (*Emphasis added*).

⁶ The 1957 Penal Code of the Empire of Ethiopia, Preface para 1.

⁷ Penal Code, Preface para 4.

“to give reality and depth to the principles of *human rights*” contained in the 1955 Revised Constitution.⁸

When the Provisional Military Administration Council came to power in 1974, criminal lawmaking was its first action. The Government had made it clear that the criminal law, adopted as a Special Penal Code, increased punishments, criminalised certain conducts not criminalised before, and was made applicable retrospectively.⁹ The Code also made period of limitation for those crimes contained in the Special Penal Code inapplicable.¹⁰

The Government provided non-positivist justification for those decisions. The preamble in the law stated that ‘the retroactive application of the Special Penal Code is not repugnant to *natural law* and *basic legal philosophy*.’¹¹ It further stated that “most of the offences provided for [in the Special Penal Code had...] previously been defined in the criminal laws and the rest [had...] long been recognised by *natural law*, *custom* and *the practice of the profession* and as such have *solid basis in the law*.”¹² The preamble also provided that the suspension of period of limitation would be supported by “*human right* and *natural justice*, [] *the standards of natural law* and *individual conscience*.”¹³

The contents of those higher non-positivist standards were not clear because they had not been positivised or propounded by the court.¹⁴ This is particularly so if they are compared to the positive nature of criminal law. However, those were higher principles as standards of evaluation against which the Government would claim the ‘correctness’ and the validity of the criminal rules.¹⁵ Those non-positivist higher ‘norms’ or ‘standards’ claimed

⁸ Id., para 5 (emphasis added).

⁹ *Special Penal Code Proclamation No 8 of 1974*, preamble paras 5-9.

¹⁰ Id., para 4.

¹¹ Id., paras 10-11 (emphasis added).

¹² Ibid (emphasis added).

¹³ Id., paras 4, 9 (emphasis added). However, the statute itself states, as one of the reasons for the adoption of a Special Penal Code, that as a result of the change, matters that were “not dealt with [in prior] criminal laws have come to light.” Id., para 2.

¹⁴ See text for (n 24).

¹⁵ Alexy argues that the formal concept of fundamental rights is their institutionalisation (or positivisation). Robert Alexy, ‘Discourse Theory and Fundamental Rights’ in Agustin Jose Menendez and Erik Oddvar Eriksen (eds) *Arguing Fundamental Rights* (Springer 2006) 27.

to justify the positive criminal law were not, however, used by the courts to evaluate such positive criminal law.¹⁶

When the EPRDF Government came to power in 1991, it adopted a Transitional Period Charter, whose bill of rights was the Universal Declaration of Human Rights (UDHR).¹⁷ One may take this as a statement by the incoming Government to the public –which had undergone oppressive and authoritarian regime– that the incoming government would act differently.¹⁸ One may also find it practical to adopt the UDHR as a bill of rights which would raise little or no question regarding its content. The non-positivist content of UDHR regarding its approach to fundamental rights is made evident in the document itself.¹⁹

When the 1995 Federal Democratic Republic of Ethiopia (FDRE) Constitution was adopted, it contained a bill of rights which appeals to a non-positivist higher principles. This is affirmed in two ways. First, Chapter two of the Constitution provides for fundamental principles of the Constitution.²⁰ These principles are pillars on which the Constitution is founded.²¹ One of those fundamental principles is the inviolability and inalienability of “*human rights and freedoms emanating from the nature of mankind.*”²²

The provisions of sub-article (2) of article 10 of the Constitution, also classify rights into *human rights* emanating from the nature of humankind and *democratic rights* which are exercised by citizens.²³ The wording of the provisions are sufficiently clear. However, the drafters in their notes explained

¹⁶ As discussed under Section 3.2.1 below, there was no reference made to such higher norms in the decision of the courts applying the positive criminal law.

¹⁷ *Charter of the Transitional Government of Ethiopia*, art 1.

¹⁸ *Independence of the Administration of Justice Proclamation No 23/1992*, Preamble para 2.

¹⁹ The UDHR Preamble, para 1 provides for the “recognition of the *inherent dignity* and of the equal and inalienable rights of all members of the human family.” (*Emphasis added.*) Article 1 further provides that “[a]ll human beings are born free and equal in dignity and rights”.

²⁰ The Constitution has five fundamental principles: sovereignty of the people (art 8), constitutional supremacy (art 9), respect for fundamental rights (art 10), separation of state and religion (art 11), and transparency and accountability of the conduct of government (art 12).

²¹ ‘Brief Explanatory Memorandum to the Draft Constitution Certified by Council of Representatives 28 October 1994’ (in Amharic) 9.

²² FDRE Constitution, art 10(1) (*emphasis added*).

²³ Arts 14 to 28 provide for rights emanating from human nature while arts 29 to 44 provide for democratic rights.

that *human rights* exist pre-government and the law merely recognises them, irrespective of differences in nationality, social origin or otherwise.²⁴

Second, the Constitution is guided by fundamental principles of 'rule of law', 'democratic order', 'equality' and 'full respect of individual [] fundamental freedoms and rights' as provided for in the preamble of the Constitution. Further, in order to give context to the bill of rights, article 13(2) provides that the contents of those "fundamental rights and freedoms [] shall be interpreted in a manner conforming to the principles" of international bill of rights.²⁵

The constitutional declaration of those rights as 'fundamental' is consequential.²⁶ Robert Alexy argues that human rights have three aspects: the foundation, institutionalisation and interpretation aspect. The *institutionalisation* aspect of human rights is their positivisation in the constitution with special protection.²⁷ The *interpretation* aspect of human rights involves the principle of proportionality using the law of balancing.²⁸ However, the practice of courts in the FDRE Government is not any different from the previous regimes when it comes to approaching individual rights in interpretation of the criminal law.

2. The Consequence of the Fundamental Nature of Constitutional Rights

2.1 The balancing approach

Alexy argues that rights are principles; and principles are optimisation commands to be given the maximum effect as facts and the law permits.²⁹ When there is a conflict between principles, it can be resolved by applying the 'law of balancing', or the 'principle of proportionality'.³⁰ Thus, non-absolute rights may be limited in two situations: when there occurs conflict of rights of

²⁴ 'Explanatory Memorandum to the Draft Constitution' (n 21) 15-16.

²⁵ It specifically mentions the "Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia."

²⁶ The consequences may be abstracted from the provisions of arts 9(1), 10, 13. Also see 'Explanatory Memorandum to the Draft Constitution' (n 21) 19-21.

²⁷ Alexy 'Discourse Theory' (n 15) 15-17, 22-23.

²⁸ Ibid.

²⁹ Robert Alexy (2000), 'On the Structure of Legal Principles' 13 *Ratio Juris* 294, 295.

³⁰ Ibid; Alexy 'Discourse Theory' (n 15) 23-27.

two individuals or a right is implicated by a public interests policy.³¹ One of public interest policies is the adoption of a criminal law. The criminal law has dual features: first, it restricts a realm of conduct the individual would otherwise engage in; and second, the violation of the restriction is manifested in terms of punishment.

When such conflict of values occur, the principle of proportionality is applied in order to resolve such conflict. Balancing or proportionality is a value-neutral instrument for resolving conflict between, in this case, a criminal rule and an implicated constitutional right. The principle of proportionality is widely applied in constitutional democracies, and the literature and jurisprudence is rich.³² The question is whether it has a foundation in the Ethiopian Constitution, to be applied by the courts in deciding on the applicability of a particular criminal rule. The 1987 Peoples Democratic Republic of Ethiopia (PDRE) Constitution had general limitation clause³³ that would necessarily invite application of the balancing approach save it would be interpreted by the Council of State whose president is the president of the Republic.³⁴

In the 1995 FRDE Constitution too, there are both direct and indirect approaches to see the doctrine of proportionality as part of the Ethiopian Constitutional regime. First, proportionality is the best method in resolving conflict between legal principles. The doctrine is also founded on democracy and is part of the rule of law.³⁵ The FDRE Constitution claims to be founded

³¹ Aharon Barak (2012), *Proportionality: Constitutional Rights and their Limitations* (Doron Kalir tr, Cambridge, UP) 32-42, 72-82.

³² The application of the principle of proportionality is listed in Barak, *Proportionality...* (n 31) 189. Prominent works on the principle of proportionality also include, Alexy 'Discourse Theory...' (n 15), Alexy 'On the Structure...' (n 29), Robert Alexy, 'The Reasonableness of Law' in Giorgio Bongiovanni, Giovanni Sartor and Chira Valentini (eds), *Reasonableness and Law* (Springer 2009), Humberto Ávila (2007), *Theory of Legal Principles* (Springer), Stephen Gardbaum 'The Structure and Scope of Constitutional Rights' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing 2011), Bernhard Schlink (2012), 'Proportionality' in Michel Rosenfeld and Andras Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford UP).

³³ Art 58 of the *Constitution of the People's Democratic Republic of Ethiopia* ('PDRE Constitution) provides that "[t]he exercise of freedoms and rights by citizens may be limited by law only in order to protect the interest of the state and society as well as the freedoms and rights of other individuals."

³⁴ *Id.*, arts 81 and 82.

³⁵ Barak, *Proportionality...* (n 31) 214 *ff*; Jan Sieckmann 'Rational Lawmaking, Proportionality and Balancing' in Klaus Meßerschmidt and A Daniel Oliver-Lalana

on ‘rule of law’ and ‘democratic order’.³⁶ If such claims are to be realised, these principles require the utilisation of the principle of proportionality in the realisation of fundamental rights enshrined in the Constitution.

Second, the principle of proportionality is indirectly made a part of the Ethiopian legal system. Article 9(4) of the FDRE Constitution provides that the international agreements to which Ethiopia is a party form the corpus of Ethiopian law. Further, the provisions of article 13(2) provide that the bill of rights “shall be interpreted in a manner conforming to the principles of Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia”. The Siracusa principles,³⁷ which essentially embody proportionality, were adopted by the UN Human Rights Committee as a guideline for the determination of justifiability of limitations to rights enshrined in the ICCPR. The ICCPR is one of the instruments adopted by Ethiopia thereby forming part of the domestic law, and the bill of rights in the Constitution is to be interpreted in conformity with it. The application of the law of proportionality in the assessment of state conduct implicating fundamental rights is thus recognised by the Government,³⁸ and this fills the gap in constitutional jurisprudence.

2.2 Proportionality in Ethiopian criminal law

The Constitution recognises fundamental rights in the context of the administration of justice. Often, these rights are related to the administration of criminal justice rather than the evaluation of substantive criminal law. However, the state does not have a free hand to criminalise conducts and determine the consequent punishment. The bill of rights is a limitation not only on the power of the government in other realms but also on the positive criminal law. Thus, as any public policy, the state has the obligation to justify its criminal rules through which the state’s coercive power is manifested. The justification process goes through the principle of proportionality.

(eds), *Rational Lawmaking under Review: Legisprudence According to the German Federal Constitutional Court* (Springer 2016) 111 ff; Andrej Kristan ‘Three Grounds for Tests of the Justifiability of Legislative Action: Freedom, Representative Democracy, and Rule of Law’ in Luc J Wintgens and A Daniel Oliver-Lalana (eds), *The Rationality and Justification of Legislation: Essays in Legisprudence* (Springer 2013).

³⁶ FDRE Constitution, Preamble paras 1, 6.

³⁷ Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).

³⁸ ‘Brief Explanatory Memorandum on Freedom of the Media and Access to Information Bill’ (later adopted into law as *Proc No 590/2008*) 7-11.

The principle of proportionality is used both in criminal lawmaking and adjudication; however, in this section we focus on the criminal lawmaking in harmony with legisprudential theory.³⁹ The principle of proportionality has four elements: (1) the state must have ‘pressing public or social need’ to be met, such as the prevention of crime;⁴⁰ (2) the intended state measure must be ‘appropriate’ to achieving the intended state objective; i.e., there must be a rational connection between the intended measure and such state objective; (3) the state measure must be necessary in achieving the intended state objective; i.e., there is no less intrusive means to achieve the state objective; and (4) the intended state measure must be proportional in the strict sense; i.e., the marginal social benefit of going forward with the state’s measure must outweigh the marginal social harm by limiting the implicated right.⁴¹

We can illustrate this with a criminal rule that is frequently used in criminal charges – the rule that criminalizes engaging in commercial business without a valid license and the attached punishment.⁴² The prohibited conduct includes both engaging without having a valid (renewed) commercial license, and operating a business beyond the scope of the license. Such conduct is made punishable “with fine from Birr 150,000 [] to Birr 300,000 [] and with rigorous imprisonment from 7 [] to 15 [] years” in addition to “the confiscation of merchandise, service provision and manufacturing equipment”.⁴³ These criminal punishments are in addition to administrative measures.

³⁹ For in-depth discussion of the legislation responsibilities of the lawmaker, see Simeneh Kiros Assefa (2018), ‘Walking in the Dark: The Lack in the Use of Criminal Statistics’ 12 *Mizan LR* 371; Simeneh Kiros Assefa ‘Legisprudential Evaluation of the Criminal Law: Formal Limitation to Criminalisation Power of the State’ (forthcoming).

⁴⁰ Sometimes it is referred to as ‘proper purpose’ or ‘legitimate objective’. Barak, *Proportionality...* (n 31) 245 ff. Often the first requirement is assumed and the proportionality analysis rests on the remaining three subjects – appropriateness, necessity and proportionality in the strict sense.

⁴¹ See note 32.

⁴² In order to clear the murky condition, it is good to see commercial regulation in historical context. Engaging in commercial activity without a valid license was made punishable with a fine Birr 1,000 or imprisonment not exceeding two months of both under the *Domestic Trade Proclamation 1971* art 3(3) and 15(1). The minimum capital for the obligation to obtain a license was set to be birr 1000. That was abolished in the PMAC. It was reinstated in the *Commercial Registration and Business Licensing Proclamation No 67/1997*, art 46(1). The provision takes the present form in *Commercial Registration and Business Licensing Proclamation No 686/2010*, art 60(1).

⁴³ *Commercial Registration and Business Licensing Proclamation No 980/2015* (‘Proc No 980/2015’) art 49(2).

2.2.1 A criminal rule's objective and state measures

The trade regime reform was made in the context of Ethiopia's economic reform in several rounds.⁴⁴ The purpose of the Commercial Registration and Business Licensing Proclamation No 980/2015 is stated in its preamble which also includes the modernisation of the registration system in order to make such commercial registration activity clear, transparent, and expedient.⁴⁵ The explanatory notes and the minutes of parliamentary hearing further state that the requirement of license and the annual renewal facilitate revenue collection.⁴⁶ The state, therefore, has an appropriate objective to achieve.

After having conducted investigation into the facts, the lawmaker decides whether legislative intervention is justified. It should determine whether there is a rational connection between the intended state objective and such legislative intervention. Because state action should always be supported by legislation, the lawmaker is assessing the appropriateness of such legislative intervention; here in particular, the adoption of such criminal rule.

Therefore, the determination of appropriateness in the adoption of the criminal rule is not limited to bare rational connection between the state's intended state action and objective. The state must also justify the appropriateness based on the *intensity* of the interference of the state action to

⁴⁴ The tax and trade regime reforms were attached to the International Financial Institutions' loan conditionality. Ethiopia had developed "Poverty Reduction Strategy Paper" which was said to be drawn up based "on the recommendations of the [] IMF-World Bank report". Ethiopia had, thus, been required to introduce tax reforms which include "enhanced enforcement procedures and improved penalty regime." 'Report and Recommendation of The President of The International Development Association to The Executive Directors on a Proposed Credit of SDR 96.2 Million to The Federal Democratic Republic of Ethiopia For An Ethiopia Structural Adjustment Credit (May 15, 2002)', 8-10, 14.

⁴⁵ Proc No 980/2015 (n 43) preamble para 3.

⁴⁶ 'Explanatory Memorandum on Commercial Registration and Business License Draft Bill' (later adopted into law as *Proc No 686/2010*) 9-10; "Brief Minutes of the Public Hearing Organised by the Commerce and Industry Affairs Standing Committee on Competition and Consumers' Protection, and Commercial Registration Bills, June 23, 2010" (later adopted into law as *Proc Nos 685/2010* and *686/2010*, respectively) 44-59; "Brief Minutes of Public Hearing Organised by Commercial Affairs Standing Committee on The Commercial Registration and Business License Draft Bill, 27 June 2016" (later adopted into law as *Proc No 980/2016*) 10.

the individual freedom, the *quality* of the interference and the *certainty* of achieving the intended objective of the state.⁴⁷

State action against the individual is generally justified by the ‘common good’. For the purpose of criminalisation, the doctrine of common good is represented by the criminal law doctrine of ‘legal good’. This doctrine has both positive and negative requirements to be complied with. Under the appropriateness category, the lawmaker should determine, taking the positive requirement of legal good, whether the state’s intended objective is a ‘legal good’ in want of criminal law protection.⁴⁸ In the case under discussion, whether the modernisation and rationalisation of commercial registration qualifies for criminal law protection is doubtful. Thus, criminalisation is doubtful as an appropriate state measure.

2.2.2 Whether the intended state measure was necessary

This requirement relates to the availability of a less intrusive state measure that would help achieve the intended state objective. Under the doctrine of legal good, this constitutes the negative requirement or the principle of *ultima ratio*.⁴⁹ This question may be addressed by looking at the broader context of the legislation and the power of concerned state agency. The requirements for obtaining a license are stringent,⁵⁰ and Ministry of Trade is given the power to take administrative measures.⁵¹ Further, there is a separate state agency for the collection of revenue both with administrative and penal powers, the Ministry of Revenue. This is because at the parliamentary hearing, the

⁴⁷ Ávila (n 32) 115-119. The requirement of certainty crosses over to the standards of reasonableness, requiring harmonisation of rules to reality. Ibid 111. Alexy opines that reasonableness includes rationality which is determined by balancing. Alexy ‘Reasonableness’ (n 32).

⁴⁸ For in-depth discussion on the doctrine of legal good, see Simeneh Kiros Assefa and Cherinet Wordofa Wetere (2018), “Over-Criminalisation: A Review of the ‘Special’ Penal Legislation and Penal Provisions” 29 *J Eth L* 49; Santiago Mir Puig (2008) ‘Legal Goods Protected by the Law and Legal Goods Protected by the Criminal Law, as Limits to the State’s Power to Criminalize Conduct’ 11 *New Crim LR: An Int’l and Interdisciplinary Journal* 409; Markus D Dubber (2005), ‘Theories of Crime and Punishment in German Criminal Law’, 53 *Am J of Comp L* 679.

⁴⁹ Ibid.

⁵⁰ Under the existing regime, in order for one to obtain a commercial license, a specific address to be ascertained by a notarised lease agreement is required, which, in the event of change should be reported to the authorities. Moreover, a Tax Identification Number, and in some cases, a certificate of competence are required.

⁵¹ Proc No 980/2015 (n 43) 46.

principal justification stated for the strict regulation of commercial activities was helping collection of state revenue.⁵²

The necessity requirement identifies and compares the intensity of two alternative measures at the disposal of the lawmaker. Individuals engage in commercial activity with a view to make profit as their livelihood. No business person wants to lose money while s/he desires to make money. Further, in the legislative process, the ineffectiveness of administrative measure as a justification for the adoption of penal rules was not shown.⁵³ The assumption that administrative measures would work as well and more humanely is not refuted. Therefore, under the circumstances, there are less intrusive means of achieving the state objective.

2.2.3 Whether the intended state measure is proportional *stricto sensu*

The last element in the balancing process is *proportionality in the strict sense*. In proportionality in the strict sense, the comparison is not between the state's objective of putting commercial registration in order and individual liberty. The comparison is rather between the relative weight of the marginal conflicting values in which the determination intensity of the interference into the individual right is important.⁵⁴ If there is too much restriction to achieve too little of the state objective, it is not proportional in the strict sense.

In the present statute, any person engaged in a commercial activity would face a confiscation of his business materials, a fine between Birr 150,000 and 300,000 and imprisonment between 7 and 15 years in addition to any administrative measure. Citizens generally comply with legal requirements; and the penal provision is meant for those who do not comply with the legal requirements of commercial registration. Therefore, under this part, assuming the criminalisation is established to be necessary, the comparison should reflect the marginal social benefit (of requiring citizens to obtain a commercial registration) outweighs the marginal social harm by limiting individual right. The harm here is punishing the individual with such a fine, imprisonment and confiscation.

⁵² See note 46.

⁵³ Simeneh 'Walking in the Dark' (n 39).

⁵⁴ This requirement has discretion elements, unavoidably. In order to make a better judgment on the last requirement, however, Ávila examines the extent of judicial control over the executive. He argues that if the implicated right is a fundamental right, or the legislature has a false premise in adopting the particular legislation, the court has greater control. Ávila (n 32) 121-123.

In the legislation process, rules of legislation require that a bill should be accompanied by a certification that the bill does not violate constitutional rights.⁵⁵ Stated otherwise, the lawmaker cannot desire nor has power to adopt laws that are contrary to any constitutional provision. This includes justifying restrictions on individual rights; that it is not excessive or unreasonable.⁵⁶

In the event the state is able to prove those measures are necessary, such criminal rules may be narrowly tailored in order to address persons that may negatively ‘impact’ the economy by engaging in commercial transactions without a valid license. There are three points to consider. Criminal rules should strictly be related to engaging in a commercial activity without having a commercial license at all. It should not be about those conducting business under expired (un-renewed) license because, once they are in the government record in obtaining their license, they can effectively be dealt with administratively for their failure to renew their license. Second, in order to have control on the economy, the focus should be on those whose capital is significant to impact the economy.⁵⁷ Finally, confiscation and imprisonment are not logically related to the economic expansion interest of the state. Thus, the punishment need to be limited to fine only.

Reviewing the practice of the court illustrates these concerns. In *Mehibuba*,⁵⁸ the defendant was charged for trading (selling *injera* and bread) without a commercial licence. In her defence, she presented witnesses testifying that she is in the process of obtaining one, and that she is paying her turnover taxes. Yet, the court convicted her stating that during the the time she actually sold the *injera* and bread, she did not have a commercial license, and sentenced her to a suspended four years imprisonment. There is no case where the prosecutors demanded or the judges imposed confiscation of items, a punishment that is provided for in the law. The routine punishments are four years imprisonment, often suspended and fine in the range of birr 2,000 and 4,000.⁵⁹

⁵⁵ *Council of Ministers Working Directives 1996 EC* (in Amharic, ‘CM Working Directive’) art 42(5)(a).

⁵⁶ Alexy ‘Reasonableness’ (n 32).

⁵⁷ The determination of the threshold capital should be based on thorough research because it is a key determinant factor in criminalisation.

⁵⁸ *Federal Public Prosecutor v Mehibuba Abdella* (19 April 2019, Crim File No 003716, Federal High Court).

⁵⁹ *Bazezew Yihun v Amhara Regional State Prosecutor* (24 June 2012, Cassation File No 86388, 15 Decisions of the Cassation Division of the Federal Supreme Court); *Federal Public Prosecutor v Genet Getaneh* (25 October 2017, Crim File No 121930 Federal

3. The Nature of Ethiopian Criminal Law and Judicial Practice

3.1 The 'excessive' use of criminal law by the legislature

Ethiopia has a continental criminal code. The criminal law is, however, fragmented⁶⁰ which is also manifested through separate benches for each special law, such as tax bench in the Federal First Instance court, and separate benches for crimes of corruption and terrorism in the Federal High Court.⁶¹ The federal criminal law may generally be classified into four: the Criminal Code with traditional crimes, the special penal legislation, administrative legislation containing penal provisions, and directives enforced as criminal laws.⁶²

Those crimes other than the traditional criminal law are generally unreasonable because they are mostly adopted with a view to achieve government ends that are not necessarily legitimate ends of criminal law. Those parts of the criminal law other than the traditional crimes were used to maintain political power. The Military Regime used the criminal law to buy time in order to consolidate political power⁶³ and suppressing opposition.⁶⁴ This continued in the EPRDF regime with regard to oppositions both from within and outside of the party itself.⁶⁵

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

⁶⁰ It is the nature of authoritarian regimes to have fragmented (security) criminal law. See for instance, Kazimierz Grzybowski (1960), 'Main Trends in The Soviet Reform of Criminal Law' 9 *Am Univ LR* 93.

⁶¹ These benches are created not by administrative decisions of the court authorities; rather the creation of those benches is dictated by external body. Often those traditional crimes, such as, murder and rape are tried by a court entertaining miscellaneous cases.

⁶² Simeneh 'Sovereignty' (n 1) 161-162.

⁶³ Aberra Jembere, *Agony in the Grand Palace: 1974 - 1982* (Shama Books, 1991, in Amharic) 172 – 73.

⁶⁴ Crimes that were said to be committed against the revolution were severely punished. Special Penal Code (n 9) art 35; *Special Penal Code and Special Criminal Procedure Code Proclamations Amendment Proclamation No 96/1976*, art 17(B).

⁶⁵ *Vagrancy Control Proclamation* was adopted in order to silence the support of the unemployed youth to the active political parties of the time. The *Revised Special Penal Code Proclamation No 214/1981* and later the anti-corruption legislation were applied against internal opposition to the then Prime Minister. Later, when the two prominent organisations put up strong resistance, the anti-terrorism proclamation was adopted in order deny them local support. These generalisations may be seen in light of the cases that appeared in the Federal High Court in different time. See Simeneh Kiros Assefa

However, the EPRDF regime expanded the scope of the criminal law in order to maximize its revenue and to create administrative ease. Particular to this period, the bill initiation is fragmented; any state agency may initiate a bill in its area of competence.⁶⁶ Often, this is done with a view to ease their own administrative burden. Such government agencies incorporate penal provisions with severe penalties in the draft bill in order to coerce individuals to comply with their administrative demands.⁶⁷ Currently, in addition to the comprehensive Criminal Code adopted in 2004, there are more than 120 special penal legislation and administrative legislation containing penal provisions, published in the *Negarit Gazeta*.⁶⁸

The lawmaking process is frequently changed, but in the making of those criminal rules it is not usually complied with; and there is an abridged lawmaking process.⁶⁹ Thus, the legislation adopted in two decades, between 1997 and 2017, far exceeds double all laws adopted under the three regimes combined. Those legislation adopted after the year 2002,⁷⁰ contain excessive penal provisions;⁷¹ and those adopted after 2005 are restrictive of fundamental rights of citizens some of which are revised, while other are still in effect.⁷²

In not few cases, the substantive criminal law is adopted (including special procedure law also governing evidence matters) with a view to expedite

and Cherinet Wordofa Werere ‘Governing Using Criminal Law: Historicising the Instrumentality of Criminal Law in Ethiopian Political Power’ (forthcoming).

⁶⁶ *Federal Democracy Republic of Ethiopia House of Peoples’ Representatives Working Procedure and Members’ Code of Conduct (Amendment) Proclamation No 470/2005*, art 6(3); *House of Peoples’ Representatives Rules of Procedure and Members’ Code of Conduct Regulations No 6/2015*, art 51(3); CM Working Directive (n 55) art 38(1).

⁶⁷ Simeneh and Cherinet ‘Over-Criminalisation...’ (n 48); Simeneh ‘Legisprudential Evaluation...’ (n 39).

⁶⁸ This does not include directives the court considers to form part of and enforce as though they are criminal law.

⁶⁹ Simeneh ‘Walking in the Dark’ (n 39); Simeneh ‘Legisprudential Evaluation...’ (n 39).

⁷⁰ Those legislation adopted after 2002 include the tax and duties regime, and trade regime containing severe criminal punishments.

⁷¹ Some of those legislation are *Value Added Tax Proclamation No 285/2002*, *Income Tax Proclamation No 286/2002*, *Excise Tax Proclamation No 307/2002*, *Turnover Tax Proclamation No 308/2002*, *Vagrancy Control Proclamation No 384/2004* and *The Criminal Code of the Federal Democratic Republic of Ethiopia 2004*. The lawmaker’s desire for excessive punishment is discussed in Simeneh and Cherinet ‘Over-Criminalisation...’ (n 48); Simeneh and Cherinet ‘Governing Using Criminal Law...’ (n 65).

⁷² See for example, *Freedom of the Mass Media and Access to Information Proclamation No 590/2008*, *Charities and Societies Proclamation No 621/2009* (replaced with Proc No 1113/2019), and *Corruption Crimes Proclamation No 881/2015*.

conviction. For instance, those special procedural laws deny bail to the accused;⁷³ certain facts are proved by presumption, the most common being ‘intention’ or ‘knowledge’;⁷⁴ and in certain cases it lowers the standard of proof.⁷⁵ These actions of the state are contrary to the constitutional values, such as presumption of innocence and rule of law.⁷⁶

3.2 Theories of law and judicial methods

Judges make infinite choices; the two most important choices they make are theories of law and judicial method.⁷⁷ Legal theory attempts to address the ever existing question – what is law? The theory of law the judge adopts is his/her paradigm of criminal justice. Although the entirety of those elaborate legal theories in the academia do not seem to have found their ways into the judiciary for various reasons, a few of them are claimed to have been applied in varying degrees. The theory of law a judge adopts also defines the judicial method s/he would employ.

Because such theory and method brings about consequential changes, they also define the nature of the legal system.⁷⁸ For instance, legal positivism is (wrongly) considered to be the main culprit in authoritarian regimes because such regimes incorporate their oppressive policies into positive law.⁷⁹ The choice of positivist theory is considered as a method of abdicating responsibility on the part of judges. Courts in authoritarian regimes enforce

⁷³ Several of those special penal legislation, such as the *Anti-Terrorism Proclamation No 652/2009*, *Vagrancy Control Proclamation No 384/2004*, and the *Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No 434/2005* deny bail.

⁷⁴ See text for (n 89 to 92) *infra*.

⁷⁵ For instance, Proc No 434/2005 (n 73) 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 proceeding.”

⁷⁶ See for instance, Simeneh Kiros Assefa (2012), ‘The Principle of Presumption of Innocence and Its Challenges in the Ethiopian Criminal Process’ 6 *Mizan LR* 273.

⁷⁷ Aharon Barak (2006), *The Judge in a Democracy* (Princeton UP) 106-107, 117-121. EW Thomas (2005), *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge UP) 7-22; Hans Petter Graver (2015), *Judges Against Justice: On Judges When the Rule of Law is Under Attack* (Springer) 208–212, 221.

⁷⁸ *Id.*, Graver, 208-212.

⁷⁹ Lisa Hilbink (2007), *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile* (Cambridge UP) 31–33. Graver (n 77) 237; Also consider the Hart-Fuller debate on the matter.

the oppressive policies of their governments under several justifications, such as personal choice, institutional arrangement and ideology.⁸⁰

For instance, in order to enforce oppressive state policies, the Nazi German courts adopted ‘free law’ theory. This theory was adopted in order to untie judges from old doctrines because they were ‘smashed’ by ‘National Socialism’; and National Socialism was taken as ‘supreme principle[] of law’ and an important part of legal interpretation.⁸¹ In some instances, judges are said to develop what Hans Petter Graver calls ‘moral blindness’. He maintains that, moral blindness is ‘cultivated by distance’ –moral, institutional and physical distance– which manifests the policies of such governments.⁸² Under those conditions, judges distance themselves from the consequences of their decisions and blame it on the law.⁸³

In the section below, we shall see the theories of law and judicial method adopted by the courts indicated in the discussion in the interpretation of Ethiopia’s criminal law. The discussion is made over a long period and under the governing constitutions of different regimes.

3.2.1 Legal theory in criminal law applied by the court

It is already alluded to that the FDRE Constitution adopts a non-positivist theory of law. It appeals to higher moral principles for the definition of the power to be exercised by the Government and the validity of the positive law. In the face of excessive use of criminal law and such constitutional claim to higher value, however, the courts stated in this section did not resort to such higher norms to test the validity or legitimacy of the criminal law. For the most part, it can be attributed to the nature of the court owing to limited jurisdiction or timidity.⁸⁴ However, there is no explicit theoretical discussion in any the judgments reviewed here. The court rather considers the criminal law as an instrument in the context of legal positivism.⁸⁵ The court leaves the

⁸⁰ *Id.*, 33.

⁸¹ Graver (n 77) 215-217, 222-223.

⁸² *Ibid*, 242. The victim is treated as the other, often presented as ‘public enemy’; defendant is represented as abstract thing, such as ‘offender’ rather than as a human being, holder of rights and duties; the physical distance is manifested in the place of detention.

⁸³ Thomas refers to this as judicial formalism. Thomas (n 77) 1-17.

⁸⁴ Simeneh Kiros Assefa ‘Conspicuous Absence of the Judiciary and ‘Apolitical’ Nature of Courts in Ethiopia’ (forthcoming)

⁸⁵ In rendering the judgment the court reads the objective of the statute from its preamble; it does not go beyond what is written. In the determination of punishment, the court also manifests the instrumental nature of the criminal law.

determination of the purpose of the criminal law to the Government as it pleases, which is manifested in the continuous revision of the criminal law, and the unscrupulous application of such criminal law by the court.⁸⁶

One may argue that the courts in the military regime lacked higher norms, such as a constitution with a bill of rights against which the validity of the criminal law may be evaluated.⁸⁷ In *Mulugeta Girma*,⁸⁸ the defendant was charged for breach of trust contrary to the provisions of article 12 of the Special Penal Code, in a case brought before the Special Court of the Military Government. The elements the crime were: (a) defendant, as government employee, is entrusted with government property; (b) such property is appropriated or alienated; and (c) it is appropriated or alienated to procure benefit for oneself or a third person each of which would be proved before the court.⁸⁹ It appears proof of the third element was difficult. The provisions were amended by Proclamation No 96/1976 which would shift the burden on to the defendant.⁹⁰ The court held that the provisions of article 12 were amended to expedite the judicial process on this particular fact. Therefore, if the public prosecutor proves the first two elements of the crime, the third would be presumed.⁹¹ The court, in *Let. Goshime Wondimtegegn*,⁹² further held that the

⁸⁶ Simeneh 'Conspicuous Absence...' (n 84).

⁸⁷ Johann van der Westhuizen "A few reflections on the rule of courts, government, the legal profession, universities, the media and civil society in a constitutional democracy" (2008) 8 *ARLJ* 251, 253-255. Yet, Special Penal Code (n 9), the *PMAC Establishment Proclamation No 1 of 1974*, paras 10-11, appeal to natural justice for the validity of those criminal rules.

⁸⁸ *Special Prosecutor v Mulugeta Girma* (8 December 1982, Crim File No 15/74, Special First Instance Court).

⁸⁹ Art 12(1) prohibits acts "with intent to obtain or to procure for himself or to a third person ill-gotten gain, appropriates, alienates, hides, or undervalues or puts to his own or another's use any State or public property entrusted to him or to which he has access by reason of his powers or duties or commits such other acts."

⁹⁰ Proc No 96/1976, adds sub-art (3). It provides that "[t]he accused *shall be deemed* to have committed the offences specified in sub-article (1) or (2) above *where he fails to show* that he has put Government or public property into Government or public use in accordance with the rules of his profession or that he has returned such property to the Government or the public." (Emphasis added)

⁹¹ This is the common practice also held in *Special Prosecutor v Deputy Commander Yihe'alem Mezgebu and Petty Officer Zenebe Shiferaw* (15 April 1983, Crim File No 24/75, Special First Instance Court); *Special Prosecutor v Oukube'ezgi Teklemariam* (29 November 1983, Crim File No 50/75, Special First Instance Court).

⁹² *Special Prosecutor v Let. Goshime Wondimtegegn* (26 March 1983, Crim File No 7/75, Special First Instance Court).

purpose of the provisions of article 20(3), a similar provision, is to lower the burden of the prosecutor.⁹³ The court never questioned whether the proof of an element of a crime by presumption is contrary to the principle of presumption of innocence.

After the coming into force of the FDRE Constitution, in *Solomon Herjabo*,⁹⁴ the Federal Supreme Court Cassation Division, gave a binding interpretative decision that a person cannot be held liable for breach of trust by merely proving that he appropriated or alienated items entrusted to him; it has to be proved that he appropriated or alienated those items with intent to procure benefit to himself or to a third person. Thus, intention is an essential element of the crime that needs to be proved. The Court, thus, acquitted petitioner. This is different from the practice of the court in the Military Regime.

However, the decision of the Cassation Division is exclusively based on the positive criminal law; it does not make reference to the Constitution. The subsequent revision of laws presume the existence of the intention where the material facts are proved. For instance, article 403 of the Criminal Code provides for the “presumption of intent to obtain advantage or to injure” which is also taken over by article 3 of the *Corruption Crimes Proclamation No 881/2015* under which several judgments of conviction have been rendered. The court appears to have accepted the law ‘as it is’; it never looked at any higher (normative) principle for the evaluation of the positive criminal law.⁹⁵ This is further depicted below.

⁹³ For two reasons, the court would not have jurisdiction to see this case. First, the Special Penal Code was adopted to be applied by the Special Court-Martial. When the Special Court-Martial was replaced with the Special Court, the Special Penal Code was replaced by the Revised Special Penal Code (n 65) art 48. Therefore, a prosecution can stand only if there is a substituting provision in the Revised Special Penal Code criminalising the same conduct. Second, although the Special Court is the successor of the Special Court-Martial, art 21 further provides that cases pending before any court “shall be decided by the court before which they are pending in accordance with the law and procedures under which they were instituted.”

⁹⁴ *Solomon Herjabo v SNNPS Ethics and Anti-Corruption Commission* (20 November 2007, Cass File No 24278 in 7 Decisions of the Cassation Division of the Federal Supreme Court). The contents of the provisions of art 13 of the Revised Special Penal Code (n 65) were copied from that of art 12 of the Special Penal Code (n 9), as amended.

⁹⁵ The court generally avoid invoking the Constitution in dispute resolution, particularly those right based claims. Sisay Alemahu Yeshanew ‘The justiciability of human rights in the Federal Democratic Republic of Ethiopia’ (2008) 8 *AHRLJ* 273, 277- 88.

3.2.2 Judicial methods in criminal law

Criminal law is founded on solid philosophical and theoretical foundations. It is adopted for a rational being with an underlying assumption that individuals and entities would comply with it.⁹⁶ Founded on this assumption, there are four fundamental principles – the principle of legality, the principle of conduct, the principle of culpability and the principle of personal responsibility.⁹⁷ The General Part of the criminal law contains those principles that guide understanding and interpretation of the Special Part.⁹⁸ The criminal law is part of public law, and these principles, that are duly referred to as postulates by Humberto Ávila,⁹⁹ are supplemented by other postulates that are part of the constitutional law. Thus, some of them are embodied in the Criminal Code and some may not be found in the Criminal Code, such as reasonableness and the prohibition of excess.¹⁰⁰

Postulates are essentially part of the interpretation process of the criminal law. Some of them are hermeneutic postulates because they help in the understanding of the criminal law; some of them are applicative postulates because they relate to the application of the criminal law, such as the principle of lenity and the non-retroactivity of the criminal law; and the rest may share both features, such as the principle of legality.¹⁰¹ While the Special Part of the Criminal Code (including special penal legislation)¹⁰² provides for prohibited

⁹⁶ Gabriel Hallevy (2010), *A Modern Treatise on the Principle of Legality in Criminal Law* (Springer) 2-3.

⁹⁷ Simeneh Kiros Assefa (2017), 'Methods and Manners of Interpretation of Criminal Norms' 11 *Mizan LR* 88.

⁹⁸ *Ibid.*, 94-95. These four core principles of continental criminal law are incorporated into the Ethiopian Criminal Code. The principle of legality is provided for under art 2; conduct as material objects of crime, including degrees of commission of a crime and of participation, is provided for under arts 23-47; culpability is provided for under arts 57-67, arts 48-56 and arts 68-80. Finally, personal responsibility of the individual is provided for under art 41.

⁹⁹ Like Hart's secondary rules, Ávila argues that rules and principles are objects of application. Postulates, because they are metarules, are not directly applied; rather they are about the rules and principles. Ávila (n 32) 83 ff. Also *see* Simeneh 'Methods...' (n 96).

¹⁰⁰ Ávila (n 32) 83-132.

¹⁰¹ *Ibid.* 59- 61. Simeneh 'Methods...' (n 97) 104-108.

¹⁰² Art 3 provides that the general principles of the criminal law are applicable to special penal legislation unless their application is 'expressly set aside' by such special penal legislation. The fact that their application cannot be set aside is discussed in Simeneh and Cherinet 'Over-Criminalisation...' (n 48) 68 – 71.

conduct and the consequent punishment, it is through those postulates that the scope and application of the prohibitions and punishments are determined.

These postulates are more or less found in all legal systems. The approach of using those postulates and doctrine makes the court opt for objective intent of the lawmaker. However, such choice of methods, as in theories of law, does not appear to be about methodology. It cannot be determined *a priori* that a particular method “favours the rule of law while the other favours tyranny”.¹⁰³ Yet, the choice of a particular method in a particular circumstance “has a direct consequence for the extent of [the court’s] participation in the oppression of the regime”.¹⁰⁴ For instance, the South African courts interpreting the criminal law adopted by the apartheid parliament were guided by the doctrine of ‘parliamentary sovereignty’; they used ‘subjective intent’ of the legislator (plain facts theory) as essential element of interpretation.¹⁰⁵ Thus, they avoided doctrines that would maintain fairness in the administration of justice.¹⁰⁶

The courts in Nazi Germany, however, used ‘objective intent’ of the lawmaker.¹⁰⁷ The reason the courts adopted such method was that the laws pre-dated the Nazi regime, and it was –during its enactment– inspired by the fundamental doctrines of democracy and rule of law. The decision was to detach the intents of the previous (i.e. pre-Nazi) lawmaker under the guise of enabling the law to operate in the prevailing socio-political realities.¹⁰⁸ The courts in Chile claimed to be ‘apolitical’, applying the law and only the law.¹⁰⁹ Thus, common thread of the culture of courts in authoritarian regimes is that judges choose the methods in order “to fit to the ideologies of their rulers” and their prime objective is the “realisation of the positive morality of the rulers in power”.¹¹⁰ Their methodology is manifestation of their loyalty, and such judges are complicit to the atrocities committed by the government in power.¹¹¹

¹⁰³ Graver (n 77) 208.

¹⁰⁴ Ibid.

¹⁰⁵ Id., 211, 227-228.

¹⁰⁶ Ibid.

¹⁰⁷ Id., 220-224.

¹⁰⁸ Id., 208-212.

¹⁰⁹ Hilbink (n 79) 71-101.

¹¹⁰ Graver (n 77) 230.

¹¹¹ Ibid, (229, 234). Hilbink illustrated both personal and institutional factors that put judges under control. It is generally believed that judges have aspiration to be accomplished career judges. However, their promotion and discipline is reflected in everyday work. The institutional arrangements are set up in a manner ensuring that

The Provisional Military Administrative Council (PMAC) had 'Ethiopia Tikidem' as its political motto whatever its content had been. This political motto pervaded all aspects of life as reflected in institutional set ups, the economic system, etc.¹¹² The revolution and the political motto were criminally sanctioned.¹¹³ Both the revolution and the political motto 'Ethiopia Tikidem' would also inspire decisions of the courts, at least in criminal cases. In those criminal decisions which expressly reflect the political beliefs of the judges, political matters are reserved for the sentence hearing. For instance, in *Mulugeta Girma*,¹¹⁴ in the determination of the sentence, the court held that defendant had "committed the crime at a moment where revolutionaries and anti-revolutionaries were fighting neck to neck; and the country was invaded by outside invaders [referring to the Ethio-Somali war] where each Ethiopian is paying both in blood and treasure." The court further stated that "defendant's conduct was not different from the wounds caused to the country and the revolution by anti-revolutionaries, which would aggravate the punishment." Thus, defendant was sentenced to 18 years rigorous imprisonment.

In exceptional circumstances, where the matter is raised by the parties early in the proceedings, the court manifested its political commitment in the

each judge is held accountable for his/her action. Thus, when judges are confronted with such conflict of ethical beliefs and 'loyalty' to the law, they find ways to comply with the law. Hilbink (n 79) 41, 234-235.

¹¹² For instance, a public enterprise administration office were established by virtue of *The Public Enterprises Proclamation No 20 of 1975* to administer Government Enterprises and Property that were nationalised as per *Government Ownership and Control of the Means of Production Proclamation No 26 of 1975*. Rural land was nationalised in accordance with *Public Ownership of Rural Lands Proclamation No 31 of 1975*, and urban land and extra-houses were nationalised as per *Government Ownership of Urban Lands and Extra Urban Houses Proclamation No 47 of 1975* to be administered by different agencies.

¹¹³ According to art 8 of the PMAC Proclamation (n 87) it is prohibited "for the duration of [the] Proclamation, to conspire against the motto, 'Ethiopia Tikidem', to engage in any strike, hold unauthorised demonstration or assembly or engage in any act that may disturb the public peace and security." Consequently, the Special Penal Code (n 9) art 35 provides that "[w]hosoever fails to comply with Proclamations, Decrees, Orders of Regulations promulgated to implement the popular Motto 'Ethiopia Tikidem' or hinders compliance therewith by publicly inciting or instigating by word of mouth, in writing or by any other means, is punishable with rigorous imprisonment from five to ten years."

¹¹⁴ *Mulugeta Girma* (n 88).

hearing on guilt. For instance, in the case of *Assefa Aynalem Mehanzel*,¹¹⁵ counsel for the defence argued “defendant belongs to the oppressed (proletarian) class and should not be convicted of the crime.” The Court had held that “the country had raised defendant; educated him; and finally had lent him money from public funds to establish an airways that would make him belong to the capitalist class.” The Court further held that, “while the public was dearly protecting the revolution moving it forward from one victory to another, there were those, such as the defendant, who would conspire against the revolution.” Criminal conducts “impeding a revolution of such a generous country could not be seen lightly.” Defendant was then sentenced to 15 years rigorous imprisonment.

The Constitution of the People’s Democratic Republic of Ethiopia (‘PDRE Constitution’), adopted in September 1987, re-established all justice institutions in the context of entrenched socialist political ideology.¹¹⁶ The Constitution as one of its political postulates provides that ‘organs of the state [] officials thereof and every individual shall observe *socialist legality*.’¹¹⁷ The contents of ‘socialist legality’ may be understood in light of the state’s desire for promotion of collective interest and unscrupulous obedience to law. The Constitution, after establishing the Supreme Court, specifically provided that the central objective of the courts would be “safeguard[ing] the legally guaranteed rights, interests and freedoms of the state, mass organisations, other association and individuals’ and inculcation of ‘socialist legality’”.¹¹⁸

Such responsibility of the courts is further elaborated by the respective courts’ establishment proclamations. Thus, it is provided that their objective would be: (1) to safeguard the political, economic and social system guaranteed by the Constitution and other laws; (2) safeguarding the legally guaranteed rights and interests and freedoms of individuals, (3) state organs, mass organisations and other associations; (4) to strengthen the maintenance

¹¹⁵ *Special Prosecutor v Assefa Aynalem Mehanzel* (7 June 1982, Crim File No 14/74, Special Frist Instance Court).

¹¹⁶ Moreover, the military court and the prosecution office had been established by *Military Court Establishment Proclamation No 10/987*, *Procuratorial Office Establishment Proclamation No 11/1987*, respectively.

¹¹⁷ Art 5. Art 6 further provides that the “Workers’ Party of Ethiopia [] is a vanguard party” and it “charts the direction for the development of the country and is the guiding force of the State and the entire society.”

¹¹⁸ PDRE Constitution (n 33), art 100(1) establishes the Supreme Court whose jurisdiction and administration are further detailed in art 100(2).

of law and order and the observance of *socialist legality*.¹¹⁹ Like Chile’s Supreme Court under Pinochet, the PDRE Supreme Court is also made in charge of administration ‘of all courts of the country’ supervising their function.¹²⁰

The practice of courts under the FDRE Constitution is not any different from courts in authoritarian regimes; they rarely use principle in the General Part of the Criminal Code. As can be observed from the decision of the courts after the enactment of the FDRE Constitution, they want to give the impression that they are apolitical but they employ interpretative methods that would help render a judgment the political leadership desires. One might argue that the courts pursue a positivist legal theory. However, a close examination of the judicial decisions indicate otherwise, because positivism does not preclude principles and doctrines of the criminal law, at least those that are provided for in the General Part of the criminal law, such as the principle of lenity or the principle of legality.

The excessive use of criminal law by the state is established in other studies.¹²¹ The courts in the FDRE Government apply those laws unscrupulously. For instance, Special Penal Code, with its ideological baggage, had been in application until it was finally repealed in 2004.¹²² When it was repealed, the provisions of the Criminal Code, and of the Corruption Crimes Proclamation 881/2015 have incorporated provisions of the Special Penal Code in many respects including providing for presumption of intent.¹²³

The lawmaker has shown its commitment to excessive use of the criminal law, manifested in different ways. The commonly found provision is that the specific penal provision is applicable unless such conduct entails a greater penalty in any other law.¹²⁴ Yet, such provision is contrary to the principle of

¹¹⁹ Emphasis added. *Supreme Court Establishment Proclamation No 9/1987* art 3; *High Courts and Awraja Courts Establishment Proclamation No 24/1988*, art 4.

¹²⁰ PDRE Constitution (n 33), art 102.

¹²¹ See Simeneh Kiros Assefa ‘Limiting the Criminalising Power of the State in Ethiopia’ (PhD dissertation submitted to the AAU Law School 2020, unpublished); Simeneh and Cherinet ‘Over-Criminalisation...’ (n 48); Simeneh and Cherinet ‘Governing Using Criminal Law...’ (n 65)

¹²² See the discussion in Simeneh and Cherinet ‘Governing Using Criminal Law...’ (n 65).

¹²³ Ibid.

¹²⁴ See for instance, *Coffee Quality Control and Marketing Proclamation No 602/2008*, art 15; *Biosafety Proclamation No 655/2009*, art 21(1); *Banking Business Proclamation No 592/2008*, art 58.

lenity. Accordingly, when there are two competing provisions governing the same conduct, the public prosecutor prosecutes individuals under the aggravated charges. This is the case regarding, for instance, trade regulations, tax law, and economic regulations.

While there are the provisions of article 433 of the Criminal Code prohibiting conducts engaging in a commercial activity without a valid license or beyond the scope of the license,¹²⁵ the public prosecutor draws up charges based on the provisions of articles 60 and 49 of *Commercial Registration and Business License Proclamation No 686/2010* and *No 980/2015*, respectively, looking for severe punishment.¹²⁶ There are pertinent provisions in *Coffee Quality Control and Marketing Proclamation No 602/2008* which punish a person who sells in the domestic market coffee that is of export quality; the punishment is simple imprisonment not less than three years but not exceeding five years and a fine up to Birr 50,000. However, the public prosecutor brings charges under article 354 of the Criminal Code, seeking heavier penalty.¹²⁷ Article 353 of the Criminal Code provides for crimes against the national economy and state monopolies, while article 354 provides for aggravation of the crime providing for a rigorous imprisonment ‘not exceeding fifteen years’.

Likewise, in the face of provisions such as those prohibiting unlawful refusal to pay taxes and incitement to refusal to pay taxes, articles 349 and 350 of the Criminal Code, the public prosecutor would draw up charges under *Income Tax Proclamation No 286/2002* and *Value Added Tax Proclamation No 285/2002* adopted earlier than the Criminal Code.¹²⁸ In the face of the provisions of article 346 of the Criminal Code, that prohibits trading in foreign currency, the public prosecutor charges persons engaged in foreign exchange

¹²⁵ It provides that “[w]hoever performs any activity, in respect of which a license is required by law or regulations, without obtaining such license or by exceeding the limits of his license, is punishable according to the circumstances of the case with simple imprisonment or fine; or with rigorous imprisonment not exceeding five years and fine.”

¹²⁶ For the content of the provisions, see text for (n 43). Regarding court decisions based on such rules, see for instance, *Mehibuba* (n 58), *Bedru* (n 59) and *Genet* (n 59).

¹²⁷ *Federal Public Prosecutor v Eskinder Fikru, et al*, (20 August 2019, File No 192313, Federal High Court). *Federal Attorney General v Ousman Ahmed, et al*, (12 July 2018, File No 203050, Federal High Court); *Federal Attorney General v Elias, et al*, (File No 207274, Federal High Court).

¹²⁸ *ERCA v Berti PLC, et al*, (March 13, 2013, File No 171851, Federal First Instance Court); *ERCA v Abdurahman Idris, et al*, (File No 207153, Federal First Instance Court); *ERCA v G.D.G Construction PLC, et al*, (Federal First Instance Courts File No 206968 May 6, 2016).

trading under article 58 of the Banking Proclamation No 592/2008 seeking heavier penalty.¹²⁹

One of the required elements of the principle of legality in Ethiopia is the publication of the criminal law in the *Negarit Gazeta*.¹³⁰ Courts should comply with this elementary but fundamental requirement. For instance, in *Daniel*,¹³¹ defendant was charged for violation of Directive CTG/001/97, adopted by the National Bank of Ethiopia, for attempting to smuggle 46.96 kilos of gold to Djibouti.¹³² The Federal First Instance Court convicted and sentenced him to a term of imprisonment and fine as provided for under article 59(2)(b) of the *Monetary and Banking Proclamation No 83/1994*.¹³³ The Federal High Court reversed the conviction on the ground that the prohibited act was provided for in a Directive which was not published in the *Negarit Gazeta*. The reversal was affirmed by the Federal Supreme Court.

However, the Federal Supreme Court Cassation Division reversed the decision of the Federal High and Supreme Courts and affirmed the decision of the Federal First Instance Court. It held that “the prohibited acts are

¹²⁹ *Federal Public Prosecutor v Kerima Abdulmejid Mussa* (8 November 2018, Crim File No 255845 Federal First Instance Court); *Federal Public Prosecutor v Qelemua Ousman, et al* (15 January 2019, File No 188831, Federal High Court).

¹³⁰ The principle of legality, *Negarit Gazeta* establishment, the non-retroactive principle, etc.

¹³¹ *ERCA v Daniel Mekonnen* (21 July 2010 Cass File No 43781, 10 Decisions of the Cassation Division of the Federal Supreme Court).

¹³² The *Customs Proclamation No 859/2014*, art 168(1) provides that “[a]ny person who, knowingly or ought to have been aware of the fact, imports, exports or attempts to export prohibited or restricted goods or goods subject to customs clearance by smuggling or out of their legal route or illegally imports duly exported goods, in contravention of customs law shall be punished with rigorous imprisonment not less than five years and not exceeding ten years and with fine not less than Birr 50,000 and not exceeding Birr 200,000.” The Customs Proclamation also authorises the Council of Ministers to adopt regulations and the ERCA to adopt directives for the implementation of the *Customs Proclamation No 859/2014*, arts 180, 2(55). The provisions have always been the same – *Customs Proclamation No 622/2009*, art 99. Yet, prosecutions are conducted based on the provision of NBE directives.

¹³³ *The National Bank of Ethiopia Establishment (as Amended) Proclamation No 591/2008*, art 20(3). The National Bank of Ethiopia Establishment Proclamation under article 26(1)(a)(5) provides that if somebody “in violation of the provision of [...such] directives issued pursuant to this Proclamation is found carrying foreign exchange in excess of the amount fixed or authorised by the National Bank, [] shall, without prejudice to the confiscation of the property with which the offence is committed, be punishable in accordance with the provision of the Criminal Code.”

provided for in the Directive adopted by the National Bank.” There is “no law requiring the publication of Directives in the Negarit Gazeta, but this does not deny the Directive’s quality as law.” The court further held that “the Directive has to be interpreted to enforce the objective of the enabling Proclamation. Once the requirements of prohibition are established in the Directive, the punishments are to be determined according to the Proclamation.” This is applying the subjective intent of the lawmaker in disregard of the fundamental doctrines of the criminal law¹³⁴ which require publication of the law.

Several criminal prosecutions relating to violation of customs proclamation are based on such directive adopted by the National Bank of Ethiopia, which is changing from time to time.¹³⁵ The stability of criminal law is a fundamental quality that cannot be ignored.¹³⁶ Thus, beyond the economic regulatory measure, there is no evidence which indicates that the objective of such directive targets at a criminal norm.¹³⁷

The use of government-adopted directives as establishing criminal responsibility covers all aspects of government responsibility, including property¹³⁸ and land administration.¹³⁹ However, the public prosecutor even goes to the extent of using working directives of private business enterprises as rules for establishment of criminal responsibility. In this regard, directives of private banks are invoked when their employees are charged for crimes of corruption.¹⁴⁰

¹³⁴ The excessive use of the criminal law and unaccounted lawmaking power of the lawmaker and the unscrupulous obedience of the lawmaker to the executive are discussed elsewhere. See Simeneh ‘Legisprudential Evaluation...’ (n 39); and Simeneh ‘Conspicuous Absence...’ (n 84), respectively.

¹³⁵ There are several similar cases. *Public Prosecutor v Zelalem Shiferaw* (8 November 2017, Federal First Instance Court, File No 256759); *Samson Mengistu v ERCA* (7 February 2013, Cass File No 80296, 14 Decisions of the Cassation Division of the Federal Supreme Court); *Public Prosecutor v Leeyu Lu* (12 July 2018, File No 257687, Federal First Instance Court).

¹³⁶ ‘Explanatory Memorandum to the Draft Constitution’ (n 21) 49-51.

¹³⁷ There is a distinction between the use of directives as interpretative materials (in hermeneutic interpretation) and as providing for elements constituting a crime. For further illustrations of cases of contradictory decisions by the Cassation Division, see Simeneh ‘Conspicuous Absence...’ (n 84).

¹³⁸ *Goshu Yohannes Gebru v FEACC* (24 June 2015, Cass File No 97291, 14 Decisions of the Cassation Division of the Federal Supreme Court).

¹³⁹ *Federal Public Prosecutor v Wondwossen Gashaw, et. al.*, (1 February 2017, File No 17765, Federal High Court).

¹⁴⁰ See for instance, *Federal Public Prosecutor v Gezahegn Belete Firisa*, File No 255170, Federal High Court, 2020.

4. Proposed Theories and Judicial Methods for Criminal Law

4.1 Proposed theory relating to the criminal law

Judges make important decisions with significant ramifications. Probably, the most important aspect of a judicial decision is the perspective from which the judge wants to see the legal system, ultimately defining whether defendant goes free or to jail. Thus, it is strongly argued that a judge needs to have a theory of law –any theory, but he has to stick to it in all decision-making process.¹⁴¹ EW Thomas, for instance, chose a theory of law –taking the law as a process– some instrumentalism, some positivism, some realism, etc, in it.¹⁴² He argues that basic knowledge of legal theory would help judges to properly define their role in society and disregard their cling to “determinedly [] positivist bent” or formalism.¹⁴³

There are constitutional guarantees for the accused in the criminal process. There are also constitutional guarantees against excessive or unreasonable criminal law. While those procedural guarantees are reduced to rules to be incorporated in the procedural code, the protection against excessive criminal law is enshrined in the Constitution as constitutional postulates, forming part of the legal theory reflecting on the nature of the criminal law.¹⁴⁴

For instance, the manifestation of the supremacy clause of the Constitution¹⁴⁵ is the principle of unity of legal system.¹⁴⁶ The judge should therefore interpret the criminal rules in *coherence* both with the legal system and the reality. The Constitution recognises fundamental rights emanating from human nature, such as the right to life and liberty as fundamental constitutional principles. The natural consequence is that the Constitution is the positive higher norm against which the ‘correctness’ of sub-constitutional norms, including the criminal law, are tested. The interpretation of the Constitution for the purpose of application is not precluded from the

¹⁴¹ Thomas (n 77) 7-15.

¹⁴² Ibid.

¹⁴³ Thomas (n 77) 8-9.

¹⁴⁴ See FDRE Constitution, arts 10, 14, 15, 16.

¹⁴⁵ Article 9(1) provides that the “Constitution is the supreme law of the land. Any law [] which contravenes th[e] Constitution shall be of no effect.’ Art. 9(2) further provides that ‘[a]ll [] organs of the state [] have the duty to ensure observance of the Constitution ...”.

¹⁴⁶ Luc J Wintgens ‘Legislation as an Object of Study of Legal Theory: Legisprudence’ in Luc J Wintgens (ed), *Legisprudence: A New Theoretical Approach to Legislation* (Hart Publishing 2002) 35-38.

jurisdiction of the court. The court should, therefore, employ the law of balancing or the principle of proportionality in assessing the validity or correctness of the criminal law.

The Ethiopian criminal law is an instrument meant to achieve the ‘common good’, and it is defined by this fundamental criminal law doctrine that the lawmaker cannot create another objective for the criminal law. It is also in the nature of criminal law that it has to be a positive law; yet, it is not governed exclusively by the positivist theory. In the applicative interpretation of the criminal law, the judge should also take heed to those Constitutional values enshrined as fundamental.

In the determination of the theory applicable for an interpretation of a criminal law provision, a judge defines the social role of the court.¹⁴⁷ And in rendering a judgement, the judge who opines for ‘loyalty to the law’ is expected to have fidelity to the Constitution and the values therein – the most important being the bill of rights.

4.2 Proposed judicial methods in criminal law

The criminal law is applied in the context of a particular theory a judge adopts. The criminal justice is not just system of rules; it also includes methods and institutions.¹⁴⁸ The law does not send people to jail; it is the court. This institutional theory of law, thus, considers both institutions and their practice as essential parts of the legal system.

The method adopted by the court determines the outcome of the case. The Constitution is founded on rule of law, respect for human and fundamental rights, and democracy. The criminal law interpretation method, as is the theory of law, should be inspired by those values. As part of the public law, the criminal law has the scaffold of postulates that help in the understanding, interpretation and application of the criminal law. The postulates with wider and frequent application are highlighted below.

4.2.1 The principle of unity of legal system

As indicated earlier, the Constitution is the supreme law of the land, and all sub-constitutional norms are required to comply with the standards of the Constitution. This is translated into the principle of unity of legal system. This principle, thus, governs the entire legal system in general, and the criminal

¹⁴⁷ Thomas (n 77), 8 -9.

¹⁴⁸ Robert S Summers (2006), *Form and Function in a Legal System: A General Study* (Cambridge UP); Massimo La Torre (2010), *Law as Institution* (Springer); Ota Weinberger (1991), *Law, Institution and Legal Politics: Fundamental Problems of Legal Theory and Social Philosophy* (Springer).

law in particular. Therefore, the criminal law needs to comply with the constitutional values which include rule of law, reasonableness, and rationality.

One of the sub-principles to the principle of unity of legal system is, *the principle of coherence*.¹⁴⁹ This principle is normative and has broader application. In relation to coherence of rules in different plane (hierarchy), it governs validity of those rules on the lower hierarchy. When it relates to coherence of rules on the same plane, it is called *consistency*.¹⁵⁰ However, those rules need to cohere also with reality, which might cross over to reasonableness. This is also reflected in the punishment that would be imposed for violation of the prohibition.¹⁵¹ The court should see the application of every criminal rule in this context. This is clearly seen in the context of the following criminal law principles.

4.2.2 The principle of legality

The principle of legality is one of the earliest principles in criminal law that had helped positivise the criminal law. This principle includes other principles, such as the non-retroactive application of the criminal law, in the context of governing the spatial and temporal application of the criminal law; it also commands the power to declare and the manner of declaration of the criminal law.¹⁵² Thus, directives are not criminal rules owing to (i) lack of authority of agencies to declare criminal rules and (ii) the non-publication of these rules in the *Negarit Gazeta*.

4.2.3 The principles of conduct, of culpability, and of personal responsibility

The principles of conduct, the principle of culpability and the principle of personal responsibility¹⁵³ emanate from the foundational supra-principle of

¹⁴⁹ Ávila (n 32) 85- 91; Luc J Wintgens 'Legisprudence as a New Theory of Legislation' in Luc J Wintgens (2005), *The Theory and Practice of Legislation: Essays in Legisprudence* (Routledge) 15-22.

¹⁵⁰ Wintgens 'Legisprudence...' (n 149) 15.

¹⁵¹ Alexy 'Reasonableness' (n 32) 9-11. Also see Wintgens 'Legislation as a Theory...' (n 146) 35, 38 where he argues for the coherence of rules with social reality.

¹⁵² For in-depth discussion, see Simeneh 'Methods...' (n 92) 104-108.

¹⁵³ They are discussed in Simeneh 'Methods...' (n 92), and Simeneh and Cherinet 'Over-Criminalisation...' (n 48) in greater depth.

human rationality, and they define the criminal law.¹⁵⁴ Thus, a person can be criminally responsible for a prohibited conduct he is engaged in. The criminal responsibility for inaction cannot also be justified unless it constitutes active abandonment tantamount to action.

With regard to the mental element (*mens rea*), a person may be responsible for conduct committed either intentionally, or negligently.¹⁵⁵ The law cannot achieve any purpose by punishing individuals for accidents. Thus, such moral element also needs to be proved. The last element in this cluster of principles (i.e. personal responsibility) requires that a person can be held criminally responsible only for his own action, not for actions of others.¹⁵⁶ Several of those tax crimes, such as managers' criminal responsibility for tax crimes committed by a company he manages, or those tax crimes with no requirement of intent, or passing one's commercial license to another person, would not constitute crime if the court takes these doctrines seriously.¹⁵⁷

4.2.4 The principle of lenity

The principle of lenity relates to finding facts or rules that favour the accused. If there is any doubt, such doubt favours the accused; likewise, if there is any rule that favours the accused, the court should apply such rule.¹⁵⁸ Several of those special penal legislation or those administrative legislation containing penal provision govern matters that are already governed by the Criminal Code. Often, they merely carry increased punishment. Sometimes, they expand the scope of conducts that are criminalised. These laws, however, expressly state that the more serious punishment shall be applied. Such rules would not stand if the court applies the principle of lenity.¹⁵⁹ In the sentencing

¹⁵⁴ Hallevy (n 95) 3-5. These four principles could better be appreciated seen in light of Fuller's morality of law. Lon L Fuller (1969), *The Morality of Law* (revised edn, Yale UP) 33-94.

¹⁵⁵ Culpability should properly take into consideration unity of guilt.

¹⁵⁶ It is for this reason that the German method of interpretation of the criminal law is applied. The court first determines whether there is conduct, and whether such conduct is prohibited. It then determines whether the conduct is accompanied with guilt (i.e. criminal intention or negligence), which essentially means whether the conduct deserves punishment. At the third stage, it considers whether there is a justification or an excuse, respectively. The punishment is required to be proportional – proportionality *in rem* and *in personam*. Gabriel Hallevy (2013), *The Right to be Punished: Modern Doctrinal Sentencing* (Springer) 33-36.

¹⁵⁷ Simeneh and Cherinet 'Over-Criminalisation...' (n 48).

¹⁵⁸ This rule is poorly crafted and incorporated in arts 5 and 6 of the Criminal Code. Simeneh 'Methods...' (n 92) 109-110.

¹⁵⁹ Simeneh and Cherinet 'Over-Criminalisation...' (n 48) 78-79.

process, the court is required to take the lightest punishment first; and the court may opt for the next severe punishment only upon sufficient justification.¹⁶⁰

4.3 Accepting the result of judicial evaluation

The criminal law is a limitation to individual rights. Individual rights are enshrined in the Constitution as fundamental rights, and this limits both legislation and adjudication powers. The Constitution sets those rights as non-positivist standards for the assessment of those legislative powers of the Government. The state has the burden to justify the existence and enforcement of such criminal rules. This begins with the legislation process.

Where there is a dispute regarding the validity of a criminal rule, the court is required to address it properly and specifically. The court is not precluded from interpreting the Constitution for the purpose of application of a sub-constitutional norm, a criminal rule. The interpretation is required to be guided by the constitutional doctrines of the rule of law and respect for human and fundamental rights.

Both the Constitution and the law-making rules require the lawmaker to make proper constitutional evaluation of its activities. Thus, in the interpretation and application of the law, the court looks at the preparatory material and parliamentary debates in order to evaluate the justifications of the state in adopting a particular criminal rule. Where the court finds that the lawmaker makes a proper assessment of the circumstances in the determination of criminalisation and punishment, the court may defer to the decision of the lawmaker and harmonize its decisions with non-positivist higher norms enshrined in the Constitution and the General Part of the Criminal Code.

However, where the court finds that the lawmaker has exceeded its power or the criminal rule is unreasonable, it is expected to address the matter in two ways because courts do not have the power to nullify such law. Where there are alternative ways of limiting the application of the criminal law, short of nullification, the court may give limited effect to such criminal rule. The second possibility relates to cases whereby the court cannot limit the application of the criminal rule but it finds that it offends a constitutional value based on grounds such as a criminal rule that is unreasonable, excessive, or contrary to rule of law unreasonably burdening individual rights. Under such

¹⁶⁰ Criminal Code, preface para 6. This is incorporated into the 2019 Draft Criminal Procedure and Evidence Code – which provides for determination of sentence, art 274(4).

circumstances, the court after providing detailed reasons why it is not applying such criminal rule, may refer the matter to the House of Federation for the criminal rule's invalidation on the basis of unconstitutionality.

Conclusion

The criminal law in Ethiopia is contained in a code and several other criminal law and non-criminal law legislation. The court employs theory of law in the determination of the nature of the criminal law and adopts methods of interpretation of the criminal law. The Constitution enshrines a non-positivist theory of law against which the correctness of criminal norms would be tested. There are various criminal law and constitutional doctrines that scaffold the interpretation of criminal rules. Such interpretation is guided by the constitutional doctrines, such as the rule of law, respect for human rights and democracy.

As observed from the decisions indicated in this article, the courts that rendered the decisions do not seem to have adopted a specific traditional theory. The courts have rather applied political ideology as part of their interpretation method in full disregard of doctrines.¹⁶¹ Courts should rather be guided by constitutional values in the determination of its theory of law. In the interpretation of the criminal law, it should be guided by the doctrines in the Code or otherwise. In choice of legal theory and methods, courts should indeed be bound by constitutional doctrines, such as the rule of law and respect for human and fundamental rights. ————— ■

¹⁶¹ Such courts do not write detailed reasoning in their judgments, and it is very much limited to their decisions. However, the influence of political ideology may be discerned from the trends in oppressive legislation and unreasoned decisions of the courts that put defendants at a disadvantage.
