Ethiopia's Criminal Law Evolution from the Perspectives of Major Legal Theories: An Overview

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Abstract

This article reviews the various theories of law applied throughout the modern development of the Ethiopian system of rules from a criminal law perspective. As is elsewhere, the initial influences mainly relate to the natural law theory. Later, positivisation evolved as part of the modernisation of law. Further, as part of the modernisation of society, the social theory of law evolved. With the PMAC coming to power, the Marxist theory of law crept in. The excessive connection between law and politics glamoured the instrumentality of the law. This got prominence in the post-2005 election in Ethiopia. The theories of law are abstracted from the manner the laws were designed, or the way they are implemented. The discussion looks into the difference between the statutes and the application of criminal law. Further, it shows that legal theory has a method aspect. I finally argue for the pragmatic instrumentality of the law.

Key terms:

Jurisprudence · Legal theory · Natural law · Legal positivism · Social theories of law · Pragmatic instrumentalism

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1. Introduction

A theory of a particular subject is a generalisation regarding properties, causation, nature or otherwise of the subject under consideration. Accordingly, the theory of law (legal theory) is meant to explain the nature and/or function of law. Several legal theories appear to have developed around criminal law, either to justify or critique existing law, because they focus on the legitimacy of the coercive power of the state. This article dwells on legal theories from the criminal law perspective. Theories of law evolved along with the level of legal and political power consciousness of society. Thus, no legal system has a singular legal theory because legal systems, often, do not subscribe to a particular theory of law.

The transition from natural law to positivism, in as much as it is a legal transformation, is the transition of political power from the church to the monarch. The positive nature of the law is evident from the statute itself. However, legal theories are also used to define the scope and purpose of a particular statute. This is seen in the methods of interpretation and application of the law. In this regard, legal theory is, therefore, a part of the legal method. Further, the instrumental nature of law is abstracted from the ends the particular statute is intended to achieve. Thus, a holistic approach is necessary to understand the applicable theory in a particular context.

An effective legal theory attempts to explain the essential elements of law and to comprehensively address them. However, no theory does that; nor are many of those legal theories mutually exclusive. Each of them explains an aspect of the law, and the use of a combination of theories appears to be justified. Thus, different theories of law may be applied (in tandem) in a single case. Based on the methods of analysis, the theories –to use Brian Tamanaha's

classification– employ three perspectives: normative, analytical and empirical.[1] These theories of law are discussed in that order.

This article attempts to identify applicable theories to Ethiopian criminal law in light of the traditional and modern schools of legal thought. Although the theories developed elsewhere in different legal traditions, historical developments of Ethiopian law have significant parallels in those systems wherein the theories are said to have evolved.

Law operates in a society; and it is highly influenced by non-legal factors and disciplines, such as economics, sociology and political theory. These developments are shared by Ethiopian society too. There are also global developments that influenced the Ethiopian politico-legal realities, such as the religious influence in the Middle Ages, the positivisation of law in the Renaissance, and rationalisation and codification of law in the Enlightenment, constitutionalism in governance in the early 20th century, the legal transplantation after WWII and the socialist legal movement in the 1970s.

These realities have all influenced the Ethiopian legal system. It is, therefore, appropriate to evaluate the historical development of the Ethiopian system of rules in light of these theories. The system of rules is examined in chronological order. The theories are abstracted from provisions of the law, purposes they are meant to address, the general theoretical and philosophical background of those laws, the manner of application of the law and the nature of institutions applying such law. This article focuses on the evolution of legal theories in relation with Ethiopian criminal law embodied in codified criminal laws in Ethiopia (including some introductory reference to the Fetha Negest). Thus, various customary laws, traditional systems, the Sharia and other normative systems that have been an integral part of the Ethiopian legal tradition over many centuries are beyond the scope of this article.

Frequently used acronyms

E.C	Ethiopian Calendar
FDRE	Federal Democratic Republic of Ethiopia
PDRE	People's Democratic Republic of Ethiopia
PMAC	Provisional Military Administration Council
UDHR	Universal Declaration of Human Rights
WPE	Workers' Party of Ethiopia

[1] Brian Z Tamanaha (2017), *A Realistic Theory of Law* (Cambridge University Press), at 30 ff.

Based on the sequence in the influence of the legal theories, Section 2 deals with natural law theory, and Section 3 deals with the modernisation of the legal system in Ethiopia and legal positivism. As a continuation of the discussion, Section 4 deals with the social theory of law. Under this section, sociological jurisprudence, historical school and Marxist theory of law are discussed as different variants of social theories of law. Sections 5 and 6 deal with the positivisation of natural law and an argument for pragmatic instrumentalism.

2. Natural Law Theory

The natural law theory has a moral conception of law. It evaluates the correctness of human law against 'higher' moral principles to determine what a "good law" is. It holds that a legal rule should comply with certain moral principles short of which it is not binding. The medieval theory of natural law - had a religious – 'premise' that both the ruler and the ruled must pursue "a good life" on earth that should be "fitting[] to the happiness of heaven."[2]

Thomas Aquinas classified natural law into four - eternal law, divine law, natural law and human law. Human law is binding insofar as it is not in conflict with natural law. However, the positive law is not abstracted from natural law; he rather argues that natural law must be abstracted from, among others, the scriptures, by reason, through a rational process.[3] In modern natural law theory, this is done through practical reasoning as expounded by John Finnis.[4] Both Aquinas and Finnis thus pursue that every act of human beings must conform to nature, which is guided by the "natural inclination of man" to do "human good".[5]

The natural inclination of a human being is the foundation of Zara'a Ya'Eqob (Worqe)'s views. He argues that once God has given me the natural appetite, it is a contradiction that he prohibits me from engaging in certain activities, such as the prohibition of eating at a particular time, and a particular type of meal because of the church's order of fasting.[6] It is based on such

[2] Shirley Robin Letwin (2005), *On the History of the Idea of Law* (Cambridge UP) at 72.
[3] Id., 73-80. There are certain qualifications to this general statement. Ibid.
[4] John Finnis (2011), *Natural Law and Natural Rights, Second Edn* (Oxford UP) at 100 ff.; Letwin, *supra* note 2, at 72-79.
[5] Finnis, *supra* note 4, at 401-403; Letwin, *supra* note 2, at 73-76.
[6] Getachew Haile (2017), *Ethiopian Studies in Honor of Amha Asfaw* (Birana Books) "The Discourse of Warqe: Commonly known as *Hateta ze-Zara'a Ya'Eqob*" at 51-71; _____ (2006 E.C), *Autobiography of Worqe which is known as Hateta Ze'Zer'a Ya'Eqob* (Trans. Getachew Haile, Amharic) at 24-29. The translator argues that Zara'a

understanding of natural law that Zara'a Ya'Eqob also argues for the equality of human beings, including racial and gender equality.[7]

Although Christian scholarship in Ethiopia regarding law dates back to a millennium ago, records show that it was at its peak during the reign of Emperor Zara'a Ya'Eqob (1434-1468). To make Ethiopia a Christian nation, he had exercised what we might today call "excessive power". He helped the church to own extensive property, to control each family through a father confessor, creating a strong bondage between the church and the citizen.[8] He also wrote several books, treated as law, to guide citizens on how to live a life by God's command.[9] The ordinary citizen during the period, therefore, felt both the power of the church and the power of the Emperor. He presided over hearings of cases along with monks and priests and his judgments were exclusively based on ecclesiastic scriptures. Such codes of conduct were later on absorbed into and manifested through the *Fiteha Negest*.

The *Fiteha Negest*

The Ethiopian political history of the Middle Ages, as is elsewhere in Europe, is religious history. The state was engaged in the dissemination of Christian teachings, and the establishment of churches and monasteries until the formal separation of the government and religion were proclaimed since the Mid-1970s. The diplomatic, economic, and political power relations were all manifested through religion.[10] The essential interests revolved around religious values and thus the law was used to promote those values.

Ya'Eqob must have been exposed to Thomas Aquinas's theory. Ibid, 10. It should be noted that the philosopher Zar'a Ya'Eqob (1600 -1693) and the Emperor Zar'a Ya'Eqob (1426 -1460) are different individuals who lived in different eras.

[7] *Autobiography of Worqe*, *supra* note 6, at 21-24. Zar'a Ya'Eqob in fact objects to the biblical statements that Israel is the chosen people, and man is head of woman. God created every human being, whether Israelite or otherwise, men or women.

[8] Taddesse Tamrat (1972), *Church and State in Ethiopia: 1270 – 1527* (Clarendon Press) at 206-247.

[9] Emperor Zar'a Ya'Eqob wrote a book that defines what a "good life" is and how to be righteous before the eyes of God. Atse Zar'a Ya'Eqob (2012 E.C), '*Tomare Tesebe'et: Se'w Yemhon Debbdabe* (Trans. Simachew Negatu, Amharic). He also authored the following books: *MeThihafe Birhan*, *MeThihafe Selassie*, *MeThihafe Bahriy*, *Te'Aqibo MesTir*, *Sibhat Fiqur* and *Egziabiher Negis*. Getachew Haile (2013 E.C), *Bahire Hassab: YeZemene A'QoTaTer Qersachin Ke'tarik Masetawosha Gar, Third Edn* (Birana Books, Amharic) at 236.

[10] *See*, for instance, Sergew Hable Sellassie (1972), *Ancient and Medieval History of Ethiopia* (United Printers); Job Ludolphus (1684), *A New History of Ethiopia, Second Edn* (Samuel Smith Booksellers).

The beginning of the Solomonic dynasty marks the height of the Ethiopian liturgy. There were extensive writings (and translated works into *Ge'ez*) of the church and the monarch that governed accession to the throne and the lives of citizens.[11] That includes *Kibere Negest*, *Metsehafe Berhan*, *Metsehafe Milad*, and *Fiteha Negest*, which is the last and one of the most important documents of this period.[12]

The *Fiteha Negest* was translated into Ge'ez in the 15th century to be applied both by the church and by the monarch.[13] It was originally written by Ibn al-'Assal in Egypt "as a guide for the Christian Copts living among the Muslim people of Egypt."[14] *Fiteha Negest* was meant to regulate two aspects of life – the first part governs the spiritual (heavenly) life and the second part (which is influenced by Roman-Byzantine sources) was meant to govern worldly (temporal) life.[15] Although the criminal law is found in the second part, its content is very much influenced by the contents of the first part.

Before the *Fiteha Negest*, Coptic Christianity governed all aspects of the Christian life.[16] Before the adoption of the *Fiteha Negest*, the ecclesiastic

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[11] Philip F. Esler (2019), *Ethiopian Christianity: History, Theology, Practice* (Baylor UP) at 109 – 22; Taddesse, *supra* note 8, at 1-5, 19-20, 34-38, 107-18, 248-50. Getachew, *Ethiopian Studies…, supra* note 6, at 9-12.

[12] Esler, *supra* note 11. Emperor Zaz'a Ya'Eqob makes frequent reference to the Pentateuch, *Synodos*, *Didascalia* and *Metsihafe Kelementos. Supra* note 9.

[13] Because the *Fiteha Negest* makes reference to Constantine, the translators doubted its content assuming this is a reference to King Constantine because the contents of the *Fiteha Negest* include events and laws that were adopted after the passing of King Constantine. However, Emperor Zar'a Ya'Eqob would call himself CosTenTinos and he is said to have committed what King Constantine did. Zar'a Ya'Eqob, supra note 9, at 79; Getachew Haile (2012 E.C), *Ke'Ge'ez SeneTsihouf Gar Bizu Afta Qoyita* (Birana Books, Amharic) 47; Getachew, "*Bahire Hassab*…", *supra* note 9, at 236; Getachew, *Ethiopian Studies*…, *supra* note 6, at 370.

[14] *The Fetha Nagast* (1968), Translated from Ge'ez by Abba Paulos Tzadua, Edited by Peter Strauss (Second printing, Carolina Academic Press, 2009), Foreword (p. xvi) *See* also Dibekulu Zewde (1986 E.C), *Fiteha Negest: Nomocanon* (Addis Ababa, Amharic) at 52, 53. _____(1968) *Fitha Negest: The Law of the Kings* (Trans. Abba Paulos Tsadwa, Law Faculty, HSIU) Foreword at xvi, xvii; Getachew, *Ethiopian Studies…*, *supra* note 6, at 123-137.

[15] _____ (1962 EC), "*Fiteha Negest*" in *MeTsehafe Higgigat Abbeyit* (Addis Ababa, Amharic) Preface, 12.

[16] *MeTsehafe Higgigat, supra* note 15, Preface. There has already been established "covenant between Debre Asebo [later Debre Libanos monastery] and the Palace [of Yekuno Amlak] of an everlasting mutual help and cooperation in administration Christian Ethiopian in prayer and sharing national revenue." Getachew, *Ethiopian Studies* …, *supra* note 6, at 322.

laws, such as the Pentateuch, *Synodos*, *Didascalia* and *Metsihafe Kelementos*, *Kibre Negest*, *Fewse Menfesawi* were governing rules many of which were cited in the preface of the *Fiteha Negest* as sources of the law.[17] Customary laws were also governing interpersonal relations;[18] and in later days, the monarchs adopted edicts either as a proclamation pronouncement or as a judgement.[19]

The *Fiteha Negest* applied during a period whereby there was yet a significant overlap between the church and the state's power.[20] As it governed both spiritual and worldly matters, criminal punishment had both spiritual and temporal aspects. In as much there was no distinction between the state and the church, there was no distinction between crime and sin, and punishment was expiation of sin, in as much it is social censuring of the offender.[21] Criminal punishments normally involved corporal punishment including the death penalty[22] and were carried out upon the judgement of the temporal judge.[23] Where judgment is not rendered or executed, a spiritual judgement

[17] Preface, *Fiteha Negest*, *supra* note 15, at 12-17; _____(1834), *The Ethiopic Didascalia; or, The Ethiopic Version of The Apostolical Constitutions, Received in The Church of Abyssinia with an English Translation* (Edited and Trans. By Thomas Pelle Platt). *Kibre Negest* is not cited in the *Fiteha Negest*; it was rather written in the 12th Century to legitimise the king's power by linking it with the House of David and Solomon in Israel. Daniel Kibret (2011 EC), *Etiopiawiw Surafe: Ye'Abbune TekleHaimanot Ye'hiwot Tarikena Astwatse'o* (Addis Ababa) at 23-31. Getachew is very critical on the *Kibre Negest* and takes it as the only fiction in the literature. Getachew, "*Ke'Ge'ez SeneTsihouf Gar…"*, *supra* note 13, at 39, 182 -222.

[18] Aberra Jembere (2000), *An Introduction to the Legal History of Ethiopia, 1434 - 1874* (Lit Verlag) at 42 ff.

[19] Ibid, 83-99.

[20] Taddesse, *supra* note 8; *MeTsehafe Higgigat, supra* note 15, Preface.

[21] In the *Fiteha Negest*, homicide is described to "belong to the category of great sin". "The Law of the Kings", *supra* note 14, Rule XLVII, at 289. Letwin, *supra* note 2, at 70 – 71. Simeneh Kiros Assefa and Cherinet Hordofa Wetere (2017), "Over-Criminalization': A Review of Special Penal Legislation and Administrative Penal Provision in Ethiopia" 29 J Eth L 49, at 51, 52.

[22] For instance, those involving corporal punishment in the *Fiteha Negest* include, Apostasy - Chapter XLVI, Murder – Chapter XLVII, Fornication – Chapter XLVIII and Theft – Chapter XLIX. 'The Law of the Kings', *supra* note 14. Reference is made both to the Amharic and English version of the *Fiteha Negest*. The Amharic version is cited as "*Fiteha Negest*" while the English version is referred to as "The Law of the Kings".

[23] The death penalty may be imposed for taking the life of another person. If a judge passes a death penalty in such circumstance, the convict would be given to the avenger. It is up to the avenger either to kill the murderer, to take blood money, or to forgive

may be made by the High Priest, i.e., ex-communication, the spiritual judgement, "a punishment in the world without end".[24]

The *Fiteha Negest* enforced religious morality in as much as it was about maintaining order; and it granted full power to the monarch including the power to punish.[25] However, there are two other matters that augment the argument for the natural law theory. The preface of the *Fiteha Negest* admits that the content of the *Fiteha Negest* might not be complete. In the event of such a gap, as every one of us is endowed with a rational mental faculty, those who administer the law may apply the law as would be revealed to them, as was revealed to those who wrote the *Fiteha Negest*.[26] Further, a priest may be appointed as a judge if, among others, he has good knowledge of the scripture, is conversant with interpretation by analogy or in the dual interpretation of the law and should know the customs of the forefathers.[27]

It appears for these reasons that before the adoption of the 1930 Penal Code, criminal responsibility was not properly systematized. Thus, once the judge finds the defendant guilty of the crime charged, the judge sends him to the Governor for a sentence because it is the Government that "knows the punishment".[28] According the medieval natural law theory, criminal punishment is the expiation of sin and for a conduct to be a crime, it must first

him. "The Law of the Kings", *supra* note 14, at 294. A certain Dejazmach Wodaje of Gojam who had killed his wife was sentenced to death. He was handed over to his avengers and on 24 August 1905 he was killed by them. MerseHazen WoldeQirqos (2008 EC), *Ye'Hayagnawe KifleZemen Me'Bacha: Ye'Zemen Tarik Tizitaye Kayehutena Kesemahut 1896 – 1922 Third Edn* (Addis Ababa UP, Amharic) at 29.

[24] "The Law of the Kings", *supra* note 14, at 289.

[25] Ibid, at 272.

[26] "*Fiteha Negest*", preface, *supra* note 15, at 10, 17.

[27] Ibid, Paragraph 43, Rule No 1424 – 27. "The Law of the Kings", *supra* note 14, Chapter XLIII, Section I, 9th Rule, 251. It should be noted that the Orthodox Church teaching is the School of Reading (ንባብ), School of Liturgical Music (ዜማ), School of Poetry (ቅኔ), and School of Interpretation (ትርጓሜ). Interpretation is the highest level of study. See, in general, Habte Maryam Worqneh (2013 E.C), *Tintawi Ye'Ethiopia Timihirt Second Edn* (Birana Books, Amharic); *Autobiography of Worqe supra* note 6, at 14; Esler, *supra* note 11, at 127-132. Even Zara'a Ya'eqob took 10 years to complete the school of interpretation.

[28] The 1930 Penal Code, Preamble para 3; Jean Graven (1964) "The Penal Code of the Empire of Ethiopia" *1 J Eth L* 267, 273; Tsegaye Beru (2013), "Brief History of Ethiopian Legal Systems – Past and Present" *41 International Journal of Legal Information* 335, at 350. Such is how a case against negligent soldiers of Dejazmach Beyene Wondgimagegnehu of Wolayita was disposed of. The judges had established guilt and Dej. Beyene determined the punishment. MerseHazen, *supra* note 23, at 248-249.

constitute a sin.[29] Law was not seen as a protection against tyranny; it was rather seen as "God's dispensation for the punishment of man's transgression".[30] The Monarch was regarded as a representative of God on earth and there was no limit to his power.[31]

The monarch or his "representative" would preside on important cases, along with important personalities such as high priests, monks, and judges based on the *Fiteha Negest*.[32] Likewise, until the appointment of the first eight ministers by Emperor Menelik II (in 1907), the Emperor performed almost every judicial, administrative and legislative function in running his government.[33] There was a strict schedule set to be implemented by the Imperial timekeeper who had several assistants under him. The Monarch reviewed cases at the Crown Court.[34]

To maintain the legitimacy of the state law, the 1930 Penal Code was presented as a continuation of the *Fiteha Negest* in two ways – first, the Penal Code states that it is a revision of the *Fiteha Negest*;[35] second, the

[29] Graven, *supra* note 28, at 281-284; Letwin, *supra* note 2, at 60.

[30] Letwin, *supra* note 2, at 63. In the *Fiteha Negest* the punishment for apostasy would be death by slaying or stoning. "The Law of the Kings", *supra* note 14, Chapter XLVI, Section II. This is how individual criminal responsibility is put in place. Zar'a Ya'Eqob, *supra* note 9, at 74.

[31] See, *Fiteha Negest*, *supra* note 15, para 44. Taddesse, *supra* note 8, at 98 ff. The heading of the 1930 Penal Code refers to the Monarch as "Haile Selassye 1st the Appointed of God".

[32] There are records of application of the *Fiteha Negest* from the period of Emperor Sertse Dingil (1563 -1597) until His Imperial Majesty Haile Selassie (1922 -1974). *See*, "The Law of the Kings", *supra* note 14, foreword.

[33] MahitemeSelassie WoldeMesqel (1962 EC), *Zikre Neger, Second Edn* (Addis Ababa) at 52. Paulos GnoGno (2003 E.C) *Atse Menelik be'Hager WusT YeteTsaTsafuachew Debedabewoch* (Aster Nega Publisher). Many of those letters were appointments to public office, instructions to officials either to disburse finance or collect taxes, grant permit, arrest warrants, etc. They are enforced as "law" because non-compliance would be met with punishment. Some of the letters appear to be too personal; yet, the King's words were "the law".

[34] MahitemeSelassie, *supra* note 33, at 60-66. For instance, Art 9(1) of the Courts Proclamation No 165/1962 provides that: "an appellant who has exhausted his rights of appeal [may] apply[] to His Imperial Majesty's Chilot for a review of the case."

[35] See preamble of the 1930 Penal Code, Preamble, para 5, 16,

interpretation method of the Penal Code followed the methodologies of the dual interpretation of the *Fiteha Negest*.[36]

There was no significant legal development between 1930 and 1942. In 1942 when the courts were established in a manner close to what we know them today, there were not many rules to be applied by such courts. Therefore, *Administration of Justice Proclamation No 2 of 1942* (Article 24) provides that "no court shall give effect to *any existing law* which is contrary to natural justice or humanity." The Amharic version rather provides for "natural justice and human conscience." The statute does not define what "law" is and thus "any existing law" would include rules that were in application. The applicable rules were the *Fiteha Negest*, other ecclesiastic laws, a few statutes adopted by the king, and (local) customary rules.[37]

As these rules were the ones that judges had exposure to, it appears they were given a free hand to apply the law they deemed appropriate and the only restriction would be their conscience. Thus, it was unavoidable for the judges to resort to those *Fiteha Negest* rules which they knew too well. This shows that the natural law theory was the dominant theory of the period.

3. Legal Positivism

The classical positivist theory principally holds that a legal rule is valid where it is adopted *by the state exercising its authority*. Insofar as the rule is adopted *following the procedure laid down*, there is no moral judgment regarding the content.[38] It is written in a statute form or otherwise, and often, there is a hierarchy of those rules.

In the preface of the *MeTsehafe Higgigat Abbeyit*, His Imperial Majesty Haile Selassie I stated that although Ethiopia has a long history of government, the government never promulgated laws before the *Fiteha Negest*. This is because the spiritual and worldly matters overlap, and the public has been decent to be governed by canonical laws – Pentateuch and the four gospels.[39] This statement is about "state law" declared as "statutes" to govern secular matters. Other than such laws, Emperor Zar'a Ya'Eqob wrote

[36] Ibid, para 11. However, there is a stark difference in content; while the *Fiteha Negest* was meant to enforce religious morality, the Penal Code was meant to enforce state public morality.

[37] See, for instance, MahitemeSelassie, *supra* note 33.

[38] Hart argues a legal system is a system of primary and secondary rules with minimum moral content. HLA Hart (1994), *The Concept of Law, Second Edn* (Clarendon Press) at 100 ff, 206 ff.

[39] *MeTsehafe Higgigat, supra* note 15.

several books that contain prohibited conduct and punishments; and Emperor Menelik II wrote countless letters which were enforced as "law".[40]

In 1900 (EC, i.e. 1907) Emperor Menelik II established the first eight Ministries and defined their power by their respective statutes.[41] It was in this manner that positive law took root in the Ethiopian legal system even though there were no sufficient statutes promulgated to govern a wide range of social interactions.[42] In the Proclamation that established the modern courts in 1942, it was stipulated that traditional dispute settlements would remain applicable insofar as they would not contradict natural justice and human conscience.[43] However, when the courts were re-established, the law to be applied by the courts was defined to be the one that is published in the *Negarit Gazeta*.[44] It provided that "the law is what is provided by Us", i.e. the Emperor. This appears to be an important milestone in the positivisation of the law disregarding previous practices including customary law.

The shift of power from the church to the monarch facilitated the positivisation of law. In the positive law, criminal punishment is imposed to enforce state authority. The enforcement of religious morality is another state objective to be criminally enforced, not as a sin but as a lesson to others.

Modernisation of the law is more advanced and frequented in the area of criminal law than other subjects. Thus, the 1930 Penal Code can be considered as the first positive criminal law. The lawmaker (the Emperor) is explicit in positivising criminal law. The Preface states that under the *Fiteha Negest*, once a judge finds guilt of the accused, he would refer the matter to the governor for sentencing. The Penal Code was, therefore, intended to make the criminal rule complete – both the prohibited conduct and the consequence are provided for in the Penal Code.[45]

In the earlier phases of the positivisation of the law, rule fundamentalist view was reflected. According to this view, the law is a virtuous institution,

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[40] Paulos, *supra* note 33.

[41] For instance the powers and responsibilities of the Minister of Justice, the Ministry of Interior, and the Ministry of War were defined by the statute creating them. MahitemeSelassie, *supra* note 33, at 68, 104 and 223-224, respectively.

[42] It should be noted that the manner of promulgation of proclamations was through oral pronouncement. A few copies may be found in the Imperial Achieve.

[43] *Administration of Justice Proclamation No 2 of 1942*, Art 23.

[44] *Courts Proclamation 1962*, Proclamation No 195 of 1962, Art 2.

[45] The 1930 Penal Code lists the types of criminal punishments – death, exile, imprisonment, flogging, amputation, fine, etc. Further, under each provision the specific punishments are provided for.

and is the best way of ordering society which it can do so effectively.[46] Legislation and positivisation have been vigorously advocated for by Bejirond TekleHawaryat.[47] He aspired to have laws and a constitution for Ethiopia. His arguments for legislation included the role of law in the preservation and protection of the rights and dignity of citizens, preventing anarchy, state budget efficiency and maintenance of law and order.[48]

He was Russian-educated with exposure to western liberal culture. The demand for legislation is personal to TekleHawariat. He thought that legislation is an important tool to make a clear distinction between whether he is the personal servant of the Monarch or he serves the state of Ethiopia, as he would always aspire to do.[49] As he was a staunch advocate of public service and the duties of citizenship, he desperately wanted to have rules put in place to make his service to his nation count as a public service.[50]

Once he drew up the first constitution under Emperor Haile Selassie in 1931, he explained the virtues and nature of positive law in two rounds of lectures to the officials and the nobility.[51] In his constitutional inaugural lecture, he explained the significance of the Constitution and the meaning of the law. He described the Constitution as a mutual covenant between the Monarch and the people, binding on both. He defined the law functionally as "state command for the maintenance of law and order …".[52] The law, along

[46] His Imperial Majesty states to the nobilities and dignitaries the reasons for the adoption of the Constitution into law. MahitemeSelassie, *supra* note 33, at 764-766. Also see, the lectures of TekleHawaryat. Ibid, at 800-814.

[47] Lij Iyasu had granted his wish to draw up city ordinance for Addis Ababa which was not adopted. TekelHawaryat TekleMaryam (1998 E.C), *Autobiography* (Addis Ababa UP, Amharic) at 161, 223-228, 334-336, 348-353.

[48] Ibid, 161. Although TekleHawaryat was inspired by western legal and political culture, he was very much troubled by the urgent need for law and order which is fundamental for the establishment and maintenance of socio-political order. Also *see* "The Law of the Kings", *supra* note 14, at 272 that the justifications for the law and punishment are the desire to maintain order in society. *Fiteha Negest*, *supra* note 15, sections 1536, 1537.

[49] That is the confrontation he had with HIM Haile Selassie. TekelHawaryat, *supra* note 46, at 338-353.

[50] Ibid. This is also what TeklkeHawaryat attempts to reflect in his lectures to the nobilities regarding the nature of law and the Constitution.

[51] TekleHawaryat, *supra* note 47, at 221-225; MahitemeSelassie, *supra* note 33, at 800 ff., 814 ff.

[52] The Amharic word *mengist* (**መንግሥት**) is vaguely used to refer to "state" and "government" at the same time. The word is translated in to the appropriate meaning depending on the context. Likewise, the Amharic word "ager" (**አገር**) is used to mean

with the army, is the principal instrument of the Monarch to govern its people; it is also a shield for the public in the process of governance.[53] He further stated that "those who transgress it will be subject to penalty by those exercising state coercive power (authority)".[54]

He stated that the law defines the sphere within which the individual is free to act and what is commanded. According to TekleHawaryat, "interest" refers to what the individual is free to act, and he classified such interest into *individual interest* and *collective good*. He further classified interests (individual or collective) into three –property interests, the pursuit of knowledge or wisdom, and moral pleasure (love and religion).[55] He summed up his argument by stating that they are all generally provided for in the Constitution granted by the Emperor.[56]

TekleHawaryat further stated that the details may be provided in the detailed rules that would be adopted in the future. In elaborating on the nature of law, he further stated that "law is essential in keeping everyone under control, both the weak and the strong, that the Monarch is the custodian of state's coercive power to enforce compliance.[57] He gently and humbly explained to the nobility who had always been governed by the might of their power that, in an organised state, the Imperial coercive power is sufficient to coerce compliance with those rules[58] and this is for the common good.[59]

In this argument, he appears to be utilitarian (close to Bentham's views), because the law is for the pursuit of the collective good. TekleHawaryat would argue that the collective good justifies the legitimacy of the constitution because it is an agreement between the Monarch and the people. He is not a purely contractian theorist for two reasons. First, according to his views, the

territory while the normal meaning is a country. Mahiteme Selassie, *supra* note 33, at 806.

[53] Ibid, at 818.

[54] Ibid, at 806.

[55] Ibid. These ends of law would overlap with the natural law theory argument based on natural rights. This is particularly discernible in John Finnis' argument on the basic form of good. See Finnis, *supra* note 4, at 59 ff. Yet, his argument is for positive law.

[56] Ibid.

[57] Ibid.

[58] Ibid, 813. However, such legality or legal subordination of subjects, rule based dominion in the proper sense of the term, is taken equivalent to rule of law in later explanations because the successor to the throne is made predictable. _____(1968), "Patterns of progress: Constitutional Development in Ethiopia, Book XI" (Ministry of Information) at 25, 32, 34.

[59] MahitemeSelassie, *supra* note 33, at 806-813.

Constitution is granted by the Monarch; second, he rather argued from the collective good perspective that it is for the benefit of both: the public governed under the Constitution and the Monarch who wants to govern the public. It should be noted that although the king claims his authority to be divine, that was positivized into the constitution and the signatories were those who had religious, political and social influence at the time.[60]

TekleHawaryat's views on the validity of subsidiary laws appears to be aligned with the Kelsenian validity pyramid, even though his statements precede that of Kelsen. He argued that subsidiary rules would be valid if they are made based on the Constitution, and if there is Imperial assent to it.[61] His argument is pure positivist and has no reference to any supreme justification, no appeal to natural law.

On the first anniversary of the Constitution, he further explained the nature of law, the state and the constitution and several other related legal and political concepts. He argued that the fundamental pillars of the Constitution were the King, the People, Territory and Law. These four elements, he further noted, in turn, constitute the state.[62] His argument seems to have considered the state as the all-inclusive *entity* (statehood/nationhood at country level) that has the King, the People, Territory and the Law as its constitutive elements). Among these elements, he stated that the law is the one that keeps the three in harmony; the law is the boundary never to be crossed over. It passes from posterity to posterity; it can be repealed or replaced by another law by (the will of) the Monarch.[63]

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[60] Those who put their signature and stamp on the 1931 Constitution were Abbuna Qerlos, Abbuna Yisehaq, Abbuna Petros, Abbuna Sawiros, Leoul Ras Kassa Hailu, MeridAzemach Awfawossen, Ras Gugsa Are'aya, Ras Hailu TekeleHaimanot, Ras Seyoum Mengesha Yohannes, Dejazmach HabteMichael, Dejazmach Metaferia, Dejazmach Aberra Kassa, Bittwoded Getachew, Firtawrari Birru – Minister of War, Bittwoded WoldeGebriel – Minister of the Palace, Bittwoded WoldeTsadiq – Minister of Interiror, Afe Negus Mekonnen Demissew – Minister of Justice, Tsehafi Ti'ezaz WoldeMesqel – Minister of Pen, Tsehafi Ti'ezaz Afeworq – Minister of Agriculture and Works, Fitawrari Haile WoldeRufael – Minister of Post, Telegraph and Telephone, Bejirond TekleHawariyat, Ato Ayele Gebre for Municipality. Even though his name does not appear in the list of signatories, there is a picture of him Emperor Haile Sellassie I putting his signature on the Constitution. Ibid, at 776 – 77. They also signed and stamped on the statute creating and defining the power of different branches of the executive. Ibid, at 792.

[61] Ibid, at 806, 810; Hans Kelsen (2005), *Pure Theory of Law* (Max Knight tr, the Lawbook Exchange) at 193.

[62] MahitemeSelassie, *supra* note 33, at 817.

[63] Ibid, at 818.

TekleHawaryat stated that the law is defined or manifested in statute (writing). It is the manifestation of the coercive power of the Monarch, and it governs both the Monarch and the citizens. The unity in the form of the state and the law is manifested in the Constitution. In this regard, his views are aligned with Kelsen when he argues that the state and the law are identical.[64] He also argued that the (constitution) state is constituted of the Monarch, the people, territory and the law. Subject to Hegelian argument based on the dialectical *unity of opposites*, he appears to be violating the rule of identity, because the state law is presented as both an element of and the whole of the thing at the same time. He, however, argued that since there would be no Monarch without people and territory, there would be no state without law. Likewise, the people cannot be well of without the Monarch and territory.[65]

With regard to Criminal law, there are two ways of looking at the enquiry into whether contemporary criminal law is purely positive law. The first issue relates to whether the source of the law is a statute adopted by the state. It is obvious that criminalization, which is a legislation process, is a political decision irrespective of the ends it is intended to achieve. Once it is adopted into law, it becomes a positive law. The second issue that deserves attention is whether the statute is the only source of law. The positivisation of the penal law was complete with the adoption of the 1957 Penal Code, which, *inter alia*, embodies the principle of legality. As such, the criminal law was codified in its entirety so that the Code could be "the only source of penal law".[66] The subsequent adoption of other major codes in the 1960s makes the positivisation of the legal system clear.

While this is the general impression about the law, whether criminal law is purely positive law is debatable. The General Part of the 1957 Penal Code, and the Criminal Code (enacted in 2004), contain principles of interpretation and application of the penal law.[67] Such principles, according to Dworkin,

[64] Ibid. Kelsen, *supra* note 61, at 286 -290.

[65] MahitemeSelassie, *supra* note 33, at 817.

[66] Graven, *supra* note 28, at 281-284. This is now entrenched by the decisions of the Cassation Division. See for instance, *Jemila Mohammed v Federal Public Prosecutor* (26 February 2009, Cass File No 38161, 9 Decisions of the Cassation Division of the Federal Supreme Court); *Worku Fekadu and Shume Arrarso v Benishangul Gumuz State Prosecutor* (24 January 2013, Cass File No 75387, 14 Decisions of the Cassation Division of the Federal Supreme Court).

[67] This includes the objectives of specific legislation stated in the preamble and elsewhere in that statute.

require the judge to go beyond the positive law.[68] The argument on the ends of the specific statutes, their *raison d'être*, etc takes us to the social theory of law. The provisions of Article 1 of the 2004 Criminal Code, and other provisions governing the judicial determination of punishment appear to pursue a consequentialist approach. This is argued elsewhere that, criminal law is not merely a rule of positive law.[69] However, practice shows that the court follows "formal positivism".[70]

It is to be noted that continental criminal law is guided by four principles – the principle of legality, conduct, culpability and personal responsibility, each of which is required to be proved. However, the court applies criminal law rules as written provisions, rather than testing such rules against other fundamental principles, such as the principle of lenity or presumption of innocence.

For instance, the *Special Penal Code Proclamation No 8 of 1974* (Article 12) provides that a person is punishable for breach of trust if the public prosecutor can prove that the defendant: (i) is a government employee, (ii) is entrusted with such government (public) property as part of his work or authority, (iii) has appropriated or alienated such property to procure benefit to himself or a third person. Because the Public Prosecutor would not be able to prove all the elements constituting the crime, however, as in *Prosecutor v. Deputy Commander Yehualaw Mezgebu et al.,*[71] the Provisional Military Administration Council ("PMAC") amended the provision subsequently. The *Special Penal Code and Special Criminal Procedure Code Proclamations Amendment Proclamation No 96/1976*, thus provided that it would be sufficient for the public prosecutor to prove the first two elements to obtain a conviction.

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[68] *See* Ronald Dworkin (1985), *A Matter of Principles* (Harvard UP); Humberto Avila (2007), *Theory of Legal Principles* (Springer).

[69] Simeneh Kiros Assefa (2020), "The 'Non-Positivist' Higher Norms and the 'Formal' Positivism in the Interpretation of Criminal Law in Ethiopia" *14 Mizan L Rev, No 1*; Simeneh Kiros Assefa (2017), "Methods and Manners of Interpretation of Criminal Norms" *11 Mizan L Rev, No 1*.

[70] *ERCA v Daniel Mekonnen* (21 July 2010 Cass File No 43781, 10 Decisions of the Cassation Division of the Federal Supreme Court). Former judge at the Federal Supreme Court judge defended this approach to "formal positivism". Ali Mohammed Ali "Fundamental Error of Law" in Muradu Abdo, Ed (2014), *Cassation Questions in Ethiopia* (Papers Presented at a Symposium Organised in Commemoration of the 50th Anniversary of the Founding of the School of Law).

[71] *Prosecutor v. Dep. Comm. Yehualaw Mezgebu et al.* (15 April 1983, First Instance Special Court Crim File No 24/75).

The Court in *Maj. Goshime*, and *Mulugeta*[72] held that the provision is amended to avoid prolonged litigation and to expedite the disposition of cases while in fact the effect is shifting the burden of proof.[73] This was maintained in the Revised Special Penal Code Proc. No 214/1981, Article 13(3).[74] However, even after the enactment of the FDRE Constitution which expressly provides for the presumption of innocence, *Corruption Crimes Proclamation No 881/2015*, (Article 3) provides that where the material facts are proved, the intent to obtain advantage or injury is presumed. Based on such presumption of obtaining an advantage, the court in *Aschalew*[75] required defendants to enter their defence. The constitutionality of such presumption is yet to be challenged by defendants; or the court is yet to refer the matter to the Council of Constitutional Inquiry.

4. The Social Theory of Law

The social theories of law recognize that law does exist and operate in society. Legal theories develop in a particular socio-economic and political condition. It is, thus, influenced by non-legal factors from other disciplines, such as sociology, economics and political science.[76] Moreover, international relations and comparative experience of other legal regimes have influence in the reception of legal concepts, doctrines and methods.

As highlighted in the preceding sections, the two universal theories of law are *natural law theory* and legal *positivism* because they claim to apply at all times and in all circumstances.[77] When the natural law theory was dominant, the social system was based on religious belief. Positivism evolved at a time when there was the industrial revolution, when power shifted from the church to the monarch, and when there was a shift from faith to reason.[78] Other theories, such as sociological or historical jurisprudence, realist school or

[72] *Special Prosecutor v. Maj. Goshime WondimAgegn* (24 June 1983, Special Frist Instance Court, Crim File No 7/75); *Special Prosecutor v. Mulugeta Girma* (8 December 1983, First Instance Special Court, Crim File No 15/76).

[73] *See* further, Simeneh "Non-Positivist…", *supra* note 69, at 103-104.

[74] *See*, for instance, *Hamid Mohammed v Special Prosecutor* (28 November 1984, Special Court of Appeal, Crim App File No 46/76).

[75] *Federal Attorney General v Aschalew Shewa, et al.,* (11 June 2021, Crim File No 260048, Federal High Court).

[76] Tamanaha, *A Realistic Theory…, supra* note 1, at 12 ff.

[77] Ibid. at 17.

[78] Generally, see M.A. Ntumy (1986), "Neo-Naturalism: Tailoring Legal Philosophy for Capitalism and Neocolonialism" 13 *J Eth Law* 169.

Marxist theory of law or critical studies focus on one or a few aspects of the law taking the positive nature of the law as a foundation.[79] Each legal theory evolved as a justification or a critique of the existing system of rules; some developed as a repudiation of another theory. Yet there is no singular legal theory that is universally applicable to all time.

The social theories of law appear to be instrumentalist views of the law.[80] For instance, the sociological theory of law considers the law as an instrument to change society for the better. There were such instances in Ethiopia where the law was used to change society or the social value system. Yet, the law is also said to have taken root in the tradition of Ethiopian society. Likewise, there are moments when the law is used as a pure instrument of governance. The application of those social theories to Ethiopian law can be examined from the perspectives of sociological jurisprudence, historical legal theory and Marxist theory of law.

4.1 Sociological Jurisprudence

Sociological jurisprudence holds that the law is a very good instrument of social change.[81] Accordingly, the late 1950s and early 1960s were years of extensive transplants of foreign rules into Ethiopia. To use Duncan Kennedy's words, such transplants mark the second wave of globalization of laws and legal doctrines.[82] Ethiopia has always been borrowing legal doctrines, principles and practices from other systems. For instance, several ecclesiastic documents, many of which are considered to be part of natural law, were translated from Egypt and Syria to *Ge'ez*. However, in the classification of areas of religious influence, Ethiopia is under the Oriental Orthodox, to which Egypt and Syria belong. Thus, those documents were considered "ours".[83]

The borrowing of modern and secular legal rules and principles in the early 1950s and 1960s was made having the instrumental nature of the law at heart to achieve secular state objectives. Thus, the preface of the 1957 Penal Code states that "…the contributions of science, the complexities of modern life and

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[79] Tamanaha, *A Realistic Theory…*, *supra* note 1, at 19.

[80] *See* generally, Brian Z Tamanaha (2006), *Law as a Means to an End: Threat to the Rule of Law* (Cambridge UP).

[81] Tamanaha, *A Realistic Theory…*, *supra* note 1.

[82] Duncan Kennedy (2010) "Three Globalizations of Law and Legal Thought: 1850 – 2000" in *The New Law and Economic Development: A Critical Appraisal* (David M Trubek and Alvaro Santos, Eds, Cambridge UP). Also see, Daniel Haile (1973) "Law and Social Change in Africa: Preliminary Look at the Ethiopian Experience" 9 *J Eth L* 380.

[83] Getachew, "*Ke'Ge'ez SeneTsihouf Gar…"*, *supra* note 13, at 32.

consequent increase in the volume of laws require that effective, yet humane and liberal procedures be adopted to ensure that legislative prescriptions may have the efficacy intended for them as regulation of conduct." It further states that the law, along with developments in other fields, would "transform[] the nation and our lives" and "[would] inevitably shape the lives of those who come after us."[84] Therefore, "new concepts, not only juridical, but also those contributed by the sciences of sociology, psychology and, indeed penology, have been developed and must be taken into consideration in the elaboration" of the 1957 Penal Code.[85] Article 1 of the 1957 Penal Code (and the 2004 Criminal Code) provide for the purpose of the criminal law as promoting the "common good" which is new to Ethiopian criminal law.

In the inaugural statement of the *Journal of Ethiopian Law*, His Imperial Majesty stated, law "is an instrument for civilizing the peoples of the world."[86] He further stated that law "is a unifying force in a nation".[87] It is to facilitate the integration of those principles and doctrines into the Ethiopian legal system and help create a shared understanding of laws in general, that the Law School was established and the *Journal of Ethiopian Law* was inaugurated.[88]

The court cases that were reproduced in the first few volumes of the Journal of Ethiopian Law were meant to introduce the legal method.[89] For instance, the first criminal case that was reproduced in the Journal of Ethiopian Law was that of *Pvt. Getachew Gizaw* who invoked criminal irresponsibility as per the 1957 Penal Code (Articles 48 and 49).[90] At the trial court, the appellant was convicted of homicide in the first degree of one Commander Tsegaye Getaneh and, by a majority, the appellant was sentenced to death. His appeal petition was based on criminal irresponsibility. This case was reproduced to

[84] The 1957 Penal Code, Preface, para 1.
[85] Ibid, para 2.
[86] _____(1964), "Inaugural Statement by His Imperial Majesty" 1 *J Eth L*, vi.
[87] Ibid, v.
[88] Ibid.
[89] They may not be representative of the whole case decided by the courts. However, the High Court, presided by the British Judges such as Buhagiar, they were extraordinary in their interpretation taking into account both the principles in the General Part and the specific provisions in the Special Part of the Penal Code.
[90] *Pvt. Getachew Gizaw v Attorney General* (Imperial Supreme Court, Crim. App File No 95/51).

illustrate the application of criminal (ir)responsibility in the then-newly adopted Penal Code.[91]

The medical examination results were explained in the English version of the judgement written by Judge William Buhagiar and, the judgment of the High Court was affirmed by the Imperial Supreme Court. Further, the death sentence was affirmed by His Imperial Majesty as per Article 59 of the Revised Constitution and Article 204 of the Criminal Procedure Code. This marked a significant manifestation of institutional reform, because the death penalty was traditionally imposed only by the King's Court, and later, only on the basis of the *Fiteha Negest*[92] in parts of Ethiopia where it was effectively applied.

4.2 Historical Legal Theory

As a reaction to the sociological approach that uses law as an instrument of social engineering, and as a cultural reaction to the French codification, the German historical school[93] argued that the law is an outgrowth of the social value system; it is a product of the collective conscience. In Ethiopia, the historical theory of law is reflected in the adoption of the 1930 Penal Code which was meant to catch up with the social and economic developments of the time.[94]

In the preface to the 1957 Penal Code, His Imperial Majesty stated that although we borrow legal rules and concepts from other systems, "the point of departure must remain the genius of Ethiopian legal traditions and

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[91] There were several significant contributions introducing and simplifying the interpretation of the then newly adopted 1957 Penal Code of Ethiopia. See, Peter L Strauss (1968), "On Interpreting the Ethiopian Penal Code" *5 J Eth L* 375; Peter L Strauss and Michael R Topping (1970), "Decision Trees" 7 *J Eth L* 447.

[92] The 1930 Penal Code, First Part, First Chapter No 1; MahitemeSelassie, *supra* note 33, at 86 -88.

[93] Tamanaha, *A Realistic Theory*…, *supra* note 1, at 18 ff.

[94] Preface, paras 1, 6 – 9. For instance para 9 states that "[d]amages and fines which in the year 1700 were paid in cattle, in the year 1800 were paid in salt, in the year 1900 in [Birr]. But since the year 1900, owing to the increase in the people's knowledge, the wider spread of trade, the greater love of work, the greater cheapness of the [Birr] and the diminished profit which is gained by the [Birr], the damages and fine have been of no profit to the injured man who has been awarded damages and have been no deterrent and no burden to the offender has had to pay damages. All the advantages of food and clothing which are necessary for human existence which were formerly purchased for one [Birr] cost to-day up to five [Birr] in a district near a town and up to two[Birr] in the country at a distance from a town. For these reasons, it has become necessary to revise the law of damages and punishments."

institutions which have origins of unparalleled antiquity and continuity."[95] He also stated that such law "must be profoundly grounded in the life and traditions of the nation".[96] Jean Graven states that there was an effort to reconcile "tradition" and "progress" in his justification of why flogging and the death penalty were maintained in the Penal Code adopted in 1957. [97] According to the *Fiteha Negest*, punishment is imposed not only for censuring the individual, but also as an expiation of sin, and it focused on corporal punishment. However, the *Fiteha Negest* further instills the understanding that God has created such condition of hierarchy and authority including the imposition and enforcement of punishment to be the foundation of order and peace, and if there is no authority constituted, it assumes there would be no peace.[98]

4.3 Marxist theory of Law

It is in the context of the social theory of law that Marx's instrumentalist critique of law is discussed. Marx's "class instrumentalism" view of law is one of the most influential theories of law that gave rise to other critical thoughts on the law. His principal point of view which is in issue here is that the law reflects the economic base which is manifested in the false universalisation of legal interests by the superstructure; as such, the law is an instrument for the dominant class exercising dominion over the working class.[99]

Marxist theory of law crept into Ethiopia's legal system in the preamble of the *Provisional Military Government Establishment Proclamation No 1 of 1974*. The first action of the PMAC was a repudiation of various laws and institutions of the Imperial Government; it suspended the 1955 Revised Constitution and prominent institutions. The preamble of Proclamation No 1 of 1974 stated that "the Constitution of 1955 was prepared to confer on the Emperor absolute powers; that it does not safeguard democratic rights but merely serves as a democratic façade for the benefits of world public opinion; that it was not conceived to serve the interests of the Ethiopian people; that it

[95] The 1957 Penal Code, Preface, para 4.
[96] Ibid, para 1.
[97] Graven, *supra* note 28, at 288-291.
[98] "The Law of the Kings", *supra* note 14, at 272.
[99] Raymond Wacks (2006), *Philosophy of Law: A Very Short Introduction* (Oxford UP) at 81-83.

was designed to give the baseless impression that fundamental natural rights are given from the Emperor to his people."[100]

It was further stated that the reason for the suspension of the parliament was that: it had not been serving the people; it had been serving its members and the ruling aristocratic classes; that is the reason it refrained from legislating on land reform which was considered to be the basic problem of the country. The preamble of the Proclamation further stated that the parliament was passing laws at various times that were intended to raise the living standard of its members "using the high authority conferred on it by the people to further the personal interests of its members and aggravating the misery of the people."[101] These statements depict the law as an instrument of oppression by the aristocratic class over the ordinary citizenry.

The PMAC used the law as a political instrument even though it had declared itself as dedicated to "serve the public good and capable of developing Ethiopia and coping with the various security problems prevailing at [the] transitional period."[102] It further established a military court "to try those who contravene" the Motto *Ethiopia Tikidem* and other laws that may be adopted by the PMAC.[103] The decision of the military court would be final; and in exceptional situations, where the punishment is a death sentence or life imprisonment, the decision would be reviewed by the Head of State.[104]

In subsequent legislation, the law was manifestly meant for the promotion of political ideology. For instance, the Special Penal Code (Article 35) punishes those who contravene the Motto "*Ethiopia Tikidem*".[105] To bring about "economic justice" among the various "classes", land and urban extra-houses, and means of production were nationalised.[106] "Socialist legality"

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[100] *Provisional Military Government Establishment Proclamation No 1 of 1974,* Preamble, para 3.

[101] Ibid, para 2.

[102] Ibid, para 4.

[103] Ibid, art 9.

[104] Ibid, art 11. *Definition of Powers of the Provisional Military Administration Council and its Chairman*, *Proclamation No 2 of 1974* grants all the necessary state power to the PMAC, such as lawmaking, treaty-making power and defining the PMAC as the Head State and Government, among others.

[105] The *Revised Special Penal Code Proclamation No 214/1981*, art 12 punishes the so-called *Counter-Revolutionary Acts*.

[106] *Government Ownership and Control of the Means of Production Proclamation No 26 of 1975*; *Public Ownership of Rural Lands Proclamation No 31 of 1975*; *Government Ownership of Urban Lands and Extra Urban Houses Proclamation No 47 of 1975.* Also, see, Stefan Brune (1990), "Ideology, Government and Development – The People's Democratic Republic of Ethiopia" *12 Northeast African Studies 189*; Fasil

was strengthened and "dictatorship of the proletariat" was affirmed in the PDRE Constitution.[107] Without having a constitution, the unelected [109 usually stated as 120] Members of the PMAC changed the political, economic and social setting of the nation irreversibly using the might of "the law".[108]

Several of those laws established local dispute resolution institutions thereby making the courts "irrelevant" by denying citizens access to the regular court on politically sensitive disputes.[109] Finally, the Workers' Party of Ethiopia was constitutionally established, as the only political party and the vanguard of the nation, which limits in essence, the political freedom of citizens.[110] Any challenge to the political authority was criminally sanctioned.

Institutionally, because the PMAC did not have trust in the regular courts, it established the first Special-Courts Martial (1974 -1981) which later was changed to Special Court (1981-1987). The regular courts were applying the 1957 Penal Code and the Criminal Procedure Code while the special courts applied the Special Penal Code and the Revised Special Penal Code respectively. The review process of decisions of the special courts reflects the political nature of the juridical process.

Subsequent to conviction and in the determination of the punishment, in various cases, the special court reasoned that such crimes are in opposition to the establishment of a socialist system (communism), a system where there is no class exploitation, and the decision further stated that the convict is one of those anti-revolutionaries acting both from within and external counter-revolution. An extensive statement is made in *Special Prosecutor v Assefa*

Nahum (1980), "Socialist Ethiopia's Achievements as Reflected in its Basic laws" 11 *J Eth L* 83.

[107] *Constitution of the People's Democratic Republic of Ethiopia*, Art 5.

[108] Fasil Nahum calls it "Legal Revolution" except it is negatively affective the lives of citizens. Fasil, *supra* note 106, at 83 ff.

NB- Bahru Zewde states the figure as 110 and Aregawi Berhe cites two different sources which record 109 Derg members.

[109] When everyone is denied of his/her property, resort to the court would be a natural course of action. However, taking jurisdiction away from the regular courts, the *Peasant Association Organization and Consolidation Proclamation No 71/1975* would establish a tribunal for the disposition of rural land dispute at *Woreda* and *Awraja* levels. Likewise, the *Urban Dwellers' Association Consolidation and Municipalities Proclamation No 104/1975* would establish tribunals at *Kebele*, Higher (*kefitegna*) and Central levels to dispose disputes relating to urban land and houses, among others. In similar fashion, labour disputes were handled by other institutions.

[110] PDRE Constitution, *supra* note 107, Art 6.

Aynalem Mehanzel.[111] In the determination of the punishment, the defence pleaded with the court that he should not be seen as against the revolution because the revolution is meant for persons like the defendant as he is from the oppressed class. The court in addressing this issue held that:

> the broader mass is protecting the revolution dearly because it came for the oppressed and the working class, and the people are moving the revolution from one victory to another victory in the class struggle. Yet, some, like the defendant who is against the revolution, are violating edicts of the state. This crime is committed at a time when the class struggle is undergoing to build a socialist system where no one would exploit another and would not be treated lightly.[112]

After the regular courts were side-lined for thirteen years, they absorbed the special courts, and were empowered to enforce the political ideology of the single-party state. Thus, the *Supreme Court Establishment Proclamation No 9/1987* (Article 3) provides objectives of the Supreme Court to:

1. safeguard the political, economic and social system guaranteed by the Constitution and other laws;
2. safeguard the legally guaranteed rights, interests and freedoms of individuals;
3. safeguard the legally guaranteed rights and interests of *State organs*, *mass organizations* and *other associations*;
4. strengthen the maintenance of law and order and *the observance of socialist legality*;
5. educate the people in order *to raise their legal consciousness*.[113]

It is evident that the PMAC used both the law and the institutions as a means of achieving political ends.[114] The political nature of various laws was reflected in the judicial decisions which appear to be a reflection of "socialist

[111] *Special Prosecutor v Assefa Aynalem Mehanzel* (7 June 1982, Special First Instance Court, Crim File No 14/74).

[112] Similar argument is stated in *Mulugeta*, *supra* note 72.

[113] These are also the objectives of the High and Awraja Courts. *High Courts and Awraja Courts Establishment Proclamation No 24/1988*, art 3. [emphasis added].

[114] *See*, Simeneh and Cherinet, *supra* note 21.

legality".[115] Socialist legality, from the reading of such laws, appears to have given primacy to collective interests than individual interests.[116]

5. Positivisation of Natural Law?

As highlighted in Section 3, positivism upholds that law is what is adopted by the state organ that has the authority to make such law following a certain procedure, and it contains only those rules without any moral judgement regarding its content. The non-positivist theory of law, including classical natural law theory, rather holds that law is not limited to the system of rules, there are (moral) principles and postulates (metanorms) that define the binding nature and content of the positive law.

Robert Alexy rather argues for the necessary connection between law and morality. Both in his "Argument from Injustice[117] and "the Ideal dimension of Law",[118] he made a distinction between the real dimension of law, which is the authority of lawmaking and the efficacy of the law, on the one hand, and the ideal dimension on the other. The ideal dimension of the law is that it must be "correct" and it must be "just". This argument is based on Radbruch's formula[119] and when it involves constitutional (human rights) issues, the argument is related to his proportionality thesis.[120]

Even though it may not be appropriate to put these schools of thought in one basket, it is in this line of argument that modern natural law upholds certain higher principles against which the positive law is evaluated. John Finnis argues for basic (essential) life goods which the law is supposed to help accomplish.[121] Likewise, Dworkin argues from a method perspective that the

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[115] Ibid. It is worth mentioning that in his 1980 E.C. Report, the President of the High Court stated that six officers of the court were deployed to the battlefield, and the rest of the staff are actively working to cover the position of those absentees "in accordance with the instruction given by the Workers' Party of Ethiopia". *1 Chilot No 1* (1989) (Booklet of the Addis Ababa High Court, Amharic) at 11.

[116] *See* text for note 113 *supra*.

[117] Robert Alexy (2002), *The Argument from Injustice: A Reply to Legal Positivism* (Trans. Stanley L Paulson and Bonnie Litschewski Paulson, Clarendon Press) at 35.

[118] Robert Alexy (2021), *Law's Ideal Dimension* (Oxford UP) at 18 ff.

[119] Stanley L Paulson (1994), "Lon L Fuller, Gustav Radbruch, and the 'Positivist' Theses" *13 Law and Philosophy 313*; Andrzej Grabowski (2013), *Juristic Concept of the Validity of Statutory Law: A Critique of Contemporary Legal Positivism* (Trans. Malgorzata Kieltyka, Springer) at 526-533.

[120] Alexy, *Law's Ideal*…, *supra* note 118.

[121] Finnis, *supra* note 4, at 85 ff.

law needs interpretation which involves principles[122] that are beyond legal rules.[123] This is particularly so in the interpretation and application of criminal law rules, and the court uses principles (in the General Part of the criminal law) that determine the scope and application of the positive law.[124]

When the PMAC came to power, it criminalized certain conduct and made the criminal law retroactively applicable. The justification was an appeal to certain higher principles that could not be contradicted by the positive law. When Ethiopian Peoples' Revolutionary Democratic Front ("EPRDF") took power in 1991, it adopted a Transitional Period Charter which contains the UDHR as its bill of rights that recognizes the inherent dignity of humankind. The *Central Government Courts Establishment Proclamation No 40/2993* states that "the rule of the Derge-WPE regime for the last seventeen years had particularly been inhuman wherein democratic rights were suppressed and illegal activities widespread". It further stated that it is the historical obligation of the Transitional Government of Ethiopia "to establish and organize a court system based on fundamental principles of justice which would guarantee the observance of human and democratic rights of the peoples of Ethiopia".[125]

The objectives of the courts as provided for under Art 4(1) would therefore be "safeguarding individual and democratic rights, freedoms and interests guaranteed by the Charter". Jurisdiction of the Courts also covered cases "arising under the Charter, International Treaties and the laws of the Central Government."

This approach is also emulated by the FDRE Constitution. Article 10, for instance, provides that "rights and freedoms emanating from human nature are inviolable and inalienable."[126] Moreover, Article 11(3) of the *Federal Courts Proclamation No 1234/2021* provides that "…the Federal High Court may render a decision, judgment or order to protect justiciable human rights specified under chapter three of the Constitution". The question then would be whether a claim for the enforcement of rights and duties on the basis of such constitutional rules, is based on the natural law or the positive law.

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[122] Dworkin, *supra* note 68, at 119 ff.

[123] *See*, Avila, *supra* note 68.

[124] Alexy, *Argument form Injustice*…, *supra* note 117, at 68-81.

[125] *Central Government Courts Establishment Proclamation No 40/2993*, preamble, paras 2, 3.

[126] Art 15 provides for the right to life, art 16 provides for personal security, art 17 provides for the right to liberty, and art 18 provides for the protection against cruel, inhumane and degrading treatment and punishment.

The practice of the court does not show a situation where unwritten law is applied, including international agreements which are not published in the official *Negarit Gazeta*. The courts consistently use only written law.[127] Claims before the courts are always based on statutory law, which is juridically considered to be valid.[128] Any reference to entitlements based on "natural law" can be given effect only if it is expressly provided for in the positive law. When the claim is based on "natural rights" incorporated into the Constitution, it is a claim based on the provisions of the Constitution, the positive law, not based on the (non-statutory) natural law. Therefore, it is palpable to argue that those "natural law" rules are positivised to be given effect.

It is the principle of legality that dictates the nature of criminal law to be exclusively positive law. Thus, both the prohibited conduct and the consequence need to be stated in the statute. However, it is the interpretation of such criminal law that calls for non-positive law materials in the name of principles, such as the principle of lenity.[129]

6. Pragmatist Instrumentalism of the Law: The Way Forward

Positivism appears to be a theory of convenience both in authoritarian and liberal governance. However, other theories are also taking positivism as a foundation. This is because of the certainty of the positive law. While positivism defines the nature of law, other theories rely on the function of positive law. Irrespective of the nature of such function, the law is considered an instrument for achieving certain objectives, often the collective good.

Unfortunately, as the history of modern law in Ethiopia indicates, the state resorts to using the law as an instrument of choice.[130] Political opposition is an ordinary business in politics. However, the ruling party using its state power utilizes criminal law to suppress political opposition.[131] Even though the declaration of emergency by a government is justified only under

[127] For instance, in Daniel Mekonnen, *supra* note 69, the court applied a directive to convict the accused.

[128] _____ (1950), *The Legal Philosophies of Lask, Radbruch, and Dabin* (Trans. Kurt Wilk, Oxford UP) at 112 -114, 119-120.

[129] *See*, Simeneh "Non-Positivist…", *supra* note 69; Simeneh "Methods…", *supra* note 69.

[130] *See*, for instance, Simeneh and Cherinet, *supra* note 21.

[131] Simeneh Kiros Assefa and Cherinet Hordofa Weter, "Instrumentality of the Criminal Law in Ethiopian Political Power" (Forthcoming).

extraordinary circumstances, it is often seen that the state uses its power of declaring a state of emergency when the political heat increases and the government finds itself weaker to suppress such political opposition.

The first legitimate state of emergency declaration was made around the territories bordering the state of Somalia in 1964.[132] However, most declarations of emergency in Ethiopia are exclusively to control local opposition, whatever form it takes. Such instances include: *Declaration of a State of Emergency in Certain Areas of the Teklay Gizat of Eritrea Order, 1970*; the Proclamation Establishing the PMAC itself that was essentially a declaration of state of Emergency; and *Declaration of State of Emergency Proclamation No 55/1975*. The PDRE Government adopted *Council of State Special Decree No 1/1988 to Declare State of Emergency in Eritrea and Tigray*. The EPRDF Government also adopted the *State of Emergency Proclamation for the Maintenance of Public Peace and Security No 1/2016*. These are just illustrations of the different regimes in Ethiopia.

These declarations of Emergency involved the suspension of rights of citizens, whatever rights they have at the moment of adoption of such proclamation,[133] and giving excessive power to state security forces to suppress any "unrest". It grants the government the power to detain individuals without a court order, keeping them in prolonged detention without bringing them to court, unrestricted search and seizure of individuals and items, the power to prohibit citizens from staying in a certain locality, etc. These are obvious manifestations of excessive state coercive force without or with limited accountability.

One would then ask the basic question: what is the purpose of the law? Both from the principle of utility and the theories of justice or rights, one can arrive at the following conclusion. The principle of *utility* pursues that a certain social objective is worth pursuing if it brings about the greatest happiness to the greatest number of people. Thus, the principle of utility creates a democratic society where the law is made by the majority for the benefit of the majority. When the law is made by the majority and applied to

[132] *Declaration of State of Emergency in the Region Bordering the Republic of Somalia Order, 1964*. The other apparently legitimate declaration of state of Emergency relates to address the Covid-19 pandemic. *A State of Emergency Proclamation Enacted to Counter and Control the Spread of COVID-19 and Mitigate Its Impact Proclamation No 3/2020*.

[133] The constitution promised in the PMAC Establishment Proclamation No 1/1975, art 5(b) is adopted only in 1987. In between, despite some argue there is no constitutional gap, *see* Fasil, *supra* note 106, there was no constitution in between. As a result of which there was no right to be suspended, arguably.

everyone without any protection to the minority, against whose interest the law is applied, it is a rule of domination or majority tyranny. However, rights are the protection of individuals against claims based on principles, such as the principle of utility. Therefore, there is the bill of rights as a protection against the tyranny of the majority.[134]

There are, however, several theories that are meant for the protection of the minority against majority tyranny, and they revolve around the bill of rights. They are incorporated both in legal and political theories.[135] The law is an instrument that should serve everyone in society. It must serve society by helping achieve important social ends, creating a fair and just society, creating wealth, or maintaining law and order. However, it must also afford protection to those who are most vulnerable among us. Such balancing of the two is made possible through the doctrine of the *common good*.[136] That common good is pursued by principles, such as *rule of law*.

Yet this argument is vulnerable in that it appears to have required mere benevolence. The making of state law is associated with political power, which in turn is associated with better organisation of a particular group to control such political power.[137] It is this political power that translates its interests and views into law. Therefore it is this group that defines the state interest. Yet, if the minority is defined by an immutable social or natural identity, that group will remain a minority, without ever having a chance to get a platform for its interests.

Therefore, a just society is one wherein everyone takes part in governance and is treated fairly; and a legislation is valid insofar as it maintains this minimum rule. It is the application of such rule that promotes the rule of law. This doctrine of rule of law is not only the institution and implementation of the positive law; rather it also involves the participatory process in lawmaking and implementation.[138]

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[134] Ashutosh Bhagwat (2010), *The Myth of Rights: The Purposes and Limits of Constitutional Rights* (Oxford UP) at 24-26.

[135] John Rawls (1999), *A Theory of Justice, Revised Edn* (The Belknap Press) at 19 -21.

[136] The doctrine of "common good" is legitimation principle for the use of criminal rules in Ethiopian. *See*, Simeneh and Cherinet, *supra* note 21; Simeneh and Cherinet (forthcoming), *supra* note 131.

[137] R Hardin (2006), "Constitutionalism" in B Weingast and DA Wittman (eds), *The Oxford Handbook of Political Economy* (Oxford UP) at 298.

[138] Brian Z Tamanaha (2004), *On the Rule of Law: History, Politics, Theory* (Cambridge UP) at 99-101.

Thus, there has to be a need to have a law, it must be made by the decision of the majority, the lawmaking process must be inclusive, and the law should not be unreasonable and should not be intrusive on the minority.[139] Indeed, the law is the common institution we reign on ourselves. And as years and decades roll on, there can be the need for a constant revision of, and agreement on the "social contract".

7. Conclusion

This article has attempted to review the various theories that are believed to explain the nature and function of criminal law in Ethiopia under three categories – the natural law theory, positivism and social theory of law. The natural law theory has been a dominant theory for several centuries. When the church had a strong grip on society, it enforced its religious morality through criminal punishment. Transgressions to those ecclesiastic rules were treated as a sin deserving corporal punishment for the expiation of such sin, without which the individual would be condemned to punishment in the world without end.

With the modernisation of legislation, positivism grew to govern almost all aspects of life. When power shifted from the church to the monarch, the latter adopted laws, and society progressively moved away from religious rules to secular ones. The positive law is meant to enforce state objectives. Statutory rules are imposed on citizens as effective controlling tools for the state. As power is exercised by the different institutions, the authoritarian nature of the state is diffused among those institutions. The state makes use of positive law excessively. To minimize the instrumental nature of criminal law, it is finally proposed that the law should be employed to its proper utility, *promoting the common good*.

[139] Ibid, at 104-112.

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