CASE COMMENT

The Retroactive Application of Criminal Law in Favor of the Accused: A Comment on the FDRE Council of Constitutional Inquiry's (CCI) Decision

Bebizuh Mulugeta Menkir ♣

Abstract

Article 182 of the Customs Proclamation (Proclamation No 859/ 2014) provides that cases pending before the coming into force of the Proclamation shall be treated in accordance with the previous law. In *Melaku Fenta* et al, the constitutionality of this provision was challenged because it denied the retroactive application of criminal law in favor of the accused. In its decision, the CCI declared the provision as constitutional and this comment aims to examine this decision. By examining the decision in light of Art 22(2) of FDRE Constitution, domestic laws, international legal frameworks and the literature concerning the retroactive application of criminal law in favor of the accused, this comment argues that the CCI should have declared Art 182 as unconstitutional to the extent it denied the retroactive application of criminal law in favor of the accused. Determining whether the accused could benefit from the decriminalization should have been left to the court to decide.

Keywords

Council of Constitutional Inquiry, accused, criminal law, constitution, interpretation, retroactivity

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Contents

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1. Introduction

The retroactive application of criminal law in favor of the accused is a constitutional law norm and criminal law principle that is recognized under Art 22(2) of FDRE Constitution, Art 5(3) and Art 6 of the Criminal Code and other human rights instruments ratified by Ethiopia. Customs Proclamation (Proclamation No 859/ 2014) decriminalized some conducts that used to be criminal acts in the preceding Customs Proclamation (Proclamation No 622/2009). Yet, Art 182 of the Proclamation states that "cases pending before the coming into force of the proclamation shall be treated in accordance with the previous law."

In *Melaku Fenta et al* case, the constitutionality of Art 182 was questioned because it denied the retroactive application of criminal law in favor of the accused. As a result, the Federal High Court referred the matter to the Council of Constitutional Inquiry (CCI) and House of Federation (HoF) for constitutional interpretation. The CCI decided that Art 182 of the Proclamation does not contradict Art 22(2) of the FDRE Constitution.

This case comment examines this decision in light of the retroactive application of criminal law in favor of the accused. By consulting domestic and international legal frameworks, court cases and scholarly literature, it is argued that the CCI erred in its decision. It is also argued that the CCI should have declared Art 182 as unconstitutional to the extent that it denied the retroactive application of criminal law favoring the accused. Determining whether the accused (*Melaku Fenta et al*) could benefit from decriminalization should have been left to the court to decide.

The next section provides a general overview of the facts in *Melaku Fenta et al* case and the decision of the CCI. Section 3 briefly discusses the application of criminal law in relation to time. Section 4 examines CCI's decision and Art 182 of the Proclamation in light of the principle of retroactive application of criminal law that favors the accused. The last section, Section 5, provides concluding remarks.

2. *Melaku Fenta* et al vs. Ethiopian Federal Ethics and Anti-Corruption Commission Prosecutor

2.1 The issue on constitutional interpretation

Ethiopian Federal Ethics and Anti-Corruption Commission Prosecutor (hereafter also referred to as the EFEACC Prosecutor") filed criminal charges in the Federal High Court against *Melaku Fenta and* other twenty-four

individuals (in two separate files).[1] The charges presented include corruption crimes (maladministration) that were alleged to have been committed in violation of Art 411 of the Criminal Code and the Federal Customs Proclamation (Proclamation No 622/2009)[2]. The director of the Ethiopian Revenue and Customs Authority (*Melaku Fenta*) and the deputy director (*Gebrewahid W/Giorigis*) were accused of abusing their authority on the duty-free importation rights and importation of restricted commodities/ medicine; with the intent to procure an undue benefit for themselves and other defendants in the case.[3]

While the criminal case was pending, a new customs proclamation (Proclamation No 859/ 2014)[4] repealing the previous customs proclamation (Proclamation No 622/2009) was enacted. The new proclamation decriminalized the acts that were the basis for the corruption charges presented against the accused and they were regulated by administrative measures and penalties.

Following the enactment of Proclamation No 859/ 2014, the accused sought the retroactive application of criminal law. In their petition submitted to the Federal High Court, the accused argued that Art 163(1) of Proclamation No 859/2014 decriminalized acts related to the abuse of duty-free importation right. In relation to the importation of restricted commodities/medicines, the accused justified their argument for decriminalization by citing Art 156(1) of the latest proclamation. The accused also mentioned the absence of any other remaining conduct that can be used as a basis to constitute a crime of corruption (maladministration) under Art 411 of the Criminal Code. Accordingly, they requested the termination of the pending criminal charge according to Art 22(2) of the FDRE Constitution and Art 5(3) of the FDRE Criminal Code.[5]

The EFEACC Prosecutor argued that the criminal charges presented against the accused are based on Articles 32(1)(a) & 411 of the Criminal Code and stated that the changes in the customs proclamation shall not affect the

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[1] *Melaku Fenta et al* vs. Ethiopian Federal Ethics and Anti-Corruption Commission (EFEACC) Prosecutor, Federal High Court, File No 141352 & 141356, (hereafter *Melaku Fenta et al* vs. EFEACC Prosecutor) (unpublished)

[2] Customs Proclamation, Proclamation No. 622/2009, Fed Neg. Gazette 15th Year No.27 19th February, 2009 Addis Ababa

[3] *Melaku Fenta et al* case, Council of Constitutional Inquiry (CCI) decision (here after referred as CCI decision), File no 1421/2015), July 24/ 2015, (unpublished); also in *Melaku Fenta et al vs. EFEACC* Prosecutor, *supra* 1

[4] Customs Proclamation, Proclamation No. 859/2014, Fed Neg. Gazette 20th Year No.82 9th December, 2014 Addis Ababa

[5] Ibid.

pending charge against them.[6] The Federal High Court then addressed the issue of whether there are crimes that are decriminalized by Proclamation No 859/ 2014, and stated the following;

> … contraband, possession of illegal properties, inappropriate utilization of duty-free imported commodities, custom frauds (committed in the disguise of legally imported commodities) and other customs fraudulent acts which used to be criminal acts under the former customs (Proclamation No 622/2009) have been decriminalized under … the latest proclamation (Proclamation No 859/2014).[7] (Author's translation)

The court also made reference to the transitory provision (Art 182) of the Proclamation which states that "without prejudice to the provisions of other laws, cases pending before the effective date of this proclamation shall be disposed in accordance with the previous laws."[8]As the court found this provision contradictory to Art 22(2) of the FDRE Constitution, it referred the matter to HoF and CCI for constitutional interpretation.[9]

2.2 Overview of CCI's decision

In its decision, the CCI examined whether the transitory provision stated under Art 182 is contradictory to Art 22(2) of the FDRE Constitution and Art 5(3) of the FDRE Criminal Code.[10] The court's reasoning in its decision stated the following:

> Before rendering a decision on whether the phrase "subject to the provisions of other laws" under Article 182 of the Proclamation really refers to the provisions of Article 22(2) of the Constitution and Article 5(3) of the Criminal Code, and before determining whether it conflicts with the Constitution and the Criminal Code, laws that lack clarity and

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[6] Decision of the court on June 19th /2015, at 7, 10&12

[7] Id., at 12-13. The ruling of the Federal High Court reads: "**በጉምሩክ አዋጅ ቁጥር** 622/ 2001 **ውስጥ እንደ ወንጀል ይቆጠሩ የነበሩ የኮንትሮባንድ፣ ሕገወጥ ዕቃዎችን ይዞ መገኘት፣ ወደ አገር ውስጥ የገባን ዕቃ ያላግባብ መገልገል፣ ከቀረጥ ነፃ የገባን እቃ አላግባብ መገልገል፣ በሕጋዊ ዕቃ ከለላነት የሚፈፀም የማጭበርበር ወንጀል እና ሌሎች የጉሚድ ማጭበርበር ወንጀሎች እና አተረጓጎማቸው በ አዲሱ የጉምሩክ አዋጅ ቁጥር** 859/2006 **ትርጉም ለውጥ የተደረገባቸው ያሉ በመሆኑ፣ ሙሉ በሙሉ እንደወንጀል ይቆጠሩ የነበሩ የወንጀል ዓይነቶች፣ ወንጀልነታቸው ቀሪ እንዲሆን** (decriminalize) **ስለመሆናቸው ችሎቱ አረጋግጧል፡፡**"

[8] Customs Proclamation, *supra* note 4, Art 182

[9] *Melaku Fenta et al vs. EFEACC Prosecutor, supra* note 1, see ruling given on June 19th /2015, pp. 14-15

[10] CCI decision, *supra* note 3

> that are ambiguous should be interpreted in accordance with the general objective of the Proclamation and our system of legislative enactment.[11]

The CCI stated that the general objective of the Proclamation is to put in place a modern customs law that is supportive of the development of the nascent manufacturing industry and that encourages lawful trade and investment initiatives in the country.[12] Complying with international and regional trade agreements that require advanced customs law and practice is also the other objective of the proclamation mentioned by the CCI.[13] In addition, the CCI stated that the Proclamation aims to strengthen the legal framework to prevent the increasing threat that contraband and other illegal trade activities have posed to the national security, government income and other social and economic development of Ethiopia.[14] The CCI also stated that the Customs Proclamation No 859/ 2014 has been enacted to realize these objectives, but not to benefit the accused or convicted individuals.[15] Furthermore, as per the CCI, whether it is benefiting the accused or not, the Proclamation shall be seen in accordance with the principle of justice, equity and the objectives stated in the Proclamation.[16]

The CCI also considered whether the Proclamation was indeed favoring the accused.[17] In this respect, it referred to the second paragraph of Art 3 of the Criminal Code that limits the applicability of the general principles of the Criminal Code when the provisions of special penal legislation provide otherwise. The CCI then stated that Art 182 of the Proclamation is a special penal legislation that puts exception to the applicability of the general principles of the Criminal Code, so as to achieve the general objectives of the

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[11] Id., at 3. The decision reads: "**የአዋጁ አንቀጽ** 182 **በሌሎች ሕጎች የተገለፁት እንደተጠበቁ ሆነው የሚለው ሐረግ በእርግጥም ከሕገመንግሥቱ አንቀጽ** 22(2) **እና በወንጀል ሕግ አንቀጽ** 5(3) **የተገለፁትን የሚመለከት ነው? ወይስ አይደለም? ወይም ከሕገ መንግሥቱ እና ከወንጀል ሕጉ ጋር ይጋጫል? ወይስ አይጋጭም? በሚለው ላይ ውሳኔ ከመሰጠቱ በፊት ሕጎች በራሳቸው ግልፅነት ከሌላቸው እና አሻሚ ከሆኑ ለሕጉ ትርጉም መሰጠት ያለበት ከአዋጁ ጠቅላላ ዓላማ እና ከሕግ አቀራረፅ ሥርዓታችን አንፃር መሆን ይገባዋል።**"

[12] CCI decision, *supra* note 3, p. 20

[13] Ibid

[14] Ibid

[15] Id., pp. 3-4. CCI's decision reads:"**አዲስ የወጣው የጉምሩክ አዋጅ ቁጥር** 859/2006 **በቀድሞው የጉምሩክ አዋጅ ቁጥር** 622/2001 **ላይ የተቀመጡ ጉዳዮችን በትኩረት በማየት ከአዋጁ አጠቃላይ ዓላማ ሲባል የተሻሻለ እንጂ ፣ ተከሳሾችን ወይም የተቀጡ ሰዎችን ለመጥቀም ታሳቢ ተደርጎ የወጣ አይደለም።**"

[16] Id., p. 4.

[17] But here, the CCI went out of its mandate to interpret the constitution. This is because determining whether the law is favoring the accused is the mandate of the court as per Art 6, second paragraph, of the Criminal Code.

Proclamation stated in its preamble.[18] In particular, the CCI stated the following regarding the constitutionality of Art 182 of the Proclamation.

> Art 182 of the Proclamation … does not allow the accused to benefit from it. Retroactive application of criminal law benefiting the accused, stated under Art 22(2) of the Constitution, applies when the new proclamation makes the accused beneficiary. In the case at hand, since the Proclamation does not make the accused beneficiary, it is not contradictory to Art 22(2) of the Constitution.[19] (Author's translation)

3. The Applicability of Criminal Law in Terms of Time: An Overview

3.1 The non-retroactive application of criminal law

The principle of legality is a fundamental principle of criminal law that has a constitutional norm status.[20]According to this principle, an individual shall not be convicted for committing a crime for an act that was not an offence at the time of its commission (*nullum crimen sine lege*); nor does s/he receive a punishment other than what is stated in the law at the time of the commission of the act (*nulla poena sine lege*).[21] As the principle of legality requires prior notice of the prohibited conducts together with their punishment, it inevitably requires the prospective application of criminal law; i.e., a non-retroactive application of criminal law.[22]

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[18] CCI decision, *supra* note 3 p. 4. The conclusion that the CCI made based on the second paragraph of Art 3 of the Criminal Code may adversely affect the fundamental norms such as the " principle of legality", "prohibition on the retroactive application of criminal law", "prohibition of double jeopardy" which are constitutional principles that cannot be limited by subsidiary legislations. (*See* also, Simeneh Kiros and Chernet Wordofa (2017), "Over-criminalization": A Review of Special Penal Legislation and Administrative Penal Provisions in Ethiopia, XXIX (1) *Journal of Ethiopian Law*, p.70

[19] CCI's decision in *Melaku Fenta et al* case, *supra* note 3 The decision reads: "**አዋጅ ቁጥር** 859/ 2006 **በመሻሻገሪያ ድንጋጌው አንቀጽ** 182 **በሌሎች ሕጎች እንደተጠበቀ ሆኖ ይህ አዋጅ ከወናበት ቀን በፊት የተጀመሩ ጉዳዮች በነበረው ሕግ መሠረት ፍፃሜ ያገኛሉ**" **በማለት በግልፅ ተከሳሾች በዚህ አዋጅ እንዳይጠቀሙ አድርጓል፡፡ የሕገ መንግሥቱ አንቀጽ** 22(2) **ድርጊቱ ከተፈፀመ በኋላ ለተከሳሹ ወይም ለተቀጣው ሰው ጠቃሚ ሆኖ ከተገኘ ከድርጊቱ በኋላ የወጣው ሕግ ተፈፃሚነት ይኖረዋል በማለት የተደነገገው የሚሠራው አዲሱ አዋጅ ተከሳሾች እንዲጠቀሙ ያደረገ ከሆነ ነው፡፡ በዚህ ጉዳይ አዲሱ አዋጅ ተከሳሾችን እንዲጠቀሙ ያላደረገ በመሆኑ ከሕገ-መንግሥቱ አንቀጽ** 22(2) **ጋር አይጋጭም፡፡**"

[20] Simeneh Kiros (2017). "Methods and Manners of Interpretation of Criminal Norms", 11(1) *Mizan Law Review*, p. 107

[21] Philppe Graven (1965). *An Introduction to Ethiopian Penal Law* (Haile Selassie I University and Oxford University Press) pp. 17 &18.

[22] Id., *see* also Simeneh, *supra* note 20, pp 107&109.

The non-retroactive application of criminal law protects individuals from arbitrary and abusive use of criminal law.[23] This principle is also important to maintain legal certainty and avoid discriminatory application of criminal law.[24] Ethiopia is no different because the prohibition on the retroactive application of criminal is recognized under the FDRE constitution to protect individuals from an abusive application of criminal law.[25] The same principle is recognized under Art 5 of the Criminal Code and Art 15(1) of the International Covenant on Civil and Political Rights (ICCPR).

3.2 The retroactive application of criminal law in favor of the accused

The principle of prohibition on the retroactive application of criminal law is subject to an exception in case it is favorable to the accused person. Choosing the law favoring the accused is a universally accepted principle that is applicable where two laws apply at the same time or if they have different temporal applications.[26] If there are laws applicable at the same time, the one favoring the accused shall be applied. The same holds in the case of laws having different temporal applications whereby a person who has committed an offence in the previous law shall be prosecuted or punished according to the latest law if it favors the accused.[27]

The retroactive application of criminal law in favor of the accused is also part of the general objective of preventing arbitrary, abusive and discriminatory application of criminal law. Moreover, applying criminal law favoring the accused is justified by the principle of lenity.[28] The retroactive application of criminal law favorable to the accused is justified because the replacement of the previous law by another law means that "the new law is more satisfactory than the laws that it replaces."[29]

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[23] Shahram Dana "Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing", (2008-2009), 99(4) *J. Crim. L. & Criminology,* pp. 662-664; Yarik Kryvoi & Shaun Matos (2021), "Non-Retroactivity as a General Principle of Law", 17(1) *Utrecht Law Review*, p. 48; David Sulakvelidze, (2021), "The Retroactive Application of Criminal Law-A Commentary on the Judgment of the Constitutional Court of Georgia", pp. 119, 119-129 < https://clr.iliauni.edu.ge/wp-content/uploads/2020/05/David-Sulakvelidze-pp.119-129.pdf >, accessed on 4/9/2023.

[24] Ibid.

[25] Constitution of the Federal Democratic Republic of Ethiopia, 1995, Proclamation No. 1, Fed. Neg. *Gazette*, 1st year, No 1, Art 22 (1) ; FDRE Constitution, Explanatory Note, at 50

[26] Simeneh, *supra* note 20, p. 109.

[27] Simeneh, *supra* note 20, pp. 107 & 109, Graven, *supra* note 21, at 19.

[28] Simeneh, *supra* note 20, pp. 107& 109

[29] Graven, *supra* note 21, at 19.

The retroactive application of criminal law favoring the accused is also recognized under the FDRE Constitution, the FDRE Criminal Code and the International Covenant on Civil and Political Rights (ICCPR).[30] One of the issues that can be raised regarding the retroactive application of criminal law in favor of the accused is whether it can be limited by subsidiary criminal legislation. In this respect, it is argued that this principle shall not be limited by criminal legislation because doing so, among others, paves the way for the discriminatory application of criminal law by allowing criminal legislation to be enacted only for a specific individual or group of individuals.[31]

4 The CCI Decision *vs.* the Retroactive Application of Criminal Law in Favor of the Accused

As stated above, the CCI declared Art 182 of the Proclamation as constitutional by interpreting it in accordance with the objectives of the proclamation namely –supporting the development of the manufacturing industry, encouraging lawful trade and investment activities, complying with the terms of international and regional trade agreements and prevention of trade-related crimes[32] As per the CCI decision, these objectives will be achieved by disposing of pending cases in accordance with the previous law[33] which may also include denying the retroactive application of criminal law that benefits the accused. CCI's interpretation is problematic because of the following reasons.

FDRE Constitution (Art. 22/2) and ICCPR (Art. 15/1)

The constitutionality of criminal legislation shall be evaluated in the light of the "accurate contents and ... scopes of the relevant constitutional provision and the standards it sets out for substantive law."[34] In *Melaku Fenta et al* case, the CCI committed error from the outset because it considered the objectives of the Proclamation (rather than the content of Art 22(2) of the Constitution) to examine the constitutionality of Art 182 of the proclamation.The content of Art 22(2) of the Constitution is clear on the retroactive application of criminal law favoring the accused. The mandatory stipulation that provides an

[30] FDRE Constitution, *supra* note 25, Art 22(2), The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No.414/2004, Fed. Neg. Gazette, Addis Ababa, 9 May 2005, Art. 5(3) & Art 6. International Covenant on Civil and Political Rights (ICCPR), 999 UNTS (1966) (hereafter ICCPR), Art 15(1).

[31] Simeneh, *supra* note 20, p. 107

[32] CCI decision in *Melaku Fenta et al* case, *supra* note 3

[33] Id., at 4

[34] Sulakvelidze, *supra* note 24, p. 124

exception to the non-retroactive application of criminal law reads "… a law promulgated subsequent to the commission of the offence *shall apply if it is advantageous to the accused or convicted person*."[35] (*Emphasis added*). Based on the mandatory content of Art 22(2) of the Constitution, it can be argued that a retroactive application of criminal law favoring the accused cannot be limited by criminal legislation. As a result, contrary provisions in criminal legislation, (like Art 182 of the Proclamation) shall be declared unconstitutional.

If objectives have to be considered for constitutional interpretation, it shall be the objectives of the Constitution that shall guide the interpretation of the constitutionality of a subsidiary legislation or a provision thereof. In this regard, the objective of Art 22 of the FDRE Constitution is to protect individuals from the abusive use of criminal law.[36] I argue that non-retroactive application of criminal law and the retroactive application of criminal law favoring the accused are the two ways that are designed to realize the objective of the Constitution. Despite this, the CCI interpreted the constitutionality of Art 182 of the Proclamation in light of the objectives of the customs proclamation; rather than the objectives of Art 22 of the Constitution, which shows the other erroneous aspect of its decision.

The retroactive application of criminal law favoring the accused is also embodied in Art 15(1) of the ICCPR.[37] Since Ethiopia is a party to the ICCPR, Art 15(1) shall be considered an integral part of Ethiopian law by virtue of Art 9(4) of the FDRE Constitution. Moreover, fundamental rights and freedoms enshrined under Chapter III of the Constitution shall be interpreted in line with the provisions of international human rights covenants.[38] This rule of interpretation is also valid (by extension) to interpret subsidiary legislation.[39] Thus, in *Melaku Fenta et al*, Art 15(1) of ICCPR should have prevailed over Art 182 of the Customs Proclamation with regard to laws that favor the accused.

The CCI stated in its decision that the phrase under Art 182 that reads " …without prejudice to the provisions of other laws …" refers to laws (like anti-money laundering proclamations) that were enacted before the coming

[35] FDRE Constitution, *supra* note 25, Art 22(2).
[36] FDRE Constitution Explanatory Note, at 50
[37] Art 15(1) of ICCPR reads as "…If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty**,** *the offender shall benefit thereby*." (*Emphasis* added)
[38] FDRE Constitution, *supra* note 25, Art 13(3)
[39] Adem Kassie Abebe (2012). "Litigating Human Rights in Ethiopia", 4(2) *Ethiopian Bar Review*, p. 66

into force of the customs proclamation; that considered crimes against customs laws as predicate crimes.[40] The CCI did not provide reason why it singled out these proclamations to interpret Art 182. Nevertheless, if doubts shall be interpreted in favor of the accused, the phrase could also be interpreted as it refers to Art 22(2) of the FDRE Constitution and Art 5(3) and 6 of the Criminal Code that require the retroactive application of criminal law in favor of the accused.

In *AMICO* vs. Ethiopian Federal Revenue and Customs Authority and *Seyfe Abebe Negussie vs.* Ethiopian Federal Revenue and Customs Authority, the Federal Supreme Court Cassation bench rendered judgments that dropped criminal cases that were pending before the coming into force of Proclamation No 859/ 2014. The Cassation Bench dropped these criminal charges in accordance with Art 5(3) of the Criminal Code and Art 22(2) of the FDRE Constitution.[41] In doing so, the Cassation Bench did not give effect to Art 182 of the Customs Proclamation No 859/ 2014) that stipulated for pending cases before the coming into force of the new customs proclamation to be disposed of in accordance with the previous customs proclamation (Proclamation No 622/2009)[42]. The cassation bench did not raise any of the concerns and objectives of the new Proclamation that the CCI used as a basis for its decision in *Melaku Fenta et al*.

There is one aspect of the case that needs extra examination though. In the submission to the High Court, the Prosecutor argued that the criminal charges presented against the accused are based on Art 32(1)(a) and Art 411 of the Criminal Code and that the changes in the Custom Proclamation shall not affect the pending charges.[43] According to the Prosecutor, the crime of corruption, under Art 411, still continued to be a criminal act unaffected by the decriminalization under new Customs Proclamation.[44] In this respect, as the Federal High Court correctly indicated, whether the crime of corruption

[40] CCI decision in *Melaku Fenta et a*l case, *supra* note 3, p. 5.

[41] See, *AMICO vs. Ethiopian Federal Revenue and Customs Authority*, Federal Supreme Court Cassation Bench, File No 111086, Vol. 19, (March 4th / 2016). *Seyfe Abebe Negussie vs.* Ethiopian Federal Revenue and Customs Authority (Adama Branch) Prosecutor, Federal Supreme Court Cassation Bench, File No 111960 , Vol. 21, (Nov. 15/ 2016)

[42] See, *AMICO vs. Ethiopian Federal Revenue and Customs Authority*, Federal Supreme Court Cassation Bench, File No 111086, Vol. 19, (March 4th/ 2016).

[43] *Melaku Fenta et al vs. EFEACC* Prosecutor, *supra* note 1, (ruling given on June 19th /2015, at 7,10 &12)

[44] Ibid.

can exist independently from the decriminalization made by the latest Customs Proclamation is something that shall be decided by the court itself.[45]

Objectives of the proclamation

Denying the retroactive application of criminal law favoring the accused is not justified even in light of the objectives of the Proclamation that the CCI referred to in its decisions. As the focus should be on the future than in the past, it is the implementation of the improvements introduced by Proclamation No 859/2014 that can be helpful in achieving its objectives. For instance, if prevention of crimes as the objective of the law is considered, criminal law prevents crimes by providing prior warning by identifying the prohibited actions and omissions. In *Melaku Fenta et al,* the Proclamation has already decriminalized the conducts[46] which were the reasons for corruption charges. It is because the legislature does not believe in the significance of their continued criminalization that it decriminalized them under Proclamation No 859/ 2014. This shows the legislature's objective that considers "the new law as more satisfactory than the law that it replaces".[47]

As the adequacy of the latest law shall be seen in light of the provisions and objectives that it intends to realize, it is only the criminalized conduct that shall be taken as necessary to realize the objectives of the new Proclamation. Denying retroactive application of criminal law in favor of the accused is not thus helpful in the realization of the Proclamation's objectives. Moreover, CCI's reasoning states how denying the retroactive application of criminal law in favor of the accused will be useful to promote trade and investment. With respect to the third objective, there is no international obligation, specifically identified by the CCI, which Ethiopia must comply with by denying the retroactive application of criminal law benefiting the accused. On the contrary, the ICCPR as stated above provides otherwise.

'Ultima ratio' and the principle of lenity

According to the principle of "*ultima ratio*", interference by criminal law is justified only when other alternatives in civil and administrative laws are

[45] Id., at.12. Art 6 of the Criminal Code reads as "Where the criminal is tried for an earlier crime after the coming into force of this Code, its provisions shall apply if they are more favorable to him than those in force at the time of the commission of the crime. *The Court shall decide in each case whether, having regard to all the relevant provisions, the new law is in fact more favorable*." (Emphasis added)

[46] These conducts are contraband, possession of illegal properties, inappropriate utilization of imported commodities and inappropriate utilization of customs duty free imported commodities. (See, *Melaku Fenta et al* vs. EFEACC Prosecutor, *supra* note 1; court ruling given on June 19th /2015, pp. 12-13).

[47] Graven, *supra* note 21, p. 19.

proven to be inadequate to realize the objective of the law.[48] With regard to Art 182 of the Proclamation, the legislator has already preferred administrative penalties with respect to certain conducts. If such conducts committed after the coming into force of the Proclamation are treated favorably (through administrative measures), there is no reason to deny the same treatment for pending cases. While there are still other less restrictive alternative measures that can be taken to deal with past conduct, insisting on the application of criminal law will be against the principle of "*ultima ratio*."

Denying the favorable application of criminal law is also against the *principle of lenity*.[49] According to this principle, doubts shall be applicable in favor of a defendant and the legislator shall not limit the application of criminal law in favor of the accused.[50] The Customs Proclamation No 859/2014 that limits the application of criminal law favoring the accused is against the principle of lenity and it pursues discriminatory application of criminal law. [51]

5. Conclusion

Art 182 of the Customs Proclamation No 859/2014 stipulates that cases pending before the Proclamation came into force shall be regulated under the previous law (Proclamation No 622/2009). In *Melaku Fenta et al*, this raised the issue of constitutional interpretation because the provision prohibits the retroactive application of criminal law in favor of the accused provided under Art 22(2) of the FDRE Constitution. On this issue, the CCI decided that Art 182 does not contravene Art 22(2) of the FDRE Constitution.

As discussed in the preceding sections, the mandatory provision under Art 22(2) of the Constitution that forbids a retroactive application of criminal law favors the accused, and this cannot be limited by criminal legislation. Thus Art 182 of the Proclamation is unconstitutional because it denies the favorable treatment that the accused would otherwise enjoy. The retroactive application of criminal law in favor of the accused is also mandatory under Art 15(1) of ICCPR, which is an integral part of Ethiopian law by virtue of Art 9(4) of the FDRE Constitution. Moreover, fundamental rights and freedoms enshrined

[48] Simeneh, Simeneh Kiros (2020), "'Non-positivist' Higher Norms and 'Formal' Positivism: Interpretation of Ethiopian Criminal Law", 14(1) *Mizan Law Review*, p.95. *See* also Simeneh Kiros and Chernet Wordofa (2017), "Over-criminalization": A Review of Special Penal Legislation and Administrative Penal Provisions in Ethiopia", XXIX (1) *Journal of Ethiopian Law*, pp. 50 & 57

[49] Simeneh, *supra* note 20, p. 107

[50] Ibid

[51] Ibid

under Chapter III of the Constitution shall be interpreted in line with the provisions of international human rights covenants. This renders Art 182 of the Customs Proclamation inapplicable with respect to criminal laws favoring the accused.

The objectives of the Constitution shall be considered while interpreting the constitutionality of Art 182. In this regard, the objective of Art 22 of the FDRE Constitution is to protect individuals from arbitrary and discriminatory use of criminal law. It does so, among others, through a retroactive application of criminal law favoring the accused. Any subsidiary legislation or a provision thereof that limits this shall be declared unconstitutional.

It is to be noted that the objectives of the Proclamation mentioned by the CCI in its decision are all forward-looking on future activities. Hence, focusing on the already decriminalized conducts of the past and denying the retroactive application of criminal law favoring the accused is not helpful to achieve the objectives of the Proclamation. The legislator has already preferred administrative measures for similar conducts that were the reasons for corruption charges in *Melaku Fenta* case. This shows that insisting on the application of criminal law in *Melaku Fenta et al* is against the principle of *"ultima ratio"*

Art 182 and the phrase contained therein that reads "…without prejudice to other laws" should have been interpreted in a way that accommodates the provisions of the FDRE Constitution and the Criminal Code concerning the retroactive application of criminal law favoring the accused. The CCI has thus committed an error in its decision, in *Melaku Fenta* case, by considering Art 182 of the Proclamation as constitutional. The CCI should have rather declared Art 182 as unconstitutional to the extent it denies the retroactive application of criminal law favoring the accused. Determining whether the accused could benefit from the decriminalization should have been left to the court to decide according to Art 6 of the Criminal Code. ■

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