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IGNORANCE DEFENSE AND UNPUBLISHED ADMINISTRATIVE RULES IN ETHIOPIA

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Abstract

The maxim ignorance of law is no excuse might work where crimes were acts that every human conscience considers taboo. In the era of proliferating regulatory offences, it may risk punishing those who violate the law without any hint that what they did may be offensive. To decrease this risk, there is the duty of the state to make the law known. This article examines criminal liability based on unpublicized administrative rules. To this end, an examination is made to relevant literature, comparative experience, laws and cases. Although agency directives do not create crimes by themselves, their violation may lead to prosecution based on the higher laws that enable their enactment. The author argues that in cases of criminal charges based on unpublicized agency directives, the prosecution should be required to prove whether the accused knew the directive she is accused of having violated. Failing this, courts should presume the accused commits the offence due to ignorance of law and choose between acquitting the accused and convicting her but imposing no penalty. If acquittal is found to be unwarranted for whatever reason courts may see, conviction serves the primary goal of criminal law, i.e., notice.

Keywords: *administrative rules; criminal guilt; Ignorance of law; promulgation of laws.*

1. Introduction

As a principle, ignorance of law is no excuse.[1] However, courts may mitigate punishment[2]and impose no penalty in cases of absolute and justifiable

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[1] Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/ 2004, Art. 81 (1).

ignorance and good faith without overt criminal intent.[3] The principle that ignorance of law is no defense is founded on everyone's duty to know the law[4] and got acceptance mainly because ignorance defense can be invoked but no one knows how to refute it.[5] In the era of proliferating regulatory offences, however, ignorance of law is a reality and relying on the ignorance maxim erodes due process of law.[6] To decrease this risk, due process of law requires the government to promulgate the law and effectively announce its existence to the public before it takes effect.[7] In Ethiopia, laws are promulgated in Negarit Gazeta since 1942.[8] Currently, there is Federal Negarit Gazeta for federal laws and states have their own official law gazettes.[9]

This article asks whether administrative rules should be promulgated and whether ignorance can be a defense against unpublicized administrative rules in five sections. Next to this introduction, section two examines the literature about the ignorance maxim and new challenges to it. Section three examines states' duty to make the law known and cases where ignorance may be an excuse. Section four presents the Ethiopian experience, followed by a conclusion under section five.

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[2] FDRE Criminal Code, Art. 81(2).

[3] FDRE Criminal Code,Art.81(3).

[4] Nciko Arnold, *Ignorance of the Law is no Defence: Street Law as a Means to Reconcile this Maxim with the Rule of Law*, Strathmore Law Review (2018) , P. 26; Bruce R. Grace, *Ignorance of the Law as an Excuse*, Columbia Law Review(1986), Vol. 86, No.7, P. 1395.

[5] Sharon L. Davies, The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance, Duke Law Journal (1998), Vol. 48, No. 3, P 342.

[6] See generally Douglas Husak, Overcriminalization: The Limits of the Criminal Law, (Oxford University Press, 2008); Paul Rosenzweig, *Ignorance of the Law Is No Excuse, But It Is Reality*, Backgrounder *(*2013) , No. 2812 ; Grace, *supra* note 4, Pp. 1395-1398.; *Arnold, supra* note 4*, P35*; Joseph E. Murphy, *The Duty of the Government to Make the Law Known*, Fordham Law Review(1982), Vol. 51, Issue 2, Article2,P 256.

[7] Murphy, *supra* note6, Pp256-257.

[8] Establishment of the Negarit Gazetta Proclamation No. 1/1942, quoted in Sileshi Zeyohannis and Fanaye Gebrehiwet (2009), Legislative Drafting: Teaching Material(Unpublished), Pp 17-18.

[9] For the federal official gazette, see Federal Negarit Gazeta Establishment, Proclamation No.3/1995.

2. Ignorance of Law Is No Excuse: Development, Justifications and New Challenges

2.1. Historical Development of the Maxim

Ignorance of law refers to a situation where an individual acts due to lack of knowledge about the existence of the law or that the law regulates or criminalizes his acts.[10] Ignorance defense is an affirmative defense in criminal law where the accused concedes that she commits the act for which she stands accused but claims that the law excuses punishing her act (s).[11]

The maxim that ignorance of law is no defense develops from ancient Roman legal tradition. These Latin expressions for this, *inter alia*, include "*ignorantia juris non excusat,*" - "Lack of knowledge about the legal requirement or prohibition is never an excuse to a criminal charge," and "*ignorantia juris nemi nem excusat*,"- "ignorance of the law excuses no one".[12] The Latin term *ignorantia* has been translated into English to mean ignorance (or error) and mistake. Hence, although the terms ignorance and mistake have technical difference,[13] they are often used interchangeably.[14]

The maxim's origin is attached to the presumption that the law is certainly knowable and, since it was not the duty of the Roman law to help the fool, proof of the citizen's knowledge of the law was not required in litigations.[15] The maxim is also connected with the rules that "ignorance of things which everyone is bound to know does not excuse" and "everyone is presumed to

[10] Edwin Roulette Keedy, *Ignorance and Mistake in the Criminal Law*, Harvard Law Review *(*1908) , Vol. XXII, No. 2 , Pp76-77 & 90-91; Gideon Yaffe, *Excusing Mistakes of Law*, Philosophers' Imprint (2009), Vol. 9, No.2, P3.

[11] Larry Laudan, Truth, Error, and Criminal Law: An Essay in Legal Epistemology (Cambridge University Press, 2006), P111.

[12] Bryan A. Garner (ed.), Black's Law Dictionary (Thomson West, 8th ed., 2004), Pp 762-763.

[13] As different from ignorance of law, mistake refers to false belief or wrong conclusion that the law did not regulate one's specific acts, caused due to inadvertency or insufficient knowledge of the law or the application of the law to the specific facts. See Keedy, *supra* note 10, Pp.76-77 & 90-91; Yaffe, *supra* note 10, P3.

[14] Keedy, *supra* note 10, P76.

[15] The Jurisprudence of Willfulness, *supra* note 5, P350.

know the consequence of his act."[16] However, this was not based on mere assumption that everyone knows the law or duty of everyone to know the law. It was founded on contexts where the law was sufficiently defined and easy to understand for any capable citizen.

For example, in ancient Greek every Athenian citizen was paid to participate in public affairs where laws and other matters of common interest were to be decided.[17] Similarly, the Romans excuse ignorance of the *jus civile* (civil law) that were laws to regulate individual relations whereas everyone was expected to know the *jus genitum* (laws of natural reason and custom) that were laws of universal application.[18] Particularly, while no excuse for not knowing the *jus genitum*, the Romans exceptionally excuse the young under twenty-five years of age, disenfranchised women and soldiers who were away from home during the passage of the law as especial category of people who were unlikely to be informed of the passage of the *jus civile*.[19]

The ignorance maxim developed not to deny the defense of error of law, rather, "to make it plain that failure to know the prohibitions of the criminal law was inconceivable."[20] From this, in modern German legal scholarship, prohibitions in criminal law are understood as proscriptions between right and wrong, and ignorance of the criminal law is considered as "absence of capacity to discern right from wrong," hence "the legal test of insanity."[21]

2.2. Justifications for the Maxim in Modern Criminal Law

The first justification is the presumption of knowledge of the law. The proscriptions in criminal law are matters of common knowledge and allowing ignorance defense "may be unnecessary where there is little likelihood that the defendant did not, in fact, know the law."[22] As to the

[16] D. O'Connor, *Mistake and Ignorance in Criminal Cases*, The Modern Law Review (1976), Vol.39, No.6, P.647.
[17] Arnold, *supra* note 4, P31.
[18] *Id*., Pp. 31-32; The Jurisprudence of Willfulness, *supra* note 5, Pp. 351-352
[19] Arnold, *supra* note 4, p. 31.
[20] Gunther Arzt, *Ignorance or Mistake of Law*, The American Journal of Comparative Law (1976), Vol. 24, P647.
[21] *Ibid*
[22] Grace, *supra* note 4, Pp 1396-1367.

rebutability of this presumption O'Connor argues that the ignorance maxim gives "no room for rebuttal"; it is an irrefutable legal presumption.[23] To the opposite, Strauss argues for rebuttal, saying "… even if there is a presumption that everyone knows the law, the proposition that ignorance of the law is no excuse could not be inferred so long as a defendant is permitted to bring evidence to rebut that presumption."[24]

Second justification is the evidence problem.[25] Allowing ignorance defense may entail difficult inquiries as to whether a defendant is in fact ignorant of the law. Even if only reasonable ignorance were to be accepted, it would require inquiring whether a given defendant's ignorance is reasonable. Therefore, disallowing ignorance defense simplifies criminal proceedings.[26]

Third is the utilitarian demand for legal education through penalization. According to this, "[t]o admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey" and public interest outweighs individual's justice.[27] Therefore, while punishing offenders who commit crime due to ignorance of law achieves optimal societal knowledge of and compliance with law, allowing ignorance defense would be disincentive to it.[28] Therefore, enhancing the public's legal education by punishing the ignorant offender is believed to be "worth more than the welfare of a particular criminal defendant."[29]

Fourth is argument based on the principle of legality.According to this, permitting ignorance defense "would contradict the principle of legality, elevating offenders' perceptions of the law above the law itself."[30] Hence, the defendant should be judged by an objective standard of what the law

[23] O'Connor, *supra* note 16, P647.
[24] Jon Strauss, *Nonpayment of Taxes: When Ignorance of the Law is an Excuse*, Akron Law Review (1992), Vol. 25, No.3 & 4, P612.
[25] The Jurisprudence of Willfulness, *supra* note 5, P354.
[26] Strauss, *supra* note 24, P612.
[27] Oliver Wendell Holmes, The Common Law, quoted in The Jurisprudence of Willfulness, *supra* note 5, P354.
[28] The Jurisprudence of Willfulness, *supra* note 5, P354; Grace, *supra* note 4, P1395.
[29] Hall & Seligman, Mistake of Law and Mens Rea, cited in Strauss, *supra* note 24, P 613.
[30] Jerome Hall, General Principles of Criminal Law, cited in The Jurisprudence of Willfulness, *supra* note 5, P355.

actually is rather than a subjective standard of what she believes for the law to be.[31]

A fifth justification is the need to condemn intrinsically wrongful acts. According to Hart, an individual who committed an intrinsically wrongful act, e.g., murdering, is blameworthy and deserves punishment both for she did not know that murder was wrongful and she took another's life. For Hart, however, the maxim should apply only to acts which are *malum in se* (intrinsically wrongful) and not to acts which are *malum prohibitum* (wrongful by statutory prohibition).[32]

2.3. Proliferation of Statutory Offences as Challenge to the Ignorance Maxim

One of the reasons for Lord Hewart to label the administrative state as New Despotism as early as 1929 was the proliferation of innumerable departmental legislation leaving the citizen at perilous ignorance.[33] Hewart said the departmental legislation issued in England were 2473 in 1920 and 1349 in 1927. Of the forty-three Parliamentary Acts passed in 1927 twenty-six of them authorize the making of departmental legislation. For Hewart, human brain could not read and understand this multitude of departmental legislation to the extent of mastery and the maxim everybody is supposed to know the law was quite inaccurate. Therefore, because the citizen is bound to obey the mass of subsidiary legislation which she "does not know what it is", "where to find it" and "probably would not understand it, and its relation to the rest of the law", "the citizen is permitted to be ignorant" without her "ignorance … permitted to be an excuse."[34]

The problem of applying the presumption of knowledge within the context of the regulatory state is not, however, only the proliferation of delegated legislation. The proliferation of penalizing parliamentary acts as policy instruments has also made the presumption that everyone knows the law

[31] Hall & Seligman, Mistake of Law and Mens Rea, cited in Strauss, *supra* note 24, P 613.
[32] Henry M. Hart, Jr., The Aims of the Criminal Law, cited in The Jurisprudence of Willfulness, *supra* note 5, Pp 355-356.
[33] Lord Hewart, The New Despotism (London: Ernest Benn Limited,1929), Pp.79-101.
[34] *Id*., Pp 96-97.

largely fictional that it is "unrealistic to assume that every sane citizen would be familiar with the new, rapidly-expanding criminal prohibitions."[35]

The challenges to the maxim can be seen in two perspectives. First, the rise of positivist philosophy of law erodes the moral foundation of the ignorance maxim.[36] Because of this, the application of the maxim imposes harsh criminal penalty for ignorance mostly "in regulatory crimes involving conduct that is not inherently immoral."[37] The problem in the positivist view of law as mere policy instrument is that penal legislation penalize ordinary conducts and behaviors "that should not have been criminalized at all" and even conducts and behaviors which were "legally permissible at an earlier time."[38] This leaves everyone at risk of criminal punishment without prior indication that her act has been criminalized.

Second, the rapid expansion of criminal law leading to excessively voluminous penalizing legislation has made ignorance of law a reality. This has led scholars to counting criminal laws, a task impossible to accomplish because penal legislation are scattered in different laws. For example, as of 2008 in U.S.A., Baker estimated more than 4,500 federal statutory crimes.[39] Similarly, as of 1991, Coffee estimated that there were more than 300,000 federal regulations that can be basis for criminal prosecution.[40]

Stating the UK experience, in addition to the increasing number of delegated legislation, Lord Justice Toulson has presented three reasons which make knowing the law difficult.[41] First, he stated that only in 2005 "nearly 21,000 pages of laws had been passed in the UK, that is, nearly 1,750 pages on a monthly basis."[42] Second, laws related to a single issue are found scattered in

[35] Grace, *supra* note 4, P1396; Arzt, *supra* note 20, P650.
[36] Arnold, *supra* note 4, P33.
[37] Strauss, *supra* note 24, P613.
[38] Over-criminalization, *supra* note 6, Pp 3 & 17; Grace, *supra* note 4, Pp 1396-1403
[39] John S.Baker Jr., Revisiting the Explosive Growth of Federal Crimes cited in Rosenzweig, *supra* note 6, P 4.
[40] John C. Coffee Jr, *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinctionin American Law*, Boston University Law Review (1991), Vol. 71:193, P4.
[41] *Regina v William Chambers* (2008), cited in Arnold, *supra* note 4, P33.
[42] *Id*., Pp. 33-34.

different legislation, impossible for the citizens to have knowledge about them.[43] Third, searching for the laws in database is not helpful for those who did not know the laws, because the search is to be by the names of the legislation not by the information the laws are assumed to have regulated.[44]

These problems leave everyone uncertain of what law may have regulated every act in her day-to-day activity. Due to this, "any citizen could claim ignorance of the law in so far as he did not get a proper explanation of its content from an expert."[45] Showing the degree of uncertainty, Silverglate estimated that an average American may commit "three felonies a day even without knowing it."[46] However, it is not only the average citizen or lay people that lack knowledge about the law in these contexts. Asked by the US Congress to quantify the number of federal crimes, the Congressional Research Service has responded that it cannot with certainty.[47] Because of this, even full-time law practitioners and professors cannot be familiar except only with fractions of the laws to which they are subject.[48] Therefore, ignorance maxim of law may blindly punish the ignorant in the absence of fair advance warnings.

3. Balancing the Ignorance Maxim with the Demands of Rule of Law and Justice

3.1. Duty to Make the Law Known and Accessible

In connection to publication of laws, the principle of legality connotes two important points: first, the criminal law should be enacted by the legislative branch of the government; second, the criminal law so enacted should be sufficiently publicized.[49] Publicity has two aspects: formal and substantial. Formal publicity concerns the publication and accessibility of the criminal law to the society. Substantial publicity requires for the criminal law to be

[43] *Regina v William Chambers* (2008), cited in Arnold, *supra* note 4, P33.
[44] *Ibid*.
[45] Arnold, *supra* note 4, P32.
[46] Harvey Silverglate, Three Felonies a Day, cited in Rosenzweig, *supra* note 6, P4.
[47] Rosenzweig, *supra* note 6, P3.
[48] Over-criminalization, *supra* note 6, P 12; C. R. Synman, Criminal Law (5th ed., 2008), P 203.
[49] Over-criminalization, supra note 6, P13; Peter Westen, Two Rules of Legality in Criminal Law in Law and Philosophy (2007), Pp 289 & 296-298; Gabriel Hallevy, A Modern Treatise on the Principle of Legality in Criminal Law (Springer, 2010), Pp 36 & 26-27.

sufficiently clear for those subject to it to comprehend it easily, hence refuting vague criminal statutes.[50]

In English legal tradition, promulgation was not validity requirement for laws. The argument was that promulgated laws cannot be distributed to all the corners of a country at a time and this may create uniformity problems. Hence, the date of official signature should be considered for law's validity, not the date of promulgation.[51] The prohibition of *ex post facto* criminal law and due process clause in US Constitution abolish this tradition. Since the prohibition of *ex post facto* criminal law is justified because of the need to protect a person from punishment for acts not criminalized at the time they were committed, this works if sufficient notice of criminalization of the acts is given.[52] Similarly, the US Supreme Court held that due process of law protects citizens from criminal conviction based on criminal statues which are too vague to be understood by men and women of common intelligence.[53] While due process prohibits vague statutes that men and women would guess their meaning, it would be anomalous if it permitted "laws to be effective before one could guess that they existed."[54]

Publicity of law also helps to meet the public interest of legal certainty. The primary goal of criminal law is regulating human behavior by prohibiting acts categorized as criminal. Publicizing the criminal law enables those who want to obey it to know what acts are prohibited, hence achieving its goal without need to resorting to penalty.[55] Without sufficient notice given to them members of the society cannot know and obey the law and it is not clear how the society can notice that a given law ever existed except where it is promulgated.[56] To emphasize that the promulgation of laws lets the law into the memories of its subjects, Bentham has said:

[50]Gabriel Hallevy, *Id*., Pp 26-27.
[51] See Murphy,*supra* note 6, Pp 257-261.
[52] *Id*., Pp 261-265.
[53] *Papachristou v City of Jacksonville 405 U.S. 156, 162 (1972)*, cited in Murphy, *supra* note 6, P265.
[54] Murphy, *supra* note 6, P265.
[55] Hallevy, *supra* note 49, P26.
[56] Over-criminalization, *supra* note *6*, Pp 12-13; Murphy, *supra* note 6, P268

> *That a law may be obeyed, it is necessary that it should be known: that it may be known, it is necessary that it be promulgated. But to promulgate a law, it is not only necessary that it should be published with the sound of trumpet in the streets; not only that it should be read to the people; not only even that it should be printed: ... To promulgate a law, is to present it to the minds of those who are to be governed by it in such manner as that they may have it habitually in their memories, and may possess every facility for consulting it, if they have any doubts respecting what it prescribes.*[57]

Murphy has presented two earlier US cases to show the benefit of formal official publication of laws to resolve issues of authenticity of laws. In 1807 the Virginia Supreme Court faced an issue whether a law alleged to have been enacted in 1691 was in fact enacted. Because the central archives were previously destroyed the status of the law was ascertained by published copies found distributed in county clerks.[58] Similarly, in 1889 the US Court of Claims was asked to consider whether a document presented from the files of the War Department alleged to be order of the President was an effective Presidential order. The document was signed by the Secretary of War on 31 December 1870 titled as 'General Orders 000' and dated as 'December 000, 1870.' The Court rejected the document and gave its decision based on another subsequent order which was found duly promulgated. The US Supreme Court affirmed the decision.[59]

These cases show the role promulgation plays in creating certainty about what is the law that the society has to obey. Absent the duty to promulgate the law nothing even prevents the signing of administrative orders and even statutes *ex post facto* but carrying an earlier date on its face. Promulgation, therefore, "assures society that there will be a lasting, certain record of the law, and that the only laws in effect are those in the public domain."[60] For the ignorance maxim's utilitarian purpose of encouraging societal legal

[57] Bentham J., The Works of Jeremy Bentham, quoted in Abebe Assefa & Wendmagegn Gebre, "Enforcement of the Principle of Legality in Ethiopia after Ethiopian Revenue & Customs Authority v Ato Daniel Mekonnen," in Bahir Dar University Journal of Law, Vol. 2, No. 2, P208.
[58] Murphy, *supra* note 6, P268.
[59] *Id*., P269.
[60] *Ibid*.

knowledge by imposing the duty to learn it to be achieved, the law must be promulgated, put into public domain and a notice of its existence should be given to the public. Then, the duty to inquire the law's details will rest upon the citizenry.[61] Those who are for non-promulgation of laws may claim promulgation costs. However, societal costs of prolonged litigations caused by uncertainty about the law and costs caused by non-implementation of the law's policy objective, e.g., losses caused by accidents due to non-obedience of regulations due to absence of sufficient knowledge that legal awareness through promulgation would avoid outweigh the promulgation and distribution costs.[62]

Seen from individual perspective, it is unfair to impose punishment on those found acting in violation of the criminal law without having notified them in advance that what they did is proscribed.[63] Even publication of the laws in official law gazettes or else is insufficient to meet the demands of notice in the era of proliferating penal legislation. For example, Nciko Arnold argues that to enhance societal legal awareness, it demands additional measures such as the use of legal clinics and street law programs.[64] Similarly, Rozenzweig argues that because the proliferation of proscribing legislation, both primary and secondary, has made ignorance of law a reality, the US Government should compile all laws with penal provisions into Title 18 of the US Code (the part that provides for crimes and criminal procedure), made it accessible in the Internet and keep it always up-to-date.[65] Murphy, while admitting the requirements for continuous public education to enhance societal legal awareness, has presented an experience from Philadelphia Bar Association's involvement to develop law related curriculum in high schools.[66] These arguments rightly show the extent of the duty to enhance legal awareness and the futility of the ignorance maxim absent the duty to make the law known.

[61] *Id*., P271.
[62] *Id*., Pp 269-270.
[63] *Hallevy, supra* note 49, P 27.
[64] Arnold, *supra* note 4, Pp 35-37.
[65] Rosenzweig, *supra* note 6.
[66] Murphy, *supra* note 6, Pp 286 & 288.

A related issue is regarding noncriminal parliamentary acts and delegated legislation. As Husak argues, many prohibitions which can be the basis for criminal prosecution are found in different noncriminal laws. This is a manifestation of the decay of the principle of legality and makes looking at the criminal law not sufficient. To describe this problem Husak has said that "the criminal law outsources."[67] In this regard, the demand for notice through the publication of the criminal law also applies to noncriminal statutes which impose obligations or prohibitions and delegated legislation. Because, the doctrine of non-delegation of legislative powers has withered away and delegation when necessary has been accepted.[68]

The problems in delegation of legislative power are, first, parliaments use it to delegate their powers without clear criteria to scrutinize the legality of the delegated legislation. Second is the enactment of skeletal parliamentary acts their sole purpose simply the delegation of the legislative power to the executive, a problem called the dependence of parliamentary acts on subsidiary legislation and the enactment of incomplete statements of law.[69] There is no experience of direct delegation of the power to enact criminal legislation. Some jurisdictions have even clearly prohibited the delegation of the power to enact laws imposing criminal and administrative penalties.[70] However, since detailed regulations issued by executive departments may put restrictions the violation of which leading to criminal prosecution, these subordinate legislation should be published as parliamentary acts. While promulgation saves innocent actors not to be in contradiction with the law

[67] Over-criminalization, *supra* note 6, P13.

[68] For the non-delegation doctrine and justifications for delegation, see Erwin Chemerinsky, Constitutional Law: Principles and Policies (ASPEN Publishers, 2006, 3rd ed.), Pp 327-331; A. W. Bradley and K. D. Ewing, Constitutional and Administrative Law (Pearson Education Limited, 2007, 14th ed.), Pp 675-692; D.R. Elder and P. E. Fowler (eds.), House of Representatives Practice (Commonwealth of Australia, 2018, 7th ed.), P407; Stephen Argument, "Delegated legislation," in Matthew Groves and H. P. Lee (eds.), Australian Administrative Law: Fundamentals, Principles and Doctrines (Cambridge University Press: 2007), Pp 134-142.

[69] Ceil T. Carr, "Delegated Legislation," cited in Hewart, *supra* note 33, Pp 97-98.

[70] Argument, *supra* note 68, Pp 134-135; Hallevy, *supra* note 49, Pp 37-39

without intent to offend it, it also helps to bridge the legal lacuna that "no one may in impunity offend against them under pretence of ignorance."[71]

Comparative experience shows that delegated legislation are publicized. For example, in Australia delegated legislation are required to be registered and are effective from the day next to their registration in the Federal Register of Legislation.[72] In the UK except for statutory instruments classified as local and some instruments which can be applied even before they are laid down before the Parliament only upon immediate explanation to the Lord Chancellor and Speaker, there is a uniform system of numbering, printing and publishing delegated legislation. Accordingly, all general statutory instruments made in each year and still in force are collected and published.[73]In USA except those taken as secrets in the interest of the public, those concerning only the internal management of a government agency and those addressed and served upon named persons, all substantive rules issued by way of delegation to executive government agencies are required to be published in the Federal Register.[74]

The principal means of publicizing laws is publishing them in official law gazettes. However, it can be done flexibly; for example, posting regulations in public streets as used in traffic rules.[75] When agency rules relate to specific groups, notice may be complied by mailing list of the affected section of the society. For example, mailing list mechanism was required in Colorado State according to the Revenue Statute enacted in 1973 before register of statutes was established.[76] The US APA also provides that persons may individually be served of pre-enactment notices of agency rules where those subject to the rules are specifically known.[77]

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[71] Bangndu Ganguly, Administrative Legislation in Modern India, quoted in Aron Degol and Abdulatif Kedir, *Administrative Rule Making in Ethiopia: Normative and Institutional Framework*," Mizan Law Review (2013), Vol.7, No. 1, Pp 12-13.
[72] Elder and Fowler, *supra* note 68, P408.
[73] Bradley and Ewing, *supra* note 68, P687; Peter Leyland and Gordon Anthony, Textbook on Administrative Law (Oxford University Press, 2013, 7th ed.), P88.
[74] Administrative Procedure Act (APA), Section 3(a) (3).
[75] Murphy, *supra* note 6, P278.
[76]Murphy, *Id*., P288.
[77] US APA, *supra* note 74, Section 4 (a).

3.2. When Ignorance of Law is a Defense: Acts *Malum Prohibitum* and Unpublished Rules

Regarding cases where ignorance of law is to be accepted as a defense, two points should be noted from the outset. First, the ignorance defense is an exception to the general principle that ignorance does not excuse.[78] Second, to establish criminal liability, the prosecutor may not be required to prove that the accused has actual knowledge of the law; it suffices if the accused had the opportunity to know it. Once the government has done its duty to promulgate the law, unreasonable ignorance cannot be a defense.[79] Bearing this in mind, ignorance of law may be accepted as defense in cases of acts *malum prohibitum* and cases of unpublicized agency rules.

3.2.1. Acts *Malum Prohibitum*

Acts *Malum Prohibitum* (also called statutory offenses) are those acts which are, in contrast to acts *malum in se* (or acts inherently evil), not inherently evil but criminally punishable because they are prohibited by government statutes.[80] Similar to the difference between crimes and torts, the distinction of crimes as *malum in se* and *malum prohibitum* may not be watertight. While it may sometimes be context and culture specific, the societies' one time judgment of some acts as *malum prohibitum* may through time change to *malum in se*.[81]

An obvious example of acts *malum in se* is homicide. To take an example of acts *malum prohibitum*, let us see the following case. In 1977 Wisconsin State Department of Agriculture, Trade and Customer Protection issued a regulation which required a completion date to be included in writing in all house improvement contracts where money is paid prior to the completion of the work and that the work be completed by that date unless delayed due to circumstances beyond the contractor‘s control. Such government regulation may be justified because house improvement contracts may be abused and put a person's important right at risk. However, criminal conviction and

[78] Synman, *supra* note 48, P203.
[79] Synman, *Id*., p. 204; Hallevy, *supra* note 49, P28
[80] Black's Law Dictionary, *supra* note 12, P978.
[81] Hallevy, *supra* note 49, Pp 28-29; Coffee, *supra* note 40, Pp194 & 239.

punishment on those who unknowingly violate such regulations is unjust.[82] As it will be clear in subsequent discussions, acts *malum prohibitum* are made crime by statutes while their nature does not necessarily require criminalization or could be settled by civil litigation between individuals or by regulatory or administrative instruments of government, not the use of criminal law.

In Germany, ignorance defense in cases of social welfare offences was developed as response by German courts to the government social welfare policy of economic planning and distribution of scarce goods following the WWI which was enforced by criminal sanctions. Due to rapid expansion of criminal sanctions for violation of government regulations in those days it was found unrealistic to assume that every citizen of sound mind would be familiar with the new criminal prohibitions. German courts react to this problem by limiting the principle that ignorance of law is no defense to the traditional criminal law and dis-applying it to the new criminal provisions which were found dispersed in different statutes dealing with the distribution of scarce goods and price control, not incorporated to the Penal Code. In effect ignorance of law developed as valid defense against such social welfare offences. Because the accused's error in such case was understood as an error related to administrative regulation enforced through criminal sanctions, German courts restricted the ignorance maxim to the traditional criminal law the knowledge of which was taken for granted from knowledge of general norms and values.[83]

To confirm the courts' dis-application of the ignorance maxim in social welfare offences, an ordinance was issued in January 1917 which provided that a criminal charge should not be instituted for violation of regulations such as economic measures where the accused believed his action to be legal based on a non-culpable error about the existence or contents of the regulations she violated. In general, courts understood error in connection to these regulatory offenses as mistake of administrative law not mistake of criminal law.

[82]Grace, *supra* note 4, Pp 1397-1398.
[83] Arzt, *supra* note 20, P650.

The philosophical reasons behind this development are, first, courts believed that error of law was likely to occur with respect to the new criminal laws than the traditional criminal law. Second, whereas criminal punishment presupposes blameworthiness or guilt, reasonable ignorance of the law excludes or reduces the degree of guilt. Third, courts believed that to steal was immoral in the old criminal law whereas to exploit scarcity of good in times of need, an act proscribed in the new criminal provisions was not immoral or was less-immoral.[84]Nowadays, German law categorizes ignorance as unavoidable ignorance where ignorance may lead to defendant's acquittal and an avoidable one where only sentence may be mitigated. The avoidability test requires diligent effort beyond mere psychological criterion to be acquainted with the legal requirements to the extent of consulting lawyers. However, the threshold is relatively high in cases of traditional criminal law and less strict for regulatory offences.[85]

In USA, the rise of criminal statutes has led to arguments against the ignorance maxim and in favour of the ignorance defense.[86] The Supreme Court, on its part, has developed what is called the jurisprudence of willfulness to acquit the accused if the prosecutor did not prove that the accused committed the crime with knowledge of the law where the respective criminal provision requires the accused's willful action. One of these crimes that require willful act is the crime of tax evasion, where the Court even openly accepted unreasonable ignorance or mistake of law as defense. The US Supreme Court defines "willfulness" as "voluntary, intentional violation of a known legal duty" for both evasion of assessment and evasion of payment,[87] and establishes that "[a] defendant's good faith belief that he is not violating the tax laws, no matter how objectively unreasonable that belief may be, is a defense in a tax prosecution."[88]

[84]Arzt, *Id*., Pp 650-651.
[85] Michael Bohlander, *Principles of German Criminal Law*, (2009), Pp.22 & 119-21
[86] Over-criminalization, *supra* note 6, P12; Paul J. Larkin, Jr., Time for a 'Mistake of Law' Defense as cited in Rosenzweig, *supra* note 6, P2.
[87] By evasion of assessment the tax payer evades taxes due already and assessed by concealing or underreporting her income or overstating her costs and expenses, whereas by evasion of payment the taxpayer evades tax by hiding property or money from which the tax authority could collect these taxes (See generally Office of Chief Counsel, Criminal Tax Division,Tax Crimes Handbook, 2009).
[88]Tax Crimes Handbook, *Id*., Pp 9-10 & 17-18.

It has been established that taxpayer's mere understatement of income or due tax or mere failure to pay due tax did not suffice to establish the crime of tax evasion. Rather, an affirmative action to evade tax is required. US courts have tried to develop list of material facts in the taxpayer's action from which willfulness to evade tax can be inferred and where good faith cannot be invoked as defense. For evasion of assessment, these are acts that show the taxpayer's intention of concealment of assets or covering up of sources of income or willful blindness or deliberate indifference about what was obvious to her. These, *inter alia*, include signing return knowing it underreports income; destroying, throwing away or losing records; making or using false documents, books, records or invoices; keeping double books of record; placing property or business in the name of another; and holding accounts with a fictitious name.[89] For evasion of payment, willfulness is inferred from taxpayer's acts designed to place assets beyond the reach of the government to hinder the government's measures of tax collection by attaching and selling the taxpayer's properties.[90]

The reason for the US Supreme Court to require proof of knowledge of the tax law for tax evasion is because tax laws are too technical and complex to presume that everyone knows them.[91] The Court has made it clear that the defendant's erroneous belief that the tax laws are unconstitutional cannot be a defense against tax evasion.[92] However, as Justice Scalia stated, once willfulness is defined to mean "voluntary, intentional violation of a known legal duty" and a defendant's good faith erroneous interpretation that her acts did not violate the tax laws, even though objectively unreasonable, is a defense, "It is quite impossible to say that a statute which one believes unconstitutional represents a known legal duty."[93]The defendant's subjective belief may emanate not only from the taxpayer's interpretation of the tax laws but also from her interpretation of the Constitution. Hence, it will be

[89] *Id*.,Pp9-12.
[90] *Id*., P18.
[91] The Jurisprudence of Willfulness,*supra*note5, Pp.363-370; Strauss, *supra* note 24, P 622.
[92] *Cheek v United States, 498 U.S. 192, 205-06 (1991)*, cited in Tax Crimes Handbook, *supra* note 87, P10.
[93] Scalia J., (concurring opinion), *Cheek v United States, 498 U.S. 192, 205-06 (1991)*, cited in Strauss, *supra* note 24, P 627.

intricate to excuse one who violates a statute because of mistake on what it says but not to excuse another who violated the statute based on erroneous belief that it was unconstitutional.[94]

For Strauss, tax laws are not only complex but subject to frequent changes. Hence, tax offences are *malum prohibitum* than *malum in se*. More importantly, since violations of the tax statutes can be met with civil penalties and interest on delayed taxes, harsh criminal sanctions against those who violate the tax statutes due to ignorance or misunderstanding seems unnecessary.[95] The point is that while the tax disputes may be settled in tax litigations between the government and the taxpayer, criminally punishing those taxpayers who innocently acted with belief that they did not violate their tax duty falls far from just. Therefore, conviction and penalty for tax evasion should be limited to those who acted with clear plan to escape from their duty to pay tax.

Another case the US Supreme Court established the requirement of proof of knowledge of law is based on the definition to the term "knowingly" in relation to food stamp regulations. In *Liparota v United States*,[96] Liparota was prosecuted for violating Section 2024(b) of the US Code, which criminalizes acts of knowingly using, transferring, acquiring, altering, or possessing food coupons in violation of the food stamp regulations. Liparota bought food stamps from government agents below face value in several occasions and what he did was against the food stamp regulations. However, the Court ruled the government was required to prove that Liparota violated the regulation knowing that he was violating it.[97]

The Court did not rely on the ignorance defense. Rather, it analogized the case with the crime of receipt of stolen goods and said that while not knowing that the goods were stolen is a defense, not knowing that receiving such stolen goods is a crime cannot be. Similarly, the Court said, Liparota did not allow ignorance defense based on the claim that one did not know that possessing food stamps in violation of the regulation was illegal.

[94] *Id*., Pp 627-628.
[95] *Id*., P629.
[96] *Liparota v United States 105 S. Ct. 2084 (1985*), cited in Grace, *supra* note 4, P1398.
[97] *Ibid*.

However, the decision was "driven by judicial uneasiness with laws that criminalize ordinary behavior."[98] While those unaware of how the food stamps operate may think that buying the food stamps from a neighbor at some discounts is favoring the seller and punishing such innocent acts is unjust, those who bought food stamps knowing the prohibitions in the regulation would undoubtedly be convicted and punished. The point is that except those who know about the food stamp regulation everyone cannot be presumed to know how the food stamps work and distinguish the government agents who sale government discounted food stamps from other market centers who sale similar foods. The Court, then, interpreted that when the terms "willfully" or "knowingly" are used in Congressional Acts, the Congressional intent is to make knowledge an element of the offence.[99] Similar ignorance defense in cases where knowledge of law is element of an offence has been incorporated in Kenyan Penal Code.[100]

In UK in *Regina v Smith*[101] Smith, a tenant, installed a speaker wire behind the wall of the apartment he rented with permission from his landlord. However, when he left the apartment he rented, he disconnected the wire. For this, he was charged and convicted with the crime of damaging property belonging to another, a crime which presupposes intention or recklessness. The Queen's Bench, on an appeal, acquitted him based on his mistake of law. The law was that "[t]hings attached to a wall belonged to the tenant; things installed behind them to the landlord." Smith was, however, mistaken about the legal rule in believing that the speaker wire belonged to him. Smith made two interconnected mistakes of law. First, he mistakenly believed the speaker wires belonged to him while the property law provides for them to belong to his landlord. Second, he mistakenly believed that disconnecting the speaker wires was not criminal. His mistake sufficed to excuse him from criminal conviction. Based on this case, Yaffe argued that the criminal law maxim that ignorance of law is no excuse is simply false.[102]

[98] *Id*., P1399.
[99] *Id*., P1402.
[100] Penal Code, in *Laws of Kenya* (National Council for Law Reporting, Rev. Ed., 2009 (2008)), Section 7
[101] *Regina v Smith (1974 (2 Q. B. 354))*, cited in cited in Yaffe, *supra* note10, Pp 1 & 3.
[102] *Id*., Pp 1-3.

Ignorance of the law may not always be a defense. Smith had sufficient reason to believe that the speaker wires belonged to him. Because, in the first place they were his and later he fixed them behind the apartment he rented having secured his landlord's permission, hence he might not think ownership dispute would arise. This was his mistake about how the law regulates the speaker wires.[103] However, a passerby may not invoke mistake of law defense as Smith did. What is important here for Smith's acquittal is his honest belief that he was exercising his property right. Similar provision for the defense of mistake of law in case of *bonafide* claim of right has been incorporated in Kenyan Penal Code.[104]

In the Republic of South Africa (RSA), the understanding of ignorance of law defense is that in crimes which require criminal intention, as opposed to crimes punishing negligence, an honest ignorance of law negates criminal intention. Because, culpability in crimes which require criminal intention is understood to mean the accused's knowledge of the consequences of her acts but also that what she did is illegal. However, this is as an exception to the general rule that everyone is presumed to know the law and that ignorance of law is no defense.[105]

When we see the exceptions, they are cases of either mistake of fact or acts *malum prohibitum*. For example, to show the acceptability of mistake of law as defense Synman uses a hypothetical case similar to the *Regina v Smith* case. According to Synman, if "X takes property belonging to Y in the belief that Y had given him permission to take it, whereas Y had in fact not given such permission[,] Y then lacks the intention and culpability required for theft."[106] However, this hypothetical case seems to show that X erred factually in honestly believing that he has Y's permission to take the property.

[103] Israeli Penal Code of 1977 has also incorporated mistake of legal situation as defense in its amendment No.39 of 1994. See Boaz Sangero, Self-Defence in Criminal Law (Hart Publishing, 2006), P295.
[104] Kenyan Penal Code, *supra* note 98, Section 8.
[105] Synman, *supra* note 48, Pp 32 137 & 203.
[106] *Id*., P32.

The way ignorance of law develops as a defense in criminal cases in the RSA relates it with acts *malum prohibitum*. Before decision on *De Blon*[107] in 1977 changed the case, ignorance defense had no judicial recognition. In that case, the accused was charged for violating a foreign exchange control regulation which criminalizes an act of travelling abroad having jewelry in excess of a specified monetary value without prior permission. The Appellate Division accepted her defense that she did not know such prohibition and reversed her conviction. The Appellate Division did not raise unreasonableness and other circumstances where ignorance of law is not accepted. It said that in present day understanding of culpability, the presumption that everyone knows the law has no foundation and the view that ignorance of law is no excuse does not have application.[108]The decision achieves in abolishing the untenable presumption that everyone knows the law.[109]

However, *De Blon* failed to limit the ignorance defense. For example, Synman argues that unreasonable and avoidable ignorance of law should not be accepted as defense.[110] In recent cases, South African courts have deviated from *De Blon* by denying avoidable ignorance defenses where the accused did not take reasonable steps to acquaint theme selves of the law.[111] Limiting the ignorance defense to cases of reasonable and unavoidable ignorance is proper. However, the *De Blon* decision seems justified based on the case. The crime was violation of a certain regulation which restricts the amount of jewelry an individual can carry without permission while going abroad. Such a prohibition could be justified based on government's regulatory concerns. However, it could be implemented by regulatory measures short of criminal prosecution. And, the act is not inherently evil and could be classified as *malum prohibitum*; hence, the reversal of the accused's conviction based on the ignorance defense seems sound.

The distinction between acts *malum in se* and acts *malum prohibitum* and the acceptance of ignorance defense for acts *malum prohibitum* may not have one-fits-all standard. Particularly, there may be contexts difficult to

[107] *De Blon* 1977 3 SA 513 (A), cited in Synman, *supra* note 48, P203.
[108] *Ibid*.
[109] *Id*., P205.
[110] *Id*., Pp. 205-207.
[111] *Id*., P 207.

determine whether ignorance defense is reasonable or not.[112] It may also be opposed based normative issues.[113] However, while issues of normative consistency and standardization can be developed through practice and case-by-case analysis, its benefit to counter balance the problem of over-criminalization is commendable.

3.2.2. Unpublished Administrative Rules

Experience as to ignorance defense against criminal prosecution based on unpublished agency rules shows the value legal systems accord to promulgation of laws. For example, in UK, the Privy Council opined in *Lim Chin Aik*[114]that "the defendant could under no circumstances have had prior knowledge of an unpublished ministerial decree refusing immigration to him individually." According to this precedent, English law was said to have established extremely high unavoidability threshold to ignorance, because it took promulgation as the minimum requirement upon the fulfillment of which ignorance of law could be avoided.[115] Nowadays, a relaxed approach has been developed. According to this, to secure the accused's conviction the prosecutor should show that the respective statutory instrument was published in the time the accused is alleged to have violated it or the group of society affected were or, at least, the accused personally was made informed of the rule.[116]

In USA, there is a more appealing experience. There are Congressional Acts with express provisions for ignorance of agency rules to be invoked as defense against imprisonment and even civil damages. The Securities Exchange Act of 1934 provides imprisonment and fines as criminal penalties against those who violate the Act and rules and regulations enacted under it. However, it specifically provides that "no person shall be subject to imprisonment under this section for the violation of any rule or regulation if

[112] Arzt, *supra* note20, Pp 655-656.
[113]For example, one of the critics against the US Supreme Court's jurisprudence of willfulness is Professor Davies. See The Jurisprudence of Willfulness,*supra* note 5, Pp 361-412.
[114] *Lim Chin Aik*, [1963] AC 160, cited in, Principles of German Criminal Law, *supra* note 85, P119.
[115]*Ibid.*
[116] Bradley and Ewing, *supra* note 68, P687.

he proves that he had no knowledge of such rule or regulation."[117] The application of this provision is only with respect to imprisonment and it cannot be invoked by the defendant against criminal conviction and fines. However, important in it is that unless the prosecutor proves the accused's knowledge of the rule she is accused of violating, the accused is allowed to rebut the presumption that everyone knows the law.

Similarly, the Federal Trade Commission Act while it entitles the Commission to claim compensation from persons, partnerships and corporations, who violate cease and desist orders it gave according to the Act, it limits this only to circumstances where the Commission satisfies the competent district court that the violators could have known their acts were dishonest and fraudulent against which the cease and desist orders apply.[118] More importantly, a provision which bars any criminal conviction for violation of a rule which the accused can prove ignorance has also been provided in the Investment Company Act of 1940.[119] According to this provision, anyone accused of a crime in violation of a rule may not be convicted so long as she can show that she is ignorant of the respective rule.

These statutes are attempts made to partly abolish the maxim that ignorance of law is no excuse with respect to agency rules. The application of these provisions is not limited to agency rules which are not promulgated as laws. A defendant so long as she can show that she is ignorant of the agency rule based on evidence to the satisfaction of the competent court, she can invoke ignorance as defense. Hence, it should be established that the ignorance maxim is inapplicable in the absence of promulgation.[120] Because, while a person may have reasons to be ignorant even of a promulgated law, it is easily possible to presume ignorance of a rule not promulgated at all. This is also strengthened by the provision in the US Administrative Procedure Act that "No person shall in any manner be required to resort to organization or procedure not so published."[121]

[117]Securities Exchange Act of 1934 [As Amended through 2012], Section 32(a).
[118] Federal Trade Commission Act [As Amended through 2010], Section 19(a)(2).
[119] Investment Company Act of 1940 [As Amended Through P.L. 111-72, Approved Oct. 13, 2009], Section 49.A.
[120]Murphy, *supra* note 6, Pp 281-282.
[121] US APA, *supra* note 74, Section 3(a) (3).

4. The Ethiopian Experience: Judicial Notice of Laws and the Ignorance Defense

4.1.Duty to Make the Law Known Vis-à-vis Duty to Take Judicial Notice of Laws

In Ethiopia, save the power of States to enact penal laws in subject matters not covered by the Federal Government, the power to enact Criminal Code is that of the House of Peoples' Representatives.[122] The Parliament's duty to promulgate laws it enacted has been established in the FDRE Constitution and in Parliamentary laws. The Constitution stipulates that laws deliberated and passed by the Parliament shall be promulgated with or without the President's signature, if the President failed to sign, within fifteen days.[123] The Constitution also prohibits retroactive application of criminal law unless for the accused's benefit.[124] According to these provisions, the Parliament is constitutionally bound to promulgate all laws it passes and penal laws cannot have effect before the date they are promulgated and made known to the public.

The Parliament's duty to promulgate criminal laws it enacted can also be derived from the purposive interpretation of the Criminal Code itself. The Criminal Code provides that, its purpose being ensuring societal peace and order, it intends to achieve this in the first place by giving due notice to the members of the society about which acts and omissions are proscribed and the penalties upon them. It is if the notice is found ineffective that the law will resort to punishment.[125] The Criminal Code also stipulates in its principle of legality that save the power of courts to interpret criminal law in line with its purpose and legislative intention, crimes are only those stipulated in the Criminal Code with penalties are specified for them and courts can neither create crimes through analogical interpretation nor can they impose penalties not stipulated in the law.[126] These Criminal Code provisions tell that crimes are those with respect to which the public is

[122] FDRE Constitution, Art.55(5)
[123]FDRE Constitution, Art.5771 (2).
[124]FDRE Constitution, Art.22.
[125] FDRE Criminal Code, *supra* note 1, Art. 1.
[126]FDRE Criminal Code, Art.2 (1)-(4).

expressly notified by the legislature's promulgation of the criminal law applicable only prospectively. For the simple reason that members of the society cannot keep their hands from violating the criminal law unless they are told what conducts and behaviors are prohibited by the criminal law, the purpose of criminal law cannot be achieved except by promulgating and publicizing the criminal law.

The third law imposing the duty to promulgate criminal laws is the Federal Negarit Gazeta Establishment Proclamation which provides that "All Laws of the Federal Government shall be published in the Federal Negarit Gazeta," and "All Federal or Regional legislative, executive and judicial organs as well as any natural or juridical person shall take judicial notice of Laws published in the Federal Negarit Gazeta."[127] Bearing in mind that the power to legislate laws with respect to matters given for the Federal Government is given to the Parliament, it is safe to conclude that laws enacted by the Parliament cannot give effect unless they are duly promulgated to keep the public aware of their enactment. Once laws, including penal legislation, enacted by the Parliament are duly promulgated in the Federal Negarit Gazeta, this is considered the minimum requirement to keep the public aware of the enactment of laws. Consequently, every natural or juridical person and all government organs are required to take judicial notice thereof. Hence, in principle ignorance may not be invoked as defense against laws so promulgated.

So far, we did not have any experience of criminal laws enacted by the parliament but not promulgated; hence the issue whether ignorance can be raised as defense against parliamentary laws of penal nature cannot be a complex issue. However, a contrary conclusion that no one is duty bound to take judicial notice of laws not promulgated in the Federal Negairt Gazaeta leads us to an issue whether there is a duty to promulgate subordinate legislation in Negarit Gazeta. There are laws which require the promulgation of the same. The first is Article 343(1) of the Criminal Code. It provides:

> *Where a crime is committed in breach of legislation issued by an authorized public organ in accordance with the law and duly*

[127]Federal Negarit Gazeta Establishment Proclamation No.3/1995,Art.2 (2) & (3).

> *published in the Federal Negarit Gazeta or in the legal gazettes of the regional states concerning the control or protection of the fiscal or economic interests of the State, the punishment shall be determined in accordance with the principles of this Code.*

In this provision, the expression "legislation issued by an authorized public organ in accordance with the law" shows that the provision includes not only primary laws but also delegated ones. Similarly, the contrary reading of the expression "duly published in the Federal Negarit Gazeta or in the legal gazettes of the regional states" shows that subordinate laws issued in connection to government's regulatory power and fiscal and economic interests not promulgated in official law gazettes cannot give rise to criminal liability. The Maritime Code also requires for Ministerial Orders varying the Code's provisions with respect to the amount of limit of liability of ship owner and carrier to be published in Negarit Gazeta.[128] Similarly, the Civil Procedure Code requires for Rules enacted pursuant to it to be published in Negarit Gazeta.[129] These provisions give a clue for the argument that directives issued by federal and state government agencies pursuant to delegated legislative power should be promulgated in the respective official law gazettes. However, promulgation in official law gazettes by itself may not suffice to make the society aware of enacted laws. Indeed, as Dejene Girma duly noted, that there is prevalent level of illiteracy, that most of the peoples reside in rural areas, that laws both at federal and state levels are enacted in certain specified languages in the context of multilingualism and that *Berhanena Selam*, the institution that publishes and distributes federal laws has only limited branches throughout Ethiopia make promulgation insufficient to notify the people about crimes that do not coincide with religious and moral values.[130] The important point here is that while promulgation in Negarit Gazeta may not be sufficient for societal legal knowledge, it is the minimum standard.

[128] Maritime Code of the Empire of Ethiopia Proclamation No. 164 of 1960, Art.371(3).
[129] The Civil Procedure Code of the Empire of Ethiopia Decree No 52 of 1965, Art.383(2).
[130] Dejene Girma Janka, *Examining the Relevance of Ignorance of Law in Ethiopian Criminal Law: Emphasis on its Role as a Mitigating Circumstance*, Haramaya Law Review(2021), Vol. 10, Pp. 32-33; Dejene Girma Janka, A Handbook on the Criminal Code of Ethiopia (Addis Ababa, 2013), Pp. 114-16.

4.2. Incomplete Legislation and the Validity of Unpublished Penalizing Agency Rules

The FDRE Constitution allows the Parliament to delegate its legislative power to the Council of Ministers.[131] In addition, the Criminal Code also acknowledges regulations and special laws of criminal nature.[132] Because we did not have constitutional limitations to prohibit delegation of legislative powers on criminal matters, these provisions, seem to authorize the enactment of criminal regulations by the Council of Ministers.

In an attempt to limit this blow, Abebe and Wendmagegn have argued that the power to enact delegated legislation of criminal nature should be limited only to regulatory offenses and shall not be extended to criminal law *per se*.[133] This insightful recommendation could have been constitutionally entrenched based on the joint interpretation of Article 55(5) and Article 77(13) of the FDRE Constitution in line with the justifications for delegated legislation. However, there are no cases so far. Another possible interpretive way to preclude the possibility of criminal laws being enacted by delegation is to restrictively interpret the term "legislation" in Article 3 of the Criminal Code. Accordingly, since the title of the provision says "Other Penal Legislation,"[134] it is possible to restrictively interpret this title to mean legislation enacted by the legislature to give effect to the Government's regulatory policies which come up with their special penal provisions for matters not covered by the Criminal Code.

This line of recommendation may face a challenge on the ground that the provision refers to "regulations" too. However, it has to be seen from the perspective of restricting crimes to those only specified in the Criminal Code. As noted earlier, according the principle of legality as provided in Article 2(1)-(4) of the Criminal Code, crimes and the penalties that follow their commission are only those specified in the Criminal Code. In this perspective, one may argue that Article 3 of the Criminal Code refers to regulations and special laws that if they include penal provisions are required

[131] FDRE Constitution,Art.77(13)
[132] FDRE Criminal Code, Art.3.
[133] Enforcement of the Principle of Legality in Ethiopia, *supra* note57, P 217.
[134] See Criminal Code, *supra* note 1, Art.3. Its title reads: "Other Penal Legislation."

to make reference to specific crimes in the Criminal Code as per Article 344 of the same Code, not regulations and special laws that provide penalties by themselves. Article 344 deals about fiscal and economic crimes. However, the author does not see anything that prohibits the application of this provision for non-economic and non-fiscal crimes. According to this, while the government may enact regulations and special legislation that proscribe acts not criminalized in the Criminal Code as the case may be, these laws may not impose penalties. Rather, they should refer to the relevant crimes in the Criminal Code.[135] Failing this, we will have "criminal laws" rather than "criminal law" and talking about the principle of legality will fall nonsense.

Having the current multinational federal experiment in Ethiopia, whatever one may think about its viability, this argument has one sound limitation. That is the power of states to enact their own penal laws on matters not covered by the federal penal code.[136] And, this is justifiable based on the modern understanding of federalism as a system of government where there are at least two layers of government each of them being "sovereign in at least one policy realm" leading each citizen to be directly governed by "at least two authorities."[137] According to this, it seems sound to argue that the power of states to pass penal laws is limited to matters not covered by the federal penal code not because of the failure of the federal government to incorporate the subject matters but because the matters are of limited scope not covering the whole country, hence natural to be left for state jurisdiction.

Although the FDRE Constitution is silent in this regard, another point is the delegation of legislative powers for specific government agencies beyond the Council of Ministers, which the Parliament has made extensive use of.[138] So

[135] For the same argument regarding fiscal and economic crimes, see Leake Mekonnen Tesfay, *Concurrence of Crimes under Ethiopian Law: General Principles vis-à-vis Tax Laws*, Mizan Law Review (2023), P101.
[136] FDRE Constitution, Art. 55 (5)
[137] Jenna Bednar, The Robust Federation: Principles of Design (Cambridge University Press, 2009), Pp. 18-19. In the traditional understanding of federalism, "[t]he federal authorities may represent the Governments solely, and their acts may be obligatory only on the Governments as such". They could not regulate individual citizens. For example, see John Stuart Mill, Representative Government (1861) (Kitchener: Reprinted by Batoche Books, 2001), P189.
[138] For this, see Administrative Rule Making in Ethiopia,*supra* note 71, Pp19-20.

long as the justifications to delegate are met and the agency rules so enacted can be scrutinized, the Parliament's power to delegate its legislative powers to specific executive agencies can be justified by its general power to legislate on matters which fall on the legislative jurisdiction of the Federal Government.[139] So far, however, we do not have experience of the Parliament delegating its power to issue criminal law either to the Council of Ministers or to specific executive departments. What we do have is incomplete legislation enacted by the Parliament itself with special penal provisions than the general Criminal Code. These penal provisions not only penalize violations against those parliamentary laws but violations of regulations and directives issued based on those parliamentary laws.[140]

This makes the promulgation of subordinate legislation not only a matter of principle but also necessity. Having this, the argument that the duty of the government to promulgate laws should also apply to delegated legislation is, in addition to the experience of other countries, supported by the following two justifications. First, as noted above, the Parliament has a constitutional duty to promulgate laws it enacted. Therefore, when the Parliament delegates its legislative power, it cannot delegate only its legislative power. Since the Parliament's power to issue laws and its duty to promulgate laws it issues are inseparable, the duty to promulgate laws should also pass together with the delegation of legislative power. Therefore, it is sound to argue that there is a constitutional duty to promulgate delegated legislation similar to primary legislation.

[139] FDRE Constitution, Art.55 (1).

[140] Generally see Simeneh Kiros Assefa & Cherinet Hordofa Wetere, Over-*criminalization: A Review of Special Penal Legislation and Administrative Penal Provisions in Ethiopia*, Journal of Ethiopian Law (2017), Vol. 29, Pp 71-83. The problem of incomplete penal legislations is not only criminalization for violation of regulation and directives. Some proclamations also made cross reference to other laws and international agreements as to what acts are prohibited or restricted. For example, the Customs Proclamation No. 859/2014 provides that importing or exporting prohibited or restricted goods amounts to Contraband and it has made reference to other laws and international agreements to determine what goods are prohibited and what are restricted. See Articles 168(1), 2(30) and 2(31). According to this, knowing the details of the Customs Proclamation does not enable to know what amounts to Contraband. This makes the law incomplete and leaves even professional lawyers uncertain about which law and which international agreement to refer to.

Second, as noted above, the Federal Negarit Gazeta Establishment Proclamation provides that "All Laws of the Federal Government shall be published in the Federal Negarit Gazeta," and "All Federal or Regional legislative, executive and judicial organs as well as any natural or juridical person shall take judicial notice of Laws published in the Federal Negarit Gazeta."[141] The term "law" in these provisions has to be interpreted to mean not only proclamations enacted by the Parliament, but also regulations[142] and directives issued by delegation.[143]

If administrative rules are to be accepted as laws without being promulgated in official law gazette, one may argue that they should not be used as laws to regulate social behavior than prescription of administrative working procedures and their violation should not lead to liability. At this juncture, whether promulgation is a validity requirement for laws may be an issue of debate. Since the Federal Negarit Gazetta establishment law does not

[141]Federal Negarit Gazeta Establishment Proclamation No.3/1995, Art.2 (2) & (3).

[142] In practice, regulations issued by the Council of Ministers are promulgated.

[143] For arguments that the term "law" should include all proclamations, regulations and directives, see Administrative Rule Making in Ethiopia, *supra* note70, Pp 21-23; Enforcement of the Principle of Legality in Ethiopia, *supra* note 57, Pp 218-219. In the previous Negarit Gazeta establishment law, not only all laws (proclamations, decrees, regulations, orders, notices), all appointments and dismissals of senior government officials and awards of titles, establishment of associations for the promotion of education and Chambers of Commerce, and all notices of general information of public interest were required to be promulgated in the Negarit Gazeta. See Proc. No. 1 of 1942, Art.2 (a) - (d). Despite this, the current Federal Negarit Gazeta Establishment Proclamation uses the general term "All laws of the Federal Government," when it stipulates about the requirement of promulgation of laws. The change in trend in regions seems also similar with that of the Federal Government. For example, in Tigray according to the regional Negarit Gazeta establishment law which was applicable during the Transitional Government of Ethiopia all proclamations, decrees, government notices, and orders; appointments, dismissal and awards of titles, medals and prizes; the establishment of associations, schools and chambers of commerce; and other information considered of benefit to the public were required to be published in the Negarit Gazeta. See ብዛዕባ ምቑም ነጋሪት ጋዜጣ ክልል ትግራይ ዝወፀ ኣዋጅ ቁፅሪ7/1985 (A Proclamation to Provide for the Establishment of the Negarit Gazeta of the State of Tigray Proclamation No.7/1993), Art.2 (1)-(3)). This law was later revised and those required to be promulgated were made proclamations and regulations, and the establishment of higher education and research institutions. See ነጋሪት ጋዜጣ ክልል ትግራይ ንምቑም ዝወፀ ኣዋጅ ቁፅሪ 8/1986 (A Proclamation to Provide for the Establishment of the Negarit Gazeta of the State of Tigray Proclamation No.8/1994), Art.3 (1) & (2)). Again, this law was amended and only proclamations and regulations are required to be promulgated currently. See መማሓየሺ ኣዋጅ ነጋሪት ጋዜጣ ትግራይ ቁፅሪ110/1998 (Amendment of Tigray Negarit Gazeta Establishment Proclamation No. 110/2006), Art.2(2))

expressly state that laws not promulgated are invalid, there may be an argument that promulgation is required only for the purpose of taking judicial notice. Interestingly, as one can grasp from Article 57 and 71(2), the FDRE Constitution does not expressly provide for publication as validity requirement. However, if the conclusion that laws exist as valid laws irrespective of their promulgation in official law gazettes is to be deducted from these provisions, it means that proclamations and regulations that we know them promulgated in practice need not be promulgated. This seems to lead to legal system turmoil where laws will never be distinguished from pieces of papers whatever is written on them. In addition, we take judicial notice of laws published in official law gazettes because we know or assume that their promulgation gives them binding legal force, as different from news we read from newspapers. Therefore, the distinction between promulgation as validity requirement and as requirement for taking judicial notice seems to be a distinction that does not make sense, a distinction without difference.

Being this as it may, the other possible remedies may be to accept ignorance defense or to require the prosecution in criminal cases or anyone who presents claims based on unpublished administrative rules that the accused or the defendant violates the administrative rules knowingly or recklessly. However, in practice[144] the maxim that ignorance of law is not a defense has overshadowed such important technical issues from being entertained by courts.

4.2.1 Some Points about the Enactment of Administrative Rules according to the Procedures Provided in New Administrative Procedure Proclamation

Recently, the Parliament has enacted a new Administrative Procedure Proclamation (APP).[145]This law has come up with some important procedural and validity requirements for the enactment of agency directives.

[144] As the author understands from his experience as a public prosecutor and a judge, some judges are aware of the issues whether unpublished rules should give rise to criminal liability and the possibility of ignorance defense in cases of criminal charges based on unpublished administrative rules. However, they did not entertain them because they are dominated by the general "consensus" that ignorance of law is no defense.

[145]Federal Administrative Procedure Proclamation No. 1183/2020.

Under Articles 8, it requires every agency to publish a notice of its draft directive "on a newspaper with wide circulation" as well as "on its website and other media". Under Articles 9 and 10, it requires the solicitation of comments for not less than 15 days by distributing the draft directive to relevant agencies and stakeholders and by conducting public hearing forums. Under Article 12(4) & (5), it requires any agency to submit the draft directive to the Ministry of Justice (MoJ) for comments. Under Article 16, after a directive passes the above set procedures of notice and hearing and is then enacted, the APP requires the submission of the directive and its explanatory notes to the MoJ that registers and enumerates the directive. Under Article 17, it requires the MoJ to print and distribute the directive to governmental and other stakeholders, publish it on its website and make it open for all who want to take a copy thereof upon their expenses. Article 18 culminates by stating that directives not registered by the MoJ and posted in the website of the respective agency do not have a binding force as a law.

These provisions being important, one may invoke the following significant concerns. First, the proclamation empowers the MoJ to overtake the power of parliamentary scrutiny. Although the MoJ as an institution entrusted with the power to advise the Government has to play important role in helping government departments to enact legally sound directives, the fact that the APP says nothing about the role of the parliament in scrutinizing the procedural and validity issues of directives seems problematic. Second, more related to the issue of our discussion, from the perspective of registration and numeration as validity requirement, what evidence will proof the directive's registration is not clear. As one practitioner of law can understand, there are several "directives" that informally circulate in court rooms and in the hands of practitioners being copied from one to another. Although they bear serial numbers and the name of the administrative institution that issued them, their informal circulation makes their validity questionable because they do not bear evidence of legal authenticity the best of which should be evidence of promulgation in official law gazettes as different from newspapers. In addition, the registration by the MoJ does not make the directives known and accessible to the people.

Third, while one cannot guess how many copies of all directives issued by all federal government agencies the MoJ will distribute to how many stakeholders, how much of the citizenry can access its website is another issue. Here, an argument that because we need no more paper work suffices it if put online may be raised. However, the issue is how much of its subjects may access the law online. For a law school professor with relative access to the Internet from her desktop, websites may be even more accessible than institutions empowered to publish and disseminate laws such as *BerhanennaSelam* in the case of federal laws. For a peasant residing in the countryside, however, access to websites is unthinkable, at least in the era we live today. On the opposite side, without denying the help of the Internet in making laws and other materials accessible, whether we can fully rely on all directives that we access from it unless they bear evidence of promulgation in official law gazettes may also be questionable. On the other hand, while paperwork is decisive for those who do not have access to the Internet, promulgation in official law gazettes may not necessarily mean publication in paper work. It may be possible to devise a mechanism of making laws bearing evidence their official promulgation accessible in the internet.

Another related issue may be that promulgating administrative rules is adding to the challenge of publication in terms of pace and cost. However, this does not justify application of non-promulgated rules. Indeed, considering the pace and cost of publication we did not apply non-promulgated proclamations and regulations. Conversely, one may argue that the problems associated with publication pace and cost may have positive impact in reducing the enactment of delegated legislation only on selectively necessary technical subject matters, which is not the practice in our case.[146]In general, although the APP will have positive contribution in regulating administrative rule making, the duty to make directives accessible in the Internet for those who can use being one important contribution, it does not resolve important issues that may lead to the invocation of ignorance defense.

[146] Although it needs a separate study for itself, it is important to note here that several regulations and directives are enacted most of their contents being repetitions of and some of them contradictory with subject matters that the enabling parliamentary acts have already regulated.

4.3. Ignorance of Law as Defense

In cases where delegated legislation not promulgated in official law gazette are accepted as valid laws, there must be some way to protect innocent actors who might find themselves in contradiction with these delegated legislation without even having any idea about what these delegated legislation might have prohibited. As noted above, the experience in the UK and USA in this regard is accepting ignorance of law as defense. The experience of accepting the ignorance defense is also used in case of retroactive enactment of criminal law in two ways. First, ignorance of law may be accepted as defense and the accused can be acquitted for the first time, but this will be taken as notice and the ignorance defense will not be accepted next time for the violation of the same rules. Second, the ignorance defense may be accepted but the accused may not be acquitted, she is convicted but subjected to reduced punishment.[147] Here, the important point is that in sentencing hearings, aggravation claims by the prosecutor and mitigation claims by the accused and other facts that can have effect on the sentence, if disputed, have to be proved or disproved in a hearing no less fair than the pre-conviction hearing of the prosecution and defense evidence.[148] Hence, if ignorance of law is accepted as a factor to mitigate sentence, this means that it is used as a defense against unduly aggravated sentence.

In this connection, the Criminal Code provides that "Ignorance or mistake of law is no defence."[149] This seems to leave no room for ignorance defense. However, one can argue that this provision is limited to proclamations duly promulgated. Because, legislative power rests on the legislature and, as noted above, the legislature has constitutional duty to promulgate laws it enacted. Form this, when the Criminal Code precludes ignorance defense, it presupposes that all laws will be promulgated. The citizenry cannot be presumed to know laws the existence of which is not publicized at all and the ignorance maxim applies only to laws duly promulgated.[150] Hence, in cases

[147] Hallevy, *supra* note 49, P152.
[148] Andrew Ashworth, Sentencing and Criminal Justice(5th ed., Cambridge University Press, 2010), Pp 372, 376 & 380-381; Simeneh Kiros Assefa, Criminal Procedure Law: Principles, Rules and Practice(2009), Pp 394-395.
[149] FDRE Criminal Code,Art.81(1).
[150] Philippe Graven, An Introduction to Ethiopian Penal Law (1965), P237.

of criminal prosecution for the violation of unpublished agency directives, ignorance of law should be invoked as defense.

In another way, courts can mitigate punishment without restriction where the accused committed a crime in exercising a reasonably but mistakenly perceived right.[151] More importantly, courts may not impose punishment in case of absolute and justified ignorance and good faith without overt criminal intent.[152] According to Abebe and Wondimagegn, one reason for absolute and justified ignorance of law may be luck of notice about the law due to its non-promulgation and publicity.[153] However, unlike other jurisdictions who accept justified ignorance of law as defense, only mitigation of punishment for ignorance or mistake of law has developed in Ethiopia as legal tradition since the first Penal Code of 1930 and the 1957 Penal Code.[154] According to the 1930 Penal Code, a stranger who came from abroad and heard nothing about the Government ordinances was subject to reduced punishment, but only for six months. Similarly, a countryman or woman versed with a different language than Amharic, the language with which the law was enacted, was subject to reduced punishment.[155]

When the 1957 Penal Code was codified, while some in the Codification Commission argued that to conclusively presume that all citizens know the law would be unrealistic others argued that it would be detrimental to the national interest to let a person who failed to take due notice of offenses and

[151] FDRE Criminal Code, Art. 81 (2).

[152]FDRE Criminal Code, Art. 81 (3). Although not directly related with the subject matter that this article intends to examine, the Criminal Code has provided for many other circumstances where courts can reduce or decide not to impose punishment. These include: accused's renunciation and active repentance "promoted by honesty or high motives" (Art. 28 (1)), attempt of impossible crime using a means or process that "could in no case have a harmful effect" (Art. 29)), crimes committed by superior order in context of stringent State or military necessity (Art.77(2)), excess in self-defense resulting from "excusable fear, surprise or excitement caused by the attack" that the accused was defending (Art.79 (2)), provocative insulting aroused by acts or behaviors that are manifestly shocking and offensive (Art. 616 (1)), and petty theft caused by duly proven hardship and need (Art. 852(1)).

[153] Enforcement of the Principle of Legality in Ethiopia, *supra* note 57, P213.

[154] See Gean Graven, *The Penal Code of the Empire of Ethiopia*, Journal of Ethiopian Law (1964), Vol. 1, No. 2, Pp 275-276 & 290; Penal Code of the Empire of Ethiopia Proclamation No. 158 of 1957, Art.78.

[155]Graven, Introduction to Ethiopian Penal Law, *supra* note 150, P236.

penalties thereof prescribed by law go free. What was adopted was a compromise between these contradicting views. From this, Graven argues that the mitigation of punishment due to ignorance applies with respect to laws duly promulgated.[156] He bases his argument on two laws. The first was the Negarit Gazeta Establishment Proclamation, which as noted above, required promulgation of not only primary legislation but also all subsidiary legislation before they give effect.[157]The second was the then Administration of Justice Proclamation No. 2 of 1942 which provided "when any law has been enacted … it shall be published in the Official Gazette of Ethiopia in the Amharic and English languages."[158]

Therefore, since what was developed in the 1957 Penal Code has been adopted into the current Criminal Code and since the legal tradition in Ethiopia was that all laws, including subordinate laws, were required to be promulgated in Negarit Gazeta, the provision in the Criminal Code to allow ignorance or mistake of laws only as ground for mitigation of punishment works for laws promulgated in Negarit Gazeta. This argument is supported by the comparative experience of accepting ignorance defense in cases of *malum prohibitum* in Germany, UK, USA and the RSA. Moreover, as noted earlier the prevalence of illiteracy and limited distribution of laws in Ethiopia make the argument defensible.[159] Using the criminalization of failure to register the birth of one's infant in the 1957 Penal Code, Peter Strauss has expressed this stating that ignorance about statutory offences is "especially likely to be true in a country such as Ethiopia, where the complexities of modern life are new, where codes, court decisions, and legal information are not widely available, and where not all citizens understand the languages in which they are published."[160] However, Strauss has made it clear that the ignorance of law defense recognized in the Penal Code was not intended to apply for cases of ignorance caused "due to deceitful action on the part of the government in hiding the law once passed" and stated that "if the

[156] *Id*., P237.
[157]*Ibid*. See also Proc. No. 1 of 1942, *supra* note 8.
[158] Administration of Justice Proclamation No. 2 of 1942 Article 22, quoted in Graven, Introduction to Ethiopian Penal Law*, supra* note 150, P237.
[159] See the text accompanying footnote 130 above.
[160] Peter L. Strauss, *On Interpreting the Ethiopian Penal Code*, J. Ethiopian L. 375 (1968), P348.

government ever did act in such a reprehensible manner, it would seem entirely within a judge's authority to refuse to enforce the statute in question."[161] From this perspective, one may think that enacting administrative rules but failing to promulgate them is not different from hiding them. Therefore, in cases where unpublished agency directives are used as basis for criminal prosecution courts should reject to enforce the directives or, at least, accept the ignorance or mistake of law defense and acquit the accused unless the public prosecutor proves to the contrary. The public prosecutor may negate this by showing the court that either the accused had actual knowledge of the directive involved or she could have known it had she taken reasonably required measures, as is required according the avoidability test in the experience of Germany.

The other alternative is to accept ignorance of law as a ground not to impose punishment. If the accused invokes ignorance of law as affirmative defense in case of laws duly promulgated, she bears the burden of proof.[162] Similarly, the scholarly conviction in Ethiopia so far seems to be that "prosecutors are relieved of showing the knowledge of defendants on the existence or correct understanding of the existing penal legislation. It is up to the defendant to show that he lacked legal knowledge or he misunderstood the existing law to get whatever benefits are available to him due his ignorance or mistake."[163] This may be because the problem in prosecution for violation of unpublished administrative rules has not been studied critically. According to this author, however, in cases of prosecution for violation of unpublished agency directives, the accused should be totally exempted from punishment without being required to prove her ignorance. The mere fact that the directives she is alleged to have violated are not promulgated suffices for her to be ignorant of them. The logic in this argument is that if the accused cannot be acquitted based on ignorance defense with respect to unpublicized directives for whatever reason courts may find, she should face no punishment without a prior notice or opportunity to be aware of what acts are criminalized, unless the prosecutor proves her actual or reasonable ground for knowledge. Hence, her conviction serves the primary purpose of criminal law, i.e., notice. Still,

[161] *Id.*, P347.
[162] For a note on the contradiction between presumption of innocence and the accused's burden to prove her affirmative defenses, see Laudan,*supra* note 11, Pp110-114.
[163] Dejene, *supra* note 130, P114.

it is unfair to convict a person for violating a directive she did not know or she is not given an opportunity to know. However, it is an evil lesser than convicting and punishing her. In this connection, if the registration of agency directives by the MoJ according to the APP and their publication in the website of the MoJ and the respective agencies that issue the directives is to be accepted as sufficient means of publishing them in place of promulgating them in official law gazettes, those who do not have access to the internet should be allowed to invoke ignorance either as a defense against conviction or as a factor to reduce or not to impose punishment.

4.4. The Experience in Federal Supreme Court Cassation Division

In *Dandi Boru University College v Teklu Urga and others*, the Cassation Division said that courts are required to take judicial notice of all proclamations, regulations and directives so long as they are officially issued by the government.[164] In other words, the Cassation Division "assumed that the mere issuance of the directives renders them 'official'"[165] and precludes any option for requiring the prosecution or a claimant who relies on an unpublished administrative rule to proof knowledge of the accused or the defendant when violating the unpublicized rule.

In *ERCA Public Prosecutor v Daniel Mekonen*,[166] the petitioner charged there spondent for two alternative counts. According to the charge, on 22 Nehassie 1996 E.C., the respondent was found transporting 46.96 KG Gold to Djibouti to export it illegally. For this, the first alternative charge was contraband under the Customs Proclamation No. 60/89 (as amended). The second alternative was illegal transaction in gold under the Money and Baking Proclamation No. 83/94 and National Bank Gold Transaction Directive No.CTG/001/97. The respondent pleaded not guilty. The Federal First Instance Court (FFIC) examined the prosecution and defense evidence, acquitted him from the first, and convicted and sentenced him under the second.

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[164]Cited in Administrative Rule Making in Ethiopia, *supra* note 71, P23

[165]*Ibid*

[166] *Ethiopian Revenues and Customs Authority Public Prosecutor v Daniel Mekonen*, File No. 43781, Federal Supreme Court Cassation Decisions, Vol. 10, Pp 345-349.

On appeal, the Federal High Court (FHC) ruled that with respect to the first alternative charge the petitioner did not prove that the respondent committed contraband. With respect to the second alternative, it ruled that Proc. No. 83/94 did not provide for restriction on gold transaction and since Directive No. CTG/001/1997 was written only in English (not both in Amharic and English) and not promulgated it could not establish criminal liability. The Federal Supreme Court (FSC) confirmed the FHC's decision.

The Cassation Division quashed the FHC's and FSC's decisions and said that there was no Administrative Procedure Law and any law that requires promulgation of subordinate legislation in Ethiopia. It also said that there are as many subordinate legislation issued by different institutions in different ways not promulgated in Negarit Gazeta and criticized the FHC's and FSC's decisions that they would annul the multitude of directives in practice. By virtue of this decision, the Cassation Division precludes any challenge to the validity of unpublished administrative rules.

The Cassation Division's interpretation regarding the ignorance defense is mixed. In *Samson Mengistu v ERCA Public Prosecutor*,[167] the petitioner was charged with the crime of possession of unlawful goods in violation of Article 99 of the Customs Proclamation No. 622/2009[168] and the National Bank of Ethiopia Directive issued on Ginbot 21, 2001 E.C. that restricts possession of foreign currency and Ethiopian birr by passengers leaving and Entering Ethiopia. The ground for the charge was that he was found, on an ex-ray customs search, on 10th day of Sene 2002 E.C. in Bole International Airport leaving Ethiopia having 5000 Euro. The petitioner pleaded not guilty. The FFIC examined the prosecution and defense evidence and acquitted him. It opined, the Cassation Division has given binding decision

[167] *Samson Mengistu v ERCA Public Prosecutor*, File No. 80296, Federal Supreme Court cassation Decisions, Vol. 14, Pp 180-183

[168] This provision criminalized possession of unlawful goods found in violation of the customs laws. In the new customs law, there is no a crime called possession of unlawful goods. The Cassation Division has ruled that the new law did not include a crime called possession of unlawful goods. See Customs Proclamation No. 859/2014, Articles 166-174; *Ethiopian Revenues and Customs Authority Public Prosecutor v Seyfe Abbebe Nigusse*, File No. 111960, Cassation Decisions, Vol. 20, Pp192-195.

in File No. 45435[169] that the fact that the petitioner was found on the way to leave the country having the Euro after the expiry of the time within which he was allowed to re-export it denies him only his right to take the Euro abroad but it did not deny him his right to claim its equivalent in Ethiopian birr; and that since the petitioner imported the Euro with due declaration and tried to take it abroad with a belief that he has the right to take it back, he committed the act with no intention to commit a crime.

The FHC reversed the FFIC's decision and opined that the petitioner was found leaving Ethiopia possessing foreign currency six months after the declaration (with which he declared the Euro when entering Ethiopia) was written; the directive which was in force when he entered Ethiopia had been changed when he was found leaving back with the foreign currency, hence it is the new directive which has applicability to his act; and that the petitioner knows that foreign currency is a restricted good. The FSC dismissed the petitioner's appeal. The petitioner petitioned the Cassation Division that confirmed the FHC's and FSC's decisions. He argued that the directive which was in force when he was found trying to go abroad having the Euro was not in force when he entered Ethiopia having declared the same Euro, and, he added, if it was to be said that the time limit for him to re-export the Euro was lapsed, he should not be denied his right to claim its equivalent in Ethiopian birr.

The Cassation Division rejected the petitioner's claims based on two reasons. First, it said according to Article 25 of the Criminal Code,[170] the directive applicable to his act of attempting to go abroad having the Euro is the new

[169]See *Ethiopian Revenues and Customs Authority v W/ro Eyerusalem Wondie*, File No. 47935, Cassation Decisions, Vol. 12, Pp169-170. In this case, the respondent sued the petitioner in the FFIC on the ground that when she came from U.S.A. on Hamle 29, 1999 E.C., she declared 12,500 USD with and deposited with the petitioner. However, when she goes to Dubai on Tikimt 14, 2001 E.C. the petitioner gave her only 2,500 USD deducting the 10,000 USD, and claimed for the respondent to pay her the 10,000 USD or its equivalent in Ethiopian Birr. The Federal First Instance Court decided that whereas the act of the petitioner prohibiting the respondent from leaving the country having the 10,000 USD is justified, it ordered the petitioner to pay the respondent its equivalent in Ethiopian Birr. This decision was confirmed both by the Federal High Court and the Cassation Division.

[170] Article 25 of the Criminal Code provides about time and place when and where a crime is said to be committed.

directive.[171] Secondly, the Cassation Division rejected the petitioner's invocation of the ignorance defense with a shallow reasoning. It said, according to Article 81(1) of the Criminal Code ignorance of law is no excuse and, it is understandable from the petitioner's arguments that his act did not fall in Article 81(3) of the Criminal Code.

Similar to *Samson Mengistu v ERCA Public Prosecutor*, in *Michael Liminez v ERCA Public Prosecutor*,[172] the petitioner was charged in the FFIC for possession of unlawful goods in violation of Article 99 of the Customs Proclamation No. 622/2009 and National Bank Directive No.472/2002, on the ground that he was found going abroad having 100,000 ETB, a restricted amount. The petitioner pleaded guilty, but explained that he committed the act due to ignorance of law and because he did not find a foreign currency despite his due effort to change the ETB into foreign currency. The FFIC convicted him according to his plea of guilty and sentenced him to one year and two months' imprisonment. The FHC dismissed his appeal. In his cassation petition, he argued that he committed the act with good faith and is excusable according to Article 81(2) & (2) of the Criminal Code; and that the lower courts should mitigate the penalty unrestrictedly and the imprisonment should be suspended.

The Cassation Division examined his petition in light of Article 81(3) of the Criminal Code and acquitted him. According to it, extracts from the words the petitioner stated in his plea in the FFIC established that he had declared above 8,000 (eight thousand) USD when he entered Ethiopia, and exchanged the same into ETB according to legal banking procedure; that he bought goods necessary for his investment but was left with excess money, and because the bank where he exchanged his USD first rejected his claim to exchange the ETB to foreign currency he was found with x-ray examination going back to his country having 100,000 ETB. The Cassation Division concluded that he had legally exchanged in bank above 8,000 USD and he came to Ethiopia for investment purposes and that his investment work

[171] Neither the FHC nor the Cassation Division stated the details of the similarities and differences between the previous directive and the new one. It was impossible to have access to and present the differences between the two directives to readers.

[172] *Michael Liminez v Ethiopian Revenues and Customs Authority Public Prosecutor*, Federal Supreme Court Cassation Division, File No. 59453, 27 October 2011 (Unpublished).

enables him to come back in another time show he acted in good faith and had no overt intention to commit crime.

In *Samson Mengistu v ERCA Public Prosecutor*, the Cassation Division relied on Article 81(1) of the Criminal Code and held that ignorance or mistake of law is no defense. It particularly rejected the petitioner's claim for ignorance defense saying that his arguments in the lower courts and before the Cassation Division itself did not show that his case falls under Article 81(3). The Cassation Division's reasoning is too shallow. It did not state the facts he should have proved to invoke ignorance defense. Fortunately, in *Michael Liminez v ERCA Public Prosecutor* the Cassation Division reopened the room for the ignorance defense. It acquitted Mr. Michael Liminez based on his ignorance defense based on Article 81(3) of the Criminal Code. The reasoning the Cassation Division used to acquit him is not sufficiently clear. However, lower courts and even the Cassation Division itself can go counting the facts in *Michael Liminez v ERCA Public Prosecutor* to capitalize on these circumstances to develop the jurisprudence of ignorance defense more clearly in future similar cases.

In this connection, an important establishment in *Michael Liminez v ERCA Public Prosecutor* is the prosecutor's burden to prove that the accused committed the criminal act out of good faith and the way the Cassation Division interpreted plea of guilty under Article 134 of the Criminal Procedure Code. The Cassation Division makes it clear that if the accused pleaded to have committed the criminal act he is accused of due to ignorance of law and in good faith, it is up to the prosecutor to disproof the accused's claims, the accused is not required to proof his ignorance of law and his good faith.[173] This, taken strictly, may be problematic that all accused may use it to defy prosecution. However, it can be helpful in cases the accused has reasonable grounds to be ignorant of the law, for example in cases where the crime is based on un-promulgated agency directives used to complement penal legislation the issue of our discussion in this article.

Still, however, there is confusion in the Cassation Division's interpretation of the difference between 81(1) and 81(3). In both *Samson Mengistu v ERCA*

[173] *Ibid.*

Public Prosecutor and *Michael Liminez v ERCA Public Prosecutor* the Cassation Division considers the ignorance defense under Article 81(3), although it arrived at completely different conclusions. However, it has to be clear that if courts accept ignorance of law defense and decide to acquit the accused, they have to rely upon their interpretive insertion of exception to Article 81(1), not Article 81(3). Article 81(3) cannot be relied upon to acquit the accused based on ignorance of law. It can only be relied upon to decide not to impose a punishment on an accused convicted of a crime when courts found reasons not to impose punishment.[174] In other words, because excusable acts are "accts done in circumstance reducing the degree of guilt",[175] not excluding it, Article 81(3) reduces guilt and empowers courts to go to the extent of deciding not to impose penalty, but not to the extent of acquitting the accused. Hence, the Cassation Division relied upon a wrong provision when acquitting Mr. Liminez. The problem is not that it acquitted him. However, it should have done so by interpreting Article 81(1) that the exclusion of ignorance of law defense applies only to laws duly promulgated. Interestingly, in this case it seems the Cassation Division found itself in a quandary between its determinations to acquit Mr. Liminez, on the one hand, and maintaining its previous balance sheet of precedents that unpublished administrative rules can give rise to criminal liability and that ignorance of law is not a defense even against agency directives not promulgated, on the other.

Being this as it may, another comment on the Cassation Divisions' decision in *Michael Liminez v ERCA Public Prosecutor* is its lack of clarity and failure to rule on the effect of the accused's acquittal on the exhibit. Although the Cassation Division reversed the decision of lower courts convicting Mr. Liminez, it did not clearly state that he was acquitted and that the ETB he was caught exporting has to be returned to him. Because of this, Mr. Liminez instituted a civil suit to claim the ETB and he was finally successful.[176] Once the Cassation Division ruled that Mr. Liminez's case

[174] It is important that Liminez claimed for mitigated penalty, not for acquittal or exemption from penalty at all.
[175] Graven, Introduction to Ethiopian Penal Law, *supra* note 150, P178.
[176] See *Michael Liminez v Ethiopian Revenues and Customs Authority*, Federal Supreme Court Cassation Division, File No. 92478, Tir 26, 2006 E.C. (Unpublished).

falls under Article 81(3) of the Criminal Code and acquitted him it should have clearly ordered that his money should be returned to him.

5. Concluding Remarks

The maxim that ignorance of criminal law excuses no one developed from ancient Greeco-Roman legal tradition where criminal law was all about natural reason and custom reasonably known by everyone. In the modern administrative state, however, the proliferation of statutory offences has made ignorance of law a reality, and the ignorance maxim risks punishing innocent actors. To reduce this risk, there are two remedies developed. The first is the duty of states to make the law known to its subjects through promulgating it, at minimum. The second is accepting ignorance defense in cases of criminal charges for acts *malum prohibitum* and criminal charges based on unpublished administrative rules.

In Ethiopia, lack of express provision for subordinate laws to be published has led to controversy. For the purpose of criminal law or, at least, for the purpose of economic and fiscal crimes, Article 343(1) of the Criminal Code implies that administrative rules enacted either by the federal or state governments for economic and fiscal regulatory purposes cannot give rise to criminal liability unless published in official law gazettes. On the other hand, joint reading of this provision with Article 81 of the same Code implies that ignorance of law may a defense against criminal liability for the violation of unpublished administrative rules. Contrary to this, the Federal Supreme Court Cassation Division has given successive binding interpretations to the effect that courts should take judicial notice of unpublished administrative rules, that unpublished administrative rules can give rise to criminal liability and that ignorance defense may not be invoked against criminal liability for violation of unpublished rules. The cases in which the Cassation Division so decided involve transaction in gold as well as possession and export of currencies, acts criminalized for economic and fiscal policy objectives.
The Cassation Division has accepted ignorance defense in *Michael Liminez v ERCA Public Prosecutor*. However, it did base on the petitioner's plea that he did the act he was accused of due to ignorance of law. That is, cautious enough to maintain its previous precedents it did not invoke the fact that Mr. Liminez was accused of violating unpublished National Bank directives

issued to control the import and export of currencies as justification to acquit him. Although *Michael Liminez v ERCA Public Prosecutor* could open a new perspective for ignorance defense, the recently enacted APP provides for directives issue by all federal government agencies to be registered by the MoJ and be posted in the website of the both the MoJ and the respective agencies that pass the directives. This implies that ignorance defense may not be invoked against directives so registered and posted, as if registration by the MoJ will avoid possible confusions or mistake as to the legal authenticity of the directives and as if everyone has access to website. In fact, the APP also requires the MoJ to disseminate copies of the directives so enacted to stakeholders. If all directives were to be distributed to all concerned parties in this way, ignorance would not be an issue. However, this seems to be unrealistic.

The risk of criminal liability while ignorance of law has been the norm may be rectified with two complementary remedies. First, federal and state legislative councils need to enact laws to the effect that delegated legislation be published in official law gazettes. Second, courts need to develop the jurisprudence of ignorance defense. According to this, in case of criminal charges for acts *malum prohibitum* even based on promulgated laws, courts may reduce or impose no penalty if the accused proves her ignorance of the law as per Article 81(1) or (3) of the Criminal Code. Although this is already in the law, we do not have developed judicial jurisprudence to this effect. In cases of criminal charges for violation of unpublished administrative rules, courts should require the prosecutor to prove that the accused knows or had the opportunity to know the said rule. Failing the prosecutor to prove, courts should, at least, impose no penalty as per Article 81(3) of the Criminal Code. In effect, conviction serves the purpose of notice. Finally, if agency directives not promulgated in official law gazettes but published in websites are to be accepted as valid laws the violation of which is backed by criminal sanction, those who can reasonably show lack of access to the Internet should be allowed to invoke ignorance defense.

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