# Governing Using Criminal Law: Historicising the Instrumentality of Criminal Law in Ethiopian Political Power

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## Abstract

*While a constitution vests (limited) power on a government, criminal law may be used to effectively deny power to any contending party (group). This article argues that besides achieving its legitimate ends of prevention of crime, the criminal law is used to govern the country by denying power to contending parties. This is done based on the analysis of the adoption of the respective constitutions, the adoption of the criminal laws and the attending socio-political circumstances of the adoption of the criminal law.Emperor Haile Selassie adopted the 1930 Penal Code on the day of his coronation which is later sanctioned by the 1931 Constitution which makes his power perpetual 'divine right'. When the Provisional Military Government had come to power, it adopted a Special Penal Code to be applied by a Special Courts-Martial, and the PDRE Constitution came only 13 years later. Likewise, as soon as EPRDF came to power, it detained the previous regime officials, both civilian and military, in the first few days. It is only after such action that the Transitional Period Charter was drawn up.*

**Key terms:** Constitution; Criminal Law; Instrumentalism; Special Penal Code; Special Courts-Martial; Special Laws.

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## Introduction

It has long been recognised that law in general, and criminal law and the institutions of criminal justice in particular, are used for achieving certain ends.[1] The ends of criminal law are diverse[2] but they can generally be put under two categories – legitimate and non-legitimate ends.[3] Certainly, criminal laws are used for legitimate ends of 'maintaining social order', which is a common good, provided other means, such as civil and administrative actions, are found to be ineffective.[4] However, the legitimacy of the ends of

[1] Tamanaha examines the various theories of law and their instrumentalist perspective. B.Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW (Cambridge University Press 2006). The Comaroffs discussed how the law is fetishized as an instrument of 'combat'. J.L. Comaroff and J.C. Comaroff, *Reflections of the Anthropology of Law, Governance and Sovereignty* In RULES OF LAW AND LAWS OF RULING: ON THE GOVERNANCE OF LAW (F. von Benda-Beckmann, K. von Benda-Beckmann and J. Eckert eds., Ashgate Publishing 2009).

[2] TAMANAHA (2006) *supra* note 1, at 6.

[3] M. Tonry, *The Functions of Sentencing and Sentencing Reform*' In 58 STANFORD L. REV. 37 (2005).The discussion is made from the perspective of the purposes of punishment. However, it clearly shows the various ends of criminal law from punishment perspective. The instrumental aspect of criminalization of the conduct of 'others' is better dealt with by criminologists. See for instance, P. SCRATON, POWER, CONFLICT AND CRIMINALISATION (Routledge 2007). A. Norrie,*Citizenship, Authoritarianism and the Changing Shape of the Criminal Law* In REGULATING DEVIANCE: THE REDIRECTION OF CRIMINALISATION AND THE FUTURES OF CRIMINAL LAW (B. McSherry, A. Norrie and S. Bronitt, eds., Hart Publishing (2009); J.J. RODGER, CRIMINALISING SOCIAL POLICY: ANTI-SOCIAL BEHAVIOUR AND WELFARE IN A DE-CIVILISED SOCIETY (Willan Publishing 2008). H.D. BARLOW AND D. KAUZLARICH, EXPLAINING CRIME: A PRIMER IN CRIMINOLOGICAL THEORY (Lanham: Rowman & Littlefield 2010). G.R. SKOLL, CONTEMPORARY CRIMINOLOGY AND CRIMINAL JUSTICE THEORY: EVALUATING JUSTICE SYSTEMS IN CAPITALIST SOCIETIES (Palgrave Macmillan 2009).

[4] For the principle of *ultima ratio* and subsidiarity of criminal law, see Simeneh Kiros Assefa and Cherinet Hordofa Wetere, *'Over-Criminalisation': A Review of the Special Penal Legislation and Penal Provisions* In 29 JOURNAL OF ETHIOPIAN LAW 49 (2017); A.M.P. del Pino*The Proportionality Principle in Broad Sense and Its Content of Rationality, the Principle of Subsidiarity* In TOWARD A RATIONAL LEGISLATIVE EVALUATION OF CRIMINAL LAW (A.N. Martin and M.M. de Morales Romero eds., Springer 2016). D.

criminal law may be seen both objectively as well as in historical context in their attending socio-political-economic circumstances.

Criminal law has played a central role in the Ethiopian politics, arguably, more than constitutional law. The 1930 Penal Code had been promulgated on the day His Imperial Majesty Haile Selassie was crowned. Even though the Code, in its preamble, states that it is a revision of the *Fetha Nagast*, and that it contains several provisions that are meant to achieve the common good in any open and democratic society, both the content and the circumstances of its adoption show that it is used as a political tool for suppression of contention to the throne.[5] The power consolidation had further been sanctioned by the 1931 Constitution. As Eritrea had become part of Ethiopia in 1952, the Federal Criminal Law had been adopted late in 1953 and Federal Courts were established to enforce such suppression of opposition and the protection of the federation, constituting 'the Empire'. The 1957 Penal Code was a comprehensive substitute of the previous criminal laws with fairly the same end.[6] In so doing, the state is using the 'rule of law' justification for its coercive action.

As soon as the Provisional Military Government Council ('PMAC') came to power in 1974, a new political economy was established – the means of

Husak, *The Criminal Law as Last Resort* In 24 OXFORD J. OF LEGAL STUDIES 207 (2004).

5 See section 3.2, infra.

6 The 1957 Penal Code is a penal code that would be adopted in any open and democratic society. Because Graven understood that Ethiopians believe in the expiation of punishment, he kept those severe penalties. Jean Graven, *The Penal Code of the Empire of Ethiopia* In 1 J ETH L 267(1964) at 271, 274, 288. He further maintained the spirit of the 1930 Penal Code regarding those crimes that are considered threat to the state and government many of which are punishable by death. *Id.*, at 289. For instance, offences against the Emperor or the Imperial Family (art 248), outrage against the Dynasty (art 249), outrages against the constitution or the constitutional authorities (art 250), armed rising and civil war (art 252) were potentially punishable by life imprisonment or death.

production were nationalised; and socialism was declared the national political-economic ideology.[7] The initial legislative action of the Military Government had first been establishing itself as a legitimate government by virtue of the *Provisional Military Government Establishment Proclamation (1 of 1974)* which also provided for the adoption of a special penal code to enforce the 'new' political economy. The PMAC had taken important extra-judicial measures, but it has also made good use of criminal justice for the enforcement of its political ideologies and preservation of political power.[8]

Our general observation is that political stability is an ever-present concern in the country and each new government attempts to maintain 'law and order' sanctioned by criminal law. Even though it had not bent on adopting new penal legislation, as if it is a natural course of action, as soon as the EPRDF Government came to power, it started detaining previous Government Officials.[9]

The state intervention and manipulations were not limited to criminal norms. Often the government uses certain institutions because the efficacy of those criminal norms is determined by the institutions behind them and the methods

[7] See in general, Fasil Nahum, *Socialist Ethiopia's Achievements as Reflected in Its Basic Laws* In J ETH L 83, (1980).

[8] The political irony is made clear when Let. Gen. Tefaye Gebrekidan released those former military generals as 'political prisoners' in his one week long acting president position in late May 1991, whom his convicted as a presiding judge in the Court Martial of the Supreme Court, for a failed coup d'état against President Mengistu Hailemariam in May 1988. ENA, *196 Political Prisoners Released on Amnesty*, ADDIS ZEMEN, Addis Ababa, 24 May 1991, at 1, 6 (in Amharic).

[9] The EPRDF forces took control of the city of Addis Ababa on 28 May 1991. In the following few days, the Dergue high ranking civil and military officials were arrested either on active search or on surrender. _____, *High Ranking Officials of the Previous Government Surrendered*, ADDIS ZEMEN, Addis Ababa, 03 June 1991, at 1, 6 (in Amharic). _____, *Legesse Asfaw Captured*, ADDIS ZEMEN, Addis Ababa, 03 June 1991, at 1, 6 (in Amharic). _____, *High Ranking Officials of the Previous Government Continue Surrendering*, ADDIS ZEMEN, Addis Ababa, 05 June 1991, at 1, 5 (in Amharic).

they employ. Generally, criminal laws are enforced by the ordinary courts. However, there are several institutional arrangements made for the various criminal laws. For instance, the Imperial Government created Federal Courts to enforce the 1953 Federal Criminal Law. The PMAC created a Special Courts-Martial manned by military officials to enforce the Special Penal Code. It also created a Special Prosecutor and a Registrar for the Special Courts-Martial. Those institutions were the manifestation of both the sheer force of the state and the specific desire of the government of the time.

There were also both subtle and overt changes in administration of criminal justice in the post-1991 period. Initially, there were no norm creation as the criminal law was already rich; there was no creation of special courts because it does not have particularly popular record.[10] Thus, it focused on the prosecution side, such as the Special Prosecutor's Office for the prosecution of the former Dergue officials, and later, the Federal Ethics and Anti-Corruption Commission for the enforcement of the anti-corruption laws, and the Revenue and Customs' Authority Prosecutors for enforcement of tax legislation, etc. Those institutions were established to enforce the values behind those special legislations and yet the state always and consistently uses the doctrine of 'rule of law' for using such coercive action.

In this article, we examine the state's use of criminal law as an instrument in the power relations arrangement through a chronological time frame and the rule of law justification provided by the governments of the time for the use of such coercive state acts. It reviews the content of specific criminal law and specific provisions in the context of the attending socio-political circumstances such rules were adopted. It illustrates with decided cases.

[10] It should be noted that specialized benches were established for those cases.

Section one gives the context of the utilisation of criminal law for various ends. It discusses the legitimate ends of criminal law; in so doing it attempts to show how the positive nature of criminal law is taken advantage of to achieve ideological ends too. Because the government of the time justifies the enforcement of criminal law as the rule of law, section two dwells on doctrine of rule of law. As the doctrine of rule of law borders the notion of limited government, and the coercive power of the government is manifested principally through criminal law, the content of the doctrine of the rule of law is discussed in order to give background to criminal law as an exercise of sovereign power. Section three then follows to chronologically illustrate how criminal law is used as an instrument of maintaining political power and ideology. It does so in putting the socio-political circumstances and events of the day in context. Often the sources are matters of common knowledge and provided for in the laws' preamble. However, some news reports are also examined in order to show the general political tendency of the time.

It can generally be observed that there is a tendency in the governments to make use of special legislation all the time. The Special Penal Code is historical black spot; however, its ramifications continued to date. Thus, Section four discusses the continuation of the spirit and activities of the Special Penal Code in an attempt to clarify certain conclusions. Section five makes an evaluation of the historically discussed criminal legislation in light of the doctrine of the rule of law as understood at the time of the application of those legislations. A final remark is also in order.

## 1. The Context of Political Changes and Criminal Law

Governments have a menu of actions from which they choose to achieve their legitimate ends. Because a government action must be based on law, more often than not, governments legislate laws to justify their actions on diverse

areas. In recent decades, the role of the state is expanding – as the ideology shifts from a *lassiez faire* to welfare state and administrative law is expanding too.[11] Those administrative actions are sanctioned by criminal law because it is the most effective instrument of social control. Such criminal sanctioning of administrative matters created inflation of criminal law[12]progressively changing the administrative state into a criminal state.[13] Such tendencies give the state a freehand to use criminal law for other purposes too.

The limitations on the criminalisation power of the state are developed in the area of criminal law rather than in other public laws, such as constitutional law and administrative law. There were various theories developed in order to limit the power of the state in resorting to criminal law, such as the principle of utility,[14] subjective rights,[15] protected legal interests,[16] and the common

[11] These are new developments in the common-law world particularly for the welfare state. Norrie, *supra* note 3, at 32, 33.

[12] Generally, see S. Eng, *Legislative Inflation and the Quality of Law* In A NEW THEORETICAL APPROACH TO LEGISLATION (L.J. Wintgens ed., Hart Publishing 2002).

[13] After the 'New Deal' the US Congress delegated extensive administrative rulemaking power to executive agencies. Thus, Barkow describes such state of affairs as 'administrative state'. R.E. Barkow, *Prosecutorial Administration* In 99 VIRGINIA L. REV. 277 (2013). R.E. Barkow, *Separation of Powers and the Criminal Law* In 58 STANFORD L. REV. 989, 994 (2006). In the Ethiopian case, the administrative agencies are also delegated criminal lawmaking power. Simeneh and Cherinet, *supra* note 4.

[14] Beccaria appears to have convoluted the social contract theory justification of sovereignty for criminalisation and enforcement of punishment, and the principle of utility in the criminal law. He further crossed over to the notion of the common good. C. BECCARIA, BECCARIA ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS (R. Bellamy ed., Cambridge University Press 1995) (1764) at 7, 9, 11, 12.

[15] M.D. Dubber, *Theories of Crime and Punishment in German Criminal Law* In 53 AM. J. OF COMP. L. 679, 686, 687 (2005). T. VORMBAUM, A MODERN HISTORY OF GERMAN CRIMINAL LAW (M. Hiley Tr., Springer 2014) at 49, 51, 56.

[16] The doctrine of legally protected interest originally developed by Karl Binding to expand the criminalisation power of the state. Today, we are arguing for a limited criminalising power of the state based on that same doctrine. See, Dubber, *supra* note 15, at 686. VORMBAUM, *supra* note 15, at 49, 129,

good.[17] Despite the stark difference in the core of these theories, they converge on two central issues. Criminal law is used for the prevention of crime and it must be used as a last resort measure. The concern is always criminal law is used to achieve other purposes than the prevention of crime or as first resort state action.

Ethiopia had several government changes, many of which are traditionally accompanied by violence making political stability always a central concern of the government of the time. In the modern history of the change of governments, it appears to be a natural course of action that the new government makes various legal reforms and such reforms were led by criminal law, not by a constitutional law. Emperor Haile Selassie, for instance, signed the 1930 Penal Code into law before the adoption of 1931 Constitution.[18] When it established itself by Proclamation No 1 of 1974, PMAC promised a constitution would soon be adopted.[19] It had also promised to establish a Special Courts-Martial to deal with the 'past

[17] The doctrine of protected legal interests is expanded and refined in its content to refer to the common good as incorporated in the provisions of art 1 of the Criminal Code. Also, see S. Mir Puig, *Legal Goods Protected by the Law and Legal Goods Protected by the Criminal Law, as Limits to the State's Power to Criminalize Conduct* In 11 NEW CRIM. L. REV.: AN INTER'L AND INTERDISCIPLINARY J. 409, 413 – 18 (2008).

[18] Graven, *supra* note 6, at 272.

[19] The *Provisional Military Government Establishment Proclamation No 1 of 1974* ('Proc No 1 of 1974') art 5(b) provided that 'the new draft constitution, the promulgation of which has been demanded by the Armed Forces Council *as a matter of urgency*, shall be put into effect after necessary improvements are made to include provisions reflecting the social, economic and political philosophy of the new Ethiopia and to safeguard the human rights of the people.' [emphasis added.]

events'.[20]The Special Courts-Martial had been established immediately while the constitution took more than 13 years to come by.[21]

Two months after their detention, all the former high-ranking Imperial officials, were summarily executed on 23 November 1974 on the order of PMAC.[22] It was only after such execution that the Special Courts-Martial went into business. Apparently, the Government was not satisfied with the way the Special Penal Code help accomplish its objectives. Thus, the Code had been revised in 1981 to increase the punishment for several of those offences and to include few other offences.[23] The Special Courts-Martial had also been replaced with Special Courts wherein civilian judges were presiding, this time, with both first instance and appellate jurisdiction.[24] Unlike that of the Special Courts-Martial, the decisions of the Special Court are available. This Special Court again was later merged with the regular courts we know of today.[25] The creation and transformation of the Special

[20] *Id*., art 9. It also provided that 'judgements handed down by the Military Court shall not be subject to appeal'.

[21] *The Special Courts-Martial Establishment Proclamation No 7 of 1974* ('Proc No 7 of 1974') and *The Special Penal Code Proclamation No 8 of 1974* ('Special Penal Code'), respectively.

[22] The letter written on 22 November 1974 with 'Extremely Urgent' note at the top was signed by Mengistu Hailemariam. It states that it is a unanimous political decision of the Dergue that those individuals be killed by a firing squad. _____ *Important Political Decision Rendered by Provisional Military Administrative Council*, ADDIS ZEMEN, Addis Ababa, 26 November 1974, at 1, 6 and 7 (in Amharic).

[23] *The Revised Special Penal Code Proclamation No 214/1981* ('The Revised Special Penal Code').

[24] *Special Court Establishment Proclamation No 215/1981* ('Proc No 215/1981') art 2 establishes 'First Instance Special Court' and 'Appellate Special Court'. Like its predecessor, art 4 (and art 22) of this proclamation give the exclusive jurisdiction on civil and criminal matters to such Special Court.

[25] The PDRE Constitution art 100(1) established 'one Supreme Court' whose power would be defined by the National Shengo, art 63(3)(c). The PDRE Supreme Court had, thus, been established by *Supreme Court Establishment Proclamation No 9/1987*. The Supreme Court had civil, criminal and military divisions, art 17(1). Proclamation No 215/1981 was repealed and all those matters arising under the Revised Special Penal Code would be given to the

Penal Codes and the Special Courts have historical parallels in the former Soviet Union, and other former Latin American military dictatorships, such as Chile and Argentina.[26] It is stating the obvious that both the norms and the institutions were used as political tools of convenience.

After the Military regime was deposed in 1991, the new government did not adopt a new criminal law immediately because the criminal law was already rich. However, it established a Special Prosecutor's Office ('SPO'), and prosecuted those former regime officials including all the PMAC founding members alive.[27] Even though the Transitional Period Charter was adopted before the adoption of the SPO Proclamation, because there were several groups contending for power,[28] those former officials were all arrested within

High Court. The High Court is established by the *High Court and Awraja Courts Establishment Proclamation No 24/1988*. It is worth noting that Military Courts were also established by *Proclamation No 10/1987* with traditional military jurisdictions. Finally, Central Courts were re-established by *Central Government Courts Establishment Proclamation No 40/1993*.

[26] See for instance, L. HILBINK, JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE (Cambridge University Press 2007). A.W. Pereira, *Of Judges and Generals: Security Courts under Authoritarian Regimes in Argentina, Brazil, and Chile* In RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (T. Ginsberg and T. Mustafa eds., Cambridge University Press 2008). HANS PETTER GRAVER, JUDGES AGAINST JUSTICE (Springer 2015). K. Grzybowski, *Main Trends in the Soviet Reform of Criminal Law* In 9 THE AM. UNI. L. REV. 93 (1960).

[27] Girmachew Alemu Aneme, *The Anatomy of The Special Prosecutor v. Colonel Mengistu Hailemariam, et.al., (1994-2008)* In 4 INT'L JOURNAL OF ETHIOPIAN STUDIES1,(2009) at 1 – 3.

[28] The principal participants of the transitional period conference were EPRDF, OLF, EDU and ALF. There were also representatives of Benishangul, Gambella, Guraghe, Hadiya, Sidama, Somali, Adere, Kenbata, Wolaita, among others. ENA, *Conference Participants and Observers*, ADDIS ZEMEN, 06 July 1991, Addis Ababa, at 1, 8 (in Amharic). The Transitional Government legislative body was established with 87 seats and 81 of them were allocated to those groups participated in the Conference. (*Id.*) It is to be noted that some of those organisations were declared 'terrorist' organisations' by the House of Peoples' Representatives as per the *Anti-Terrorism Proclamation No 652/2009* ('Anti-Terrorism Proclamation') art 25(1). Adem Kassie Abebe, *From the 'TPLF Constitution' to the*

the first few days soon after EPRDF took control of the city of Addis Ababa and they were awaiting their trial while the Transitional Period Charter was being 'negotiated'.[29]

It is evident that criminal law has a unique feature that, in the political power struggle, while a constitution vests power in a 'limited government', a portion of the criminal law may effectively be used to deny power to 'the other' whoever claims or aspires to claim power legitimately or otherwise. In making use of criminal law, the new government asserts either of the two things or both; that is, it intends to install 'rule of law', and the previous government has failed to deliver such a public good. There are historical evidence for this assertion. The first ever written constitution, the 1931 Constitution, vests all the power of a government in the Emperor and makes his power perpetual and succession to the throne only through bloodline.[30] The official narration for adopting a constitution (and a positive criminal law) was to advance the country in positive direction, and maintenance of rule of law, making power succession predictable.[31] In fact, there was an elaborate discussion on the virtues of 'the law'.[32] The Constitution under article 6 also provides that the monarch would act 'in conformity with the established rule of law'.[33] The absolute power of the Monarch and the perpetual nature of his

*'Constitution of the People of Ethiopia': Constitutionalism and Proposals for Constitutional Reform* In CONSTITUTIONALISM AND DEMOCRATIC GOVERNANCE IN AFRICA: CONTEMPORARY PERSPECTIVES FROM SUB-SAHARAN AFRICA (M.K. Mbondenyi and T. Ojienda eds., PULP 2013) at 56.

[29] E.g., see Girmachew, *supra* note 27. Adem, *supra* note 28, at 54.

[30] The 1931 Constitution art 3 provided that 'The Law determines that the Imperial Dignity shall remain perpetually attached to the line of His Imperial Majesty Haile Selassie I'.

[31] ----------, *Patterns of Progress: Constitutional Development in Ethiopia Vol. XI* (Ministry of Information 1968) at 25, 32.

[32] *Id.*, at 32, 33.

[33] The 1931 Constitution, art 6 provided that '[i]n the Ethiopian Empire supreme power rests in the hands of the Emperor. He ensures the exercise thereof in conformity with the established law.'

power and the bloodline succession to the throne is maintained in the 1955 Revised Constitution.[34]

Likewise, the PMAC vested all government powers on itself.[35] Any opposition to 'the changes' is prohibited and anything against the motto 'Ethiopia Tikidem' would be severely punished.[36] The Council promised to have a constitution in the 'immediate future' in which principles of democracy and human rights are enshrined and blames the previous government for monopoly of state power and abuse of such power.[37] The combined reading of these two statements would indicate that the rule of law is what the would-be coming constitution was sought to address. In the same vein, the FDRE Constitution recognise 'past grave injustices' and desires to establish a political community founded on a democratic order based on the rule of law and respect for individual fundamental rights and freedoms as well as group rights.[38]

There are two points of clarification. First, as alluded to earlier, criminal law is not used only for illegitimate purposes by those in power. Substantial part of the criminal law provisions are meant to promote public good by protecting life, liberty, property, good name, and social morality so that social existence of the individual may be possible. Likewise, the stability of the state and the incorruptibility of public offices is a common good.[39] The fact is that there are those few provisions that are susceptible to abuse in order to promote other

[34] The provisions of art 3 of the 1931 Constitution became art 2 of the Revised Constitution of 1955. The provisions of arts 3 – 25 govern succession to the throne.
[35] Proc No 1 of 1974, *supra* note 19. *Definition of Powers of the Provisional Military Administration Council and its Chairman, Proclamation No 2 of 1974* ('Proc No 2 of 1974') art 6.
[36] Proc No 1 of 1974, *supra* note 19, art 8. Special Penal Code, *supra* note 21, art 35.
[37] Proc No 1 of 1974, *supra* note 19, preamble paras 1, 2, 3.
[38] FDRE Const., preamble para 4.
[39] Dubber, *supra* note 15, at 684.

values that are aggressively prosecuted and remain in the news media. Second, criminal law is not the only branch of law that is used as a means for such purposes. The other areas of public law, such as constitutional and administrative laws, are also used for such purposes. However, they too are sanctioned by criminal law which may not be necessary.

Otherwise, the laws recognise that the state's power is not unlimited. Even the first Imperial Constitution article 6 provides that the king acts in accordance with the 'established rules of law'. This is a classical contradiction that he is the one making the law and at the same time he is bound by the laws he made. Such events appear to be occurring all the time. In the period of the PMAC, the Council is the highest organ and its chairman can set the agenda for discussion and acts on behalf of the Council. His actions were not any different from the Monarchical era except the fact that the Chairman of the Council was not claiming entitlement based on divinity.

It is in such sorts of political instability and infighting for dominance that the criminal laws are adopted and the institutions are established by the body in power. Unmistakably, the enforcement of such criminal law is presented as maintenance of rule of law.[40]The doctrine of the rule of law is about a limited government whose actions are justified by law.[41] Criminal law is quintessentially a manifestation of the state's coercive power.[42] Thus, whether

[40] As soon as PM Abiy Ahmed came to power, the EPRDF Executive Committee decided to release people detained for protesting against the Government and for violation of the state of emergency rules, in order to expand the political space (this is just not to say 'political prisoners') both the Prime Minster and the Attorney General state that 'the rule of law has to be maintained'.

[41] Barkow (2006) *supra* note 13, at 994.

[42] *Id.*, at 992, 993. N. PERSAK, CRIMINALISING HARMFUL CONDUCT: THE HARM PRINCIPLE, ITS LIMITS AND CONTINENTAL COUNTERPARTS (Springer 2007) at 6, 10.

the state's power regarding the use of criminal law is limited is a proper area of enquiry.[43]

## 2. Doctrine of the Rule of Law

The doctrine of the rule of law has always been a point of debate for its content and connotation. However, there are intuitively understood qualities of the doctrine of the rule of law. It is a rule of law not of men and that the law is equally applied and that the state itself is also subject to law for all its activities.[44] Each of these assertions are also subjects of reasonable differences. However, there is a general agreement that the rule of law is 'good' as such for it is said to have the virtue of limiting discretion and establishing certainty.[45]

The classification of the discussions on the doctrine of the rule of law into the formal and the substantive rule of law made by Paul Craig is still guiding.[46] The formal doctrine of the rule of law is about formal things, such as the existence of rules and the manner such rules are adopted. Such definition of the rule of law does not question the content of such law. Because it is concerned with the ontology of the rules, some call such approach to the rule of law as 'strong legalism'.[47] In a general reference, the proponents of such

[43] Barkow (2006) *supra* note 13, at 993.
[44] D. Dyzenhaus, *Recrafting the Rule of Law* In RECRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER (D. Dyzenhaus ed., Hart Publishing 1999) at 1, 2, 8, 9.
[45] Ibid. Also, see B.Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (Cambridge University Press 2004) Chapter 11, at 137 ff.
[46] P.P. Craig, *Formal and Substantive Conception of Rule of Law: An Analytical Framework* In PUBLIC LAW 466 (1997).
[47] L.J. Wintgens, *Legislation as an Object of Study of Legal Theory: Legisprudence* In LEGISPRUDENCE: A NEW THEORETICAL APPROACH TO LEGISLATION 9, 19 – 20 (L.J. Wintgens ed. Hart Publishing 2002).

approach are also called 'democratic positivists' because, often, they tend to be Benthamite.[48]

The substantive doctrine of the rule of law, on the other hand, takes into consideration both the form of the law, i.e., whether there is a law on the basis of which the state acts, how such law is made, as well as it enquires into the content of such law. There is intense debate regarding what to include in the nature and content of law in order for its compulsory application to constitute a rule of law. Brian Tamanaha, for instance, argues that the rules need to have certain quality and content without which the rule cannot be validly complied with.[49] Because this approach goes beyond the positive law to consider other disciplines or subjects, such as individual rights, morality, economics and sociology, it is also called 'weaker legalism'[50] and some refer to its proponents 'liberal anti-positivists'.[51]

Having these matters in mind, we now turn to the discussion on the formal and substantive doctrines of the rule of law. In his cascaded discussion from the thinnest doctrine of the rule of law to the thickest, Tamanaha further classifies the formal doctrine of the rule of law into three categories and the substantive doctrine into another three categories.[52] Because his classification is detailed and makes our discussion more intelligible, we rely on it without necessarily subscribing to it.

[48] Dyzenhaus, *supra* note 44, at 2 – 4.
[49] See text for notes 56 and 57, *infra*.
[50] Wintgens, *supra* note 47, at 19, 20, 25. Dyzenhaus, *supra* note 44, at 4, 5.
[51] Dyzenhaus, *supra* note 44, at 3.
[52] Following Craig's classification of theories on rule of law into formal and substantive (*supra* note 46) Tamanaha discussed the formal theories of rule of law under Chapter 7 and the substantive theories under Chapter 8. TAMANAHA (2004) *supra* note 45.

The first type of the formal rule of law is what he calls the *rule by law*.[53] This understanding of the rule of law requires that there be a law only on the basis of which the state acts however it is made.The second type of the formal doctrine of rule of law is *pure legality*,[54] i.e., the law must meet the legal requirements of the law-making process. The third type of formal rule of law requires pure legality but it also requires that the law should be *democratically made*.[55] What is common among the three categories is that they all are content with the positive law and they do not go beyond. Doctrine of the rule of law in the formal sense is complying with 'a rule'.

Substantive doctrines of the rules of law are also classified into three but we discuss only the two of them which are relevant to our discussion. The first category of substantive rule of law requires pure legality, but it also requires respect for *human rights*.[56] Thus, the law-making power of the legislative body is limited by fundamental rights and freedoms of citizens.The second category of the substantive doctrine of rule of law further requires it should be *democratically made*,[57] which, as the pure formal doctrine of rule of law, is without content. Unlike, the formal rule of law, the substantive rule of law considers matters that are 'beyond' the positive law. Those two last categories overlap with the doctrine of constitutionalism.[58]

Before going into the details, there are few theoretical cautionary notes to make regarding how the theory of law defines almost everything else that follows, including doctrine of the rule of law itself. Theory is a method of solving a given problem because it gives paradigm to the enquirer on the

[53] TAMANAHA (2004) *supra* note 45, at 91-93.
[54] *Id.*, at 93-99.
[55] *Id.*, at 99-101.
[56] *Id.*, at 102-108.
[57] *Id.*, at 110-112.
[58] TAMANAHA (2004) *supra* note 45, Chapter 11.

subject at hand, such as law, in our case.[59] The theory of the nature of law defines the meaning of such notion of law, because it affects the method in law and the role of the institutions interpreting the law, which ultimately affect the doctrine of the rule of law.[60] This is because, first, the type of theory we choose determines how we see the relationship between law and other subjects, such as morality or politics. For instance, positivism makes a clear boundary between law and those 'other things' that are beyond 'the law', such as the social values and politics.[61] Positivism is about whether the law is validly made without looking at its content; the existence of the law as valid law made according to the procedure that empowers the making of such law is the necessary and sufficient condition without questioning the content of such law because positivism does not deal with matters that are not part of 'the law'.[62]

The nature of theory of law also determines the method of the legal system, such as interpretation of the law. For positivism, rules are sufficient in themselves, therefore, it utilises exegetic method of interpretation.[63] Other schools, such as natural law and realist schools consider matters that are said to be 'beyond the law'; they utilise hermeneutic interpretation method.[64] Consequently, the theory of law the system adopts further determines the role

[59] Barlow and Kauzlarich, *supra* note 3, at 1-15.
[60] Wintgens, *supra* note 47, at 18. Dyzenhaus, *supra* note 44, at 2 – 4.
[61] M. ZAMBONI, LAW AND POLITICS: A DILEMMA FOR CONTEMPORARY LEGAL THEORY (Springer 2008). Also, see K. Touri, *Legislation Between Politics and Law* In LEGISPRUDENCE: A NEW THEORETICAL APPROACH TO LEGISLATION 9, 102 ff(L.J. Wintgens ed. Hart Publishing 2002).
[62] Wintgens, *supra* note 47, at 14.
[63] Wintgens, *supra* note 47, at 11, 17, 18.
[64] *Id.*, at 11, 17, 18. See, e.g., A. Ornowska, *Introducing Hermeneutic Methods in Criminal Law Interpretation in Europe* In INTERPRETATION OF LAW IN THE GLOBAL WORLD: FROM PARTICULARISM TO A UNIVERSAL APPROACH (J. Jemielniak and P. Miklaszewicz eds., Springer 2010). R.S. SUMMERS FORM AND FUNCTION IN A LEGAL SYSTEM: A GENERAL STUDY (Cambridge University Press 2006).

of institutions, such as the courts and the legislature. For instance, in positivist school, the courts' authority is limited to interpreting and applying the law in a formal way, leaving major actions to the legislature.[65] As such, governing through law is considered to be the sovereign authority of the lawmaker.[66]

In fact, the principle of legality requires that criminal law be positive law. Stated otherwise, the rules must be pre-declared. That, however, does not mean criminal law subscribes to the positivist theory of the nature of the law. There are few general observations one can reasonably make. First, criminal law displays intuitional character; it is both normative in that it declares rules of conduct and it has real consequence in life.[67] Second, its interpretation is guided by several postulates and principles that are not necessarily written in the law; included are, the principle of legality, the principle of unity of legal system and coherence, non-retroactivity of criminal law, equality before the law, and the principle of lenity.[68]

Third, at least in the discussion of criminalisation, politics has significant role in criminal law. By definition, criminalisation is a borderline between law and politics that it cannot squarely fall under positivist theory of law.[69]

[65] E.W. THOMAS, THE JUDICIAL PROCESS: REALISM, PRAGMATISM, PRACTICAL REASONING AND PRINCIPLES (Cambridge University Press 2005) at 255.

[66] D.S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN (Cambridge University Press 2006) at 26, 27. B. KRIEGEL THE STATE AND THE RULE OF LAW (M.A. LePain and J.C. Cohen Tr., Princeton University Press 1995) at 31.

[67] O. WEINBERGER, LAW, INSTITUTION, AND LEGAL POLITICS: FUNDAMENTAL PROBLEMS OF LEGAL THEORY AND SOCIAL PHILOSOPHY (Springer 1991). M. LA TORRE, LAW AS INSTITUTION (Springer 2010).

[68] Ornowska, *supra* note 64, at 254, 255. Also, see H. AVILA, THEORY OF LEGAL PRINCIPLES (Springer 2007) Chapter 3, Metanorms. Simeneh Kiros Assefa, *Methods and Manners of Interpretation of Criminal Norms* In 11 MIZAN L. REV. 88 (2017) at 100 – 110.

[69] ZAMBONI, *supra* note 61, at 9, 23. PERSAK, *supra* note 42, at 23. Also, see Tuori, *supra* note 62. Simeneh Kiros Assefa, *Legisprudential Evaluation of Ethiopian Criminal Law-Making* In 14 MIZAN L. REV. 161 (2020) at 165 – 167.

Criminalisation is a process by which a yet to be law conduct, which is not in the realm of positive law, is transformed into an already law, which is in the realm of the positive law. In fact, positivism has been blamed for every evil that occurred in history, including Nazism, Apartheid, slavery and colonialism.[70] Each of those institutions claimed rule of law and by that they mean positive law.

The question then would be which doctrine of rule of law is applied in the Ethiopian criminal justice? All of those successive Governments appear to have similar theory of the nature of law, either expressly adopted or actually implemented. However, as we are reviewing a fairly long time range and different political systems, in order to evaluate the doctrine of the rule of law of the time, it is appropriate to evaluate the prominent criminal legislation of such period.

## 3. Ethiopian Criminal Laws in Historical Context

### *3.1. The Fetha Nagast*

The *Fetha Nagast* is a religious text as well as a legal document. The first part, composed of 22 chapters, deals with religious matters.[71] The second part, composed of 51 chapters, deals with secular matters because it is applicable to citizens in their everyday life. The *Fetha Nagast* appears to be a universe of the law complemented by the Pentateuch and other scriptures;[72] the criminal

[70] See, for instance, U. MATTEI AND L. NADER, PLUNDER – WHEN THE RULE OF LAW IS ILLEGAL (Blackwell Publishing 2008).

[71] The first part deals with the Church, the Holly Books accepted by the Church, Baptism, appointment of Patriarchs, Bishops, Priests and Deacons, and the various mass services, fasting, prayers, etc.

[72] This part also deals with, for example, betrothal, dowry, marriage, prohibition of concubines, loan, pledge, guarantee, deposit, mandate, liberty, slavery, guardianship, sales, purchase, lease, loan, will regarding property, succession, and various types of crimes, appointment of judges, and hearing of witnesses.

law, given a relatively expanded coverage than other subjects,[73] is found in the second part and is highly influenced by the first part.

It is evident that those rules are meant to maintain law and order in the church structure, instil morality and obedience in the society and maintain law and order. The content of *Fetha Nagast* was progressively revised by religious fathers, also enforced by the monarch. Once the king is anointed by the Church, the latter also sanctions that any challenge to his power is meted out severely, thereby maintaining the monarchical power.[74] The *Fetha Nagast* had a commanding obedience because of the religious influence it had.[75]

### *3.2. The 1930 Penal Code*

On the day of his coronation, Emperor Haile Selassie signed the 1930 Penal Code into law.[76] In order to inspire greater legitimacy, the Penal Code claims to be a revision of the *Fetha Nagast*; however, a closer examination shows otherwise. The *Fetha Nagast* is dominated by religious matters. Therefore, the conducts that are criminalized in the *Fetha Nagast* are religious and moral offences, such as blasphemy and fornication.[77] The Penal Code does not have similar content.[78]

[73] Criminal provisions are found in different parts but chapters 44 – 50 deal with criminal matters directly.

[74] See the trial of one Surahe Krestos, the chief of Wolkait in the reign of Iyasu II (1730-1755). He had been adjudged 'a rebel', which is an act of high treason, a crime against the monarch. He was judged not worthy of 'being spared from death'. FETHA NAGAST: THE LAW OF THE KINGS (Trans. Abba Paulos Tsadwa, Law Faculty HSIU 1968) at xxi-xxv.

[75] *Fetha Nagast*, *supra* note 74, at xix. Graven, *supra* note 6, at 268 – 270.

[76] Graven, *supra* note 6, at 272.

[77] Chapters 46 and 44, respectively.

[78] The association of the Code with the *Fetha Nagast* is only for legitimacy purpose. Graven, *supra* note 6, at 273, note 15.

The Code is relatively well organised and modern for its time. Even though it appears to be divided into five parts, it can generally be said it has a general part and a special part. The first part appears to be the general part governing punishment – it defines the types of punishment, aggravation and mitigation grounds, defences, and calculation of fines. The second, third and fourth parts govern crimes against the government, against persons and against property, respectively. The fifth part governs contraventions. In this Code, there are only three provisions regarding religious crimes reducing them to minor crimes – articles 270 – 272.

However, the instrumental nature of criminal law may be seen in context. When Emperor Menelik II passed away, Lij Iyasu succeeded the throne. He was dethroned by conniving nobilities, putting Empress Zewditu, the daughter of Emperor Menelik II, as the Queen and Ras Teferi as her Reagent.[79] When Queen Zewditu died in dubious manner, Ras Teferi had been designated for the throne in 1928 and anointed as King of Kings in 1930. Teferi was aware of the various front battles to succeed to the throne even against Queen Zewditu, and the main resistance coming from Lij Iyasu assisted by his father, *Negus* Michael.[80] He knew maintaining power in the traditional combat style is difficult. Thus, as soon as he came to power, he adopted the 1930 Penal Code.[81]

[79] EMIRU HAILE SELASSIE, FROM WHAT I SAW AND WHAT I RECOLLECT (second edn, in Amharic, Addis Ababa University Press 2002 EC) at 53 – 89.

[80] Negus Michael was granted posthumous amnesty on 02 November 1952, on 23rd coronation anniversary of His Imperial Majesty apparently only to 'make peace' with the people of the province of Wollo. _____, *His Imperial Majesty's Benevolence to the Nobilities and People of the Province of Wollo and Amnesty to Negus Michael,*ADDIS ZEMEN, 02 November 1952, Addis Ababa, at 1. (in Amharic).

[81] Regarding development of those institutions and their work see, Simeneh Kiros Assefa, *The Development of Modern Criminal Justice Process and Institutions in Ethiopia (1907-1974): An Overview*In 18 MIZAN L REV 215 - 240 (2024) Notes (in Amharic).

The following year, in 1931, the first written constitution was adopted. The official narrative for the adoption of the Constitution focuses on modernization of the country; but there are also admissions made that it is meant 'for the maintenance of [the] government'.[82] However, the content of the Constitution shows that the Emperor was solidifying his power not only to himself but also to his successors.

### *3.3. Special Legislation and Penal Code Amendments*

Between the 1930 and the 1957 Penal Codes, there were two major political events. The first was the Italian occupation of the country for five years. In restoring the Empire, the Penal Code was amended to punish those alleged to have had taken side with the invading Italian force for crimes of treason, espionage and allied offences.[83] In order to handle such matters, a Security Court had been established by *The Security Prosecution Proclamation 1947* (No 87/47) to be presided by nine judges. Records show that, Dejazmach Haile Selassie Gugsa was tried by this court and sentenced to death.[84]

The second political event was the federation of Eritrea to Ethiopia in 1952. Just a few months later, in November 1953, *Federal Crimes Proclamation No 138 of 1953* was adopted.[85] It is stated in the preamble and in the content of the Federal Criminal Law that it was meant for the protection of 'the Federal

[82] *Patterns of Progress*, *supra* note 31, at 28, 30

[83] This appears to be trial for war crimes as it had been conducted elsewhere at the conclusion of WWII. See *Penal Code (Amendment) Proclamation 1942 and Penal Code (Amendment No 2) Proclamation No 1942*. N. MAREIN, THE ETHIOPIAN EMPIRE – FEDERATION AND LAWS (Royal Netherlands Printing and Lithographing Company 1954) at 75.

[84] But there is no evidence that he was executed. *Id.*, at 76

[85] Marein calls this law 'a code in miniature' because it incorporates broad range of offences. *Id.*, at 181. However, the legislation clearly depicts its common-law touch as reflected in its definition of murder and manslaughter.

Government and of the integrity of the Federation'.[86] The obvious, yet unstated, objective of the Federal Criminal Law was in fact to suppress any opposition to the federation both from Eritrean and Ethiopian sides.[87] This legislation was probably the first to require registration of any type of non-governmental organisations at the pain of criminal punishment.[88]

In order to enforce such law, the courts established in 1942 were transformed into Federal Courts;[89] where the court hears matters of federal jurisdiction. One of the members of the Court is required to be of Eritrean origin appointed by the Monarch.[90]

### *3.4. The 1957 Penal Code*

Subsequent to the adoption of the Revised Constitution, Ethiopia adopted the 1957 Penal Code. Suffice here to state only a few points. The Code is purely continental code, comprehensive and requiring special knowledge for its application. Second, it also incorporates enforcement of individual rights through criminal law.[91] Third, it restricts the criminalization power of the state by requiring it to comply with certain requirements, as provided for under article 1.[92] Yet, it had extensive provisions for the protection of the Monarch

[86] *Federal Crimes Proclamation No 138/1953* ('Proc No 138 of 1953') preamble para 2.

[87] See, e.g., treason, not reporting treason, inciting and aiding treason, conspiracy to overthrow the government, and acts against the territorial integrity of the Federation were severely punished. arts 3 – 9.

[88] Proc No 138 of 1953, *supra* note 86, art 10(B).

[89] *The Federal Judiciary Proclamation of Ethiopia No 130 of 1953*, later amended by *Proclamation No 135 of 1953*.

[90] Marein, *supra* note 83, at 77. There was no publication of appointment of Eritrean origin to such court. *Id.*, at 79.

[91] The Code introduced basic principles of criminal law which help in the interpretation and application of criminal law in general and the Penal Code in particular. Simeneh (2017), *supra* note 68, section 3.

[92] For in-depth discussion on the interpretation and application the provisions of art 1 of the Criminal Code, see Simeneh and Cherinet, *supra* note 4, section 2.3.

and the Imperial family the violation of which would be punished severely. It is the specific nature of those provisions that enticed the PMAC to adopt special rules for the protection of the members of the PMAC and their families.[93]

### *3.5. Special Penal Code Proclamation No 8 of 1974*

When the PMAC came to power on 12 September 1974, it promised to have a special court to deal with 'past matters'. Thus, it would adopt the Special Penal Code, to address 'grave offences [committed against] the changed' political economy, matters that had not been covered by the Penal Code and that had come to light along with the political change; it would also provide for 'the internment of persons found committing crimes and considered to be a danger or the cause of danger to society' and to empower the court, when it is necessary, to confiscate any property or wealth obtained by illegal means'.[94] The belief that punishments in the Penal Code were 'light' is also expressed as one of the reasons for the adoption of the Special Penal Code.[95]

The Special Penal Code was made applicable retrospectively.[96] The reason was said to be most of those crimes provided for in the Special Penal Code 'have previously been defined in the criminal laws and the rest have long been recognized by natural law, custom and the practice of the professions' that they were not new.[97]

[93] See texts to notes 98 and 99 *infra*.
[94] Special Penal Code, *supra* note 21, preamble paras 5 and 6.
[95] *Id.*, preamble para 8.
[96] *Id.*, art 2(1), preamble para 11.
[97] *Id.*, preamble para 9.

The Special Penal Code had 6 Chapters; Chapter 1 provided for Offences against the Ethiopian Government and the Head of State.[98] However, this protection is also provided for the members of the PMAC personally and to their family.[99] All offences provided for under this Chapter carry the death penalty, except those committed in relation to preparation and offences against the activities of the PMAC.

Chapter 2 was about breach of trust and offences against the interest of the government; it provided for improper use of government property, crimes relating to tax and bribery. Those offences were all punishable by imprisonment and fine. Chapter 3 was about abuse of official power. Those offences were punishable by a lesser term of imprisonment and fine. Chapter 4 was about crimes against the judicial proceedings of the Special Courts-Martial, such as court contempt, perjury and improper translation, and aiding escape of detainees. These offences were also punishable by a term of imprisonment and fine, similar to those provided for under Chapter 3.

Chapter 5 contained signature offences to the time, such as offences against the Motto 'Ethiopia Tikidem', false or tendentious information, traffic in prohibited arms, and illicit making, acquisition, concealment or transport of dangerous materials without special authorization. Each of these offences were also punishable by a term of imprisonment and fine. Chapter 6 provided for additional punishments, such as fines to be imposed in addition to imprisonment when the crime is committed for gain,[100] confiscation of property[101] and internment as a special measure after a convict completes the

[98] Proc No 2 of 1974, *supra* note 35, arts 2 and 3 provide that the 'Council shall discharge [both] the functions of the Head of Government' and Head of State. The Head of Government and Head of State is the Provisional Military Administrative Council.
[99] Special Penal Code, *supra* note 21, art 7.
[100] *Id*., art 42.
[101] *Id*., art 43.

terms of his punishment should he be found to be 'dangerous to the national security and unity or public order and general welfare'.[102]

### *3.6. The Revised Special Penal Code*

The long-awaited constitution had not come forth. However, the Government believed the Special Penal Code and its institutions needed revision. The revision of the Special Penal Code is only increasing those punishments which were already severe in comparison to the 1957 Penal Code. For instance, the punishment for smuggling money and property to foreign countries was originally punishable with 3 to 10 years' rigours imprisonment; this punishment is increased from 3 to 25 years' rigorous imprisonment.[103] Likewise, corrupt practices and acceptance of undue advantage were punishable with fine and in exceptional circumstances from 10 to 20 years' rigorous imprisonment. This punishment is increased from 1 to 25 years' imprisonment and in exceptional circumstances imprisonment for life or death.[104]

The Revised Special Penal Code also introduced few new offences, such as commission of counter-revolutionary acts (art 12),[105] offences against the economy (art 18), each of which is punishable with 5 to 25 years' rigorous imprisonment and in exceptional grave conditions, with life imprisonment or death. Failure to supervise, breach of duties and procurement of undue advantage (arts 24 to 26) were also newly introduced offences.

[102] *Id*., art 44.
[103] *Id*., art 18. The Revised Special Penal Code, *supra* note 23, art 19.
[104] Special Penal Code, *supra* note 21, art 17 and 19. The Revised Special Penal Code, *supra* note 23, art 20.
[105] As crime against the national motto 'Ethiopia Tikidem' (Special Penal Code, art 35) was dropped, one may consider this as a substitute. See note 131, *infra*.

The Special Penal Code cannot be seen in isolation. The Special Courts-Martial was also created to enforce the Code by virtue of *Special Courts-Martial Establishment Proclamation No 7 of 1974*. The Proclamation creates not only the court but also Special Prosecutor and Registrar of such court.[106]

The Court had two tiers – The Special General Court-Martial and the Special District Court-Martial.[107] Jurisdiction is allocated to these two courts in the schedule attached to the Special Criminal Procedure Code Proclamation No 9 of 1974, and those crimes that are considered serious are allocated to the Special General Court-Martial. The decisions of those courts were not subject to review.[108] However, cases in which serious penalties were imposed by the court may be reviewed by the Head of State.[109] Further, as the Courts-Martial was only in session in Addis Ababa, jurisdictions of the Special Courts-Martial were partly delegated to provincial civil courts.[110] In order to counter clandestine opposition, the Special Penal Code was amended in July 1976 to include death penalty for 'anti-revolutionary activities'.[111]

Perhaps a legislation that is worth mentioning is *A Proclamation to Provide for a Measures Ensuring Public Order, Safety and Welfare, No 10 of 1974*. This Proclamation assumes that there were people attempting to 'disrupt the peaceful change' in the country, and desiring 'to create chaos'.[112] It thus authorizes the State to take temporary measures to suppress threats by 'demand[ing] for surety' or to order the 'preventive detention' of those

[106] Proc No 7 of 1974, *supra* note 21, art 16.
[107] *Id*., art 3(1)(a) and (b).
[108] *Id*., art 10.
[109] *Id*., art 11.
[110] *Special Courts-Martial Establishment, Special Penal Code and Special Criminal Procedure Code Proclamations Amendment Proclamation No 21/1975*.
[111] *Special Penal Code and Criminal Procedure Code Proclamations Amendment Proclamation No 96/1976*, art 17.B.(2).
[112] *A Proclamation to Provide for a Measures Ensuring Public Order, Safety and Welfare, No 10 of 1974*, preamble.

persons the State believes to have posed 'a threat to public order'.[113] Such preventive detention may be ordered for a maximum of three months. However, the Government may extend it for a maximum of additional three months.[114]

After having things under relative control through several extra-judicial actions and the Special Courts-Martial,[115] the later was transformed to a Special Court.[116] All the detainees were released and there was actually no case to be transferred to the newly created Special Court.[117] The Court had both Special First Instance Court and Special Appellate Court which were presided by 'civilian judges'.[118] The Special Court is later integrated to the ordinary courts.[119]

We focused on the Special Penal Code and the Special Courts-Martial because they were signatures of the time. There were also other legislations that were meant to pursue the state's objectives. From the provisions discussed here, one can discern that they were meant to achieve certain objectives of the Government of the time that were not necessarily legitimate nor do they justify the use of criminal law or such severe punishment. The obvious government objectives were maintaining political power, pursuing a particular political ideology, maximizing government revenue and

[113] *Id*., art 3.
[114] *Id*., art 4(1), (2).
[115] See, *supra* note 22.
[116] Proc No 215/1981, *supra* note 24, arts 4, 22.
[117] ABERRA JEMBERE, AGONY IN THE GRAND PALACE: 1974 - 1982 (Shama Books 1991, in Amharic) at 172 – 73.
[118] Proc No 215/1981, *supra* note 24, arts 4, 5. Some of those military judges who were presiding in the Special Courts-Martial remained judges in the Special Court of First Instance and Appellate Court and civilian judges were also appointed.
[119] See, *supra* note 25.

maintaining public property. The reading of the decisions of the Special Court shows that the political rhetoric finds its way into the judicial decisions.[120]

### *3.7. Later Developments*

Even though the Special Court had already come to an end in 1991, the direct application of the Special Penal Code continued for a longer period. In later times, the State is engaged in excessive use of criminal law which may be put under three categories. The first type of criminal norms include special penal legislation, such as *Proclamation to Control Vagrancy No 384/2004*, *Anti-Terrorism Proclamation No 652/2009*, and *Corruption Crimes Proclamation No 881/2015*. These proclamations were meant to govern conducts that were originally in the 1957 Penal Code and later in the 2004 Criminal Code.[121]

The second category of norms include administrative proclamations, such as the *Banking Business Proclamation No 592/2009* and *Commercial Registration and Business Licensing Proclamation No 980/2016*. These legislation were principally meant for administrative purposes but they also contain penal provisions that carry serious punishments. The third type of

[120] *Special Court Prosecutor v. Assefa Ayinalem Mehanzel* (Special First Instance Court, Crim. F. No A3/14/74, June 7, 1984). *Special Court Prosecutor v. Abdi Mohammed Ibrahim, et. al.,* (Special First Instance Court, Crim. F. No 62/75, December 8, 1983). *Special Court Prosecutor v. Addisie Libassie* (Special First Instance Court, Crim. F. No A/61/75, November 1, 1983). *Special Court Prosecutor v. Tamiru Kershewa* (Special First Instance Court, Crim. F. No 42/76, June 6, 1985). In all these cases, either in pleading the facts of the case, or as part of the sentencing hearing, parties present political matters in their favour. For instance, the defendant asserts that he belongs to a proletarian class, and that he is happy the revolution have come. On the other hand, the prosecutor presents that the crime is committed at a moment where the nation is at war from different fronts directed against the revolution.

[121] See Simeneh and Cherinet, *supra* note 4.

criminal norms were created by administrative agencies either by direct or indirect delegation of such criminal lawmaking power.[122]

### 4. Continuity of (the Spirit of) the Special Penal Code

The Special Courts-Martial Establishment Proclamation No 7 of 1974 and the Special Penal Code, Proclamation No 8 of 1974 were adopted simultaneously. The Special Penal Code was exclusively given to the Special Courts-Martial; and if there is doubt as to whether the 1957 Penal Code or the Special Penal Code applies, the Special Courts-Martial decides.[123] Further, if there is doubt as to the applicability of laws and jurisdiction of the court, the Special Prosecutor decides.[124] The proper contents of the Special Penal Code, as discussed above, were not entirely new. They also include prohibitions contained in the Penal Code.[125] However, the Code basically merges civilians

[122] *Id*., at 74 – 76. Also see 'Evaluating the Existing Criminal Law: Proposed Subjects and Manners of Revision' In Criminal Justice System Working Group, DIAGNOSTIC STUDY OF THE ETHIOPIAN CRIMINAL JUSTICE SYSTEM (FDRE Attorney General 2021) at 2 – 6. The political motives for the adoption of those legislation were made clear in the minutes of committee hearings. See for instance, Minutes of Public Hearing Organised by Law and Administrative Affairs, and Social Affairs Standing Committees on the Vagrancy Control Draft Bill, 12 January 2004 (later adopted into law as *Proc No 284/2004*). Brief Minutes of Public Hearing Organised by the Trade and Industry Affairs Standing Committee on Competition and Consumers' Protection, and Commercial Registration Draft Bills, 23 June 2010 (later adopted into law as *Proc Nos 685/2010* and *686/2010*, respectively). Brief Minutes of Hearing with Stakeholders on the Anti-Terrorism Draft Bill Organised by Justice and Administrative Affairs, Foreign Relations Affairs, Defence and Security Affairs Standing Committees, 24 June 2009 (later adopted into law as *Proc No 652/2009*). Brief Minutes of Public Hearing Organised by Commercial Affairs Standing Committee on The Commercial Registration and Business License Draft Bill, 27 June 2016 (later adopted into law as *Proc No 980/2016*).

[123] Proc No 7 of 1974, *supra* note 21, art 15(2).

[124] *Id*., art 18.

[125] Offences against the independence of the state – Special Penal Code (*supra* note 21), art 2 (Pen. C., art 253, 259), armed uprising and civil war – art 3 (Pen. C., art 252), provocation and preparation – art 10 (Pen. C., art 269), breach of trust, malversation and receipt of ill-gotten gains – art 12 (Pen. C., art 320), misuse or waste of government or public property – art 13 (Pen. C., art 319, 421), unlawful refusal to pay public taxes or dues – art 14 (Pen. C.,

with the Armed Forces and the Police Force to be tried before the Special Courts-Martial.[126]

The application of the Special Penal Code would come to an end when the Special Court, the court empowered to apply it, was abolished. The 'abhorrence' to such special courts is incorporated into the FDRE Constitution, article 78(4). However, the application of the substance and/or the spirit of the Special Penal Code continue to date in different forms.

### *4.1. Direct application of the Special Penal Code*

The Special Penal Code was expressly repealed by the 2004 Criminal Code. Unfortunately, the Federal Supreme Court applied the Special Penal Code against the former Prime Minister, *Tamirat Layine*.[127] This opened the door for application of the same law by lower courts; see, for instance, the case against *Abate Kisho*,[128] the former Southern Nations, Nationalities, and Peoples' Regional State President, was tried before the Federal High Court as per the Special Penal Code.

### *4.2. Indirect application of the Special Penal Code*

The Special Penal Code is criticised for various reasons, including for expediting the instrumentality of the law for achieving other ends. For

art 360), incitement to refusal to pay taxes – art 15 (Pen. C., art 361), forgery of government or public documents – art 16 (Pen. C., arts 367, 372, 383, 387), abuse of authority of search and seizure – art 24, (Pen. C., art 415), unlawful arrest or detention – art 25 (Pen. C., art 416), false or tendentious information – art 37 (Pen. C., art 346) are few comparisons.

[126] Special Penal Code, *supra* note 21, art 14(3) defines public servant as 'a person appointed or employed by the Government, a member of the Armed Forces, Police Force, Territorial Army, Parliament or a Judge'.

[127] *Federal Public Prosecutor v. Tamirat Layine et. al.* (Federal Supreme Court, Crim. F. No. 1/89).

[128] *Federal Ethics and Anti-Corruption Commission v. Abate Kisho, et al.* (Federal High Court, Crim. F No. 260/94).

instance, the law expressly stated that the existing punishments were light; it is made applicable retroactively.[129] Often the moral requirements were not included in constituting the crime.[130] The provisions are broad and vague both to comply with and to enforce[131] sometimes criminalising the very basic human activity of communication[132] or movement;[133] any activity could constitute a criminal activity when the public prosecutor initiates a case against an individual.

These features and flavours of the Special Penal Code are reflected in the various special penal and administrative legislations containing penal provisions. There are some reasonably discernible patterns of prosecution on

[129] Special Penal Code, *supra* note 21, preamble paras 7-9, art 2.

[130] In stating the crime, the lawmaker does not state the moral requirement. In such cases, resort may be had to the General Part of the 1957 Penal Code for interpretation, which the court did not.

[131] Art 35, for instance, provided that '[w]hosoever fails to comply with Proclamations, Decrees, Orders or Regulations promulgated to implement the popular Motto 'Ethiopia Tikidem' or hinders compliance therewith by publicly inciting or instigating by word of mouth, in writing or by any other means, is punishable with rigorous imprisonment from five to ten years'.

[132] It provided that any communication with anti-revolutionary group or individual is prohibited and severely punished. Proc No 96/1976, *supra* note 110, art 17.B.(1)(c).

[133] In a country where there was no free press or media, the Special Penal Code, *supra* note 21, art 10(5) provided that '[w]hosoever, with the object of permitting or supporting the commission of any of the acts provided for in Articles 2, 3, 5, 7, 8, and 9 [] launches or disseminates, systematically and with premeditation, by word of mouth, images or writings, inaccurate or subversive information or insinuations calculated to demoralise the public and to undermine its confidence or its will to resist, is punishable with simple imprisonment from one year to five years, or, where the foreseeable consequences of his activities are particularly grave, with rigours imprisonment not exceeding ten years'. Further, art 37 provided that '[w]hosoever, with intent to incite troops to indiscipline or insubordination, or to foment disorder between the military and the civilian population, puts forth or disseminates tendentious information which he knows to be false is punishable with rigorous imprisonment from three to fifteen years'. The Revised Special Penal Code, *supra* note 23, art 12(1)(b) provided that '[w]hosoever [] commits treason against the country and the people by illegally leaving or attempting to leave the country is punishment with rigorous imprisonment from five [] to twenty-five [] years'.

the basis of a particular legislation. At one time, violation of the press proclamation was aggressively prosecuted; in subsequent years, prosecution under the anti-corruption legislation was heavy handed; later the prosecution under the dangerous vagrancy proclamation followed; currently, aggressive prosecution is made under the anti-terrorism law and tax crimes.

These are legislations adopted while there are provisions in the Criminal Code that cover the subject; those legislations expand the scope of the criminal activity and increase the punishment.[134] In their statement of the offences, many of them are vague, and some are not providing for the moral element constituting the crime, thus, are enforced as strict liability crimes.[135] For instance, the Vagrancy Control Proclamation increases the punishment for those prohibited activities.[136] The Anti-Terrorism Proclamation punishes acts the content of which are not properly defined or are not justified.[137]

Some statutes expand the reach of the criminal law unreasonably. For instance, the basic conception of corruption is associated with public power.

[134] On the relationship between those special penal legislation and administrative legislation containing penal provision and the Criminal Code, see Simeneh and Cherinet, *supra* note 4, section 3.

[135] For discussions on how sentences are increased in those special penal legislation and administrative legislation containing penal provisions, see *Id*., section 4.3.

[136] Those acts that are listed under art 4 of the Vagrancy Control Proclamation are 'punishable with imprisonment not less than one year and half [sic], and not exceeding two years. In cases of exceptional gravity, the maximum penalty may be extended to three years' imprisonment'. Those conducts as provided for in the Criminal Code are, however, punishable by fine or detention for a few days.See, e.g., Criminal Code, Part III, art 842, 846, 854.

[137] The provisions of arts 3 and 4 of the Anti-Terrorism Proclamation, *supra* note 28, are always subject to debate as to their content. Further art 15 provided that a person leasing 'a house place, room, vehicle or any similar facility have the duty to register in detail the identity of the lessee and notify the same to the nearest police station within 24 hours'. A violation of those prescriptions is 'punishable with rigorous imprisonment from three to ten years'. The content of the obligation and the consequent punishments are reduced under art 33(3) in the *Prevention and Suppression of Terrorism Crimes Proclamation No 1176/2020*.

As such, only those exercising public power may be held criminally liable for corruption; other individuals may be held criminally liable for participating in such crimes of corruption. However, officers of the private entities are also made criminally responsible for corruption.[138]

One can discern that those legislations provided for heavier punishment than what is provided for in the Criminal Code. The statutes defining the crimes of corruption, for instance, provide for the heavier sentences, the standard punishment in the Criminal Code appears to be between 7 and 15 years. In aggravated circumstances, the sentence may even be higher.

### *4.3. Other Modes of Application of the Special Penal Code*

The Special Penal Code is criticised for its distortion of criminal provisions from their theoretical base. The latent purpose of the Special Penal Code was to impose such oppressive criminal law in order to achieve other ends. The instrumentalist view of the court regarding criminal law finds every excuse to hasten such criminal conviction. For instance, the Revised Special Penal Code included a presumption of guilt unless defendant proves his innocence.[139]Likewise, the Special Penal Code has blanket criminalisation of conducts that are not clear at all.[140]

[138] In conventional understanding employee of a public organisation is a public servant exercising public authority. However, the *Corruption Crimes Proclamation No 881/2015* ('Proc No 881/2015') art 2(5) defines 'employee of a public organisation' as 'an employee who is employed, appointed or elected by members to work [] in a public organisation and include leaders of the organisation, any members of the board of directors or any person or committee involved in the formation of a share company or a charity'. The rest of the Proclamation criminalises conducts for which 'public servant or employee of a public organisation' may be held responsible for corruption crime.

[139] The Revised Special Penal Code, *supra* note 23, art 13(3). Provide the existence of the moral element was the common practice in the Special Court. This is the common practice also held in *Special Prosecutor v Deputy Commander Yihe'alem Mezgebu and Petty Officer*

The content and spirit of the Special Penal Code find their way into contemporary special penal and administrative legislations and continue their oppressive effect by making prosecutorial burden of proof lighter and conviction faster. For instance, contrary to the presumption of innocence, in crimes of corruption, the moral element is presumed to exist.[141] Even worse, if the prosecutor proves certain basic facts, the burden of proof shifts onto the defendant as though it is a civil case.[142] In some instances, the standards of proof are expressly made lower.[143] In the Anti-Terrorism Proclamation, contrary to the basic constitutional rights of the defendant to be protected against ill treatment, confessions are admissible irrespective of their quality;[144] contrary to the right of the defendant to have access to evidence,

*Zenebe Shiferaw* (Special First Instance Court, Crim File No 24/75, 15 April 1983); *Special Prosecutor v Oukube'ezgi Teklemariam*(Special Frist Instance Court, Crim File No 50/75, 29 November 1983). *Special Prosecutor v Let. Goshime Wondimtegegn* (Special First Instance Court, Crim File No 7/75, 26 March 1983).

[140] Special Penal Code, *supra* note 21, art 35. The Revised Special Penal Code, *supra* note 23, art 12 Commission of Counter-Revolutionary Acts.

[141] Proc No 881/2015, *supra* note 138, art 3 provides that '[u]nless evidence is produced to the contrary, where it is proved that the material element (the act) has been committed as defined in a particular provision providing for a crime of corruption perpetrated to obtain or procure undue advantage or to cause injury to another person, such act shall be presumed to have been committed with intent to obtain for oneself or to procure for another an undue advantage or to injure the right or interest of a third person'.

[142] Proc. No 881/2015, *supra* note 138, art 21 provides that any public servant or employee of a public organisation, '(a) maintains a standard of living above which is commensurate with the official income from his present or past occupation or other means; or (b) is in control of pecuniary resources or property disproportionate to the official income from his present or past occupation or other means; unless he proves […otherwise] shall be punishable, without prejudice to the confiscation of the property [], with simple imprisonment and fine or in serious cases, with rigorous imprisonment not exceeding five years and fine not exceeding Birr five thousand'.

[143]*The Revised Anti-Corruption Special Procedure and Rule of Evidence Proclamation No 434/2005*, art 33 provides that '[t]he standard of proof required to determine any question arising as to whether a person has benefited from criminal conduct, or the amount to be recovered shall be that applicable in civil proceedings'.

[144] Anti-Terrorism Proclamation, *supra* note 28, art 23(5).

evidence are admissible irrespective of access to defendant or not.[145] There are several provisions in different legislations criminalising conducts in blanket, leaving conducts criminalised vague.[146]

The foregoing discussion may not reflect a perfect comparison between two sets of provisions; but it shows the similarity of the belief behind them and how the actors think of the role of law and institutions in society and in the power relations. We can generally see that, even though the state has several tools at its disposal for achieving certain ends and enforcement of its political ideologies, it excessively uses the law and the criminal law in particular. Such inflation of the criminal law only reflects abuse of sovereign power.

There is extensive government intervention into the judiciary, both personally and institutionally.[147] However, the government established various strong prosecution institutions, such as the ethics and anti-corruption commission, the revenue and customs authority, the competition and consumers' protection authority, etc., with prosecution authority. In their heydays, they were powerful to the extent exerting influence on the court. They are all now brought under one umbrella.

There is also another aspect to the discussion. Obviously, vagrancy law is directed against the unemployed; the trade license and tax proclamations are directed against those who engage in trade and business; save for publicly

[145] *Id*., art 23(1), (2), (4), (5). The content of those provisions is vague in the English version; the Amharic version is rather clear.

[146] See, e.g., The *Banking Business Proclamation No 592/2009*, art 58(7) provides that '[a]ny person who contravenes or obstructs the provisions of [the] Proclamation or regulations[sic] or directives issued to implement [the] Proclamation shall be punished with a fine up to Birr 10,000 and with an imprisonment up to three years'.

[147] For instance, 1n 1996 several hundred judges were purged. JANELLE PLUMMER (ed), DIAGNOSING CORRUPTION IN ETHIOPIA: PERCEPTIONS, REALITIES, AND THE WAY FORWARD FOR KEY SECTORS (IBRD 2012) at 212 – 13.

traded companies executives, corruption crimes are directed against public officials and government employees. This nature of the law predisposes defendants for selective prosecution which makes the enforcement of the criminal law more political.[148]

## 5. Observations

Law and political power are closely linked because the law gives as well as denies such power. Legal manifestations of political debates often play into the hands of those in power. The law is the forum where all political fights are fought through and the Comaroffs appropriately call it *lawfare*.[149] In this essay we examine criminal law as one such forum of political battle for (maintaining) power; thus, it goes without saying that criminalisation and determination of punishments are political decisions.[150] Some even legitimately opine that the extent the criminal law strives to accommodate human nature reflects how liberal the state of the political affair is.[151]

In Section two, where the various doctrines of the rule of law are discussed, it is also indicated that, the scope of application of legal doctrines determines the content of the doctrine of the rule of law. In section three where the

[148] The Minutes of Public Hearing Organised by Law and Administration, and Social Affaires Standing Committees on Vagrancy Control Proclamation Draft Bill (12 January 2004) at 12, show that the concern that such law is intended against opposition political parties is raised. The authors argued in several cases based on art 25 of the Constitution against discriminatory prosecution, but the court never addressed the mater directly. See for instance *Public Prosecutor v. Ali Aduros, et. al.* (Federal High Court, Crim File No 134044, 11 December 2014).

[149] Comaroff and Comaroff, *supra* note 1, at 36, 37. TAMANAHA (2006) *supra* note 1, at 46.

[150] Substantial number of legal theories argue the existence of a strong relationship between law and politics except the degree varies. In fact, it is only legal positivism that holds the autonomous nature of law.Generally, see ZAMBONI, *supra* note 61. PERSAK, *supra* note 42, at 5-7.

[151] See, e.g., A. Masferrer, *The Liberal State and Criminal Law Reform in Spain* In THE RULE OF LAW IN COMPARATIVE PERSPECTIVE (M. Sellers and T. Tomaszewski eds., Springer 2010).

criminal laws are seen in historical context and their justifications for their adoption, we discussed both the one stated by the State, which makes the use of criminal law appear legitimate, and the unstated one which is reflected by the contemporary socio-political-economy. It is now appropriate to evaluate whether our criminal laws actually meet the contemporary understanding of the doctrine of the rule of law, since at least that was required by the existing consciousness of the nation.

The doctrine of the rule of law in Ethiopia is not defined anywhere both in the law and in judicial decisions; neither has it been a subject of academic research, but the doctrine of the rule of law has long lived in the political rhetoric having evolved over decades.[152] This may be abstracted from the laws of the country and their application.

The *Fetha Nagast* would be considered a classical natural law, because as a religious norm it invokes validity by conforming with divine orders. However, as it is made by religious fathers, at their convenience, to achieve religious and monarchical purposes, it is used as a means of social ordering; in this sense, the rule of law is only whether the prohibited conduct is provided for in the law. This gives the impression that the rule of law in this context revolves around legalism. However, the analogical interpretation of the criminal law makes the rule of law impossible to imagine.[153]

[152] It is only recently that Adem discussed the notion of rule of law in Ethiopia, which is not very flattering. Adem Abebe, *Rule By Law in Ethiopia: Rendering Constitutional Limits on Government Power Nonsensical*, CGHR WORKING PAPER 1, CAMBRIDGE: UNIVERSITY OF CAMBRIDGE CENTRE OF GOVERNANCE AND HUMAN RIGHTS 2011).

[153] There were several requirements listed in the *Fetha Nagast* for one to become a judge. The ninth requirement is that he must know the law and the rules of procedure – which fall under four categories and the fourth category is the potential judge 'must be able to draw analogies [] the ability of connecting the branches [] to the roots from which they sprouted'.

The preface of the 1930 Penal Code states that the Code is merely a revision of the *Fetha Nagast*; in the *Fetha Nagast*, the crimes are stated, and the punishments are not. The practice was that, once the judge finds guilt, defendant is sent to the government for sentencing because it is the governor who knew the punishment.[154] Further, the criminal law was subject to interpretation by analogy, inherited from the *Fetha Nagast*. This lack of knowledge of punishment on the part of the judge, and interpretation by analogy reflecting on the lack of knowledge on the part of the subject regarding the prohibited conduct, utterly contradicts the doctrine of rule of law.

Both the 1953 Federal Criminal Law and the 1957 Penal Code were adopted by the Emperor who was not elected. The 1974 Special Penal Code was adopted as per the provisions of the Proclamation that Defines the Powers and Responsibilities of the PMAC, an organ which vested all lawmaking power on itself.[155] The PMAC was composed of unelected army personnel to administer the country provisionally, until a constitution would be drawn up and elections were conducted.[156]

These phenomena give the impression that the lawmaker was principally focused on the doctrine of a valid positive law. Therefore, one may conclude that the doctrine of rule of law that existed at the time was merely having a valid law irrespective of its content.

The rule of law conception based on the existence of positive law is a positivist understanding of the law. Nevertheless, PMAC gives the impression

Obviously, there is no distinction between civil and criminal cases. *Fetha Nagast*, *supra* note 74, at 251, 253.

[154] The *Fetha Nagast* only helps in the determination of guilt. If the person is convicted, he wold be sent to the Governor for sentencing. Graven, *supra* note 6, at 273.

[155] Proc No 2 of 1974, *supra* note 35, art 6.

[156] Proc No 1 of 1974, *supra* note 19, art 6.

that it has naturalist theory of law; this is abstracted from two provisions of the law. First, the Special Penal Code was made applicable retroactively, based on the assertion that some of the crimes that had allegedly been committed by the previous regime were contrary to natural justice.[157] Second, it accused the previous government that human rights emanating from nature are coined as the ones that is granted from the Emperor.[158]

These appeals to higher moral principles give the impression that the state's theory of law is naturalist and, thus, the positive law would have been tested against a certain higher standard for validity.However, such appeals were matters of convenience and there had not been any higher standard against which the laws were being tested, nor had the Government complied with the positive law it put in place. Its claim to higher moral values is rather defeated by its assertion that it shall make all types of laws which is a claim of 'sovereignty' an antithesis of rule of law.[159]

An essential element of the pure legality notion of the rule of law is the clarity of the rules. First, the law was made applicable retroactively. Yet, some of the provisions, such as article 35 of the Special Penal Code were difficult to comply with due to the fact that the content of the provision could not properly be defined.[160] The content of the motto *Ethiopia Tikidem* was not subject to any discussion for that matter. Thus, what was contrary to this motto ever remained vague. Also, the fact that the law was made by the Council which had not been elected would make a big difference on the claim of the rule of law. However, a retroactively applied criminal law could never

[157] Special Penal Code, *supra* note 21, preamble para 11.
[158] Proc No 1 or 1974, *supra* note 19, preamble para 3.
[159] Proc No 2 of 1974, *supra* note 35, art 6. However, one should not forget the extra-judicial acts of the Government, despite all these powers. See, e.g., *supra* note 22.
[160] See *supra* note 131 for the content of the provisions the Special Penal Code, *supra* note 21, art 35.

be complied with and it contradicts to any doctrine of the rule of law. Thus, in those several decades, the Ethiopian criminal laws never complied with the elementary doctrine of the rule of law.

In later developments, the FDRE Constitution provides for fundamental elements of the thick concept of the rule of law. First, it recognises that sovereignty is vested in the people[161] not in the government or the law. Second, it commits itself to an establishment of a political community based on 'democratic order' which is further based on 'rule of law';[162] third, it also expresses its conviction in that such democratic order based on rule of law is possible only when there is respect for fundamental rights and freedoms of the individual and people.[163] For the rest, the Constitution provides that it is the supreme law of the land;[164] that 'human rights and freedoms emanating from the nature of mankind, are inviolable and inalienable'.[165] 'Every person has the inviolable and inalienable right to life, and the security of person and liberty'.[166]

In terms of the power arrangement, Ethiopia is a federal state. Power is distributed both horizontally and vertically. Thus, the powers of the Federal Government are provided for under article 51. The law-making power of the Federal House is also provided for under article 55. There are two provisions that require specific examination. Article 51(1) provides for a general

[161] The Constitution makes reference to the Ethiopian Nations, Nationalities and Peoples. FDRE Const., art 8(1). For the instrumental and fictitious nature of sovereignty, see Simeneh Kiros Assefa, *Sovereignty, Criminalising Power of the State and Fundamental Rights* In 12 MIZAN L. REV. 127 (2018).
[162] *Id*., preamble para 1.
[163] *Id*., preamble para 2.
[164] FDRE Const., art 9(1).
[165] *Id*., art 10(1).
[166] *Id*. art 14. The following provisions, arts 15 – 17, provide for the content of the right to life, liberty and security of person. art 18 specifically provides for the prohibition of cruel, inhuman and degrading treatment and punishment.

legislative power of the House on matters that are designated to fall under the power of Federal Government; yet, the criminal lawmaking power is expressly provided for under article 55(5).

Despite such constitutional normative and institutional limitations, however, there is an inflation of criminal law which resulted in the over-criminalisation and over-punishment of conducts.[167] Those legislations indicate that some of the conducts should not have been criminalised; and others are over-punished. Thus, the criminal law is unjustifiably used to achieve purposes other than the purpose of the criminal law. Some of the legal provisions are contrary to the constitutional provisions and values. Criminal laws made by government agencies are contrary to the constitutional institutional arrangement; even when the law is properly adopted by the House, when it punishes conducts that should not be criminalised, or those conducts are legitimately criminalised but over punished, which is contrary to the Constitution and the legislative promise to limited use of the criminal law.

The unlimited power of the House is obviously contrary to the basic notion of limited government; which in turn is contrary to the doctrine of the rule of law. The court is also applying those criminal rules scrupulously.[168] The claim of the Government that whatever the nature of the criminal law the House adopts has to be complied with and the claim that the rule of law should be maintained at the same time contradicts the very doctrine of rule of law however it is understood.

[167] For detailed discussion, see Simeneh and Cherinet, *supra* note 4, section 4.3.
[168] Simeneh Kiros Assefa, *Non-Positivist 'Higher Norms' and Formal Positivism: Interpretation of the Ethiopian Criminal Law* In 14 MIZAN L. REV. 85 (2020).

## Conclusion

It is stating the obvious that there is a strong link between law and politics. Because of such strong link, political fights are fought through the law. In this fight law is used as a means to achieving various ends for those who have political leverage; at the forefront is the criminal law; there is an excessive use of criminal law. There is also a constant effort to increase punishment. While the single most important purpose of criminal law was maintaining the social existence of men, the instrumental nature of the law and institutions becomes a challenge to the rule of law.

The mere enforcement of criminal law is equated with the rule of law in this country. However, in order to better understand the doctrine of the rule of law or the instrumental nature of criminal law, one has to first adopt a particular legal theory regarding the nature of law. This theory is a paradigm which define the understanding of law, the method, the process and institutions. The Ethiopian law does not appear to be adopting a particular legal theory other than giving such impression.

The discussion should not be understood to make criminal law as a whole irrelevant because that part of the criminal law punishing, such as murder, rape and robbery helps to make the social existence of man possible. Nor is criminal law the only instrument in the political power struggle. The constitutional and administrative laws are also used to achieve such objectives but their overarching objectives are also sanctioned by criminal law. This makes criminal law quintessentially a political tool. The chronology clearly depicts that, for the most part, Ethiopia is administered by criminal law rather than constitutional or administrative law.

Yet, when the content of the law is not known, the lawmaking body is not democratically elected, the law does not meet the requirements of

fundamental rights; mere aggressive enforcement of criminal law cannot create a sense of rule of law. This is clearly so where there is no contemporaneous constitutional litigation to afford defendants protection from unreasonable criminal law and punishment.