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EXAMINING THE RELEVANCE OF IGNORANCE OF LAW IN ETHIOPIAN CRIMINAL LAW: EMPHASIS ON ITS ROLE AS A MITIGATING CIRCUMSTANCE

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Abstract

Ignorance of law excuses no one is a maxim everyone is expected to be familiar with. Consequently, ignorance of law is not a defence in most legal systems. However, ignorance of law could entail exemption from punishment in some cases. It can also be used as a mitigating circumstance. This being the position in most legal systems, the purpose of this article is to examine the relevance of ignorance of law in Ethiopia both as a defence and as a mitigating factor. To accomplish that, relevant literature has been reviewed to identify scholarly positions and the experiences of some countries on the relevance of ignorance of law both as a defence and as a mitigating ground, pertinent Ethiopian laws have been analysed, data has been obtained from limited number of lawyers to get a clue on how they view the relevance of ignorance of law, and some cases in which issues of ignorance of law were entertained have been consulted. Based on this, the article has concluded that ignorance of law is as, a rule, prohibited from serving as a defence in Ethiopia although it can lead to exoneration in exceptional cases. Nonetheless, due to some unique realities existing on the ground in Ethiopia, ignorance of law can lead to exculpation of many people from punishment, particularly those living in the rural areas. Moreover, although the position of the Criminal Code is not explicit regarding the relevance of ignorance of law as mitigating circumstance, close scrutiny of relevant provisions shows that the Code actually leaves sufficient room to use it as a mitigating circumstance.

Keywords: *Crimes, criminal law, ignorance of law, defence, mitigation, punishment*

I. INTRODUCTION

Penal (Criminal) codes do not commonly start by specifically stating the purpose of criminal law due to the assumption that the purposes of criminal law can be deduced from the purposes of

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the law itself.[1] However, the first Article of the Ethiopian Criminal Code starts by specifically mentioning what the Code is meant for and how what it is meant for can be accomplished. The Code states that its purpose is to "ensure peace, order and the security of the State, its Peoples and inhabitants for the public goods."[2] This shows that the Criminal Code was enacted to protect public interest as opposed to individual interests.[3] With regard to the manner of achieving this objective, the Criminal Code is clear. It states that its objective can be achieved by preventing crimes from happening by; first, giving the general public sufficient notice (due warning) about which behaviours are regarded as crimes and the penalties they entail when they happen and, second, by using punishment and measures in case the notice is not heeded or fails to produce the desired results.[4] From these, one can understand that there are three important means the Criminal Code employs to achieve its purpose of protecting the public: *giving due notice* to enable the public to know the law and act accordingly, *imposing punishment*, and *applying measures*. Of course, the last two means are used only if the first means (the due notice) fails to work. If people avoid engaging in criminal acts, there will be no room for punishment and measures. On the other hand, in order for people to heed the warning given by criminal law and avoid punishment, they must know the law. Yet, given the size of the laws we have today and also the fact that penal provisions are found fragmented and scattered in various enactments, knowing all the criminal laws may not be easy or even possible for most people.[5] If so, what would happen if a person commits a crime without knowing the existence of the law he has violated? Will punishment be applied to him or can he raise his ignorance as a defence? Does the fact that criminal law is made to protect public interest lead to sacrificing justice to individual if a crime is committed due to genuine ignorance of law? If punishment is unavoidable, does ignorance of law have relevance in criminal justice system?

Generally, ignorance of law is not praised for providing defence against criminal liability although it may be considered to mitigate punishment. In Ethiopia too, while there are some issues worth considering in detail, the Criminal Code does not, as a rule, recognize ignorance of law as a defence. On the other hand, the Code is not quite clear in relation to the position of

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[1] GRAVEN, PHILIPPE, AN INTRODUCTION TO THE ETHIOPIAN PENAL LAW (Arts.1-84) 5-6 (Oxford University Press, Addis Ababa-Nairobi) 1965). For example, unlike the Criminal Code, the Penal Code of Kenya, available at https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/28595/115477/F-857725769/KEN28595.pdf (accessed on the 10th of November 2021), the 1998 Criminal Code of Germany (as amended in 2019), available at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0012 (accessed on the 10th of November 2021), and the Penal Code of Japan, Act No. 45 of April 24, 1907, available at https://www.oecd.org/site/adboecdanti-corruptioninitiative/46814456.pdf (accessed on the 10th of November 2021) do not start by stating their purposes.

[2] CRIMINAL CODE OF FEDERAL DEMOCRATIC REPUBLIC ETHIOPIA, Proclamation No. 414/2004, NEGARIT GAZETTA, 9th May, 2005, WAddis Ababa (here after CRIMINAL CODE) 1st paragraph of Article 1.

[3] Similarly, it may be argued that public protection incidentally leads to protection of individuals interests as well. For example, when homicide is prohibited for the purpose of public good, individuals are also protected against killings by others. Hence, although the primary purpose of criminal law may not be the protection of individuals, in many cases, its purpose can be served by protecting what individuals have (life, liberty, property, dignity, etc.)

[4] See DEJENE GIRMA JANKA, A HANDBOOK ON THE CRIMINAL CODE OF ETHIOPIA, Revised Edition, 7-8 (Far East Printing, Addis Ababa) (2021).

[5] Knowing all the criminal laws may be very difficult even for legal professionals given the proliferation of laws in today's world.

ignorance of law as a mitigating factor. Indeed, nowhere does the Code explicitly address the relevance that ignorance of law may have to mitigate punishment. Consequently, there is no uniformity in practice.[6] For example, opinions among members of the legal community differ in relation to the significance of ignorance of law as a mitigating factor in Ethiopia. The purpose of this article is, therefore, to investigate the relevance of ignorance of law in general and as a mitigating factor in particular in light of the provisions of the Criminal Code. To meet this purpose, the data used in these sections have been gathered mostly from relevant literature and pertinent provisions of the Criminal Code. In order to get a clue as to what the practices and perceptions of using ignorance of law as a mitigating ground look like, about 72 legal professionals (judges, prosecutors, and advocates) were requested to provide information online and through SMS (short message service).[7] Further, few decided cases were used to substantiate some claims/arguments made in this article.

To achieve the above objective, the discussions in this article have been divided into four sections. The first section contains introductory remarks; the second section presents general overview of the relevance of ignorance of law as a defence and as a mitigating factor together with some related issues; the third section deals with the relevance of ignorance of law in Ethiopia both as a defence and as mitigating ground; and the last section concludes the discussions with some recommendations.

II. IGNORANCE OF LAW: A GENERAL OVERVIEW OF ITS RELEVANCE AS A DEFENCE AND A MITIGATING CIRCUMSTANCE

A. Ignorance of Law As A Defence

The people in the legal profession are familiar with the maxim '*Ignorantia juris non excusat* or *ignorantia legis neminem excusat*.' The maxim simply means, *ignorance of law excuses no one*. It can be taken as a field-specific general knowledge[8] which conveys the message that a person may not avoid liability for violating a law by claiming that he did not know about the law he violated. Here, the word '*Ignorantia*' has been translated both as *ignorance* and as *mistake;* as a result, the two terms have generally been used interchangeably.[9] However, the two English terms convey different ideas. While *ignorance* is defined as lack of

[6]As a practicing lawyer, the author has not seen many advocates invoking ignorance of law as a ground to mitigate penalty. Similar, in some cases, although the author himself has raised ignorance of law as a mitigating circumstance, the requests were declined. Yet, as subsequent discussions will reveal, there are times when the same claim were accepted by some courts to mitigate punishment.

[7] The online questions are open to all of lawyers indiscriminately while the questions sent through SMS are sent to judges, prosecutors, and advocates who are chosen from the phone contacts of the author randomly. Unfortunately, although the methods used could have generated hundreds, if not thousands, of responses, only 72 lawyers have responded. Yet, as the purpose here is not to get representative sample but to secure a clue on the issue, the responses of 72 lawyers would suffice; the result obtained from these lawyers can be an eye-opener.

[8] In fact, some scholars even say that the maxim is familiar to the layman as well as to the lawyer. See, for example, Keedy, Edwin Roulette, Ignorance and Mistake in the Criminal Law, XXII HARVARD LAW REVIEW 2, 76 (1908) available at https://www.repository.law.indiana.edu/facpub/2052 (accessed on the 5th of November 2021).

[9] See Kohler, Richard E., *Ignorance or Mistake of Law as a Defense in Criminal Cases*, 40 DICKSON LAW REVIEW 2, 113 (1936), available online at: https://ideas.dickinsonlaw.psu.edu/dlra/vol40/iss2/7, (accessed on the 5th of November 2021) and Keedy, Edwin Roulette, mentioned above at note 8, p.76.

knowledge, *mistake* is defined as a wrong inference caused by insufficient knowledge.[10] This shows that ignorance of law refers to a situation where a person does not know that there is a law while mistake of law refers to a situation where a person knows that there is a law but he wrongly believes that the law gives him the right to act. Due to this difference, the two terms are used to relay different messages in many criminal laws such as the Ethiopian Criminal Code.[11]

The doctrine *ignorance of law excuses no one* is considered to be of a Roman origin and it was initially applied only to civil actions.[12] This shows that the application of the doctrine in the field of criminal law is a subsequent development. From this, one can infer that claims that crimes had been committed due to lack of knowledge of illegality of one's conducts would not have disappeared in vain in the Roman law until the application of the maxim was extended to crimes.

Moreover, when the doctrine of *ignorance of law excuses no one* originated in the Roman law, it did not apply to all persons.[13] Instead, certain groups of persons such as; those under twenty-five years of age, women, soldiers, peasants, and others of a limited knowledge were exempted from the maxim because it was considered that people of inferior legal intelligence would not have knowledge of the law.[14]

On the other hand, the maxim *ignorance of law excuses no one* became firmly established in the Common law in the early 13th century where the earliest case in which ignorance of law was pleaded but rejected as a defence occurred in the year 1231.[15] However, unlike in the Roman law, the English Common Law exempted no particular class of persons from the maxim.[16] Similarly, in the Common law, the rule was applied not only to common law offenses but also to statutory crimes, felonies and misdemeanours, and crimes *mala prohibita* (made evil by law) as well as *mala in se* (inherently evil).[17]

Putting the above historical differences aside, today, the rule that ignorance of law excuses no one is recognized and applies to all categories of persons both in the Civil law and Common law systems.[18] Thus, in principle, any claim that a crime was committed due to lack of

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[10] See Keedy, Edwin Roulette, mentioned above at note 8, p.76.

[11] See, for example, Article 81. Of course, one may ask, at this juncture, whether the two situations lead to differences in criminal liability.

[12] See Keedy, Edwin Roulette, mentioned above at note 8, pp.77-78.

[13] See Kohler, Richard E., mentioned above at note 9, p.113.

[14] *Id.*

[15] *Id.*, p.114.

[16] *Id.*

[17] *Id.* For more early cases where the use of the doctrine featured, See Keedy, Edwin Roulette, mentioned above at note 8, pp.78ff. Crimes *mala in se* are those crimes which are inherently wrong such as homicide, rape, arson, and robbery, while crimes *mala prohibita* are conducts which are punished by statutes. So, while *mala in se* (evil in itself) refers to acts that are regarded as sinful or wrong by their very nature, *mala prohibita* (prohibited evil) refers to conducts that are crimes simply because they are prohibited. For more on this matter, see for example, The Distinction between "Mala Prohibita" and "Mala in se" in Criminal Law Source, 30 Columbia Law Review 1, 74ff (Jan., 1930). This Article was published by Columbia Law Review Association, Inc. and it can be accessed from Stable URL: https://www.jstor.org/stable/1114831.

[18] Cass, Ronald A., *Ignorance of the Law: A Maxim Re-examined*, 17 WILLIAM AND MARY LAW REVIEW 4, 670 (1975-1976), available at https://scholarship.law.wm.edu/wmlr/vol17/iss4/3, (accessed on the 6th of November 2021).

knowledge of illegality of one's act will be to no avail in both systems.[19] Yet, two important points need emphasis here.

The first point that needs emphasis is the fact that there are countries where ignorance of law can be presented as a defence. For example, in South Africa, ignorance of law can be accepted as a defence. In this regard, the Appellate Division (now the Supreme Court of Appeal) of South Africa recognized the defence in the matter between *S v De Blom* in 1977.[20] A similar position was repeated in 2010 in the *Andries Marthinus Coetzee vs. Kobus Steenkamp Case* by the High Court of South Africa.[21]

In Germany, ignorance of law is treated like ignorance of fact and, as such, it is accepted as a defence.[22] In fact, it is argued that the full recognition of the defence in German law has done

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[19] If we consider logic, there is absolutely no question that the maxim ignorance of law excuses no one should be abrogated as it negates *mens rea*. However, in relation to the maxim, logic is made subservient to law, the master, because law is meant to promote an overriding public policy/public necessity such as ensuring the welfare of the society and the safety of the state. So, we can understand from this that, by relying on the maxim, individual justice is actually sacrificed to promote greater public interest. For this and more, see generally, Perkins, Rollin M., Ignorance and Mistake in Criminal Law, 35 University Of Pennsylvania Law Review 1, 41, available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?Article=9057&context=penn_law_review, (accessed on the 29th of October 2021).

[20] In 1977, in the case of *S v De Blom*, the Appellate Division (now the Supreme Court of Appeal) of South Africa stated that "at this stage of our legal development it must be accepted that the cliche that "every person is presumed to know the law" has no ground for its existence and that the view that "ignorance of the law is no excuse" is not legally applicable in the light of the present-day concept of *mens rea* in our law." Then, the court stated that "if the accused wished to rely on a defence that she did not know that her act was unlawful, her defence can succeed if it can be inferred from the evidence as a whole that there is a reasonable possibility that she did not know that her act was unlawful." For more on this case, see Grant, James, CRITICAL CRIMINAL LAW 207-209 (Published on African Legal Information Institute at https://africanlii.org, 2018), accessed on the 10th of November 2021; Turpin, Colin, Defence of Mistake of Law 8-11 (37 Cambridge Law Journal 1) (Cambridge University Press, 1978).

[21] Moreover, in the *Andries Marthinus Coetzee vs. Kobus Steenkamp Case*, the High Court of South Africa state: "At this stage of our legal development it must be accepted that the cliché that "every person is presumed to know the law" has no ground for its existence and that the view that "ignorance of the law is no excuse" is not legally applicable in the light of the present day concept of *mens rea* in our law. But the approach that it can be expected of a person who, in a modern State, wherein many facets of the acts and omissions of the legal subject are controlled by legal provisions, involves himself in a particular sphere, that he should keep himself informed of the legal provisions which are applicable to that particular sphere, can be approved." "In the interpretation of the definition of a statutory offence it is presumed, until the contrary appears, that the Legislature did not wish to make an innocent illegal act punishable ---. In such a case it must be accepted that, when the State has led evidence that the prohibited act has been committed, an inference can be drawn, depending on the circumstances, that the accused willingly and knowingly (i.e. with knowledge of the unlawfulness) committed the act. If the accused wishes to rely on a defence that she did not know that her act was unlawful, her defence can succeed if it can be inferred from the evidence as a whole that there is a reasonable possibility that she did not know that her act was unlawful; and further, when *culpa* only, and not *dolus* alone, is required as *mens rea*, there is also a reasonable possibility that juridically she could not be blamed, i.e. that, having regard to all the circumstances, it is reasonably possible that she acted with the necessary circumspection in order to inform herself of what was required of her... Should there be, on the evidence as a whole, i.e. including the evidence that the act was committed, a reasonable doubt whether the accused did in fact have *mens rea*, in the sense described above, the State would not have proved its case beyond a reasonable doubt." For more on this case, see Andries Marthinus Coetzee vs. Kobus Steenkamp, In The High Court of South Africa (Northern Cape High Court, Kimberley), Case No: 579/2009, Heard: 13/05/2010, Delivered: 18/06/2010.

[22] In fact, some argue that the first systematic approach to the recognition of the ignorance of law as a defence occurred in Germany during the 1970s. Later on, many other countries adopted the same legal doctrine and, since then, the trend of recognition of the mistake of law as an excuse has been spreading in many countries of the continental legal system, as well as in some countries of the common law system. See Paunović, Dragan, MISTAKE

more for the good conscience of the legal profession than it has helped defendants as it is not easy for the defendants to prove the presence of invincible ignorance at the time of their act.[23] This shows that vincible or avoidable ignorance will not be accepted as a defence in Germany.

Other countries where ignorance of law is accepted as a defence, although under limited circumstances, include; China, Denmark, Switzerland, Argentine, and Japan, France, Italy, Poland, Serbia, Montenegro, and North Macedonia.[24] This shows that the trend of recognizing ignorance of law as a defence, at least in some cases, has been spreading in many civil law countries as well as in some countries of the common law countries.[25] In these countries, ignorance of law can be invoked as a defence when it is specifically allowed by the law.[26]

In the USA, the Model Penal Code recognizes ignorance as to a matter of law as a defence because ignorance negates the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense.[27] Similarly, the proliferation of laws creating crimes *mala prohibita* have led contemporary criminal law theorists and practitioners to initiate consideration of another approach to the issue of ignorance of law as it could not be expected from the modern age person to know all regulations and to follow them.[28]

The second point that needs emphasis relates to the definitional elements of some crimes. In principle, knowledge of the law defining a crime is not itself an element of the crime.[29] However, there are countries where existing legal provisions are being interpreted as requiring proof of knowledge of illegality. For example, it is argued and being interpreted in the USA that many new crimes such as tax or finance related ones allow ignorance of law as an excuse because the crimes they regulate contain knowledge of illegality as their definitional elements.[30] Moreover, it is said that in cases where some special mental element is required for conviction of a particular offense, ignorance of the law can be a defence as its presence negates the existence of such intent.[31] This shows that, although it is generally accepted that ignorance of law excuses no one,

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OF LAW: CURRENT STATUS AND PERSPECTIVE, p.184ff. (This material is available at http://rlr.iup.rs/wp-content/uploads/2020/12/14-Paunovic.pdf, (accessed on the 24th of October 2021).

[23] For the ideas mentioned in this paragraph and more on the German experience, see generally, Arzt, Gunther *Ignorance or Mistake of Law*, 24 THE AMERICAN JOURNAL OF COMPARATIVE LAW 4, 646ff (1976), available at https://www.jstor.org/stable/839579 (accessed on the 26th of October 2021).

[24] Paunović, Dragan, mentioned above at note 22, pp.183-184ff; Yochum, Mark D., The Death of A Maxim: Ignorance of Law Is No Excuse (Killed By Money, Guns and A Little Sex), 13 Journal of Civil Rights and Economic Development 3, 635 (1999), available at https://scholarship.law.stjohns.edu/jcred/vol13/iss3/7/, (accessed on the 7th of November 2021).

[25] *Supra note 22*, at, 183-184ff.

[26] *Id*. See also *Supra note 24*, at 635.

[27] See Section 2.04(1), Model Penal Code, The American Law Institute, Philadelphia, PA, 1985."

[28] *Supra note 22*, at.184.

[29] Supra note 24, at. 639ff.

[30] *Id*. It is said that, in such cases, law-makers do not use clear language to tell that an anti-maxim mental state is required to punish but courts find this anti-maxim mental state as a requirement to punish where statutes include troublesome expressions like *wilfully* which imply the presence of evil motive. So, courts are arguing that if a person does not know that his conduct was against the law, he cannot be said to have *wilfully* violated the law. Moreover, in Kenya, ignorance of law can serve as a defence if knowledge of the law by the offender is expressly declared to be an element of the offence. For more on Kenyan experience, see Art. 7 of the Penal Code of the Republic Of Kenya (Published by the National Council for Law Reporting) (available online).

[31] For more on this this point, Perkins, Rollin M, mentioned above at note 19, pp.45,

there are times when the rule is moved to the back seat.[32] In fact, this may be justified given the fact that certain crimes are arcane and committing them wilfully requires knowledge of illegality.[33]

To sum up, it is accepted in many countries that ignorance of law excuses no one. Nonetheless, there are still countries in which ignorance of law is accepted as a defence. Similarly, there are countries where ignorance of law is accepted to grant exemption from punishment under some circumstances. Further, ignorance of law can be relevant when knowledge of illegality of one's act is recognized as the definitional element of a crime. Therefore, one can argue that ignorance of law is not altogether irrelevant as a defence against criminal liability.

B. Presumption of Knowledge of Law and the Maxim of Ignorance of Law Is No Excuse

At the back of the maxim *ignorance of law is no excuse*, there exists one important presumption: *everyone is presumed to know the law*. Nowadays, *everyone is presumed to know the law* is by itself a maxim that has become familiar to all jurists and to many laymen although such maxim, like many others, has been criticized by professionals.[34] It is because of this presumption[35] that a claim that a crime was committed due to lack of knowledge of illegality of one's conduct is to no avail. The idea is someone should not argue that he does not know what he is presumed to know (the law) and not knowing what one is expected to know (the law) is by itself blameworthy.

However, when the maxim *ignorance of law is no excuse* had originated in the ancient Roman law, and for centuries then after, the number of laws and different prohibitions made in almost all systems were rather small and, as such, they could easily be counted, remembered, and understood.[36] Moreover, the prohibitions made by those limited laws usually overlapped

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[32] For example, in *United States Vs Three R.R. Cars case* (1868), the judge (Judge Hall) disagreed with the suggestion the legislature's intent should be reflected by the maxim that ignorance of the law is no excuse and concluded that Congress could not have intended to classify an act as a felony when it was "committed without any illegal or improper motive, and under the honest belief that it was entirely right and proper." So, in the case, three modern factors to be considered in the anti-maxim interpretation of "wilfully" were identified: whether the act or crime is a regulatory offense; the punishment is a felony; and if there is a plausible chance or actual existence of a subjective belief in rectitude. Of course, there are judges who interpreted the word *wilful* in criminal statutes only to mean that a person knows what he is doing and it does not mean that he knows or supposes that he is breaking the law. See Yochum, Mark D., mentioned above at note 24, at.646-650.

[33] Here, ignorance of law can serve as an excuse because no one can consent to punishment without knowing the law that creates arcane crimes. For more on this point and a related idea of the *consensual theory of punishment*, which states that punishment is justified because a person consents to it, see generally, Imbrisevic, Miroslav, Why Is (Claiming) Ignorance of The Law No Excuse, *8* *Review Journal of Political Philosophy* 1, 58ff (2010), available at https://philpapers.org/rec/IMBWIC, accessed on the 6th of November 2021).

[34] *Supra* note 9, at pp.113.

[35] Some call such presumption a fiction. See, for example supra note1, at. 236.

[36] See generally, Ignorance of law: Can it be an excuse?, IIFL Securities, available at https://www.indiainfoline.com/Article/news-sector-others/ignorance-of-law-can-it-be-an-excuse-113111404453_1.html, (accessed on the 18th of October 2021); Paunović, Dragan, mentioned above at note 22, 183-184.

with the same traditional and/or religious norms and hence they could be known by the public.[37] For example, no one would say that he did not know killing another human or stealing others property was wrong as these conducts are natural offences (*mala in se*).[38] Therefore, in situations where there were limited laws and the prohibitions made by such laws overlapped with some traditional and/or religious prohibitions, the rule that ignorance of law excuses no one can be justified. However, currently, there are thousands of laws issued by the parliament and the executive to forbid numerous human conducts.[39] As a result, it is difficult to believe that everyone knows these laws.

If it is difficult to believe that everyone actually knows the thousands of laws creating crimes, in particular crimes *mala prohibita*, why is the presumption *everyone knows the law* still standing? Surely, denial of the defence of ignorance of law because of this illogical presumption of possession of knowledge of law by everyone represents a case where the society does injustice to the individual. So, is there any supreme policy justification to warrant the continuity of the relevance of this presumption?

Given the proliferation of laws creating crimes in present times, it is true that the presumption everyone knows every law is not anymore logical. In fact, mere logic shows that such presumption has to be discarded instantly.[40] However, as the following examples reveal, the continued relevance of the presumption is not founded on logic but it is premised on other factors which aim to promote public good.

First, it is argued that ignorance of the law excuses no one not because all persons know the law but because it is an excuse every person will plead and it is something no one can refute.[41] If ignorance of law is accepted as a defence, every accused person will potentially invoke it to avoid liability. Thus, as proof of knowledge of illegality of an act is rarely possible, absence of presumption of knowledge of law will make administration of justice next to impossible.[42] This is a pragmatic justification for the maxim. If we borrow utilitarian's language, rejecting ignorance of law as a defence will promote greater good even if such rejection could cause harm or injustice individuals.

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[37] *Supra note 36*.

[38] Philipp Graven describes such crimes as natural offences. See Graven, Philipp, mentioned above at note 1, 238.

[39] Ignorance of law: Can it be an excuse?, mentioned above at note 36. In fact, due to the proliferation of laws creating crimes, contemporary criminal law theorists and practitioners initiated consideration of another approach to the issue of ignorance of law. The new approach was based on the need for recognition of the fact that it could not be expected from the modern age man to know all regulations and to follow them. The outcome of such concerns was the widespread professional opinion that the ignorance of law should be an excuse only in some limited situations and under very strict conditions. Ibid.

[40] *Supra note 24, at 635.*

[41] *Id.*

[42] *Id*, at pp.635-638. Incidentally, it must be noted that knowledge (state of mind) is a fact and hence, under certain circumstance, it can be proved. For example, someone who works as a homicide crime prosecutor cannot claim ignorance of law if he/she kills another. It is clear that this person knows that killing is prohibited and it is a crime because he/she is prosecuting others according to such law. Yet, in most cases, refuting claims of lack of knowledge of legality could be very difficult.

Second, there is an assumption that presumption of knowledge of law will encourage people to strive to know the law.[43] As the result of this presumption, individuals will be motivated to explore their obligations with a view to avoiding commission of crimes. On the contrary, although it is true that there are many cases in which the criminal could not have known that he was breaking the law, to admit ignorance of law as an excuse would be to encourage or reward ignorance where the law-maker has determined to make persons know and obey the law.[44]

Third, there is also a justification for the presumption which relates to what is known as *legislative rationality*. The idea here is that the law written by a rational legislature must be knowable to everyone.[45] As a result, any claim that a crime was committed due to lack of knowledge of law is not acceptable.[46]

Fourth, presumption of legal knowledge on the side of the accused saves courts from engaging in an issue which is extremely difficult to solve and lawmakers from mentioning in each of their laws that not knowing their laws will not excuse anyone.[47] Because of this presumption, courts do not need to engage in issues involving proof of knowledge of illegality of a conduct. Similarly, law makers do not have to mention in each of their laws that failure to know their laws will not serve as an excuse. In this sense, therefore, the maxim *everyone is presumed to know the law* relieves both organs from some hard tasks.

From the above explanations, we can understand that there are many reasons offered to justify the continued importance of the maxim *everyone is presumed to know the law*.[48] But, from all the reasons, what is clear is the fact that legal knowledge is, in principle, presumed and ignorance of law is, thus, regarded as inherently blameable and not acceptable as a defence.[49]

At this juncture, it is important to pose one question: what would happen if a person acts in accordance with a law that allows his act but which is, unknown to him, repealed and replaced by a new one which criminalizes his act? To start with, *repeal* is the abrogation or destruction of a law by legislative enactment and it includes a case where one legal provision is substituted by another.[50] As such, the normal effect of repealing a statute without providing a saving clause is to obliterate it from the statute-book completely as if it had never been passed and had never been existed except as to matters and transactions past and closed.[51] So, in a simple language, a

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[43] *Id, at, 638.*

[44] This is a justification put by Oliver Wendell Holmes, Jr. See Kahan, Dan M., *Ignorance of Law is An Excuse but only for the Virtuous*, 96 MICHIGAN LAW REVIEW 1, 127 (1997).

[45] Yochum, Mark D., mentioned above at note 24, at 635.

[46] Surely, this justification doesn't seem to work in relation to many arcane crimes law-makers creates every time.

[47] *Supra note 24, at, 638.*

[48] For example, it is argued that society must presume legal knowledge for an ordered state and this is another justification for the presumption. *Id*.

[49] Of course, there are scholars who reject the proposition that every man is presumed to know law claiming that there is insufficient foundation for maxim. See WILLIAMS, GLANVILLE, THE CRIMINAL LAW, THE GENERAL PART , 289 (2d Ed. 1961). See also *Supra note 22, at, 638.*

[50] Miah, Khaled and Hossen, Saddam, Effect of Repeal of Statutory Law: A Judicial Precedent Based Study, 2 BiLD Law Journal 2, 58-59 (2017), available at file:///C:/Users/user/Downloads/Effect-of-Repeal-of-Statutory-Law-A-Judicial-Precedent-Based-Study.pdf, (accessed on the 25th of October 2021).

[51] *Id.*

repealed law is not a law anymore; it gives no right or imposes no obligation from the moment the repeal becomes effective.[52] On the other hand, a new law is obligatory and it is presumed to be known by everyone as of the time of its entry into force. So, should a person who commits a crime while complying with a law whose obligatory force is withdrawn through repeal be punished even if he did not know that there was a new law which criminalized his act? In such cases, some writers argue that public policy requires not prosecuting the person because, in his mind, he is acting in conformity with the law although it is the wrong one.[53] It is argued that, as a matter of due process, it appears that no notice has been provided about the new law and, hence, it is wise not to punish him under such circumstance.[54]

C. Ignorance of Law As A Mitigating Ground

As the previous explanations have revealed, the traditional and current position in most legal systems is that ignorance of law is normally not a defence as everyone is presumed to know the law. Does this mean that ignorance of law is not relevant in other way? The answer is in the negative. The fact that ignorance of law is not, as a rule, a defence in most cases does not imply that it will not be relevant in other ways. Actually, ignorance of law can be considered during sentencing to grant mitigated punishment.[55] This shows that while ignorance of law is not generally credited for serving as a defence against criminal liability, it can be used as a factor entailing a less severe penalty. In fact, even traditionally where the rule of ignorance of law is no excuse was so prevalent in almost all criminal laws, it was commonly accepted under certain circumstances that a person who has committed a crime and argued that he did so because of ignorance could be punished less than those who were fully aware of the crime they had committed.[56]

Similarly, in countries like Germany where ignorance of law can be accepted as a defence, it can still be used during sentencing to mitigate penalty if it does not meet the necessary requirement to serve as a defence.[57] For example, Germany punishes a person if his ignorance of law is vincible (conquerable or avoidable by making efforts); yet, such ignorance can lead to a less severe punishment as compared to a person who commits a crime with full knowledge of illegality of his conduct.[58]

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[52]At this juncture, it must be noted that there is no difference between repealed law and amended law on a given subject-matter as the amendment also renders the stipulations it changes ineffective. In fact, amendment is a partial repeal of law.

[53] HALL, DANIEL E., CRIMINAL LAW AND PROCEDURE 245 (DELMAR CENGAGE LEARNING, 5th Edition, Australia et al, 2009). So, there is no question that such person does not have guilty mind as he is complying with the law although it is a repealed and he does not have notice of such repeal.

[54] *Ibid*. It is said that if a lawyer advises a client that a particular act is legal when it is not, the client will be liable for the crime and he cannot raise the advice as a defence. *Id*.

[55]See Graven, Philipp, mentioned above at note 1, p.236. See also Ignorance of the Law Is Not an Excuse, The Informed Citizen, available at https://njsbf.org/2018/04/23/ignorance-of-the-law-is-not-an-excuse/ (accessed on the 18th of October 2021).

[56] See FIONDA, JULIA, BRIEFCASE ON CRIMINAL LAW, 93 (CAVENDISH PUBLISHING LIMITED CP, 2ND EDITION, LONDON AND SYDNEY, (2000) pp.93. See also supra note 22, at, 186 and *supra* note 19, at 41.

[57] *Supra note 23, at, 646ff.*

[58] *Id.*

Therefore, it is safe to argue that ignorance of law may not be widely accepted as a defence against criminal liability but it can be used as a circumstance leading to mitigated penalties. This is logical because a person who commits a crime due to lack of legal knowledge deserves more leniency than a person who commits a crime knowing that he is violating a law. In fact, a person who deliberately violates the law assumes the risk of receiving the punishment attached thereto whereas, a person who is ignorant of the law does not assume such risk, which makes extending preferential treatment to him tenable.

III. POSITION OF IGNORANCE OF LAW IN ETHIOPIA

In Ethiopia, the concept of *ignorance of law* is recognized and regulated by the Criminal Code. But what relevance does the Code attach to it? Is it a defence against criminal liability? Is it a penalty extenuating circumstance? Is it both? The position of the Code on these issues will be examined in this section.

A. Ignorance of Law as A Defence in Ethiopia

In Ethiopia, crimes which can be treated as *mala in se* and *mala prohibita* are recognized. For example, murder, rape, arson, theft, and robbery could be regarded as crimes *mala in se* while crimes of carrying unlicensed firearms, failure to do environmental impact assessment when so required, and hunting protected wild animals could be regarded as crimes *mala prohibita*.[59] How does the Code treat the issue of ignorance of law in relation to the two types of crimes? In principle, the Criminal Code rejects the possibility of using ignorance of law as a defence without attaching any significance to the above distinction between crimes.[60] The rejection is in line with the widely accepted conception and the positions adopted in most legal systems.[61] Likewise, in relation to federal laws, the rejection is in line with the duty imposed on everyone to take judicial notice of all laws published in the Federal Negarit Gazeta.[62] Indeed, the duty to take judicial notice of the laws published in Federal Negarit Gazeta supports the presumption that everyone knows the law. Concomitantly, lack of knowledge of illegality of one's conduct cannot be raised as an excuse in Ethiopia.[63]

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[59] It is said that the problem of ignorance or mistake of law poses itself not in the case of natural offences (crimes *mala in se*) such as homicide or theft but in the case of certain special offences (crimes *mala prohibita*) such as economic offences. See Graven, Philipp, at 238.

[60] See Article 81(1) of the CRIMINAL CODE.

[61] *Supra* note *1,at , 235-236.*

[62] Article 2(3), *Federal Negarit Gazeta Establishment Proclamation*, Proclamation No. 3/1995. The issue of accessibility of this newspaper is a big challenge. On this issue, see generally, Dejene Girma Janka, mentioned above at note 4, at 208-213.

[63] However, it is still important to question which law-federal or regional or both-the Criminal Code refers to when it denies the relevance of ignorance of law as a defence. This question becomes particularly important as regional laws are even less accessible as compared to the federal laws. It must be noted that the FDRE Constitution leaves some rooms for regions to create crimes as the result of which regions have been including criminal provisions in some of their laws such as rural land use and administration proclamations. See Article 55(5) of the 1995 FDRE Constitution, Articles 18ff of the Oromia Pollution Control Proclamation, No.177/2012, *Megeleta* Oromia, 2012 and Article 19 of the of the Oromia Environmental Impact Assessment Proclamation, No.176/2012, Megeleta Oromia, 2012. The two proclamations criminalize different acts.

However, the Code does not reject ignorance of law as a defence in a blanket manner. Under Article 81(3), the Code recognizes an exception to the rule. It states that *in exceptional cases of absolute* and *justifiable ignorance* and *good faith* and, *where criminal intent is not apparent, the Court may impose no punishment*. From this exception, what we can understand is the fact that courts are given the discretion to examine if there is ignorance of law and if such ignorance is *absolute* and *justifiable*, and that the accused was in *good faith with no apparent criminal intention* to act in the way he did. If these requirements are met, courts can accept ignorance of law as excuse and exonerate accused persons from liability.

At this juncture, it would be fair to ask what the Code wants to refer to when it demands someone to be in a state of *absolute* and *justifiable ignorance* and *good faith with no apparent criminal intent* to be exempted from liability under Article 81(3). These are not easy terms to explain. However, it can be said that good faith refers to *honest* ignorance, absolute and justifiable ignorance refers to ignorance that *cannot be avoided by a person of his type* and *who is in the same situation*, and absence of apparent criminal intent refers to a*bsence of any plan to commit a crime*.[64] If a person was honestly ignorant about the existence of the law he violated, if the situation he was in would normally lead another person of his kind to the same mistake, and he did not have any intention to commit a crime whatsoever, then, his ignorance could be treated as a ground for exemption from punishment in accordance with article 81(3) of the Code. These requirements imply that vincible ignorance of law cannot serve as a defence.[65]

How difficult is it to fulfil these requirements to successfully invoke the defence of ignorance of law under Article 81(3) of the Criminal Code? At first glance, one may be tempted to say that it is almost impossible for ignorance of law to serve as a defence for anyone even under exceptional circumstances as the requirements are so stringent. Nonetheless, due to certain realities existing on the ground, many people can actually benefit from the exception. In this regard, considering the fact that most of Ethiopians live in the countryside,[66] significant part of our population is not educated,[67] and the manner in which our laws are published makes them less accessible to the majority, one can argue that many accused persons may be able to successfully invoke the defence of ignorance of law and secure exemption from liability pursuant to Article 81(3) of the Criminal Code.

For example, since our laws; Federal or Regional, are published in some specifically designated official newspapers and significant number of our people is uneducated and most of

[64] For more on these points, see generally, Graven, Phillip, pp.237-238.

[65] These requirements imply that evincible ignorance of law cannot serve as a defence. In some ways, the requirement to apply this exception seems to be similar with what is known as *invincible* (unavoidable) ignorance of law in Germany.

[66] For example, according to the World Bank's collection of development indicators, Ethiopia's rural population (people who live in rural areas) in 2020 was reported at 78.31 %. This shows the fact that most Ethiopians still live in rural areas. For more on this and related issues, see Ethiopia-Rural Population, available at https://tradingeconomics.com/ethiopia/rural-population-percent-of-total-population-wb-data.html (accessed on the 1st of November 2021).

[67] For example, in 2017, adult literacy rate in Ethiopia was 51.77%. This shows that nearly half of the adults (15 years of age and above are not literate). For more on this point, see Ethiopia Literacy Rate 1994-2021, available at https://www.macrotrends.net/countries/ETH/ethiopia/literacy-rate, (accessed on the 1st of November 2021).

them live in rural areas where accessibility to such laws is almost impossible, persons who commit some *mala prohibita* crimes can successfully rely on the provisions of Article 81(3) of the Criminal Code to avoid penalty.[68] First, we do not expect illiterate persons to read and understand new laws which create new crimes unless the concerned government body raises their awareness in some other ways. Second, let alone uneducated rural persons, even lawyers find it difficult to get access to many newly enacted laws. For example, where do we get regional laws from? Who is authorized to print and distribute them? How many branches does *Berhanena Selam* have all over the country to distribute federal laws? These factors actually contribute to ignorance of law not just for the ordinary citizens but for legal professionals too. Third, if a newly defined criminal act does not coincide with religious or moral wrongs a person is familiar with, then, an uneducated person will not surely believe that his conduct is a crime even if it is forbidden by the law. The first encounters rural uneducated persons make with new laws may be when they are prosecuted according to such laws. To make matters worse, even the languages in which our laws are written are not accessible to everyone. These and other factors show that the exception under Article 81(3) of the Criminal Code can actually be extended to cover many people. The following example can elaborate this issue more.

In 2020, Ethiopia enacted the Firearms Administration and Control Proclamation.[69] Under Article 2(13), the Proclamation defines *harm inflicting materials* to include tools like *mencha* and *spear*. Moreover, under Article 22(9), the Proclamation criminalizes keeping, using, carrying, or buying three or more of these tools in violation of its stipulations.[70] Yet, these tools, which the Proclamation categorizes as harm inflicting and, hence, prohibits from being kept, used, bought, and carried, are part of the tradition of some communities. Besides, some of these tools are used by many to win their livelihood. As a result, a farmer in far rural area of Oromia can argue that he did not know that keeping three spears is criminalized and there was no way for him to know about such prohibition. Similarly, a countryman in the remote Eastern part of Ethiopia can successfully argue that he did not know that keeping three *menchas* was criminalized by the government and there was no way for him to know about such criminalization. At the end, if someone is accused of keeping three spears or three *menchas*, he could effectively invoke the exception to the rule ignorance of law excuses no one and avoid liability unless the prosecution can show that the concerned community and, hence, the accused was well informed about the changing legal landscape in relation to these tools.

In conclusion, the Ethiopian criminal justice system does not, as a rule, allow ignorance of law to be used as a defence. However, the fact that new laws are frequently made and such laws contain penal provisions makes it difficult for many people to know about the new crimes they create. Under such circumstance, ignorance of law can be invoked and used as a ground to get

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[68] Of course, one major challenge here is the manner in which ignorance of law is presented to courts by accused persons. Unless the defence is presented well, which normally requires the assistance of a lawyer, courts may not be willing to accept it although accused persons can meet the conditions laid down in Article 81(3) of the Code.

[69] *Firearms Administration and Control Proclamation*, Proclamation No. 1177/2020. FED. NEGARIT GAZETTA 26th No 28, 25th May, 2020.

[70] *Id.* In the Proclamation *bulk harm inflicting materials* is defined to mean *three* or *more* harm inflicting materials. See *Id*., Art, 2 (10).

exemption from punishment if it can be shown that it is absolute and justifiable and that the accused was in good faith with no apparent criminal intention to commit a crime. Leaving this as it may, what would happen to a person in Ethiopia if he commits a crime while acting based on a repealed law? Surely, when the Criminal Code declines to accept ignorance of law as a defence, it is clear that it refers to operative laws. As a result, it can be argued that ignorance of a new law cannot be a defence in Ethiopia for a person who acted in accordance with an old law. However, if the concerned person can show that his ignorance of the new law meets the requirements of Article 81(3) of the Code, he can be exempted from punishment.[71] If such claim does not succeed, can he raise it during sentencing to seek mitigation of penalty? This issue will be discussed below.

B. Ignorance of Law as A Mitigating Circumstance in Ethiopia

Historically, ignorance of law served as a mitigating circumstance in Ethiopia in varying degrees of severity.[72] For example, the 1930 Penal Code made the following stipulation:

> "The man who offends after learning and knowing the law of the Government, and after reading the law or hearing the proclamation with his own ears, is a wilful offender and shall receive full punishment."[73]

This stipulation clearly shows that the offender receives full punishment only if he had actual knowledge of the law through *reading* or *hearing* its text. If a person commits a crime because he did not know the law, the 1930 Penal Code allowed reduction of his penalty in varying degrees. For example, while a man who is weak and forgetful and is unable to remember the law he has seen or heard about gets $1/10^{th}$ of his punishment reduced when he commits a crime,[74] a woman who has not learned the law and ordinances and does not go out to the courts shall have $6/10^{th}$ of her punishment reduced when she commits a crime.[75] Further, a countryman who converses in the language of his own country but who does not know the Amharic language in which laws were made will have $8/10^{th}$ of his penalty reduced if he commits a crime.[76] This last ground of mitigation seems to be best suited to Ethiopia as it is a country with great linguistic diversity.[77]

On the other hand, both the 1957 Penal Code and the 2004 Criminal Code do not contain similar stipulations with the 1930 penal Code.[78] Unlike in relation to defence, the Criminal Code is not clear with regard to the relevance of ignorance of law as a penalty mitigating factor. For example, while the Code recognizes irresistible coercion as a defence under Article 71, it recognizes resistible coercion as a mitigating factor under Article72; while it recognizes

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[71] As stated before, many members of our rural population may be able to show that they are not aware of the new law within the meaning of Article 81(3) of the Criminal Code.

[72] In addition to the provisions of the 1930 Penal Code, see LOWENSTEIN, STEVEN, MATERIALS FOR THE STUDY OF THE PENAL CODE OF ETHIOPIA 244-245 (Oxford University Press, Addis Ababa-Nairobi) (1965)

[73] See Article 12 of the 1930 Penal Code of the Empire of Ethiopia.

[74] *Id., Art. 13.*

[75] *Id, Art. 18.*

[76] *Id.* Art. 20. Of course, this mitigation works only for three years from the time the law is made.

[77] For more on how penalties could be reduced under the 1930 Penal Code, see Articles 12-21 of the Code.

[78] For the 1957 Penal Code, see Articles 78, 79, 80, and 83.

necessity as a defence under Article75, it recognizes excess of necessity as a mitigating ground under Article 76; while it recognizes legitimate defence as an immunity under Article 78, it recognizes excess of legitimate defence as a mitigating ground under Article 76. Yet, the Code does not expressly say anything as to the relevance of ignorance of law to mitigate punishment. As a result, practices and perceptions among legal professionals are not uniform on this matter.

For instance, in order to check what the perceptions of lawyers look like with regard to the relevance of ignorance of law as a penalty mitigating factor, three online questions were put to judges, public prosecutors, and advocates[79] on 11 October 2021.[80] Similarly, to increase the number of participants, the same questions were sent through SMS (Short Message Service) to these legal professionals on 3rd and 4th November 2021. These lawyers were asked to tell whether or not they have encountered cases were ignorance of law has been presented in court as a mitigating circumstance, whether it has been accepted by courts, and if it is possible, under the Criminal Code, to present such ground to obtain mitigated penalty. At the end, the lawyers who replied to the questions are 72 (35 judges, 19 public prosecutors, and 18 advocates). The following is the summary of their responses.[81]

From the 35 judges who responded to the questions, 25 of them have confirmed that they have encountered cases where ignorance of law has been presented as mitigating ground. However, it is only 8 of them who have confirmed that they accepted such ground to reduce punishment; 17 of them have stated that they did not accept the ground to mitigate punishment.[82] On the other hand, from the 35 judges who answered the questions, 23 of them have stated that ignorance of law can be accepted as a mitigating ground under the Criminal Code while 12 of them have stated that it cannot be used as a mitigating ground. This shows that nearly 34.3% of the judges do not believe that the Code allows ignorance of law to be used as a mitigating ground.

From the 19 public prosecutors who responded to the online questions, 10 of them have confirmed that they have encountered cases where ignorance of law has been presented as mitigating ground whereas, 9 of them stated they have not encountered cases where ignorance of law was presented to request mitigation. From the 10 public prosecutors who stated that they have encountered cases where ignorance of law was presented as a mitigating ground, only 4 of them have stated that the ground was accepted by courts to reduce penalty; 6 of them stated that

[79] This includes defence lawyers.

[80] I used responses that were given within ten days of the post. Some incomplete responses were rejected.

[81] Although equal chance was given, in particular through the online questions, to all of them, judges were more active to reply to the questions than the other two groups. So, it is not by calculation but by chance that the number of judges exceeded the number of the other groups. Moreover, the respondents are people working at different levels. For example, although the questions were not put to the legal professionals by identifying their levels of work, the author knows that judges who work at supreme courts, high courts, woreda courts participated in the survey; the same is true for prosecutors. As to the lawyers, such distinction is not relevant as they appear before any court depending on the level of their licenses.

[82] The reason for the rejection could be lack of convincing argument from the side of the accused or due to the judges' conviction that such ignorance cannot be used to reduce penalty.

the ground was rejected.[83] On the other hand, from the 19 public prosecutors who answered the questions, 12 of them have stated that ignorance of law can be accepted as a mitigating ground under the Criminal Code while 7 of them have stated that it cannot be used as a mitigating ground. This shows that nearly 36.8% of the prosecutors do not believe that ignorance of law can be relevant to secure extenuated penalty.

Finally, from the 18 advocates who replied to the questions, 10 of them have confirmed that they had the experience of presenting ignorance of law to secure their clients mitigated penalties. Similarly, from the 10 advocates, 4 have confirmed that ignorance of law was accepted to mitigate penalty while the remaining 6 advocates stated that it was declined. With regard to the possibility of using ignorance of law as a mitigating circumstance, 9 advocates replied in the affirmative while 9 of them said the Criminal Code does not allow the use of ignorance of law as a mitigating circumstance. This shows that 50% of the advocates do not believe that there is a room in the Criminal Code to use ignorance of law for the purpose of mitigation.

Now, the above mini survey is by no means taken to represent what the overall practices or perceptions of using ignorance of law as a mitigating factor look like. Yet, it can provide a clue with regard to the relevance that is being attached to ignorance of law as a mitigating ground by the legal community. The responses obtained from the above legal professionals clearly show that the practices and the perceptions that exist in relation to the relevance of ignorance of law as a mitigating circumstance are mixed or divided. In this regard, 34.3% of the judges, 36.8% of the public prosecutors, and 50% of the advocates do not think that ignorance of law is relevant as a mitigating factor. This implies that the size of judges, prosecutors, and advocates who think that ignorance of law cannot be used as a mitigating ground in light of the Criminal Code could be significant.[84] Thus, the record has to be set straight to align these differing opinions together: does the Criminal Code allow the use of ignorance of law as a mitigating factor? If so, which possible provisions of the Code can be relied upon? If the Code allows ignorance of law to be used as a mitigating factor, does it entail ordinary mitigation or free mitigation?

As we have seen before, the widely accepted position is that ignorance of law is not as a rule a defence but it is a factor courts can take into account during sentencing with a view to reducing the severity of punishment when circumstance so justify.[85] However, the Criminal Code does not unequivocally state that *ignorance of law* is one of the factors courts may consider for mitigation

[83]Although this information cannot lead us to any conclusive position, it can give us a clue as to the possible disposition of our judges in relation to the use of ignorance of law a punishment mitigating circumstance.

[84] In fact, there are many cases where the author of this Article raised ignorance of law as a mitigating ground but the concerned courts declined to accept it. For example, in the Cases between Federal Attorney General Vs. Dejene Fikadu Bekele, Federal High Court Bole Bench 3rd Division, File No.217845 (2020), Federal Attorney General Vs. Dejene Fikadu Bekele, Federal High Court Lideta Bench 1st RTD Division, File No.221904 (2021), Federal Attorney General Vs. Dejene Fikadu Bekele, Federal High Court Bole Bench 1st Division, File No.187647 (2020), Federal Attorney General Vs. Dejene Fikadu Bekele, Federal High Court Bole Bench 3rd Division, File No.217957 (2020), and Federal Attorney General Vs. Dejene Fikadu Bekele, Federal High Court Lideta Bench 6th Division, File No.221787 (2020) ignorance of law was presented as a mitigating ground but in all cases, it was rejected

[85] See, for example, Fionda, Julia, mentioned above at note 56, at, 93; Paunović, Dragan, mentioned above at note 22, at 186; Perkins, Rollin M., mentioned above at note 19, at 41; Graven, Philipp, mentioned above at note 1, at 236.

purpose. Thus, relevant provisions of the Code need to be examined to find out whether the Code leaves rooms to use ignorance of law for mitigation purpose. In this regard, the possible provisions of the Criminal Code to examine are Article 81, Article 82(1) (a), and Article 86. Do these provisions allow the use of ignorance of law as a mitigating circumstance? While the answer to this question is in the affirmative, the explanations for holding this position are provided below.

To start with, at first glance, Article 81(2) of the Code clearly recognizes *mistake* of law as a factor leading to free mitigation since it deals with the case where a person erroneously believes that he has a right to act although the right does not exist. As holding *erroneous belief* relates to mistake of law and mistake of law is different from ignorance of law, one can argue that ignorance of law is not specifically recognized as a mitigating factor under Article 81(2). Yet, even if the *plain meaning rule* requires applying the law as it is when it is clear, it also allows interpretation of a clear law when applying its plain text can lead to absurd conclusion. In the case at hand, it would be absurd to accept mistake of law which meets the requirements of Article 81(2) as a mitigating ground and reject ignorance of law which meets exactly the same requirements. Thus, Article 81(2) of the Code must be interpreted in such a way that it accommodates not only mistake but also ignorance of law. In fact, it can be argued that a person may hold erroneous belief with regard to his right to act because he does not know that there is a law prohibiting his act (ignorance) or he misunderstands the law (mistake). If this is the case, then, Article 81(2) can safely be interpreted to embrace not only mistake but also ignorance of law to apply free mitigation pursuant to Article 180 of the Code. For example, courts can grant free mitigation to any person who invokes ignorance of law provided that he was in *good faith* and had *definite* and *adequate* reasons to be unaware of the existence of the law he violated.

But, when do we say that a person was in *good faith* and that he had *definite* and *adequate* reasons to accept his ignorance or mistake of law as a mitigating factor? If the ignorance or mistake of a person is honest, we can say he was in good faith; if his ignorance or mistake emanates from circumstances which would equally put a conscious person in the same situation, we can say his ignorance or mistake is definite and adequate.[86] From these, one can see that only excusable ignorance or mistake can be accepted to mitigate punishment in accordance with Article 81(2) oft eh Code.

Moreover, as we have seen before, Article 80(3) of the Code recognizes cases where ignorance of law can excuse a person provided that it is *absolute* and *justifiable* and the accused was *in good faith* and he did not have any *criminal intent*. The requirements stipulated here, which were explained before in relation to defence, are very stringent. For example, if the accused was ignorant about the existence of the law he violated and he was in good faith and had no criminal intention, he can use such ignorance as a defence only if it is also *absolute*; if it is not absolute, his ignorance does not lead to exculpation. However, such ignorance should be

[86] See Graven, Philipp, mentioned above at note 1, at 237-238.

accepted as a penalty mitigating factor through interpretation of Article 81 as a whole. Such interpretation surely is not writing the law but interpreting the law to avert possible absurdity.[87]

The other pertinent provision of the Code to the issue at hand is Article 82. This Article provides for the lists of penalty mitigating factors. Unfortunately, Article 82 does not expressly mention *ignorance of law* as a mitigating ground. It is, however, interesting to note that Article 82(1) (a) of the Code allows a person to raise lack of intelligence (ዕውቀት ማነስ) or ignorance (አለማወቅ) as a mitigating factor if these situations led him to the commission of a crime. It is not clear what type of lack of intelligence (ዕውቀት ማነስ) or ignorance (አለማወቅ) this provision refers to. From between the two terms, if we focus on the term *ignorance* and examine the possible context in which it is used in the Code, we will arrive at the following conclusion. First, the types of ignorance regulated by the Criminal Code are ignorance of *fact* and ignorance of *law*. Second, in our case, ignorance or mistake of fact can be used as a defence pursuant to Article 80 of the Code. That being the case, Article 82(1) (a) cannot relegate what is already recognized as a defence (ignorance of fact) to a mitigating factor. Thus, it is only logical to argue that the term ignorance (አለማወቅ) under Article 82(1) (a) refers to ignorance of law, not of fact.

Lastly, Article 86 of the Criminal Code allows courts to use factors which are not expressly provided for in this Code as mitigating circumstances to reduce penalty in accordance with Article 179.[88] The only thing courts are required to do to rely on Article 86 is to give reasons for applying penalty extenuating factors not expressly stated by the Code. This shows that courts can accept factors which are not expressly mentioned by the Code as penalty reducing grounds if they are convinced to do so. Indeed, this Article of the Code is widely used by accused persons to present various factors to get mitigated penalty and courts have been generously and extensively relying on it to apply mitigation. The following are some of the factors which are commonly presented as mitigating circumstances pursuant to Article 86 and usually accepted by courts provided that they are supported by evidence.

If the accused claims that he is married and has children, courts usually grant him reduced penalty in light of Article 86 of the Code assuming that he is the one who supports his family.[89] If the accused has health problem(s) and he claims that he has a medical follow-up, courts grant

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[87] If such ignorance can be treated in accordance with Article 81(2), the will be acceptable. However if the kind of ignorance of law stated in this paragraph is not treated as being embraced by this Article, then, based on the overall spirit of Article 81, it must be used as a mitigating circumstance.

[88] According to the current Federal Supreme Court Sentencing Manual, the effect and manner of application of penalty mitigating grounds that are presented and accepted in accordance with Article 86 of the Criminal Code are the same with those listed under Article 82 of the Code. See አንቀፅ 25፣ የተሻሻለው የቅጣት አወሳሰን መመሪያ ቁጥር 2/2006፣ ፌደራል ጠቅላይ ፍርድ ቤት፣ ጥቅምት 1 ቀን 2006 ዓ.ም. አዲስ አበባ::

[89] As a practicing lawyer, I have not encountered any case where this ground has been rejected as a mitigating ground. It is like one of the standard mitigating grounds courts accept if evidence is presented. See, for example, Federal Attorney General Vs. Fetene Guta et al, Federal High Court Arada Bench 1st Homicide By Negligence Division, File No.234282 (2021), Federal Attorney General Vs. Adane Tesfaye et al, Federal High Court Lideta Bench, 5th Anti-Corruption Division, File No. 216931 (2021), and Federal Attorney General Vs. Dejene Fikadu Bekele, Federal High Court Bole Bench 3rd Division, File No.217845 (2020).

him reduced penalty in light of Article 86 of the Code.[90] If the accused is a student and he requests his penalty to be reduced, courts grant him reduced penalty in light of Article 86 of the Code.[91] If the accused participates in some social affairs for free such as *idir* or he participates in some religious activities like rendering free spiritual services, courts grant him reduced penalty in light of Article 86 of the Code.[92] If the accused participates in some national developmental activities such as purchasing a bond relating to the Great Ethiopian Renaissance Dam, courts grant him reduced penalty in light of Article 86 of the Code.[93] If the accused stays in custody (in prison) during trial and he shows good behaviour while in custody, upon request, courts grant him reduced penalty in light of Article 86 of the Code.[94] If the accused who is in custody (in prison) during trial participates in some committee works at a place where he is kept, upon request, courts grant him reduced penalty in light of Article 86 of the Criminal Code.[95] If the accused person has some sort of physical disability, courts grant him reduced penalty in light of Article 86 of the Code.[96] If the accused maintains good discipline during his trial, this fact (good discipline) can be used to grant reduced penalty in light of Article 86 of the Code.[97] The fact that there is COVID-19 pandemic at the moment has been raised by some accused persons to get reduced penalty and there are benches which have accepted this situation to reduce penalty in light of Article 86 of the Code.[98] Other general mitigating grounds which can be (and are being) accepted, although not uniformly, in accordance with Article 86 of the Code include being deceived into committing a crime, serving the public as government employee for long time, the age of the criminal (like old age), pregnancy, and the nature (importance) of the service the accused was (is) rendering (being a teacher, a medical doctor, etc.).[99] As we can see from the above example, Article 86 of the Criminal Code is being generously understood by courts to accept various factors to mitigate penalty. Thus, there is a greater chance of using ignorance of law as a mitigating ground pursuant to Article 86 if it is not already accepted in accordance with Article 81 or Article 82 of the Code.

At this juncture, it is necessary to examine the connection between Article 86 and Article 182 of the Criminal Code. Article 86 of the Criminal Code allows court to apply general penalty

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[90] *Id*.

[91] See, for example, Federal Attorney General Vs Fetene Guta et al, mentioned above at note 76.

[92] See, for example, Federal Attorney General Vs Adane Tesfaye et al, mentioned above at note 76.

[93] See Oromia Attorney General Vs Mulugeta Deme et al, Oromia Special Zone Surrounding Finfinne High Court, File No. 71034 (2020); Federal Attorney General Vs Adane Tesfaye et al, Federal High Court Lideta Bench, 1st Anti-Corruption Division, File No. 221449 (2021).

[94] See, for example, Federal Attorney General Vs Adane Tesfaye et al, mentioned above at note 68, Federal Attorney General Vs. Dejene Fikadu Bekele, Federal High Court Bole Bench 3rd Division, File No.217957 (2020), and Federal Attorney General Vs Dejene Fikadu Bekele, Federal High Court Lideta Bench 6th Division, File No.221787 (2020).

[95] See, for example, Federal Attorney General Vs Dejene Fikadu Bekele, Federal High Court Bole Bench 1st Division, File No.187647 (2020).

[96] This physical disability should not be the one which entails mental consequences. If mental consequences follow from the physical disability, his case may be connected to Article 49 of the Code.

[97]See, for example, Federal Attorney General Vs Adissu Abebe, Federal High Court Lideta Bench, 3rd Homicide and Robbery Division, File No 255240 (2021).

[98] See Federal Attorney General Vs Adane Tesfaye et al, mentioned above at note 80.

[99] Dejene Girma Janka, mentioned above at note 4, at 316-317.

extenuating circumstances not expressly provided for in the Code as long as they give reasons for applying them. On the other hand, Article 182 of the Code clearly prevents courts from exempting criminals from any penalty whatever or waiving the penalty in whole or in part except in such cases as are expressly provided by law. So, while Article 86 recognizes the use of penalty reducing factors not expressly provided by the Code, Article 182 forbids reducing penalty in cases where there is no express permission by the law. On the other hand, it is clear that mitigation leads to waiver of penalty in part. If this is the case, then, one may ask if the two provisions are compatible.[100]

At first glance, there is no question that the two provisions seem contradictory. However, in order to keep both provisions functioning on matters of mitigation, Article 182 of the Code can (should) be understood as referring to cases where no mitigating circumstances are presented or accepted in accordance with Articles 81, 82, 83, 86, etc. of the Code. So, mitigating grounds presented and accepted in accordance with Article 86 of the Code must be taken as the one expressly allowed (even if they are not mentioned) by the law within the meaning of Article 182.[101] Such approach renders the two apparently inconsistent provisions compatible and effective. Consequently, courts can accept new penalty mitigating circumstances, if they have reason to do so in light of Article 86 without being restricted by the stipulation of Article 182 of the Criminal Code.

To sum up, we can see from the analysis made so far that the Criminal Code leaves sufficient rooms to use ignorance of law as penalty mitigating factor provided that such ignorance contributed to the commission of a crime. At best, ignorance of law can be used as a special mitigating factor leading to free mitigation in accordance with Article 180 of the Code if it is presented based on Article 81(2) of the Code or at least as a general mitigating factor leading to ordinary mitigation pursuant to Article 179 of the Code if it is presented based on Article 82(1) (a) or Article 86 of the Code.

IV. CONCLUSION

The widely accepted position is that ignorance of law is not a defence as everyone is presumed to know the law. But in some countries like South Africa and Germany, ignorance of law can serve as a defence. Moreover, even in countries where ignorance of law is not generally accepted as a defence, it is considered to grant exemption from penalty under limited circumstance. Further, in countries like the USA, some provisions in criminal statutes are being interpreted as requiring knowledge of illegality of one's conduct. In such cases, not knowing the law can serve as a defence. On the other hand, ignorance of law is generally considered during sentencing for punishment mitigation purpose.

The position held in Ethiopia is not different from what is widely accepted. In principle, ignorance of law is not welcomed as a defence against criminal liability. However, under

[100] Can we, for instance, use ignorance of law as a mitigating ground in light of Article 86 (if not accepted under Article 81 or Article 82) of the Code while Article 182 prevents its use?

[101] For the possible implication of not understanding or construing Article 182 in this manner, see Dejene Girma Janka, mentioned above at note 4, at 200-201.

exceptional circumstances, the Criminal Code allows ignorance of law to excuse a person provided that his ignorance is *absolute* and *justifiable* and that he is in *good faith with no apparent criminal intent* at the time of his act. Yet, given the existing realities on the ground, many members of our rural population may benefit from this exception in relation to novel crimes mala prohibita although the requirements to secure exemption appear to be stringent.

As far as mitigation is concerned, the relevance that the Criminal Code attaches to ignorance of law is not stated in an unambiguous manner. For example, the Code clearly recognizes using resistible coercion, excess of necessity, and excess of legitimate defence as mitigating grounds. However, a similar stipulation is missing from the Code in relation to ignorance of law. Nonetheless, close scrutiny of relevant provisions of the Code reveal that ignorance of law can also serve as a ground to mitigate penalty. In fact, the Code seems to have left sufficient room to rely on ignorance of law to request and secure extenuated penalty. In this regard, ignorance of law can be presented to seek free mitigation in accordance with Article 81(2) and Article 180 of the Code. If argument based on Article 81(2) and Article 180 does not succeed, ignorance of law can still be presented as a general mitigating ground in accordance with Article 82(1) (a) and/or Article 86 to secure ordinary mitigation pursuant to Article 179 of the Code. Consequently, everyone involved in our criminal justice system (judges, prosecutors, advocates, etc.) must be aware of the fact that the Code accommodates ignorance of law as a mitigating ground, as is the case elsewhere, either in accordance with Article 81(2) or Article 82(1) (a) or Article 86 provided that any claim of ignorance of law is persuasive or meets the requirements attached to these provisions. Thus, advocates or accused persons must present ignorance of law to courts to seek mitigation when there are reasons to do so; public prosecutors should not challenge such claim arguing that the law does not allow it; and judges should accept the claim and mitigate penalties if they are convinced that the conditions recognized to allow ignorance of law as a mitigating factor are stratified.

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