

Concurrence of Crimes under Ethiopian Law: General Principles *vis-à-vis* Tax Laws

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Abstract

One or successive act(s) may lead to multiple criminality. According to the principle of unity of guilt and penalty, however, one provision punishes the combination of acts flowing from a single criminal guilt. This principle applies to crimes in Ethiopia's Criminal Code and in special penal legislations, unless otherwise provided. This article examines the application of general criminal law provisions to special penal legislations, using tax crimes as illustration. The author argues that the tax legislations do not have, and do not need, special rules on concurrence of crimes. Except for acts committed in different tax periods with renewed criminal guilt, tax evasion is the major offence and prosecution/conviction for other predicate offences should be considered only where the evidence is deficient to prove tax evasion. The author also argues that enacting penal law is the power of the Federal Government and regional states may penalize only matters not covered by the federal penal law. This, as a rule, precludes concurrent criminal liability for a single act based on federal and state laws. However, in the context of separate federal and state taxation powers, a single act may simultaneously violate federal and state tax laws.

Key terms:

Concurrence of crimes · Unity of guilt and penalty · Concurrence of tax crimes

DOI <http://dx.doi.org/10.4314/mlr.v17i1.3>

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Received: 20 March 2023

Accepted: 9 July 2023

Suggested citation:

Leake Mekonnen Tesfay (2023). "Concurrence of Crimes under Ethiopian Law: General Principles *vis-à-vis* Tax Laws", 17(1) *Mizan Law Review*: 81-116.

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The author is grateful to the anonymous internal and external reviewers for their comments on the draft of this article.

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1. Introduction

Concurrent crimes may follow from either a single or successive act(s) or omission(s).¹ The Criminal Code provides three scenarios for concurrent crimes against an accused. *The first* setting is where an offender commits two or more successive similar or different crimes. The *second* scenario is where two or more legal provisions are violated or two or more harms are caused with a single act/omission. The third context relates to cases where similar harm is caused to multiple victims with a single act/omission violating one legal provision.²

However, successive acts flowing from the same criminal guilt may violate a single penal provision applicable to the combination of acts.³ Graven considered this as “imperfect or apparent” concurrence. Although the combination of acts seems to violate several provisions, actually one legal provision applies to it.⁴ We call this the principle of “unity of guilt and penalty.”⁵ According to Article 3 of the Criminal Code, such principles of the Criminal Code (including the provisions on concurrence) apply to special penal legislations unless otherwise provided.

The concept of dual sovereignty in federal systems also presents a subject of discussion about concurrence of crimes. In the USA, for example, simultaneous liability for a single criminal act based on federal and state laws

¹ Andrew Ashworth (2010). *Sentencing and Criminal Justice* (5th ed., Cambridge University Press), p. 260.

² Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004, Article 60(a)-(c).

³ Elias N. Stebek (2022). *Principles of Ethiopian Criminal Law* (Rev. Ed.), p. 187.

⁴ Philippe Graven (1965). *An Introduction to Ethiopian Penal Law* (Haile Selassie I University), p. 163.

⁵ Criminal Code, *supra* note 2, Article 61.

is one reason for long imprisonment for one crime.⁶ In Ethiopia, it is the power the Federal Government to enact penal law, and states may penalize matters not covered by the federal penal code.⁷ However, since the Federal and regional state governments have separate powers of taxation,⁸ federal and state tax legislations may apply concurrently to punish a single act that constitutes a tax offence under both laws.

This article examines general and special provisions about concurrence of crimes. The next section highlights two cases pertinent to concurrence of tax crimes, respectively from the Federal and Tigray Supreme Court Cassation Divisions. The third and fourth sections respectively present the general provisions regulating concurrence of crimes and issues about concurrence of crimes and federalism. Section five examines concurrence of crimes in special penal laws using tax crimes as illustration, followed by a conclusion.

2. Background: Two Cases on the Concurrence of Tax Crimes

The first case is *Yirgalem v ERCA Prosecutor*.⁹ The petitioner was charged in the Federal First Instance Court with five counts. First was tax evasion under article 96 of Income Tax Proclamation No. 286/2002.¹⁰ Second was conducting transaction without a Value Added Tax (VAT) invoice under Article 50(b)(1) of VAT Proclamation No. 285/2002.¹¹ Third was use of unauthorized invoice under Article 50(c) of VAT Proc. No. 285/2002. Fourth was making misleading statements under article 97(3)(b) of Income Tax Proc. No. 286/2002, and fifth tax evasion under Article 49 of VAT Proc. No. 285/2002.

After hearing prosecution and defense evidence, the Court acquitted him of the fifth charge citing that it is related with the second charge, convicted him of the other four counts and sentenced him to seven years and eight months imprisonment and fine of ninety five thousand Birr (by summing up the

⁶ Douglas Husak (2008). *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press), p. 47.

⁷ Constitution of the Federal Democratic Republic of Ethiopia, Proc. No. 1/1995, Article 55(5).

⁸ *Id.*, article 96 and 97.

⁹ *Yirgalem Tsegay W/Slassie v Ethiopian Revenues and Customs Authority Public Prosecutor* (Federal Supreme Court Cassation Division, File No. 95326, Meskerem 26, 2007 E.C., Unpublished).

¹⁰ Income Tax Proclamation No. 286/2002 (now repealed).

¹¹ Value Added Tax Proclamation No. 285/2002 (as Amended with Proclamation No. 609/2008), Article 50(b)(1).

sentence it determined for each count). On appeal by the petitioner, the Federal High Court confirmed the decision. In his petition to the Federal Supreme Court Cassation Division he demanded the merger of the second and third charges into one, because, he claimed, they arose from single criminal intention and the facts in both charges were the same.

The Cassation Division decided against him. Based on the record of the lower courts' decisions, the Cassation Division's decision states that the crime in the second charge was conducting transaction using an ordinary invoice while the petitioner should use a VAT invoice whereas the third charge was that he used an unauthorized invoice for the transaction. It underlined the inapplicability of the principle of unity of guilt and penalty to the case. According to the Cassation Bench's decision, although criminal acts committed with a single intention are punishable as one crime as per article 60 and 61 of the Criminal Code, there are different penal provisions, due to their special nature and the purpose the lawmaker aspires to achieve, specially provided to be punishable independently.

For the Cassation Division, it is understandable from the letter and spirit of the provisions in the income tax, VAT and customs laws that acts criminalized in these laws are designed to stand as independent offences. It concluded that the penal provisions stated in the second and third charges against the petitioner have provided for material elements of the respective crimes and penalty separately. The decision stated that it has also been proved that the petitioner conducted a transaction without a VAT invoice and used an unauthorized invoice. Hence, they can be tried independently and it is impossible to say the acts arose from a single criminal intention. Therefore, in consideration to the objective of tax reforms that the lawmaker intends to introduce, applying these penal provisions concurrently is proper. Finally, it confirmed the total punishment.

The second case is *TRDA Prosecutor v Tsrity and Kifle*.¹² The respondents are husband and wife and the acts they were charged for were committed in a business center registered in the first respondent's name. The present petitioner charged the respondents with two counts each. The first count was failure to use sales register machine under Article 50(d)(2) of the VAT Proc.

¹² *Tigray State Revenue Development Authority Prosecutor v W/ro Tsrity Tekhlehaymanot and Kifle Birhane*, File No. 61264, date decided 18/4/2006 E.C., (Unpublished).

No. 285/2002 (as amended).¹³ On 16 September 2005 E.C., the first respondent sold commodities worth 6,800 Birr. Similarly, on 08 September 2005 E.C., the second respondent sold commodities worth 630,010.25 Birr. The crime was that they used ordinary invoice while they should have used an invoice generated from sales register machine.

The second count was that the respondents, with the acts stated in the first count, committed the same crime under Article 97(A)(2) of Tigray State Income Tax Proc. No. 68/95 (as amended). Having examined prosecution evidences, the trial court merged the counts into one. Tigray State Supreme Court Appellate Division confirmed the decision of the trial court that merged the two counts into one. The petitioner in its petition to Tigray Supreme Court Cassation Division argued that the acts committed by each defendant establishes concurrent crimes according to Article 60(b) of the Criminal Code because they violated the VAT Proclamation, a federal tax law and Tigray State income tax law simultaneously.

The defendants argued that both provisions deal with the use of sales register machine and an incidence of failure to use a single sales register machine cannot establish concurrent crimes. They added that the state law is a replica of the federal law and that mere criminalization of an act in the two proclamations does not establish concurrent crimes. They further argued that the lawmaker does not intend to establish concurrent crimes under such context and they “regretted” that if it were in Addis Ababa, where only federal tax laws apply, they could not face concurrent charges for a single act.

The Court decided against them. It compared the case with the criminalization of a single act of sexual assault committed against a relative as rape under Article 620 of the Criminal Code and indecent behavior between relatives under Article 655. The Court added that a single act could be criminalized in both proclamations stated in the charges in consideration to the purposes of the proclamations and according to the principle provided in Article 60(b) of the Criminal Code. The Court also stated that the VAT Proclamation deals with crimes committed with respect to VAT collection and it has no connection with using or not using sales register machine for state tax purposes. With respect to the second count, the Court said, the provision intends to prevent tax evasion by failure to use sales register machine and an incidence of failure to use sales register machine may simultaneously violate

¹³ An issue whether Tigray State Revenue Development Authority has the power to prosecute based on the VAT Proclamation, a federal tax law, was raised and the courts answered to the affirmative.

federal and state tax laws. These cases require an inquiry into concurrence of crimes in general and the concurrence of crimes in special penal legislations in particular.

3. General Criminal Law Provisions Governing Concurrence of Crimes

3.1 Criminal concurrence: material and notional concurrence, and plurality of victims

Literally, “concurrent” means “existing or happening at the same time.”¹⁴ However, concurrent crimes may arise either from several criminal acts committed in different times consecutively or intermittently, or from one criminal act or omission.¹⁵ While those who commit several criminal acts are persistent offenders, others may face multiple prosecutions for a single incidence that violates several penal provisions.¹⁶ In this connection, it is important to note the difference between recidivists and those who face multiple charges for multiple criminal acts in their first appearance before court.

While both are habitual offenders, the former are those who are found committing new crimes after their punishment whereas the latter are those who have been committing criminal acts repetitively before being identified and later faced accumulated charges.¹⁷ The Criminal Code uses the term “concurrent” for both crimes arising from a single act or combination of acts and from several acts.¹⁸ Concurrence of crimes, therefore, means presentation of several counts of criminal charges against the accused in one case filed to a court, not necessarily multiple offences arising from a single act or combination of acts.¹⁹

The wider definition given to criminal concurrence leads to typology of concurrent crimes. While the concurrence of crimes resulting from consecutive acts/omissions is called material concurrence or concurrence of offences, the concurrence of crimes resulting from a single act or combination of acts violating different penal provisions is called notional concurrence or

¹⁴ A. S. Hornby, *Oxford Advanced Learner’s Dictionary* (Oxford University Press, 8th Ed., 2010), p. 300.

¹⁵ Ashworth, *supra* note 1, p. 260.

¹⁶ *Ibid*

¹⁷ *Ibid*

¹⁸ Criminal Code, *supra* note 2, Article 60

¹⁹ Elias, *supra* note 3, pp. 188-189.

concurrence of provisions.²⁰ However, perfect categorization is impossible. In this regard, Ashworth noted that while the task of search for more generally applicable principles should not be stifled by the need for circumstance specific considerations, it is more “a pragmatic device for limiting overall sentences rather than a reflection of a sharp category distinction.”²¹

The Criminal Code provides three scenarios for the concurrence of crimes. These are: (1) *material concurrence*, i.e., concurrence of offences (2) *notional concurrence*, i.e, concurrence of provisions or harms, and (3) multiplicity of victims. As provided in Article 60(a) of the Criminal Code, material concurrence occurs when a person “successively commits two or more similar or different crimes, whatever their nature”. The term “successively” has no implication on specific proximity or gap in time. It indicates the repetition of acts constituting separate crimes for each other.²² The repetition may be between “weeks, months or even years”.²³ The repetition of the acts may also be within a short time, but with a renewed intention.²⁴

An illustration for this can be *Blockburger v United States*.²⁵ In this case, the US Supreme Court confirmed concurrent convictions for two consecutive sales of drug to the same purchaser within a short time. It rejected the appellant’s argument that the two sales “constitute a single continuing offence” based on the ground that there was “no substantial interval of time between the delivery of the drug in the first transaction and the payment for the second quantity sold”. It said:

The sales ... although made to the same person, were distinct and separate sales made at different times. ... shortly after delivery of the drug which was the subject of the first sale, the purchaser paid for an additional quantity, which was delivered the next day. But the first sale had been consummated, and the payment for the additional drug, however closely following, was the initiation of a separate and distinct sale The next sale was not the result of the original impulse, but of a fresh one –that is to say, of a new bargain.

²⁰ Id., pp. 191-193; Graven, *supra* note 4, p. 163.

²¹ Ashworth, *supra* note 1, pp. 263-264 & 266.

²² Id., p. 256.

²³ Id., p. 260.

²⁴ Criminal Code, *supra* note 2, Article 62.

²⁵ 284 U.S. 299 (1932)

Materially concurrent crimes may be either independent, when neither act is committed as means of achieving the other (e.g., if a person commits rape and robbery), or related, when either act is committed as a means to achieve the other.²⁶ Notional concurrence occurs where a person with a single criminal act simultaneously violates several penal provisions or results in several material harms provided in Article 60(b) of the Criminal Code. For example, in the case of concurrence of provisions, a married man who rapes his relative in a public place violates four provisions of the Criminal Code, i.e., article 620 (rape), Article 655 (incest), Article 652 (adultery) and article 639 (public indecency).²⁷

Elias observes three scenarios for the case of concurrence of results. First is “concurrence of intentional crimes” or concurrence of direct and indirect intentions causing two separate harms, provide in article 66(1)(a) of the Criminal Code. Second is “concurrence of intentional and negligent offences” provided in Article 66(1)(b). Third is “concurrence of negligent offences” provided in Article 66(1)(c).²⁸ The several material results (harms) caused by a single act flowing from a single criminal guilt violate several penal provisions and affect plural victims.²⁹

Multiplicity of victims occurs where a person with a single act flowing from the same criminal guilt causes similar harm on several victims as provided in Article 60(c). There was no similar provision in the 1957 Penal Code. It was incorporated to remedy Graven’s criticism to the 1957 Penal Code’s failure to provide for the concurrence of crimes based on the multiplicity of victims.³⁰ For Elias, however, the new provision brings a new problem, not a solution.

To show the sentencing problem caused in the application of Article 60(c), Elias cites results of a class assignment submitted by one of his students in a hypothetical case.³¹ Ten randomly selected judges were asked to determine punishment for a hypothetical case if a person “convicted under Article 670 for having robbed 1,000 Birr that belongs to 10 persons” without taking any aggravating or extenuating circumstances; and whether it makes a difference “if the money belonged to 50 [individuals] who had kept their saving in a box”

²⁶ Criminal Code, *supra* note 2, Article 63; Graven, *supra* note 4, pp. 161-162.

²⁷ Graven, *supra* note 4, p. 162; Ashworth, *supra* note 1, p. 257. See also Criminal Code, *supra* note 2, Article 660.

²⁸ Graven, *supra* note 4, p.p. 162-163.

²⁹ *Id.*, p. 173.

³⁰ *Id.*, pp. 165-166; Explanatory Notes of the 2004 Federal Democratic Republic of Ethiopia Criminal Code, p. 37. See explanation on Article 60(c).

³¹ Woinshet Kebede (2006), cited in Elias, *supra* note 3, p. 204.

or to one person only. Their verdict varied between 1 to 4 years of rigorous imprisonment in the case of one victim, and between 1 to 15 years in cases of 10 and 50 victims. Elias argues that Article 60(c) of the Criminal Code has overextended the notion of concurrence, because plurality of victims under such settings may merely justify aggravation of a sentence (where appropriate).³²

Andenaes, commenting on Norway's criminal law, proposes that the problem of plurality of victims can be remedied by distinguishing between concurrence of victims of violations of personal rights and victims of violations property rights. He said, in violations of personal rights as "murder, assault and defamation", "it will always be assumed that there are as many offences as there are victims". Whereas in case of violation of property rights as "theft and destruction of objects which belong to a number of people ... [t]he offence is no more serious ... than if they belong to only one."³³ Elias argues in support of a similar interpretation in the Ethiopian case, and states:

A bomb that causes the death of five victims entails *multiple material results*, i.e. the death of five persons, whereby robbery of Birr 1,000 belonging to five persons has the *same material result*, i.e. violence (or intimidation) accompanied by the abstraction of Birr 1,000 that belongs to another person. While the five victims of bomb attack are subjects of distinct personality, a certain amount of money (e.g. Birr 1,000) represents an amount of value (as medium of exchange, store of value and symbol of value) which can be perceived as a single object of forceful abstraction irrespective of the number of its owners. Thus, when the same rule applies to offences against property which, unknown to the offender, happens to belong to two or more persons, aggravating punishment on the basis of the number of rights would be unreasonable.³⁴

While the argument to distinguish between personal and property rights is sound, it does not seem to have gained acceptance yet. For example, Article 543(1) of the Criminal Code provides for punishment of "simple imprisonment from six month[s] to three years, or ... fine from two thousand to four thousand Birr" for negligent homicide. Article 543(2) aggravates the punishment to "simple imprisonment from one year to five years and fine from three thousand to six thousand Birr" where the perpetrator "has a professional

³² Elias, *supra* note 3, pp. 202, 204, 208.

³³ J. Andenaes (1965) quoted in Elias, *supra* note 3, p. 206.

³⁴ Elias, *supra* note 3, pp. 206-207, (emphasis in the original).

or other duty to protect the life, health or safety of another” as doctors and drivers. However, Article 543(3) comes with aggravation based on the plurality of victims. It aggravates the punishment to “rigorous imprisonment from five year[s] to fifteen years and fine from ten thousand to fifteen thousand Birr where the criminal has negligently caused the death of two or more persons”.

More importantly, interpreting Article 543(3) by analogy, the Cassation Division of the Federal Supreme Court decides that negligent bodily injury of multiple victims with a single negligent criminal act should not lead to multiple prosecution and conviction. The multiplicity of the victims should rather be a ground for aggravation of punishment.³⁵ This shows that the application of the provisions for concurrence of crimes due to plurality of victims is an issue not yet settled. In other words, while the Cassation Division rules that an accused does not face concurrent negligent homicide charges for the death of several victims due to the same negligent act, how it will handle other cases of plurality of victims is yet to be seen.

3.2 Unity of guilt and penalty vis-à-vis the renewal of criminal guilt

Provisions for material concurrence notwithstanding, according to the principle of *unity of guilt and penalty* successive or repeated criminal acts flowing from a single criminal guilt are punishable as one crime. The Criminal Code has three provisions in this regard embodied under Sub-Articles 1, 2 and 3 of Article 61.

Unity of guilt and penalty under Art. 61(1)

Article 61(1) provides that a single “criminal act or a combination of criminal acts” flowing from single criminal guilt and violating “the same legally protected right”, “cannot be punished under two or more concurrent provisions of the same nature if one legal provision fully covers the criminal acts”. This provision has four elements. The three are that the act or combination of acts should be: (a) committed only once; (b) flowing from one criminal intention or negligence; and (c) committed against one protected right. For example, if a guard who steals items from an employer leaves his/her job and gets another employer from whom s/he also steals, s/he is liable for “two materially concurrent offences”.³⁶ Under such cases, there is repetition of acts, and the violation of A’s and B’s rights and the repetition of the acts show renewed intention.

³⁵ *Addissu Gemechu v Amhara State Prosecutor*, Federal Supreme Court Cassation Decisions, Vol. 21, pp. 345-353

³⁶ Elias, *supra* note 3, p. 196.

The fourth element is determining the law applicable to the criminal act or combination of criminal acts, which carries exceptions to concurrence of offences and concurrence of provisions. In the case of successive acts the combination of which results in another greater offence, the perpetrator is liable only for the greater offence not for the successive acts separately. This is called imperfect/apparent concurrence, because while it apparently seems several provisions are violated, in reality only one penal provision is violated.³⁷ For example, robbery (Article 670) combines the acts of “coercion (Article 582) and theft (article 665)”.³⁸ In like cases, it is imperative to search for the penal provision that prevails on the combined effect of the acts.³⁹

Similarly, in connection to notional concurrence of provisions (Article 60(b)), a single act cannot be punished with two or more provisions of the same nature, protecting similar interests or designed to achieve similar specific objectives. Penal provisions that punish a single criminal act concurrently should have separate interests to protect independent of each other. For example, article 717(2) of the Criminal Code (attack on another’s credit) prohibits the concurrent application of article 613(3) (defamation). In like cases where a given act is penalized by a general provision and another more specific provision of similar nature, the latter law prevails because it specially regulates the action.⁴⁰

Sometimes, courts may find the more specific legal provision indefinable as in the case of *Priest Getachew v Prosecutor*.⁴¹ In this case, the petitioner caused the death of a victim by making her to smell the smoke of various foliage and using hot metal on her face as traditional medication for evil-eye (or *buda*). He was prosecuted and convicted for negligent homicide under article 543(1) and causing injury due to harmful traditional practices under Article 567 of the Criminal Code. The Cassation Division decided that while his conviction under article 567 suffices, his concurrent conviction under Article 543(1) was improper.

³⁷ Graven, *supra* note 4, p. 163; F. M. Palombino (2016). “Cumulation of offences and purposes of sentencing in international criminal law: A troublesome inheritance of the Second World War”, *International Comparative Jurisprudence*, Vol. 2, p. 89.

³⁸ Elias, *supra* note 3, p. 196.

³⁹ Palombino, *supra* note 37, p. 89. See also Criminal Code, *supra* note 2, Article 584.

⁴⁰ Palombino, *supra* note 37, pp. 89-90.

⁴¹ *Priest Getachew Teshome v prosecutor*, Federal Supreme Court Cassation Decisions, Vol. 10, pp. 200-202

The petitioner's concurrent prosecution and conviction was inappropriate. However, the Cassation Division should have carefully interpreted Articles 567 and 543(1). It is to be noted that Article 567 does not set a punishment. It refers to either Article 561 or 562. These provisions respectively deal with harmful traditional practices that endanger the life of a pregnant woman or a child, or that cause bodily injury.

Article 561 has two sub-provisions. Article 561(1) provides penalty for causing "the death of a pregnant or a delivering woman or that of a newly born child" due to harmful traditional practices. Article 561(2) provides, "Where the death was caused by negligence, the relevant provision of this Code (Art. 543) shall apply." Based on the second sub-provision, the Cassation Division convicted the petitioner under article 567 and sentenced him under article 543(1).

In determining the applicable law, understanding the principle of lesser-included offence is also important. According to this principle, "when all the legal requirements for a lesser offence are met in the commission of a more serious one, a conviction on the more serious count fully encompasses the criminality of the conduct".⁴² The purpose in the lesser-included offence principle is enabling the judicator to relate the conviction more closely with the criminal act committed.⁴³ This resolves the doctrinal and practical conflict between double jeopardy claims and concurrence of crimes. It solves the issue whether "one charged offense is subsumed by another charged offense for purposes of double jeopardy or merger (i.e., whether the defendant can be convicted and punished for both offenses)".⁴⁴

There are three theories in determining whether there is a lesser offence. The first is the strict statutory interpretation approach which uses the elements test to determine the lesser-included offence issue.⁴⁵ According to this approach, an offence is considered as a *lesser-included offence* if all elements of the lesser offence are contained in the greater offence, hence "impossible to commit the greater offence without first having committed the lesser".⁴⁶ The second theory is the cognate theory, which in its turn has two approaches:

⁴² Palombino, *supra* note 37, p. 91.

⁴³ C. R. Blair (1984). "Constitutional Limitations on the Lesser Included Offense Doctrine", 21 *American Criminal Law Review* 445, p. 449.

⁴⁴ S. A. Evig (November 2018). "Convict My Client of Something Else! Lesser Included Offences after Reyna-Abarca" *Colorado Lawyer* 38, p. 39

⁴⁵ The Judge Advocate General's School, US Army (Winter 2011), *Criminal Law Desk Book: Crimes and Defenses*, (Vol. II), p. A-10.

⁴⁶ Blair, *supra* note 43, p. 447.

the pleading approach and the evidence approach. According to the pleading approach “the court looks to the facts alleged in the accusatory pleading” not “the statutory elements of the offense” whereas according to the evidence approach “the court looks at the evidence actually adduced in the case” not “the statutory elements or the language of the accusatory pleading”.⁴⁷ The third approach is what is adopted in the US Model Penal Code whereby an offence is said to be lesser-included if “it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission”.⁴⁸

In Ethiopia, in addition to the phrase “if one legal provision fully covers the criminal acts” in Article 61(1) of the Criminal Code, relevant provisions of the Criminal Procedure Code seem to show a mixed approach that can accommodate the cognate-evidence approach and the US Model Penal Code approach. While the public prosecutor is entrusted with the power to identify the crime for which the accused is to be charged, alternative counts are possible and courts can convict a person for a lesser offence not charged if prosecution evidence proves a lesser crime.⁴⁹

Palombino’s argument for the criterion of consumption in the application of the lesser-included offence principle is relevant here. According to his argument, the application of the lesser-included offence should not be limited to cases where one offence includes the elements of the other— called *unilateral specialty*.⁵⁰ He argues, even in the cases where “each of the two crimes simultaneously appears both general and special in respect of the other”— called *bilateral* or *reciprocal specialty*, the relative gravity of the crimes should be ascertained and the crime with severe gravity consumes the lesser one.⁵¹

There are two parameters for this. The first is penalty, according to which “the offence, which carries the graver penalty, consumes the other”.⁵² In cases where the gravity in penalty cannot serve the purpose, e.g., as in international criminal law that does not embody range of punishments, the degree of gravity between crimes should be determined based on the “comparative gravity of

⁴⁷ Id., 449

⁴⁸ [US] Model Penal Code, quoted in Blair, *supra* note 43, p. 450.

⁴⁹ Criminal Procedure, *supra* note 2, Article 113.

⁵⁰ Palombino, *supra* note 37, p. 91 (emphasis original).

⁵¹ Ibid (emphasis original)

⁵² Ibid

the different contextual elements of crimes”.⁵³ Taking the example of the crimes of genocide, crime against humanity and war crime – all having murder as common denominator, he argued that genocide is graver than crime against humanity and crime against humanity is graver than war crime.⁵⁴ While his argument cannot be used for the total abolition of the concept of notional concurrence of offences when several penal provisions are violated by a single criminal act, it is relevant to avoid prosecution and conviction for a single criminal act or omission based on penal provisions with similar nature and without distinct purpose.

Unity of guilt and penalty under Art. 61(2)

The second provision on unity of guilt and penalty is Article 61(2). It provides for two circumstances where successive or repeated acts flowing from a single criminal guilt and violating the same protected right will not be punished for concurrent crimes. One is where the acts are repeated to achieve the same purpose. For example, a store keeper who repeatedly and at different occasions steals objects from the employer will not be liable for concurrent thefts because the repeated acts are united under the intention to obtain undue enrichment at the expense of the employer’s property right.⁵⁵ The other is where habitual action is a requirement to constitute the commission of an ordinary crime or aggravated crime. Such offences are offences of inherently continuous nature, having duration, and not offenses consisting of isolated acts. Example for this can be habitual exploitation of the prostitution or immorality of another person for pecuniary gain provided in article 634 of the Criminal Code.

Unity of guilt and penalty under Art. 61(3)

The third provision about the principle of unity of guilt and penalty is Article 61(3) of the Criminal Code. Three instances have been mentioned as illustration for “non-punishable acts of execution” repeatedly committed to give effect to the main offence.⁵⁶ These are crimes against property, counterfeiting currency and forgery of document. For example, a person who forges a document (Article 375 of the Criminal Code) cannot be punished (under Article 378) for the subsequent acts of using the document. Similarly, a person who counterfeited a currency (Article 356) cannot be punished for uttering under Article 361. While Article 61(3) mentions illustrative instances, cases of similar nature may be discovered on case-by-case basis.

⁵³ Ibid

⁵⁴ Id., pp. 91-92

⁵⁵ Elias, *supra* note 3, p. 196.

⁵⁶ Graven, *supra* note 4, p. 170.

Renewal of guilt and penalty

It is, however to be noted that repeated acts with renewed guilt are punishable as provided in Article 62. Yet, differentiating between acts repeated under unitary guilt *vis-à-vis* acts repeated under a renewed criminal guilt is not an easy task. Particularly, differing ancillary or subordinate acts according to Article 61(3) and renewed guilt according to Article 62 requires careful examination of the material and mental elements of crimes.

3.3 Sentencing in concurrent crimes: concurrent and consecutive sentencing

Concurrence of crimes is one of the grounds for aggravation of punishment. However, when the punishment involves imprisonment, there is a difference between concurrent sentencing and consecutive sentencing in the implementation of multiple sentences. While crimes committed concurrently should receive concurrent sentencing, series of offences should be regarded as manifestation of the perpetrator's grave criminality justifying severe penalty than single incidence offences.⁵⁷ Based on their theory of punishment, jurisdictions vary in applying multiple sentencing. In jurisdictions that pursue retributive and deterrent theories, multiple sentences are enforced cumulatively or successively "one after the other". In jurisdictions that adhere to reformatory and rehabilitative theories, multiple sentences are enforced concurrently by merging the punishment for the less serious crime with that of the serious one.⁵⁸

Adding up the sentences for each conviction in consecutive sentencing may lead to unjustly lengthy imprisonment, and unreasonably places "thefts alongside rape, or burglaries alongside robbery, in terms of length of custody".⁵⁹ To avoid this, there are countries who adopt mechanisms that balance the arithmetic additions of the sentences and the absorption of the lesser offences into the serious offence. To this effect, they impose consecutive sentences with a cap at certain maximum of years.⁶⁰ For example, in the Netherlands there is joint sentencing where the maximum sentence for multiple offences can be "one third higher than the highest statutory maximum for one of the offences committed".⁶¹

⁵⁷ Ashworth, *supra* note 1, pp. 265-266.

⁵⁸ C. Vega *et al.*, (May 2012). *Cruel and Unusual: U.S. Sentencing Practices in a Global Context* (University of San Francisco School of Law), p. 36.

⁵⁹ Ashworth, *supra* note 1, p. 270.

⁶⁰ Vega *et al.*, *supra* note 58, p. 40.

⁶¹ P. J. P. Tak (1995), quoted in Elias, *supra* note 3, p. 388.

Multiple punishment of a single act on several penal legislations may be seen as disregard to the possibility of offenders' rehabilitation. Palombino argues that this develops from the experience of the Nuremberg Tribunal that was established to try the Nazi crimes after the end of the WWII. He further states the need to incapacitate the perpetrators in the Nazi crimes and the low level of development in the protection of human rights at the international level contributed to this.⁶² However, rehabilitative penitentiary systems have got international acceptance,⁶³ and Palombino argues that the accumulation of sentences due to concurrence of crimes in international law should be revised.⁶⁴ Similarly, penitentiary systems in national legal systems should focus on the reform and rehabilitation of the convict.

In Ethiopia, while deterrence is one of the aims of the Criminal Code, the primary aim of punishment is the rehabilitation of the offender. Hence, punishments need to consider the individual circumstances of offenders.⁶⁵ To achieve the reformatory and rehabilitative objectives of punishment, prosecution, conviction and sentencing for multiple crimes require careful scrutiny. The Criminal Code has stipulated sentencing rules for concurrent crimes. In the case of material concurrence, the principle is that the penalty for each offence is calculated and added including for cases where imprisonment and fine are imposed jointly. For the purpose of adding sentences two years of simple imprisonment is considered equal to one year of rigorous imprisonment.⁶⁶

However, there are exceptions for this. First, if either capital punishment or imprisonment for life is imposed on any of the concurrent crimes, this overrides any other imprisonment.⁶⁷ Second, if the maximum of three years (five years if aggravated) for simple imprisonment is imposed on any of the concurrent crimes, no other simple imprisonment can be imposed.⁶⁸ Third, if the maximum 25 years for rigorous imprisonment is imposed on any of the concurrent crimes, no additional rigorous imprisonment can be imposed.⁶⁹ Fourth, if confiscation of property is imposed on any of the concurrent crimes, this overrides any fine.⁷⁰

⁶² Palombino, *supra* note 37, p. 90.

⁶³ International Covenant on Civil and Political Rights (ICCPR), Article 10(3).

⁶⁴ Palombino, *supra* note 37, p. 90.

⁶⁵ Criminal Code, *supra* note 2, Article 1, 87 & 88

⁶⁶ *Id.*, Article 184(1)(b), (c) & (d).

⁶⁷ *Id.*, Article 184(1)(a).

⁶⁸ *Id.*, Article 184(1)(a) and Article 106.

⁶⁹ *Id.*, Article 184(1)(a) and Article 108.

⁷⁰ *Id.*, Article 184(1)(e).

Fifth, unless the perpetrator acts with the motive of gain, the total fine cannot exceed the maximum fine of ten thousand ETB for natural persons and five hundred thousand ETB for legal persons.⁷¹ The maximum of ten thousand ETB for natural persons can be exceeded when especial higher penalty is provided.⁷² For example, in offences against the State punishable with rigorous imprisonment (Articles 238 to 258) and in case of grave economic crimes, a maximum fine of one hundred thousand ETB can be imposed in addition to other penalties provided where the offender was a person exercising or authorized for power of leadership, or acted under a motive for personal gain.⁷³ In like cases, the one hundred thousand ETB becomes the overriding maximum.

In notional concurrence, Article 187 provides for different modalities of sentencing. In case of “simultaneous notional concurrence”,⁷⁴ where the offender’s single act violates several penal provisions, the principle is that the maximum penalty to be imposed cannot exceed the highest statutory penalty for the severe crime.⁷⁵ It is only in exceptional cases where “the criminal’s deliberate and calculated disregard for the law or the clear manifestation of the criminal’s bad character so justifies aggravation”, that the penalty can be aggravated similar to the cases of material concurrence.⁷⁶

The circumstances that show the perpetrator’s deliberate disregard to the law or criminal character to justify aggravation are to be developed through judicial interpretation. In cases of “combined notional concurrence”,⁷⁷ where the offender’s single act causes several consequences of different types of harm, the Criminal Code provides for two modalities of determining the penalty. Where, at least, one of the concurrent crimes is intentional or where the offender has intentionally committed crimes against public safety or public interest, the penalty is aggravated as in the case of material concurrence.⁷⁸ When notional concurrence results from negligence, the maximum penalty cannot exceed the statutory maximum penalty for the most serious crime.⁷⁹

⁷¹ Id., Article 184(1)(a) and Article 92.

⁷² Elias, *supra* note 3, p. 382.

⁷³ Criminal Code, *supra* note 2, Article 259(1) and Article 344(1).

⁷⁴ Elias, *supra* note 3, p. 383.

⁷⁵ Criminal Code, *supra* note 2, Article 187(1), second paragraph.

⁷⁶ Id., Article 187(1), first paragraph

⁷⁷ Elias, *supra* note 3, p. 383.

⁷⁸ Criminal Code, *supra* note 2, Article 66(1)(a) & (b), 66(2) and 187(2)(a) & (c).

⁷⁹ Id., Article 66(1)(c) and 187(2)(b).

4. Concurrence of Crimes, Prohibition of Double Jeopardy and Federalism

4.1 The principle of double jeopardy and criminalizing identical crimes in different laws

The principle of prohibition of double jeopardy prohibits second trial/punishment against a person for the same act for which s/he has been tried and either convicted or acquitted.⁸⁰ From the judicial dimension of trial, conviction and sentencing there may be no conflict between the prohibition of double jeopardy and the rules of concurrence of crimes. A controversy arises if the prohibition against double jeopardy should prohibit the legislator from creating identical crimes differing only in name thereby punishing the same act more than once. For example, US Supreme Court Justice Marshall's dissenting opinion in *Missouri v Hunter*⁸¹ illustrates this point:

If the prohibition against being 'twice put in jeopardy' for 'the same offence' is to have any real meaning, a State cannot be allowed to convict a defendant two, three, or more times simply by enacting separate statutory provisions defining nominally distinct crimes. If the Double Jeopardy Clause imposed no restrictions on a legislature's power to authorize multiple punishment, there would be no limit to the number of convictions that a State could obtain on the basis of the same act, state of mind, and result. A State would be free to create substantively identical crimes differing only in name ...

In Ethiopia, to the best of this author's knowledge, there are no similar court cases where the application of the principle of prohibition of double jeopardy to prohibit the criminalization of the same act in several legislations has been entertained. However, the problem of over-criminalization, one of its manifestations being the criminalization of one act with several laws,⁸² may lead to similar cases. How courts will handle such like cases is yet to be seen.

4.2 The principle of unity of guilt and penalty in the context of federalism

One of the principles of modern federalism is the division of authority between the central and state governments where each level of government "is sovereign in at least one policy realm" and each citizen is governed directly

⁸⁰ Constitution, *supra* note 7, Article 23; Criminal Code, *supra* note 2, Article 2(5).

⁸¹ 459 U.S. 359 (1983).

⁸² Simeneh Kiros Assefa and Cherinet Hordofa Wetere (2017). "'Over-criminalisation': A Review of Special Penal Legislation and Administrative Penal Provisions in Ethiopia" 29 *J. Ethiopian L.*

by “at least two authorities.”⁸³ This creates possibility for the overlap of federal and state governing power over a single issue or incidence. In USA, for example, one reason for long imprisonment for a single crime is successive prosecution for a single criminal act based on both federal and state laws. The dual sovereignty doctrine allows both the federal and state governments to simultaneously charge a single act and the principle of prohibition of double jeopardy does not prohibit this⁸⁴ for “cases where the act sought to be punished is one over which both sovereignties have jurisdiction.”⁸⁵

The dual sovereignty doctrine has been taking root since 1820,⁸⁶ and it was expressly declared by the Supreme Court in 1850 (*Moore v. Illinois*). Moore did not actually face concurrent charges under both federal and state laws for the same act. Rather, Moore challenged conviction under Illinois State law that outlawed “harboring fugitive slaves”. The ground for Moore’s objection was “that the federal Fugitive Slave Act preempted the Illinois statute such that he could not be prosecuted under state law”. Moore also “raised the related objection that if the Court ruled the Illinois statute valid then he impermissibly could be subject to multiple prosecutions for the same offense”.⁸⁷ Dismissing Moore’s argument, the Court opined:

⁸³ Jenna Bednar (2009). *The Robust Federation: Principles of Design* (Cambridge University Press), pp. 18-19. According to the traditional understanding of federalism, “[t]he federal authorities may represent the Governments solely, and their acts may be obligatory only on the Governments as such”. They could not regulate individual citizens. See John Stuart Mill (1861), *Representative Government* (Kitchener: Batoche Books, 2001), p. 189.

⁸⁴ Douglas Husak, *supra* note 6, p. 47.

⁸⁵ *S. Ry. Co. v. R.R. Comm’n of Ind.*, cited in Anthony J. Colangelo (2009), “Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory”, *Washington University Law Review*, Vol. 86, No. 4, p. 838. The same applies to multiple prosecutions in several independent nation-states for the same act. Because, there is no rule in public international law that prohibits double jeopardy as between sovereign nation-states. *Id.*, pp. 805-835. For example, Article 14(7) of the ICCPR limits the protection against double jeopardy to a single nation-state. It provides: “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted *in accordance with the law and penal procedure of each country*” (emphasis added).

⁸⁶ Colangelo, *Id.*, pp. 782-85.

⁸⁷ *Id.*, p. 787.

An offence, in its legal signification, means the transgression of a law. ... Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. ... That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other.⁸⁸

The Court upheld the doctrine when it faced cases of actual multiple prosecutions. In *United States v. Lanza*, in 1922, upholding federal prosecution after conviction in a state court for the same act, the Court opined: “Each State, as also Congress, may exercise an independent judgment in selecting and shaping measures to enforce prohibition. Such as are adopted by Congress become laws of the United States and such as are adopted by a State become laws of that State.”⁸⁹

In *Bartkus v Illinois*,⁹⁰ in 1959, the Court ruled that “offenses against different sovereigns are not the ‘same offense’ for double jeopardy purposes” thereby allowing state departments to prosecute a person who had already faced federal prosecution for the same act. Similarly, in *Abbate v United States*,⁹¹ in 1959, it upheld its precedent of allowing federal prosecution departments to prosecute a person who had been prosecuted by state authorities for the same act. The Court also applied the doctrine to uphold successive prosecution under laws of several states for the same act.⁹² Recently, in 2019, the Court upheld the doctrine when it dismissed the defendant’s argument in *Gamble v. United States* that he should not face successive prosecution by state and federal governments for the same act.⁹³

⁸⁸ Cited in Colangelo, *supra* note 85, p. 787.

⁸⁹ Cited in *id.*, p. 788.

⁹⁰ Cited in Vega et., al., *supra* note 58, p. 62.

⁹¹ Cited in *id.*, p. 62.

⁹² *Heath v. Alabama*, Quoted in Colangelo, *supra* note 85, p. 788. This precedent precludes defendant’s opportunity for forum shopping. For example, in this case “the defendant pleaded guilty in the first case to avoid the death penalty but was sentenced to death in the second.”

⁹³ “Fifth Amendment — Double Jeopardy Clause — Separate Sovereigns Doctrine — *Gamble v. United States*”, *Harvard Law Review*, Vol. 133 (2019), pp. 312-321.

In Ethiopia, the power to enact penal law is given to the federal government and states may enact penal law only on matters not covered by the federal law.⁹⁴ While the Constitution aims to establish countrywide penal law, it empowers states to criminalize special statewide issues. Because of this, a single act may not violate both federal and state penal laws simultaneously, except in tax laws that we will see below.

5. Concurrence of Crimes in Special Legislation: The Case of Tax Crimes

5.1 Some points on special economic and fiscal penal legislations

The Criminal Code acknowledges enactment of special penal legislations.⁹⁵ However, this has led to the proliferation of laws that do not only penalize new offences, but that rather impose severe penalties on acts already criminalized in the Criminal Code.⁹⁶ With regard to tax crimes, the Criminal Code provides that punishments for crimes committed in breach of special legislations enacted by federal or state government organs to protect the economic and fiscal interests of the State and duly published in federal or state legal gazettes are determined in accordance with the principles provided in the same Code.⁹⁷

If special legislations, whether enacted by federal or state governments, provide for punishable acts, they are required to refer to specific provisions of the Criminal Code. In default of specific reference, the punishment will be simple imprisonment or fine.⁹⁸ In case of economic crimes of exceptional gravity, the fine may be a maximum of one hundred thousand Birr in addition to forfeiture of the gain derived from the crime.⁹⁹ It is to be noted that there are federal and state tax legislations with penal provisions.

⁹⁴ Constitution, *supra* note 7, Article 55(5).

⁹⁵ Criminal Code, *supra* note 2, Article 3.

⁹⁶ Simeneh and Cherinet, *supra* note 82. Compare the penalty for tax evasion in Proc. No. 983/2016, Article 125 with the penalty in the Criminal Code, Article 349 and 351. Compare also the penalty for contraband in Proc. No. 859/2014, Article 168 with the penalty in the Criminal Code, Article 352.

⁹⁷ Criminal Code, *supra* note 2, Article 343(1).

⁹⁸ *Id.*, Article 344(1)

⁹⁹ *Id.*, Article 344(2)

5.2 The Application of the General Principles in the Criminal Code for Tax Crimes

5.2.1 Overview of concurrence in tax cases

According to Article 3 of the Criminal Code, “the general principles embodied in [the] Code are applicable to [other penal] regulations and laws except as otherwise expressly provided therein.”¹⁰⁰ Thus, the general provisions in the Criminal Code such as those regulating concurrence of crimes apply to special penal legislations including tax legislations, save special provisions in the special laws. In this regard, one wonders whether the relevant tax laws have special provisions governing concurrence of crimes.

Examination of the existing tax laws reveals that any violation of the penal provisions in the tax laws is considered a violation against the criminal law of Ethiopia and the Criminal Procedure applies to the prosecution and trial thereof.¹⁰¹ This does not imply any rule governing the concurrence of tax offences different from what the Criminal Code provides. Most importantly, Article 116(1) of the Criminal Procedure allows presentation of concurrent charges against an accused. Therefore, the general principles of criminal law and procedure governing criminal concurrence apply to tax offences. Nor does the law relating to customs embody special provision/s about the concurrence of crimes.¹⁰²

The Federal Tax Administration Proclamation provides that if an act criminalized in the proclamation is committed in violation of several tax laws, the perpetrator is concurrently punished as if the act is committed in violation of each tax law.¹⁰³ That is, the proclamation applies to all tax laws (i.e., income tax, VAT, excise tax, stamp duty and turnover tax proclamations). Therefore, a single act or combination acts may violate two or more of these tax laws and hence this causes concurrent criminal liability under the Tax Administration Proclamation.¹⁰⁴ This does not provide special rule for the concurrence of tax crimes, but endorses Article 60(b) of the Criminal Code that deals with

¹⁰⁰ Id., Article 3

¹⁰¹ Proc. No. 983/2016, *supra* note 96, Article 116(1).

¹⁰² The only especial provision added was that all customs crimes can be tried *in absentia*. See Customs Proc. No. 622/2009, Article 106(1) (now repealed). Since Article 161(2)(b) of the Criminal Procedure provides for economic crimes punishable with rigorous imprisonment or fine exceeding five thousand [Birr] to be tried *in absentia*, this provision was superfluous and is now repealed. See Proc. No. 859/2014, *supra* note 96, Article 181(1).

¹⁰³ Proc. No. 983/2016, *supra* note 96, Article 116(2).

¹⁰⁴ Id., Article 2(36)

notional concurrence. The absence of special provisions governing the concurrence of tax crimes means that the general principles in the Criminal Code govern concurrence of tax crimes.

The following two examples illustrate the concurrence of tax crimes provided in Article 116(2) of the Federal Tax Administration Proclamations. If, for example, an employee of a VAT registered private limited company conducts a transaction without using the sales register machine¹⁰⁵ to issue an invoice, the company is liable for concurrent crimes in violation of the duty to use sales register machine, one for the income tax and the other for the VAT proclamations.¹⁰⁶ In another illustration, if a VAT registered taxpayer was, before using sales register machine, allowed by the tax authority to print and use 10 invoice pads,¹⁰⁷ and if the tax authority discovers that 10 more unauthorized invoice pads with similar consecutive numbers were printed and partly used, the taxpayer will be liable for concurrent crimes of income tax evasion and VAT evasion under Article 125(1) of the Tax Administration Proclamation. To ensure taxpayers' compliance, the Tax Administration Proclamation provides for both administrative and criminal liability which may apply concurrently.¹⁰⁸

As tax evasion is the major crime relating to taxes, other crimes are considered if the acts do not ultimately lead to tax evasion or in cases where prosecution evidence is deficient to prove tax evasion. The Cassation Division has decided that a person is liable to tax evasion if the accused intentionally removes property or commits similar illegal acts to hinder the tax authority's move to attach and sale the taxpayer's property for tax collection.¹⁰⁹ It based its decision on a wider interpretation of Article 11 of the ICCPR that "[no] one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation." In this decision, the Cassation Divisions equates the

¹⁰⁵ Sales register machines are used in lieu of invoice pads upon authentication and registration by the concerned tax center. See Proc. No. 983/2016, *supra* note 96, Article 20(3)(a) and Obligatory Use of Sales Register Machines Council of Ministers Reg. No. 139/2007, Article 2(1) & (2), 5(1)(a) and 16.

¹⁰⁶ Proc. No. 983/2016, *supra* note 96, Article 131(1)(b) and 132.

¹⁰⁷ Invoices are required to have consecutive numbers. See Ethiopian Revenues and Customs Authority Invoice Publication Licensing, Possession, Use and Disposal Directive No. 110/2008, Article 7(2)(c).

¹⁰⁸ Proc. No. 983/2016, *supra* note 96, Article 100-132.

¹⁰⁹ *G. Agri Pack PLC and Getahun Asfaw v Ethiopian Revenues and Customs Authority Hawassa Branch Prosecutor* (File No. 84623, Sene 04, 2005 E.C), Federal Supreme Court Cassation Decisions, Vol. 15, pp. 261-267.

duty to pay tax with contractual duties while it is a legal duty the violation of which is criminally punishable. Although it finds it as crime of tax evasion, it limits its analysis to evasion of payment with inadequate attention to the criminality of evasion of assessment.

5.2.2 Evasion of tax assessment and evasion of tax payment: US experience

Reference to US experience will help to understand the elements of tax evasion. Section 7201 of the Internal Revenue Code provides, “Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony”¹¹⁰ This has been interpreted to have created two types of tax evasion: (1) “the willful attempt to evade or defeat the assessment of a tax” –called evasion of assessment–, and (2) “the willful attempt to evade or defeat the payment of a tax” – called evasion of payment.¹¹¹ The US Court of Appeals 9th Circuit, in *United States v Mal*,¹¹² has illustrated the difference between these types of evasion. It said that “if a defendant transfers assets to prevent the IRS from determining his true tax liability, he has attempted to evade assessment; if he does so after a tax liability has become due ..., he has attempted to evade payment.”¹¹³

Evasion of assessment can be established by different affirmative acts committed to understate the taxpayer’s income or overstate the taxpayer’s deductible costs and expenses by which the government will be unable to discover the taxpayers’ true taxable income and determine the due tax properly. These acts include filing false tax return, false and fraudulent statements to the tax department and its officers, keeping double books of account, making false invoices, destroying records, and concealing sources of income and bank accounts.

Shifting corporate income to principal shareholders under the “guise of commissions or salaries out of proportion to the value of service rendered to the corporate taxpayer”, “[d]oing business in diverse names and keeping large sums of cash in safe deposit boxes in numerous banks” are also examples.¹¹⁴ These acts manifest the perpetrator’s intentional and willful move to evade a known legal duty to pay tax. The very essence of evasion of assessment is that

¹¹⁰ IRC § 7201, quoted in Internal Revenue Service Criminal Tax Division (2009), *Tax Crimes Handbook*, p. 2.

¹¹¹ Tax Crimes Handbook, *Ibid*, citations omitted.

¹¹² Cited in Tax Crimes Handbook, *supra* note 110, p. 2

¹¹³ *Ibid*

¹¹⁴ *Id.*, pp. 2-6.

the acts committed are aimed at misleading the tax department and its officers not to be able to assess the correct tax the taxpayer has to pay. Evasion of assessment, therefore, unduly increases deductible costs and expenses and/or decreases the taxable income.

Evasion of payment, on the other hand, is committed after the amount of tax owing is known, either by the taxpayer's declaration or the tax department's assessment. Evasion of payment may be committed by acts that aim for the concealment of money or assets from which the tax would be paid in order for the government to be unable to collect the tax.¹¹⁵ This, among others, includes "using bank accounts of family members and coworkers", extensive use of cash expenditures using others' credit cards, "placing assets in the names of third parties" and fraudulent bankruptcy petition.¹¹⁶ The specific acts committed to evade tax may constitute a tax crime of themselves.

For example, failure to file a tax return and failure to keep books of account, filing a false or fraudulent tax return, using fraudulent documents and intervening with the administration of internal revenue laws are crimes.¹¹⁷ However, if the commission of these acts is combined with tax deficiency leading to the crime of tax evasion, these are included in the major crime of tax evasion and the perpetrator will not be liable concurrently for tax evasion and the specific acts the combination of which establishes tax evasion.¹¹⁸ Because, while the Congress provides criminal penalties for various tax offences it is believed that it "did not intend to pyramid penalties and authorize a separate penalty for a lesser included offense, which arose out of the same transaction and which would be established by proof of guilt of the greater offense of attempting to evade income tax".¹¹⁹

¹¹⁵ *Id.*, p. 2.

¹¹⁶ *Id.*, p. 14.

¹¹⁷ IRC § 7203, § 7206, § 7207 and § 7212 cited in Tax Crimes Handbook, *supra* note 110, pp. 38, 62, 88 and 92.

¹¹⁸ Tax Crimes Handbook, *supra* note 110, pp. 19 & 78-79.

¹¹⁹ *Id.*, p. 78-79.

5.2.3 The relationship between tax evasion and the other predicate tax crimes

In Ethiopia, the Federal Tax Administration Proclamation provides for various tax crimes.¹²⁰ All of the crimes except disobedience to tax collection orders and crimes against the Tax Appeal Commission that may be committed by third parties (not necessarily intending to evade tax) are committed with tax evasion as their objective. Therefore, unless the perpetrator commits separate tax crimes that fall under Article 60(a) with renewed criminal guilt as per Article 62 of the Criminal Code or violates several tax laws simultaneously (in a manner that satisfies the requirements of Article 60(b)), the same act cannot be punished both for tax evasion and other lesser-included offence(s), or under two other penal provisions. The same act cannot thus violate different penal provisions of the same tax proclamation.

The acts of a taxpayer (or another person working for the taxpayer) such as conducting transactions without invoices and using fraudulent invoices and documents or any fraudulent acts aimed at understating income and/or overstating costs and expenses are all preparations to tax evasion. The act of presenting false or misleading financial statements is the perpetrator's last act to evade tax where s/he combines all criminal acts committed in the tax period and presents a false financial statement accompanied by explanations and all the fraudulent transactions, invoices and documents. Unless it is discovered, the process will result in tax evasion.

As provided in Article 26 of the Criminal Code, in principle, preparatory acts towards the commission of a crime are not punishable. However, the lawmaker has criminalized the preparatory acts for tax evasion in line with the principle provided in Article 26(b) of the same Code because of the special interest in protecting public revenue. Therefore, concurrently punishing a perpetrator for tax evasion, presentation of misleading statements to the tax authority and using fraudulent invoices for the same act or combination of acts amounts to sentencing a convict for homicide as well as attempt and preparation to kill the same victim.

¹²⁰ These crimes include tax evasion, Taxpayer Identification Number offences, misleading statements, using fraudulent documents and invoices, conducting transactions without invoices, claiming illegal or undue refund, VAT offences, TOT offences, disobedience to tax collection orders, obstruction to tax administration, unauthorized tax collection, aiding or instigating tax offences, crimes against the Tax Appeal Commission, crimes committed by tax agents, offences against the duty to use sales register machines, and crimes by companies; see Proc. No. 983/2016, *supra* note 96, Article 117-132

There can indeed be a number of instances for a perpetrator to be prosecuted for predicate tax offences than tax evasion. For example, a taxpayer who is found conducting a transaction without using a sales register machine or issuing an invoice on a single transaction may be held liable for failure to use sales register machine or issue an invoice if the tax department does not have suspicion and/or evidence of other offences that the same taxpayer committed before or after, the combination of which may constitute tax evasion. Similarly, a taxpayer may present falsified documents to the tax department's tax auditors in due course of their audit work to substantiate costs and expenses that the taxpayer declared without having incurred them in reality. If the tax auditors discover that the documents are falsified and reject them, the taxpayer may face prosecution for presenting false or misleading information to the tax department.

These separate acts may have behind them other similar acts that if taken together may constitute tax evasion thereby necessitating further investigation before prosecuting the taxpayer for the predicate offences. In other words, before instituting a charge for acts of preparation or attempt to evade tax, the crime investigation and prosecutions departments need to conduct due investigation whether these separate acts in combination with other similar acts have caused tax deficiency.¹²¹ Another important point is that even in cases where prosecution evidence does not prove tax evasion and the

¹²¹ Sometimes, the need to take time to investigate whether acts that constitute simple crimes of themselves would cause (or have caused) serious crimes may contradict with the speedy disposal of cases. For example, in February 22, 2002 E.C Hagos Woldemichael attacked Gidey Gebreyesus with stones on his head and leg. The next day, the prosecutor of Tigray State Atsbi *Wereda* Justice Department charged Hagos for the crime of "Common Willful Injury" under Article 556(2)(a) of the Criminal Code. The accused confessed the injury, was convicted and fined with 500 ETB. However, on March 30, 2002 E.C. the victim died due to the injury on his head. Following the victim's death, the same Justice Department charged the accused for homicide under Article 540 of the Criminal Code. Atsbi *Wereda* Court convicted the accused and sentenced him for homicide. On appeal, Eastern Tigray Zone High Court confirmed the conviction and sentence. However, Tigray State Supreme Court Cassation Division reversed the conviction and sentence as double jeopardy and the Federal Supreme Court Cassation Division also confirmed the decision of the State Supreme Court. This case shows that the *Wereda* Justice Department rushed for the speedy disposal of the case and charged the accused for simple bodily injury without waiting to see whether the injury heals or causes another serious consequence. See *Hagos Woldemichael v Tigray State Atsi Wereda Prosecutor*, Federal Supreme Court Cassation Decisions, Vol. 13, pp. 308-312.

perpetrator has to be convicted for lesser offence(s), the facts of the case should be carefully examined in relation to the proper penal provision.

Similarly, the customs proclamation states different crimes.¹²² These penal provisions aim to ensure compliance to the customs rules. This does not, however, mean that more than one penal provisions shall apply to the same offence. As each provision has its own elements, some of the acts specified as crime may also be committed as a means to achieve other customs offence. For example, the crime of obstructing customs control provided under Article 166 may be included in the crime of aggravated contraband as provided in Article 168(3) where a perpetrator forcibly disobeys customs orders while illegally importing or exporting goods. Therefore, careful examination of the facts and evidence is imperative to distinguish the specific penal provision applicable to a case.

In *Yirgalem v ERCA Prosecutor*¹²³ (highlighted in Section 2 above), the Cassation Division concluded that the general Criminal Code principles governing concurrence of crimes do not apply to tax and customs crimes. Its first reasoning was that both the penal provisions mentioned in the second (conducting transaction without VAT invoice) and third (use of unauthorized invoice in violation) charges have provided for the material elements of the respective crimes and for a penalty separately. Based on this, the Cassation Division found it impossible to conclude that the petitioner acted with a single criminal guilt.

However, whether acts committed flow from a single or renewed criminal guilt is determined by looking at what the accused committed based on the available evidence, not by examining the provisions of the law. In this case, there is no evidence to prove that the petitioner committed successive acts. The petitioner was punished concurrently for a single act of using an ordinary invoice in place of a VAT invoice. The Cassation Division's second reasoning was that the letter and spirit of the provisions in the income tax, VAT and customs proclamations and the tax reform the lawmaker intended to introduce reveal that the penal provisions in these laws are intended to apply concurrently.

¹²² These crimes include obstruction of customs control, falsification and counterfeiting of documents and symbols, contraband, customs fraud, opening or removal of customs parcels and marks, crimes against the duties of carrier and unauthorized use of customs electronic information exchange systems. See Proc. No. 859/2014, *supra* note 96, Article 166-172

¹²³ *Supra* note 9.

According to the Cassation Division's understanding, the tax legislations have special rules governing concurrence of crimes, which is not the case. The absence of special rules that govern the concurrence of crimes in the tax legislations is not a problem. The general Criminal Code principles suffice for that. A related issue is that according to the provision in Article 3 of Criminal Code, tax and other legislations may provide for special rules that regulate concurrence of crimes. However, no reasonable person expects for the legislature to provide for a single act or combination of acts to be punishable under tax evasion and other predicate offences concurrently.

5.3 Tax periods and renewal of criminal guilt in tax crimes

The issue of renewal of criminal guilt in tax crimes evokes the question whether acts committed by a taxpayer in different tax periods are separate acts committed with renewed criminal guilt as per Article 62 of the Criminal Code for the purpose of criminal concurrence. This author argues that repeated acts committed within a tax period may be combined in one crime of tax evasion, if they cause a tax deficiency. However, repetitive similar or different acts of violation against the duties of taxpayers in different tax periods are committed with renewed criminal guilt and should lead to multiple prosecution and conviction. In other words, the act of tax evasion is attached to a specific tax period. As income tax evasion is committed against the duty to pay income tax for a specific tax year, multiple charges of evasion for each tax year is sound.

For example, there is similar experience in USA.¹²⁴ One way to correct perpetrators who evade taxes persistently for as many tax periods as they are not discovered is making them face multiple criminal liabilities. However, concurrent prosecution/conviction for tax crimes committed in different tax periods is not the practice of in Ethiopia.¹²⁵ Those who deserve multiple prosecution and conviction, and accumulated penalties for multiple tax crimes they committed in different tax periods should face it. Or else, it becomes unjust to punish equally those who persist evading taxes for consecutive tax

¹²⁴ *United States v. Hook* 781 F.2d 1166 (6th Cir. 1986); *United States v. Shorter* 809 F.2d 54 (D.C. Cir. 1987).

¹²⁵ From the author's experience as a public prosecutor and as a judge, the practice is that tax auditors in the tax authority (either at normal business or under jeopardy assessment upon suspicion for tax evasion) audit a taxpayer's tax file for consecutive tax periods and present their audit reports in one audit report showing tax differences in each tax period, if found. Then, prosecutors present a single count criminal charge of tax evasion as if the audit report contained the reports of a single tax period.

periods and those who did it for a single tax period. One mechanism to avoid accumulation of penalties may be initiating for tax departments to conduct their tax audit for each tax period timely, i.e., without necessarily awaiting until limitation period approaches.¹²⁶ This would avail remedies against taxpayers who break their duty and can possibly correct them on time.

5.4 Concurrence of crimes based on federal and state tax laws

As the Federal and state governments have their own sphere of taxation power,¹²⁷ it is likely for a single act or combination of act(s) to violate federal and state tax laws simultaneously. This can possibly lead to the concurrence of federal and state tax laws and punish the same criminal act according to the principle of notional concurrence of provisions provided in Article 60(b) of the Criminal Code. In effect, whether an individual is charged under the special penal provisions in the federal or state tax legislations or by reference to the Criminal Code does not make a difference as to conviction. It only makes a difference where there are severe penalties in the special tax legislations than the Criminal Code.

As noted earlier, Tigray State Supreme Court Cassation Division in *TRDA Prosecutor v Tsrity and Kifle*¹²⁸ convicted each of the respondents concurrently based on federal and state tax legislations for the same act. One may not criticize the decision from the perspective of the general principle that a single criminal act may simultaneously violate both federal and state tax laws leading to notional concurrence of crimes. In this perspective, a person who pays income tax to a state tax department and VAT to the federal tax department may face concurrent criminal liability, one for the state income tax and the second for the VAT, for failure to use sales register machine in a single transaction.

¹²⁶ The tax authority may amend taxpayers' tax declarations within five years, or at any time in cases of suspicion of fraud. See, Proc. No. 983/2016, *supra* note 96, Article 28(2); Proc. No. 286/2002, *supra* note 10, Article 71 and Proc. No. 285/2002, *supra* note 11, Article 29(1). In some cases with suspicion for fraud, it was also common to see tax audit reports carrying taxes determined for seven years or above. Legally speaking, this may not seem to have a problem. However, in like cases the taxpayer may face accumulated sentences but the tax departments may not be able to determine and collect the taxes properly, including interests and administrative penalties for delay in the payment of tax, after the taxpayers have possibly did everything to disable assessment or collection.

¹²⁷ Constitution, *supra* note 7, Article 96 and 97.

¹²⁸ *Supra* note 12.

This happens if the perpetrator violates an expressly provided duty embodied in the federal and state tax laws, for example, if both federal and state tax laws require the use of sales register machine. At the time of the alleged acts (Meskerem 2005 E.C., September 2012), there was no law in Tigray State that required taxpayers to use sales register machine.¹²⁹ At the federal level, the duty to use sales register machine was introduced with a regulation by the Council of Ministers¹³⁰ in 1999 E.C. (2007), and this federal regulation did not apply to state taxpayers. According to the facts of the case, the respondents were not accused of using illicit/counterfeit invoices for the transactions. The petitioner did not argue that they did. Hence, we presume that they used an invoice authorized by the state tax department.¹³¹ Therefore, they faced conviction for failure to use sales register machine for state income tax purposes while they did not have a legal duty to use sales register machine. Yet, this issue was not raised by the respondents nor the courts.

The crime of failure to use sales register machines in the state income tax law was introduced in Hamle 2002 E.C. (July 2010) with an amendment¹³² to go parallel with amendments in the federal income tax laws following the introduction of the duty to use sales register machine for federal taxpayers with the regulation mentioned above since 1999 E.C. (2007). Indeed, as the respondents argued, the penal provision in the state tax law in this case was a replica of the federal tax law.

However, even in cases of permissible multiple prosecutions under multiple sovereigns for the same act there is a tension between the right of the accused to protection against double jeopardy and states' sovereign jurisdiction to enact and enforce their criminal laws. According to the individual perspective of protection from double jeopardy, "the State ... should not be allowed to make repeated attempts to convict an individual for an alleged offense". That

¹²⁹ Currently, Article 22 of Tigray State Tax Administration Proclamation No. 284/2009 (E.C.) provides for the duty to use sales register machines.

¹³⁰ Reg. No. 139/2007, *supra* note 105. Currently, the Federal Tax Administration Proclamation provides for the duty to use sales register machines. See Proc. No. 983/2016, *supra* note 96, Article 20.

¹³¹ On the authorization and use of receipts state taxpayers, see በዓል መዘ. ልምዳት እቶት ክልል ትግራይ (ጥቅምቲ 2006 ዓ.ም)፣ ዝተመሓየሽ መምርሒ ኣወሃህባን ኣጠቓቕማን ቅብሊት ቁፅሪ 11/2006 [Tigray State Revenue Development Authority (October 2013), Issuance and Use of Receipts Revised Directive No. 11/2013]. Article 15 of the directive repeals an earlier directive that had been in use since 1996 E.C. (2003/4).

¹³² See The State of Tigray Income Tax Amendment Proclamation No. 180/2002 EC, Article 97(A)(2).

would be “subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity” and that would enhance “the possibility that even though innocent he may be found guilty.”¹³³

As noted above, the prohibition of double jeopardy protects an individual from multiple prosecutions for the same act only within one sovereign. It does not preclude multiple prosecutions for the same act according to the laws of different sovereigns.¹³⁴ However, as Justice Black noted in his dissenting opinion in *Bartkus v. Illinois*,

Looked at from the standpoint of the individual who is being prosecuted, this [dual sovereignty] notion is too subtle ... to grasp. ... [I]t hurts no less for two “Sovereigns” to inflict [double jeopardy] than for one. ... In each case, inescapably, a man is forced to face danger twice for the same conduct.¹³⁵

To limit cases of dual and successive prosecution for the same criminal act, the US Department of Justice has developed a policy for enforcement comity between federal and state prosecution departments, known as *Petite* policy.¹³⁶ According to this policy:

[W]henver a matter involves overlapping federal and state jurisdiction, federal prosecutors should, as soon as possible, consult with their state counterparts to determine the most appropriate single forum in which to proceed to satisfy the substantial federal and state interests involved...¹³⁷

In cases where an individual was tried in state courts without prior consultation between federal and state prosecutors, the policy limits successive federal prosecution substantively to matters involving “a substantial federal interest” not adequately vindicated by the prior state prosecution and trial. Procedurally, successive federal prosecution requires approval “by the appropriate Assistant Attorney General.”¹³⁸

¹³³ *Greene v. United States*, quoted in Colangelo, *supra* note 85, p. 837.

¹³⁴ Colangelo, *supra* note 85, p. 837.

¹³⁵ Quoted in Colangelo, *supra* note 85, p. 837.

¹³⁶ The policy assumes its name from *Petite v. United States*, 361 U.S. 529 (1960), from which the US Federal Government develops a policy “that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions”.

¹³⁷ Dept. of Justice, U.S. Attorneys’ Manual, quoted in Colangelo, *supra* note 85, p. 851.

¹³⁸ *Id.*, pp. 851-52.

In Ethiopia, although, as noted above, the same criminal act may violate federal and state tax laws simultaneously, Article 16 of the Criminal Code can be construed to avoid double jeopardy or, at least, to avoid accumulation of punishment. According to this provision, if an individual “who is subject to Ethiopia’s principal jurisdiction” was tried in a foreign court, the offender’s conviction and sentence, or discharge or acquittal does not bar trial or sentence according to Ethiopian Criminal Code.¹³⁹ However, the Ethiopian court should deduct the punishment already served in the foreign country from the punishment to be determined.¹⁴⁰ Courts should apply this to the jurisdictional relation between the federal and state governments in the Ethiopian federalism. Accordingly, if a state court has convicted an accused for the same act that has been tried in a federal court, it should deduct the penalty that the accused has already served according to the prior federal trial. The same applies to a federal court that conducts a successive trial after a state court trial for the same act. This resolves the possible problem of accumulation of penalty based on the federal and state laws.

Federal-state cooperation can also enable to avoid successive prosecution based on federal and state tax laws. Towards this end, the federal government may delegate its prosecutorial power to the states according to Article 50(9) of the Constitution, in cases of simultaneous federal and state jurisdictions. In effect, the state prosecutors will prosecute the case on their behalf and on behalf of federal prosecutors. If the merger of federal and state prosecutorial powers in the same case affects the jurisdiction state courts, the state prosecutors may be required to file the case before the competent state court that has the delegated power of federal court jurisdiction according to Articles 78(2) and 80(2) & (4) of the Constitution. Finally, according to a joint reading of Articles 16(3) and 187(1) (second paragraph) of the Criminal Code, the penalty to be imposed as per the concurrent federal and state tax laws may not exceed the maximum penalty provided either in the federal or state law, whichever is higher.

¹³⁹ Criminal Code, *supra* note 2, Article 16(1) & (2).

¹⁴⁰ *Id.*, Article 16(3). For more on this, see Dawit Redae (2019), “Retrial of Persons tried in Foreign Courts and applicability of the constitutional principle of prohibition of Double Jeopardy: A Reference to Ethiopia”, LL.M Thesis, Addis Ababa University, School of Law.

6. Concluding Remarks

According to the Criminal Code, an individual may face multiple prosecutions (and convictions) in the three scenarios indicated in Section 3.1 above. First, if the accused successively commits more than one similar or different criminal acts. The second is if several legal provisions or causes several material harms are violated with the same criminal act. The third scenario occurs where the same act violating the same legal provision causes similar harm to multiple victims.

Despite the provisions for concurrence of crimes, however, according to the principle of unity of guilt and penalty a single or successive criminal act(s) flowing from the same criminal guilt violating the same right may not be punished under several penal provisions as highlighted in Section 3.2. Unless the contrary is expressly provided, the provisions of the Criminal Code governing concurrence of crimes are applicable to special penal provisions including tax legislations. Understood in light of the principle of unity of guilt and penalty, tax evasion is the major crime which can be accompanied by predicate tax crimes such as using illicit invoices and presenting misleading statement to tax departments which can be charged if available evidence does not show or prove tax evasion.

In *Yirgalem v ERCA Prosecutor*¹⁴¹ (highlighted in Sections 2 and 5.2.3) the Federal Supreme Court Cassation Division has ruled that the penal provisions in tax and customs laws apply concurrently despite the principle of unity of guilt and penalty in the Criminal Code. This decision was rendered in the absence of special provisions in the relevant tax laws regulating concurrence of crimes. It is expected that the Cassation Division will revisit this interpretation in future similar cases.¹⁴²

Given the federal experiment in Ethiopia, the notional concurrence of federal and state penal laws to punish the same criminal act deserves due attention. The Constitution gives the power to enact countrywide penal code to the Federal Government, and states can enact penal laws only on matters not covered by the federal law. Yet, the Constitution leaves a room for the concurrence of federal and state tax legislations to punish the same act if the perpetrator violates express duties in both laws. This requires a caveat that before convicting and sentencing an accused concurrently based on federal

¹⁴¹ *Supra* note 9.

¹⁴² The Cassation Division may change its interpretations with an interpretation given by not less than seven judges. See Federal Courts Proclamation No. 1234/2021, Article 26.

and state tax laws, courts should establish that the taxpayer's duties under the federal and state tax laws are violated. Failure to observe this caveat, courts may find themselves convicting and punishing taxpayers in the absence of law. An example in this regard is the Tigray State Supreme Court Cassation Division's decision in *TRDA Prosecutor v Tsrity and Kifle*¹⁴³ that convicted and sentenced the respondents for failure to use sales register machine for state income tax purposes before the duty to use sales register machine was introduced in the state income tax law.

Even for acts that violate express duties in federal and state tax laws simultaneously, there is the need for a mechanism to avoid successive prosecution and the accumulation of penalty. This can be done by federal-state cooperation where the federal prosecutorial power can be delegated to state prosecutors. If avoiding successive prosecution does not work for whatever reason, a state court that conducts a successive trial and convict the accused for the same act that has already been tried in a federal court should deduct the penalty determined and served according to the prior federal trial. The same holds true for a federal court that conducts successive trial for the same act that was under trial in a state court

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¹⁴³ *Supra* note 12.

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