CRIMINAL LAW II

SHORT PRESENTATION FOR 5th YEAR STUDENTS OF DDU

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UNIT 1: CRIMINAL RESPONSIBILITY

1. Criminal Responsibility and Irresponsibility

- Unlike criminal guilt, criminal responsibility is not to be established by the prosecution.
- Responsibility is normally presumed unless irresponsibility is invoked by the accused particularly during preliminary objections (as per Article 130 (2)(g) of the Criminal Procedure Code) on the first day of a criminal proceeding.
- The court may also examine responsibility when it doubts the mental condition of the accused due to signs of partial or complete deprivation of mental faculties.

- The following issues will be discussed under this Unit:

1. Absolute Irresponsibility (Art.48);
2. Limited Irresponsibility (Art. 49);
3. Defense of Intoxication (Art. 50);
4. Infants below nine years (Art. 52);
5. Young offenders age nine to fifteen (Arts. 53 – 55);
6. Offenders of age fifteen to eighteen years: these are tried under the ordinary provisions of the Criminal Code (Art. 56), but are entitled to mitigation of penalty (Art. 179) 0r the application of special penalties specified for young persons under Article 166 – 168

1. Absolute Irresponsibility

- It is the incapacity of a person to appreciate the nature of his conduct and/or regulate his behavior for different reasons.
- Persons who are irresponsible are, therefore, considered to lack the capacity to have a morally accountable and punishable mind.
- Different legal systems adopt different ways of defining irresponsibility. These include:
  1. The biological method,
  2. The psychological method, and
  3. The Bio-psychological method.

The Biological Method

- This method of defining irresponsibility attributes criminal behavior to biological or congenital (inherited) defects of the offender.
- A person, therefore, is irresponsible when he was suffering from physical and/or mental disabilities at the time of the commission of the offence.

The Psychological Method

- A person is considered to be irresponsible when he at the time of the commission of the offence, lost his intelligence and volition for whatever reason.
- The focus in this case is the intelligence and volition of the person, not the biological cause.
- It is the case that the person is irresponsible if he was totally unable to control his behavior as a result of emotion.

The Bio-psychological Method

- This is a method which combines the biological and psychological methods of defining irresponsibility.

- In this case it is not sufficient that the biological causes or psychological effects exist independently so as to consider a person as irresponsible. They must rather exist at the same time when the offence is committed that the biological factor should be the cause of the psychological effect.

- Thus the failure of intelligence and/or volition must result from either physical or mental defects in order for a person to invoke irresponsibility as a defense.

How is irresponsibility defined under the 2004 FDRE Criminal Code?

- Article 48 (2) recognizes complete irresponsibility due to biological defects **plus** the resultant psychological effects.
- The biological defects that constitute grounds of absolute (complete) irresponsibility are:
  - ✓ Age (i.e. Senility)
  - ✓ Illness,
  - ✓ Abnormal delays in development,
  - ✓ Deterioration of mental faculties or understanding,
  - ✓ Any of the biological defects stated under Article 49 (1),
  - ✓ Any similar biological reason.

- It is defined in respect to the Bio-psychological method as it requires a cause and effect relationship between the failure in intelligence and/or volition and the physical and/or mental defects. (Arts. 48 – 51); *48(2)

CATEGORIES OF IRRESPONSIBILITY

1. **Ordinary Irresponsibility:**

- It is irresponsibility of a person either naturally or as a process.

- Is not associated with the fault of the person.

- There is no idea of committing an offence under state of irresponsibility.

A. Absolute Ordinary Irresponsibility (Art. 48)

- Exists when a person is totally deprived of his intelligence (cognition or knowledge) and/or volition (will) due to age, illness, abnormal delay in development, deterioration of mental faculties, derangement of mind and understanding or an abnormal or deficient condition (49(1)) or any other similar biological cause.

What are the elements/ requirements?

1. The biological causes,
2. Psychological effects, **and**
3. Causation between the biological causes and psychological effects.

What will be the legal effect?

1. No liability (Art. 48(2)),
2. Appropriate measures **shall** be ordered (Art. 48 (3) + Arts. **129** - 133):
   - ✓ Confinement (Art. 130),
   - ✓ Treatment (Art. 131).

- ❑ If one of the two psychological conditions (i.e. deprivation of awareness or deprivation of will) are proved to exist 'at the time of the act', **and** if these psychological conditions emanate from one of the biological (physiological) grounds embodied in articles 48 and 49, then the person is not responsible for his act.

B. **Limited/partial Ordinary Irresponsibility (Art. 49)**

- It is partial loss of either intelligence or volition or both due to one or more biological causes at the time of the commission of the offence.
- The line of demarcation between the sane person and the person with partial insanity (or diminished sanity) becomes difficult.
- Persons who are mentally ill but who are at least partially capable of discerning their wrongdoing or of controlling their conduct fall outside the defense of absolute irresponsibility.

- The defendant who falls under neither complete irresponsibility nor responsibility is classified into the category of limited or diminished responsibility in view of his reduced awareness and willpower. Article 49 deals with such persons.
- The alternative biological defects stated under Article 49 (1) are the following:
  - ✓ Any of the biological reasons stated (under Article 48(2)) with regard to absolute irresponsibility,
  - ✓ Derangement of mind and understanding,
  - ✓ Arrested mental development,
  - ✓ Abnormal or deficient condition, or
  - ✓ Any other similar biological reason.

- At times, the same biological defect (e.g. retarded mental development) may, in varying gravity, entail psychological effects with different degrees of seriousness.
- The psychological effect is thus crucial in distinguishing limited irresponsibility from absolute irresponsibility.

What will be the legal effect?

1. Partially liable (not free from liability) (Art. 49(1)),
2. In addition to the penalty, appropriate measures **may** be ordered (Art. 49(2)) in accordance with Arts. **133** Cum **129** - 131):
   - ✓ Confinement (Art. 130),
   - ✓ Treatment (Art. 131).
   - ✓ Correction or protection.

Self-induced Irresponsibility/ Intoxication (Art. 50)

- It is either total or partial loss of intelligence or volition or both which is created artificially (the loss is not natural). It is manmade.
- May be resulted by the contribution of the person himself or otherwise by taking either alcohol, drug or other substance.
- Self- induced irresponsibility may be: intentional, negligent, or accidental.

1. Intentional Irresponsibility (Art. 50 (1)),

- Is situation where a person puts himself under an abnormal condition in a state of either partial or total irresponsibility with the view of committing an unlawful or criminal act.
- Elements that **must** be fulfilled are:
  1. Pre-existing criminal design,
  2. Self induced,
  3. Irresponsibility must be total or partial,
  4. Created intentionally,
  5. Criminal design must be achieved or at least attempted unless preparation itself is punishable.
- Legal effect: Full liability (Art. 50(1)).

2. Negligent Irresponsibility (Art. 50 (2))

- In such a case, the person does not have a pre-existing criminal design but he advertently or inadvertently puts himself under the abnormal condition.
- Legal effect: Liable under provisions governing negligence if the crime committed is punishable for negligence.

3. **Accidental Irresponsibility (Art. 50(3)).**

- It exists when a person commits a criminal offence by putting himself under absolute loss of intelligence or volition without, however, there being either intention or negligence.
- In this case, the person is free from criminal liability for the offence he or she commits but will be liable for breach of public peace (Art. 491)).

4. **Coercion or absence of fault/Involuntary Intoxication (Art. 50(4))**
   - ✓ **Legal effect = Absolute irresponsibility.**

Mechanisms of Proof of Irresponsibility (Art. 51)

Expert examination is required:

1. When there is a doubt either to the full or partial irresponsibility of the accused. In this case the court shall order a medical or any relevant medical examination related to the case so as to clarify such doubt. The court shall also order inquiry about the antecedents and character of the accused.
2. When the accused is suffering from deranged mind or epilepsy, deafness, dumbness or chronic intoxication due to alcohol or drug. In this case the ct must order such examination to be undertaken. The ct cannot proceed with the trial until the doubt is resolved.

Infancy/Immaturity

- It is the incapacity of a person to appreciate the nature and/or consequence of his act due to tender ages.
- The age limits for immaturity are different in different countries. Such limits are made depending on the level of education, development and civilization of people in different places.
- In Ethiopia immaturity is generally classified into three, namely:

Infancy (Art. 52)

- Who have not attained the age of nine (<9).
- Exonerated from criminal liability.
- Family, school or guardianship may take appropriate steps

Young Offenders (Arts.53-55)

- Are minors between the ages of **nine** up to **fifteen** (inclusive).
- Presumed to be closer to adults in terms of their intelligence and volition.
- They are considered as having the capacity to take their own decisions and act accordingly.
- There is, therefore, a need for the intervention of the Criminal Law to bend their criminal inclination towards a normal life.
- As a result, they are liable criminally for the offence they commit after their conviction.

- They are, however, not equally treated with that of an adult in terms of punishment. They are, therefore, subject to penalties and special measures only provided under Articles 157-168. (Art. 53(1)). To mention them:

  - ✓ Admission to curative institution (Art. 158),
  - ✓ Supervised education (Art. 159),
  - ✓ Reprimand (Art. 160),
  - ✓ School or home arrest (Art. 161).

- In assessing penalties or measures the court shall take into account the age, character, degree of mental and moral development of the young criminal, as well as the educational value of the penalties or measures to be applied. (Art. 55)).

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Criminal Majors but Civil Minors (Art. 56)

- Are over fifteen but under eighteen years of age.
- They are principally considered to be adults for the purpose of the Criminal Law.
- They can distinguish between good and bad acts.
- They are, therefore, fully liable for their conducts and punished like that of an adult unless the court believes otherwise.

- However, the following should be taken into consideration:
    1. Mitigation in sentence (Art. 56(2) + Art. **176 paragraph 1**,
    2. In no case may death sentence be passed (Art. 176 & 117 (1))
    3. The rule of segregation shall be strictly observed Art. 176 & 110 (2)).

UNIT 2: AFFIRMATIVE DEFENSES

- In this Unit the term *'defense'* is used in its narrower interpretation, and the qualifier *'affirmative'* indicates that the defendant does not deny the commission of the act or omission stated in the charge, but rather argues that it is **lawful**, **justifiable** or **excusable** under the Criminal Code.
- According to Art.58 (2), a person who **intentionally commits an offence is always punishable except** where he acts in circumstances providing him with a **justification** or an **excuse** that is in any of the circumstances defined in Arts.68-81.

- The definition and classification of **lawful, justifiable and excusable acts** sometimes vary from jurisdiction to jurisdiction. In France, for instance, the only distinction is between justifications and excuses.
- The Ethiopian Code provides for **three classes** of acts namely **lawful acts** (acts done in circumstances which **legitimate** them), **justifiable acts** (acts done in circumstances excluding intentional guilt) and **excusable acts** (acts done in circumstances reducing the degree of guilt).

- In short,
- ✓ ***Lawful acts deal with those acts done in line with the law***;
- ✓ ***Jjustifiable act relieves a person totally from criminal liability***;
- ✓ ***Excusable act benefits a person in mitigation or reduction of punishment.***

LAWFUL ACTS

- Are acts which a person is legally obliged or authorized to do.
- It happens that the law imposes obligations or confers rights upon persons for different reason.
- Because of such a duty or a right, the act which would otherwise be criminal, is a legitimate one and ***the doer is not punishable*** since it does not constitute an offence whether the offence is serious or not.
- The Criminal Code categorizes 'Acts Authorized by Law' and 'Professional Duty' as lawful acts.

Acts Required or Authorized by Law (Art.68)

1. **Acts in respect of public, State or military duties (Art. 68 (a));**
   - Public- 11(1) and Art. 613 of Cr.Code; Art 50 of Cr.Pr.C and Art. 585 of Cr.Code.
   - State- Art. 689 of the Criminal Code (damage to property) vs. Demolishing illegal house.
   - Military- A soldier may not be liable of committing homicide if he kills an enemy.

❖ **However, limit should not be exceeded.**

2. **Acts reasonably done in exercising the right of correction or discipline (See Art. 36(1)(e) of the Constitution, Art. 576(3) of the Criminal Code and 2039 of the Civil Code);**

3. **Acts done in exercising private rights (justice) recognized by law (eg. 2076, 1148,1212 of Civil Code).**

- **N.B. Acts required or authorized by law should not be abused.**
- **Case: Criminal Appeal No.16762, Tahisas 18 1997 E.C (Elias N., p. 248.**

Professional Duty (Art. 69)

- 'Profession' is not defined under the Code.
- Profession is "a vocation or occupation requiring special skill usually trough advanced education, knowledge and art. Example, legal or medical professions." Blacks Law Dictionary.
- According to Article 69 of the Code, an act done in the exercise of a **professional duty** is not liable to punishment when it is **in accordance with the accepted practice of the profession** and the doer **does not commit any grave professional fault.**

- Professional duty can be invoked when these elements are fulfilled:
  1. There must be harm **caused by the professional**;
  2. Such harm should **result from exercising the profession**;
  3. The exercise of the profession should be in **line with the accepted practice** of the profession;
  4. There should not be **grave professional fault** (simple faults may be justified).

❖ Exercise: Material, p.54-55

Justifiable Acts and Excuses (Art.70 – 81)

- The Code does not expressly classify each provision (Art. 70 – 81) into "justifiable acts" and "excuses". You may find them here and there, even both under a single provision.
- Where there is absence of punishment under any provision, this shows that the act is "justifiable act". E.g. Articles 70(1), 70(2), 71 paragraph 1, 75 paragraph 1, 77(1), 78, and 80(1).

- Provisions which entitle the defendant to excuses through mitigation of punishment (with or without restriction) are “excusable acts”. E.g. As per Arts. 72, 74(2) parag. 1 second phrase, 75 parag. 2, 76, 77(2) first phrase, 79(1), and 82(2) the court **shall,** without restriction, reduce punishment. These provisions embody compulsory mitigation.
- Affirmative defenses are also applicable to **petty offences**. See Arts. 743, 744, 745.

1. CONSENT AS A DEFENSE (ART. 70)

- To be justifiable:
  1. The act must be punishable upon complaint, and
  2. The act must be done with the consent of the victim or his legal representative.
- Consent cannot be a defense in cases of:
  - ✓ Donation of a body part for commercial purpose (70(2) cum 573(1)&(2)). Note also Art 18 of the Civil Code.

2. COERCION/DURESS

- Criminal liability envisages a criminal act or omission based on free will.
- Under certain circumstances, however, an accused person might have no choice other than to commit the act.
- Coercion may be absolute or resistible.

2.1 Absolute Coercion (Art. 71)

- Physical (the agent is deprived of his/her freedom of movement).
- Moral Coercion (the agent is deprived of his/her freedom choice although his/her freedom of movement is not curtailed).
- Requirements (Art. 71 paragraph 1):

1. The coercion must be absolute (irresistible), and
2. Proportionality of the offence to the harm that would have occurred. (age, sex, health, physique, experience should be considered)

- Circumstances of the case have to be considered (Art.71 second paragraph).

2.2 Resistible Coercion (Art.72)

- **Not justifiable unlike that of Art. 71**
- Circumstances of the case have to be considered (Art.71 second paragraph)

❖ **Case: Teaching Material p.61 – 62.**

3. SUPERIOR ORDERS

- Juridical persons carry out their activities through a hierarchy thereby rendering the superior-subordinate relationship inevitable.

- The issue of liability to punishment may thus arise where subordinates, in the course of carrying out a superior order, commit offences.

- Certain legal systems do not recognize superior orders as an affirmative defense unless they are invoked by soldiers in the context of wars or international tribunals. Yet even such legal regimes give recognitions to unlawful superior orders where they constitute duress.

- The Ethiopian Criminal Law does not recognize superior orders to commit an unlawful act as a justifiable act, but it states the situation where certain acts that are committed under superior order may be excusable (Arts. 73 and 74).

- These provisions are applicable to the hierarchy in public administration or military hierarchy.

3.1. SUPERIOR'S RESPONSIBILITY (ART. 73)

- **Requirements:**

1. **The person giving an order must have the authority to do so, and**
2. **The act ordered must be lawful and within the limits permitted by law.**

- **If these requirements lack, the act becomes an offence where it is declared to be so under the Criminal Law.**
- **The person of higher rank (administrative or military) is punishable for the offence committed on his express order "so far as the subordinate's act did not exceed the order given". (Arts 73 and 58(3)).**

3.2. SUBORDINATE'S RESPONSIBILITY (ART. 74)

- **Requirements:**

✓ **Awareness of the illegal nature (order without authority or criminal nature of the act, i.e. any of the crimes listed such as homicide, arson, etc.).**

- **The list of criminal acts is illustrative in the English version, whereas exhaustive in Amharic version.**
- **If the subordinate intentionally exceeded the order, he is alone responsible for the excess.**

4. **NECESSITY**

- **The issue of necessity arises where two rights are in conflict ('a defense based on a balance of evils').**
- Comprises **Justifiable Necessity (Art. 75), Excess of Necessity (Art. 76) and Military State of Necessity (Art. 77)**

4.1. **Justifiable Necessity (Art. 75)**

- **Elements/ Requirements:**
  1. **The existence of danger to a legal right (person, property of oneself or others),**
  2. **The imminence of the danger (about to occur or pressing),**
  3. **Seriousness of the danger,**
  4. **Inability to act otherwise (the act is the only option to avert the danger), and**
  5. **Proportionality.**

- A person having a special professional duty to protect life or health cannot invoke justifiable necessity as a defense Art. 75 2nd paragraph). But, mitigation is possible.
- The reason is certain persons are considered to have accepted the possible danger inherent in their occupation (e.g. a pilot, a captain of a ship).
- This last issue is new inclusion in the 2004 FDRE Criminal Code.

4.2. **Excess of Necessity (Art. 76)**

- **Even where there is "imminent and serious danger", an act of necessity is not justifiable but only excusable under three alternative conditions, namely:**
  1. **Where the act is not necessary, or**
  2. **Where the act is necessary but not proportionate, or**
  3. **Where the doer, by his own fault, puts himself into the danger and the subsequent state of necessity.**
- **The ct shall (in any of four situations under Arts. 75 & 76 paragraph 2) mitigate.**

4.3. **Military State of Necessity (Art. 77)**

1. **Seems to allow a relatively wider affirmative defense of justifiable necessity for an officer of a superior rank in active service "in the case of military danger and in particular in the case of a superior rank in active service in the case of military danger and in particular in the case of mutiny or in the face of the enemy".**
2. **Under such circumstances, the officer's act is justifiable "if the act was the only means, in the circumstances, of obtaining of obedience."**

- **The term “obedience” in Art. 77 should obviously be understood to mean obedience to “manifestly lawful” orders.**
- **Where a superior officer’s act is not justifiable due to excess of necessity, the court shall freely mitigate the penalty or may exempt the accused from punishment.**

5. **LEGITIMATE DEFENSE /SELF-DEFENSE**

- **It is the act of defending one's own or another person's protected rights against an unlawful and imminent attack.**

- **It is legally recognized means of private justice.**

5.1. **Justifiable Act of defense (Art. 78)**

- **Six cumulative ingredients of legitimate defense are:**
  1. **Attack or imminent assault,**
  2. **Unlawful attack or imminent assault,**
  3. **Self-defense or defense of another person,**
  4. **Directed against a legally protected right,**
  5. **Unavoidability of legitimate defense, and**
  6. **Proportionality of legitimate defense.**

5.2. **Excess in Legitimate Defense/ Imperfect Self-Defense (Art. 79)**

- **Using disproportionate means or going beyond the acts necessary for averting the danger in the course of repelling an unlawful assault or imminent unlawful assault constitutes excessive defense.**
- **Acts of excessive defense are not justifiable. But the ct shall mitigate (71(1) & 180).**
- **A person who beats and severely injures an unarmed and physically weak pickpocket in the act of stealing birr 100 is obviously considered to have used disproportionate means.**

❖ **Exercise (case) p.86.**

6. MISTAKE

- In Criminal Law, mistake may vitiate awareness, one of the ingredients of criminal guilt, and may thus render the act not punishable.
- In contracts, for instance, fundamental mistake renders the consent of the contracting party defective and thus invalid.
- The 2004 Criminal Code deals with two kinds of mistake:
    1. Mistake of Fact, and
    2. Mistake (Ignorance) of Law

6.1. Mistake of Fact (Art. 80)

- Commission of an offence under an erroneous appreciation of facts without criminal intention shall not be punishable (Art. 80(1))
- In spite of fundamental mistake, the doer is punishable if his act constitutes an offence specified in the Criminal Code (Art. 80 (2))
- Example, shooting and injuring a person at night with the erroneous belief of shooting at a domestic animal of his neighbor constitutes an attempt of damage to property (Art.27, 29, 689). May also violate Article 809 (unlawful use of firearms).

- A physician who causes bodily injury to his patient is punishable for negligent bodily injury (559) if his erroneous prescription could have been avoided by due prudence required under the circumstances.
- Non fundamental mistake is not justifiable and it involves “mistake as to the identity of the victim or the object of the offence” (Art. 80 (3)).

6.2. **Mistake (Ignorance) of law (Art. 81)**

- Law is expressed in distinctive propositions, whereas facts are qualities or events occurring at definite places and times.

- As principle, ignorance of the law is no defense (Art. 80(1)).

- The **exception** to this rule is mitigation of penalty (Art. 81(2)) or exemption from punishment (Art. 81(3))

- Article 81(1) requires two cumulative conditions for mitigation of punishment without restriction:
    1. One must, in good faith, believe that “he had a right to act”, and
    2. A definite and adequate reason for holding the erroneous belief stated above. The doer is not blameworthy and will be deemed to have sufficient reason if a reasonable person under his circumstances would have held the same erroneous belief.
- Where these two cumulative requirements are fulfilled, the act (though not justifiable) is excusable, and the ct shall without restriction reduce the punishment. (Art. 81 (2)).

- The factors that are considered by the ct while it determines the extent of the mitigation are “the circumstances of the case and in particular, the circumstances that led to the error”. (Art. 81(2) second paragraph).
- The ct may exempt the accused from punishment in the exceptional cases stated in Article 81(3). This provision applies if the following four cumulative elements are fulfilled:
  1. The accused is ***absolutely ignorant*** of the law, and
  2. Such ignorance of the law is ***justifiable***, and
  3. The doer’s act was committed in ***good faith***, and
  4. The criminal ***intention*** of the accused is ***not apparent***

UNIT 3: CRIMINAL PUNISHMENT AND ITS APPLICATION

- Criminal punishment is the response of the society to socially dangerous behaviors.
- **Purpose of Punishment:**
  1. Retribution
  2. Deterrence
  3. Prevention/Incapacitation
  4. Reformation /Rehabilitation
  5. The Integrative view

Purposes of Punishment under the Criminal Code of 2004

- Article 1 Paragraph 2 of the Criminal Code sets out the specific objectives of the Code in the following way:
- *"It aims at the prevention of crimes by giving due notice of the crimes and penalties prescribed by law and should this be ineffective by providing for the punishment of criminals in order to deter them from committing another crime and make them a lesson to others, or by providing for their reform and measures to prevent the commission of further crimes."*
- *See also the preface and different provisions.*

Kinds of Criminal Penalties/punishments

- Generally, there are **three different sets** of punishments under the code:
  1. Ordinary punishments applicable to Adults – Book II, Title I, Articles 90-156.
  2. Measures and penalties applicable to young persons-Book II, Title I Articles 157-177.
  3. Penalties and measures applicable to Petty offences/Petty Code - Book VII, Title II, Articles 746-764.

Punishments that are Applicable to Adults.

- There are three categories of punishments applicable to adults mentioned in Articles 90-156:
  I. Principal penalties
  II. Secondary penalties
  III. Special measures applicable to Adults

I. **PRINCIPAL PENALTIES**

- Principal penalties can be put under the following heads:
    1. Pecuniary Penalties (Art. 90-102)
    2. Punishments Restricting or Depriving Liberty – (Art. 103-116)
    3. Death Penalty (Art. 117-120)

1. Pecuniary Penalties

- Pecuniary penalties (which are payable in terms of money or pecuniary form) are the following:
    1. Fine (Arts. 90 – 97),
    2. Confiscation (Art. 98),
    3. Sequestration (Art. 99),
    4. Other pecuniary effects (Art. 100-102).

2. Penalties Resulting in Restriction or Loss of Liberty

1. Simple imprisonment (Arts. 106 and 107).

2. Rigorous imprisonment (Art. 108).
   (including life imprisonment)

3. **Death Penalty (117-120)**

- ✓ Arguments for and against Capital Punishment
- ✓ Capital Punishment in Ethiopia
- ✓ Constitutionality of Death Penalty
- ✓ General Principles Relating to Death Penalty (Arts. 117-120)

II. SECONDARY PENALTIES

- A court may impose a secondary penalty on a criminal in addition to the primary punishment. Secondary penalties are not equal to primary punishment. Thus, before imposing a secondary penalty the court has to pronounce a primary penalty, which it deems to be appropriate for a crime.
- However, they may replace the principal penalty under the following conditions stated by the provision of article 122(2):

1. If such is specifically laid down by the law; or
2. Where there are extenuating circumstances; or
3. Where the law provides for a free mitigation of the punishment (article 82 &83); or
4. Where enforcement of the sentence is postponed

- **Is the court obliged to always impose secondary penalties in addition to primary penalties? No, it is its discretion (122(2)).**

Types of Secondary Penalties

1. **Caution, Reprimand, Admonishment (Article 122),**

   Caution = warning

   Admonishment = expression of disapproval of ones actions or behavior

   Reprimand = strong official disapproval of someone

2. **Public Apology (Article. 122),**
3. **Deprivation of rights (Art.123),**

Special Measures Applicable to Adults (129-156

- "Measure" refers to security and rehabilitative measures stated under 129-156
- Measures may be imposed even if they are not specifically indicated in the Special Part of the Code as far as the court finds it to be desirable keeping in view the purposes of the criminal law.
- Measures could be imposed both on a person convicted for a crime and those not responsible for a crime (129-133) because it is a protective step.
- However, for the sake of clarity and understanding our Code has the following categories of measures:

- **Protective measures such as:**

1. **Guarantee of good conduct (135),**
2. **Seizure of dangerous articles (140),**
3. **Recognizance to be of good behavior (141),**
4. **Restrictions on personal liberty (145-153),**
5. **Mentally irresponsible or insane (129-133)**

(confinement or treatment)

DETERMINATION OF PUNISHMENT

- **General Principles of Determination of Punishment: Arts. 87-89:**
- Factors that affect punishment have two big categories:
    1. Aggravating, and
    2. Mitigating circumstances.

AGGRAVATING CIRCUMSTANCES

- Are circumstances relating to the commission of crimes which cause its gravity to be greater than that of the average instance of the given type of offence.
- They are divided into two: General and Special aggravating circumstances.

1. General – See Art. 84.

✓ In this case the ct aggravates as per Art. 183.

2. SPECIAL AGGRAVATING CIRCUMSTANCES

- They are more dangerous than General Aggravating Circumstances.
- Art. 85 stipulates that in case of concurrence and recidivism, the penalty shall be aggravated as per Arts. 184-188.
- Recidivism – Art. 67 defines recidivism and Art 85 states that it is one of the grounds for special aggravation of punishment.

- To say recidivism, the following cumulative requirements must be fulfilled (Art.67):
  1. Previous conviction and imprisonment,
  2. The later offense must be committed within five years of serving a sentence or pardon,
  3. The new offense must be intentional, and
  4. The new offense must be punishable with minimum of six months of simple imprisonment.
- The court may double the penalty provided in in the special part for the fresh crime or for the most serious fresh crime in case of concurrence (Art. 188 (1)).

CONCURRENCE CRIME (ARTS. 60-66)

- Occurs when a defendant commits two or more offences tried together under the same charge.
- May be either material or notional.
- Material: when a criminal successively commits two or more similar or different crimes (Art. 60(a), 64, 85).

- Notional (ideal): though a person performs only one act, violates several provisions of law or causes the same harm against the rights of more than one person.
  - ✓ **Simultaneous N.C**- single act simultaneously contravenes several criminal provisions (Art.60(b)1st phrase, 65,187(1).
  - ✓ **Combined N.C**- single act or combinations of acts, two or more material harms (Art. 60(b) 2nd phrase, 66, 187 (2)).
- Aggravation will be assessed as follows:

ASSESSMENT OF SENTENCE IN CONCURRENCE CRIMES (ART.184)

- Art. 184 has adopted three methods of calculating sentence for concurrent crimes:

1. Cumulating (addition)- Art. 184 (1)b);
2. Assimilation (absorption) – Art. 184 (1)(a) 1st paragraph.
3. Aggravation – Art. 184 (1)(a) 2nd paragraph.

CUMULATING EXTENUATING AND AGGRAVATING CIRCUMSTANCES

- This is situation where we face the existence of different types of aggravating and mitigating circumstances (Art. 189)
- Steps:

1. Fix the deserved punishment,
2. Increase by considering aggravating circumstances(183),
3. Reduce by considering mitigating circumstances (179 and 180.

- If Recidivism and concurrent crimes occur, first assess for concurrent crimes then increase it having regard to recidivism (Art. 189(2)).

MITIGATING CIRCUMSTANCES

- Are circumstances relating to the commission of a crime which does not in law justify or excuse the act but which, in fairness, be considered as reducing the blameworthiness of the defendant. They are divided into two:

1. General – Art. 82 and Art. 179.
2. Special – Art. 83 (Family and Affection Relationship). But how can we measure the degree of family or affection relationship?