

CRIMINAL LAW I

CHAPTER ONE: INTRODUCTION TO CRIMINAL LAW

1. Definition of Criminal Law and Crime

i. Definition of criminal law

- ✓ Criminal Law is the body of law:
 - ♣ Defining crimes against the community at large,
 - ♣ Regulating how suspects are investigated, charged and tried, and
 - ♣ Establishing punishments for convicted criminals.
- ✓ Frequently the term ‘criminal law’ in the broadest sense is used to include all that is involved in ‘the administration of criminal justice.’
- ✓ The criminal law identifies, defines and declares the conducts that it seeks to prevent and prescribes the appropriate punishments for them too.

ii Definition of Crime

➤ Literal Meaning of Crime

- ✓ The word “**Crime**” was originally taken from a **Latin** term “***Crimen***” which means “*to charge*”.
- ✓ The **Greek** expression “***Krimos***” is synonymous to a Sanskrit word ‘***Krama***’ which means “**Social order**”.
- ✓ Therefore, in common parlance the word **crime** is applied to *those acts that go against social order and are worthy of serious condemnation.*

➤ General Meaning of Crime

- ✓ The Oxford English Dictionary defines crime as “an act punishable by law as forbidden by statute or injurious to public welfare”.

➤ Crime is a “**Public Wrong**” (Blackstone)

- ✓ Blackstone has defined crime as “*an act committed or omitted in violation of a public law either forbidding or commanding it*”.

➤ Crime is A “**Moral wrong**” (Stephen)

- ✓ According to Stephen crime is “an act forbidden by law and which is at the same time revolting to the moral sentiments of the society”.
- ✓ Defining crime as something against the moral sentiments cannot be accepted, because there are acts though not immoral, classified as highly criminal. **For example, Treason** is ‘Anything done to displace the governing body of state.’ Treason is graded as a crime in the highest degree and considered as a heinous crime by all Penal Codes. This is not because the moral sentiments of the society are being affected, but for the **security** and **stability** of the government.
- ✓ Similarly, there are **acts** which are highly immoral but not criminal. **For example**, an expert swimmer stands by the side of a river and sees a child drowning in the river and makes no effort to save the child and the child dies

by drowning. His act may be highly immoral but it is neither a criminal nor a civil wrong.

➤ **Crime is A “Procedural Wrong” (John Austin)**

- ✓ Austin defines crime in terms of the proceedings adopted in such cases. Austin defined crime while making a distinction between civil and criminal wrongs. He observed that:

“A wrong which is pursued by the sovereign or his subordinates is a crime. A wrong which is pursued at the discretion of the injured party and his representatives is a civil injury”.

➤ **Crime is a “Creation of Government Policy”**

- ✓ ‘**Russell**’ has rightly observed that, “to define crime is a task which has so far not been satisfactorily accomplished by any writer.”

➤ In fact, criminal offences are basically the creation of a criminal policy adopted from time to time by those sections of the community **who are powerful** or astute enough to safeguard their own security and comfort by causing sovereign power in the state to repress conduct which they feel may endanger their position”.

➤ **Crime is a “Legal Wrong”**

- ✓ Since no satisfactory definition of crime acceptable and applicable to all situations could be derived, penal statutes define precisely different criminal behaviors which they purport to check.
- ✓ On the other hand, the FDRE Criminal Code of 2005, which has codified the great bulk of the criminal law of the country, does not give any standard definition of crime. Accordingly, **Article 23(1) of the criminal code** simply states that,

A crime is an act which is prohibited and made punishable by law. In this Code, an act consists of the commission of what is prohibited or omission of what is prescribed by law.”

2. The Concept of Crime

➤ Crime is **deceiving concept**, because it **covers an enormous** range of human behavior.

- ✓ Crime may be associated in the public mind with pick-pocketing, robberies, house-breakings, and riots,
 - ✓ But, crime is also a businessman placing bribe to win a city contract.
 - ✓ It is also syndicate-controlled loan shark taking over a business from a businessman who couldn’t meet the exorbitant repayment schedule.
- Crime is often mistakenly thought of as the vice of the few but, it is not. It is everywhere in the society.
- The concept of crime has always been dependent on public opinion. In fact “law” itself reflects public opinion of the time.

- Without law there can be no crime at all, although there may be moral indignation which results in law being enacted.” Therefore, in order to know the nature and the content of crime we must first of all know what ‘Law’ is,
- **“Law”**, is the aggregate of rules set by men politically superior, or sovereign, to men as politically subject. Law is a command enjoining a course of conduct to be observed by all the members of the society and is backed by a sanction. The command may be of a sovereign or the command of a political superior to political inferiors, or the command of a legally constituted body or the legislation duly enacted by a legally constituted legislature and addressed to the members of the society in general.
- That being the definition of law, disobedience or violation of law may be termed as crime. But, all violations of law are not crimes for an act done in breach of law of contract, personal law or a civil law, are only civil wrongs leading to civil proceedings.
- **Only** such violations, which endanger the safety of individual, his liberty and property, are crimes. To common man crimes are those acts which people in society “consider worthy of serious condemnation”. Therefore, **crime is an act** which both forbidden by law and the moral sentiments of the society.

❖ Forbidden Conduct

- ✓ The concept of forbidden conduct is not a static one; it changes with the change of social norms.
- ✓ The very definition and concept of crime is not only according to the values of a particular group and society, its ideals, faith, religious attitudes, customs, traditions and taboos but also according to the form of government, political and economic structure of society and a number of other factors
- ✓ The notion about crime also *changes with time*. What is an offence today may not be an offence tomorrow and what has not been an offence till yesterday may be declared a crime to day.
- ✓ **Social changes affect the criminal law in many ways**, such as:
 - Through changes in structure of society, especially in its transition from rural self-contained and relatively sparsely populated to a highly urbanized and industrial pattern.
 - Through changes in the predominant moral and social philosophy.
 - Through developments in science especially in Biology and Medicine.

❖ Impact of Social Change on the Law of Crimes

- ✓ Criminal offences dealing with protection of life and liberty have essentially remained unchanged throughout all ages all over the civilized world. Only certain crimes against human body like abortion and sexual crimes took new forms due to changes in the attitude of the society towards such conduct.

➤ **Crime is a Multidimensional Problem:**

- ✓ Crime is not just the responsibility of the police, the courts, and the prisons.
- ✓ Crime cannot be controlled without the active support of individual private citizens, schools, businesses, and labor unions. This is so because crime has its effects on everyone-not just the criminal and his victim. The fear of crime has affected basic patterns of life of people. People in society are in need of an efficient system that is capable of checking the incidence of crime in the society so that they can feel a sense of safety and security which is essential for a peaceful living. Therefore, the problem of crime has been the concern of more than the law enforcement machinery.
- ✓ **Crime has many dimensions:**
 - ♣ To the student of crime, it is a problem of explanation and interpretation.
 - ♣ To the legislator, it is a problem in definition and articulation.
 - ♣ To the police, it is a problem in detection and apprehension.
 - ♣ To the judge, it is a problem of due process and of punishment.
- ✓ But, it is a problem too for more than these. It is a problem to:
 - ♣ The person who is engaged in breaking the law;
 - ♣ The victim who may be deprived by it of life, possessions and even the pursuit of happiness and
 - ♣ Others it is a threat to tranquility and a disturbance in the social order.

3. The Place of Criminal Law in Criminal Science

- ✓ **“Crime”** is an offence committed by an individual who is a basic unit of a society. Therefore, study of crime i.e. Criminal Science” is a social study. The main aims of Criminal Science are:
 - a. To discover the causes of criminality,
 - b. To devise the most effective methods of reducing the amount of criminality,
 - c. To perfect the machinery for dealing with criminals.
- ✓ Based on these three objectives, three main branches of Criminal Science have developed. They are:
 - 1. Criminology**
 - ☞ It is the study of crime and criminal punishment as social phenomena.
 - ☞ This branch of criminal science is concerned with causes of crimes and comprises of two different branches.
 - a) **Criminal Biology:** This investigates causes of criminality, which may be found in the mental or physical constitution of the delinquent himself such as hereditary tendencies and physical defects.
 - b) **Criminal Sociology:** This deals with enquiries into the effects of environment as a cause of criminality. This branch focuses on the objective

factors like social, political and economic conditions leading to criminality, also termed as *criminal anthropology*.

2. Criminal Policy or Penology

- ☞ This branch of Criminal Science is concerned with limiting harmful conduct in society.
- ☞ It makes use of the information provided by Criminology. Therefore, the **subjects of Criminal policy for investigation** are:
 - a) The appropriate measures of social organization for preventing harmful activities,
 - b) The treatment to be given to those who have caused harm, whether the offenders are to be given warnings, supervised probation, medical treatment, or more serious deprivations of life or liberty, such as imprisonment or capital punishment.
- ✓ This branch of study is also termed as 'Penology' and deals with treatment, prevention and control of crimes.

3. Criminal Law

- ☞ Criminal policies are implemented through the agency of criminal law.
- ☞ The criminal law decides the special sanctions appropriate in each case. These sanctions range from death penalty through various kinds of degrees of deprivation of liberty, down to such measures as medical treatment, supervision as in probation, fines and mere warnings (admonishment).

Branches of Criminal law

i Substantive Criminal Law

- ✓ Lays down the principles of criminal liability, defines offences and prescribes punishments for the same.
- ✓ The Ethiopian Criminal Code does this business. However, the substantive criminal law by its very nature **cannot be self-operative**.

ii Adjective/Procedural Criminal law

- ✓ Designed to look **after** the process of the administration and enforcement of the substantive criminal law.
- ✓ In the absence of procedural criminal Law, the substantive criminal Law would be almost worthless. Because without the enforcement mechanism the threat of punishment held out to the lawbreakers by the substantive criminal law would remain **empty in practice**.
- ✓ Thus, the procedural criminal law is to administer the substantive criminal law and give enforcement to it.

4. Nature and Scope of Criminal Law

- ✓ Criminal law has to do with **crimes**, which are different from other wrongful acts such as **torts** and **breaches of contract**.
- ✓ The distinct nature of Criminal Law can be understood by defining some of its unique features.
- ✓ According to Edwin Sutherland, Criminal Law of a place can be defined as “a body of special rules regulating human conduct promulgated by state and uniformly applicable to all classes to which it refers and is enforced by punishment.” It means the whole body of criminal law to be efficient must have four important elements.
 - i Politicality. Implies that only the violations of rules made by the state are regarded as crimes.
 - ii Specificity. Connotes that it strictly defines the act to be treated as crime. In other words, the provisions of criminal law should be stated in specific terms.
 - iii Uniformity. Implies its uniform application to all alike **without any discrimination**, thus imparting even-handed justice to all alike. The idea is to eliminate judicial discretion in the field of administration of criminal justice.
 - iv Penal sanction. Imposed under the criminal law that the members of society are deterred from committing crimes. It is, therefore, obvious that no law can be effective without adequate penal sanctions.

5. General Objectives of Criminal Law

a) Protection of Persons and Property.

- ✓ Safety and a sense of security are the most important things for the survival of any society.
- ✓ Safety of a society includes personal safety i.e. safety of life and liberty, and safety of property.
- ✓ To ensure safety there is the necessity of maintaining peace and order. This is possible only by an effective penal system, which is strong enough to deal with the violators of the law and enable the people to live peacefully and without fear of injury to their lives and property. Thus, the prime objective of criminal law is protection of the public by maintenance of law and order.
- ✓ “**Tort law**”, a branch of civil law, also protects **persons** and **property**. The difference between tort law and criminal law is that tort law results in money damages, whereas criminal law results in loss of freedom by sending a person to jail or prison. Private interests are served through the awarding of damages. The public interests are served by punishing criminal activity.

b) Deterrence of Criminal Behavior.

- ✓ A key to the hoped-for reduction in criminal behavior is that our criminal laws present a sufficient deterrent to antisocial behavior.

- ✓ A “deterrent” is a danger, difficulty or other consideration that stops or prevents a person from acting. The presumption inherent in criminal law is that if we make the punishment sufficiently harsh, persons who might do something criminal are prevented from doing so because they **fear punishment**. If enough people fear punishment, there will be considerable reduction in criminal activity. However, FDRE Constitution states under Article 18 state that there shall be no cruel and unusual punishment.

c) **Punishment of Criminal Activity.**

- ✓ Since we will most likely be unable to deter all criminal activity, our laws accept that a certain level of criminal activity will exist in society. Accordingly, we punish criminal activity for punishment’s sake. If a criminal takes something without paying for it or injures other without a justification, the criminal law makes that individual pay for it through deprivation of liberty for a period of time.

d) **Rehabilitation of the Criminal.**

- ✓ Once convicted, a criminal will begin to serve a sentence in a prison. But that is not where our criminal justice system ends. Our government has designed various programs to educate and train criminals in legitimate occupations during the period of incarceration.
- ✓ Thus, upon release there should be no reason to return to a life of crime. Sometimes a sentence is suspended (Articles 190-210 of the Criminal Code); that is, it is not put into effect. In such cases, the court supervises the individuals’ activities to ensure that they have learned from their mistakes.
- ✓ The specific purpose and function of Criminal Law are clearly stated in **Article 1** of the Criminal Code of the FDRE, 2004 as follows:
 - “The purpose of the Criminal Code of Federal Democratic Republic of Ethiopia is to ensure order, peace and the security of the state, its peoples, and its inhabitants for the public good”.
- ✓ The **second paragraph** of Article 1 proceeds to state the type of activities it aims to take up in order to achieve the purpose mentioned in the **first paragraph**, Article 1 Paragraph 2 lays down that:
 - “It aims at the **prevention** of crimes by giving due notice of the crimes and penalties prescribed by law and should this be ineffective **deter** by providing for punishment of criminals in order to 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.”

6. Criminal Law, Private law and Morality-Distinguished

- ✓ A **wrong** is an act forbidden by the society. In other words, it is a violation of rules, which are accepted by the society.

- ✓ **Society** prohibits certain activities basing on the **general conscience of the society**, which is found in *the values* and *norms* of the society.
- ✓ The concept of morality explains the values of a particular society. This means that a given society declares certain acts, which offend the moral conscience of that society as forbidden. These forbidden acts can be described as *moral wrongs*. However, *all moral wrongs are not wrongs in the legal sense*.

Classification of Wrongs

- **Moral wrong**

- ✓ There is a long list of such acts including ingratitude, hard-heartedness, absence of natural love and affection, habitual idleness, sensuality, pride and all such sinful thoughts. Such acts are called **wrongs** and are looked upon with **disapprobation**.
- ✓ The evil tendencies of these **anti-social acts** widely differ in degree and scope. Some of these wrongs such as lies, refusal to give a morsel of food to save a fellow human being, omission on the part of a swimmer to rescue a man from drowning, etc., are not considered sufficiently serious for the notice of law and are merely disapproved. These acts are considered as moral or ethical wrongs and are checked to a great extent by social and religious laws.
- ✓ Sinful thoughts and dispositions of mind might be the subject of confession and penance but not of criminal proceeding.

- **Legal Wrong**

- ✓ The category of wrongs such as nuisance, deceit, libel (defamation in visual form) robbery, dacoit, murder, rape, kidnapping and others are considered to be sufficiently serious for legal action.
- ✓ The state may respond to any of such acts in **two different ways**:
 - i Where the state takes action against the wrong-doer at the instance of the injured party, it is called the civil wrong, and
 - ii Where the state by itself proceeds against the wrong-doer, the wrong is referred to as criminal wrong.

- **Civil Wrong**

- ✓ Where the magnitude of injury is supposed to be more concentrated on the individual, the state, at the instance of the injured individual or the group, directs the wrong doer to compensate the injured in terms of money as in the case of deceit, libel, nuisance, negligence, etc. This type of wrong is called civil wrong or Tort, for which civil remedy is open to the injured.

- **Criminal Wrong**

- ✓ Where the gravity of the injury is more directed to the public at large (including the specific victim), the state by itself can take a direct action against the wrong-doer.

- ✓ In this instance public condemnation or provision for compensation is ineffective as in the case of moral or civil wrong. Wrongs, like dacoity, murder, kidnapping, sedition, treason and the like, disturb the very fabric of law and order and jeopardize the state's existence or create a wide spread panic.
- ✓ Therefore, the state stresses the necessity of punishing the wrong-doer rather than concerning itself with the question of payment of compensation to the injured party by the wrong-doer. This category of wrongs is called as "public wrongs" or "crimes" for which criminal proceedings are instituted by the state and the culprit is punished.

Relation between Morality and Criminal Law

- ✓ They are related to each other in that they both aim at maintaining social order.
- ✓ There is a category of wrongs towards which law and morality react with common hatred. They are offences like murder, rape, arson, robbery, theft, etc. Law and morals powerfully support and greatly intensify each other in this matter.
- ✓ Everything that is regarded as enhancing the moral guilt of a particular offence is recognized as a reason for **increasing the severity of the punishment** awarded to it.
- ✓ According to **Sir Stephen** the criminal law proceeds upon the principle that "it is morally right to hate criminals and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it." However, the recent tendency of the reformists is on the opposite lines, they say "hate the crime not the criminal" basing their argument on the Gandhi an philosophy i.e. "hate the sin not the sinner", because a criminal is not born, he is made. Different circumstances and experiences after his birth in the society become responsible for his becoming a criminal. Thus, today the "Reformative Justice" is the philosophy of the state.

7. Crime Distinguished From Civil Wrongs

- ✓ "**Crimes**" are said to be harms against the society and are therefore, considered as graver wrongs. "Torts" (non-contractual liability) are wrongs against individuals and are treated as lesser wrongs.
- ✓ "**Tort**" is a private wrong and the remedy available is reparation for the injury suffered and not punishment. But unlike criminal law, the state will not be involved in the dispute or litigation other than legislating the legal framework that facilitates contractual transactions, providing remedies in case of **nonperformance** and adjudicating over the case if the creditor files a suit.
- ✓ **Torts** also include certain harms or damages caused by fault that are designated as offences like assault, defamation, negligence etc. But unlike criminal offences non-contractual liability may arise irrespective of fault (strict liability) or due to harm caused by others for whom a person is answerable (vicarious liability) as in

the case of harm caused by one's child, one's employee in due course of his work, etc.,

- ✓ **Tortious liability** is said to be “**strict**” or irrespective of fault in the following instances.
 - a) If it arises from acts that do not constitute fault, or
 - b) Due to harm caused by things owned or possessed by a person namely, animals, buildings, machines, and vehicles and manufactured goods.
- ✓ Faults that result in tortious liability are wider in scope of application than offences, because in addition to offences the term “fault” for the purpose of “tortious liability” may include violations of private law (Article 2035 of Civil Code), Professional fault (Article 2031 Civil Code) and other faults that are considered to be faults on the basis of the “standard of a reasonable man's conduct under similar circumstances” (Article 2030 Civil Code).
- ✓ Criminal liability invariably requires moral guilt (intention or negligence) and personal act or omission while non-contractual liability doesn't.
- ✓ “**Analogy**” is forbidden in criminal cases based on **Article 2(3)** of the FDRE Criminal Code, but may be **permissible in Civil** in the case of **contractual and tort** where legal provisions embody illustrative (rather than exhaustive) lists.
- ✓ The distinction between the two also lies in the degree of certainty of evidence. Criminal cases require certainty beyond reasonable doubt while the preponderance of evidence in the balance of probability suffices in civil cases.
- ✓ In addition to the above listed, the following are some more important legal aspects which distinguish these legal wrongs:

1. Nature of wrong

- ♣ Crime is a **public wrong**. That means a harm done against the society. But, a ‘tort’ is a **private wrong** committed against an individual generally or the public in a given locality. But, a ‘breach of contract’ is committed when any term or condition of an agreement enforceable by law is violated by any one of the parties to the agreement.

2. Nature of the Right Violated

- ♣ In a **crime** and a **tort** there is a breach of ‘**right in rem**’, whereas in a breach of contract there is breach of ‘**right in personum**’.

3. Origin and Nature of the Duty

- ♣ In a crime the duty not to cause harm is fixed by the state. In tort such duty is fixed generally by the operation of law where the law of non-contractual liability remains un-codified and by the state where it has been incorporated in codified law as governed under Article 2035 of Civil Code. Under criminal law the duty is towards the whole world and it arises on account of the statutory enactments. In case of torts the duty is towards the public generally. Duty either

arises on the basis of statutory enactments as of Article 2035 of civil code or on the basis of general responsibility towards the society and it is independent of any personal obligation under a contract. **Whereas**, in case of breach of contract the duty is fixed as a result of contractual relationship of the parties and the duty is specifically towards the contracting party. The duty is breached as the result of failure to perform contractual obligation.

4. **Consent of the Victim**

- ♣ Consent of the victim to the injury caused is a qualified defense in criminal law based on Article 70 Criminal Code. In torts, consent of the plaintiff to the alleged injury nullifies right to remedies. A contract is founded upon consent. Therefore, if there is consent to the breach of any term or condition of the contract the plaintiff forgoes his right to claim the remedies.

5. **The element of Intention**

- ♣ Intention is an essential element of crime as recognized under Article 57 and 58 of Criminal Code. Intention may form one of the ingredients of tort, but not an essential precondition for the Tortious liability. In an action for breach of contract whether the breach was intentional is an irrelevant issue.

6. **The element of Negligence**

- ♣ Negligence attended with criminal lack of foresight amounts to a crime as governed under Article 59 of Criminal Code. Mere negligence may amount to a tort as stated under Article 2029 of civil code. On the other hand, there is no question of negligence in an action for breach of the obligation arising out of a contract.

7. **Relevancy of Motive**

- ♣ Motive may be a factor for consideration in deciding the quantum of punishment in criminal liability. Similarly, Motive is taken into consideration in deciding tortious liability. However, Motive is **irrelevant** in an action for breach of contract as stipulated under Article 1717 of the civil code. So, a breach is a breach with whatever motive it was committed in this case.

8. **Initiation of Legal Proceedings**

- ♣ Criminal proceedings are conducted in the name of the **state**. The state steps into the shoes of the victim as the protector of interests of its inhabitants. In case of the other two civil wrongs (tort and contract) it is the injured party that brings the action against the wrong doer.

9. **Remedies Available**

- ♣ The criminal is punished by the state. The punishments may range from fine, compensation via imprisonment of different kinds to capital punishment. In torts the remedies available are damages, compensation, restitution and

injunction. For breach of contract cancellation of contract, damages, specific performance and forced performance of contract are the available remedies.

CHAPTER TWO: THE DEVELOPMENT OF CRIMINAL LAW OF ETHIOPIA

1. Historical Background

- ✓ The history of Ethiopian Criminal law reveals the following important legislations incorporating the Criminal law of the country before the enactment of the existing **FDRE Criminal Code of 2005**.

- A. The Fewuse Menfessawi,
- B. The Fetha Negest,
- C. The Ethiopian Penal Code, 1930.
- D. The Penal Code of the Empire of Ethiopia, 1957.
- E. The 1974 Revolution and Criminal Law
- F. Special Penal Code of 1981

A) The Fewuse Menfessawi (Canonical Penance)

- ✓ The first attempt to compile the law was made by the **emperor zar'a Ya'eqob (1434-1468)**.
- ✓ Desiring to govern his realm by a written law rather than by amorphous customary law and oral tradition. As a result, he ordered Ethiopian Orthodox Church Scholars to compile an authoritative written law. Accordingly, compilation had **62 Articles** mainly on criminal matters. Since this was not comprehensive, it was not able to resolve many of the legal problems that arose during that period.

B) The Fetha Negest (Law of the Kings)

- ✓ The failure of the Fewuse Menfessawi led to the next codification by the same Emperor Zar'a Ya'eqob. The Fetha Negest is a very interesting legal compilation.
- ✓ As highlighted by **Graven** Fetha Negest included the following important **criminal law principles**:
 - ♣ Concerning “intention” and “negligence”,
 - ♣ Relating to the proportion between the fault and sanction,
 - ♣ The individualization of punishment,
 - ♣ The forgiveness and redemption of offenders and
 - ♣ The sharing of guilt the case of fighting, etc.
- ✓ These solutions in case of fighting are most current, familiar and understandable situations for the people.
- ✓ The Fetha Negest was formally incorporated into the Ethiopian legal system in **1908**.

- ✓ In most cases the Fetha Negest has attempted to incorporate the most suitable legal principles which could be conceived in the epoch of its emergence. However, it suffered from the following drawbacks:
 - ♣ It lacked the systematization and other characteristics of modern codes,
 - ♣ Neither the ‘specific’ is differentiated from the ‘general’ nor the ‘exception’ from the ‘rule’,
 - ♣ Aggravating and extenuating circumstances were not clearly provided,
 - ♣ Generally, the arrangement of the provisions is so haphazard that it is hard to locate the most relevant provision and
 - ♣ The Fetha Negest was accessible and understandable only to those who continuously studied it such as the clergy.
- ✓ The criminal provisions of the Fetha Negest were applied in Ethiopia until they were replaced by the Penal Code.

C) The Ethiopian Penal Code of 1930

- ✓ The Penal Code of 1930 reflects the norms and values of the old absolutist monarchy of the generation of Emperor Menelik II and Emperor Zewditu (from 1889 and 1930).
- ✓ It was also drawn up in a less systematic and clear manner and did not follow the rules of a modern codification process.
- ✓ The main attributes of the Code were as follows:
 - ♣ The crimes and respective punishments were defined in exact fashion and
 - ♣ The penalties were considerably softened and improved by setting the fines in proportion to the economic and monetary situations of Ethiopia.
 - ♣ The Code under its Special Part protected the three great classic categories of interests. These were:
 - i The state and Community,
 - ii Persons and
 - iii Property.
- ✓ Provisions of “Petty Offences” were incorporated.
- ✓ The drafter of the Code is believed to have been a Frenchman.
- ✓ The Penal Code of 1930 was in force until it was repealed and replaced by the 1957 Penal Code of Ethiopia.

D) The Ethiopian Penal Code of 1957

- ✓ The old codified laws used in Ethiopia before 1931 did not follow the rules of modern codification process and thus eventually proved unsatisfactory. The modern codification process was initiated in the second half of the 20th C.
- ✓ The task of drafting a new comprehensive penal code was entrusted to Jean Graven, a Swiss jurist who at that time had been the Dean of Faculty of Law and President of the Court of Cassation in Geneva, Switzerland.

- ✓ The **primary source** of the Code was the Swiss Penal Code of 1937 and the pre- 1957 Swiss Jurisprudence.
- ✓ The **secondary sources** were the French Penal Code of 1810 with respect to general format, the Yugoslav Penal Code of 1951 in relation to military offences, and more generally the code of Norway, Denmark, Poland the Federal Republic of Germany, the Netherlands, Portugal, Spain, Italy, Brazil and Greece.
- ✓ Some provisions of ‘the Universal Declaration of Human Rights’ and ‘the Red Cross Geneva Convention’ were also incorporated in the 1957 Penal Code of Ethiopia.
- ✓ The drafter also included a wide range of provisions that covered legal institutions that might arise in the future. New concepts used juridical, sociological and criminological, therefore developed into a homogenous penal code, which aimed at the prevention of crimes and rehabilitation of criminals. The object of criminal law should not be retributive from the outset, despite the fact that punishment will serve as deterrent of prospective offenders.
- ✓ The Fetha Negest, as well as the Penal Code of 1930, started from the presumption that criminals have to pay, i.e. they have to be penalized for the injury they would cause to the individuals and to society at large. The objective of punishment was, according to these laws in essence retributive. But, the draft penal code came up with new proposition with principal objective of that the prevention of crime and rehabilitation of criminals.
- ✓ After tiring exchange of arguments the draft was accepted. However, on the following points compromises had to be made:
 - i **Collective Punishment**
 - ✓ According to customary law, where offences had been committed by one or several persons, it was found impossible to ascertain which of the persons involved the criminal was.
 - ✓ As this traditional practice seemed not be in line with rule of law and human rights, the compromise formula that was reached **after a long debate** between the foreign experts and the Ethiopian members of the codification commission was that, *‘where an offence is committed by a group of persons, the persons who proved to have taken no part in the commission of the offence shall not be punished.’*
 - ii **Mutilation of Human Body as Punishment Abolished**
 - ✓ According to the old practice, habitual offenders were punished by mutilating the human body so as to give it the maximum deterrent effect. There was a general consensus not to incorporate this form of punishment. However,

flogging was to be inflicted on such offenders provided that it was medically ascertained that the life of the offender would not be endangered.

iii ‘Presumption of Innocence’ introduced

- ✓ In the past, the accused was required to prove his innocence. In modern penal legislation, however, the generally accepted principle is that the accused enjoys the presumption of innocence, according to which the burden of introducing evidence to prove the guilt of the accused is on the Prosecution. This is opposed to the previous principle of “presumption of guilt”. In addition to this, accused has the right to produce defense witnesses.

iv Rules Applicable to Young Offenders

- ✓ In the past, all offenders who were thought to have the capacity to discriminate between what is good and what is bad were brought before the regular courts. However, in the modern penal law infants are completely exonerated from criminal provisions. According to Article 52 of the Penal Code infancy is ‘the period extending from birth up to nine years.’ Infants are not deemed to be responsible for their acts under the law. The measures to be taken against such offenders should have curative, educational or corrective measures as may be necessary for their own good. Penalties and measures to be imposed on offenders between the ages of 9 and 15 years were those provided by Articles 161-173 of the Penal Code. Thus, young persons were not subjected to the ordinary penalties applicable to adults nor should they be kept in custody with adult offenders. For purposes of the criminal law, the age of majority for young persons is 16 years.

v Probation and Suspension of Sentences

- ✓ Previously, all forms of sentences were executed. But, penal legislation provides that certain offenders may under defined circumstances be granted release on probation or the sentence may be suspended for a fixed time.
- ✓ In accordance with the rationale of modern principles of criminal law, the Ethiopian Penal Code aims at not punishing the offender, but at rehabilitating and educating him/her.

vi The personal nature of criminal punishments and measures

- ✓ If a convicted person died before the execution of a sentence, there was, according to customary laws, the possibility of proceeding against his property or the property of his next of kin. This was not retained in the Penal Code of 1957. The principle is that, ‘crime is personal to the one who is found to have committed it’.

vii The Punishment for Burning of Crops (Arson)

- ✓ For the fact that, Ethiopian society is predominantly an agricultural society, severe penalties than other crimes are prescribed for offences relating to or committed on agricultural products (burning of crops or Arson).
- ✓ Additionally, **Jean Graven (drafter)**, also pinpointed the following areas where **new and old ideas have been reconciled**:
 - ♣ Capital punishment and corporal punishment (**flogging**) were maintained, but with all the necessary precautions as to the instance of application and the conditions of administration,
 - ♣ Pecuniary punishments particularly **confiscation of property** were made to be applicable in limited instances of serious crimes against the sovereign and the state,
 - ♣ The **principle of collective responsibility** for certain crimes involving tribes or anonymous criminals were made to rest on customary practices which had their own justification.
- ✓ The severe provisions on abduction and enslavement and the flexibility one sees with regard to adultery, concubine and illicit damage to property by stray animals of others are reflections of the changing modes of life of Ethiopia.
- ✓ The historical objective behind the enactment of the Penal Code of 1957 was to let it serve as a unifying force and as a machinery to enhance future development of the country the Penal Code of Ethiopia was promulgated on July 23, 1957 and came into force on May 5, 1958 and was in force until May 8th 2005.

E) The 1974 Revolution and Criminal Law

- ✓ Following the 1974 revolution, a "**revolutionary**" system of neighborhood justice emerged.
- ✓ It was difficult to distinguish between criminal acts and political offenses according to the definitions adopted in post-1974 revisions of the Penal Code.
- ✓ In November 1974, a proclamation which introduced Martial Law was introduced. The martial law set up a system of military tribunals empowered to impose the death penalty or long prison terms for several political offenses.
- ✓ The Proclamation applied the law retroactively to the old regime's officials. The revolutionary government these officials responsibility for famine deaths, corruption and mal-administration. Special three-member military tribunals sat in Addis Ababa and in each of the country's fourteen administrative regions.
- ✓ In July 1976, the government amended the Penal Code of 1957 to institute the **death penalty** for "**anti-revolutionary activities**" and "**economic crimes**". Investigation of political crimes came under the overall direction of the Revolutionary Operations Coordinating Committee in each *awraja*. In political cases, the courts waived search warrants required by the Criminal Procedure

Code. The government transferred jurisdiction from the military tribunals to *kebele* and peasant association tribunals. Political trials constituted the main business of these tribunals until 1978.

- ✓ Generally, the 1976 revision of the Penal Code empowered **association tribunals** to deal with **criminal offenses**.
- ✓ The revision limited the jurisdiction of association tribunals to their urban neighborhood or rural area.
- ✓ Elected magistrates, without formal legal training, conducted criminal trials. Procedures, precedents, and punishments varied widely from tribunal to tribunal, depending on the imperatives of the association involved.
- ✓ Peasant association tribunals accepted appeals at the Wereda (district) level. **Appellate decisions were final**. But decisions disputed between associations could be brought before peasant association courts at the Awraja level. In cities, Kebele tribunals were similarly organized in a three-tier system. Change of venue was arranged if a defendant committed an offense in another jurisdiction.
- ✓ The judicial system was designed to be **flexible**. Magistrates could decide not to hear a case if the defendant pleaded guilty to minor charges and made a public apology. Nonetheless, torture was sometimes used to compel suspects and witnesses to testify. Penalties imposed at the local association level included fines of up to 300 birr. The tribunals could determine the amount of compensation to be paid to victims. The tribunals could impose imprisonment for up to three months and hard labor for up to fifteen days.
- ✓ Association tribunals at the Awraja or Wereda level handled serious criminal cases. These tribunals were qualified to hand down higher sentences. Tribunal decisions were implemented through an association's public safety committee and were enforced by the local People's Protection Brigade. Without effective review of their actions, tribunals were known to order indefinite jailing.
- ✓ The 1976 Special Penal Code was further elaborated in 1981 and created new categories of economic crimes. The list included:
 - ♣ Hoarding,
 - ♣ Overcharging and
 - ♣ Interfering with the distribution of consumer commodities.
 - ♣ More serious offenses involved:
 - Engaging in sabotage at the work place or of agricultural production,
 - Conspiring to confuse work force members and
 - Destroying vehicles and public property.
- ✓ Security sections of the Revolutionary Operations Coordinating Committee investigated **economic crimes** at the Awraja level and **enforced land reform provisions** through the peasant associations.

- ✓ These committees were empowered to charge suspects and held them for trial before local tribunals. The **Penalties could entail:**
 - ♣ Confiscation of property,
 - ♣ Long prison term or
 - ♣ Death sentence.
- F) Special Penal Code of 1981**
- ✓ This amended Code included offenses against the government and the head of state. **For example,**
 - Crimes against the state's independence and
 - Crimes against the state's territorial integrity,
 - Crimes against the state's armed uprising, and
 - Crimes against the state's commission of "counterrevolutionary" acts.
- ✓ **It also included** breach of trust by public officials and economic offenses, grain hoarding, illegal currency transactions, and corruption; and abuse of authority, including "**improper or brutal**" treatment of a prisoner, unlawful detention of a prisoner, and creating or failing to control famine.
- ✓ It also abolished the Special Military Courts.
- ✓ The Code **created new Special Courts** to try offenses under the Amended Special Penal Code. Special Courts consisted of **three civilian judges** and applied the existing **Criminal and Civil Procedure Codes**. Defendants had the **right to legal representation and to appeal to a Special Appeal Court.**

2. THE CRIMINAL CODE OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA (FDRE Criminal Code)

- ☞ **What are the factors that necessitated coming with FDRE Criminal Code?**
- ➡ **The following are some factors necessitated the revision of the Penal Law of Ethiopia:**

1 To Incorporate the Modern Legal Concepts

- ✓ Since the 1957 Penal Code came into enforcement several radical political, economic and social changes have taken place in Ethiopia. Among the major factors that brought the changes are:
 - ♣ Recognition of modern legal concepts by the Constitution **and**
 - ♣ International Agreements ratified by Ethiopia.
- ✓ The important phenomena that have been recognized in the Country in the **recent past are:**
 - The equality between religions, nations, nationalities and peoples,
 - The democratic rights and freedoms of citizens and residents,
 - The Human rights,
 - The rights of social groups like women and Children.

2 To Fill in the Lacunae

- ✓ The 1957 Penal Code **fails** to properly address some of the criminal behavior arising out of advances in technology, the complexities of modern life as well as sufferings caused by reason of harmful traditional practices. **For instance**,
 - ♣ The High Jacking of aircraft,
 - ♣ Money laundering,
 - ♣ Crimes related to corruption,
 - ♣ Crimes related to drugs,
 - ♣ Grave injuries and sufferings caused to women and children by reason of harmful traditional practices.
- ✓ It is obvious that the Constitution guarantees respect for the cultures of peoples, but, does not intend to support those practices which are scientifically proved to be harmful.
- ✓ It is the responsibility of the legislature to adopt legislations that educate as well as guide the public to discontinue such harmful traditional practices.

3 To Adopt a Comprehensive Criminal Code

- ✓ It is desirable to adopt a comprehensive Criminal Code by putting together various Criminal provisions in the Negarit Gazeta.
- ✓ Since previous codes in respect of similar matters neglects equality among citizens. The Comprehensive FDRE Criminal Code is intended to put an end to such practice.

4 Punishments for Certain Offences increased

- ✓ Some crimes were recognized as punishable both under the 1957 penal code and the FDRE Criminal Code. However, under current criminal code punishments in respect of crimes such as, **Rape** and **Aggravated Theft** have been **increased**.

5 Matters Concerning the Determination of Sentence Revised

- ✓ In the case of method by which the courts can pass similar punishments on similar cases, some major changes have been made in the provisions of the Code. Accordingly, Provisions of the Penal Code that used to make sentencing complicated and difficult have been amended.
- ✓ Thus, Provisions have been inserted which enables the courts to pass the appropriate penalty for each case by carefully examining from the lightest to the severe most punishment. Due to this, Article 88(4) of the Criminal Code has been introduced requiring the Federal Supreme Court to issue sentencing manual to ensure and control the correctness and uniformity of sentencing.

6 Purpose of criminal law and objectives of punishment redefined

- ✓ The purpose and objectives of Criminal Law redefined under the criminal code. Consequently, the purpose of it was redefined as to preserve the peace and

security with having the objectives of preventing the commission of crimes and a major means of preventing the commission of crime as punishment.

- ✓ **Punishment** can **deter wrongdoers** from committing other crimes; it can also serve as a warning to prospective wrongdoers. Even though imprisonment and death are enforced in respect to certain crimes, the main objective is to prevent wrongdoers temporarily or permanently from committing further crimes against society. In such cases with the **exception** of the **death sentence** even criminals sentenced to life imprisonment can be released on **parole** before serving the whole term. In certain instances, convicts can be released on **probation** without enforcement of the sentence pronounced.
- ✓ This helps wrongdoers to lead a peaceful life and it indicates the major place which the Criminal Law has allocated for their rehabilitation. The fact that wrongdoers, instead of being made to suffer while in prison, take vocational training and participate in academic education, which would benefit them upon their release, reaffirms the great concern envisaged by the Criminal Code about the reform of criminals.
- ✓ The above express provisions in the new Code are included with intention that the Courts should on passing sentence take into account the purpose of the Criminal Law and different aims (goals) of punishment.

Scheme of the FDRE Criminal Code

- ✓ The FDRE Criminal Code has incorporated the Ethiopian Criminal law systematically, coherently and comprehensively. The Code is organized into three main parts:
 - i. General part,
 - ii. Special Part and
 - iii. Petty Offence

Relation between General and Special Parts of the Code

- ✓ The ‘General Part’ of the Criminal Code sets out the general principles of liability which are common to all serious crimes. This part explains what is meant by:
 - ♣ A criminal intention,
 - ♣ Negligence,
 - ♣ Imprisonment,
 - ♣ Probation, etc.
- ✓ The ‘Special Part’ describes the various acts which are deemed to be ‘criminal’ and lays down the penalties applicable to them.
 - ✚ It defines the essential elements of each crime such as murder, theft, robbery, etc., and prescribes appropriate punishments for each of such crimes. However, the said penalties cannot be ordered unless the conditions

prescribed by the General Part with respect to liability to punishment are fulfilled.

- ✓ In other words, the Special Part does not operate by itself, but has to be considered together with the General Part. This means, a person who behaves in a manner contrary to provisions of the Special Part is not automatically punishable. He/she shall be punishable only where his conduct is found guilty in accordance with the general principles of criminal liability laid down in the General Part of the Code.
- ✓ Furthermore, even after the liability to punishment is established, mechanical imposition of sentence is not what is expected of a Judge, simply by referring to the punishment mentioned in the pertinent Article of the Special Part. Those who administer justice are in fact dealing with ‘criminals’ rather than ‘crimes’ with ‘human beings’ rather than with ‘cases’. They are expected to individualize their decisions. To this end, they must bear in mind the provisions of the General Part; since these provisions more than those of Special Part will enable them to arrive at a decision truly reflecting the circumstances of each individual case.
- ✓ Moreover, as any action taken under the law must serve the purposes of law, those who administer justice will have to satisfy themselves that their decisions are really capable of achieving these purposes as defined in the General Part. In other words “punishments have to be tailor-made” for each and every criminal having regard to his personal circumstances and other relevant matters in order to bring him back to the society as a law abiding citizen.
- ✓ Petty offence parts are dealing with minor offences not punishable under criminal law.

Classification of Crimes under the Criminal Code

1. Classification based on the “*Seriousness of the Crimes*”

- ✓ Crimes are generally classified into different categories according to varying degrees of seriousness. For example, English Law classifies offences into treason, felony and misdemeanors.
 - i Anything done in the nature of an attempt to displace the governing body is classed as Treason. This crime finds its place in the penal codes of every country ‘as a crime against the state’.
 - ii Felony’ is a serious criminal offence punishable by at least one year imprisonment.
 - iii “Misdemeanor’ is a criminal offence which is less serious than a felony, and is usually punishable by no more than a year in a country jail, and /or a fine, restitution or some other minor penalty. These include all offences which are not felonies and treasons.

- ✓ The Criminal Code of FDRE has not adopted such a ‘tripartite’ distinction but simply classifies crimes into various titles on the basis of content rather than on the scale of punishment. Although an explicit distinction is not made between crimes, the range of punishment implies the gravity of crimes.
- ✓ “Crimes of very grave nature” are punishable with ‘rigorous imprisonment’ in Central Prisons for a period of one to twenty five years (1-25 years) as recognized under Article 108 of the Criminal Code.
- ✓ “A crime of not very serious nature” may subject to special provisions that may face ‘simple imprisonment’ for a term of ten days to three years (from 10 days to 3 years) which is stipulated under Article 106 of criminal code, subject to Special provisions that may extend the period beyond three years up to 5 years.
- ✓ “Petty offences” on the other hand, are punishable with fine or arrest for a relatively shorter period of one day to three months (1 day to 3 months) as provided under Article 747 of criminal code, subject to certain aggravating exceptions based on Article 767-769 of the code.
- ✓ The three variations in the deprivation of liberty , namely, ‘rigorous imprisonment’, ‘simple imprisonment’ and ‘arrest’ apparently denote a de facto classification into ‘very serious crimes’, ‘not very serious crimes, and ‘petty offences’.

2. Classification based On the “Subject Matter” Of the Crime

- ✓ The object of the criminal law is to protect the “interests” of the state, the community and the interests of the individual in order to ensure peace and security .Therefore, crimes against such interests are kept under various titles of the criminal code.
- ✓ The classification mainly makes distinction between “crimes” in Part II (special part) of the Code and ‘Petty offences’ embodied in Part III of the Code entitled ‘the Code of Petty Offences.
- ✓ Further, the Special Part of the Code organizes the various interests to be protected in the following order:
 - Interests of the ‘State’: Crimes against state or against National or international interests, (Articles 237-374)
 - Interests of the ‘Community’: Crimes against the Public Interests or the Community (Articles 378–537)
 - Interests of the ‘Individual’: Crimes against the individuals and the family (Articles 538-733)
- ❖ The Petty Offences. A ‘petty offence’ is:
 - ✓ An infringement of a mandatory or
 - ✓ Prohibitory provision of a law or
 - ✓ Regulation issued by a competent authority or

- ✓ A minor offence which is not punishable under the Criminal Law.
 - ✓ Such acts or omissions are made punishable under the Petty Code.
- ☞ The policy underlying the classification of crimes under the FDRE Criminal Code can be better understood from the following observation made by the drafter of the 1957 Penal Code (Jean Graven) in this regard... “... abandoning the famous ‘tripartite division’ of the offences according to their supposedly different natures into felonies, misdemeanors and petty offences, the new Ethiopian law has deliberately enthroned the identity of the nature of the offences retained in the Penal Code, all of them simply called “offences”, and the unity of all general principles which are applicable to them.
- ☞ On the other hand, it has detached from them the minor, formal and petty offences, which form the subject matter of the Code of Petty Offences. Here the natural distinction between evidently different fields is instantly perceptible...”

CHAPTER THREE: BASIC PRINCIPLES OF CRIMINAL LAW

- ☞ Criminal law unlike other laws has certain features. There are many fundamental principles of criminal law. Some of these features are principle of legality and principle of equality stated under Article 2 and 4 of FDRE Criminal Code respectively.

A. Principle of Legality

- ❖ This principle is one of the fundamental criminal law principles.
- ❖ It is claimed that there will be no fair play in the field of criminal law in default of the principle of legality. Thus, this principle is enshrined in almost all criminal laws.
- ❖ So, according to Article 2 of Criminal Code principle of legality,
 - ♣ If there is no law that defines an act or omission to be an offence there is no crime and
 - ♣ If there is no crime, there is no punishment.
- ❖ This principle has the following important ingredients or sub-principles.
 1. **No law, no offence** (“*Nullum crimen sine lege*”)
- ❖ No person shall be penalized for an act or omission which does not constitute a crime at the time of doing or omitting to do it, respectively.
- ❖ This has to do with giving due notice about criminal conducts before imposing penalties when they are performed or omitted, as the case may be.
- ✓ For example, prostitution is not a crime under the Criminal Code. Thus, current prostitutes should not be punished in accordance with the law to be enacted subsequently to penalize the conduct.

- ❖ This element of the principle of legality is embodied in Article 2(1) of the Criminal Code, because when it states that *criminal law specifies the various crimes*, it means an act which is not specified as a crime is not a crime.
- ❖ “There are no offences other than those which are expressly provided by law”.
 - ☞ ‘Criminal Law’ within the meaning of Article 2 is not only the Penal Code, but any law duly passed and published, which contains penal Provisions.
- ❖ Thus, no person may be deemed to have been committed an offence if his act is not in violation of ‘Criminal Law’ in force at the time of its commission, at the place where the act is performed.
- ❖ The principle of legality is also recognized by the FDRE Constitution under Article 22.
- ❖ *In short*, there should be a recognition or declaration for an act by law as a crime for which people are going to be punished. However, not knowing, reading the law or hearing about the law *never saves* someone from being liable for the commission or omission of an act already recognized or declared by law to be a crime.

2. No law (no crime), no punishment (“*nulla poena sine lege*”)

- ✓ No person shall be subject to penalty that is not recognized at the time he commits the criminal act. This means, he should be given the penalty prescribed by law at the time of violating the law, because it is this penalty that the criminal assumes as a risk at the time of violating the law.
- ✓ This sub-principle of the principle of legality is also enshrined in the Criminal Code, Article 2(1) of criminal code, which provides that *criminal law specifies the penalties and measures applicable to criminals*.
- ✓ The FDRE Constitution also recognizes the same principle under Article 22. Accordingly, *if a given penalty or measure is not specified at the time of committing a crime, then, it cannot be applied, at least as a rule*.
- ✓ **However**, we can apply a penalty or measure that is not stipulated at the time of committing a crime if it favours the criminal.

3. No offence by analogy (No penalty by analogy)

- ✓ No one can create offences or punishment by interpretation of analogy.
- ✓ Analogy means when someone or judge treat a given conduct as a crime which is not expressly declared to be so by criminal law merely, because it resembles another conduct declared to be a crime.
- ✓ The principle of legality goes farther and prohibits interpretation by analogy and creating an offence in the same article. Because, if one is allowed to interpret by analogy,
 - i He may end up defeating the whole purposes of principle of legality and

- ii He may be creating or making an act unmentioned in the criminal law to be a crime.
- ♣ Example 1, FDRE Criminal Code under its Article 565 criminalizes *female circumcision*. So, if one is to follow the *principle of analogy*, it is possible to treat *male circumcision* as a crime, too.
- ♣ Example 2, Articles 654-655 of the FDRE Criminal Code criminalize sexual act or act corresponding to sexual act between relatives whose marriage is forbidden on grounds of *blood relationship (consanguinity)*. By following the principle of analogy, it is possible to extend the application of these articles to relatives whose marriage is forbidden on grounds of *affinity*.
- ✓ However, such practice is prohibited. A judge has to apply the existing law as it is in as long:
 - ♣ He should not include conducts excluded by the law-maker into the realm of criminal law under the guise of interpretation,
 - ♣ But, a judge can interpret the law when there is doubt or absurdity in applying the law as it is.
- ✓ This ingredient of the principle of legality is regulated under **Article 2(2) and (3)** of the Criminal Code which prohibits not only the creation of offences by analogy, but also the creation of penalties by analogy.
- ✓ **It stipulates that:**
 - An act or omission not regarded as a crime should not be treated as a crime.
 - Different penalty than the ones provided by the law cannot be imposed.
 - ♣ For example, Article 621 of the Criminal Code criminalizes the compulsion of a man by a woman to submit to sexual intercourse. This means, the provision regulates raping a man. So, the idea is courts cannot impose the penalty provided for raping a woman (Article 620) merely because under both provisions the conduct regulated is the same (rape) **but** the one provided for raping a man (Article 621). If Article 620 is applied, the judge is said to have created penalty by analogy.

4. Interpretation of Criminal law

- ❖ Normally, criminal law is drafted in a common man to understand what is permitted and what is prohibited, because there is a possibility of going to jail if mistake is made.
- ❖ Despite this, there are instances where the language of the law is not clear and necessitates interpretation by courts.
- ❖ So, the fact that courts are prohibited from creating offences or penalties by analogy does not mean that they are not free to interpret the law. For instance, under Article 2(4) of criminal code, this power of courts is explicitly recopied.

The provision states that in **case doubt** exists courts are free to interpret the law by relying on the rules of interpretation.

- ❖ From the different rules of interpretation, Article 2(4) of the criminal code mentions only interpretation in accordance with the legislative intent. This is probably so because it is the intention of the legislature that is a law. At any rate, in case this rule fails to solve the problem of interpretation, other rules of interpretation rule of strict construction of criminal law should be used.
- ❖ The rule strict construction of interpretation which is unique to criminal law. Criminal law, unlike other laws, should be interpreted strictly. This does not, however, mean that judges should narrow down the scope of criminal law through interpretation. What it means is that if the meaning of a given criminal provision is the *equivocation* cannot be avoided by using the other rules of interpretation, that provision should be interpreted in favour of the suspect or to a criminal.
- ❖ As such, the rule of strict construction is a rule of last resort.
 - ♣ For example 1, Article 621: Compelling a man to sexual intercourse:
 - ✓ A woman who compels a man to sexual intercourse with herself is punishable with rigorous imprisonment not exceeding five years.
 - ♣ What would happen if a woman compels her husband to submit to sexual intercourse?
 - ✓ The article does not say out of wedlock, hence, it is possible to argue that marital rape on a man is recognized.
 - ✓ On the other hand, it can be argued that since the law-maker has not criminalized compelling one's wife, the same intention was (and has to be) held in relation to Article 621 since women have the right to get equal protection with men as stipulated under Article 4 of the Criminal Code and also Article 25 of the FDRE Constitution.
 - ✓ So, in cases where difficulties like this arise, the principle of strict construction of criminal law commands the interpretation of the law in favor of the suspect. This means, Article 621 should be interpreted to exclude marital rape for a woman compelling her husband to submit to sexual intercourse.
 - ♣ Example 2, Article 585(1) of the English version of the Code provides that the crime of illegal restraint may entail **3 years** imprisonment while the Amharic version says the penalty for this crime cannot exceed **3 months**. In this case the rule of strict construction should not apply. This is because when disparity between Amharic and English in Ethiopian legal system the Amharic version prevails over the English one. So this can be taken as another rule of interpretation unique to Ethiopia.

5. The principle of prohibition of double jeopardy(*Non bis in idem*)

- ✓ Prohibition of double jeopardy means that no person shall be punished or tried again for an offence for which he has already been convicted or acquitted in accordance with Article 2(5) of the criminal law and Article 23 of the FDRE constitution.
- ✓ In the criminal law, double jeopardy is strictly prohibited, if a person is tried and punished for his criminal conduct he will not be subjected to subsequent trial and punishment for the same criminal conduct.
- ✓ So, there are two prohibitions in this principle:
 - i Prohibition of double trial and
 - ii Prohibition of double punishment.
- ☞ There are certain elements or conditions for an act to say double jeopardy.
 - The first element is that the crime must be one and the same, and must be committed in the same place and time.
 - It must be remembered that a single act can give rise to 2 or more crimes at the same time. For example, Incest which comprises 2 types of crimes, raping and having sexual relationship with relatives can be taken as case.
 - The second element is that the decision must be final.
 - The decision must be final does not mean that the decision is not appealable.
 - Withdrawal of case is the condition in which after the public prosecutor started proceedings against a party, he may withdraw the case owing to lack of evidences or absence of witnesses by applying and getting permission of the court. And the accused party may be set free. But, the decision is not final. After a certain period of time, if the public prosecutor is able to furnish sufficient evidences and witnesses, the case may **revive**. In case of this, jeopardy cannot be invoked.
 - The third point is that jeopardy does not prohibit 2 types of punishment at the same time. For instance, a person who committed the crime of theft may be punished with imprisonment and fine.
 - The fourth point is that double jeopardy does not prohibit administrative or civil measures. For instance, if a successor attempts to facilitate the death of the succeeding person, he may be penalized for his committing an attempt to homicide in a criminal law and he may also be deprived of his right to succeed the deceased in civil procedure. A person may be accused due to procedural error or false accusation.

Case 1

- ☞ Let's imagine that Dandi and Saqata are quarrelsome with each other. Ato Dandi was threatening Saqata either to kill him or burn his residence into ashes.

Suddenly Saqata disappeared from his surroundings without leaving any information as to his disappearance. Dandi was, then, suspected of killing Saqata. The public prosecutor consolidated his evidences and charged Dandi. Then the court convinced by the public prosecutor and convicted Dandi of 5 years of imprisonment. Dandi served his punishment. Then, he (Dandi) came across Saqata and killed him.

- i Can the public prosecutor charge Dandi by a crime of committing homicide?
- ii If yes, can it be said as jeopardy?

☞ It should be known that Article 2(5) of the Code has an exception. Because Article 16 of the Code stipulates that a person who is subject to Ethiopia's principal jurisdiction and is tried and sentenced in a foreign country may be tried and sentenced *again* on the same charge, if he is found in Ethiopia or extradited to it.

- This means, his acquittal or conviction in a foreign country is irrelevant for new trial or sentence in Ethiopia. But the punishment served abroad will be taken into account to fix the extent of sentence to be served in Ethiopia. If the sentence served abroad is greater than what he would have served had he been tried and convicted in Ethiopia, he will be released. If, however, lesser sentence was served abroad, he would be made to serve the balance. What this, in effect means is that the double trial in Ethiopia is meant only to check whether or not the sentence imposed by a foreign court is adequate to achieve the purpose of our criminal law.
- ✓ So there will be no double punishment resulting from the double trial but possibly the extension of the already imposed penalty.
- ✓ However, if the person tried and punished abroad is a foreigner, he cannot be tried and sentenced to punishment *again*, if he is found in Ethiopia. His conviction or acquittal will be taken into account.
- ✓ Besides, according to Article 12(2) of the criminal code pardon, amnesty and period of limitation under the foreign law should be considered in his favor. So, we have a sort of exception to an exception.

6. Non-retroactivity of Criminal Law

☞ The principle of non-retroactivity of criminal law is meant to answer the question that may arise in relation to the scope of application of a new criminal law.

- ☞ The principle states that any criminal law is prospective in nature. Accordingly,
- It cannot be applied retroactively; that is, it does not apply to acts that are committed or omitted before its coming into effect.
 - This principle is corollary to the principle of legality; no law, no offence.

- ☞ The principle of non-retroactivity of criminal law is one of the principles of criminal law the FDRE Constitution has recognized. Under Article 22, the Constitution prohibits the application of criminal law retroactively.
- ☞ The criminal Code also reiterates the same principle under Article 5. Accordingly, a conduct is declared to be a crime by the Criminal Code came into force, it will not be penalized.
- ☞ For example 1, under the 1957 Penal Code, raping a man was not recognized as a crime. But under the Criminal Code this act is a crime. So, if a woman raped a man before the coming into force of the Code, she will not be punished because her case will be seen in the light of the 1957 Penal Code, which did not penalize the act.
- ☞ Example 2, the same is true in relation to computer crimes committed before the coming into force of the Criminal Code.
- ❖ However, the principle of non-retroactivity of criminal law has got many exceptions. That is to say, there are circumstances under which criminal law may be applied retrospectively. Some of the important exceptions are the following.
 - If an act was a crime under the 1957 Penal Code, while it is not declared to be so under the Code, it will not be penalized. If, however, sentence is passed and it is being served with respect to this crime, the execution of the penalty will be discontinued.
- ✓ For example, under the 1957 Penal Code, termination of pregnancy on account of rape or incest was a crime. The existence of rape or incest would only mitigate the penalty to be imposed on the accused. According to the Criminal Code, however, termination of pregnancy by a recognized medical institution within the period permitted by the profession is permitted where the woman is raped or subjected to incest. So, if a doctor of any recognized medical institution terminated pregnancy within the time limit permitted by the profession before the coming into force of the Criminal Code, he would not be punished. If he is being tried, the trial should be discontinued. If he is in a prison, he should be released.
 - The second exception comes into picture where the criminal act performed under the Penal Code of 1957 is declared to be a crime under the Criminal Code, too. In this case, the Criminal Code should apply only if it provides for lesser penalty. However, the Criminal Code will not be applied if it provides for a severe penalty.
- ✓ For example, a rapist under the 1957 Penal Code should be tried thereunder. Because the 1957 Penal Code provides for a relatively lenient penalty which would, under no circumstance, exceed fifteen years imprisonment Under the

Criminal Code, on the other hand, there is a possibility of sentencing a rapist to life imprisonment. So, since the application of the Criminal Code will not benefit the rapist, it should not apply to his case.

- ❖ *In short*, the principle of non-retroactivity of criminal law may be derogated from if the application of the new criminal law either at the time of *charging*, *trial*, or *executing sentence* is favorable to the offender. This exception is founded on the public policy that any person should get benefit from the betterment made by the law-maker.
- ❖ At this juncture, there are some very important points which are worth noting. Firstly, the commission of certain crimes may take long time. For example, the commission of the crimes of adultery (Article 652), illegal restraint (Article 585), misuse of public property (Article 477), and culpable infringement of building rules (Article 501) may start at a given time and consummated some time later. If the criminal law that exists at the time the commission of the crime commenced is in force when the commission of the crimes is consummated, there will not be any problem. Any confusion as to the applicable law will be dispelled by the application of the principle of non-retroactivity of criminal law.
- ❖ But, problem arises when the law that was in force at the time the commission of the crime commenced is no more in force at the time the commission of the crime is consummated.
 - ☞ Which law should apply?
 - ☞ It should be known that what is performed or omitted violates both laws but the crime is only one?
 - ☞ For instance, if a person starts committing adultery in September 11, 1997 E.C. and continued doing the act up to September 11, 1998 E.C., will it be the 1957 Penal Code or the Criminal Code that govern his case?

B. The Principle of Equality Before Law

- ☞ The principle of equality is recognized under Article 4 of the FDRE Criminal Code. The principle, as applicable to criminal field, means two things:
 - 1) All individuals may claim the same legal protection if they have been injured by a crime, and
 - 2) All persons who have come into conflict with the law must be treated equally and tried exclusively in accordance with the provisions of the law they have infringed, regardless of their race, religion, social position or other circumstances of a similar nature which do not affect their degree of guilt.

Exceptions By Virtue Of Recognized Immunities:

- ✓ The principle of equality before the law does not prohibit making certain differences in the treatment of criminals. Article 4 of the Criminal Code specifically mention three exceptions to the principle of equality:
 - Immunities sanctioned by Public International law,
 - Immunities sanctioned by Constitutional law, and
 - Requirements of individualization of Criminal Justice.

1. Immunities sanctioned by Public International Law

- ✓ Article 4 of the Criminal Code recognizes the existence of immunities as are enjoyed, in pursuance of Public International law, by certain categories of foreign officials who may commit a crime while in Ethiopia.
- ✓ These officials are protected from criminal prosecutions by virtue of the so-called diplomatic immunities founded on international usages of mutual courtesy.
- ✓ “Persons who partake in the functions which are to a greater or lesser extent of “diplomatic character” enjoy the same immunity as the Head of the State which they represent and are for all juridical purposes deemed to be still in their own country and not in the country in which they carry out their official duties”.
- ✓ These persons are, accordingly, considered not to be subject to the laws of the state of residence or sojourn and may, therefore, not be prosecuted and punished in that state.
- ✓ In fact this is not an absolute immunity, properly speaking, as it is immunity from prosecution in Ethiopia only. Foreign diplomats who violate the laws of Ethiopia are not punishable in Ethiopia under Ethiopian law, but they are naturally liable to prosecution and punishment in their own country under their national law.
- ✓ The effect of diplomatic immunity is then merely to create an exception to the general principle of the territorial application of the law, as the criminal is not punishable at the place where he committed the crime under the law which he violated Article 11(2) of criminal code and Article 39(1) (c) of Criminal Procedure Code.
- ✓ The immunities under the principles of International Law extend to the following:
 - Persons Enjoying Diplomatic Immunities:
- ✓ Article 4 of the Criminal Code does not specify the persons who enjoy diplomatic immunity. Generally speaking, this privilege attaches to the following classes of persons:
 - i Foreign Sovereigns

- ii Ambassadors and Diplomats: Ambassadors, their families, secretaries, messengers and servants also enjoy the same immunity as the sovereign or the state which they represent.
- 2. Immunities sanctioned by the Ethiopian Constitution(FDRE Constitution)
 - ☞ Articles, 54 (5) & (6) and 63 of the FDRE Constitution declare immunities to the ‘Members of the House of People’s Representatives’ and the ‘Members of the House of the Federation’ respectively.
 - ☞ The Members of the Houses of the Federation cannot be arrested or prosecuted without the permission of the House concerned, **except** in the case of flagrante delicto.
 - ☞ The effects of such immunities are specified in Article 39(1) (c) and 130 (2) (e) of the Criminal Procedure Code.
- 3. Requirements of Individualization of Criminal Justice
 - ☞ Article 88(2) of the Criminal Code, incorporates the fundamental principle that, ‘the penalty shall be determined according to the degree of individual guilt’, having regard to all the circumstances of the case and not only to the material seriousness of the crime.
 - ☞ The necessity of individualizing the penalty renders it inevitable that certain differences be made in the treatment of criminals, since the degree of guilt depends on circumstances which may be purely personal to the criminal, such as his age, mental condition or antecedents.
 - Special Treatment of Women, Young Persons and the Feeble Minded**
 - ☞ The expressions ‘special circumstances of the criminal’ and ‘age of the criminal’ used in the second paragraph of Article 4 make room for differential treatment of women, children and the mentally abnormal criminals.
 - ☞ In case of women, the biological factors sometimes pose a serious concern while applying the law uniformly. For example, Article 119 provides for suspension of death sentence passed on a pregnant woman, Article 120 (1) of the Criminal Code provides for commutation of death sentence passed on a pregnant woman and Article 110(1), which provides for segregation of prisoners.
 - ☞ First, infants, children under the age of ‘9 years’ are deemed to be not criminally responsible and they are not punishable under the Code (Article 52).
 - ☞ The children between 9 and 15 years fall under the second group who are referred to as ‘the young persons’ under Article 53 of criminal code.
 - ☞ The third group of young criminals, as per Article 56 falls between 15 and 18 years. In criminal law 15 years is the age of full responsibility and they can be tried under the ordinary provisions of the Code.

- ☞ Feeble minded people are the other group of criminals who deserve special treatment. Articles 48 and 49 lay down the principles relating to the negation of the moral ingredient in the acts committed by them and declare that they are irresponsible and thus they cannot be exposed to criminal liability.
- ☞ However, since they proved to be dangerous by causing harmful results to others they cannot be simply released freely in to the open society. Once their irresponsibility is duly proved in the Court of law the Court orders such appropriate treatment, correction or protection as are provided by Articles 129-131 of the Criminal Code. Directions are given in these provisions for the confinement and treatment of irresponsible criminals.

CHAPTER FOUR: JURISDICTION UNDER THE ETHIOPIAN CRIMINAL CODE **(Article 12-22 of Criminal Code)**

Definition of Jurisdiction

- ✓ ‘Jurisdiction’ means “the legal competence of a particular court to hear a certain type or class of cases”. When it relates to the application of the law as to a place, jurisdiction implies “geographical area covered by a particular court or legal system”.
- ✓ The provisions of the Criminal Code relating to jurisdiction are intended to determine the scope of application of Ethiopian Criminal Law by Ethiopian Courts and to prevent conflicts of jurisdiction. The conflicts of jurisdiction might arise when:
 - ♣ Different courts decline to try a crime (there is the possibility of a criminal escaping punishment), or
 - ♣ Different courts claim to have jurisdiction on the same crime (criminal might be exposed to “double jeopardy”).
- ☞ The conflicts of jurisdiction might arise at different levels:
 - 1) Conflicts of Jurisdiction at National level
 - ♣ Conflicts that arise between Ethiopian Criminal courts,
 - ♣ Settled in accordance with Articles 99-107 of the Criminal Procedure Code.
 - 2) Conflicts of Jurisdiction at International level
 - ♣ Conflicts arise between an Ethiopian court and a foreign court,
 - ♣ Can be settled in accordance with Articles 11-22 of the Criminal Code.

Fundamental Principles of Application of Jurisdiction

1. The Principle of Territoriality (Article 11 of criminal code)
 - ✓ The courts of the place where the crime is committed may exercise jurisdiction has received universal recognition.

- ✓ All crimes committed on Ethiopian territory fall within the jurisdiction of Ethiopian Courts.
- 2. The Principle of Quasi-Territoriality or the Protective or Security Principle (Article 13 of Criminal Code)
 - ✓ All states assume jurisdiction over aliens for acts done abroad which affect the security of the state, a concept which takes in a variety of political crimes, but is not necessarily confined to political acts.
 - ✓ Certain specific crimes directed against Ethiopia to be tried in Ethiopia even though they have not been committed on Ethiopian territory.
- 3. The Principle of Active Personality or the Nationality Principle (Articles Arts. 14, 15, (2) and 18 (1))
 - ✓ Nationality, as a mark of allegiance and aspect of sovereignty, is also generally recognized as a basis for jurisdiction over extra-territorial acts.
 - ✓ Crimes committed in foreign countries by Ethiopian citizens may be tried in Ethiopia.
 - ✓ Territorial and nationality principles and of dual nationality create parallel jurisdictions and the possible double jeopardy, many states place limitations on the nationality principle and are often confined to serious crimes.
- 4. The Principle of Passive Personality or the Passive Nationality Principle
 - ❖ Principal Jurisdiction (Article 17 (1) of Criminal Code)
 - ✓ Aliens may be punished for acts abroad harmful to the nationals of the forum.
 - ✓ Some *crimes committed in foreign countries* against Ethiopian citizens may be tried in Ethiopia.
- 5. The Principle of Universality or the Principle of Universal Jurisdiction (Article 18 of Criminal Code)
 - ✓ Allowing jurisdiction over acts of non-nationals where the circumstances, including the nature of crime, justify the repression of some types of crimes as matter of *international public policy*.
 - ✓ **Eg.** High jacking crime.
- 6. Crimes Under International Law (Article 17 and 18(2) of Criminal Code)
 - Application of the Criminal Code as To Place
 - ☞ The jurisdiction of the Ethiopian Criminal Code governed as the following:
 - A. Principal Jurisdiction**
 - ✓ The Criminal Courts of Ethiopia have principal jurisdiction by Articles 11, 12, 13, 14 and 15(2) of criminal code.
 - ✓ These courts having principal jurisdiction is that they are entitled to try a criminal even though he may also be or has already been tried in a foreign country for the same offence.

- ✓ The principal jurisdiction of the Ethiopia Criminal Code is applicable both *territorially* and *extra-territorially*.

1. Territorial principle of Jurisdiction (Crimes committed on Ethiopian Territory)

- ✓ Crimes committed in a given country are triable by the courts and under the laws of such country which are known as ‘territorial laws’ of the country.
- ✓ According to Article 11 of Criminal Code when a crime is committed within the territory of Ethiopia, the code shall apply and the courts can try and punish irrespective of the fact that the person who had committed the crime is an Ethiopian national or a foreigner.
- ✓ For the Territorial Application of jurisdiction three conditions have to be fulfilled:
 - i. Crime committed by *any person*,
 - ✓ Any person include a citizen of Ethiopia as well as a non-citizen)
 - ✓ Article 11(2) provides exceptions to “any person” Ambassadors and Diplomats. Ambassadors and some other foreign diplomats are protected from the jurisdiction of the courts. They enjoy the same immunity as the sovereign of the state which they represent and supposed to be still living in his own country. This means, Ethiopian Embassies abroad enjoy the same immunity as they are considered as parts of territory of Ethiopia (Article 104 of Criminal Procedure Code).
 - ii. The crime must be punishable under the Ethiopian law
 - ✓ The principle of legality prohibits Ethiopian Courts from trying a person who does an act which is not declared unlawful by the territorial law of the country.
 - ✓ The act committed must be the one which has been declared as ‘unlawful’ by the Criminal Code of Ethiopia or any other Ethiopian law containing penal provisions.
 - iii. The crime must have been committed on the Ethiopian territory
 - ✓ The conditions may understand according to Article 25 of Criminal Code stated as “A crime is committed at the place where at the time when the criminal performed or failed to perform the act penalized by criminal law.
 - ✓ According to Article 11 (2) of criminal code national territory comprises the following elements:
 - i On the “land”: The land comprises not only that portion of the earth within the boundaries of Ethiopia, but by virtue of Article 104 of Criminal Procedure Code. The following places are deemed to form part of the Ethiopian territory:
 - a) Ethiopian embassies abroad,
 - b) Ships, flying Ethiopian flag, and
 - c) Aircrafts flying Ethiopian flag.

- ii In the “air”: the atmosphere above the land area of a country forms part of the National Territory of that country.
- iii Bodies of Water: Crimes committed in the bodies of water in the territory of Ethiopia and the vessels sailing in such waters are triable by the criminal Courts of Ethiopia.

Special case (Delegation): Crimes by Foreigners on the Ethiopian Territory (Article 12 Criminal Code)

- These cases relate to crimes committed by foreigners on Ethiopian Territory.
- By virtue of place of commission of the crime, the original jurisdiction lies with Ethiopian Criminal Courts. However, certain *practical impossibilities* might arise if the ‘criminal-foreigner’ flees and takes refuge in his country of origin. Article 12 deals with such problems:
 - ♣ Impossibility to “try” the accused-Foreigner in Ethiopia (Article 12(1))
 - ♣ Impossibility to ‘retry’ the accused- foreigner in Ethiopia (rules of ‘*non bis in idem*’) (Article 12(2)). This rule applies in the following instances:
 - When the criminal has been tried and convicted or acquitted abroad by judgment which has become final, and
 - When sentence passed abroad has been remitted by pardon or amnesty, or
 - If the prosecution or sentence has been barred by limitation.
- “Enforcement” of Punishment in Ethiopia (Article 12 (3) of criminal code
 - Article 12(3) applies to a case where the criminal has been sentenced in the country of refuge, but has escaped serving of the sentence either fully or partly. If he comes to Ethiopia without so serving the sentence, the punishment may be enforced in Ethiopia, except when the criminal cannot be made to serve in Ethiopia a penalty of a kind which does not exist in Ethiopian Law.

2. Extra-Territorial principle of principal Jurisdiction (Article 13-16)

- ✓ Article 13 of Criminal Code incorporates the so-called *principle of quasi-territoriality* which says that:

“When a crime is committed which infringes upon the fundamental rights or interests of a given state, the aggrieved state is entitled to protect itself and to punish the criminal under its own laws even though the crime has been committed in a foreign country and the criminal might already have been tried and sentenced in the other country”
- ✓ The Criminal Code envisages three specific instances that necessitate the extra-territorial application of its jurisdiction:
 - a **Crimes committed by any person in a foreign country against interests of Ethiopia, (Article 13 of Criminal Code),**

- ✓ The principle of quasi-territoriality is applicable only to the specified by Article 13, namely:
 - ♣ Crimes against the state of Ethiopia, Article, 238-260 of criminal code
 - ♣ Crimes against Ethiopian currency, Article, 355-374 of criminal code
- ✓ For the purposes of prosecution and punishment, the specific crimes mentioned above shall be treated as crimes committed on Ethiopian territory irrespective of the place where they have in fact been committed.
- ✓ Thus, they may be tried and punished in accordance with the provisions of Article 11 (Territorial jurisdiction) and Article 16 (Effect of foreign sentences). This means Article 13 of the Criminal Code operates on the following essentials:
 - ▶ The criminal must be found in Ethiopia,
 - ▶ If he is not found in Ethiopia, his extradition shall be requested in accordance with Article 11(3) of criminal code,
 - ▶ If the requisition for extradition is not granted
- ✓ But, the courts of the place of commission of such crimes retain their power to punish the criminal under their territorial law and the effect of Article 13 is merely that Ethiopia has principal jurisdiction concurrently with the state where the crime was committed.
 - b Crimes committed by an Ethiopian enjoying immunity in a foreign country Article 14 of Criminal Code,**
- ✓ Under this provision the principle of active personality or nationality principle provided.
- ✓ The provision applies to the following classes of persons:
 - ♣ Members of the Ethiopian Diplomatic and Consular Services,
 - ♣ Ethiopian Officials and Agents.
- ✓ They are who cannot be prosecuted at the place of commission of the crime by virtue of international principles of immunity. These persons can be brought under this article, provided the following conditions are fulfilled:
 - i. The crime must not be the one covered by Article 13 of Criminal Code.
 - ii. The crime must be the one which is punishable under the law of the country where it was committed,
 - iii. The crime must also be the one punishable under the Ethiopian Criminal Code, and
 - iv. If the crime falls under the ‘category of crimes’ which requires filing of ‘*formal complaint*’ for the institution of criminal proceedings, either under the foreign law or under the Criminal law of Ethiopia, such “**complaint**” should have been filed.

c Crimes committed by a Member of Ethiopian Defense Forces in a Foreign Country, Article 15 (2) of criminal code.

- ✓ Any crime under the ‘ordinary law’, committed by an Ethiopian soldier in a foreign country will be dealt with as though the criminal was not a member of the Ethiopian Defense Forces. Ethiopia will have subsidiary jurisdiction in these cases under the following circumstances:
 - If the criminal was able to escape and take refuge in Ethiopia prior to being tried in the foreign country, and
 - His/her extradition is not requested or the requisition for extradition is dismissed (Article 21(2)).
- ☞ It may be also that criminal was prosecuted in the country where he committed the crime. If he was acquitted or discharged, no action may be taken against him on his return to Ethiopia (Article 20(1)), except disciplinary action, where appropriate. But, if he/she was convicted and took refuge in Ethiopia in order to escape the enforcement of the sentence, the provisions of Article 20(2) are applicable.

B. Subsidiary Jurisdiction (Articles 17-20)

- ✓ Under Article 17 the principle of Passive Personality or Passive Nationality governed.
- ✓ “Subsidiary Jurisdiction” relates to crimes that do not directly and chiefly concern Ethiopia. These crimes also are committed extra-territorially.
- ✓ Under certain specified circumstances the Ethiopian Courts substitute foreign courts in trying criminals who ought to have been tried in a foreign country, **but** were not so tried. Therefore, it is also referred to as derivative jurisdiction as the Ethiopian Courts derive the jurisdiction from the Foreign Courts. This is to prevent a negative conflict of jurisdiction.
- ✓ The Subsidiary Jurisdiction applies to the following categories of crimes:
 - 1) Crimes committed by Members of the Defense Forces against the ‘ordinary law’ of a Foreign Country (Article 15(1))
 - 2) Crimes committed in a Foreign Country **“against international law or international crimes specified in Ethiopian legislation, or against an international treaty or convention to which Ethiopia has adhered** (Article 17(1) (a) of Criminal Code.
 - 3) Crimes committed in a Foreign Country “against public health and morals specified in Article 525, 599, 635, 636, 640 or 641 of Criminal Code. (Article 17(1) (b) of Criminal Code.
 - 4) Crimes committed abroad against an Ethiopian national or crimes committed by Ethiopians while abroad- if the crime is punishable under both the laws

and are grave enough to justify extradition. (Article 18(1)) of the Criminal Code.

Exemption of Conditions for application of the Subsidiary jurisdiction Article (19) (2):

- ✓ The conditions relating to filing of complaint or not being legally pardoned in the country of commission and the prosecution not being time barred under the *Sub* article (1) Clauses (a) & (b) need not necessarily be satisfied as regards the crimes committed against the International Law or Universal Order (Article 17 of Criminal Code) and in relation to the crimes by foreign nationals. However, the requirement under Article 19(1) (b) relating to the extradition has to be satisfied here too.
 - As per sub article (3) Prosecution under subsidiary jurisdiction shall be instituted only after consultation with the Minister of Justice.
 - The punishment to be imposed shall be the one which is more favorable to the accused when there is a disparity between the punishment prescribed under this code and that of the country of commission of the crime-sub. Article (4).

Effects of Foreign Sentences under Subsidiary Jurisdiction

- 1 Effect of “Discharge” and “Acquittal” Article 20 of Criminal Code:
 - ✓ In all cases where Ethiopian courts have ***subsidiary jurisdiction only*** (under Article 15(1), 17 and 18) of Criminal Code, the criminal cannot be tried and sentenced in Ethiopia, if he was regularly discharged or acquitted for the same act in a Foreign Country.
 - ✓ The phrase ‘*subsidiary jurisdiction only*’ in this article too is impliedly saying that if the crime is one over which the Ethiopian Courts have principal jurisdiction, it can be tried again.
- 2 Effect of “Conviction”:
 - ✓ If the criminal was tried and sentenced in a foreign country, but did not undergo punishment or served only part of the punishment in the other country, the same may be enforced in Ethiopia.
 - ✓ The total punishment in case where it has not been served at all, or the remaining part where only part of the sentence has been served in the Foreign Country, may be enforced here in Ethiopia if it is not barred by limitation.
 - ✓ The enforcement shall be according to the forms prescribed in this code.
 - ✓ The provisions of Article 12(3) of Criminal Code are applicable *mutatis mutandis* to this Article regarding enforcement of foreign sentences. This means that, all the provisions of Art. 12(3) apply here too with the necessary changes in points of detail.

Place and Time of Crime: Article 25 of Criminal Code

- ✓ To decide questions relating to causation of crime and the applicability of the Criminal Code it is crucial to know exactly *when*, i.e. the exact point of time the crime has been committed. For the application of the appropriate jurisdiction it is important to know *where* the crime has been committed.
- ✓ Article 25 of Criminal Code lays down the principles relating to the time and place of commission of crime.
- ✓ **Under Article 25 of Criminal Code the *commission of crime* refers to:**
 - Both the performance of the *act* penalized by Criminal law (Commission) or
 - Failure to perform an *act* required by the Criminal law (Omission) and
 - The place where result of such an act has been ensued.
- ✓ **Unfortunately, there is an error in this article. It says:**
 - ♣ "...when the criminal performed or *failed to perform the act penalized by the criminal law.*" Failure to perform an act penalized by law cannot be a crime.
 - ♣ It should have been properly put as follows: "...when the criminal performed the act penalized by criminal law or failed to perform act required by criminal law."

1. Time and place of the crime in case of a completed crime:

- ✓ Article 25 of Criminal Code lay down the relevant rules relating to a **completed crime** having regard to **three possible situations:**
 - i The General Rule: Article 25(1) of criminal code**
 - ✓ The *place* commission of a crime is where the prohibited act has been performed or where the failure to perform the required act has occurred;
 - ✓ The *time* of commission of the crime is at the time when the prohibited act has been performed or when the failure to perform the required act has occurred.
 - ii Non-Instantaneous Crimes: Article 25 (2) of criminal code**
 - ✓ According to Article 25 (2) first paragraph, where the act and the criminal result do not coincide in terms of time the crime is said to be a Non-instantaneous crime.
 - ✓ In other words, the result of the act is *not immediate* it may take time to give the desired result. In such a case the crime is deemed to have been committed both at the place of the unlawful act and that of the result.
 - ♣ If A on Ethiopian territory shoot B in Sudan territory, but dies on Kenya's territory. In this case, based on Article 25 (2) first paragraph, the place of unlawful act committed in Ethiopian and the place of result deemed both Sudan as well as Kenya. Therefore, Ethiopia, Sudan and Kenya courts has jurisdiction to entertain the case. However, according to Article 25 (2), third

paragraph only Ethiopia has principal jurisdiction, whereas, both Sudan and Kenya has subsidiary jurisdiction.

iii Combination or Repetition of Acts: Article 25 (3)

➡ This provision refers to the following instances:

- a Where a crime is the result of several acts committed at different points of time, or
- b Where repetition of criminal acts may be an element of an ordinary or aggravated crime as defined in Article 61 of Criminal Code, or
- c When the act is pursued over a period of time.
 - The **time** of commission of the crime is the time **when** any one of those combined or repeated acts or part of the acts pursued is committed;
 - The **place** of commission of the crime is **where** any one of those combined or repeated acts or part of the acts pursued is committed;

2. Time and place of crime in case of an attempted crime:

- ❖ The place and time of an attempt are to be decided as per the following rules:
 - i. As a general rule, the place where and the time when the criminal performed or failed to perform the preliminary acts which constitute such an attempt.
 - ii. In case of non-instantaneous crimes, an attempt is deemed to have been committed both at the place where the criminal attempted the crime and the place he intended the result to be produced.
- ❖ Article 25 (2) the second paragraph, also deals with the place where crime attempted. Accordingly, both the places where the criminal attempted and place he intended result to be produced deemed to be the place where criminal attempt committed. Example, assume A in Ethiopia shoots B in Sudan territory and missed him. Accordingly, the offence attempted in both Ethiopia and Sudan. In order to identify principal jurisdiction of the court as stated under the 3rd paragraph Ethiopia can have it. But, Sudan has subsidiary jurisdiction.

Extradition (Article 21)

- ☞ The term '**extradition**' denotes the process whereby **under a treaty** or upon a basis of **reciprocity** one state surrenders to another state at its request a person accused or convicted of a crime committed against the laws of the requesting state, such requesting state being competent to try the alleged criminal.
- ☞ Before an application for extradition is made through the diplomatic channel, two conditions are as a rule required to be **satisfied**:
 - a. There must be an *extraditable person*.
 - b. There must be an *extradition crime*.

a. Extraditable Persons

b. Extradition Crimes:

- ✓ The ordinary practice as to extradition crimes is to list these in each bilateral extradition treaty.
- ✓ As a general rule, the following offences are not subject to extradition proceedings:
 - i Political crimes;
 - ii Military crimes, for example, Desertion;
 - iii Religious crimes.

A. Extradition under FDRE Criminal Code Article 21

1. Extradition of a “Foreigner” Article 21(1)

- ✓ **Any foreigner** who commits an ordinary crime (i.e. **non-political**) outside the territory of Ethiopia and takes refuge in Ethiopia may be extradited in accordance with the provisions of the Law, Treaties or International Custom. Except, if crime committed falls under the scope of Article 13 of criminal code.
- ✓ Accordingly, based on **Article 13** of Criminal Code Ethiopia retains its right to prosecute him under its principal jurisdiction as the crime **directly** and **principally** concern Ethiopia.

2. Extradition of “Ethiopians” Article 21 (2):

- ☞ An Ethiopian national **cannot be extradited** to a foreign country.
- ☞ No person having the status of Ethiopian national at the time of commission of the crime in a foreign territory may be handed over to that country. However, when such denial to surrender is made, he shall be tried by Ethiopian courts and under Ethiopia law.
- ☞ Article 21(2) of Criminal Code endeavors to protect the Ethiopian nationals from Foreign jurisdictions in the following ways:
 - i If the accused has the status of an Ethiopian national *at the time of commission of the crime*, even if he ceases to be an Ethiopian thereafter, he shall still fall within the scope of this provision.
 - ii An accused shall be governed by this provision provided he becomes an Ethiopian *by the time of request for extradition*, though at the time of commission of the crime he was not an Ethiopian national.
- ☞ Thus, for the applicability of this provision it is sufficient that the accused is in the status of Ethiopian national either at the time of commission of the crime or at the time of the request for the extradition.

B. Procedure to request for Extradition (Article 21(1&3))

- ✓ Extradition shall be granted on the application made in proper form by the state where the crime was committed provided; the crime does not directly and principally concern the Ethiopian state (Article 13 of Criminal Code).

- ✓ Article 21(3) of Criminal Code lies down that where a crime raises a question of extradition the requisition shall be dealt with in accordance with the principles of Ethiopian law and provisions of existing treaties.
- ✓ However, if the crime complained of is a political nature, the criminal instead of being surrendered, may be granted political asylum. Extradition of criminal is a well-recognized rule of International law and governed by the Extradition treaties.
- ✓ Extradition is made, as to a legal right in respect of only those countries with which there is **an agreement** for this purpose. But, in the absence of an Extradition treaty **refuse** extradition.

CHAPTER FIVE: PREREQUISITES FOR CRIMINAL LIABILITY

Crime and its Commission

- ❖ Criminal law is concerned with blaming a conduct and imposing punishment on perpetrators of harmful actions. However, the law determines whether a certain act is punishable or not by considering the circumstances or conditions under which the act is committed or omitted.
- ❖ A person's act does not make him/her criminally liable for the mere fact that he/she committed a wrong.
- ❖ So, it is better to identify the acts that can be considered as a crime in general and in the FDRE Criminal Code in particular.
- ❖ FDRE Criminal Code under its Article 23 (1) intends to define a crime as an act or omission which is prohibited and made punishable by law”.
- ❖ This envisages that criminal law applies when crime committed and identifying the application of criminal law itself. Criminal law does not apply in abstract. It applies only when there is a crime.
- ❖ Thus, for the existence of a crime, there are certain conditions precedents (essential elements of crime or criminal liability) that need to exist. These conditions, as expressly and impliedly envisaged under the Criminal Code are:
 - 1 Legal element (Article 23(2))
 - 2 Material element (Article 23(2))
 - 3 Moral element (Article 23(2))
 - 4 Concurrent between Material and Moral element (Article 57-59)
 - 5 Causal element (Article 24)
- ☞ Even if these conditions are important, it does not mean that their cumulative existence is always required for the application of criminal law. As it will be seen later on, in the absence of one of them, like the causal element, criminal

law may still apply. Therefore, they are not necessarily cumulative requirements for crimes to exist.

- ▶ For example, in case of result based crimes such as homicide, for a person to be said guilty of such crime, we must prove the fact or the result that the injured has died since such crimes are result based by their very nature. But, conduct based crimes such as theft and perjury require only a certain level of act and not result.

1 Legal elements (Ingredients) of Crime

- ✓ This element of the crime refers to the infringement of any law, which is a criminal nature.
- ✓ This means that a law must exist and this law must be violated so as to hold a person criminally liable.
- ✓ In most cases it is clearly said that a particular act is a crime or an offence and that there should be a law against it; but an act is not a crime for the mere reason it is wrong.
- ✓ Under Article 23(2), the Criminal Code stipulates that the existence of the legal ingredient is necessary for the completion of the commission of a crime.
- ✓ This means, if there is no criminal law that is violated by a given conduct, there will be no crime.
- ✓ Thus, by providing for the legal element, Article 23(2) is referring to Article 2 of Criminal Code; that is, the principle of legality-no law, no offence. This means no act or failure to act may be regarded as an offence unless the law so prescribes. So, a person who performs an act which is not penalized by any law, such as prostitution commits no offence.
- ✓ In addition to this, the law which prohibits the crime should be in force, not only when the act is committed, but when it is punished. If the law ceases to operate due to repeal before judgment is delivered, the accused cannot be punished for its infringement, even though it was in operation when he or she did the act forbidden by law and when he or she was convicted except in cases where the defendant benefits.

☞ **Note!** Legal element consists of sub-principles that include:

- ♣ Principle of legality,
- ♣ Non-retroactive effect of criminal Laws,
- ♣ Jurisdiction and
- ♣ Period of limitation.

2 Material element (actus reus) of crime

- Material ingredient is the next pre-requisite for criminal liability and called the criminal act or *actus reus*.

- It refers to the existence of some sort of conduct on the part of the perpetrator in order to make him/her liable criminally.
- It may be defined as a physical or muscular movement towards a given object which may also include willful restraint from doing a given act.
- FDRE Criminal Code recognized under Article 23(2) for the existence of a crime is the material element. It refers to a conduct which is prohibited and made punishable-by law. The existence of bad thought to violate criminal law by itself is not sufficient to punish a person. The law requires the manifestation of this thought through some outwardly physical conduct which is the material element of a crime.
- ✓ In the words of Article 23(1), “A crime is an act which is prohibited and made punishable by law”. **What constitutes an act?**
 - ▶ An act can be defined as “a willed muscular (bodily) movement.
 - ▶ The phrase “Material ingredients” means facts surrounding the act. The same act of shooting under different material circumstances, for example, warfare, execution of death penalty, etc, may render the act lawful.
- ✓ The second paragraph of the Article 23(1) clearly puts it in terms of acts (commission) and omissions: “in this Code, an act consists of the commission of what is prohibited or omission of what is prescribed by law”.

☞ The material element (*Actus reus*) may take two forms:

- 1 Commission
- And
- 2 Omission
- i Commission by Omission
- And
- ii Pure Omission

1 Commission

- ☞ Commission refers to a conduct which is done contrary to law. This means, a person can commit a crime by positive conduct by doing.
- ♣ For instance, if a person takes other's property contrary to Article 665, the material element will be commission because he has done what he is prohibited from doing.
 - ✓ It is when criminal law regards as sufficiently harmful; it prohibits such a deed and seeks to prevent its occurrence by imposing a penalty for its commission.
 - ♣ Every harmful event produced by human conduct is not *actus reus*, but only such event which is forbidden by the law is an *actus reus* forming the basis for criminal liability.

- ✓ A ‘deed’ may cause harm such as destruction of property or even of life but it is not a crime, unless it is legally prohibited. Infliction of harm is legally permitted, justified or even commanded under certain circumstances and these do not constitute *actus reus*. See the following instances,
 - a Events resulting from acts “Commanded” by law
 - ♣ ‘Death’ caused by execution of a criminal,
 - ♣ ‘Demolition of buildings’ under the town planning scheme, etc.
 - ☞ In this case the officers executing the lawful orders of the state are not punishable for the harmful consequences brought about by them. i.e. death of a human being, destruction of property.
 - b Events resulting from acts “Permitted by law”
 - ♣ Injuries caused by the force used in the arrest of a criminal,
 - ♣ Injury Caused by a surgeon by operating on a patient;
 - ♣ Hurt caused by reasonable chastisement of a child by a parent.
 - ☞ All these examples include “painful bodily injuries” which are necessarily inflicted upon the subjects without which certain lawful objects cannot be achieved. Therefore, law permits the infliction of such harms subject to certain limitations.
 - c Events resulting from acts “Justified” by law
 - ✓ Injuries or even death caused by acts done in the exercise of right of private defense or self-defense.
 - ✓ Law recognizes the right of self-defense of a person and allows him to use necessary force to repel the apprehended assault against human body or property.
 - d Unlawful Events: Commission of “Events” Prohibited by Law
 - ✓ It is this category of harmful results of human conduct that constitutes *actus reus*.
 - ✓ Therefore, an act or omission becomes punishable only if it produces a result that does not fall under any of the categories falling under “lawful events”. This means that producing the result that is prohibited by law, establishes the legal ingredient of crime.

2. Omission

- ☞ Omission refers to failure to do what is ordered by law under the pain of penalty. This means, a person can commit a crime by negative conduct; that is, by abstaining.
- ☞ A crime, according to Article 23(1) is also committed when a person fails to perform an act the performance of which is prescribed by law. This means, not all omissions are punishable, but only those that are in breach of a legal duty.

- ♣ For example, if, a person intentionally refrains from giving assistance to a person who is in grave and imminent peril, when he could have given him the assistance without any problem to himself or others, contrary to Article 575, the material element will be omission, because he has failed to do what he is required to do.
- ❖ Therefore, omissions to be punishable crimes must involve breach of some specific duty either imposed or recognized by law. Based on the requirement of violation of a duty “omissions” are of two types:
 - i. Pure Omission**
 - A crime of Omission is “Failure.
 - It is impossible to bring about these results by positive behavior. These are the results of negative conduct omitting to act expected of him.
 - Crimes of pure omission are those crimes which cannot be committed by doing.
 - These crimes result only from failure to act.
 - Where there is a Duty Imposed by Law.
 - Any positive behaviour in relation to them will amount to obeying the law.
- ❖ The following are some of the crimes by pure omission under the Criminal Code:
 - ✓ Failure to Report (Article 443),
 - ✓ Failure to Pay Tax (Article 349),
 - ✓ Failure to Register the Birth of a Child (Article 656),
 - ✓ Unjustified Refusal to Render Military Service (Article 284)
 - ✓ Failure to report preparation, attempt or commission of a crime (Article 39),
 - ✓ Failure to report the preparatory acts of treason and mutiny (Article 254-256),
 - ✓ Failure to inform of a crime punishable with death or life sentence (Article 443),
 - ✓ Failure to report danger in time of emergency, general mobilization or war (Article 308),
 - ✓ Failure to obey enlistment or mobilization or failure to enlist (Article 284-285),
 - ✓ Failure to appear before courts as a witness or an accused person (Article 448),
 - ✓ Failure to lend aid to another (Article 575),
 - ✓ Failure to provide the maintenance allowances stipulated under (Article 658),
 - ✓ A parent’s gross neglect in bringing up a child (Article 659),
 - ✓ Failure to report the possession of counterfeit money (Article 779),
 - ✓ Failure to exercise proper supervision over dangerous persons or animals (Article 824),
 - ✓ Failure to notify the competent authority and concealment of property (Article 855), etc.

Requirement to criminalize Omission

- ❖ In order to understand the requirements to criminalize Omission (see Article 575) of the criminal code.

- ✓ Intention
- ✓ Imminence or gravity (series)
- ✓ Physical possibility if he/she can assist
- ✓ Absence of risk

☞ **Note:** the above four elements must be considered to criminalize omission on behalf of the victim to be assisted and/or concerned person, which means if the above criteria's not exist omission cannot be criminalized.

ii. Commission by Omission

- Crimes of Commission by Omission “Refusal”. These offences include behaviors which include both positive and negative elements refusal to perform a duty includes a positive expression of ‘unwillingness to act’ expected of him.
 - ♣ Crimes of commission by omission are those crimes which are under the circumstance, committed by abstinence, but which can also be committed by doing.
 - ♣ This is where there is a Duty Recognized by Law.
 - ♣ A crime is committed when a person fails to perform a duty recognized by law, such as, professional duty of a doctor.
 - ♣ Refusal to provide professional service by a doctor, pharmacist, dentist etc., who contrary to his duty and without just cause refuses to provide his services in a case of serious need, is made punishable under Article 537 of the Criminal Code.
 - ♣ If harm is caused by such refusal, it is a crime of commission by omission.
- ☞ These types of crimes are envisaged under different provisions of the Criminal Code and they include crimes of:
- ▶ Maltreatment of Minors (Article 576),
 - ▶ Failure to Maintain (Article 658) and
 - ▶ Failure to Bring-up (Article 659).

☞ The Material element of the crime includes:

- ♣ Preparation and attempted offences.
- ♣ It also covers causation in cases where the offence requires a result to be constituted.
- ♣ Causation is required to establish a link between the act and the result and helps to identify the final stage of the material element of the crime.

3 Moral (Mental) Elements of Crime (Mens rea)

☞ The mental element of the crime is also one of the important prerequisites for a crime to exist.

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- ☞ Mental element of crime refers to the '*state of mind*' of an accused at the time of doing the act constituting a crime.
 - ✓ It also refers to a reprehensible state of mind of a person at the time of violating the provision of criminal law. All crimes require the proof of mental element of some sort.
 - ✓ An act does not make a man guilty of a crime unless his mind also is guilty. That means the existence of a conduct which is contrary to criminal law alone does not suffice for a person to be criminally responsible and punished.
 - ✓ The conduct must be attributable to some sort of bad thought or evil state of mind. This requirement of crimes is justified on the idea that a man should not be held criminally responsible and liable to punishment unless he is morally blameworthy. Obviously, a person will be morally blameworthy only if he has guilty mind at the time of contravening criminal law.
 - ✓ The Criminal Code under Article 23(2) provides for this moral element as one of the necessary conditions precedent for crimes to exist. Thus, it is only when this element is fulfilled that the commission of a crime is said to be completed, and the author thereof will be punished as provided under Article 23 (4), But it should be understood that since the moral element refers to the state of mind of a person at the time of violating the provision of criminal law, it applies only when the law is violated by human beings since entities other than human beings lack moral element.
 - ✓ However, it is still possible for legal persons to violate criminal law. If the moral element is, therefore, a requirement for legal persons as well, criminal law will fail to produce its desired results in relation to such persons. So, it is necessary to recognize an exception to the requirement of the moral element of a crime.
 - ☞ Except, for juridical persons, the requisite moral element should be present for a crime to exist.
 - ❖ Article 23(4) of the Criminal code says "*A crime is punishable where the Court has found the crime proved and deserving of punishment*". Every element of the crime may be fulfilled. And the court may find the crime proved beyond any reasonable shadow of doubt based on the evidences as presented by the public prosecutor + deserving of punishment.
 - ❖ According to Article 23(4) there are still crimes where the criminal could go free. A person could go free, in the case of infancy, insanity, necessity, self-defense and so on.
 - ♣ Example 1, if a person acting in self-defense killed someone, he may go free even if all the elements for a person to say to have committed homicide are

fulfilled and proved before the court beyond a reasonable shadow of doubt. But, the self-defense must be justified and equivalent.

- ♣ Example 2, when someone came and snapped B and B shoot and killed him by alleging self-defense, it could not be justified and he will be accused of excessive self-defense.
- ❖ In case of equivalence, his act does not, however, deserve punishment as it deemed to be a justified fact.
- ❖ Any criminal acts committed by infants also never deserve punishment for the fact that infants are believed to be unable to formulate the moral or mental element by themselves. But, if a person uses an infant as an instrument to commit homicide, such person is considered to be the material offender and is criminally liable, even if the infant could not be punishable (Article 32) of the criminal code. However, by invoking simplicity of mind, a criminal is in no way able to go free. Unlike infancy, insanity, necessity and self-defense, Simplicity of mind is neither justified nor excusable in the case of criminal law.
- ❖ **What type of moral element is required for a crime to exist?**
- A) **In common law legal system**, the mental state necessary for the existence of a crime takes three forms:
 - 1) Intention,
 - 2) Recklessness (indirect intention and advertent negligence), and
 - 3) Negligence,
- B) **In continental systems**, it takes **four forms**:
 - 1) Direct Intention,
 - 2) Indirect Intention,
 - 3) Advertent Negligence, and
 - 4) Inadvertent Negligence.
- ❖ The **Ethiopian criminal system** follows the continental system. It recognizes two broad classes of moral elements (Intention and Negligence) which are further classified into four (Direct Intention, Indirect Intention, Advertent Negligence and Inadvertent Negligence) as regulated under Articles 57-59 of Criminal Code.
- ❖ Accordingly, it is necessary that any of these moral elements exists if a crime is to exist and the author thereof is to be punished. So, prosecutors are expected to prove their existence since they cannot be presumed. This conclusion is further strengthened by the *presumption of innocence* FDRE Constitution makes under Article 20(3).
- ❖ Corollary to this, if a person violates the criminal law by accident or due to *force majeure*, he will not be punished. Because the violation is not

reprehensible since he cannot help and punishing such person is less likely to serve the purposes of criminal law.

Forms of Moral element under FDRE Criminal Code (Article 57-59)

- ✓ The key principle of criminal liability, as stated in the maxim '*actus non facit reum nisi mens sit rea*,' is expressed under Article 57 (1) of the Criminal Code, conferring "no one can be punished for an offence unless ... he commits a crime either intentionally or by negligence". These states of guilty mind are defined under Article 58 and 59 of Criminal Code.
- ✓ In the second paragraph of sub-article 1, the clause "being responsible for his acts" indicates that we should stick to responsible persons only. If the person being insane or infant, at the time of his act, is irresponsible for the act he commits, then Article 57 says that such persons were not be responsible for his act and he would not be found guilty. From this point of view, we can understand that intention or negligence comes from people who are responsible.
- ✓ It is a general and absolute condition of liability that the offender should have had a guilty mind for fixing criminal liability.
- ✓ However, there is no uniformity in the moral ingredient required for all crimes, since the same act may be an ingredient of several different crimes it must be established from case to case what the accused had in mind before one can decide the crime of which he is guilty.
 - ▶ **Eg,** in cases of theft (Article 665) the fact that the moral element (intent to obtain an unlawful enrichment) is absent, the accused is not punishable for that crime. However, it does not necessarily follow that he is not punishable at all, and he may well be found guilty of a different crime such as unlawful use of the property of another (Article 678) for which no intent to enrich oneself is required.
- ✓ Article 57 (2) of Criminal Code states that a person does not commit a criminal fault and is consequently not guilty of an offence who infringes the law in circumstances amounting to an accident or *force majeure*, or performed without there being any guilt on his part (insane or infant at time of doing the act).
 - ♣ For instance, if A drives car in accordance with traffic regulations and a child who is being run after by a dog suddenly crosses the road, is bit by the car and dies, although the legal and material elements of an offence of homicide are present. A is not punishable because he acted neither intentionally nor negligently.
- ✓ Some attention must be given to the fact that the concepts of criminal and civil liability do not coincide. Article 57 (2) is designed to stress the difference between criminal and a civil fault and accordingly prescribes that civil

proceedings may be taken against a person even where he is not guilty of an offence. In this case he/she may be ordered to pay damages although he is acquitted.

A. Criminal Intention (Article 58)

- ✓ Criminal intention is the upper degree and more reprehensible part of the moral element. This type of moral element exists when a person *knows what he is doing and the consequence thereof*.
- ✓ Intentional acts require some degree of knowledge by their very nature. For a person to act intentionally, he must have the knowledge or awareness of the conduct he is doing or the omission thereof.
- ✓ Hence, knowledge or awareness of the material element of the crime is a condition precedent to establish the existence of intention.
- ✓ If someone is not aware of the material element or the nature of his conduct, then he is not deemed to have acted intentionally. But, he can still be charged for a negligent crime.
- ✓ Intention under Article 58 classified as:
 - 1) Direct intention
 - 2) Indirect intention

1) Direct intention

The following can be considered as unique features of direct intention:

- There is full knowledge i.e., awareness of consequences accompanied by with (intent).
 - The foresight is certain or nearly certain as to the consequences.
 - There is desire for the consequences.
 - Clear foresight of consequences.
- Thus, Direct criminal intention is when a person knowingly performs an act contrary to criminal law because he desires the result thereof (Article 58 (1) (a). Accordingly, the person has acted with full knowledge and desire for the sake of achieving the specific result emanating from such an act since he needs the result.
- Similarly, if a person knows what he is doing and he is also certain or nearly certain that his act will produce a result contrary to criminal law but proceeds with his own plans, his intention is said to be direct. This is so because his *knowledge of certainty or near certainty* is assimilated to his desire. This part of direct intention is not recognized under the 1957 Penal Code. The Criminal Code also contains the same gap. It does not recognize knowledge of certainty or near certainty as part of direct intention.
- Nevertheless, a person who knowingly lets the occurrence of a given result contrary to criminal law which he is sure or nearly sure about should be

punished as though he desired the result. This would not amount to creation of offence by analogy for logical reasons.

- First since such knowledge is assimilated to desire, we can interpret Article 58(1) (a) of the Criminal Code to include it.
- Second, to let such person go free would lead us to an absurd conclusion since the Code punishes a lesser degree of guilt.
 - ✓ For example, if A wants to kill B, who is in a car, by using hand bomb and does so by throwing the bomb on the car, he should be punished for intentionally damaging the car in addition to A's death. This is so because, A lets the harm, which he knows will certainly happen, transpire even though he does not desire it. Of course, it can be argued that he has at least indirectly desired the destruction of the car as he bows that without damaging the car, he cannot kill B.

2) Indirect intention

- ✓ There is awareness of consequences and unwillingness to renounce the course of conduct.
- ✓ The foresight is not certain but awareness of the possibility of the consequences is present.
- ✓ There is no desire for consequences, but disregards and runs the risk of possible harm. i.e. accepts the occurrence of possible harm
- ✓ Uncertain foresight
- A person is said to commit a crime with indirect intention if he knows that his conduct will **probably** cause a punishable consequences but proceeds to act because he does not care (Article 58 (1) (b)).
- By indirect intention, a person has acted without premeditating to achieve the result. But, he does not care if the result comes. By negligence, we mean that a person has acted or committed a crime negligently. But, negligent crimes may not always be punishable unless the crime committed negligently is clearly stated in the special part to be punishable.
- In the case of indirect intention, even if the knowledge is not knowledge of certainty, the person has full knowledge of the nature of his act. The person cannot reach to a level of knowledge of certainty in the case of indirect intention. But, he knows that it is likely enough that his conduct may entail a criminal result. So, if he acts regardless of such consequence, then he will be deemed to have acted out of indirect intention to bring the result.
- It must be noted that even if a person has acted out of direct or indirect intention, he will be accused of acting intentionally before the court. **But, 2 persons** who are to be charged for the same crime one acted out of direct intention and the other out of indirect intention are not punished equally.

Because, as we have seen above, the person who acts out of indirect intention is not at least acting out of a motive or a desire to achieve a certain result. Rather, he is acting regardless of the consequence of his act which is bad enough to entail punishment.

- This person does not desire the criminal consequence; nor is he certain or nearly certain that it will happen. But he knows that the result will *probably* (not certainly or nearly certainly) occur.
- Thus, he gambles that is, *he is ready to accept* result if it happens. Such persons are those who are pursuing something else which they believe is more important to them.
 - ✓ For instance, if a person drives beyond the maximum speed limit and also foresees that he may kill another, but keeps on driving at the same speed because he has an appointment for which he is almost late, he will be said to have an indirect intention in case he kills a pedestrian.

B. Criminal Negligence (Article 59)

- ‘Negligence’ is another form of *mens rea*. Culpable negligence is a condition for criminal liability.
- Negligence is not taking care where there is a duty to take care.
- In negligence, there is a state of mind in which there is absence of desire to cause a particular consequence. The standard of care established by law is that of a reasonable man in identical circumstances.
- Negligence means the failure to exercise care there by causing harm (undesired by the accused) that could or should have been normally expected. Article 59(1) provides:
 - “A person is deemed to have committed a criminal act negligently where he acts:
 - (a) by imprudence or in disregard of the possible consequence of his act while he was aware that his act may cause illegal and punishable consequences; or
 - (b) By a criminal lack of foresight or without consideration while he should or could have been aware that his act may cause illegal and punishable consequences.”

➡ Based on this provision of criminal Code there are two kinds of negligence:

1. Advertent (conscious) Negligence.
2. Inadvertent (unconscious) Negligence

1. Advertent negligence (conscious negligence) Article 59 (1) (a)

- **Advertent Negligence**
 - ✓ There is awareness of consequences but disregards the possibility
 - ✓ There is awareness of possibility of consequences.
 - ✓ Rejects the occurrence of the possible harm.
 - ✓ Criminal lack of foresight.
- ➡ In the case of advertent negligence, the person, even if he acts negligently, has the knowledge of the nature of his act. A driver who is driving at a very high

speed knows that he may cause damage to the body, life or property of another person. Regardless of such consequences, he may still derive in excess of the speed limit. He may think that he does not care whatever comes out of his fast deriving or whatever damage he causes to the body, life of property of another person. In this case, he will be deemed to have acted under the state of indirect intention.

➡ But, He might think that he is acting out of over confidence by invoking his experience of driving a car for a long period of time. He may also think that he never fails to control his car because of his good experience regardless of the fact that he is driving at a very high speed. In this case, he is deemed to have acted or caused damage out of advertant negligence.

➡ Indirect intention is different from advertant negligence in that in the case of indirect intention, the person who acts out of indirect intention accepts the result achieved.

♣ For example, a person, in the mid night, went to set a fire at his enemy's house. He knows that persons in the house may die of the fire. Of course, he may act thinking that many of the persons therein may escape even if some may die of the fire. Or he may act thinking that he does not care whether they die or not of the fire. In this case, he is acting regardless of the consequence even if he does not desire to cause death to such people. He is, therefore, deemed to have acted out of indirect intention.

➡ However, if he set a fire at the house thinking that persons therein will escape when they know that their house is on fire, he is deemed to have acted out of advertant negligence. From this case, we can understand that the margin between indirect intention and advertant negligence is too narrow to identify one from the other.

➡ So, we can distinguish one from the other only on the basis of evidence. Whenever there is doubt whether a person accepted the result or not or acted out of indirect or advertant negligence or if he seems, somehow only, to have accepted the result, as a public prosecutor we should charge such person of advertent negligence. Because, in criminal law, the principle is that whenever there is *doubt*, such doubt should be interpreted in favour of the accused.

➡ However, the problem lies on the way we know whether the person has acted regardless of the consequence of the act or in disregard of the consequence of the act. We usually make use of circumstantial evidences to show the fact that the person has accepted the consequence of his act. We may also make use of witnesses to obtain the statement of the accused.

♣ Example 1, if the person in the above case is herd to speak as "I don't care or it is none of my business weather they die or not of the fire" when others

told him to renounce his act, this statement can be presented as an evidence for his act out of indirect intention. The other parameter is the probability of danger. If a person drives his car at a very high speed, at a rainy and cloudy weather and in a crowded street, in this case, this person knows that the probability of danger is higher than the probability of preventing such danger. So, this can be taken as evidence to show that he has acted regardless of the consequences of his act and he will be deemed to have accepted the result. It is also necessary to check the motive behind his act. If the motive behind the act was serious enough to show that he may have accepted the result, then we say that he must have accepted the result. If a person who injured someone was running away at his best to escape while he saw the police pursuing him, it shows that he must have accepted the result in order to escape arrest. Despite very unlikely, if such person may appear before the court and confess that he acted regardless of the consequences of his conduct, life becomes so easier.

- ♣ Example 2, 'A' is driving a car and 'B' his passenger, points to him that he drives too fast and might hit someone, to which the driver replies 'you needn't worry, I am a good driver', etc. A moment later, 'B' again insists that the driver should slow down. 'A' then answers, "I've told you that I am a good driver. Anyway, it is 2 o'clock in the night, the police are asleep and nobody will see us if something should happen." Thereafter, 'A' runs down a pedestrian who dies -----Had the accident taken place after--- the first statement ---- he had rejected the possibility of hitting someone (advertent negligence). But, after he made his second statement "it is virtually certain that he had accepted the possibility of causing a result," there by entering into the realm of indirect intention.

2. In advertent Negligence (unconscious negligent) Article 59 (1) (b)

- There should or could have been awareness of consequences but lack of consideration of the same
 - Failure to foresee the consequences.
 - Lack of fore sight i.e. failure to exercise care. Does not foresee at all.
 - Imprudence
- ✓ In the case of advertent and inadvertent negligence, what matters is the degree of knowledge.
 - ✓ In the case of inadvertent negligence, actually, there is no knowledge and the person is charged because he should or could have known that his conduct would cause damage.
 - ✓ In inadvertent negligence, the person may **not even know** that **his act could cause such type of damage**. But, he should have known to cause such damage.

A person found a pistol in somebody's house. This person believed that the pistol was unloaded and fired in the direction of another person. But, unlike his expectation, even if any danger is ensued because the pistol was loaded, he is still deemed to have had no awareness of that the pistol was loaded. But, as a reasonable man, he should have known or at least assumed that the pistol could be loaded.

- ❖ In short, negligence is the issue of prudence and hence, a person has to show care that a reasonable person could take. In some cases, individual factors could be taken into account. If a person is a doctor, he will be required to take maximum care while undergoing treatment. But, some doctors having operated a patient may leave in his body the instruments they used to operate the patient. If such patient died of that error, the doctor is said to have acted out of inadvertent negligence. Because, he should have known that he must be able to make maximum care in order not to leave any instrument inside the human body while conducting surgery. In this case, the care that not any reasonable person but reasonable doctor conducting surgery may make is taken into account.

Liability to Punishment in Case of Negligence

- ✓ Article 59(2) provides that, “crimes committed by negligence are liable to punishment only if the law so expressly provides by reason of their nature, gravity or the danger they constitute to society”. Accordingly, negligence is not punishable unless a specific provision under consideration expressly embodies negligence as its component part. For example, Article 543 and 559 expressly incorporate negligence as an ingredient of the offence. There are other provisions such as Article 493 and others, which do not distinctly refer to intention or negligence. Yet, because the punishment of negligence requires an express inclusion of ‘negligence’ such provisions invariably imply criminal intention.
- ❖ While assessing criminal negligence of a person, his personal circumstances such as age, experience, occupation education, rank and others shall be taken into account. If the law is silent about the moral element of a specific crime, it means that negligent act with respect of that specific crime is not punishable. While assessing sentence, individual circumstances such as experience and education shall be taken into account. For example, if a doctor having experience left a surgery instrument in the human body and killed the patient, he would face more severe punishment than the doctor that has not experience even if he commits the same fault.

Relationship of Cause and Effect

- ✓ The causal element is another basic premise of criminal law. That is, if the causal element is fulfilled the application of criminal law will be set into motion. The causal element is relevant only when the application of criminal law requires the achievement of a given result.
- ✓ Under circumstances where criminal law applies even in default of results, such as preparatory acts, attempts and forgery, the causal element is immaterial.
- ✓ **However**, in relation to crimes which can be completed only upon the achievement of results such as homicide and destruction of others' property, the causal element is material.
- ✓ What, then, is a *cause*? Unfortunately, no precise definition can be given to the concept *cause*. But, the general meaning of the term 'cause' is the 'act' or 'the agency' that has caused or produced an effect.

A. Cause in fact

- ☞ *Cause in fact* refers to an **event** forming part of the set of **antecedent conditions** resulting in harm. This means, anything that comes before the result and makes certain contribution, however insignificant it may be to the occurrence of harm is a cause in fact.
- ✓ **For instance**, if A called his friend B, and B while going to visit A, was knocked down by a car and was taken to a hospital where he received wrong treatment and eventually died, all the calling, car accident and wrong treatment are causes in fact. This is so because all of them contributed to the occurrence of the death.

B. Cause in law

- ❖ Cause in law is a cause in fact that is selected by law-maker as a sole cause of certain result. It should be noted that a cause in law is selected from among causes in fact. **For example**, in the above case the law-maker may say, under such circumstances, the wrong treatment should be regarded as the cause of the death.
- ❖ There are a number of parameters (tests) that criminal law uses to determine cause and effect.

1. Sine quo non (but-for) test

- ✓ This test could be even used for a remote cause. If an act, in any way, has contributed to the result, it must be considered to have caused the result. Because, had it not been to this act, the result would not have been achieved.
- ✓ In other words, if certain result would not occur *but for* a given event, then that event is a cause in law.
- ♣ **For example**, Bonsa and Lami were having a fight. Lami was more injured than Bonsa and hence, he had to be taken to hospital. But, on Lami's way to hospital, the car he was in got involved in a car accident and Lami died. In this case, according to sine quo non test, Bonsa is criminally liable for Lami's

death. Because, hadn't he fought with Lami, Lami would not have been taken to hospital and hence he would not have died. But, this type of taste is never applied in the modern criminal law. And Bonsa is never criminally liable for Lami's death. Because, his act is very remote from the target and there is no sufficient connection between his act and the death of Lami.

- ✓ This theory of causation has got certain **drawbacks**. First and for most it sometimes ridiculously widens the scope of the concept *cause*.

2. Adequate cause theory

- ♣ The theory of *adequate causation* was formulated to rectify the defects of *but-for* test. If this theory is adopted, a cause in law is an event which, ***in the normal course of things***, produces the result achieved. It does not matter whether the case is one or more but whether the cause is adequate or not.

- **For example**, shooting a person on his head normally entails death. Thus, it can be a cause in law for homicide.

- ♣ But, if a given conduct produces an extraordinary result, it will not be regarded as a cause. **For instance**,

- i. Stubbing a person on his feet with cutlass does not in normal course of thing, cause death.
 - ii. If somebody is slapped on his face and dies, the slapping will not be treated as a cause in law because it is not, in the normal course of things, capable of producing death.

3. Proximate cause theory

- This theory says a cause in law is an event which is the nearest in time and placed the result achieved. That is to mean, a cause in law is an event which is proximate or closer to the result.

- ♣ **For example**, in the scenario under cause in fact above, the event that is closer to the death of the person B is the wrong treatment. Hence, this theory regards the wrong treatment as a cause in law.

- The problem with this theory is the fact that sometimes the act closer in time and place to a given result may not be that relevant for the production of the result. **For instance**, the theory considers the act of beating another slightly as a cause in law by leaving shooting aside merely because the former might have happened at last.

- The element of causation is repleated under Article 24 of the Criminal Code. Firstly, Article 24(1), first paragraph, stipulates that the causal element is necessary only where the commission of a crime requires the achievement of a given result, if the commission of a crime does not require the achievement of a given result the requirement of cause and effect will become **irrelevant**.

- ♣ **For example**, the commission of the crime of forgery does not require the achievement of any result like damage to the public. Hence, the causal element becomes unnecessary.
- Secondly, in the same paragraph, Article 24 stipulates that when causation is important the crime committed is deemed to be non-existent as far as a given person is concerned, unless it is produced by the act or omission with which he is charged. That is to say, if his commission or omission has not contributed to the occurrence of the result then he is not deemed to have committed the crime in question. Hence, his commission or omission should form part of the domain of cause in fact, but the existence of contribution, by one's act or omission, to the occurrence of the result is not by itself sufficient to render a person a criminal in relation to the result achieved.
- Article 24 (1), 2nd paragraph, stipulates that in addition to the contribution, a person's act or omission should be the one which would, in normal course of things, produce the result achieved. That is to say, if his act or omission does not in the majority of the cases produce the result he is charged with, his act or omission will not be regarded as a cause in law. Hence, he will not be responsible for the result. What this, in effect means is that the Criminal Code adopts the adequate causation theory.
- ♣ **For example**, cutting one of the fingers of a person does not, in normal course of things, produce death. If, however, it extraordinarily produces death, the person who cuts the finger of another will not be deemed to have committed homicide because his act does not qualify as a cause in law under Article 24(1), second paragraph.
- ❖ Article 24(3) provides for an exception to the adequate causation test adopted under Article 24(1). It states that if there are many causes which are, independently treated, incapable of producing the result achieved, they may be considered causes in law if their cumulative effect has produced the result. So, complementary events can be regarded as causes in law.
- ♣ **For example**, if five individuals beat up a person with their fists and the victim dies because of the combined effect of the beatings, all the five individuals are said to have killed the victim: their beatings will be considered causes in law.
- One may want to know what would happen when all the causes are by themselves capable of producing a criminal result, if the causes are more than one and they are all, in normal course of things, capable of producing this result, the issues of concurrent and intervening causes will come into picture. While Article 24(2) answers the issue of intervening causes, it is Article 24 (1), 2nd paragraph that answers the issue of concurrent causes.

- ✓ Intervening cause refers to "an event that occurs after another event which has set the production of a given result into motion and makes its own contribution to the achievement of the result."
- ✓ The intervening cause may be more than one.
- ✓ Likewise, they can be concurrent if they occur simultaneously or non-concurrent if they occur at different times.
- ✓ In relation to concurrent and non-concurrent intervening causes, Article 24(2) states, they will interrupt the relationship established between the initial cause and the result, if they are:
 - a Attributable to 3rd party or natural or fortuitous event;
 - b Extraneous to the initial cause and
 - c By themselves produce the result
- ➡ If one of these conditions is missing (for example, if the intervening cause is attributable to the victim himself) the relationship between the original cause and the result will not be broken. If all are met, however, the relationship will be interrupted and the author of the initial act will be punished only for the crime his act constitutes, not for the result achieved. For example, he can be punished for attempting to kill.
- ➡ It has to be noted that Article 24(2), first paragraph contains some uneasy points.
 - ♣ Firstly, it states that preceding causes can interrupt the relationship of cause and effect. This seems inconsistent because if a cause is the first cause it has nothing to interrupt. Rather, its relation with the result may be interrupted. Hence, it seems necessary to remove the term preceding causes both from the Amharic and the English versions of the Code.
 - ♣ Secondly, the word "concurrent" under Article 24(2) seems misleading. It is meant to refer to intervening concurrent causes. **For example**, if three concurrent causes intervene after a single cause has set the achievement of a given result into motion, they will interrupt the relationship between that cause and the result.
- ❖ Therefore, the article should have used expressions "Concurrent" or "non-concurrent" intervening causes instead of simply using the word *concurrent*. Because, if there are concurrent causes, the principle of interruption does not apply as between themselves since interruption presupposes the occurrence of causes at different times.
- ❖ If causes are concurrent; that is, if they occur at the same time, neither of them is capable of breaking up the relationship of cause and effect of the other. Instead, they are all, if they are adequate in themselves to produce the result, causes in law Article 24(1), first Paragraph. Hence, their authors will be answerable for the result achieved. **For instance**, if two persons shoot another on his chest and both bullets

enter the victim's body at the same time causing his death, both bullets are causes in law and they are concurrent causes. Thus, both persons may be punished for killing the victim.

- ❖ Thirdly, if two or more persons, acting in concert, have the required *mens rea* for the achievement of certain result, it does not matter, who acted first or whose act actually brought about the result.

- ✓ **For example**, if Ararsa and Beka assault Chala intending to kill him both will be guilty of murder even if it is only the act of one, say Beka, that has produced the result while Ararsa's act was inadequate. In short, in cases like conspiracy, the adequate cause theory should not exclude the authors of some conducts from responsibility. The mere fact that they share the necessary *mens rea* and make some contribution should suffice. Therefore, both adequate and inadequate cases should be regarded as causes in law.

Concurrence of Crimes: Guilt in Case Of Concurrence Crimes Art 60-67

- ➡ It is possible that persons, by their single or multiple conducts, commit two or more crimes. If such crimes are committed in the same transaction, they can be called concurrent crimes but, if the transaction is not one the crimes can be consecutive, not concurrent.

- ➡ Generally, it seems that there are three cases where concurrent crimes can be committed. However, under the Criminal Code, the tendency is to recognize **four cases** where concurrent crimes can be committed:

- 1 Material Concurrence (Article 60 (a))
- 2 Notional Concurrence (Article 60 (b))
- 3 Concurrent of Victims (Article 61(C))
- 4 Imperfect Concurrence (Article 61(1))

1. Material Concurrence (Article 60 (a))

- ❖ This type of concurrence exists where there are *many criminal* producing *many different* or *similar* crimes.

- ✓ **For instance**, if a person breaks into somebody's house, steals some property, and also rapes a lady in the house, there will be three different crimes eventuating because of the three different acts:

- i Breaking into other's house without permission (crime of violating other's privacy);
- ii Taking other's property without permission (theft); **and**
- iii Outrage against sexual liberty (rape).

2. Notional Concurrence (Article 60 (b))

- ▶ This type of concurrence comes into picture where there is only one criminal act which, however, violates two or more criminal provisions.

✓ **For example**, if a married person publicly rapes his sister many legal provisions will be violated notwithstanding that there is only one act of sexual intercourse.

- Firstly, the fact that he is a married person renders him incapable of having legal sexual intercourse with others in as long as his marriage exists. Hence, if he engages in sexual intercourse with others, he will commit the crime of adultery (Article 652).
- Secondly, the fact that he forces the lady to submit to the intercourse makes his act rape (Article 620).
- Thirdly, since the sexual intercourse is with a sister, it will be incest (Article 654).
- Lastly, since the act is committed publicly, it offends public morality; that is, outrages against public morals (Article 639).

► The offender can, in this case, be charged for offending all the provisions mentioned here. However, it should be noted that if one act repeatedly violates the same provision, it will not give rise to notional concurrence because for notional concurrence to exist, the provisions violated need to be different.

3. Concurrent of Victims (Article 61(C))

- ♣ This type of concurrence regulates a kind of concurrence which is neither material nor notional nor imperfect. So, for the sake of convenience, we can call such concurrence the concurrence of victims *as* the article deals with a situation where a single criminal act contrary the interests of two or more persons. The act does not violate more than one legal provision; hence, there is no notional concurrence, too.
- ♣ For this type of concurrence to exist, the criminal fault has to be one. Besides, the harm has to be the same though it victimizes more than one person.
- ♣ **For instance**, if a person throws a bomb on a group of people standing somewhere, because he wants to kill them all, his case will give rise to the concurrence of victims under Article 60(c). In this this scenario:
 - The act is one,
 - The criminal fault is one (intentional kill), and
 - The harm is also the same (homicide)
 - But, the victims are many.
- ♣ In this case, it is possible to charge the offender for committing *crimes* of homicide against all the victims. This type of concurrence was not recognized under the 1957 Penal Code. As a result, such persons could only be charged for one crime of homicide.

- ♣ Currently, however, the Criminal Code has expressly created conducive environment to charge such persons for the harm against all the victims involved and by so doing rectified the problem of the previous Penal Code.

4. Imperfect Concurrence (Article 61(1))

☞ This is not the case of concurrence so to say. The crime is only one and the victim is one. But it seems that there is concurrence merely because there is/are an act/acts which is/are common elements) to two or more legal provisions.

- ♣ **For instance**, act A may be an element of three legal provisions: X, Y and Z. In this case if one of the three provisions can cover everything that has happened, the offender should be charged only under that provision, not under all. Merely because their common element has happened.

- ♣ **For example**, if a person takes other's property by force, two things will come into picture:

- a. Abstracting other's property and
- b. Use of violence.

☞ Out of the two things, the first belongs to both the crime of theft (Article 665) and the crime of robbery (Article 670). But this does not mean that the offender will be charged under both provisions. For the purpose of charging, we have to see the provision that can fully cover everything that has happened. Since Article 665 does not cover the violence element while Article 670 covers both, the offender should be charged only under Article 670, not under Article 665. This is the message of Article 61(1).

☞ If a person kills another by shooting, he will not be charged for killing and causing bodily injury since bodily injury is a necessary element of homicide by shooting. So, the concurrence is imperfect met. One article can cover the injury and the death. But if, for example, in the robbery case, the public prosecutor is uncertain about the existence or non-existence of the violence element, he can institute alternative charge against the offender for both crimes pursuant to Article 113(1) of the Criminal Procedure Code. However the punishment will be for violating only one provision depending on which crime the prosecution proves during trial.

❖ For the application of Article 61(1) there must exist a single criminal provision fully covering what has happened (and the elements thereof). If such provision does not exist the offender can be charged for all the provisions his single act (and its elements) violates. This means, in other words, notional concurrence will come into picture.

- ✓ **For instance**, in the case of a married person publicly raping his sister cannot be fully covered by any single provision in the Criminal Code. That is why he should be charged for all the articles his act violates.

- ❖ Similarly, the application of Article 61(1) of the Code requires the existence of the same criminal fault. If the criminal act or the combination of criminal acts does not flow from the same criminal fault (from single intention or negligence), Article 61(1) does not apply.
 - ✓ **For example**, if a person intends to injure his enemy and hits him on his head repeatedly but unfortunately causes his death, there will be two criminal faults. The criminal fault resulting in the act of causing bodily injury is intention while the criminal fault resulting in the homicide is negligence. Hence, Article 61(1) will not govern this case. Instead, the person can be charged for the crime of causing intentional bodily injury (Articles 555, 556 or 557) as the case may be and for homicide by negligence (Article 543). In other words, this seems to give rise to material concurrence than to imperfect concurrence.
- ❖ Further, Article 61(1) requires the criminal act or the combination of criminal acts to be against the same legally protected right. This seems to mean the offender must violate one provision in relation to the interest of a single person. Because if the victims are many, it is Article 60(c), not Article 61(1) that will be applicable even if there is only one provision that is violated.
 - ♣ **For example**, if a person has an intention to cause bodily injury his enemy and the first day he meets his enemy he beats him, shoots him on his leg and also cuts off some of his fingers, there are about three different criminal acts but against the same legally protected interest-physical integrity of the victim and flowing from a single criminal fault- intention. This perfectly falls under Article 61(1).
- ❖ Accordingly, the offender will be charged for a single crime-although it can be aggravated and not for the act of beating, shooting and mutilating the victim separately.

Corporate Criminal Responsibility: Goals, Kinds and Principles

❖ What mean juridical person?

- ✓ **“Juridical person”** means a body which has governmental or non-governmental, public or private structure and includes any legally recognized institution or association set up for commercial, industrial, political, religious or any other purpose (Article 34(4) of Criminal Code).
- ❖ So, a "Juridical person" is:
 - ♣ An artificial person created by law.
 - ♣ It does not have physical existence
 - ♣ It does it have moral element like human beings.
 - ♣ It cannot commit crimes except through its members.

- ❖ It is for this reason that until the 19th century the concept criminal responsibility of juridical persons was rejected. Today, however, it is generally accepted that legal persons can incur liabilities: both civil and criminal.
 - ✓ **Example**, if one considers different transnational corporations, sometimes, the way they do businesses results in the commission of different crimes. **E.g.**
 - They endanger the lives and persons of many people by polluting their environment,
 - They deliberately fail to take safety measures at work places and
 - They even engage in trafficking in human beings.
- ❖ So, these legal persons can be criminally liable.
- ❖ However, the criminal Liability of legal persons is always in a sense vicarious. Because, it is necessarily incurred through the acts of their members. This means, juridical persons can be criminally responsible and their responsibility is premised upon the theory of agency. It is only the act of their employees that is attributed to the juridical person.
- ❖ The Criminal Code recognizes the concept 'criminal responsibility of juridical persons'. Under Article 23(2), it states the legal element, the material element, and the moral element as the basic premises for criminal responsibility to exist. But, the Code expressly makes an exception to this rule, under Article 23 (3), which states juridical persons are also responsible for their criminal acts notwithstanding that the moral element requirement cannot be fulfilled.
 - ♣ **Example**, it is possible that juridical persons engage in illicit trafficking in women (Article 597), currencies (Article 346) and precious minerals (Article 347).
- ❖ Thus, they can be punished for these crimes although they cannot form guilty mind.
- ❖ However, the responsibility of juridical persons comes into picture only when the law so expressly provides. This is so because Article 23(3) makes cross reference to Article 34 and Article 34(1), first paragraph, stipulates that juridical persons are criminally responsible only when the law expressly provides. Hence, the silence of the law in relation to the responsibility of juridical persons with respect to a given crime means that juridical persons will not be liable, if they commit such crime.
- ❖ Therefore, it can be argued that still the criminal responsibility of juridical persons is not fully recognized in our criminal system. Because the liability of such persons exists only exceptionally; that is, when it is expressly provided by law (the law can be any criminal legislation).
- ❖ Here, it is important to note the problems posed by the cross reference made by Article 23(3) to Article 34.

- ❖ Primarily, Article 34 regulates cases where juridical persons participate in the commission of crime regardless of their capacity. This implies that unless the special part provisions expressly provide for their liability, juridical persons are not criminally responsible for their criminal acts in the absence of participation element.
- ❖ Therefore, it is only when they commit crimes either as principal offenders (being with others) or as inciters or accomplices that they are regulated by virtue of articles 23(3) and 34.
 - ♣ **Example**, falsification of weights and measures is a crime under Article 367 of criminal code. It is possible for juridical persons to falsify weights and measures to be used in commerce or trade. Moreover, it is possible for juridical persons (like political parties) to provoke individuals or the public to commit crimes against the constitutional order of the country as envisaged under Articles 257 and 238. However, regardless of their capacity to commit these crimes, juridical persons are not held liable in case they perform such activities since Article 34 is not pertinent to these cases.

Responsible juridical persons

- ❖ Even though it is claimed that juridical persons are criminally liable for their acts, it does not mean that all juridical persons are so exposed to criminal liability. Some of these persons are excluded from the realm of criminal responsibility.
 - ✓ For example, administrative bodies are excluded from criminal liability as provided under Article 34(1) of criminal code.
- ❖ The term 'administrative bodies' in this case should be understood in its broadest sense so as to include other organs of the government and not narrowly, so as to include only administrative agencies. Anyway, all administrative institutions are free from any criminal responsibility.
 - ✓ For instance, if the Federal Police Commission commits an act which would otherwise be a crime for non-administrative organs, the act will be at most a civil wrong, not a crime. This is, however, without prejudice to the possibility of punishing individuals authorizing the wrongful act without legal mandate.
- ❖ Based on criminal code Article 34 (4) the following are among the legal persons which can be criminally liable:
 - The Commercial Bank of Ethiopia,
 - Ethiopian Airlines Corporation,
 - Ethiopian Electric Light and Power Corporation,
 - Telecommunication Corporation,
 - Ethiopian Orthodox Church, and

- All legally recognized Political Parties in the country. For example, if any political party provokes or incites individuals to disregard military orders it will be liable to punishment as per article 332(3) of the Code.

Goals of Corporate Criminal Liability

☞ The main goals of criminal liability of corporations are similar to those of criminal law in general as enumerated below:

1. The first characteristic of corporate criminal punishment is deterrence—effective prevention of future crimes.
2. The second consists in retribution and reflects the society’s duty to punish those who inflict harm in order to “affirm the victim’s real value.”
3. The third goal is the rehabilitation of corporate criminals.
4. Corporate criminal liability should achieve the goals of clarity, predictability, and consistency with the criminal law principles in general.
5. The fifth goal is efficiency, reflected by the first three goals mentioned above, but also by the costs of implementing the concept.
6. Finally, it is the goal of general fairness.

Types of crimes juridical persons can commit

- ➡ Juridical persons can commit crimes does not mean that they can commit any type of crime. It is claimed that juridical persons cannot commit crimes for which they cannot be sentenced. In this case they cannot commit homicide if the punishment is mandatory life imprisonment since legal persons are incapable of being imprisoned. But, in our system, it is hardly possible to use the impossibility of imprisoning juridical persons to say crimes entailing loss of liberty cannot be committed by such persons. Because the Code, after providing that a juridical person can be a party to a crime either as a principal or an instigator or an accomplice when it is expressly provided, provides for the conversion of imprisonment to fine if the crime committed entails imprisonment.
- ➡ Hence, the fact that the special part of the Code provides only for imprisonment in relation to certain crime does not mean that that crime will not be committed by legal persons. The crime can be committed and the liability thereof will be determined via the conversion provision of the Criminal Code (Article 90(3)).
- ➡ It should, however, be noted that it is still possible to raise some issues in relation to punishing legal person in the light of the Criminal Code, too. Under Article 90(3), what is provided is only the conversion of imprisonment to fine. The Code does not provide for the conversion of death penalty to fine.
- ➡ So, it can be argued that, still there are crimes which juridical persons cannot commit. These crimes are crimes that are punishable solely by death and legal persons cannot be killed since they lack physical existence.

- ➡ Another point which reveals a real problem has to do with the situation where the crime committed by a juridical person entails both fine and imprisonment as alternative punishments. Article 90 provides for the conversion of imprisonment to fine only when the crime committed entails imprisonment as a *sole* penalty. If the crime committed entail fine as a *sole* penalty, the same provision provides for making such fine *fivefold*. Therefore, the situation where a juridical person commit crimes entailing the two penalties as *alternative* penalties is not regulated under Article 90.
- ➡ As a possible solution, one may suggest that courts can change the imprisonment part to line as per Article 90(3) if they opt for it and make the fine fivefold if they opt for the fine as per article 90(4). But both the conversion of imprisonment to fine and making fine fivefold are allowed only when they are provided as *sole* penalties, not when they are provided as alternative penalties. Accordingly, such measures of courts, if taken, may be considered as creating penalty by analogy.
- ➡ Likewise, as a third possibility, it is possible to suggest that courts can impose both penalties at a time and convert the imprisonment to fine and then add up the two fines. However, still the circumstance under which conversion is allowed does not give them such leeway. So, the gap is indeed inescapable.
- ➡ Equally important and concomitant to the above issue is a problem of imposing punishment on juridical persons in case they commit crimes entailing fine and imprisonment as cumulative punishments. In fact, juridical persons can commit crimes of trafficking in women and minors (Articles 535 and 538) and these crimes entail both penalties. For the same reasons mentioned before, one cannot use Article 90 and this gap is also is inescapable.

Whose acts are the acts of juridical persons?

- ➡ As stated before, juridical persons can commit crimes either as principal offenders or instigators or accomplices. At the same time, it is also stated that they lack physical existence and the moral element to commit crimes by themselves. So, whatever is done is done through their members. It is the acts of their members that are taken as the acts of juridical persons. The point worth considering, then, is whether the acts of each and every member can be attributable to a juridical person for the purpose of criminal liability.
- ➡ There is a position that a legal person is not criminally liable for the act of each and every member. Its criminal liability arises only in relation to the acts of persons who are regarded as 'the directing mind and will of the organ'. These persons are called the controlling officers; that is, individuals who control the affairs of the legal person. Therefore, if a member of a juridical person lacks supervisory or controlling role, his criminal act will not be imputed to the

juridical person. For example, the criminal act of a janitor or a guard cannot make a juridical person criminally liable because they are not in control of and directing the business of their institution.

- ➡ It should be known that even as regards the acts of the controlling officers, juridical persons are criminally liable only for acts performed within the scope of their employment. Anything done out of their scope of employment is not imputable to the juridical persons. The officers alone will pay for such acts. The determination of the scope of their authority together with who the controlling officer really is can be made on the basis of the constitution and the rules of the juridical persons concerned.
- ➡ Under the Criminal Code, the question whose act is juridical person's act is not expressly answered. So, whether the so-called "managerial staff s" act is to be regarded as the juridical person's act or that of all employees may be a matter of interpretation. If one follows the abovementioned generally accepted position, non-controlling members' acts are not the acts of juridical persons for the purpose of criminal law and there seems to exist some provisions in the Criminal Code in favor of this position. Under Article 716(2), the Code chooses the members of the legal person's administration to be personally liable for the crime committed in addition to the legal person's liability. This has an implication that the law wants to attribute the acts of these people to legal persons, not everybody's act. All the same, the existence of this provision alone may not be a sufficient guarantee to say the Code has adopted the above position.
- ➡ On the contrary, there is another equally strong argument in favour of making all members' acts the acts of a legal person. That is, if a person is employed, then he is the agent of his employer in as long as he is acting within the scope of his authority. Owing to this, his act, even if he is not a controlling officer or a managerial staff, should be ascribed to his employer like any other contractual obligation. Article 34(1) also seems to support this position because it simply regulates the acts of officers or employees in general.

Penalties on juridical persons

- ❖ Juridical persons cannot be killed because they lack souls, and they cannot be put in jails because they lack body. As a result, the only principal penalty that can be imposed on them is fine. This means, juridical persons will be fined in case they are found criminally liable. Of course, to achieve the purpose of criminal law, the fine to be imposed can be greater than the one provided for natural persons.
- ❖ The following penalties can be impose on juridical persons either independently or/and cumulatively:

1. Fine under sub-article (3) or sub-article (4) of Article 90 of this Code; and
2. Suspension or
3. Closure or
4. Winding up of the juridical person may be ordered where necessary
5. Individual liability on the officials or employees of the juridical person may be additionally imposed for their personal criminal guilt.

Principles of Corporate Liability:

- ❖ A company can be held liable for its wrongful acts by virtue of two legal principles:

1. Vicarious liability

- ✓ The legal principle of vicarious liability applies to hold one person liable for the actions of another when engaged in some form of joint or collective activity. The general rule in the criminal law is that there is no vicarious liability. This reflects the general principle that a crime is composed of both an actus reus and a mens rea and that a person should only be convicted if he, she or it is directly responsible for causing both elements to occur at the same time. Thus, the practice of holding one person liable for the actions of another is the exception and not the rule in criminal law.
- ✓ In the criminal law, corporate liability determines the extent to which a corporation as a fictitious person can be liable for the acts and omissions of the natural persons it employs. It is sometimes regarded as an aspect of criminal vicarious liability. A company can be vicariously liable to many offences of strict liability and negligence for the acts of its employees in the course of their duties.

2. Direct liability

- ✓ The idea that a company is a legal person that could sue and be sued in its own name, has given way to the law maker superimpose its individualistic conception of criminal liability to legal persons. The acts of individuals who had committed the offence are identified with the company itself. In such circumstances the company as well as the individual could be criminally liable. This is known as the identification doctrine.

Essentials to attach criminal liability to juridical persons:

- ❖ A juridical person shall be deemed to have committed a crime and punished as such if the following essential elements of such commission are established:
 - 1 One of its officials or employees commits a crime as a principal criminal, an instigator or an accomplice,
 - 2 In connection with the activity of the juridical person
 - 3 With the intent of promoting its interest

- 4 By an unlawful means or by violating its legal duty or by unduly using the juridical person as a means.

CHAPTER SIX: DEGREES IN THE COMMISSION OF CRIME

Different Stages in the Commission of Crime

- ☞ At the beginning, it was stated that the purpose of criminal law is to protect the society and its citizens. To achieve this objective, it intervenes in individuals' liberty under two circumstances:
- ✚ Firstly, when a crime is committed with a view to deterring the commission of further crimes and also rehabilitating criminals.
 - ✚ Secondly, where there is an indication that a crime will be committed in order to abort the criminal design.
- ☞ Here, it is the second instance that deserves detailed discussion.
- At what stage should criminal law intervene in individuals' affairs and restrict same? Where there are indications that crimes will be committed?
 - The stages in the commission of intentional crimes are:
 - ♣ Bad thought,
 - ♣ Preparatory acts,
 - ♣ Attempt and
 - ♣ Commission of the crime.
 - For various reasons, such as its insusceptibility to proof, bad thought is non-punishable.
 - If the result is achieved, the criminal will be punished, because he has caused some harm to the society and the society has to make sure that another crime will not be repeated. Thus, in relation to preparatory acts and attempt, the application of criminal law is discussed in detail in the following manner.

Preparatory acts

- ✓ The first thing that someone does when he wants to commit a crime is that he first starts to think about it. In this case, the criminal thoughts come to mind. However, Criminal thoughts are beyond the control of criminal law and non-punishable. This is due to the fact that they can never be proved.
 - ♣ Imagine a person told his friend what he thought to kill someone, it is not still punishable.
- ✓ The mere thoughts to commit a crime are considered to be the beginning of the preparatory acts and preparatory acts to commit an offence are as a matter of principle, non-punishable.
- ✓ Thus, in principle criminal law refrains from punishing acts of preparation because of their:

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- i Equivocation,
 - ii Remoteness from results and
 - iii Possibility of renouncing the criminal intention.
 - ✓ Firstly, no one can speak with sufficient precision or certainty that acts of preparation have the commission of crime as their sole objectives. Because of preparatory acts are equivocal by their very nature.
 - ♣ Example 1, if someone bought a gun, the buying of a gun may mean different things such as killing, hunting, and self-defense.
 - ♣ Example 2, if someone may have bought a pistol either to hunt or to prevent danger against him. Hence, it is equivocal since it is impossible to tell for certainty the motive behind the preparation. But, if such person told his friend the purpose for which he bought the pistol, the equivocality nature of the pistol would come then to an end since it can be proved by testimony.
 - ♣ Thus, punishing a person before the equivocal nature of his act amounts to punishing him for a presumed, not ascertained intention which would be contrary to the principle of presumption of innocence.
 - ✓ Secondly, preparatory acts are also non-punishable due to the fact that they are both materially and psychologically remote from the result.
 - ♣ Many other acts, in fact, the decisive ones are yet to be performed to come closer to the result (material remoteness) thereby making the danger remote.
 - ♣ As a result, there is a possibility that the author of these acts may change his mind to commit the crime (psychological remoteness).
 - For instance, if someone purchased a pistol to kill someone, he is at the stage of preparation up to the moment he pointed the pistol at the person he thought to kill. And he is not criminally liable because, the law does not want to intervene so early to encourage people to finalize their preparatory acts.
 - ✓ Thirdly, the other one is the possibility of renouncing the criminal intention. The criminal should also be given the chance to renounce his criminal intention.
 - ♣ If we start punishing preparatory acts, individuals who prepare for criminal acts will pursue the criminal act up to the end.
 - ♣ On the other hand, if we exempt individuals for their preparatory acts to commit a crime from criminal punishment, we can encourage them to renounce their criminal intention at that stage. Because, prevention of crimes is one of the purposes the criminal law is trying to achieve by exempting preparatory acts from criminal punishment.
 - ✓ However, there are some instances or exceptions by which preparatory acts are made punishable as provided under Article 26 of the criminal code.

- ✓ Article 26 reads as “Acts which are committed to prepare or make possible a crime, particularly by procuring the means or creating the conditions for their commissions are not usually punishable, however, such acts are punishable where.
 - a In themselves they constitute a crime defined by law; or
 - b They expressly constitute a special crime by law owing to their gravity or the general danger they entail”.
- ✓ Article 26 of the Criminal Code regulates the issue of preparations to commit crimes and stipulates that preparatory acts are not liable to punishment. However, it provides for two exceptions where preparations become punishable.
 - a If the preparations in themselves constitute independent crimes, the authors will be punished not for the intended result, but for the crime they have already committed.
- ✓ In this case, the intervention of the law is justified on the need to deter the commission of further crimes, not to abort the intended crime, since their preparations have incidentally produced criminal results.
- ✓ So, this is not an exception to the rule that preparatory acts are not punishable, although Article 26 provides it as an exception.
- ✓ Article 26(a) of criminal Code seems to be of difficulty. It says “(a) in themselves they constitute a crime defined by law”. But, unlike this sub-article, the criminals are not being punished for their preparation; they are being punished because of the fact that **the acts they have committed constitute crime defined by law**.
 - ☞ Example 1, Article 809 of criminal code reads as:

“Whoever is found carrying in a public place an arm which he was not authorized to acquire or entitled to carry, or makes use of an arm, even though authorized, at a time when or in a place where such use is prohibited is punishable with fine not exceeding one hundred Birr or arrest not exceeding eight days”.
- ✓ No one is entitled to bear arms. So, in this case, the mere act of possessing or bearing of an arm unlicensed constitutes a crime and is made punishable. So Article 26(a) is talking about such types of crimes.
- ✓ So, it does not seem relevant to include such type of provision under article 26, for the fact that such act are not preparation, but commission of a crime defined by law (see Article 809).
 - ☞ Example 2, if someone attempted to commit homicide with the use of an unlicensed gun, he will not be accused of committing 2 crimes, but attempting to commit homicide only and the possession of an unlicensed

gun will be used to aggravate the punishment which is going to be imposed upon the accused.

- b If the law expressly provides that, under the circumstance, preparations to commit certain crimes will constitute **special crimes**, preparatory acts will be punishable.
- ✓ There are crimes the nature of which requires the law to intervene as early as possible at the preparatory stage. Such type of crimes are:
 - ♣ Economic treason,
 - ♣ Coup and
 - ♣ Subversive activities.
- ✓ They are called special crimes.
- ✓ They are so serious and grave by their very nature that the law made the mere preparation for such special crimes as defined by law punishable. This is for the reason that, if the individuals proceed and commit even attempt such crimes they can create chaos in the nation due to the gravity of their nature.
- ✓ Thus, criminal law penalizes preparatory acts if the crime intended is grave or the interest to be protected is so important. In this case, the law does not allow individuals to take even a single step towards the commission of the intended crimes, because let alone committing the crimes even attempting to commit them may cause grave consequences. So, in such situations, the law wants to avoid attempt by itself and to do that, it has to penalize preparations which is proximate and capable of leading to attempt.
 - ☞ For example, under the Criminal Code any preparations to commit the crimes defined under Articles 238, 239, 240, 241, 246, 247, 248, 249, 250, 251, 252 (via Article 256); 269, 270, 271, 272, 273 (via Article 274); and 385 and the following by virtue of Article 390 constitute special crimes.
- ❖ Thus, as far as these provisions are concerned individuals can be punished at three stages;
 - i When they make preparations to violate them,
 - ii When they attempt to violate them, or
 - iii When they succeed in violating them.
- ➡ **Note!** if the crimes intended are committed,
 - ♣ The authors of the preparatory acts will not be charged for both preparations and the crimes they have committed. Their charge should be only for the completed crimes because, according to Article 61(1), preparation is a necessary element of the crimes committed.
 - ♣ The same logic applies in the case of attempt, too. Therefore, no one will be punished for preparing to commit a crime, attempting to commit it, and

finally committing the crime. If the crime is completed, the charge should be solely for committing the crime.

Attempt (Article 27 of Criminal Code)

- ✓ Preparatory acts are acts of laying foundation to commit a crime. So, attempt refers to a step taken on the basis of the foundation laid (preparatory acts) to consummate the commission of a crime.
- ✓ The author of the preparation fails to obtain the result for various reasons which may be attributed to his own effort or external factors. That is why attempt is characterized by failure. If there is success, we can only talk of completed crime not attempt.
- ✓ Accordingly, failure is necessary to consider issues pertaining to attempt. But failure is not the only requirement for attempt to exist. There are some other elements that must be present. These elements are:
 - 1 The first thing is that for attempt to exist, the requisite moral element is intention. This means attempts are intentional, with full knowledge and desire to commit a crime or to achieve a certain result. And attempt by its inherent nature cannot be committed through negligence. As long as the intention element is fulfilled, the material element can be either commission or omission. So, there is no distinction in relation to the *actus reus*.
 - ▶ For instance, if someone who was getting used to how to shoot or hunt wounded a man, he did not do it intentionally; so, he is not going to be held criminally liable for negligently attempted homicide. He is rather to be held criminally liable for his negligent bodily injury. If we are provided with facts that seem to indicate the presence of negligent attempts, then those facts are not the case governed under Article 27 of the criminal code.
 - 2 The other parameter that enables us to judge whether a person has passed the stage of preparation and made an attempt to commit homicide is the proximity to the intended result.
 - ♣ We have already said that preparatory acts are non-punishable due to their remoteness to the intended result. But, attempts are proximate enough to the intended result to be punishable.
 - ♣ By Proximity, we may mean physical proximity to the target. If someone is seen or caught pointing his gun at a person, he is on the virtue of firing the gun and he can be accused of attempting to commit homicide and we don't have to wait for the last act, firing a gun, for a person to be deemed to have attempted a crime.
 - 3 The other one is that he must commit the last act which is necessary for completed attempt.

- ♣ For example, if someone wants to kill someone with a pistol, the last act will be to pull the trigger of the pistol and in case of poison, the last act will be to add the poison on the thing to be eaten or drunk by the injured. If the last act is done, it makes the situation easier in the scene of determining the existence of attempt. And if someone missed the target or wounded someone, there is attempt and the only thing expected from us is to ascertain whether the attempt is to commit homicide or to inflict bodily injury upon such person.
- 4 The other one is the point of no return.
- ✓ If having regard to the circumstances of the case, someone is likely to reach to the conclusion of a certain crime, such suspect has reached to the point of no return and then he would be deemed to have attempted the crime. This does not mean that someone has a mere resolve or commitment to kill someone but he has reached such stage after passing decisive stages of preparation.
- ♣ **Eg**, suppose someone who is not a student of Wollega University and whose quarrelsome he is looking for to murder is studying here and living in Block No.300 and Dorm No.302 reached the 3rd floor, then we can say that such suspect has reached the point of no return. Here, it must be convinced that there is no way or possibility with which such person is going to return back and say that he is not going to commit a crime.
- 5 The other major parameter non-equivocality of the acts.
- ♣ If it is equivocal or if the facts of the case are not sufficient to tell the intended plan of the suspect, then he is not going to be deemed to have attempted to commit a crime. So, attempt to be punishable must be non-equivocal to be justified.
- ✓ **Attempt** It is only when the above conditions are met that we can talk of criminal attempt. If they are fulfilled, normally, the attempter will be punished. That is to say, upon the fulfillment of the above requirements, attempt becomes a crime. But, the conditions are not cumulative in the absence of one of the requirements attempt can be committed. However, sometimes, it is very difficult to know where preparatory acts end and attempt begins.

Try to see the following Attempt Cases

Case one

Morka bought a gun and tasted it. Afterward, he got on a car and after some time he pointed at the driver Gutu and told him to take him to a dangerous place which was found nearby. Suddenly, Gutu the person at which the gun was pointed snatched the gun from Morka and escaped.

☞ Now, does this person (Morka) make an attempt to commit a crime? Was Robbery, homicide, kidnapping? Yes, the act of this person is an attempt since the above parameters save as the last act is more or less completed. Depending on the type of the case, waiting for a person to kill, taking someone to dark place, abducting and taking someone home and others can be taken as parameter to say so. But, it must be noted the above parameters are not cumulative and an act may be taken as an attempt in the absence of one or more of those parameters. It must be also noted that evidence is the key not just for attempt but also for completed crime.

Case Two

A man who was riding a motor cycle and bearing an artificial gun went to a bank and showed them a logo which says “hand over that cash or I will kill you”. Then, he was caught at the door of the bank.

☞ Would it be an attempted robbery or homicide? Yes, even if he has born an artificial gun, it is an attempt and the yardsticks are more or less complete and no one can easily detect the artificiality of the gun and such artificial gun can achieve the intended result.

Case Three

Assume Marga went to Milkesa Hunda and asked that he wants to kill his enemy called Boresa. Then, Milkesa Hunda gave a lemon and told him (Marga) that he should put the lemon on the palm of his enemy. Suddenly, the enemy Boresa died.

☞ Now, would Merga be accused of committing homicide? No, he cannot be accused of committing homicide. The causal effect relationship can never be established in this case (Article 24). Because, a lemon can kill no one in the normal course of things even if the man believes that the lemon can fulfill his intention superstitiously. The criminal law does not also give recognition for superstitious things. Article 27(1) says

“Whoever intentionally begins to commit a crime and does not pursue or is unable to pursue his criminal activity to its end, or who pursues his criminal activity to its end without achieving the result necessary for the completion of the crime shall be guilty of an attempt”.

☞ The crime is deemed to be begun when the act performed early aims, by way of direct consequence, at its commission”.

❖ **Criminal attempt** is recognized and regulated under Article 27 of the Criminal Code. There are three types of attempt of execution test in the criminal code:

1. Incomplete Attempt (Article 27 of criminal code)
2. Complete Attempt (Article 28 (2) of criminal code)
3. Impossible Attempt (Article 29 of criminal code)

1. Incomplete Attempt (Article 27 of criminal code)

- ❖ The Code subjects criminal attempt to certain requirements for its existence. These requirements are:
 - Firstly, failure should be there, because the law is deals with individuals who do not pursue or are unable to pursue their criminal activity *to its end*, or who have pursued their criminal activity to its end, but *without achieving the result intended*.
 - Secondly, the pursuit should be intentional. Hence, attempt by negligence is not recognized. At this juncture, it is necessary to consider the type of intention that is required for attempt. Article 27 of the criminal code simply uses the term *intention* without making reference as to any of its types. Hence, it is possible to argue that both direct and indirect intentions are envisioned. Nevertheless, from some of the terms used in Article 27, it is highly probable that only direct intention is envisaged.
 - ♣ For instance, terms like pursue and begin to commit show the existence of desire on the side of the attempter which, in turn, shows the requirement of direct intention.
 - Thirdly, the article does not make distinction between the two types of material elements (commission and omission). In particular, the cumulative reading of the Amharic version of Article 27(1) and 23(1), 2nd paragraph, leads us to a conclusion there can be attempt by both commission and omission despite the use of the term *commit* in Article 27(1).
 - ♣ Eg, it is possible to attempt to commit a crime against Article 575 if a person unsuccessfully withholds assistance which he can give without any problem.
 - Fourthly, when Article 27 states, "whoever intentionally begins to commit a *crime...*" the word **crime** tells us that the intended result should be, if obtained, contrary to criminal law.
 - ♣ For instance, acts like suicide and prostitution are not crimes. Accordingly, any attempt to do these acts will not constitute a crime. After all, attempt is a parasite crime. It does not, like other crimes, exist in abstract unless there are substantive crimes.
 - Lastly, the requirement of the fulfillment of all the elements of the intended crime is an inbuilt element in the fourth requirement. Because missing one of those requirements, let alone attempt, even the main crime will not exist.
- ➡ The other relevant point is Article 27(1) 2nd paragraph, states that attempt commences, if there is an act which *clearly aims, by way of direct consequence*, at the commission of a crime. This means, if one act is performed and this act, without any ambiguity, shows that the author is going to commit a crime, then attempt is said to have begun and the author thereof can be charged therefor.

- ➡ In fact, in the criminal code the element of proximity is not expressly recognized. The article makes express stipulation only for the absence of the equivocation element. But the requirement of proximity can be read into the requirement of *unequivocally* and the expression *by way of direct consequence*. This is due to the fact that something that is remote never ceases to be equivocal.
- ➡ On top of that, it will not have the commission of a crime as its direct consequence. That is to say, if what a person is performing unequivocally shows, by way of direct consequences, that he is committing a crime, then the person must have come closer to the result.
- ❖ If the existence of attempt is proved, the attempter will, as a rule punished (Article 27(2)). The extent of penalty is as per Article 27(3) the same as the penalty for a person who has succeeded in the commission of the result intended. But there are certain considerations that should be taken into account while determining punishment for criminal attempt.
 - 1 Exceptionally, attempts are made non-punishable. Hence, if the law does not expressly exclude attempt from punishment, attempters will be punished.
 - ♣ For example, even if instigation and accomplice are punishable, attempt to instigate or assist is as a rule excluded from the realm of punishment (Article 27(2), 2nd paragraph). Similarly, any attempt to commit petty offences is non-punishable (Article 740).
 - 2 An attempter will not be punished by death even if the crime he attempted to commit would entail death penalty. Because, Article 117(1) of criminal code stipulates that death penalty can be imposed only for completed crimes.
 - ✓ For example, in the Kamilat case, the Federal High Court 3rd criminal division sentenced Demise Zerihun to death and his co-offender to 20 years on 30 January, 2008. The individuals were charged for attempting to kill Kamilat Mehadin (who was his girlfriend) in violation of Article 32(2) (a) and Article 27 (1) and Article 539 (1) and causing grave bodily injury to her sister in violation of Article 32 (a) and Article 555 (a) of the Criminal Code by using sulfuric Acid on 28 December, 2007 @ around 10:00 pm. In this case the Federal High Court sentenced a person who attempted to commit the crime defined under Article 539(1) to death, which is obviously wrong." So based on Article 117 of the criminal code the decision given by the Federal High Court was improper imposition of death penalty.
 - 3 Even if, an attempter is to be punished as though he committed the intended crime, he may be granted a mitigated penalty (Article 27(3) 2nd paragraph). Therefore, a person who attempts to commit a crime will be punished as though he committed that crime (Article 27(3)) **except** that he may be entitled to

mitigating penalty. Nonetheless, Article 80(3) seems to provide for some sort of exception to Article 27(3).

- ✓ For example, if Gada wanted to kill Morka but he killed Guta who wore Morka's clothes, there is no doubt that Gada attempted to kill Morka. However, article 80(3) stipulates that he should be punished as though he killed Guta deliberately. Hence, there will be no punishment for attempting to kill Morka separately as stipulated under article 27(3). Consequently, Gada will not benefit from the (last two) advantages attached to attempt as explained above. For instance, he can be sentenced to death depending on his degree of individual guilt and the absence of any mitigating ground.
- ✓ As stated before, attempt represents failure. But one may wonder why individuals, after making all the necessary preparations, fail to commit the crimes they want to commit. They may fail to succeed in the commission of crimes because:
 1. They could not pursue their criminal activity to its end due to the existence of factors external to them;
 2. They might decide not to pursue their criminal activity to the end;
 3. Even if the criminal activities are pursued to their end, the result may not be achieved due to the existence of factors external to them; or
 4. Even if the criminal activities are pursued to their end, the result may not be achieved as the actor may decide not to succeed; that is, he may undo what he did.
- ❖ The first two factors give rise to what is known as incomplete attempt. If the failure is due to the second factor the actor is said to have renounced his intention.
- ❖ The last two factors give rise to what is known as completed attempt. If the result does not happen, because of the fourth factor, the attempter is said to have repented actively.
- ❖ Article 27(3) of the Criminal Code reads as:

“Without prejudice to the provisions of Article 117, in the case of an attempted crime the criminal is liable to the punishment attaching to the crime he intended to commit. Provided that if circumstances so justify the Court may reduce the punishment within the limits provided by law (Article 179)”
- ♣ This sub-Article states that, if someone attempted to commit a crime, he will be accused of such crime by mentioning Article 27 in the general part and the specific provision of the attempted crime in the special part cumulatively and if proved, he will be sentenced with the punishment attached to that specific crime in the special part.
- ❖ A complete attempt is said to be done when the criminal has done everything on his part or in his capacity to accomplish the intended result.

- ❖ An incomplete attempt is said to be done when the criminal has begun the execution of the criminal design; but, still, there is something that the criminal has to do before we say that he has made the complete attempt.
- ♣ This distinction is clearly seen under Article 27 of the criminal code, even if it does not classify it as complete and incomplete attempt. And the last act taste helps us to know the difference between complete and incomplete attempt. But, it must be noted that the classification as complete and incomplete attempt is used only for academic purpose and not while instituting an action before a court.
- ♣ In order to establish the true intention of the criminal, circumstantial evidences or the antecedents of the crime must be established by observing thoroughly the relationship existed between the target and the perpetrator up to that moment.
 - ☞ For example, if someone was caught pointed his gun at a man who killed the brother of the former, he cannot be believed if he argues that his intention was simply to wound him.

Renunciation and Active Repentance

Renunciation (Article 28 (1) of criminal Code

- ☞ Article 28(1) of the Criminal Code reads as, If a criminal of his own free will renounces the pursuit of his criminal activity the Court shall reduce the punishment within the limits provided by law (Article 179) or without restriction (Article 180) if circumstances so justify.
 - ✓ The law is still trying to encourage renunciation. The law says that even if one has made an attempt, if one renounces it out of his free will, he will either get mitigation with restriction or without restriction meaning, he can go free.
- ☞ It goes further and says that, No punishment shall be imposed if the renunciation was prompted by reasons of honesty or high motives. The law still believes the criminal to have honesty and high motives, even if he has entered in to incomplete attempt. This means that if he has renounced his criminal activities, because of high motives or honesty, this person can even go free. It must be noted that renunciation applies only for an incomplete attempt. But, if one made a complete attempt, he can repent and not renounce.
 - ✓ During preparatory stage, we cannot talk about renunciation but abandoning criminal preparation. Normally a person plans to execute a criminal design. Then, after he has begun the execution of his intention, he pursues that criminal design to its end or renounces pursuing that criminal design to its end. But, before he completes his criminal intention, he may make a decision

that he should not commit that crime *out of his free will* or may be prevented from pursuing that crime to its end *by an external factor*. If he has been prevented from pursuing that crime to its end by an external factor, then we cannot say that he has renounced out of his own free will.

- ♣ Example 1, assume Gudata went to lighten his enemy's house having the necessary equipment's such as benzyl and explosive. But, after he splattered the benzyl over the roof, he heard children laughing therein. Then, he decided that he should not be such cruel at those children and cancelled his premeditation. In this case, we can say that the person has renounced out of his own free will.
- ♣ Example 2, Morka went to Galgale's house to rape her (Galgale). Then he tied her and prepared himself to have sexual intercourse forcefully. Suddenly, she told him that she was HIV AIDS positive. Then he abandoned his criminal intention. In this case, we cannot say that such person has renounced his criminal intention out of his free will rather, he stopped raping the woman owing to fear of HIV AIDS. But, if she had told him that she was a pregnant woman instead and he had abandoned his criminal activity, it would be renunciation. If someone has abandoned his criminal activities fearing of the law, it would also be regarded as renunciation. In general, renunciation is possible when it is at an incomplete attempt stage.

Complete Attempt

Active Repentance (Article 28(2) of criminal code

- ✓ The distinction between renunciation and active repentance is the degree the criminal has reached.
 - ♣ In the case of renunciation, the criminal has reached to a stage called incomplete attempt.
 - ♣ In the case of active repentance, the criminal has reached to a stage called complete attempt without achieving the intended result. Active repentance is possible only when it is at the stage of complete attempt.
- ✓ For active repentance to exist:
 - ✚ The criminal must pursue his criminal activity to its end or
 - ✚ There must be a complete attempt;
 - ✚ The intended result must not be achieved.
 - ✚ The criminal must be active enough to prevent the result from being achieved.

- ☞ The criminal must be active enough to prevent the result from being achieved. Because, if the intended result has been achieved, there can be no active repentance but sincere repentance.

Article 28(2) of the criminal code reads as, *if a criminal having completed his criminal activity, of his own free will prevents, or contributes to prevent the consequent result; the Court shall without restriction reduce the punishment.*

- ❖ According to this sub-article, the prevention of an act by the criminal himself or the contribution to prevent the consequent result such as by calling a doctor is a condition precedent for a person to avail himself of active repentance. But, the active repentance must be done out of the criminal's free will and not out of external factor.

- ♣ Example 1, if Qoricho gave for Dumesa a meal adding poison with a view of killing him. But, Qorich gave him again an antidote to prevent the result out of his free will or after regretting. So here the act of Qoricho would be an active repentance if the injured was cured.

- ♣ Example 2, in case of theft, there would be an active repentance if the thief puts the object back after picking it up and not taking it away.

- ❖ Renunciation and active repentance would also apply for an instigator or accomplice, if he has renounced the criminal activity or prevented or contributed to prevent the consequent result out of his free will (Article 28(3)). In case of sincere repentance, the intended result has achieved and the mitigation would be an ordinary mitigation.

- ☞ For instance, if someone knocked someone down and tried his best to prevent the death of the injured despite not success, he will be said to have been sincerely repented and it would constitute a mitigation ground within the meaning of Article 82 (1) (e), but not in the manner as provided under Article 28.

- ❖ Sincere repentance is not mandatory as such and may even be ignored by the court while what is provided under Article 28 is mandatory. Since sincere repentance is not mandatory, it is left for the discretion of the court after it looks into sincerity of the repentance.

Impossible Offences (Article 29) of criminal code

- ❖ Sometimes, individuals may try to commit crimes which cannot be committed either because:
 - ♣ The object of the crime is absolutely insusceptible to harm or
 - ♣ The means used is absolutely incapable of producing the result intended.

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- ☞ Example 1, if a person tries to kill a dead person the offence of homicide cannot be committed. Because the crime of homicide can only be committed against a person who is alive. Then it is impossible from the object. Or
 - ☞ Example 2, if a person tries to steal his own property the offence of theft cannot be committed. Because the crime of theft can only be committed against other's property. Then it is impossible from the object. Or
 - ☞ Example 3, if a person got into a house with a view to still something and there is nothing therein, then it is impossible from the object. Or
 - ☞ Example 4, if a person adds sugar into a cup of tea to kill another, thinking that sugar is deadly, the means used is absolutely incapable of producing the result intended. Therefore, this person is said to have committed a crime impossible of completion.
 - ❖ This crime is a crime of attempt. Because the actor fails, despite his efforts, to produce the result. This type of attempt can be called a **special attempt**, because the result intended can never be produced by any person against the same object or by using the same means. Therefore, according to Article 27(2) of the criminal code if the crime amounts to an attempt, then it is, as a rule, punishable. That is why Article 29 provides for the penalty to be imposed on such person. Accordingly, he is liable to the punishment attached to the crime he intended to commit. However, the court should reduce his penalty without restriction (Article 180), because persons who try to commit crime impossible of completion are more of bird-brained than dangerous. Even, exceptionally, the court shall exempt a person from liability if he uses a *means or processes (not against an object which is never susceptible to harm)* which could in no case have a harmful effect and the person uses such means or processes owing to his *superstition or simplicity of his mind*.
 - ♣ For example, if a person tries to kill another by *sorcery or cursing*, he should be exempted from liability as such means will never produce death and it also reflects the user's gross stupidity than his dangerousness.
 - ❖ Crimes impossible of completion can also be committed in relation to instigation and accomplice.
 - ♣ For instance, if a person incites someone to kill a dead person or a living person by using innocent means like milk, or if he gives assistance to kill a dead person or to buy milk to kill a person, he is said to have committed a crime of instigation or accomplice in relation to a crime impossible of completion. Such person, under the Code, is put on equal footing with those who incite or assist in the commission of crimes possible of completion.
 - ❖ Impossibility can be absolute or legal, material or relative impossibility.

1. Absolute impossibility- if someone attempts to kill someone with unloaded gun, then, it is an absolute impossibility. Because, success can never be achieved regardless of who ever uses that gun.
 2. Legal impossibility- for instance, conducting abortion is a crime. But the legal requirement is that it must be conducted on a pregnant woman. If there is no pregnancy, it is legally impossible since abortion can happen against a pregnant woman.
 3. Relative/Material impossibility- for example, if someone added a very small amount of poison on a meal with a view to kill someone while it can never kill him owing its insufficiency, then it is relative impossible.
 - ✓ It is said to be relative impossible because had such person added a sufficient amount of poison, he would have brought the intended result.
 - ✓ If a pick-pocket sends his hand in one's right hand pocket to still money while the money is in the left hand pocket, then it is materially or relatively impossible. Because, he would have been stolen had he sent his hand in the left hand pocket.
- ☞ Relative or material impossibilities are dealt with under Article 27 of criminal code even if they cannot be distinguished from any other attempts.
- ☞ Absolute and legal impossibilities are dealt with under Article 29 of criminal code. The person can go free if his acts arise out of superstition or simplicity of mind.
- ♣ For example, if someone attempts to bring down a plane throwing a stone, he would not be criminally liable, because his act arises out of simplicity of mind.

CHAPTER SEVEN: PARTICIPATION IN THE COMMISSION OF CRIME

- ❖ It is clear that a crime should not always be committed by single persons. In the commission of criminal offence there may be several persons or groups which play distinct role. Collectively, these persons or groups are called parties to the crime.
- ❖ Thus, the purpose of the law of participation is to deal with issues arising from the participation of several persons or groups in the commission of a crime. The most relevant of these issues include determination of:
 - ♣ Parties to crimes,
 - ♣ Their (parties) degree of involvement whether they are liable or not for the crimes they take part in, and
 - ♣ The extent of their (parties) liabilities.

- ❖ The Criminal Code has classified parties to crimes and regulated their status depending on their degree of involvement in the commission of crimes into:
 - ♣ Participants in principal capacity (principal criminals) and
 - ♣ Participants in secondary capacity.
- ❖ Participant in the commission of crimes in primary (principal) capacity, in their participation in the commission of a crime is so close, direct and active. Besides, they are persons who pose greater danger to the society.
- ❖ On the other hand, participants in the commission of crimes in secondary capacity are those persons whose participation in the commission of crimes is not so close, direct and active. Relatively, the danger they pose to the society is also of lesser importance, because their involvement in the commission of crimes is more of indirect than direct.
- ❖ On top of that, the Criminal Code by reading Article 32 cum Article 33 classifies the crimes persons may participate in into two which can, for the sake of convenience, be called *ordinary* and *special crimes*.
 - ☞ Ordinary crimes are those crimes which can be committed by any person, whereas special crimes are those crimes which can be committed only by persons possessing certain qualities.
- ❖ At any rate, the Code provides for the criminal liabilities of all the parties to crimes regardless of the type of crimes they commit. It also stipulates that any personal circumstance that tends to benefit or harm a particular criminal works for or against him, respectively; and hence, non-transmissible. This means, any exempting or mitigating or aggravating circumstances is applicable only to a person for or against whom it exists. These parties will be considered below one by one.

A. Participation in Principal Capacity in the commission of ordinary crimes

- ☞ Few laws define what is meant by a principal offender as the person who does the act or acts constituting the offence or who abstains from acting when he is bound to act.
- ☞ Principal criminal or criminals who get involved in principal capacity in the commission of ordinary crimes are defined and regulated under Article 32 of the Criminal Code. Accordingly, the family *principal criminals*, made to include three types of criminals.

1. The Material Offender

- ✓ Any crime has got a material element. This form of participation is dealt with under Article 32(1) (a) of the Criminal Code. It exists when the one, who, with the requisite mental state, personally engages in the act or omission concurring with mental state which causes the criminal state. Accordingly, The Criminal

Code under its Article 32 (1) (a) defines material offender as a person who actually commits a crime either directly or indirectly, in particular, by means of an animal or a natural force.

- ✓ A person commits crime directly mean when every person directly, physically or personally commits the offence. So, if a person directly gets involved in the commission of a crime, he will be a material offender for the crime committed. For example, the material element of the crime of homicide is killing while that of theft is abstracting other's property. A person can perform this element of a crime either directly; that is by personally and physically getting involved.
 - ♣ Assume that Ararsa takes the life of Bulcha, Beka, Dabala, and Ebisa by shooting, stabbing, poisoning or strangling respectively. In these cases Ararsa is the material offender (Criminal) as he personally commits the crime. A material offender is, therefore, a person who performs this element of a crime.
- ✓ A person commits a crime indirectly when the perpetrator commits the crime by using instruments like animals (different from human beings) or natural force such as fire and flood. For instance, if Soresa trains his monkey/Ape/Dog to bring him other's property and successfully commits or attempts to commit the crime or the same holds true when Soresa employs a flood in the destruction of property which belongs to Bultosa. In these scenarios Soresa will be a material offender for the commission of the crime of theft and destruction of property.
- ❖ There can be more than one principal party as a material criminal when more than one actor participates in the actual commission of the crime. For example, Marga and Wayeasa was enemy with Olana, but unfortunately they got him, and Marga beats Olana and Wayesa stabs Olana with a knife and as a result he died. Here both are material criminals in the murder. Similarly, it is also the same when two persons forge separate parts of the same instrument. They can be considered as material offenders in the offence of forgery.
- ❖ It is also possible for a person to be regarded as a material criminal if he or she negligently performs an act and produces a forbidden harm. This is to mean that a person should not always commit the crime intentionally in order to be regarded as a principal party in the form of material criminal. Negligent performance of an act can constitute for material criminal.

2. The Moral Offender

- ❖ Sometimes, persons may not perform the material elements of crimes. Instead, they may associate themselves with the commission of crimes and the results intended. In this case, they may organize material offenders; select the possible victims, the place and time of committing the crimes and etc.

- ❖ By so doing, these persons adopt the crimes committed or to be committed by others as their own. Such criminals are called moral offenders. They are regarded as moral offenders because they are morally fully participating in the commission of the crimes. The roles they play in the commission of the crimes are so vital. For that matter, they are called the master minds or the working minds.
- ✓ In the Criminal Code, these offenders are regulated under Article 32(1) (b). Hence the Code defines moral offenders as persons who, without performing the criminal acts by themselves, fully associate themselves with the commission of crimes and the intended results. This means, if a person makes himself part of the criminal decision, he can be regarded as a moral offender. Further, if he makes himself part of the execution of a criminal decision in which he did not take part, he can still be a moral offender.
- ✓ Normally, Moral offender is a person who fully associates himself/herself with the commission of the crime and takes the crime as his or her own, even though he or she is not present at the time when and the place where the crime was committed.
- ❖ Sometimes, a person may fully associate himself to the commission of the crime. He may design the commission of the crime from the top to the bottom thereof. He even identifies the group of people who would be involved in the commission of the crime. Once he set that design in motion, he may not be involved in the commission of that crime. Such kinds of persons are deemed to be master minds in the commission of an offence. He is behind the seen; but, he has done everything possible in his capacity to the achievement of the intended result. So, such people under the law are deemed to be as moral offender. Because, they morally associate themselves with the commission of the crime. But, they are also deemed to be principal offender. They are not material offenders; because, they have not been involved in the commission of the crime.
- ❖ Thus, a moral offender is ready to commit the crime intended in case the material offender fails to succeed. Owing to this, the Code puts the two on equal footing; that is, it treats them as principal criminals. This is justifiable from deterrence point of view since moral offenders are not less, if not more, dangerous than material offenders.

3. The Indirect offender

- At times, to be immune from punishment, some individuals may use human agents to commit crimes. These persons are referred to as indirect offenders. Normally, the persons used as agents are those who do not draw criminal liability onto themselves.

- The Criminal Code under its Article 32 (1) (c) recognized and defined indirect offenders as those persons who use infant, a person who is mentally deficient [insane person] or unaware of the circumstance person who is mistaken as to the true fact of the situation as means or compel others to commit crimes.
- ☞ Thus, the criminal code Indirect offender refers to a person listed below:
1. Uses infant who are immature persons as provided under Article 52 of criminal code.
 - ✓ One of such circumstances is that the criminal may employ an infant to commit a crime. Infant is defined under the law to be any child under 9 years of age. Though, he is deemed to be the principal offender.
 2. Employ mentally deficient persons in the course of the execution of a crime.
 - ✓ A person may also employ a mentally deficient person with absolute or relative insanity to commit a crime. He is still deemed to be the principal offender.
 3. Uses person unaware of the circumstances to commit a crime.
 - ✓ The third one is that the person may employ another person who is unaware of the circumstances to commit a crime. A person may give something parcelled but explosive to someone as if it were a new year gift to deliver it to a specific person. In this case, he is using the person who is unaware of the circumstances; though, he is deemed to be the principal offender.
 4. Compel another to commit a crime.
 - ✓ A person may also compel or coerce someone to commit a crime Article 71 of criminal code.
 - ✓ Accordingly, this provision of the code deals with “**Absolute Coercion**” and stated as, Whoever, without causing greater harm than he could have suffered, commits a crime under an absolute coercion which he could not possibly resist is not liable to punishment. The person who exercised the coercion shall answer for the crime under Article 32(1) (c) of the criminal code.
 - ✓ The Court shall determine the existence of absolute coercion, *taking into account the circumstances of the case*, in particular the degree and nature of the coercion as well as the personal circumstances and the relationship of strength, age or dependency existing between the person who was subjected to coercion and the person who exercised it.
 - ✓ Coercion is a defence; and any one may invoke coercion, because, if someone is coerced and the *state of coercion is absolute*, the law exempts him from being criminally liable. Coercion can be physical or moral coercion. However, the person coercing someone to commit a crime is criminally liable in the capacity of principal offender.

- ✓ On the other hand, if the person who alleges to have been coerced had the capacity, the time and the opportunity to avoid the danger which would have been entailed against him, he cannot invoke the issue of coercion as a defence before a court. But, he shall not be tried for the crime committed and gone beyond the intention of the criminal In spite of being subject to such provisions governing negligent acts.
 - ♣ Example, if a person gave his word to commit or committed a certain crime at a gun point; he is deemed to have been coerced into committing a crime in the eyes of the law. And hence, he is not criminally liable for what he committed out of coercion. But, the coercer would be criminally liable.
- ✓ On the other hand, the person who has been coerced may go beyond what the coercer intended. For instance, when the person forced another person to commit crime of robbery, the forced person may commit crime of rape in addition to theft. In this case, the coercing man would only be criminally liable for his coercion of the person to commit crime of theft and not for what goes beyond his intention, rape. The coercing person is, however, considered to be the principal offender in respect of the crime of robbery. A person coerced another person to wound someone with a pistol. But, the coerced man, while trying to wound, killed the target. In this case, the coercer is going to be criminally liable for advertent negligent homicide. A person coerced another person to kill someone. But, the coerced man remained at the stage of attempt. In this case, the coercer shall be punished with the application of Article 27, 32(1) (c) and the specific Article of homicide.
- However, Dr. Dejene Girma criticized the elements incorporated under the above provision of the indirect offender. Accordingly, he argues that the Criminal Code still suffers from certain defects in relation to indirect offenders. That is, Article 32(1) (c) is not exhaustive, because there are other persons who are irresponsible under the Criminal Code but who are counted out from the reach of this article. For example, pursuant to Article 50(4) a person who is involuntarily intoxicated and as a result commits a crime is not responsible for his criminal act. Similarly, as provided under Article 51 (3) of the criminal code there are situations when voluntarily intoxicated persons are considered not responsible for their criminal acts. So, the use of such persons should give one the status of an indirect offender. But, under Article 32(1) (c), the use of these persons is not stipulated to render the user an indirect offender. This means, neither the **intoxicated person** nor **his user** is responsible for a crime committed by using intoxicated persons (within the meaning of Article 50 (4) of criminal code) though there is no reason to let the user go unpunished.

➤ He argues that, all the same, the legal gap in this respect should be filled to bring those persons who are left out within the purview of the Criminal Code either by making another enactment or by amending the Code itself. As a result he proposed in the following manner if amendment is to be made.

(c) He employs ***an irresponsible person*** or a person who is **coerced** or **mistaken as to the true fact of the situation** or ***any other person who is not answerable for his criminal act***.

☞ According to his proposition, the expression *irresponsible person* includes, among others things, infant, insane person and unanswerable intoxicated persons. Moreover, the expression *any other person who is not answerable for his criminal act* brings any other person using human agent to commit a crime into the scope of criminal law. Example, if A intentionally creates a state of necessity to make kill C, and B kills C, as calculated by A, to avert the state of necessity; A should be treated as an indirect offender and punished accordingly although B will not be punished.

☞ ***Do you agree with his comments and the proposed text? Why? Why not?***

❖ Under Article 32(2), the Code repeats what is stated under Article 58(3) where the crime committed goes beyond the intention of the criminal. It states that persons should not be punished for intentional crimes, if they did not intend (goes beyond intended) either directly or indirectly the commission of crimes. Similarly, they should not be punished for negligently committing crimes unless they are found negligent and negligence is punishable under the circumstance.

❖ Article 32(3) regulates the legal consequences of participating in the commission of crimes in principal capacity. Accordingly, it provides that all are liable to the penalty attached to the crime committed as though they committed the crimes alone. But the extent of the sentence may be different depending on the participants' degree of individual guilt (Article 88).

❖ Sub-article 3 deals with co-offenders. In this case two or more persons may plan or conspire to commit a certain crime. If these individuals go ahead and commit that certain crime, they would all be charged in the capacity of principal offender.

✓ For example, suppose three persons Tumsa, Bakako and Gamada went to a certain place to intentionally murder Morkata and found the target thereon. Then, Tumsa boxed the target while Bakako snapped and Gamada gunned down at him (Morkata). In this case, all these individuals would be considered to have been as material as well as principal offenders by virtue of Article 32 (1) (a and c) as far as their intention to kill the person is proved. They would all be charged for intentional homicide; but, the extent of punishment each would receive may differ, notwithstanding that their

degree of participation is identical. Because, personal circumstances can be invoked either to extenuate or aggravate the punishment.

- ❖ Similarly, sub Article 3 of the criminal code is also not free from critics. Accordingly, Dr. Dejene Girma criticizes that, Article 32(3) fails to specify that there are certain groups of criminals who are not subject to the punishment attaching to the crimes committed, even if they participate in their commissions in principle capacity. For example, the following two instances reveal that Article 32(3) should have foreseen few exceptions:
 1. If a young person participates in the commission of a crime in principal capacity, he will not be liable to the punishment attaching to the crime committed. Instead, he will be treated in accordance with Article 53 of the Code. On the other hand, Article 53 refers to Articles 157-168 of the Code. So, unlike what is stipulated under Article 32(3), young offenders are liable to special measures and penalties provided in the Code, not the penalties stipulated by the specific special part provisions they participated in violating.
 2. In fact, principal participants in the commission of crimes could be either legal persons or physical persons. If legal persons are involved in the commission of crimes in principal capacity, they will not be liable to the punishment provided by the law they violate. Instead, they will be liable to fine in accordance with the mode of calculation of fine provided under Article 90 of criminal code. Therefore, the penalties of legal persons will be determined based on Articles 32(3), 34 and 90 of the Criminal Code. This shows that while natural persons can be imprisoned, juridical persons will be fined.
- ☞ In this regard, he suggests that Article 32(3), first paragraph, should be amended as follow: **Unless otherwise expressly provided by law**, where two or more persons are involved as principal criminals in the commission of a crime, each shall be liable to the punishment attaching thereto.

Participation in Principal Capacity in the commission of Special Crimes

- Special crimes are those crimes which can be committed only by persons possessing certain special qualifications called *special offenders*. Persons lacking these qualifications cannot commit them. However, it can easily be discerned that those persons who are unable to commit these crimes can still play vital roles in the commission of the crimes. That is to say, they can facilitate or make the commission of the crimes possible. By so doing, they will become no less, if not more, dangerous to the society than the actors themselves since they participate in the commission of these crimes with full knowledge and intent (desire).

- Undoubtedly, in the absence of their participation the crimes might not be committed, which shows the vital role they play in the commission of these crimes. As a result, the Criminal Code, under Article 33, treats them as principal offenders and also subjects them to the same penalties the actors are exposed to unless they are young offender (in which case they will be governed by special provisions) or legal persons (which are subject to fine).
- **The following are some of the special crimes envisaged under Article 33:**
 - i. Rape: The Criminal Code under its Article 620 defined crime of rape as a crime that can be committed only by males. Therefore, females cannot materially commit the crime of rape.
 - ii. Corruption: this type of crime is enshrined under Article 408 of the criminal code and it is a unique crime to public officials. A person who is not holding public office cannot act as material offender as far as this crime is concerned.
 - iii. Incest: The crime of incest is recognized under Article 654 of the criminal Code as a crime that can be committed when persons who are prohibited from getting married due to their blood relationship perform sexual activities as between themselves.
 - iv. Adultery: The crime of adultery is provided under Article 652 of the criminal code that can be only committed by married person.
 - v. Desertion: Article 282 of the criminal code specifies that to commit this crime one needs to be a member of the defense force. So, persons who are not members of defense force cannot materially commit the crime.
 - vi. Homosexuality: This crime as stated under Article 629 of the criminal code is special in the sense that it cannot, unlike other crimes, be committed by people of different sexes acting together. Therefore, its commission necessarily requires the acts of persons of the same sex.
- ☞ The above crimes are some of the special crimes the Criminal Code has in mind pursuant to Article 33. Therefore, the idea is those persons who cannot act as material offenders in the commission of these crimes can be treated as principal offenders if they have full knowledge about the commission of the crimes and also fully associated themselves with the results intended.
 - ♣ Example, if a lady, after hiding her brother in her bedroom, calls her friend whom she wants to be raped by him, and leaves the house telling her friend that she will pick some staff from the nearby shop, and also locks her in pretending that she does so for safety, the lady will be treated as a principal offender to the crime of rape if it is committed by virtue of Articles 33 and Article 620 of criminal code.

- ☞ What are their differences as well as similarities between moral offenders and persons helping special offenders as envisioned under Article 33 of criminal code?

Collective crimes

- ✓ Under Article 35, the Criminal Code regulates issues pertaining to collective crimes. Collective crimes, within the meaning of the Code, are those crimes which are committed by persons acting in **concert**. The Code, when it provides for a separate provision regulating collective crimes has, in mind, persons acting in similar capacity.
- ✓ Similarly, the closer reading of Article 35 shows that these persons need to be principal offenders, in particular, material offenders. If they are different from material offenders, the other provisions of the Code such as Articles 32, 36, or 37 will apply as the case may be.
- ✓ An interesting issue under Article 35 pertains to the presumption it makes. The first paragraph of this provision presumes guilt. Because it states: *where two or more persons commit a crime in concert, the person who is proved to have taken no part in the commission of the crime shall not be punished.*
- ♣ This means, innocence should first be proved if a person is to be released. Stated differently, innocence should be established by dismissing the presumption of guilt. However, if it is not proved that the person did not take part in the commission of a crime, he will be punished for the crime he is charged with. This is contrary to Article 20(3) of FDRE Constitution with the principle of presumption of innocence. Therefore, by virtue of Article 9(1) of the FDRE Constitution, Article 35, first paragraph of the Criminal Code, can be considered null and void. But, Article 35 of the first paragraph of Amharic version is compatible with Article 20(3) presumption of innocence until proved guilty in accordance the law.

B. Participation in Secondary Capacity in the commission of crimes

- ❖ Someone may commit a crime without being a principal offender in the secondary degree of participation.
- ❖ Secondary participants in the commission of crimes called *secondary offenders* are those persons whose participation is not so close and active in the commission of crimes. Like principal offenders, however, they can participate in the commission of both ordinary and special offences.
- ❖ Participation in the secondary capacity exists either before or during the commission of the crime. A person is not considered to be principal criminal as his participation in this case is less than the principal criminals. This relates to incitement or complicity, which are also called accessories either before or during the commission of the crime. Accessory after the fact does not come

under participation for one cannot take part in the commission of the crime after it is consummated. Secondary participation refers to incitement and complicity.

1. Incitement(Instigation or Inducement)

- ☞ Inciting a person to commit any offence is itself an indictable offence. Thus, an inciter is an offender. The criminal code under its Article 36 recognizes the act of incitement as crime. However, for incitement to become a crime or an inciter to be regarded as an offender, the following conditions must be satisfied.
- i. Incitement requires at least two persons. These are the inciter/instigator and the incited/instigated. The incited is the one who actually commits the crime either in the form of material, moral or indirect criminal. The instigator is the person who initiates the idea of committing the crime by the principal by using different means. Here, it should be borne in mind that the instigator and the principal may be two or more than two.
 - ii. Intention. No one will be an inciter unless he knows that he is causing another to commit a crime. This means the instigator should have the knowledge of what he incites. The type of intention is, however, irrelevant. It is stipulated that any person who intentionally induces another to commit a crime is regarded as a criminal. The Code requires the mental element of the criminal to be intention to become an inciter. Hence, if one induces another by negligence, he will not be a criminal within the meaning of Article 36 of the criminal code.
 - iii. Inducement. The inciter must induce the incited person either via persuasion, promise, money, gifts, threats, etc. The Criminal Code is open as far as the means to be used to incite a person to commit a crime is concerned. It has the stand that anything can be used to induce a person to commit a crime. For instance, a person can induce another by way of persuasion, order, advice, promise, financial payment, gifts, threats, pressure, goading, flattery, using other human agents (like prostitutes), giving false information knowing that the information will make a person commit a crime, etc. So, what matters is the existence of inducement, not the type of means used to induce.
 - iv. Causal relationship. The incited must be convinced and commit the crime as intended by instigator. Causation in incitement involves the following three chains of events:
 - a. That there shall be an act of incitement by the instigator to induce or convince the other person
 - b. That the principal criminal takes his or her decision as a result of the inducement
 - c. That the principal criminal should commit the crime
 - v. Commission. Since incitement means convincing, one is not able to convince another through omission. Hence, the material element required for instigation

is commission. If we take a look at the means of persuasion mentioned under Article 36 of the Criminal Code, all of them are attributable to positive human conducts. Hence, this requirement seems implied in and it is even a necessary element of Article 36.

- vi. Absence of prior inducement. For a person to become an inciter, it is necessary that the person to be incited is not previously induced. That is to say, it is only a person who has not made up his mind to commit a crime that can be induced. If a person has already decided to commit a crime, any subsequent attempt to induce him to commit the same crime will be in futile, impossible.
- vii. The crime must be attempted or committed (completed). This must be based on Article 27 (2) of the criminal code.

☞ However, there are cases where instigation is not seen in light of Article 36. This happens where instigation by itself, because of the importance of the interest to be safeguarded, is made an independent crime.

- ♣ For example, under the Criminal Code, to provoke or incite the public, to incite a person not to pay tax, to incite another to commit suicide, etc. are instigations which are not treated in the light of Article 36, but in the light of the specific special part provisions. Hence, the penalties these provisions provide for may be lesser or greater than the penalties inciters may be subjected to if their cases are seen in the light of Article 36. Further, in relation to these instigations, the instigators are considered principal offenders, not secondary offenders; therefore, Article 36 is inapplicable.

The legal effect of being an instigator

- ❖ According to Article 36 (3) of the criminal code the instigator will be liable to punishment under the law for the intended crime. For instance, that a person who incited the commission of the crime of robbery will be liable under Article 36 and 670 of the criminal code.
- ❖ There are several gaps not clearly provided under the criminal code. For example, in the case of the *capacity of the persons to be incited*, the Criminal Code is *silent*. It simply provides that inciting a person to commit a crime is culpable. Hence, it can be argued that as long as incitement by itself is culpable, a person can be an inciter if he incites one to instigate another. This means, it is possible to incite persons to act in both principal and secondary capacities to commit crimes. On top of that, it is possible to argue that inciting a person to act in secondary capacity is the same as using this person as a means to incite the required person. Accordingly, since Article 36 is open-ended as to the means to be used to incite, it is possible for a person to be an inciter as per this article if he incites another to act in secondary capacity. On the other hand, one may argue that since the Code makes accomplice culpable (Article 37) only in

relation to principal criminals, the same should apply to instigation because both are secondary participation in the commission of crimes.

- ❖ Moreover, it may sometimes happen that incited persons go beyond what their instigators intended. In this case, under Article 36 (4) of the criminal Code has the stand that inciters will not be liable for what they did not intend. For example, if A is instigated to rape a lady but he kills her after raping, his instigator will not be liable for the homicide unless he intended it either directly or indirectly. His liability will be limited to inciting the crime of rape. For the crime of homicide, the perpetrator alone will be liable. This is just a reiteration of Article 58(3) of the criminal code.

2. Accomplice (Complicity)

- ☞ An accomplice, who is a secondary offender (secondary participation), is a person who gives supports for the commission of principal offence or to a principal offender. As a result, lending assistance to a perpetrator is a crime.
 - ✓ For example, a person who gives inside information on when money will be available on premises; a person who keeps lookout in case the police arrive; a person who acts as a getaway driver; and, a person who provides support for criminal activities are all accomplice or accessory before the fact.
- ☞ An accomplice is recognized under Article 37 of the criminal code. According to this provision of the Code, it also may exist either before or during the commission of the offence.
 - ✓ For complicity to exist, the following elements should exist:
 1. It requires at least two persons.
 - ✓ This means the accomplice and the principal criminal. For example, if Urgesa knowingly gives his pistol to Gurmesa in order to kill Morkata. Urgesa is an accomplice and Gurmesa is the principal criminal.
 2. The assistance must be given to the principal criminal.
 - ✓ The assistance should be lent to a principal offender. Hence, assisting a secondary offender does not make a person an accomplice.
 3. The assistance has to be given either before or during the commission of a crime.
 - ✓ Any intentional assistance given to a principal offender after the commission of a crime does not make a person an accomplice. Because this person cannot be said to have participated in the commission of the crime since his role comes into picture after the commission of the crime is consummated. Hence, he is normally treated as accessory after the fact. As such, he commits an independent crime against the administration of justice. Therefore, it is only

giving assistance before or during the commission of a crime that renders a person an accomplice.

4. The assistance may be material or non-material.
 - ✓ Material assistance means when the assistance relates to guns, money, supplies, instrumentalities, being at a look out, ran the gateway car, signal the approach of the victim, send the victim to the actor, prevent a warning from reaching the victim, facilitate the crime by getting the victim, or possible witness away from the same. On the other hand, non-material assistance is when it relates to advice, command, counsel, encourage, etc.
5. The assistance given to the principal criminal should always be intentional.
 - ✓ This means the accomplice should have the knowledge that he/she is giving help or assistance to the principal criminal in order to realize the latter's criminal design. Assistance that is given by negligence does not fall under Article 36.
 - ✓ Normally, it may be said that accomplice's liability exists when he or she intentionally encourages or assists in the sense that his or her purpose is to encourage or assist another in the commission of a crime as to which he or she has the requisite mental state. However, it should be known that the principal criminal is not necessarily required to know the assistance given to him or her by the accomplice. Rather what is required is that the accomplice should intentionally assist the principal criminal in the commission of the crime.
6. The assistance should relate to the crime for which it was rendered.
 - ✓ For example, if the accomplice agrees with the principal criminal to give the latter assistance for theft, but the principal criminal commits robbery thus the accomplice will only be considered as an accomplice for theft but not for the robbery. It is the principal who will only be liable for the robbery.
 - ✓ Thus, as first degree murder requires a deliberate and premeditated killing; an accomplice is not guilty of this degree of murder unless he acted with deliberation and pre-meditation.
 - ✓ Also as a killing in a heat of passion is man slaughter and not murder, an accomplice who aids while in such state is guilty only of man slaughter even though the killer is himself/herself guilty of murder. Similarly, it is equally possible that the killer is guilty only of manslaughter because of his or her heat of passion but that the accomplice, aiding in a state of cool blood, is guilty of murder.
7. The crime should be completed or at least attempted.

- ✓ This is to mean that the crime intended must be at least begun so as to hold a person liable as an accomplice.
- ❖ The following are the legal effects of complicity:
 1. The accomplice is liable for the punishment under the law regulating the intended crime.
 2. The accomplice will not be liable for what goes beyond his intention.
 3. Punishment may, however, be reduced within the limits of the law as per Article 179 of the criminal code.

Criminal Conspiracy

- Criminal conspiracy is governed under Article 38 of the criminal code.
- Conspiracy is when an agreement between two or more persons formed for the purpose of committing by their joint efforts some unlawful or criminal act.
- The essential elements of this act are *agreement and intention*.
 - ♣ The agreement can be written, unwritten, express or tacit. So, what matters is the existence of agreement, not the form in which it is made, or the mode of expressing it. It is obvious agreement can be takes place between two or more persons and you cannot make it individually.
 - ♣ Conspiracy is an intentional act. That is to mean, the agreement has to be entered into with the knowledge of what is to be done and that it is criminal. A person cannot be a conspirator if he does not have any intention to participate in the commission of a crime.
- Therefore, agreement and intention are the essences of conspiracy, if any of the two is missing, conspiracy is also missing.
- The criminal code under Article 38 (1) disregard as independent crime rather it used as general aggravating circumstances as of Article 84 (1) (d). Thus as a principle conspiracy is used as aggravating ground in our criminal system.
- The Criminal Code has not totally liberalized conspiracy. There are instances where an agreement to commit a crime is considered a crime. These instances are mentioned under Article 38(2) which provides that conspiracy can be penalized pursuant to Articles 257, 274, 300, and 478.
- These exceptions pertain to crimes which are against the essential interests of the state and its defense, the forming of unlawful associations and the participation therein, as well as to the organization of gangs or associations of wrongdoers.
- So, if an agreement is made to commit any of these acts, the agreement per se becomes a crime. Therefore, the conspirators can be charged for committing two crimes:
 - i The conspiracy and
 - ii The crime for which the conspiracy is made if it is at least attempted.

- That means, sometimes, conspiracy ceases to be an aggravating circumstance and calls for its own penalty which will be imposed in accordance with the principles of determining penalties. Of all the exceptions stated under Article 38(2), the exception made in relation Article 478 is relatively of some importance to discuss here. Under Article 478, conspiracy to commit a crime becomes a crime if:
 - 1 Two or more persons make an agreement;
 - 2 The purpose of the agreement is to commit a crime;
 - 3 The crime to be committed is serious; and
 - 4 The conspiracy materializes.
- The first two elements are recognized under Article 38(2) and they were discussed before. But the last two elements are not included under Article 38(2).
- To begin with, the concept *serious crime* could have caused ambiguity had it not be for the definition given under Article 478. The provision defines it as a crime which is punishable by rigorous imprisonment for five years or more. Therefore, an agreement to commit a crime which may entail rigorous imprisonment of five years or more may be a crime. But it should be known that five years imprisonment by itself is not sufficient to make an agreement a crime. The imprisonment has to be rigorous since there are exceptional situations in which five years simple imprisonment may be imposed as stated under Article 106 (1) of the criminal code.
- The other element which is missing from Article 38(2) but which is embodied in Article 478 is the *materialization element*. The provision requires the conspiracy to materialize before it becomes a crime. Hence, pursuant to this Article, it is the materialization element that consummates the crime of conspiracy and not the agreement by itself. But, unlike the concept of serious crimes, Article 478 does not define the concept materialization. Accordingly, this unclear and confusing concept may give rise to divergent opinions.
- The other point worth considering is the necessity of Articles 254, 274, and 300 in the presence of Article 478. The crimes these provisions deal with are the same as the crimes envisaged under Article 478.
 - ✓ For example, crimes against the constitutional order, the defence force and international law are among the crimes regulated by these provisions. These crimes can also fall within the reach of Article 478. Hence, it can be said that these provision are superfluous. But it seems that the Criminal Code wants to make conspiracy, in relation to these crimes, ripe by reducing some of the requirements like the materialization element. Thus, conspiracy to commit these crimes can be punished earlier than conspiracy to commit the crimes

envisaged under Article 478. Therefore, Article 478 is meant to apply only when these provisions do not apply because they are more specific provisions.

The Rationale for Holding a Person Criminally Liable For conspiracy

- ✓ It is clear that a person may not be punished for what he or she intends to do or for what he or she has planned in his or her mind only. Rather, a person is punished when three basic elements under Article 23 are established. Accordingly, one cannot be punished for his or her intention because the other two elements. I.e. material and legal are missing in accordance with Article 23 of the Criminal Code.
- ✓ However, Conspirators commit a crime for their intentional agreement. The reason to hold conspirators criminally liable is that collective action towards antisocial behavior involves a greater risk to the society. The more parties there are the larger the probability for the commission of the crime, the greater the threat to the community for conspirators:
 - ✚ May encourage each other.
 - ✚ May feel bolder than if they were on their own.
 - ✚ May fear reprisal from the other
 - ✚ May not want to lose face from the others.

Accessories After the Fact

- ❖ Article 40 of the Criminal Code regulates the case of an accessory after the fact. According to this provision an accessory after the fact is a person who gives assistance to someone who has already committed a crime. So, it is different from accomplice in that his assistance comes after the fact. As for the form of assistance, it may be hiding the criminal or helping him escape prosecution or punishment or receiving the proceeds of the crime committed.
 - ✓ For example, if someone hides a criminal so that he will escape arrest, he will be an accessory after the fact. Similarly, if a person helps a criminal to abscond from his country to avoid criminal prosecution and punishment, he will be an accessory after the fact. A person who receives the gains obtained from the commission of a crime like corruption to help the criminal avoid liability or greater liability is also an accessory after the fact. So, granting a criminal any type of help so that he can avoid criminal liability in whole or in part will render someone an accessory after the fact.
- ❖ However, as mentioned before, an accessory after the fact is not a participant in the commission of a crime. Instead, he commits an independent crime. Thus, his punishment has nothing to do with the punishment for the crime committed by another person. That is why Article 40 stipulates that an accessory alter the

fact is punished not in accordance with the provision violated by the criminal obtaining assistance from him but in accordance with Articles 445, 460, and 682. These are provisions which make each act of an accessory after the fact a crime. For instance, article 445 criminalizes helping a criminal, in any manner, to avoid prosecution.

- ❖ Article 460 criminalizes helping a criminal to avoid punishment by obstructing, in any way, the execution of sentence. Article 682 criminalizes receiving the fruits of a crime. This shows that it is not what is done by another person that entails criminal liability to the accessory after the fact but his own act.
- ❖ It is, however, necessary to note that Article 40 is silent about the mental state of the accessory after the fact. For example, incitement and accomplice are intentional acts. Should accessory after the fact also be an intentional act, too?
- ❖ However, it is the reading of Article 40 together with the special part provisions of Articles 445, 460, and 682 and the provisions of other penal laws that will lead us to a conclusive answer. Accordingly, accessory after the fact is an intentional crime under Articles 445 and 460, whereas it can be committed by intentionally under Article 682. This is because based on Article 59 (2) of the criminal code crimes committed by negligence are liable to punishment only if the law so expressly provides. This means if negligence is not stated under the special provision of the law violated it can be presumed as the crime committed by intentional. Thus the mental state of accessory after the fact under Article 682 of the criminal code is intentional.

THE END