Chapter One: Introduction to Criminal Law

➢ Introduction

- Criminal Law is the body of law defining crimes, regulating how suspects are investigated, charged, and tried, and establishing punishments for convicted criminals.
- The term ‘criminal law’ is used to include all that is involved in ‘the administration of criminal justice’ in the broadest sense.

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- The criminal law identifies, defines and declares the conducts that it seeks to prevent and prescribes the appropriate punishments for them too.
- The law of crimes has been as old as the civilization itself. Wherever people organized themselves into groups or associations the need for some sort of rules to regulate behavior of the members of the group inter se has been felt, and where there were rules of the society, infringements were inevitable.

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- And it was realized that there was the necessity of devising some ways and means to curb such violations.
- To prevent a crime from happening, or to deal effectively with a crime once it has occurred, we have to know 'what the crime is' and 'what the related legal ramifications' are.
- The study of criminal law aims at having an understanding of these concepts.

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:
  - To discover the causes of criminality,
  - To devise the most effective methods of reducing crimes,
  - To devise the machinery for dealing with criminals.

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- 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.

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- **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 are:

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- The appropriate measures of social organization for preventing harmful activities,
- 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.

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3.Criminal Law: The Criminal Policies postulated by Criminology and Penology, are implemented through the instrumentality of 'Criminal law'. In other words, 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 degrees of deprivation of liberty, down to such measures[?] as medical treatment, supervision as in probation, fines and mere warnings (admonishment).

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- Criminal law in its wider sense consists of two branches.
  - Substantive Criminal Law
  - Adjective/Procedural Criminal law.
- 'The Substantive Criminal law' lays down the principles of criminal liability, defines offences and prescribes punishments for the same.
- However, the substantive criminal law by its very nature cannot be self-operative. A person committing a crime is not automatically stigmatized and punished. At the same time, generally, a criminal would not be interested in confessing his guilt and receiving the punishment.

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- It is for this reason that 'Procedural Criminal law' has been 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.
- Thus, the procedural criminal law is to administer the substantive criminal law and give enforcement to it.
- However, our study in this course is reserved for the substantive part.

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 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.”

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- For the whole body of criminal law to be **efficient[?], it** must have four important elements: Politicality, Specificity, Uniformity, and Penal sanction.
  - *Politicality* implies that only the violations of rules made by the state are regarded as crimes.
  - *Specificity* of criminal law 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.

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- *Uniformity* of criminal law implies its uniform application to all alike without any discrimination.
- Finally, it is through '*Penal sanctions'* 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.

General Objectives of Criminal Law

- The objectives of Criminal law are the protection of persons and property, the deterrence of criminal behavior, the punishment of criminal activity and rehabilitation of the criminal.

a. **Protection of Persons and Property[?]:** 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.

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b. **Deterrence of Criminal Behavior:** 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.

c. **Punishing 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.

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d. Rehabilitation of the Criminal: government has designed various programs to educate and train criminals in legitimate occupations during the period of incarceration. Upon release, therefore, there is a little possibility to return to a life of crime.

- The specific purpose and function of Criminal Law are clearly stated in Art. 1 of the Criminal Code of the Federal Democratic Republic of Ethiopia, 2004. Art. 1. Para 1 sets out the purpose of criminal law (Code) as follows:

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- *"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 Art. 1 proceeds to state the type of activities it aims to take up in order to achieve the purpose mentioned in the first para. Art. 1 Para 2 lays down that:

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- "It aims at the *prevention* of crimes by giving due notice of the crimes and penalties prescribed by law and should this be ineffective by providing for punishment of criminals in order to *deter* them from committing another crime and make them a lesson to others, or by providing for their *reform* and measures to prevent the commission of further crimes."

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- This paragraph states *"What"* the function of criminal law is … it is prevention *of crimes.* It also states **"***How"* the Criminal Code undertakes this function i.e. the methods adopted in performing this function, they are:
  - Giving due notice of the crimes and penalties prescribed by the law.
- If such declaration of the punishable acts does not deter people from committing of crimes then the following methods are employed to deal with the criminals:

a) Provide for punishment to deter and reform criminals, and

b) Provide for measures to prevent the commission of further crimes.

Public wrong, Private wrong and Morality

- A *wrong[?]* is an act forbidden by the society. In other words, it is a violation of rules and norms, 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. E.g.?

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- Wrongs: Moral and legal
- Legal wrongs: Civil and criminal
- **Moral wrong**: This is a wider term including a wide range of reprehensible acts, which tend to reduce human happiness.
- There is a long list of such acts including ingratitude, hard-heartedness, absence of natural love and affection, 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.
- These acts are considered as moral or ethical wrongs and are checked to a great extent by social and religious laws.

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- **Legal wrongs**: The category of wrongs such as nuisance, deceit, libel (defamation in visual form), robbery, murder, rape, kidnapping, etc., are considered to be sufficiently serious for legal action.
- **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, etc. This type of wrong is called civil wrong or Tort, for which civil remedy is open to the injured.

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- **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.
- This category of wrongs is called "public wrongs" or "crimes" for which criminal proceedings are instituted by the state and the culprit is punished.
- Is there any civil wrong[tortuous] that does not involve criminal punishment and the vice versa?

Relation between Morality and Criminal Law

- Though morality and law can be precisely distinguished, they are not totally distinct phenomena. 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.
- When a member of the society does a wrong involving serious moral guilt, the moral sentiment of the society gets offended so seriously that the whole society waits in all its eagerness to see that the offender is punished severely.

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- 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 Gandhian philosophy i.e. "hate the sin not the sinner", because a criminal is not born, he is made.

The Concept of Crime

- Crime is *deceiving concept* because it covers an enormous range of human behaviour. Crime may be associated in the public mind with pick-pocketing, robberies, house-breakings, and riots, but crime also includes placing bribe to win a city contract.
- Crime is often mistakenly thought of as the vice of the few. It is not. It is everywhere in the society. It is in the bed room of a married couple where wife battering and marital rape happen, among the family members where…….

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… child abuse and incest happen on the road where eve teasing and cheating happen, at work place where a variety of criminal behaviour is found including abuse of power, corruption and sexual harassment.

- Therefore, trying to find a single comprehensive answer to "the crime problem" is, like trying to lump together measles and schizophrenia, or lung cancer and a broken leg. Do you agree?

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- The concept of crime has always been dependent on public opinion. In fact "law" itself reflects public opinion of the time. Obviously, every society formulates certain rules to regulate the behavior of its members, the violation of which is forbidden.
- However, the problem arises as to what acts should be forbidden, or what acts should be selected for punishment by the society or the state. In other words what acts should be declared as crime.

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- According to Terence Morris, "Crime is what society says is crime by establishing that an act is a violation of the criminal law. Without law there can be no crime at all, although there may be moral indignation which results in law being enacted."
- 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.
- Don't you think that non performance of contract endangers the property right of the party?

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- 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. Not at all times.
- According to Wechsler, "the purpose of penal law is to express the social condemnation of forbidden conduct, buttressed by sanctions calculated to prevent it".

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- 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[decriminalized acts] and what has not been an offence till yesterday may be declared a crime to day.
- Abortion, polygamy, computer crime, white collar crimes, copy right infringement…

Definition of Crime

- Crime is an *act that goes against social order and are worthy of serious condemnation*.
- The Oxford English Dictionary defines crime as "an act punishable by law as forbidden by statute or injurious to public welfare".
- It is too wide a definition and fails to precisely identify the thing it purports to define.

✓ **Crime is a "Public Wrong"—Blackstone**

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- Blackstone, (1968) has defined crime as *"an act committed or omitted in violation of a public law either forbidding or commanding it". What is public law???*
- In a modified definition and he said, "*A crime is a violation of the public rights and duties due to the whole community…".*
- The second definition of Blackstone proceeds in terms of "public rights and duties" replacing the phrase "public law".

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- ✓ **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, e.g., Treason i.e. 'anything done to displace the governing body of state.'
- Other such examples ……

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- ✓ **Crime is A "Procedural Wrong"???? –John Austin**
- *"A wrong which is pursued by the sovereign or his subordinates is a crime."*
- *But, crimes upon complaint….*
- ✓ **Crime is a "Creation of Government Policy"**
- ✓ **Crime Is A "Legal Wrong"**
- Since no satisfactory definition of crime acceptable and applicable to all situations could be derived, penal statutes define, specifically, different criminal behaviors, which they purport to check.

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- *"A crime is an act which is prohibited and made punishable by law. Which law?*
- *In this Code, an act consists of the commission of what is prohibited or omission of what is prescribed by law."…Art.23*
- It refers to the specific kinds of conduct prohibited under the Special Part of the Code.

‘Crime’ Distinguished From ‘Civil Wrongs’

- “Crimes” are said to be harms against the society and are therefore, considered as graver wrongs. “Torts” (cases of non-contractual liability) are wrongs against individuals and are treated as lesser wrongs.
- “Breaches of contract” are also civil wrongs, which result from non-performance of contractual obligation.
- “Tort” is a private wrong and the remedy available is reparation for the injury suffered and not punishment.

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- "Breach of contract" entails civil liability of the defaulter that may result in forced (specific) performance, cancellation of the contract or payment of damages.

✓ 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.,

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- Tortuous 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.

- In short, criminal liability invariably requires moral guilt (intention or negligence) and personal act or omission while non-contractual liability doesn't. ?

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- ✓ Another important difference lies in the fact that "analogy" is forbidden in criminal cases (Art. 2 (1), the Criminal Code but may be permissible in Civil (i.e. contractual and tort) cases where legal provisions embody illustrative lists.
- ✓ Degree of proof
- The following are some more important legal aspects which distinguish these legal wrongs:

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- ✓ **Nature of wrong:** Crime is a public wrong i.e. a harm done against the society. A ‘tort’ is a private wrong committed against an individual generally or the public in a given locality. How tort is a private wrong?
- Violation of contract too is a private wrong committed against a specific individual.
- ✓ **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’*.
- "Rights in rem -'rights residing in persons and availing against other persons generally.' Or they may be defined as 'Rights residing in persons, and answering to duties incumbent upon other persons generally.

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- ✓ **Origin and Nature of the Duty**
- 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 (Art.2035 C.C) or on the basis of general responsibility towards the society.??
- 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.

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✓**The Element of Intention**

- Intention is an essential element of crime (Art.57 and 58 of Criminal Code). Intention may form one of the ingredients[Art.2029] of tort but not an essential precondition for the Tortuous liability. In an action for breach of contract whether the breach was intentional, is an irrelevant question.

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✓ **The Element of Negligence:**

- Negligence attended with criminal lack of foresight amounts to a crime (Art.59 Criminal Code). Mere negligence may amount to a tort (Art.2029 C.C). So, where lies the difference?
- There is no question of negligence in an action for breach of the obligation arising out of a contract.

✓ **Relevancy of Motive:**

- Motive may be a factor for consideration in deciding the quantum of punishment in criminal liability.(e.g. Art.92, 265, 539, 799 etc)
- Motive is taken into consideration in deciding tortuous liability. So, the difference? Motive is irrelevant (1717 C.C) in an action for breach of contract.

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- ✓ **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, it is the injured party that brings the action against the wrong-doer.

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- ✓ **Remedies Available:**
- The criminal is punished by the state. The punishments may range from fine, compensation through 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.

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- The other difference: in tort there is always damage, but not essential in crime. Do you agree?
- NB: There is an overlap between crime and tort as the same act can be both a crime and a tort, as in murder and bodily injury. Thus, it is impossible to divide the two branches based by reference to the type of act…LW
- It is also impossible to distinguish then by reference to the consequences of the act.
- There is no fixed principle nor even a general basis for this distinction and that every crime contains the essential element of tort. But, what about crimes against state?

Chapter Three: Basic Principles of Criminal Law

❖ **The Principle of Legality(nullum crimen sine lege & nulla poena sine lege)**

- The principle of legality requires that prosecutions and punishments for crimes should be strictly in accordance with a pre-existing legal provision.
- A person cannot be made criminally responsible for producing a harmful consequence if such harm is not declared as a prohibited one by law.
- The principle also requires that wrong-doers should be punished strictly within the prescriptions of law.

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- *No crime (can be committed), no punishment (can be imposed) without (having been prescribed by) a previous penal law*) is a basic maxim in continental legal thinking.
- This principle first became prominent at the time of the French Revolution towards the end of the eighteenth century.
- A statement of the principle was included in 'the French Declaration of the Rights of Man'.

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- Under the ancient regime, the pre-Revolution government of France, judges were closely tied to the kings or feudal lords, and were thought to exercise an arbitrary power to define crimes and punishments in a way which benefited the political power of the ruler.
- The principle of legality was a specific reaction against this repressive device, intended to end its use by requiring the government to announce in advance the rules of conduct it would enforce by criminal law.

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- The policy behind the principle of legality is that "fair warning" should be provided to a criminal so that he does not inadvertently commit a crime that he has no reason to believe is illegal.
- There is no deterrence value in having unwritten crimes because people do not know what actions to avoid.
- Also, it is not morally culpable to do an act that a person reasonably believes is not illegal.
- It would aslo be unconstitutional under the *ex post facto* clause to do so.

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- It is an important principle of Criminal law that has been inherited from the Roman Law.
- **Art. 2 of the Ethiopian Criminal Code** incorporates this principle. No crime without law and no punishment other than those prescribed by the law(sub 2)
- Thus, courts are no allowed to create a crime by analogy(sub 3)
- However, this doesn't prohibit courts from interpreting the law(sub 4)
- The principle against double jeopardy is part of this principle(sub 5).

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- The first ingredient of the principle of legality is that "there is no offence other than those which are expressly provided by law". 'Law' within the meaning of Art.2 is not only the Criminal Code, but any law duly passed and published, which contains penal Provisions.
- The principle "nullum crimen" conveys four different rules, namely:
  - Certainty in Legislation,
  - Accessibility of the law,
  - Rule of strict Construction,
  - Non-retroactivity of penal laws.

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- **Certainty in legislation:** Penal law should be sufficiently definite for those to be affected by it. People must know their duty and be precisely aware about the prohibition created by law.
- This is possible only when the law is certain and definite. A prohibition must also be drafted in *clear, certain and unambiguous language.*
- **Accessibility of the Law:** The Penal law must be accessible and intelligible because it is addressed to people in society who are bound to obey it on pain of punishment. it must be properly publicized; in what form? In codes or Notice?

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- **The Rule of Strict Construction:** Since all penal laws affect the liberty of the subject, they have to be constructed strictly.
- The court must see that the act or omission charged as a crime is within the plain meaning of the words used in the provision
- Nothing should be regarded as being with in the meaning of the statute which is not within the letter. No analogy.
- Strict construction in relation to penal statutes requires that "no case shall fall within a penal statute which does not satisfy all the elements of the crime as defined by the statute."

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- The rule requires that where the ambiguous language of a statute leaves a reasonable doubt about its meaning and scope, the benefit must go in favor of the accused.
- Art.2(4) Criminal Code: 'In cases of doubt the Court shall interpret the law according to its spirit, in accordance with the meaning intended by the legislature so as to achieve the purpose it has in view.
- Where a doubt arises as to the meaning or the scope of the legal provision, according to **Graven**, the court which interprets such provision must have regard to "the meaning intended by the legislature".

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- To this end, he proposes the following two methods of interpretation:

✓ **Grammatical or logical interpretation**, in which the meaning is sought *from within the text* of the law, or

✓ **Historical interpretation**, in this method the meaning may be sought *from without the text* of the law.

- **Philippe Graven** states, in this connection that, "(W)hen the rules of construction have failed to remove the ambiguity, obscurity or uncertainty of the law … the doubt must be resolved in favor of the accused".

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- **Non-retroactivity of Criminal law; Arts. 6-10**
- The principle that people should be free from retroactive law has its roots in another principle: that there is no crime or punishment except in accordance with law.
- This principle was first formulated in Article 8 of the French Declaration of the Rights of Man of 1789, which reappeared in the French Constitution of 1791, and remains in the French Code Penal.

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- As early as 1651, Hobbes wrote:
- *"No law, made after a fact done, can make it a crime ... For before the law, there is no transgression of the law".*
- Article 7 of the European Convention on Human Rights provides that no one shall be held guilty of a penal offence made so retrospectively.
- *"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed"...Art.15 of ICCPR*

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- No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it was committed. Nor shall a heavier penalty be imposed on any person than the one that was applicable at the time when the criminal offence was committed..Art.22(1) FDRE Constitution.
- Art 5 of the Criminal code lays down three important rules relating to the applicability of law in respect of a crime committed before the coming into force of the new Code.
- Exception to this principle is when the law is favorable to the accused…sub 2 of art.22 of the Constitution and art.6 of the Criminal Code

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- Notwithstanding the provisions of sub-Article 1 of this Article, a law promulgated subsequent to the commission of the offence shall apply if it is advantageous to the accused or convicted person..22(2)
- Where the criminal is **tried(?)** for an earlier crime after the coming into force of this Code, its provisions shall apply if they are more favorable(?) to him than those in force at the time of the commission of the crime..art.6
- Thus(am…), is it only for reduced punishments? Do you think that the new code would impose a reduced punishment for the same crime than the repealed one?

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- Yes, see 655 of cc and 622 of pc.
- Doesn't this exception apply for procedural matters?
- This rule is an exception to the second component of the principle of legality i.e. 'no penalties other than those prescribed by the law'.
- As per this provision, though the criminal is tried under the old Code for the crime committed earlier to coming into force of the new code (Art. **5(1),** he shall be sentenced under the new Code if the new provisions are more favorable to him.
- Arts.7-10……..

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- The exceptions to the principle of non-retroactivity of the criminal is found in Art.5(3), Art.7, 8, 9 and 10 of the Criminal Code in that if the crime not punishable under the new Code, s/he shall not be tried; that the measures to be imposed after the coming into force of the new Code shall be the ones provided under this Code; that upon the coming into force of the new Code, period of limitation for the prosecution or enforcement of penalty is governed by the new Code; that penalties passed under the repealed law shall be enforced as per the new Code(9(3));

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- that the cancellation of entries in the judgment register and reinstatement in case of judgments given under the repealed law is governed by the new Code.
- Thus, the question that can be raised at this juncture is that ' in the face of these exceptions to the principle, what remained to be governed by the repealed law as per art.5(1)?
- The other issue that worth mentioning is the time when a crime is deemed to be committed for the purpose of Art.5(1) in case when the crime is continuous in nature like unlawful restraint(art.557 and 585 of the penal and Criminal Code respectively).

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- For instance when a criminal unlawfully detain a person at the fall of 2004 and continues after the coming into force of the new Code i.e. after 9th May 2005, when does this crime is deemed to be committed and which law should govern the issue?
- May the rule of interpretation of the law in case of conflict between two is of help in this case. The rule says that 'in case of conflict between two laws the latter prevail over the previous.' Thus can we say in this example that the new Code prevail over the former law(the Penal Code).
- The problem however is that this rule is typically applicable for laws equally in force at the time of the conflict and not as such in case where one of the laws is repealed. After all, can we take this as a conflict?

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❖ Prohibition of double jeopardy(***'Non bis in idem'*** **(Nobody shall be punished(tried) twice for the same act))**

- No person shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the criminal law and procedure…Art.23 FDRE Consn.
- Nobody shall be tried or punished again for the same crime for which he has been already convicted, punished or subjected to other measures or acquitted by a final decision in accordance with the law…Art.2(5) of the Code.

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- Double jeopardy allows for protection against three main legal abuses. The first, double jeopardy protects against a second prosecution for the same crime after acquittal.
- Double jeopardy also protects against a second prosecution for the same crime after conviction and also for multiple punishments for the same crime.
- It is true that more than one penalty is inflicted for one crime, but this does not amount to punishing the criminal twice within the meaning these Articles, for nothing in these Articles precludes various punishments being combined or cumulated in the manner and within the limits provided for by law so as to achieve the various purposes of criminal law.

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- The Double Jeopardy Clause speaks of the "same" crime, and yet the Court casually applies the Clause to crimes that are not the same but obviously different.
- The principle, therefore, has to be understood clearly that, even though the crime in the second trial is not ‘the same crime’, still the second trial will be barred if it is based on the same facts for any other crime for which a different charge from the one made against accused person might have been made.

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- ***E.g. A*** is charged before the court for negligent homicide (Art 543) and convicted of it. ***A*** cannot afterwards be tried for on the same facts for ordinary (Art 540) homicide.
- What if the accused is acquitted for ordinary homicide? Can s/he be tried for negligent homicide? same fact
- Does this principle forbid subsequent charges that should be made in alternative? E.g. Grave bodily injury or willful bodily injury; Theft or breach of trust……same fact

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- Double jeopardy is referred to as a legal technicality instead of a legal right. Double jeopardy allows the defendants not to address whether the crime was actually committed or whether they are guilty or innocent.
- Any evidence uncovered and produced to show that a person is guilty is inadmissible if they were already presented for the same crime.
- This principle vs.Art.16 of the Criminal Code??? Is this provision against the principle?
- This is justified because the crime tried by the court which either has subsidiary jurisdiction or had not the same interest as Ethiopia particularly in case of Art.13 and 15(2)…Phil. But, why art.12?

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❖**The Principle of Equality before the law vs……**

- A number of distinct meanings are normally given to the provision that 'there should be equality before the law.'
- One meaning is that, *equality before the law only connotes the equal subjection of all to a common system of law whatever it's content.*
- According to Lord Wright, "all persons are equally subject to the law, though the law to which some are subject may be different from the law to which others are subject".

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- In this sense the concept of equality principally means that there should be no lawlessness but that all should be within the some framework of laws, whatever the generality or quality of the laws in question.
- The expression "equality before the law' has also been explained as a procedural concept pertaining to the application and enforcement of laws and the operation of the legal system.
- The formulation 'equality before the law' gives rise to the following derivations:

Cont'd

- Denial of unwarranted privileges
- All are subject to the ordinary law of the land as administered by the ordinary courts.
- All shall enjoy equal access to society's legal tribunals and other dispute resolving agencies.??
- All are entitled to impartiality and independence of the judiciary in the administration of justice.??
- State and individual before the law should be equal.

Cont'd

- Therefore, the privilege of 'equality before the law' is invariably used in a procedural sense.
- In the words of Jennings 'equality before the law' is … "the right to sue and be sued, to prosecute and be prosecuted, for the same kind of action, should be the same for all citizens of full age and understanding, and without distinction of race, religion, wealth, social status or political influence".

Cont'd

- Art.4 of the Code... *"Criminal law applies to all alike without discrimination…'' No difference in treatment of criminals may be made except as provided by this Code, which are derived from immunities sanctioned by Public International law and Constitutional law, or relate to the gravity of the crime or the degree of guilt, the age, circumstances or special personal characteristics of the criminal, and the social danger(recidivists?) which s/he represents".*
- *Art.25 of FDRE Constitution……*

Cont'd

- Exceptions to the principle

a) Immunities sanctioned by public international law(see also art.11(2): 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.

Cont'd

- In fact this is not an absolute immunity, properly speaking[?], as it is immunity from prosecution in Ethiopia only.
- The effect of diplomatic immunity is then merely to create an exception to the general principle of the territorial application of the law.(11(2)
- Therefore, the diplomatic immunity only raises question of jurisdiction and in no way creates a situation contrary to the principle of equality before the law. Do you agree?
- Who enjoy this immunity?

Cont'd

b)Immunity sanctioned by the FDRE Constitution

- The Members of the Houses of Peoples Representatives cannot be arrested or prosecuted without the permission of the House concerned, except in the case of ***flagrante delicto***..Art.54(6); see also Arts. 39(1) (c) and 130 (2) (e) of the Criminal Procedure Code.
- Immunities granted to these members do not conflict with the principle of equality before the law. How?????

Cont'd

- Thus, even here it becomes evident that these rules do not provide for any exception to the ordinary provisions of the Criminal Code[?] but only result in creating a temporary immunity from prosecution, and in no case they create an absolute immunity from punishment.
- The fact that special formal conditions govern the institution or the continuance of the proceedings does not affect the fundamental rule according to which no discriminations may be made among criminals which are based on social conditions only.
- What if the parliament refuses to permit such arrest or prosecution? It is debarment. So, don't you think that it is creating a discrimination though legal?

Cont'd

c) **Requirements of Individualization of Criminal Justice**

- The penalty shall be determined according to the degree of individual guilt, taking into account the dangerous disposition of the criminal, his antecedents, motive and purpose, his personal circumstances and standard of education, as well as the gravity of the crime and the circumstances of its commission…Art.88(2) of the Code.
- These differences do not contradict the rule of equality before the law so long as they are based on considerations which affect the liability to punishment and criminal guilt of the person concerned.

Cont'd

d) **Special Treatment of Women, Young Persons and the Feeble Minded** vs.personal circumstances of the criminal in (c)? See the Amharic version of 88(2)

- 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.
- Article 119 provides for suspension of death sentence passed on a pregnant woman while she continues to be in that state. Further, Article 120 (1) of the Criminal Code provides for commutation of death sentence to life imprisonment passed on the woman with child and if the child is born alive and the mother has to nurse such child.

Cont'd

- Prisoners of different sexes shall serve their sentences in different prisons..Art.110
- Juvenile delinquents and the young criminals are given a special treatment under the Criminal Code due to the fact that this group of criminals is immature.
- It has been universally accepted that the young criminals have to be dealt with sensitivity so that they can be corrected of their bad ways rather than punishing them for their wrongful acts.
- To achieve this objective more effectively the Criminal Code puts the young criminals(?) under three categories.

Cont'd

- First, *the infants* i.e. children under the age of '9 years' are deemed to be not criminally responsible and therefore, are not punishable under the Code (Art. 52).
- The children between 9 and 15 years fall under the second group who are referred to as *'the young persons'* under Art. 53. Children of this age group are exposed to criminal liability but, in principle, they are not liable to ordinary punishments.
- The law provides special measures(see arts. 157 et seq) including curative institutions, supervised education, reprimand and censure, school or home arrest, admission into corrective institutions.

Cont'd

- The third group of young criminals, as per Art 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.
- But, the court may reduce the penalty within the limits it specifies (Art. 179), if the circumstances of the case seem to justify such a reduction.
- No death penalty be imposed on persons who do not attained the age of 18 at the time of commission of the crime and that theses criminals should be segregated from adults…Art.176. Art.177

Cont'd

- 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.
- However, since they proved to be dangerous by causing harmful results to others they cannot be simply released freely in to the open society.
- They are subject to special measures (art.129 and the ff)
- Death sentence shall not be carried out on fully or partially irresponsible[when this state of health of the person?] or seriously ill person

Cont'd

❖**The Principle Of Individual Autonomy**

- The *factual element* in autonomy is *that individuals in general have the capacity and sufficient free will to make meaningful choices*.
- The *free will* argument has, however, been contradicted by the 'determinist' claim that all human behavior is determined by causes that ultimately each individual cannot control.
- Thus, for example, the capacities assumed by the law may not be present in those who are too young or who are mentally disordered.

Cont'd

- The general assumption is thus that sane adults may properly be held liable for their conduct and for matters within their control, except in so far as they can invoke some excuses.
- **The normative element:** *that the individuals should be respected and treated as agents capable of choosing their acts and omissions, and that without recognizing individuals as capable of independent agency they could hardly be recognized as moral persons. Its difference from the factual one???????????*

Cont'd

- Individual autonomy vs. euthanasia and HIV AIDS Laws….
- The word euthanasia stems from the Greek words, *"euthanatos"* meaning "good death" and refers to the action of a third party, usually a doctor to deliberately end the life of an individual.
- Euthanasia vs. assisted suicide???
- ***Assisted suicide*** refers to the practice of an individual taking his/her own life on the basis of information, guidance and/or medication provided by a third party. For example a doctor might prescribe a lethal dose of medication for an individual, who then administers the medication him/herself.

Cont'd

- Your position as to whether euthanasia should be legalized???
- Euthanasia vs. the principle of double effect?
- Doctor may prescribe pain medication, the intention of which is to ease the patient's suffering. However, in some cases the dose of pain medication required to relieve the pain may also be sufficient to end that patient's life.
- This is known as the ***doctrine of double effect*** since the treatment provided to ease pain has the additional effect of ending the patient's life.

Cont'd

- While euthanizing a patient, the doctor intends to cause the death of the individual. It is this intention that distinguishes euthanasia from other medical practices, which might also result in an individual's death.
- HIV AIDS Laws vs. individual autonomy: These laws may have a clause saying that:

✓ Doctors must notify government of AIDS and "AIDS virus" patients.

✓ Patients may be compulsorily removed, detained and hospitalized.

Cont’d

- ✓ Persons with AIDS or associated conditions are prohibited from giving or receiving treatment involving skin penetration e.g. tattoo, ear-piercing, chiropody etc.
- ✓ Compulsory certificates by blood and semen donors relating to own health history and sexual activities and health history and sexual activities of donors' present and past sexual partners.
- Do these legal provisions violate the individual autonomy?

Chapter Four: Jurisdiction under the Ethiopian Criminal Code

- Jurisdiction is an aspect of sovereignty and refers to judicial, legislative, and administrative competence.
- The 'prescriptive or legislative jurisdiction' refers to the power to make rules.
- 'The enforcement or prerogative jurisdiction refers to the power to take executive action in pursuance of or consequent on the making of decision and rules.

Cont'd

- 'Jurisdiction', generally, 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 "the 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. Thus, it determines judicial jurisdiction.

Cont’d

- conflicts in jurisdiction may be of two kinds:
- **‘Negative’ conflict of Jurisdiction**: It may arise when different courts deny the existence of jurisdiction, over the matter in question. In this case there is the possibility of a criminal escaping punishment.
- **‘Positive’ conflict of Jurisdiction**: When different courts claim to have jurisdiction on the same crime, there is a risk that the criminal might be exposed to “double jeopardy”.

Cont'd

- The conflicts of jurisdiction might arise at different levels:
- **Conflicts of Jurisdiction at National level**: Such conflicts may arise as between Ethiopian Criminal courts, which shall be settled in accordance with Arts 99-107 of the Criminal Procedure Code.
- **Conflicts of Jurisdiction at International level**: These conflicts arise between an Ethiopian court and a foreign court, which can be settled in accordance with Arts 11-22 of the Criminal Code.

Fundamental Principles of Application of Jurisdiction

❖**The Principle of Territoriality:** The principle that the courts of the place where the crime is committed may exercise jurisdiction.

- According to this principle, all crimes committed on Ethiopian territory fall within the jurisdiction of Ethiopian Courts (Art. 11)
- This principle has a number of practical advantages, including the convenience of the forum and presumed involvement of the interests of the state where the crime is committed.

Cont'd

- **The Principle of Quasi-Territoriality or the Protective or Security Principle: Is** jurisdiction over aliens[?] for acts done abroad which affect the security of the state
- This concept covers a variety of political crimes, but is not necessarily confined to political acts. Currency, immigration, and economic crimes are frequently punished by the states under this principle.
- Art. 13 refers to certain specific crimes directed against Ethiopia to be tried in Ethiopia even though they have not been committed on Ethiopian territory.

Cont'd

- **The Principle of Active Personality or the Nationality Principle:** Under this principle, a person becomes amenable to the jurisdiction of the country by his nationality.
- According to this principle, crimes committed in foreign countries by Ethiopian citizens may be tried in Ethiopia [Arts. 14, 15(1) para2, 15(2) and 18 (1)].
- Since the territorial and nationality principles and the incidence 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. What does it mean?

Cont'd

❖**The Principle of Passive Personality or the Passive Nationality Principle**

- According to this principle, aliens[?] may be punished for acts abroad harmful to the nationals of the forum.
- Why passive??
- This is the least justifiable, as a general principle, of the various bases of the jurisdiction. Why?
- Art. 18(1) of the Criminal Code incorporates this principle.

Cont'd

❖**The Principle of Universality or the Principle of Universal Jurisdiction**

- principle 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.* E.g. breaches of the laws of war, crimes against humanity, genocide..

Cont'd

- The Ethiopian Criminal Code incorporates this principle in relation to the following cases:

✓ a crime against international law or an international crime specified in Ethiopian legislation or an international treaty or a convention to which Ethiopia has adhered..Art.17(1)

✓ a crime against public health or morals specified in Articles 525,599,635,636,640 or 641 of this Code..sub b

✓ all other crimes committed outside Ethiopia "by a foreign national punishable under Ethiopian law with death or with rigorous imprisonment for not less than ten years..Art.18(2)

Territorial Application of Principal Jurisdiction

A. Crimes Committed on Ethiopian Territory: 'Normal Case', Art.11

- 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.
- This is known as "territorial jurisdiction" because submission to the jurisdiction of the court is by virtue of the crime being committed within the Ethiopian territory.

Cont'd

- Exception to the normal case: There are some persons who may commit crimes in Ethiopia and nevertheless will not be subjected to the laws of Ethiopia nor be punished by the courts of Ethiopia.
- These persons are those who enjoy diplomatic immunity. They enjoy the same immunity as the sovereign of the state which they represent.

Cont'd

"... **Crimes Committed on the Territory of Ethiopia"**

- The national territory comprises the land, air and bodies of water, the extent of which is determined by the Constitution…Para.2
- Within the meaning of this provision, the crime must have been committed in any one of the following places:

Cont'd

a) **On the "land"**: The land part of Ethiopia can be identified by the provisions of Art. 2 of Constitution of Ethiopia, which states thus, ***"The territorial jurisdiction of Ethiopia shall comprise the territory of the members of the Federation and its boundaries shall be determined by international agreements".***

- The land comprises not only that portion of the earth within the boundaries of Ethiopia, but by virtue of Art 104 of Criminal Procedure Code.
- The following places are deemed to form part of the Ethiopian territory i.e.: Ethiopian embassies abroad[?]; Ships flying Ethiopian flag, and Aircrafts flying Ethiopian flag.

Cont'd

B. Crimes by Foreigners on the Ethiopian Territory: "Special Case", Art. 12

- Relate to crimes committed by **foreigners** on Ethiopian Territory. In fact, 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.
- Thus, if s/he has taken refuge in a foreign country and his extradition cannot be obtained, the Ethiopian. authorities may request that he be tried in the country of refuge..12(1)

Cont'd

- Hence, the original jurisdiction of Ethiopian courts gets delegated to the Foreign Courts, in relation to a crime committed on Ethiopian territory.
- Whose law is to be employed? If foreign law, what if the act is not prohibited by that law? What if the punishment provided for this crime is more severe than the one under our Code?
- Why not such a delegation works in other cases where the Ethiopian courts have principal jurisdiction? Fear of leniency and principle against double jeopardy(phil). But how the principle? Because of Art.16. Do you agree?

Cont'd

- If s/he has been tried and acquitted in the foreign country by a judgment which has become final or if he has been granted pardon or amnesty or if the prosecution or sentence has been barred by limitation, the criminal can't be retried in Ethiopia…sub2
- Why such prohibition of retrial unlike the case of Art.16 where Ethiopia has not delegated its jurisdiction? Phil.
- Therefore, **except in cases of discharge**, Ethiopia is bound by any decision made abroad since, after she has delegated her jurisdiction to the country of refuge.
- Can Ethiopia try the offender if the criminal is tried abroad on the basis of quasi-territoriality)? Or without Ethiopia's request for delegation? JEL……Phil.38

Cont'd

- What if the criminal is not tried in country of refugee and reappears in Ethiopia; Can Ethiopia resume its principal jurisdiction?
- Enforcement of the sentenced passed by the delegated state…sub 3
- ''Where the criminal has not undergone his punishment or only undergone part of it in the foreign country, the whole or the unexpired part thereof shall be enforced in Ethiopia, if s/he is apprehended and the enforcement of the penalty is not barred by limitation under the provisions of this Code.''
- Is this irrespective of the lapse of period of limitation for the enforcement of the penalty as per the law of the country which tried the offender?
- No(phil.) and adduced art.20(2)

Cont'd

- Enforcement according to whose law? Law of rendition(phil) example in case the order is immediate payment of the fine, such fine should be paid forthwith and the penal Code is inapplicable.
- Exception: in case of simple imprisonment that the criminal would be detained under the same conditions as those sentenced in Ethiopia. E.g. Working for 7 hrs a day though ordered abroad to work 6 or 8 hrs.
- But why such difference for fine and imprisonment?

Cont'd

- But, the criminal should not be conditionally releases if this is not the case under the law of rendition.
- Correspondence of the punishment i.e. in case of fine in Dollar and in Birr?
- The correspondence between the nature of punishment passed abroad and the one provided under our Code?

Extra-Territorial Application of the Principal Jurisdiction (Arts. 13-16)

- The Criminal Code envisages three specific instances that necessitate the extra-territorial application of its jurisdiction:
  - Crimes committed by any person in a foreign country against interests of Ethiopia, Art. 13,
  - Crimes committed by an Ethiopian enjoying immunity in a foreign country Art. 14,
  - Crimes committed by a member of Ethiopian Defense Forces in a foreign Country, Art 15 (2).

Cont'd

- How to exercise this jurisdiction over persons as per art.13?
- Art. 13 operates on the following essentials:
  - The criminal must be found in Ethiopia,
  - If s/he is not found in Ethiopia, his extradition shall be requested
- What if the criminal cannot be found after these efforts? Trial in absentia? Or delegation of jurisdiction?

Cont'd

- A delegation of jurisdiction may not be effected and the provisions of Arts. 160-164 (procedures in cases of default) of Criminal Procedure Code shall apply, where appropriate.
- Why not delegation? Why the state which delegates its jurisdiction on crimes committed In its territory can't delegate the same for crimes committed abroad? After all, the crime committed within Ethiopia[art.11] may include crimes specified in Art.13
- Can a state of place of commission has a power to prosecute the criminal? If yes(concurrent), can this criminal be prosecuted in his/her absence in Ethiopia and abroad simultaneously?

Cont'd

- Except for offences specified in Art.13, other Ethiopians acting abroad are only subject to subsidiary jurisdiction(art.18)
- Effects of foreign sentence: Art.16: The concept of 'Principal Jurisdiction' seems to imply that Ethiopian courts may try a criminal even though he has already been tried in a foreign country.
- This is apparently, contrary to Art. 23 of the Constitution and Art 2(5) of the Criminal Code since the principle of *'non bis in idem'.*
- .

Cont'd

- Where the criminal was tried and sentenced abroad, and served all or part of the sentence, the rule against double jeopardy demands that the term of sentence served in the foreign country be deducted from the sentence imposed in Ethiopia
- Crimes Committed in a Foreign Country by an Ethiopian Enjoying Immunity…Art.14..why to punish?

Subsidiary Jurisdiction(arts.17-20)

- “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.

Cont’d

- Conditions for Subsidiary Application..Art.19
- Effect of Foreign Sentences…Art.20
- Recognition of foreign Sentences [in both principal and subsidiary cases]…Art.22

Extradition

- 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.
- Rationales:

a) to ensure that serious crimes do not go unpunished. A state in whose territory a criminal has taken refuge may not/cannot prosecute or punish him/her.

Cont'd

- Thus, international law applies the maxim, '*aut punire aut dedere'* i.e. the offender must be punished by the state of refuge or surrendered to the state which can and will punish him.

b) The state on whose ***territory[?]*** the crime has been committed is best able to try the criminal because the evidence is more freely available there, and that state has the greatest interest in the punishment of the criminal.

Cont'd

- extradition began to assume prominence in the nineteenth century, although actually extradition arrangements date from the eighteenth century.
- Due to the neutral attitude of customary international law on the subject, extradition was at **first dealt with by bilateral treaties**.
- Before an application for extradition is made through the diplomatic channel, two conditions are as a rule required to be satisfies:
  - There must be an ***extraditable person.***
  - There must be an ***extradition crime.***

Cont'd

- Extraditable person: Nationals are not usually extraditable. This does not necessarily mean that they will escape prosecution…see art.21(2) of the Criminal Code.
- Extradition crimes: Usually listed in bilateral extradition treaty. Generally, states extradite only for serious crimes.
- However, the following offences are not subject to extradition proceedings:

  i. Political crimes;

  ii. Military crimes, for example, desertion;

  iii. Religious crimes.

Cont'd

- Conditions for extradition: In addition to the seriousness of the offence and the requirement of extraditable person and crimes, the following are preconditions to extradite.

a) The principle of double criminality: the crime is punishable according to both the laws of the state of asylum and of the requesting state.

- The application of the rule to peculiar circumstances came before the United States Supreme Court in 1933.

Cont'd

b) The Principle of Specialty: the requesting state is under a duty not, without the consent of the state of refuge, to try or punish the criminal for any other crime than that for which he was extradited.

- This principle is frequently embodied in treaties of extradition.
- Extradition under the Criminal Code..Art.21

Cont'd

- Extradition of foreigners(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.
- Extradition of Ethiopians, Art.21(2): Ethiopian national either at the time of commission of the crime or at the time of the request for the extradition cannot be extradited.

Chapter Five: Prerequisites for Criminal Liability

❖ **Crime and its Commission**

➢ **Ingredients of crime(see art.23)**: Crime has three elements: Legal, Material and Moral.

- The legal element basically deals with the principle of legality in that there should be a law the prohibits or prescribes a certain act.
- The material element of the crime refers to the acts and/or omissions.
- And, the mental element is about the state of mind of the criminal at the time of committing the crime.

Cont'd

- The legal[?] and material elements can be jointly referred to as the *actus reus* i.e. the physical element of crime and the moral element refers to the mens rea i.e. the mental element of crime.
- *Actus reus* means, ***the result forbidden[?] by law brought about by human conduct***. It is such a result of human conduct that the law seeks to prevent.
- Thus, *actus reus* requires the offender's act or omission to cause, for example, death, hurt etc.

Cont'd

- ✓ **The Legal Element of Crime:** a law must exist and this law must be violated so as to hold a person criminally liable.
- In the absence of prohibition by the law, no act is a crime even if it may seem wrong it to the individual conscience.
- Therefore, a person who performs an act which is not penalized by any law 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.

Cont'd

- ✓ **The Material Element:** It refers to the existence of some sort of conduct on the part of the perpetrator in order to make him/her liable criminally.
- The material element of a crime may be classified as commission, omission, and commission by omission.
- "Material ingredients" means facts surrounding the act, such as, the type of weapon used, place and time of commission of the offence, range of shooting, the part of the body of the victim hit by the bullet, etc.

Cont'd

- …an act consists of the commission of what is prohibited or the omission of what is prescribed by law"…Art.23(1)
- The material element (*Actus reus*) may consist of Deed of commission, or Result of omission.
- **Deed of Commission:** The word '*actus*' connotes a deed i.e. a material result of human conduct.
- 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.

Cont'd

- This means that producing the result that is prohibited by law, establishes the legal ingredient of crime.
- **Result[?] of Omission:** intentional non-doing
- Under the criminal law[see art.23,…what is prescribed…., only failures to perform legal duties can amount to criminal omissions. Legal duties to act might arise out of relationships or contracts, or might be imposed by statutes.
- Failures to perform moral duties cannot constitute the *actus reus*.

Cont'd

- "omissions" are of two kinds:

a) *Crimes of Omission: Where there is a Duty* ***Imposed*** *by Law:* The law often imposes the duty to do something, e.g. to report about the criminals, to register the birth of a child, etc. and penalizes the failure to carry out these duties.

- Crimes of this type are referred as "Crimes of Omission' and are characterized by the non-performance of a mandatory act.

Cont’d

b) **Crimes of Commission by Omission: 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.

- If harm is caused by such refusal, it is a crime of commission by omission.

Cont'd

- ✓ **The 'moral ingredients' of crime (*mens rea*)**
- The guilty state of mind of a person which is associated with the principle *"Nulla poena, sine culpa"* which means there is no punishment without guilt.
- This implies that a person cannot be held criminally liable for those acts he/she commits without there being any fault what so ever on his or her part unless there exists some sort of blameworthiness.

Cont'd

- *"No one can be punished for an offence unless he has been found guilty there of under the law. A person is guilty if, being resp*onsible for his acts; he committed an offence either intentionally or by negligence."..Art.57(1)
- No one can be convicted under Criminal Law for an act penalized by the law if it was performed or occurred without there being any guilt on his part, and was caused by force majeure, or occurred by accident…sub 2

Cont'd

- "accused persons have the right to be presumed innocent until proved guilty"…Art.20(3) OF FDRE Constituion.
- Therefore, it must, always be established that, "the state of mind of the accused at the time of the commission of crime was of the nature defined in Art. 58 or 59".
- the Latin maxim ***"actus non facit reum nisi mens sit rea"*** (act alone does not make a man guilty unless his intentions were guilty).

Cont'd

- **How to Determine the "Moral Ingredient" of Crime?** What was going on in the mind of the accused at the time of commission of crime only he should know and at the same time we cannot expect him to come and confess before the court sincerely about his state of mind.
- Therefore, it becomes the task of the court to infer from different **facts** and **circumstances** before, after and attending at the time of the commission of the crime.

Cont'd

- The following are the various tests applied in investigating the working of the mind of the person at the time of doing the act resulting in crime:

a) **Objective standard of Morality:** "the facts of each case were studied to see whether the accused's behavior did or did not reach the moral standard generally accepted and approved in the period".

- This is the essence of the test of reasonable man.

Cont'd

- The real test is that, 'it must be known to everyone including the accused and that if facts showed that the accused had not conducted himself as a man obedient to the moral code would have been expected to conduct himself, this established his *mens rea*.

b) **The Test of Subjective Standard:** The new doctrine of subjective *mens rea* gave the courts a new method of avoiding excessive hardship in reasonable cases of self-defense, accident, mistake of fact etc. All these came to be accepted as grounds of excuse from criminal liability.

Cont'd

c) **Voluntariness of Conduct:** , in cases of persons acting under the influence of Somnambulism (sleepwalking), insanity, intoxication or automatism the defense of involuntary conduct was available.

- So, how it is different from subjective standard?

d) **Foresight of Consequences:** The method of determination of *mens rea* through establishing voluntary conduct was found not satisfactory in certain instances.

Cont'd

- For example, in cases of 'pure accident' where there is no foresight of consequences if the voluntary conduct of the person in driving the vehicle is taken to be his *mens rea* then he should be punished even for an accident.
- There should be proof that "he must have had foresight of consequences" of his conduct. A man cannot be held guilty if his voluntary actions result in harm but the harm was not contemplated.
- Accordingly, there has developed a principle that "a man should not be punished unless he had been aware that what he was doing might lead to mischievous results".

Analysis of Provisions Relating to Essential Ingredients of Crime under the Criminal Code of Ethiopia

- The criminal offence is only completed when all its legal, material and moral ingredients are present…Art.23(2) of the Criminal Code…
- **Forms of 'States of Mind'**

A. Intention: "intention" is used to denote the state of mind of a person who not only foresees but also wills the possible consequences of his conduct.

Cont’d

- There cannot be intention unless there is foresight.
- A person cannot intend to do a thing unless he desires to do it.

B) **Recklessness (indirect intention):** Intention cannot exist without foresight, but foresight can exist without intention.

- A man may foresee the possible or even probable consequences of his conduct and yet not desire them to occur.

Cont'd

- In spite of this foresight if he proceeds on his course of action he knowingly runs the risk of bringing about the unwished result.
- A man who is reckless may prefer that – the event shall not happen, or s/he may not care whether it happens or not.
- Nevertheless, in either case he does not desire it to happen and therefore, does not act with the purpose that it shall happen.
- Mostly found mostly in the cases of dangerous driving of motor vehicles, adulteration of food materials, drugs and medical negligence etc.,

Cont'd

- **Forms of "Moral ingredients" Under the Ethiopian Criminal Code. (Arts. 57-59)**
- The cardinal principle of criminal liability, as embodied in the maxim *'actus non facit reum nisi mens sit rea,'* is expressed in the sub. Art (1) of Art 57 of the Criminal Code, according to which "no one can be punished for an offence unless … he commits a crime either intentionally or by negligence".

Cont'd

A) **Criminal Intention: Art. 58 :**'Criminal intention', constitutes the highest degree of criminal guilt and comprises of two elements in the words of Art. 58.

- According to Art.58(1)(a), A person is deemed to have committed a crime intentionally where he performs an unlawful and punishable act with full **knowledge** and **intent** in order to achieve a given result;
- **Knowledge:** Criminal intention firstly implies awareness.

Cont'd

- Therefore, it follows that where an act is penalized by law regardless of its consequences, the person who performs this act may not be deemed to perform it intentionally unless he is aware of the circumstances which have the effect of rendering it criminal e.g. a person does not intentionally commit a breach of official secrecy if he does not know the information he discloses is "secret" (Art. 397)

Cont'd

- If under the law certain **consequences** must be achieved so that a crime is complete, a person may not be regarded as having intentionally committed this crime unless he knew that such consequences would follow. For example, a person does not intentionally commit homicide if he is not aware of the fact that his target is a human being and that he is going to produce the death if human being (Mistake of fact, Art. 80).

Cont'd

- **Intent:** If we refer to the original French term la volente, we understand that the word 'intent' is used in Article 58/1 to mean 'will' or 'volition'.
- 'Will' involves desiring the result as an objective of the act or omission.
- **Volition, Intention and Motive**: These three terms are interrelated. The desire that impels the motion is known as volition.
- The longing for the object desired which sets the volition in motion is motive.

Cont’d

- The expectation that the desired motions will lead to certain consequences is the intention. Thus, the intention is not a desire whilst motive is.
- Intention, under Article 58 is found in two different forms:

a) **Direct Intention Art 58/1/Para (a):** The state if mind of the person is unmistakably directed towards the object and the offender willingly and deliberately brings about the “harmful result”.

Cont'd

b) **Indirect Intention (*Dolus Eventualis*):** Art. 58/1, Para (b), reads, "… he being aware that his act may cause illegal and punishable consequences commits the act regardless that such consequences may follow".

- In this state of mind, the criminal does not **desire** the occurrence of the harm. However, he is aware of the possible consequences and yet is unwilling to renounce his act.
- In other words, though the criminal does not desire, he accepts the occurrence of possible harm.

Cont’d

- E.g. if a driver, who is eager to avoid being late for an appointment, drives rashly exceeding the appropriate speed with an intention to reach his destination in time.
- S/he foresee the possibility of hitting a pedestrian on an overcrowded street, accepts the possible harm but still he proceeds with his course of conduct consciously taking the risk.
- Here indirect intention is said to exist in case he causes bodily injury, death or damage to property.

Cont'd

- In 'indirect intention', the offender does not foresee the harm as a certainty (or near certainty) but only as a possibility.
- It, thus, differs from the direct intention where the criminal is aware of the certainty or near certainty of the harm.
- This kind of mental attitude is commonly referred to as "recklessness".

Cont'd

- An intentional crime is always punishable save in cases of justification or excuse expressly provided by law (Arts. 68-81)…Art.58(2)
- No person shall be convicted for what he neither knew of or intended, nor for what goes beyond what he intended either directly or as a possibility, subject to the provisions governing negligence…sub 3

Cont'd

B) **Criminal Negligence Art. 59:** "Criminal Negligence" constitutes criminal guilt of a lower degree.

- 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.

Cont'd

- 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."

Cont'd

- The essential elements of the provision are:
  - Acting by imprudence or (inadvertent)
  - Being aware that his act may cause illegal and punishable consequences acts in disregard of such consequences, or (Advertent)
  - Acting by a criminal lack of foresight, or (Advertent)? Amharic Version????
  - Acting without consideration of possible consequences while he should or could have been aware that his act may cause illegal and punishable consequences.(Inadvertent)

Cont'd

- two kinds of negligence:
  - Advertent (conscious) Negligence.
  - Inadvertent (unconscious) Negligence
- **Advertent Negligence** : Acting in disregard of possible consequences defines conscious type of negligence. In this form of negligence the criminal, like in the case of in direct intention, foresees the possibility of some harm but disregards (or rejects) its occurrence.
- Under indirect intention the criminal accepts the occurrence of the possible harm whereas in the advertent negligence the person rejects the possibility of the harm which in fact materializes as a result of his negligence.

Cont'd

- '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' …
- 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 no body will see us if something should happen."
- There after, '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.

Cont'd

- **Inadvertent Negligence:** Acting without consideration represents the unconscious type of negligence. Under inadvertent negligence the accused is not aware of a possible harm. The offender does not foresee the result at all.
- For example, the accused believing that the gun is unloaded pulls the trigger and to his surprise finds some one injured.
- It cannot possibly be a case of pure accident since he is handling a deadly weapon, which requires the exercise of care and caution on his part.
- His failure to take care makes him liable for negligently injuring the person.

Cont’d

- **Criminal Lack of Foresight:** These acts produce a result the criminal never expected and which he may most regret.
- A person is guilty of criminal negligence when, having regard to his personal circumstances, particularly to his age, experience, education, occupation and rank, he fails to take such precautions as might reasonably be expected in the circumstances of the case..Art.59(1), para.2

Cont’d

- “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”…Art.59(2)

Relationship of Cause and Effect

- The doctrine as to the connection of causes and effects is known as causation in law.
- a man can be said to have caused the *actus reus* of a crime if that *actus* would not have occurred without his participation in what was done.
- In all cases where the commission of a crime requires the achievement of a given result, the crime shall not be deemed to have been committed unless the result achieved is the consequence of the act or omission with which the accused person is charged.

Cont'd

- **Tests to Establish the Relationship of Cause and Effect:** Various tests have been suggested to enable the courts to decide whether alleged 'act' is the cause of the 'result' in question, of which the following are important ones: *Sine qua non* test and Adequate or proximate cause test.
- **Sine qua non Test or the Theory of Absolute Causation:** Until very recently, some countries have applied this so-called sine qua non-test. 'Sine qua non' is a Latin term which means "without which not" – an indispensable condition or an important prerequisite.

Cont'd

- The test says, "An act in the absence of which the result would not have been achieved is deemed to be the cause of such result".
- For example, if 'A' strikes 'B' and 'B' gets injured. 'C' drives 'B' to a doctor but the car crashes on the way and 'B' dies in the crash, 'A' will be held liable for B's death.
- The test tries to explain that, had 'A' not wounded 'B' he would not have had to be driven to a doctor and would not have lost his life in the car accident.

Cont’d

- This theory, known as the theory of absolute causality, goes too far because it mixes up ‘causes’ and the ‘occasion’ of the harm.
- However, criminal liability cannot be established through the sine qua non test quite clearly. Therefore, another test has been evolved to establish ‘cause’ and ‘effect’ more distinctly.

Cont'd

- **Adequate or Proximate Cause Test:** in the above illustration, though cause and effect relationship exists between A's act of striking 'B' and the slight injury suffered by 'B', it cannot be extended to anything that may happen after striking and apply to B's death.
- The striking alone could not result in B's death and it is obviously the car accident and not the striking, which in this case is the "cause" of death.

Cont’d

- Cause and effect shall be presumed to exist when the act would, in the normal 'course of things, produce the result charged…Art.24, para.2
- Any relationship that might exist between the result and an act not normally capable of producing it has no legal consequences.
- For example, ‘A’ simply pretends to shoot at ‘B’ with his gun and ‘B’ who has heart problem dies of “fright”.

Cont’d

- In the ordinary course of things, one cannot kill a person by pretending to shoot him.
- However, if the offender knows that his victim is suffering with a heart condition, then his act can be defined as the cause for the death of the victim.

Factors That Might Break the Chain of Causation

- These include preceding, concurrent or intervening causes.
- Where there are preceding, concurrent or intervening causes, whether due to the act of a third party or to a natural or fortuitous event, which are extraneous to the act of the accused, this relationship of cause and effect shall cease to exist when the extraneous cause in itself produced the result…Art.24(2)

Cont’d

- **Preceding Causes:** A preceding cause is the one that exists before the act done by the accused towards commission of the crime.
- The chain of causation would cease to exist if there exists a cause prior to the act or omission of the accused and makes a material difference in the consequences foreseen or ought to have been foreseen by the accused.
- E.g. ‘C’ who was suffering with high blood pressure problem met with a car accident.

Cont’d

- He sustained some minor injuries and was hospitalized. Shortly afterwards he died in the hospital.
- The cause for his death was extensive bleeding which could not be controlled due to his high blood pressure.
- Therefore, the person responsible for the accident can be held liable only for causing injuries by negligent driving but not for causing death.
- The minor injuries he had suffered in the accident could not have caused his death but for the uncontrollable bleeding. Therefore, the causal relationship is broken here by the existence of a preceding cause.

Cont'd

- **Concurrent Causes:** when a given result may be attributed to two or more simultaneous causes. For example, if 'A' and 'B' simultaneously shoot 'C' with the intention of killing him and 'C' is hit by bullets from both and dies, the question is whether both A and B are liable or A or B alone is liable.
- If it is proved that both the bullets were fatal, 'A' and 'B' will be equally liable for the homicide.
- If the bullet fired by 'A' hit 'C' in the leg[?] while the bullet fired by 'B' hit 'C' in the heart, 'B's act will be regarded as the efficient cause of 'C's death.

Cont'd

- **Intervening Causes:** when a given result may be attributed to a multiplicity of causes. The difference between this case and the case of concurrent causes lies in the time element involved. The task is to know which of the two or more consecutive (not simultaneous) events has caused the harm in issue.
- For instance, if 'A' beats up his child and inflicts on him an injury that, though not fatal, makes it necessary that he is admitted to hospital. The child, while under treatment at the hospital, catches some deadly infectious disease and dies.

Cont'd

- There is no doubt that the efficient cause of the child's death is not the injury, but the disease. The latter is an intervening cause, the effect of which is that no chain of causation exists[?, because the law says 'the cause and effect cease to exist'(see the Amharic version), not 'no causation exist'] between the beating up and the death since, the initial act done by 'A' could not, in the normal course of things[?], produce the result eventually achieved.

Cont'd

- Therefore, here in this case, 'A' would be liable for maltreatment of his child under Art. 576[art.24(2), para.2) only since the efficient cause that brought about the death is the disease and not the injury caused by the accused.
- Relationship of cause. and effect shall be presumed to exist between each cause specified under sub article (2) above and the result achieved, when the result is the cumulative effect of these causes, even though each cause cannot independently produce the result….sub 3

Cont’d

- For instance, ‘A’ and ‘B’ simultaneously/ consecutively shoot ‘C’ with the intention to kill him. ‘A’ shoots in his leg whereas, ‘B’ shoots in his upper arm and death ensues due to excessive bleeding from the wounds. The cause and effect relationship can be presumed to exist between the acts of both ‘A’ and ‘B’. Both are equally liable for the crime of homicide.

Difficulties in the Assessment of "Physical Element" of Crime

A) **Where there is no Physical Participation:** For e.g.: A man in 'Addis Ababa' may be held liable for having instigated and arranged the commission of a crime in 'Dire Dawa'.

B) **Where Participation is Indirect:** A person will be held fully "responsible if he has made use of an "innocent agent" to commit a crime. E.g.: 'A' secretly puts poison into a drink, which he knows or expects Mrs. 'B' will offer to Mr. 'C'

- In these instances, the innocent agent is guiltless and is not responsible criminally, but the one who had brought about such results intentionally or recklessly is held criminally liable

Cont'd

C) Where another Person has intervened: Cases might arise in which it would appear that the harm would not have occurred but for an act or omission of the accused, but in fact it could be established that the more direct and immediate cause of the harm was the intervention of some other person. In such circumstances, the accused has been exonerated. Different foreign cases……

Cont'd

D) Where Victim's Own Conduct has affected the Result: prisoner has set fire to a stack of straw. While the stack was burning the deceased was seen in the flames and his body was afterwards found in the stack yard.

- If there is any reasonable doubt to the affect that, the deceased might not have been there in the enclosure at the time when the accused set fire to the stack, but might have entered there afterwards, then the victim's own act intervened between the death and the act of the prisoner. In such a situation his death could not be the natural result of the accused's act; and in that view he ought to be acquitted.

Cont'd

- The accused has wounded a man. According to the evidence, there was medical advice to get the wounded finger amputated.
- However, the deceased refused to submit himself for amputation and died subsequently. The prisoner was convicted for homicide in spite of the medical evidence that "had he submitted to the amputation his life would have been saved".

Cont'd

E) **Contributory Negligence of the Victim:** Plaintiff's own negligence disentitled him to bring any action against the negligent defendant. The defendant has to prove that the plaintiff failed to take reasonable care of his own safety and that was a contributing factor to the harm ultimately suffered by the plaintiff.

- E.g. If 'A' going on the wrong side of the road is hit by a vehicle coming from the opposite direction that is being driven rashly by 'B' the defense of contributory negligence is available to 'B' against 'A' since he has contributed to the occurring of the incident by walking on the wrong side of the road.

Cont'd

- No such defense is available to the accused in criminal proceedings.?????

F) **Where the Participation is Superfluous:** E.g. 'A' and "B" two strong men were engaged in beating 'C' to death. 'X' a stranger rushed in unasked and undesired by them and gave some small blows to the victim.

- If 'C' dies 'X' would be guilty of the murder of 'C' just as 'A' and 'B' are responsible of the murder, if it can be established that each of the three offenders foresaw that the death of 'C' would be the result of the general attack which has been made upon him.
- How it is different from cumulation of intervening causes?

Guilt In Case of Concurrent Crimes Art. 60-67

- 'Concurrence' of crimes occurs in either of the following two[?] ways:
  - When several unlawful acts are done in contravention of one or more articles of the law. This type of concurrence is known as concurrence of crimes or Material Concurrence, or
  - When one unlawful act is done in contravention of several articles of the law. This is called concurrence of criminal provisions or Notional Concurrence.

Cont'd

- **Concurrence of crimes or material concurrence:** when the criminal successively commits. two or more similar or different crimes, whatever their nature…Art.60(a)
- For example, if a criminal robs B's shop and C's residence, there is a case of material concurrence due to the criminal's successive acts. If the criminal in addition rapes a maidservant while robbing C's residence, there is a material concurrence of three crimes, i.e., two crimes of robbery and a crime of rape.

Cont'd

- **Concurrence of Criminal Provisions (Notional Concurrence):**A single criminal act or omission may give rise to concurrent crimes by violating two or more provisions. Such events are referred to as national concurrence…art.60(b).
- This is one aspect of notional concurrence.
- For instance, if a married man rapes his relative in a public place he is punishable for four crimes. The crimes of rape (Art.620) incest (Art.654), adultery (Art.652) and public indecency (Art. 639) arise from the criminal's single act.

Cont'd

- When a single criminal act results in several punishable crimes, it is classed as Simultaneous Notional Concurrence.
- Under this type of concurrence, if the criminal is proved to have caused one of them with criminal intention or negligence, he is held guilty of all the crimes because they invariably occur at the same time from the same causal relation. What if he is didn't know that the victim is his relative??

Cont'd

- The second element of notional concurrence is when the same act results in in crimes with various material consequences..art.60(b) & 66
- This is a non- simultaneous combination of crimes as stated in Art. 66, where by causation and the particular state of mind must be proved independently for each of those crimes.
- There are three possibilities of combined notional concurrence, namely :

Cont'd

- Concurrence of intentional crimes, Art.66(1)(a)
- Concurrence of intentional and negligent crimes, Art. 66(1)(b)), and
- Concurrence of negligent crimes, sub c

- For example, if 'A' sets fire to B's hut with an intention to destroy it, it is obviously an intentional crime of 'Arson' under Art. 494. If 'B' dies while asleep inside the hut, a possibility which the criminal had foreseen and accepted, "A" is concurrently (Art. 66/1/a) punishable for intentional homicide (*dolus eventualis*). If 'A' having foreseen the possibility and had believed that 'B' might not be present inside the hut at the crucial point of time, there is concurrence of intentional arson and the resulting negligent homicide (Art. 66/1/b).

Cont'd

- What if, in a fight, A hits B who falls into the rock and died of skull fracture? Possible to convict for bodily injury and negligent homicide? JEL, vol.5, No.2, p.402
- There is also a third type of concurrence when a criminal act which, though flowing from the same criminal intention or negligence and violating the same criminal provision, causes the same harm against the rights or interests of more than one person…Art.60(c)
- E.g……

Cont'd

- Unity of Guilt and Penalty: Art.61:Art. 61 states the following three instances of imperfect concurrence where by the seemingly concurrent crimes are merged (united) by the same criminal guilt and purpose.

a. Single Act or Combination of Criminal Acts: By virtue of Article 61/1, a criminal cannot be charged and punished under two or more concurrent provisions of the same nature if the following 3 conditions are satisfied:

Cont'd

- If a single act or a combination of criminal acts are committed,
- Against the same protected right,
- Flowing from a single criminal intention or act of negligence.

- E.g. in case a criminal stabs a person with a knife intending to cause death, but fails to bring about the desired result, he is charged only for attempted homicide because bodily injury is an inevitable ingredient of homicide and the injury flows from the single criminal intention" to kill.

Cont'd

b. **Successive non-concurrent acts Art. 61/2:**

- 'Successive or repeated acts against the same legally protected right flowing from the same initial criminal intention or negligence constitute one crime; the criminal shall be punished for the said crime and not for each of the successive acts which constitute it.'
- For example, a cashier who misappropriates 5 Birr a day over a period of one year commits a successive 'offence of breach of trust' since the acts which he repeatedly does are of the same kind (misappropriation) and directed against the same legally protected interest (property).

Cont'd

c. Ancillary (subordinate) Acts. Art. 60/3

- 'Where the criminal is regarded to have intention to commit a specific crime, in particular where he committed a crime on property to obtain unlawful enrichment or he made counterfeit currency, used it or put it into circulation or executed a forged document and used it, the subsequent acts performed by the criminal himself after the commission of the main crime for the purpose of carrying out his initial- criminal scheme shall not constitute a fresh crime liable to punishment and are merged by the unity of intention and purpose.'

Cont’d

- **Renewal of Guilt and Penalty, Art. 62:** ‘When a criminal having committed a crime as specified in Article 61 commits with renewed criminal intention or negligence another crime' of the same kind, whether against the same person or the same legally protected right, such crime constitutes a fresh crime and the Court shall aggravate the sentence on ground of concurrence as provided in Article 184.’
- E.g. in case an offender shots five times and misses the target, it is apparently a single (non-concurrent) attempt.

Cont'd

- But, if the offender fires at the victim a week after he missed him, prosecution may invoke renewal of criminal intention under Art. 61 and charge the offender for concurrent offences.
- Can he be prosecuted for attempt and for homicide if the ensued fro the later fire?
- How it is different from cases of art.61(2) or repeated or successive acts??????
- An other example: if a truck driver who did not fasten his load of bricks is aware of this fact that a brick has fallen off and killed someone, he will, if another brick falls off and kills a second person, be punishable for concurrent offences of 'negligent homicide'.

Cont’d

- **Guilt in Case of Related Crimes**, art.63: ‘When a criminal commits a crime with the intention of causing or facilitating' the commission of another punishable crime the provisions regarding aggravation of penalty in case of concurrence shall apply (Art. 184), when this has been attempted unless such crime is declared by law to be an aggravated crime.’
- This provision vs. art.61(3)? Again with art.721 and 723?
- Preparation??? Art.26

Cont'd

- Guilt in case of recidivism, art.67: The court shall aggravate the penalty on the ground of recidivism when a fresh intentional crime the minimum of which is six months simple imprisonment? has been committed within five years of serving the sentence of imprisonment? in whole or in part or having been remitted by pardon.
- Is this the general definition of recidivism???

Corporate Criminal Liability

- Recently, developments have been made in criminal law with respect to wrong doings by legal persons.
- Criminal liability of corporations became one of the most debated topics of the 20th century. The debate became especially significant following the 1990s, when both the United States and Europe faced an alarming number of environmental, antitrust, fraud, food and drug, false statements, worker death, bribery, obstruction of justice, and financial crimes involving corporations.

Cont'd

- The criminal liability of corporations has been more controversial. While several jurisdictions have accepted and applied the concept of corporate criminal liability under various models, other law systems have not been able or willing to incorporate it.
- **Goals of Corporate Criminal Liability:** The main goals of criminal liability of corporations are similar to those of criminal law in general such as deterrence, retribution, rehabilitation….

Models of corporate liability

- Corporate criminal liabilities currently exist in many legal systems, including United States, England, Australia, Canada, Finland, Denmark, France and in the European Corpus Juris.But, these systems use models of corporate liability that differ in three important respects:
  - The choice of which organizations are Criminally liable
  - The types of offences attributed to corporate entities
  - The criteria for attributing liability

Cont'd

- **Organizations subject to criminal law control**: The comparative study suggests three possible models. One approach is to use the term 'organization' without definition or restriction. The second approach is to list all the specific types of Organization upon which criminal liability may be imposed. The third approach is to restrict liability to only those organizations that the civil law considers legal entities with status.
- Emblematic of the first approach is that of the Australian legislation of corporate criminality.

Cont'd

- The second approach is specified liability model and sets forth definite list of criminally liable organization. An example is that of the United States. The US. Sentencing guideline defines organizations which are subject to the regulation. Organization means a person other than individual. The term includes corporations, partnerships, associations, joint stock companies, unions, trusts, pension funds, unincorporated organizations, government and political subdivisions thereof, and nonprofit organizations.

Cont'd

- The same approach is adopted in Canada. The Criminal Code extends criminal liability to organizations by defining the terms 'everyone' and 'person' to include public bodies, corporate bodies, societies and municipalities in relation to the acts and things capable of doing.
- The third approach in the traditional partisan model that reflects the classic opposition between legal status and non-legal status entities. French and Denmark are examples. The lack of precise criteria in defining non-legal status entities creates uncertainty and confusion among courts.

Cont’d

- ❖Typology of offenses: Different approaches in addressing the issue of which offences can be attributed to corporations.
- The first model is absolute pacification of physical persons and juristic persons. In this view, organizations are criminal liable for all of the same offences that can be attributed to individuals.
- The second model is to avoid a general rule designating the typology of crimes imputed to corporations and instead, to legislate for organizational liability crime by crime.

Cont'd

- The third one is to list which crime can be committed by entities.
- The first approach is adopted by Australian Criminal Code and the Canadian and Dutch system. The Australian Code plainly affirmed that a body corporate may be found guilty for any offence, including one punishable by imprisonment.
- The second approach is found in France. The penal Code adopts the specialty principle by which corporate criminal liability does not cover a large spectrum of offences but applies only when there is express mention in the law.

Cont’d

- The third model is the one adopted in United states. The sentencing guidelines include a detailed list of offences covered under the regulation. This list include most of the crimes committed in corporate environment, such as theft, money laundering, bribery, fraud, antitrust offences and tax offences.

❖ Criteria of ascription of the Actus reus: The comparative experience does not provide a clear contrast. The principle of respondeat superior which is adopted in civil law system and US. represents the implementation of the principles governing vicarious liability: The actus reus and mens rea of the individuals who act on behalf of a corporation are automatically attributed to the corporation.

Cont'd

- This principle requires that the corporation id liable if: an agent of the corporation commits a crime while acting within the scope of employment with the intent to benefit the corporation.
- Who are agents? Every employee. This broad definition of agency in this sense includes individuals who work in the corporation. This interpretation is followed in US. This interpretation also influenced the Australian legislation which states that if a physical elements of the crime is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his/her employment, or within his/her apparent authority, the physical element must also be attributed to the body corporate.

Cont'd

- Is this intent to benefit must be an exclusive one that it must solely aimed at benefiting the corporation only? What if the crime is committed with a mixed intent to benefit both the corporation and that of the actor?
- The alternative method of interpreting 'agent' to mean managers is followed in France.

❑**The problem of corporate culpability**: There are systems like France that reject corporate mens rea and those which require it.

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- Those systems that require corporate mens rea adopt two approaches: The anthropomorphic and the organizational approach. The former measures corporate blameworthiness by using the traditional standards applicable to individuals while the latter determines culpability based on the characteristics of the corporation, on its policies and practices.
- The anthropomorphic model uses the identification and collective intent theory. The identification theory developed in England now is recognized by Australian, Canadian and Finnish system.

Cont'd

- This theory also called the alter ego theory. It relies on the assumption that all legal and illegal acts performed by a high level managers are properly identified with the activities of the corporation: the offences charged against these officials are automatically attributed to the corporation. And, those acting at a management position is not acting as an agent but as a corporation itself.
- The anthropomorphic theory can be described in the following way:

Cont’d

- ‘A company may in many ways be likened to humans body. It has brain and nerve center which control what it does. It also has hands which hold the tools and in accordance with the direction from the center. Some of the people in the company are mere servants and agents who are nothing more than hands to do works and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.’

Cont'd

- The collective intent of the aggregation theory is based upon the difficulty of identifying an individual offender who operated in a complex and decentralized structure.
- Thus, if one assumes a crime with elements A, B and C where A is known to officer A, B is known to officer B, and C is known to officer C, then, for the purpose of criminal liability, all elements are known to the corporation.
- There are four **organizational models** of organizational liability.

Cont’d

- Corporate policy model, corporate culture, preventive fault, and reactive corporate fault.
- Under the corporate policy model, corporate culpability may attach under any corporate policy that intentionally or foreseeable enables illegal actions. First, corporate crimes may be found where the policies themselves are illegal because they compel or authorize illegal acts. Second, illegal actions may occur, where policies and practices, though lawful, encourage corporate crime in foreseeable way.

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- Under the corporate culture model, a finding of culpability rests upon the assumption that the personality of the corporation encourages its agents to crimes….corporation as a community with its own attitudes, norms, customs, habits and mores.
- Corporate blameworthiness and structure of the organization. According to an Australian Criminal Code, corporate culture means an attitude, policy, rule course of conduct or practice existing within the body corporate generally or in part of the body corporate.

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- The preventative-fault model of culpability finds liability when a corporation fails to insert and implement an adequate internal system of control to prevent the commission of a crime. This model is found under the Us. Sentencing guidelines.
- Reactive fault exists when a corporation fails to react satisfactorily to the actus reus of an offense. Failure to undertake effective preventive and corrective measures in response of discovery of an external element of a crime is a form of corporate fault.

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- **Principles of Corporate Liability:** A company can be held liable for its wrongful acts by virtue of two legal principles:

A) **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.

Cont'd

- 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 corporations 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. Is that vicarious liability????

B) **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.

Cont'd

- In such circumstances the company as well as the individual could be criminally liable. This is known as the identification doctrine.
- **Corporate criminal liability in Ethiopia: Art.34**
- Which corporation?
- How to commit a crime?
- Forms of participation in the crime?
- Individual liability
- The forms of punishment to be imposed…

Chapter Six: **Degrees in the Commission of Crime**

- **Different Stages in the Commission of Crime**

a) **Preparation:** Various phases normally precede acts. The phases of desire, decision and initial planning (in the thoughts of the criminal) are mental that do not involve exterior acts.

- From the moment these phases develop into "external conduct" that aims at the commission of a crime, the phase of preparatory act is said to have begun.
- However, not every preparatory act is punishable.

Cont’d

- For example, a person who has planned to rob a store may buy a pistol, survey the most “appropriate” time of action and arrange various facilities.
- Such preparations apparently involve external conduct. Yet, it is difficult and unfair to punish such acts because we cannot be certain about a person’s criminal intent unless the prospective criminal himself tells us.
- This uncertainty is inevitable because preparatory acts are “remote” from the ultimate harm and unequivocal design and the determination to carry it out.

Cont'd

- Most Criminal Laws including Ethiopian Criminal Code do not in principle punish preparatory acts.
- Preparatory Acts are defined under Art. 26 of the Penal Code of Ethiopia as those acts which are merely designed to prepare or make possible an offence, by procuring the means or creating the conditions for its commission.
- These preparatory acts are not punishable as a general principle for two main reasons.

Cont’d

- That is, it is difficult to safely conclude that a person manifests the material element of the crime due to the equivocal nature and remoteness of the preparatory acts towards the offences intended to be committed.
- In other words, behaviors cannot be considered to constitute the material element of the crime unless they are proximate and definite that the offence is likely to be committed.

Cont'd

- E.g. A, having determined to kill B and having reflected his intention to his friend, decides to use a gun and he buys gun. A cannot be said to have satisfied the material element of the crime for homicide because it is not clear for what purpose is the gun bought.
- such acts are punishable where in themselves they constitute a crime defined by law e.g. possessing Unlicensed guns. Thus, are we punishing for his preparation or for possessing this gun???????????
- Or they are expressly constituted a special crime by law by owing to their gravity or the general danger they entail"..art.26

Cont'd

- For example, material preparation of offences against the state (Art. 256, 257), preparing a mutiny or seditious movement (Art. 300) and preparing machinery and means of counterfeiting currency (Art. 371) are expressly stated to constitute special crimes.
- Preparation is punishable only when it has reached such an advanced stage and is close to an attempt that there is no doubt as to the purpose of the arrangements made and as to the willingness of the person who made them, to carry them further if he is given the chance of doing so.

Cont'd

b) **Attempt:** Attempt is the second degree in the material element of the crime. It is a substantial but unsuccessful effort to commit a particular offence. It is a willful effort but without success.

- Attempt includes three most important requirements to exist that include: intent, overt act, and failure to achieve the result.
- See Art.27(1), para.2
- Attempt requires an act more than preparation.

Cont’d

- Attempt, therefore, requires a purposeful behavior. A person can be said to have attempted an offence when he purposefully acts to accomplish what he has originally intended to commit. See art.27 ‘…intentionally …’
- Accordingly, negligent attempt is inconceivable as the person in such case does not desire the consequences.

Cont'd

- **Kinds of Attempt:** Basing on the 'reason' for the failure to achieve the intended result attempts can be classified into three categories:

a) **"Incomplete Attempt":** If the accused chooses not to do or is prevented from doing the last act of the crime, the attempt is said to be incomplete.

- The words "… does not pursue … his criminal activity to its end" in Article 27 define "incomplete attempts" because of voluntary withdrawal.

Cont’d

- The part of the provision that reads, “… or is unable to pursue his criminal activity to its end”, on the other hand, indicates an incomplete attempt because of external interventions.

b) **“Complete Attempt”:** An attempt is said to be complete when the wrongdoer has performed everything on his/her part, which is considered to be necessary without, however, result having occurred.

- The reasons for the failure to achieve the result may be of two types:

Cont'd

- Due to situations beyond his/her control: the attempter would in all probability have achieved in causing the desired result had it not been for the existence of unexpected events.
- This category of attempt includes impossible offence[?]. Because it falls in separate category of attempt i.e. incomplete attempt.
- Attempt could also failed to achieve the result due to the active involvement of the perpetrator him/herself. This is known as active repentance.

Cont'd

- Complete attempts may take the forms of voluntary undoing or involuntary failure to achieve the result.
- If a criminal having poisoned a victim with a dosage sufficient to cause death, regrets and voluntarily takes him to hospital there by enabling complete recovery, the criminal has apparently "undone" the effects of what he had done. Such an "active repentance" (Art. 28/2)

Cont'd

- Involuntary failure to achieve intended result occurs upon missing a target, abortion of result or impossibility of achievement as specified in Art 29[?].

c) **"Impossible Attempt" Art. 29:** Such attempts involve situations where a criminal attempts "to commit a crime by means or against an object of such a nature that the commission of the crime was absolutely impossible".

Cont'd

- Article 29 covers the cases of absolute impossibility and not relative impossibility where the circumstances in which the criminal acted are unable to cause the criminal's intended harm due to the means used or because of the object against which the act is committed.
- Failure to achieve result because of an unloaded gun is an absolute impossibility due to the means used.

Cont'd

- If a doctor attempts abortion over a woman who is not pregnant, there is absolute impossibility due to the missing object.
- Poisoning a person with an insufficiently fatal poison is a case of relative impossibility due to insufficient means.
- However, No punishment shall be imposed when the criminal, from superstition or owing to the simplicity of his mind acted by using means or processes which could in no case have a harmful effect..para.2
- E.g…….

Cont'd

- An attempted crime is always punishable save as is otherwise provided by law..Art.27(2)
- A mere attempt to instigate or assist in a crime does not come within the provisions of the law unless it is expressly provided to the contrary…sub 3. What does it mean? An example?
- 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..sub 4

Cont'd

- Sentence of death shall be passed only in cases of grave crimes and on exceptionally . Dangerous criminals, in the cases specifically laid down by law as a punishment for completed crimes and in the absence of any extenuating circumstances. A sentence shall be passed only on an criminal who, at the time of the commission of the crime, has attained the age of eighteen years…art.117(1)

Cont'd

- The exceptions relevant to the issue of attempt are prohibition to impose death penalty on attempted crime and on young criminals who do not attained the age of 18 years at the time of commission of the crime.
- This means, one, if the crime attempted is punishable by death, we can't impose a death penalty. But, what should be the penalty in this case???
- Second, if a person at the age of 17 gas attempted a crime punishable by death, he can't be sentenced to death. But, for what type of punishment he would be liable? Can we refer sub 3, para.2?

Cont'd

- What about the suspension(not prohibition to impose) death penalty imposed on fully or partially irresponsible or seriously ill person while they are in that state[art.119]?
- Can't we take it as an exception to the equivalence of punishments for both the completed and attempted crimes? No, because, what this article(119) dictates is suspension of execution of death penalty and doesn't prohibit imposition. However, what article 27 dictates is about the imposition of death penalty.
- However, what is the difference in effect of prohibiting imposition of death penalty and suspending its execution?

Renunciation And Active Repentance

- **Renunciation:** refers to situations where a person abandons the pursuit of his or her criminal activity by his or her own free will without completing the act required producing the result…..Art.28(1)
- **Active repentance:** when, after having performed all the acts to bring about the desired result, the perpetrator himself either prevents or contributes for the prevention of the result…sub 2

Chapter Seven: Participation in the Commission of Crime

❖ **Participation in Principal Capacity(first degree)**

- Principal participation exists where those persons who do the act or acts constituting the offence or abstain from acting when they are bound to act. It is, therefore, the case that a person is considered to be the principal offender in homicide who stabs another by a knife; or he or she is the principal offender in an offence of theft if he or she snatches the bag from another.
- If the persons who involve themselves in the commission of the crime are more than two, they are still called principal criminals.

Cont'd

- In Ethiopia, principal participation is defined under article 32 broadly that it takes the forms of material, moral and indirect offenders…*"a person shall be regarded as having committed a crime and punished as if:*
- *(a) he actually commits the crime either directly or indirectly, in particular by means of an animal or a natural force; or*
- *(b) he without performing the criminal act itself fully associates himself with the commission of the crime and the intended result; or*
- *(c) he employs an infant or a person who is mentally deficient or unaware of the circumstances, for the commission of a crime or compels another person to commit a crime."*

Cont'd

a) Material Criminal(art.32(1)(a)): It exists when the one, who, with the requisite mental state, personally engages in the act or omission considered as crime.

- A person is a material criminal in a crime of homicide if he or she takes the life of another. Such form of principal criminal can commit the offence either directly or indirectly.
- It is direct when every person directly, physically or personally commits the offence.

Cont’d

- It could also be indirect when the perpetrator commits the crime by using instruments like animals or natural force. E.g. when A employs a flood in the destruction of property which belongs to B.
- 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.

Cont'd

b) **Moral Criminal(sub 1(b)):** 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.

- Moral criminal is a person who plays no part physically in the commission or omission of the offence.
- He/she just takes part in the process by designing plans, providing means, facilitating everything necessary for the commission of the offence

Cont'd

- E.g. When 'A' organizes a group for the purpose of robbing a bank, decides the time and place of the crime, the means to be used in committing the same but stays at home while the crime is being committed. S/He can be considered as the moral criminal who facilitates the commission of the crime.

c) **Indirect Criminal(sub 1(c)):**Such a criminal to uses an intermediary to commit a crime. E.g. use of infants, mentally deficient persons, persons unaware of the circumstances or compelling of others.

- What makes it different from indirect material criminal i.e. sub 1(a)?
- Are they exhaustive lists?

Cont'd

- Where the crime committed goes beyond the intention of the criminal, s/he shall be tried in accordance with Article 58(3)…Art.32(20
- **Co-criminals/ co-offenders(arts.32(3) & 33):** are those persons who participate in a crime in their principal capacity[?] either as a material or moral or indirect parties.
- Persons may also be categorized as co-criminals in general crimes and special crimes. Several persons may be considered as co-criminals in crimes in general when the crime in question can be committed by any one.
- This relates to homicide, theft, robbery, bodily injury and so on.

Cont'd

- Persons are co-criminals in special crimes when the crime in question requires special qualification.
- ''…*a crime which can be committed only by certain specified persons, in particular by a member of the Defense Forces in the case of military crimes, or by a public servant in respect of crimes against public office, or only by male persons as in the case of rape*.''..Art.33
- Desertion, rape, incest, corruption, adultery..

Participation in the Secondary Capacity

- This refers to the involvement of persons in the commission of a crime in the second degree. This exists either before or during the commission of the crime.
- 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[?].

Cont'd

A) **Incitement(instigation):** *"whoever **intentionally** induces another person whether by persuasion, promise, money, gifts, and threats or otherwise to commit a crime shall be regarded as guilty of having incited the commission of the crime…Art.36(1)*

- *"The person who incited the commission of a crime shall be liable to punishment provided the crime was at least attempted"…sub 2*
- *The punishment to be imposed shall be that provided by law for the intended crime. It may be reduced within the limits specified by law if the circumstances of the case justify such a reduction (Art. 179)…sub 3*

Cont'd

- *When the person who committed the crime went beyond what was intended by the instigator, the latter shall be liable to punishment only for the crime he intended or could foresee.(Art.58 (3). The actual criminal shall alone be answerable for the more serious crime which he committed…sub 4*
- What if the crime committed in unrelated to the one intended by the instigator?
- What is the difference between indirect principal participation by compelling others(art.32(1)(c)) and inducement by threat as an instigation?

Cont'd

- B) **Complicity(accomplice):** It is also a secondary participation which may exist either before or during the commission of the offence as provided under Article 37 of the Criminal Code as *"an accomplice is a person who **intentionally** assists a principal criminal either before or during the carrying out of the criminal design, whether by information, advice, supply of means or material aid or assistance of any kind whatsoever in the commission of an crime.*
- *An accomplice in an **intentional crime** shall always be liable to punishment…sub 2*

Cont'd

- The crime must be at least attempted…sub 3
- The punishment to be imposed is the one provided for the crime as long as such crime does not go beyond the accomplice's intention…sub 4
- When the person who committed the crime went beyond' what was intended by the accomplice the latter shall be liable to punishment only for the crime he intended or could foresee..sub 5
- The actual criminal shall alone be answerable for the more serious crime which he committed.
- What if the crime committed is unrelated to the one intended by the accomplice?

Cont'd

- assistance may be material or non-material. It is material 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.
- It is non-material when it relates to advice, command, counsel, encourage, and so on.
- 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.

Cont'd

- **Criminal Conspiracy:** Conspiracy is an agreement between two or more persons to effect something unlawful. There is a need of an overt agreement beyond independent intentions of the persons involved which of course constitutes the material element of the crime.
- The crime of conspiracy is completed at the moment when two or more persons have agreed that they will do at once or at some future time an act which is unlawful.
- Therefore, the crime of conspiracy is said to be completed even if there is no further act to put the agreement into effect.

Cont'd

- In the Ethiopian law, conspiracy, as a rule, is *not* considered to be an independent crime[?]. Rather, it is a ground for aggravating punishment when persons participate in the commission of a crime based on prior agreement as per Article 38(1) of the Criminal Code.
- By this, the Code disregards that collective preparation is more dangerous than individual preparation because the risk than an offence would be committed is greater(for the conspirator would encourage each other or feel bolder than if they were on their own), and that the probability that the venture may be successful is higher…Phil.
- The code does not, however, disregard that the conspirator may be more dangerous than a person who individually prepares an offence…phil

Cont'd

- His consulting with the other may imply a taking of risk(disclosure of purpose) showing his determination to achieve what he has in mind.
- This subjective danger is taken into account not by punishing him as conspirator but by providing that if the crime is committed or attempted, he would be punished more severely than If he had acted alone.
- This aggravation is more limited than if conspiracy is an independent offence and the sentence were increased on the ground of concurrence of offences(art.184)

Cont'd

- Though our law disregards the act of conspiracy as an independent crime, Article 38(2) provides exceptions that it is taken as an independent crime.
- As certain cases of preparations are independent offences under article 26, certain cases of conspiracy within the meaning of article 37(1) are punishable in themselves although the common design id not executed...Phil
- Agreement…..in what form?
- What does the phrase 'the foregoing provision shall not affect…' mean? See phil...

Accessories after the Fact

- Whoever after a crime has been committed assists a criminal either by hiding him or helping him to escape prosecution or punishment or by. receiving the proceeds of his crime, shall be punished in accordance with the provisions of the Special Part of this Code dealing with such acts (Arts. 445,460 and 682)…Art.40
- Such a person cannot be considered as an accomplice, which is one form of participation and hence cannot be treated under Article 36 because there is no participation in the commission of a crime once it has been completed. So an assistance given to the criminal after the commission of the crime is independent crime.

Cont'd

- **Failure to report:** *Failure to report the preparation, attempt or commission of an offence or of the person who committed the offence, shall not be liable to punishment as an act of an accomplice or an accessory after the fact except in the cases expressly provided by law. (Art. 254 and 335)…Art.39(1)*
- *The provisions regarding the failure to report to the authorities in the cases specified under Art. 443 shall apply…sub 2*

Cont’d

- Such a person cannot be said to have participated in the commission of the crime. He is, rather, treated as an independent criminal when the law expressly provides so.

Chapter Eight: Criminal Responsibility

❖ Criminal Responsibility and Irresponsibility

- Responsibility or irresponsibility is concerned with the criminals' awareness and their capabilities to control their action.
- If the criminal do not know the nature and consequences of their act or if they cannot control their acts despite their awareness, they should not be responsible for the result of their acts.

Cont'd

- Irresponsibility may arise in three cases. With regards to adults, it may arise from ***insanity*** or ***intoxication***, and with regards to ***infants***, it may arise from their immaturity.
- Generally, when a person is accused of a crime his/her responsibility is presumed by the Court. The prosecution need not prove it.
- Then it becomes the burden of the defence to prove the accused is irresponsibility beyond reasonable doubt. Then the burden of the prosecution is only to raise a reasonable doubt in the mind of the Court that the accused is responsible and deserves punishment.

Absolute Irresponsibility: Art. 48

- According to Art. 23 (3), a criminal offense is not punishable unless the accused is found guilty. Moreover, no person is liable to punishment unless he is found responsible for his acts (Art. 48).
- Rather the fulfillment of the requirement as to responsibility is a condition precedent to the fulfillment of the requirement as to guilt.
- No person may be convicted of an offence unless, at the time of commission, he was responsible for his acts.

Cont'd

- In other words, before a court can decide whether the accused acted intentionally or negligently, it must satisfy itself that the accused was capable of so acting.
- The problem of defining criminal responsibility remained the most controversial one. The question as to who is responsible person is not yet settled for it involves numerous extra-legal elements.
- Responsibility could not be defined in a positive, but only in a negative manner, and this is why most codes including the Ethiopian Criminal Code (2005) do not describe responsible but irresponsible persons.

Cont’d

- **A) Insanity:** Insanity is a complete defense to a criminal charge. It is based on the assumption that one who is insane has no mind and hence cannot have the necessary mens rea to commit a crime.
- Moreover, the act of an insane man, being unintentional and involuntary, no punishment can deter it.
- In law, insanity means a disease of mind, which impairs the cognitive faculty, namely, the reasoning capacity of a man to such an extent as to render him incapable of understanding the nature and consequences of his act.

Cont'd

- It excludes from its purview, the insanity caused due to emotional and volitional factors.
- The kind and degree of insanity available as a defense to a crime has many times been defined. However, the most notable of all is the 'right and wrong test' formulated in *Mc`Naughten's* case.
- Sir Robert Peel, by creating the Metropolitan Police in London, wanted to destroy the liberties of Englishmen. He hunted Sir Robert to kill him, but mistakenly shot and killed his secretary. M'Naghten was acquitted of the murder charge by virtue of insanity.

Cont’d

- The House of Lords moved by the controversy aroused and clarified the defense of insanity as follows: ‘’Every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crime, until the contrary be proved to their satisfaction; and that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was suffering under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know he was doing what was wrong.’’

Cont’d

- Therefore according to their clarification, a defendant is not guilty of crime if, at the time of the act, due to sever mental illness, **First**, in cases the defendant does not know the nature and quality of his or her act (in other words, did not appreciate what he was doing
- for example, a person strikes another person, and in consequence of an insane delusion thinks he is breaking a jar or
- **second** in cases, that the defendant does not know the wrongfulness of his or her act (in other words, if he could not form the requisite mens rea), for example, one may, under insane delusion, believe an innocent man whom he kills, to be a man who is going to take his life.

Cont'd

- A person is not responsible for his acts under the law when, owing to age, illness, abnormal delay in his development, deterioration of his mental faculties, one of the causes specified under Article 49 sub article 1 or any other similar biological cause, he was incapable at the time of his act, of understanding the nature or consequences of his act, or of regulating his conduct according to such understanding…Art.48(2)

Cont'd

- It provides both the biological and psychological tests.
- The biological method consists in specifying a number of physical or mental disabilities or defects deemed to render the person concerned irresponsible.
- The psychological method on the other hand consists in prescribing that a person incurs no liability if, at the time of the offense, was incapable of understanding the nature of his acts or of controlling himself. ????

Cont'd

- ***Age:*** refers to old age, for senility may affect a person's mental faculties.
- ***Illness:*** refers to any form of mental as well as physical disease as a result of which a person is deprived of his mental faculties.
- ***An abnormal delay in the offender's development,*** which includes cases such as idiotism, cretinism, the consequences of deafness, dumbness sleeping sickness.
- ***Deterioration of mental faculties*** of the offender due to poison, intoxication by alcohol[?] or drugs, hypnosis or somnambulism.

Cont'd

- inability to understand the nature of the act. For example, if person strikes another, and in consequence of an insane delusion he thinks that he is breaking a jar.
- inability to understand the consequences of the act for example a person may kill a child under an insane delusion that he is saving him from sin and sending him to heaven
- inability to regulate one's conduct according to such understanding (some suggests this implies the notion of 'irresistible impulse' which includes cases where the offender is deprived of the power of controlling his conduct/Graven) by disease.

Cont’d

- The Court may order in respect of an irresponsible person such suitable measures of treatment or protection as are provided by law (Arts. 129-131)…sub 3

Limited Responsibility: Art. 49

- This novel idea is meant to cover defendants not mentally ill enough to qualify for an outright acquittal “by reason of insanity,” yet not well enough to be found fully accountable and “guilty”.
- Therefore, between insanity and sanity, there exists intermediary stages where an offenders faculties are affected to such an extent that, although he is certainly able to understand what he does and to act accordingly, it is equally certain that his intelligence or will-power is not that of a “normal” person and that his degree of guilt is consequently lesser than that of such a person.

Cont'd

- Such a person may neither be relieved of liability, since he is not fully irresponsible, nor should he be liable to a full punishment, since he is not fully responsible.
- The biological causes of limited responsibility described under Art. 49, stated as a *derangement of the mind or understanding (e.g. hysteria), an arrested mental development (e.g. imbecility) and an abnormal or deficient condition (e.g. alcoholic intoxication??)* do not have the effects specified under Art. 48.

Cont'd

- But according to the contemporary view, the causes and characteristic ingredients of limited responsibility are similar to those of irresponsibility. The question is that whether the abnormality substantially impaired the defendant's mental responsibility for his acts or not. This is a question of degree…see Art.49(1)
- **Legal Effects of Limited Responsibility:** The accused is liable to punishment since he was not irresponsible at the time of the act and he is capable of understanding the meaning and purpose of punishment.

Cont’d

- However, the penalty must be reduced because the offender’s responsibility, and consequently his degree of guilt, is reduced…see sub 1
- In addition to a penalty the Court may order such appropriate' measures' of treatment, correction or protection as are provided by law (Arts. 129-131)…sub 2

Intoxication

- Drug addiction and alcoholism remain two of the foremost-unsolved problems confronting the criminal justice system of many countries.
- A person is deemed voluntarily intoxicated when he takes an intoxicant including alcohol, drugs or any other thing being aware that it is or may be an intoxicant and he takes it in such quantity as impairs his awareness or understanding.
- A person may be involuntarily intoxicated say, for the purpose of medication or being under coercion.

Cont'd

- Where an offense is committed under intoxication caused due to fraud or coercion, the intoxicated man may not be said to have acted on his own accord, and therefore, is not responsible for the consequences of his acts.
- The justification for such a provision is based on the contention that the accused had himself not contributed to his drunkenness, which was not likely to be repeated as in case of voluntary drunkenness.

Cont’d

- The provisions excluding or reducing liability to punishment shall not apply to. any person who, in order to commit a crime or' knowing that he could commit a crime, intentionally put himself into a condition of absolute irresponsibility or of limited responsibility by means of alcohol or drugs or any other means…Art.50(1)
- It is based on the rule that intoxication is no defense if caused by the offenders’ voluntary act.

Cont'd

- This is applicable in relation to both offenses of commission (if *A* drinks in order to kill *B*) or omission (if *A*, a soldier on leave drinks so as to disable himself from going back to his unit).
- If a criminal by his own fault has put himself into a condition of absolute irresponsibility or of limited responsibility while he was aware, or could or should have been aware, that he was exposing himself, in such 'a ,condition, to the risk of committing a crime, he shall be tried and punished under the ordinary provisions governing negligence, if the crime committed is punishable on such a charge (Art. 59)…sub 2

Cont'd

- This therefore is applicable to states of negligence—advertent and inadvertent.
- In the case of a crime which was neither contemplated nor intended and was committed in a state of **absolute irresponsibility** into which the criminal put himself by his own fault, the provision of Article 491 of the Special Part of this Coder-elating to crimes against public safety shall apply…sub 3

Cont'd

- For instance a person may in a particular quite and cold evening staying home alone begin to drink with intent to get himself warm and relaxed but may get completely drunk and commit a punishable act.
- In such instances, the accused is not liable to punishment under sub-art.3, as the person has neither criminal intention nor criminal negligence existed before he intoxicated himself. According to Art.57 (1), he should, therefore, go free because he is not guilty of the offence committed.

Cont'd

- However, the need to ensure the peace of the public justifies that the offender should be punished and should not be permitted to excuse himself on the ground that he did not mean to do any harm prior to getting drunk.
- This conflict is solved by holding the doer not of the offence actually he committed but of a special offence against public safety (Art.491).
- No person shall be liable to punishment where he commits a crime while in a state of **absolute irresponsibility**, into which he has been coerced or for which he has no fault on his part…sub 4

Infancy

- An infant is incapable of distinguishing between right and wrong and so no criminal responsibility could be fastened in regard to his deeds.
- Children of such age are granted absolute immunity on the ground that they are *doli inapax*, that is, incapable of doing a criminal act, because a child under such age group cannot form the necessary intention to commit a crime.
- It is immaterial whether the nature and quality of the wrong done as it is normally one to be done only by someone with high caliber and experience.

Cont'd

- However, no absolute rule as regards the age of discretion is found. It differs from country to country.
- In Malaysia and England, the age of complete immunity is ten years. In India, Canada and some states in Australia it goes down to the age of seven. In Germany, Austria and Norway the minimum age is 14 years; while in Denmark and Sweden, it is 15 years; in Argentina a minor under 16 years and in France below 13 years if age is not punishable.
- In the United States, the age of absolute incapacity varies from state to state ranging between eight to 12 years.

Cont'd

- According to Art.52 of the Ethiopian Criminal Code, infants are completely exonerated from criminal provisions. The lower limit of penal majority is made nine years under this article.
- Where a crime is committed by young persons between the ages of nine and fifteen years, the penalties and measures to be imposed by the courts shall be only those provided in Articles 157-168 of this Code…Art.53
- Art.54, expert evidence…
- Art.55, assessment of the sentence….

Cont'd

- If at the time of the commission of the crime the criminal was over fifteen but under eighteen years of age, he shall be tried under the ordinary provisions of this Code…Art.56(1)
- But, may be mitigated by the court and no death penalty imposed on such persons.
- In addition, Where a young criminal's physical or mental development is considered to be that of a young person below the age of fifteen or did not commit a serious crime and, according to expert opinion, still seems amenable to curative, educational or corrective measure, the court may impose them..art.177
- These are persons of intermediary age..see art.176

Chapter Nine: Affirmative Defenses

- Defenses for criminal liability are circumstances that relieve an accused from conviction of guilt and its consequent penalty.
- Defenses for criminal liability are incorporated in criminal law in different ways. Some are clearly provided by the law as defenses while others are not.
- The latter categories are special defenses. They are defenses that apply in particular crime. Special defenses could be non-fulfillment of essential conditions of the crimes provided in the special part of the Criminal Code. Do you agree?

Cont'd

- The other categories of defenses are those expressly provided by law as defense. They are general defenses. They are applicable to all crimes. They are excuses and justifications.
- The Criminal Code of 2005 does not follow this dichotomy. ???
- Excuses are defenses that arise because the defendant is not blameworthy for having acted in a way that would otherwise be criminal. Excuses are the defects and unusual conditions of the criminal during the commission of the crime.

Cont'd

- E.g. Mistake of law and/or fact..
- In the cases of the excuses, the focus is on the individual criminal rather than on the crime committed.
- Defenses that arise when the defendant has acted in a way that the law does not seek to prevent are called justification defenses. In short they can be called "justifications".
- In cases of justifications, there are preliminary conditions that enable the doer of the act to take necessary and proportionate action.

Cont'd

- Example; acts done in self defense and acts of necessity.
- In justifications, the focus is on the act rather than on the criminal. The society encourages those acts.
- Justifications include acts required or authorized by law, legitimate defense, necessity and professional duty. What about consent of victim?
- Is irresponsibility a defense?? 106 of TM

Cont'd

- **Justification for Defenses:** Law reflects the value of the society. It punishes persons blamed for committing harmful act against the society. Nevertheless, sometimes the society does not blame the perpetrator of an act that has caused harm to it when that act is committed in certain circumstances.
- The basic reason for the existence of the defense is that it is not just to hold persons guilty for a crime for which the society does not blame them as a criminal.

Cont'd

- **Burden of Proof in Cases of Defenses:** the burden of proving the existence of circumstances bringing the case of the accused within any of the general exception in the criminal Code, or within any special exception or proviso contained in any part of the Code, or in any law defining the crime is upon the accused.
- There is a presumption against him and the burden to rebut that presumption is on him.

Cont'd

- The definition and classification of lawful, justifiable and excusable acts sometimes vary.
- Some laws, taking into account the fact that there is for all practical purposes little differences between lawful and justifiable acts do not even attempt any classification, and deal with both types of acts under headings such as "general exceptions", "excuses" or "affirmative defenses".

Cont'd

- The Ethiopian Code does not follow any of the above-mentioned models but provides for three classes of acts with respect to which the ordinary rules concerning criminal guilt do not apply or fully apply, namely lawful acts (acts done in circumstances which legitimate them), justifiable acts (acts done in circumstances excluding intentional guilt[?]) and excusable acts (acts done in circumstances reducing the degree of guilt).
- According to Art.58 (2), a person who intentionally commits an offence is always punishable except where he acts in circumstances providing him with a justification or an excuse.

Lawful Acts

❖ **Acts authorized or required by the law**

- Because of the existence of the legal right or duty to act, the act, which would otherwise be criminal, is a legitimate one for which the doer is not punishable.
- The defense of lawful acts therefore provides a counter-law to the prohibitory law. The prohibitory law says: you must not kill. But the counter-law says: If you are a soldier in a combat, you must kill.
- the availability of the defense is conditioned upon the fulfillment of two conditions.

Cont'd

- **Firstly**, one cannot claim protection under the defense unless he/she is one who has acquired the status required in the law. For instance, however the person is someone sentenced to death for the atrocious crime he has committed, only employee of the prison administration and perhaps particularly who has been assigned to do the job can take action against the sentenced to enforce the order of the court.
- Therefore, if a person other than the one mentioned above takes action and kill the sentenced offender, his act would amount to an ordinary crime of murder.

Cont’d

- **Secondly,** the objective circumstances that necessitate the action in question must be present. Therefore, despite the fact that the doer is one envisaged in the law, his act would remain a punishable crime so long as it is committed in the absence of objective circumstances the necessitate the act.

Cont'd

- Acts required or authorized by law do not constitute a crime and are not punishable; in particular:
- (a) acts in respect of public, State or military duties done within the limits permitted by law;
- (b) acts reasonably done in exercising the right of correction or discipline; or
- (c) acts done in the exercise of private rights recognized by law, where the conditions and limits of the exercise of such rights are not exceeded…Art.68

Cont'd

- **Acts Relating to Public, State or Military Duties:**
- What is public duty? How it differ from state duty?
- Art.68 is silent as to what constitutes "acts in respect to public duties". But, if one compares it with 'State duty', which is more specific and require the claimant to possess an official status or be vested with some kind of some power, it appears the defense is available to anyone who does, in accordance with the law, something for the public good.

Cont'd

- For instance, any private person who arrests or participates in the arrest of an offender must be protected under this defense because the act he does pertains to public duties so long as done on the conditions laid down in the Criminal Procedure Code, Arts.50 and 57(for offences punishable for not less than three months).
- The defense of State or military duties on the other hand is available when the doers possess an official status, either civil or military, and act in discharge of their duty.

Cont'd

- Acts of a public servant or a member of the armed forces are therefore do not constitute an offense and are not punishable so long as they are done in accordance the terms of the relevant law.
- Thus, a policeman searching a house, a prosecutor charging an offender, a judge ordering the accused to be kept in custody, a prison employee executing death penalty and a soldier killing an enemy are not committing crime and are not liable to any kind of punishment as long as they discharged their respective duties according to the terms of the Criminal Procedure Code and the laws of war.

Cont'd

- **Right of Correction or Discipline:** Such is the case, for instance, Art.2039(c) of the Civil Code impliedly authorizing the parents, guardians and masters to use reasonable use of force for the purposes of chastisement.
- Accordingly, Art.576/3 of the Criminal Code dealing with maltreatment of minors expressly limits the right of correction or discipline. Thus, there shall be no criminal liability against those legally authorized for their acts unless they have gone beyond legal limit, namely the reasonableness of the action *vis-a-vis* the seriousness of the fault sought to be corrected.

Cont'd

- **Exercising Private Rights:** the acts that are sometimes referred to acts of private justice. Thus, Arts.1148 and 2076(2) are just some provisions of the Civil Code that justify the protective actions of a holder of a thing and a possessor of a land however their action may cause harm to others. In both cases, the doer is not guilty of an offense of bodily injury or damage to property, since the law expressly authorizes him to act as he does.

Cont'd

- **Professional Duty: Art. 69,** "An act done in the exercise of a professional duty is not liable to punishment when it is in accordance with the accepted practice of the profession and the doer does not commit any grave professional fault."
- In fact, the defense serves a specific purpose of ensuring the exclusion of criminal liability for acts done under certain legally tailored conditions while exercising professional duties.

Cont’d

- What is profession and who are professionals?
- The term is defined nowhere in the Code the. But there are some suggestions for it to include “any vocation or calling in which a person professes to exercise learning, skill or art”.
- It also refer to “any activity which a person habitually carries out for the purposes of obtaining the resources necessary to his livelihood”.

Cont'd

- It seems irrelevant for the purposes of Art.69 whether this activity is exercised by virtue of the law or a contract. On the other hand, remuneration seems important to determine whether the profession a recognized one.
- It seems, for instance, the law does not allow persons infringe the law while acting in seeking of pleasure.
- However, it seems that remuneration, whatever its form, should not be regarded as a conclusive test in deciding whether a person carries out a profession within the meaning of the provision.

Cont'd

- Sometimes it is irrelevant whether the person acting is remunerated as long as he is recognized as someone capable of doing things more efficiently and accurately than ordinary persons.
- Only a person entitled to practice a profession is exempted from criminal liability. Thus, if an eye-doctor should cause the death of a person in attempting to remove the appendix of this person, he could obviously not be deemed to have acted in the exercise of his profession, and would therefore not justified under Art.69.

Cont'd

- Only a surgeon performing an operation does not commit an offence of bodily injury and only a mechanic dismantling a car entrusted to him for repair may not be punished for damage to property.
- The justifications is not the fact that the doer carries out a professional duty; it is rather the fact that the act is ordered by law.
- If it were not due to the law, the doer would remain criminally liable regardless of the fact that the act is necessary in carrying out his profession.

Cont'd

- In all the above cases, however, the act is justified only on the condition that it is done "within the limits permitted by law".
- Art.69 applies only when the doer acts in accordance with ***the accepted practice of the profession*** and does not commit ***any grave professional fault***.
- In order to determine whether the first condition is fulfilled, reference will have to be made to the professional regulations, if any, or to the custom of the particular profession, which may be ascertained through expert evidence.

Cont'd

- For instance, it is not normal surgical practice if a surgeon uses a kitchen knife in removing someone's appendix.
- The doer who acts in accordance with the practice of the profession on the other hand must not commit any grave professional fault.
- Thus, a surgeon commits such a fault when, after skillfully removing a person's appendix, he leaves his instruments in the patient's body.
- If this omission causes the patient's death, the surgeon is guilty of homicide by negligence even though he has done a lawful act when operating on the patient.

Justifiable Acts and Excuses

- **Consent As a Defense: Art. 70,** ‘’A crime is not liable to punishment where it is **punishable upon complaint** and where it is done with the consent of the victim or his legal representative.’’..sub 1
- This was not a defense under the repealed Penal Code.
- The form of consent? Express? Implied? Both? Refer to the specific provisions of the Code on the subject?
- However, donation of body parts with commercial motive both the donor and the person who takes the bodily organ from his body i.e., surgeon are liable to punishment under Art. 573 sub-article (1) and (2) respectively….sub 2

Cont'd

- **Coercion/Duress:** The defense of coercion is therefore, a defense that the actor engaged in the conduct charged to constitute an offense because he is coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.
- However, the evil that threatens the actor and the evil created by the actor not be out of the proportion. One is for instance generally not justified if he or she causes death in submitting himself/herself for a threat against his/her property.

Cont’d

- In addition, the threat must be of instant harm to the person compelled to commit the offense and without reasonable possibility for escape.
- Further, the person who so threatened should not have placed in that situation of his own accord. This means the defense of coercion is disallowed if the defendant intentionally or recklessly placed him or herself in a situation subject to coercion.

Cont'd

- Why such a defense? because like an insane person or intoxicated person he is totally deprived of his freedom of choice and therefore equally deserves the same treatment as long as the loss of will power is involuntary.
- Absence of any purpose to punish a coerced person is also another justification lying behind the defense of coercion. Punishment does deter neither the coerced person nor any potential victim of coercion.

Cont'd

- Finally, the disposition of a coerced person is not that of a criminal who willfully act in disregard of the law. Thus, punishing a coerced person would be absolutely contrary to the basic principle of criminal justice.
- **Absolute Coercion(art.71):** ''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(Art. 32(1)(c).''…para.1
- 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...

Cont'd

…and the relationship of strength, age or dependency existing between the person who was subjected to coercion and the person who exercised it…para.2

- *Coercion under Art.71 can be of either physical or moral. Physical coercion is "violence exercised by someone in consequence of which a human agent is materially obliged to commit an offence".*
- This definition implies that the defense of coercion is available when violence or force is used, whether for the purpose of compelling or preventing an act, which renders the agent physically incapable of acting otherwise than as he does.

Cont'd

- For instance when 'A' is about to shoot at a gazelle but 'B' forcefully makes him aim and discharge his gun at 'C'. In this case 'A' is not guilty of homicide as he is physically coerced.
- Moral coercion on the other hand is exercised when an act which does not render the agent's movements involuntary is done, but deprives him of his freedom of choice.
- It is usually in the form of threats intended to break the will of a person.

Cont’d

- In case of moral coercion, it is immaterial whether the agent himself or some other person is being threatened, as are also the contents of the threat.???
- …without causing greater harm than he could have suffered… Proportionality test

Cont'd

- **Resistible Coercion**: ''If the coercion was not irresistible and the person concerned was in a position to resist it or avoid committing the act, the court shall pass sentence on the criminal (Art. 180)…Art.72
- Coercion can be resistible when it is physical as well as moral. A case is for example when 'A' and 'B', in an attempt to escape from prison tie up 'C', a warden. But, 'C' was able to untie himself and ring an alarm bell while 'A' and 'B' are in the act of escaping.

Cont'd

- Another case of resistible coercion would be when 'A' drops his gun and starts looking for it in the dark while compelling 'B' at a gun-point to company him to 'C's' house for the purpose of forcing open the door of 'C's' safe. B's failure to flee in fear of the possibility of repossessing the gun by 'B' would only excuse him under this article.
- Hence, according to this article, the act is punishable as a rule. However, the punishment may be reduced if the actual and personal circumstances of the case warrant mitigation.

Cont’d

- **Superior orders: ”**In the case of an act committed by a subordinate on the express order of an administrative or military superior **who was competent so to do**, the person who gave the order is responsible for the crime committed and is liable to punishment, where the subordinate's act constitutes a crime and did not exceed the order given (Art. 58(3))…Art.73

Cont’d

- For Art.73 to be applicable, it is not required that the superior should be a high-ranking official or military commander. It rather suffices that he/she should be of a higher rank than the person executing the order, i.e. he/she should have the right to give orders and that his subordinate should have corresponding duty to obey.
- He who gives the order must, therefore, be a person in authority.

Cont'd

- Further, the superior who orders an act to be done, which is unlawful, is liable only for those acts. This is to say that, if the subordinate exceeds or departs from the order, the superior is not answerable for the excess or departure unless he directly or indirectly intended it to occur.
- **Responsibility of the subordinate:** The subordinate shall be liable to punishment if he was aware of the illegal nature of the order, in particular if he knew that the order was given without authority or knew the criminal nature of the act ordered, such as in cases of homicide, arson or any other grave crime against persons, or national security or property, essential public interests or international law…Art.74(1)

Cont'd

- The duty to obey, therefore, ceases to bind the subordinate when the doing of an act is ordered which is contrary to the law.
- ..illegal nature… it is a subordinate who knows that his superior is not allowed by law to give an order of the type in question. E.g. Order in the absence of search warrant
- ..without authority… refers to a situation where one obeys an order from someone else to whom he does not owe obedience.

Cont'd

- Knew the criminal nature…
- For the application of Art.74, the definite knowledge of the illegality of the order and unlawfulness of the act is required, and mere suspicious or negligence is not sufficient.
- The subordinate is liable only when obedience is not the result of a mistake of fact or the mistake of law.
- But in exceptional circumstances, despite the definite knowledge of the subordinate about the illegality of the order and unlawfulness of the act, he may enjoy mitigation or total exemption of punishment…sub 2

Cont'd

- **Necessity:** A necessary act is an act performed in so critical situation that the doing of harm is the only alternative to the suffering of harm.
- The rule for the defense of necessity is similar to that of legitimate defense. In fact in cases of necessity the threat to the actor comes from nature.
- It is sometimes called an "act of God," and it may be a fire, a storm, and an earthquake, or a shipwreck that compels the actor to do something that otherwise would be illegal.

Cont'd

- Under such circumstances the actor's right or those of another are in imminent danger and a choice must be made between safeguarding them and sacrificing them.
- As a matter of social policy, if the law is violated to avoid greater harm, the violator will not be punished unless the emergency situation is **created by his own fault**.
- So a necessary act is a non-condemnable act though contrary to the law because condemnation is based on the cost-benefit analysis of the society.

Cont’d

- In every law there are some things, which when they happen, a man may break the words of the law, and yet not break the law itself and such things are exempted out of the penalty of the law, and the law privileges them although they are done against the letter of it; breaking the words of the law is not breaking the law, so long as the intent of the law is not broken.
- ‘Necessity knows no law.’

Cont'd

- ***A***, in a great fire, pulls down houses in order to prevent the conflagration from spreading. He does this with the intention in good faith of saving human life and property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, A is not guilty of the offence.
- Nevertheless, necessary acts, unlike acts done in legitimate defense, are not deemed to be lawful. How?

Cont'd

- In case of necessity the actor does not have the right to protect his interests at the expense of those of another and is not authorized by law to cause harm so long as he is not threatened with or subjected to, an unlawful attack.
- Plea of necessity for the hungry and homeless persons??

Cont'd

- ''An act which is performed to protect from an imminent and serious danger a legal right belonging to the person who performed the act or a third party is not liable to punishment if the danger could not have been otherwise averted…Art.75, para.1
- **a) Serious and imminent Danger:** The criminal act must have been done only in order to avoid certain consequences, which would have inflicted irreparable evil upon the accused or upon others whom he was bound to protect?.

Cont'd

- The defense of necessity is not meant to allow individuals to encroach up on others rights to save their interest from a danger, which is not yet to be materialized. It is not also available when the danger is already over.
- The need to make a choice between encroaching up on some one's innocent interest or scarifying oneself must be actual, pressing and urgent.
- The danger must be reasonably certain to eventuate. There shall be no time to resort to a third choice that can be used to avoid the danger.

Cont’d

- If the law has to be violated and innocent interest be scarified, both shall be so at the last resort.
- If, for instance, A and B were in a life-boat with enough food for three days but A throws B overboard so as to have enough food for six days, he would have been not considered as having faced with an imminent danger. Accordingly, he would have been criminally held liable for homicide.

Cont'd

- What constitutes '*serious*'?
- Is it necessary to stipulate it as a condition?
- The very stipulation of the requirement in the law seems improper. Because the justification of the defense is based, among other things, on the proportionality that must exist between the danger averted and the interest made sacrifice.
- It is therefore immaterial whether the danger at hand is serious or not as long as a danger is averted at a lesser cost

Cont'd

- On the other hand, the very word "danger" implies that the harm with which the actor or the person for whose benefits he acts is threatened must amount to more than a simple inconvenience.
- E.g.? TM, p.182
- **The Danger Could Not Otherwise Be Averted:** There shall exist no possibility of averting the danger than by acting in that way.
- Therefore a person in a state of necessity is not justified, unless the doing of harm is absolutely necessary in the circumstances.

Cont'd

- If he can protect his interest or those of another person without breaking the law or can reasonably be expected **not to protect them[?]**, he may not invoke Art.75.
- However, the above principle is not applicable to the cases where the actor is mistaken as to the necessity of his act, for instance, because he is unaware of the fact that the danger can actually be averted otherwise than by causing harm.
- For example, a person not aware of the fact that there is an extinguisher in his own house and steals it from his neighbor may avail himself of the defense of Art.80 but not Art.75

Cont'd

- **The Harm must be Proportional:** This condition implies that, when causing harm is the only way to avoid danger, the doer is justified only if he does not cause more harm than he would have suffered had he refrained from acting.
- The threatened right must, as a rule, be at least as important as the right infringed upon by the actor.
- E.g.? TM, p.186

Cont'd

- The question of proportionality can be also discussed in light of the means used to avert the danger.????
- The absence of fault: the absence of fault on the side of the doer is another requirement to avail himself of the defense of necessity…implied from Art.76
- If a person intentionally creates the situation of necessity, he will be held liable for intentionally causing the harm eventuated.

Cont’d

- If he negligently produces the state of emergency triggering the necessary act, he will be liable for causing the harm.
- For instance, a person driving at an excessive speed cannot raise necessity as a defense if he runs over a pedestrian to save the passengers in the car.
- However, the punishment may be mitigated.
- **The rights protected??????????**

Cont’d

- The scope of the defense is somehow limited. The second paragraph of Art.75 provides for an exception where necessity is not a defense notwithstanding that all the necessary conditions to raise the defense are met.
- The law stipulates that persons who have special professional duty to protect life or health may be entitled to mitigation but cannot invoke necessity.

Cont'd

- Accordingly, if a given boat has some passengers in excess of its carrying capacity and as the result is about to be drown, except for the crewmembers that are necessary to navigate the boat, others must be sacrificed first.
- The professionals are therefore there to protect others from the danger even at the expense of their lives. They shall not breach the special duty imposed upon them to take care of others' life and health. If the duty is breached, they will be liable to punishment

Cont'd

- **Legitimate Defense:** There may be situations where help of the state authorities cannot be obtained in order to repel an unlawful aggression either because no time is left to ask for such help or for any other reason. To meet such exigencies, the law has given the right of legitimate defense to every individual.
- The law of legitimate defense provides that when a person is suddenly faced with an attack to his person or property and immediate aid from the state machinery is not available, that person is entitled to defend himself and resist the attack and to inflict on the attacker any harm that is necessary for the purpose of defense.

Cont'd

- It negates the negation of the law
- Legitimate defense is one specific type of necessity, and therefore has much in common. In both cases, a situation of distress arises which cannot be solved otherwise than by the doing of harm.
- But there also some fundamental difference between general state of necessity and legitimate defense.
  - The doer of a necessary act, unlike a person who defends himself, is not resisting an unlawful assault.

Cont’d

- In the case of necessity, the conflict is between two legitimate interests but in the case of legitimate-defense the conflict is not between two legitimate interests.??
- This entails that in the first case it is ***strength***, while in the second case it is the ***law***, which has the last word.??

Cont’d

- ‘’An act done in self-defense or the defense of another person against an unlawful attack or an imminent and unlawful attack against a legally protected right shall not be punishable if the attack Or imminent attack could not have been otherwise averted and if the defense was proportionate to the needs of the case.’’…Art.78

✓ **There must be an [actual] or imminent attack or a thereat of an attack?**: the justification is available only insofar as there exists a state of **actual** danger, whether the attack is in the course of being executed or is imminent.

Cont'd

- It follows that there is no right of defense when either the attack has already taken place or the doer seeks to prevent a future danger from eventuating.
- The right of legitimate defense commences as soon as a reasonable apprehension of danger to a legitimate interest arises from an attempt threat to commit the offense though the offense may not have been committed; and it continues as long as such apprehension of danger continues.

Cont'd

- However a reasonable ground for the apprehension is requisite. This on other hand is not to mean that for the exercise of legitimate defense it is necessary that the party exercising the right must have suffered some injury at the hands of his attackers.
- **The attack[actual or imminent] must be unlawful:** the act done or intended to be done by the aggressor should be objectively contrary to the law.

Cont'd

- Whatever this law may be, and it is not required that it should amount to a criminal offence nor, when it amounts to such an offence, that it should be punishable.
- The reason behind this solution is that the defender cannot be expected to know or has no time to find out whether the aggressor is, subjectively, at fault.
- But, is there any attack against the person or his property which could not be a crime?

Cont’d

- The right is available against an offense and so an aggressor cannot claim the right of legitimate defense.
- If a person goes to kill another with a gun, the intended victim is entitled to exercise the right of legitimate defense, and if he does so, there is no right of legitimate defense in the former to kill the latter.
- In other words, there is no private defense against private defense.

Cont’d

- It is also true of, in a free fight, situation like where two parties come armed with determination to measure their strength and to settle a dispute by force and in the ensuing fight both sides receive injuries.
- In such cases, there is no right of private defense to either party. Each one is responsible for his own acts and both parties are aggressors and none of them can claim right of private defense.

Cont'd

- ✓ **The attack could not otherwise be averted**: There is no right of legitimate defense in cases in which there is time to have recourse to the protection of the public authorities.
- For example: A, sees B who is attempting to remove a heavy statue from his (A's) garden.
- Therefore, the defense, as a rule, is not legitimate if the threatened right could have been effectively protected by calling the police.
- What if A arrests B without calling the Police?

Cont'd

- ✓ **The act of defense must be proportionate to the needs of the case:** The right of private defense in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defense.
- A comparison must be made between the harm caused by the act of defense and that which the defender could reasonably fear.
- When an attack endangers several interests, the question whether the defense is proportionate should be resolved by taking into account a more valuable of these interests.

Cont’d

- E.g. if A, when in the act of removing a statue from B’s garden, sees B coming towards him and pulls out a gun, B, who had originally come to defend his property, is then in peril of his life; if he kills A, his act which would have been disproportionate had A not pulled out a gun, is lawful since, at the time of the defense, it is no longer his property but his life.

Cont'd

- The proportionately condition implies that regard must not only be to the respective importance of the interests involved, but also to elements such as the weapons, if any, used in the attack and the defense, and the respective sex, age, strength or state of health of the aggressor and the defender.
- The defender commit mistake as to the proportionality of the defense. In such a case the defense is legitimate when the court is satisfied that, in view of all the material and personal circumstances of the case, the defender exercise his right in a reasonable manner.

Cont'd

- For instance, A can succeed in legitimate defense if he kills B believing that B has threatened him with a real gun while B is actually holding a popgun.
- **Sources of the attack:** It is immaterial from whom the assault emanates. The right of legitimate defense is also available against an offence committed by a person who might not be criminally liable for his act, either by reason of the doer being a man of unsound mind, or because of want of maturity of understanding, or by the reason of any misconception on the part of that person.

Cont'd

- X, under the influence of madness, attempts to kill A; X is guilty of no offense. But A has the same right of private defense, which he would have if X were sane.
- A right of defense exists even against animals used as instruments in the cases provided for by Art.32 (1)(a).
- Rights protected: Legitimate defense exists against attacks endangering ***any right***, i.e. any interest is protected by law, such as *life, bodily integrity, honour, sexual liberty or property*.

Cont’d

- It is irrelevant whether the right protected is that of the defender or of another person.
- It is not required, therefore, that the act of defense should always be done by the person who is or is about to be, unlawfully attacked. Such an act may be done, not only to protect one’s own interests, but also those of a third party, whatever these interests may be.

Cont’d

- Excess of legitimate defense: Art.79, ‘’When a person in repelling an unlawful attack or an imminent and unlawful attack exceeded the limits of legitimate defense by using disproportionate means or going beyond the acts necessary for averting the danger…’’
- **using disproportionate means** or **going beyond the acts necessary for averting the danger(attack)**
- Is there a difference between these?

Cont'd

- Using disproportionate means…e.g. using gun in repelling an attack accompanied by stones
- Going beyond necessary….e.g. if A is attacking B with a stick and A defending by the same means, the acts of A done after B fall on the ground as a result of the first kick in defense are in excess of what to avert the danger/attack.
- What if A is attacked by a mob who attempts to murder him. A cannot effectually exercise his/her right of private defense without firing on the mob, and s/he cannot fire without risk of innocents who are mingled with the mob. Is s/he liable for the offence, if by so firing s/he harms any of the children?

Cont’d

- **Mistake of Fact, Mistake of Law and Ignorance of law:**

- Mistake of fact can serve as a defense if it negates the state of mind (mens rea) required for the crime. The mistake or ignorance must be both honest and reasonable. If a woman mistakenly picks up a purse that is very similar to her own and walks off with it, she could claim mistake of fact in response to a charge of larceny.

Cont'd

- Similarly, the accused while guarding his maize field shot an arrow of a moving object in the bonafide thinking that it was a bear and in the process caused the death of a man who was hiding there. It can be held that he could not be held liable for murder.
- ''Whoever commits a crime under an erroneous appreciation of the true facts of the situation shall be tried according to such appreciation.''…Art.80(1)
- ''Where there is no criminal intention the doer shall not be punishable. Where he could have avoided the mistake by taking such precautions as were commanded by his personal position and the circumstances of the case (Art. 59), he shall be punishable for negligence in cases where such negligence is penalized by law.''…para.2

Cont'd

- A fact may consists of:
- 1. a phenomenon perceptible by the sense. (e.g. the doer mistakes arsenic for sugar) or
- 2. a state of mind (e.g. the doer believes that someone intends to kill him)
- It is immaterial for the purposes of Art.80, whether the fact as to which the doer is mistaken concerns him personally or not. For example, he marries believing himself to be a widower or he has sexual intercourse with a woman whom he believes to be unmarried.

Cont'd

- A legal provision, is not a fact and Art.80 is inapplicable, when the doer is mistaken as to the legal consequences of an act which he does (with a clear knowledge of the facts of the case and correctly appreciated by him).
- For example, he has sexual intercourse with a woman whom he has known to be married but believes that the legal consequences of the act is in this case is that she only commits an offence….80(2)??

Cont'd

- Article 80 therefore may be invoked on the following cases:

a) When the doer is mistaken as to a fact, which is a material ingredient of an offence. **Example I:** Suppose A shoots something which he takes to be a gazelle but actually is B, he certainly has a desire to kill, though not the desire to kill a human being, which is a required element of an offence of homicide. Since he does not know that his target is a human being (mistake of fact), he should not, be found guilty of intentional homicide. **Example II:** If A, after shooting B with the intention of killing him, buries him in the belief that he is dead, but B is still alive and actually dies of suffocation.

Cont'd

- A is not guilty of intentional homicide as the act done to cause B's death (the shooting) misses its purpose and act causing B's (the burial) is not done with a view to terminate the life of a human being, which is a required element of the offence of intentional homicide. Single or concurrent crime???

b) **When the doer is mistaken as to fact, which did it, exist, would legitimate or justify his act**

- Mistakes in doing an act of the nature defined in Art.68: as imaginary necessity; imaginary legitimate defense.

Cont'd

- This Article excuses a person who has done what by law is an offence, under a misconception of facts, leading him to believe in good faith that he was commanded by law to do it.
- **Example ;** A, an officer of a Court of justice, being ordered by that court to arrest Y, and after due enquiry, believing Z to be Y, arrests Z. A has committed no offence.

Cont’d

c) When the actor is unaware of the fact that he acts in aggravating circumstances

- **Example:**
- A insults B, not knowing that the latter is a public servant on duty. In this case, A is not liable to the aggravated punishment as he does not know of the fact in consequences of which the penalty is increased, namely the special status the victim has.

Cont'd

- **Negligence is punishable**: Where he could have avoided the mistake bytakin9 such precautions as were commanded by his personal position and the circumstances of the case (Art. 59), he shall be punishable for negligence…sub 1, para.2 second alinea
- E.g. a doctor who caused the death of a patient by giving him, by mistake, a poison instead of a drug is not guilty of international homicide; yet a person in his position should obviously be particularly careful not to commit a mistake of this kind.

Cont’d

- He could and should have ensured that he actually was administering a medicine or that the patient was not allergic to the drug. Therefore, the doctor is punishable for homicide by negligence.
- **Separate and Independent Offence shall be Punishable, sub 2: ”**Mistake as. to a fact which constitutes a specified crime shall not exclude the punishment of the doer for another. crime' constituted ,by the act he performed.’’

Cont’d

- The doer of an act who is free from any punishment due to the mistake of fact is not free from punishment of another offence which in itself constitutes a separate offence.
- Suppose A, in sight of the public, has sexual intercourse with a girl whose age he is mistaken. He A is punishable for committing an offense of public indecency intentionally committed even though he is not punishable for sexual intercourse.

Cont’d

- **Mistake as to the identity of the victim or the object is not a defense: sub 3**

  ‘’The crime is committed where there is a mistake as to the identity of the victim or the object of the crime.’’

- Mistake of this kind are sometimes referred to as non-fundamental mistakes, in opposition to fundamental or essential mistakes which are the only ones that which Art.80 is concerned with.

Cont'd

- A' waits near B's house with intention of shooting him when he comes home. Seeing someone approaching the house, he shoots C thinking that it is B . In this case, A is guilty of intentional homicide and he cannot invoke Art.80.
- **Mistake of Law and Ignorance of Law: art.81:** Mistake from the point of view of the law in a criminal case is no defense. Mistake of law ordinarily means mistake as to the existence of any law on a relevant subject as well as mistake as to what the law is.

Cont'd

- its application to criminal offences, admits of no exception, not even in the case of a foreign who can not reasonably be supposed in fact to know the law of the land.
- The legal presumption that everyone knows the law of the land is often untrue as a matter of fact but the reason for this seems to be nothing but expediency, otherwise there is no knowing of the extent to which the excuse of ignorance of law might be carried.

Cont'd

- However, the question of whether mistake of law and ignorance of law is excusable has been a controversial issue for a long time.
- With regards to this question, there are two main schools of thought.
- The first school supports the general rule: that states "Ignorance of Law is no Excuse."
- According to this school of thought an offender is not justified by his unawareness or misconception of a legal provision.

Cont'd

- Whether or not he actually knows the law is immaterial for he is in any event conclusively presumed to know it.
- The second school supports an exception to the general rule and states: "Ignorance of Law May be an Excuse in Certain Circumstances"
- According to this school of thought, the maxim "ignorance of law is not an excuse" It is not acceptable on the following grounds:

Cont'd

- The complexities of modern life and the consequent increase in the volume of laws, makes it completely impossible for anyone to know the laws.
- It is inconsistent with the principle "nulla poena sine culpa" (no penalty without intentional guilty) upon which so many modern codes, including Ethiopian criminal code, are based.
- Thus a mistake of law, like a mistake of fact, affects the "knowledge" component of intentional guilt.

Cont'd

- ''Ignorance or mistake of law is no defense.''…Art.81(1)
- ''The Court shall, without restriction, reduce the punishment (Art. 180) applicable to a person who in good faith believed he had a right to act and had definite and adequate reasons for holding this erroneous belief.'' sub 2
- ''In exceptional cases of absolute and justifiable ignorance and good faith and where criminal intent is not apparent, the Court may impose no punishment.''….sub 3
- This stance of the criminal code shows that it stands in a half way between the two schools of thought discussed above. How?

Chapter Ten :Criminal Punishment and its Application

❖Theories(purposes) of Punishment

- The history of criminal law shows that what is considered to be the purpose of criminal law has been changing from time to time with the development of human knowledge about the criminal mind i.e. the development of criminology.
- There are various theories concerning the purpose of punishment ranging from retribution, through prevention, deterrence, reformation and education to rehabilitation.

Cont'd

a) **Retributive theory:** The origin of retributive theory lies in the primitive notion of vengeance against the wrong-doer. Punishment satisfies the feeling of revenge. It largely stems from the Biblical saying of "an eye for an eye: a tooth for tooth; and life for life".

- Many old forms of punishments have been imposed based on this need to avenge the victim of a crime by punishing the criminal in the same manner as he committed the crime. Also called just desert or lex talionis
- Is there any verse of the Bible which says so?

Cont'd

- The Mosaic Law of the Bible has been, in fact, overemphasized, to explain the retributive theory of punishment.
- "An eye for an eye… is never in the Old Testament of ***Savagery,*** as it is sometimes portrayed, ***but of equity.*** It is always offered as guidance for the judge to determine appropriate sentence, never as a rule for personal reaction.
- There is no evidence in the Old Testament that the terms of the law were ever carried out exactly (eyes put out, teeth extracted, etc.). It functions is rather as a vivid statement of the equivalence of crime and penalty.

Cont'd

- It is lost it currency today when judicial ferocity awards a disproportionately harsh sentence (lengthy imprisonment for shoplifting), or when judicial leniency awards a sentence plainly less than a serious offence merits (a short sentence for rape or for causing death driving under the influence of alcohol).
- How can we measure the equivalence of crime and its punishment? How many years of imprisonment should be imposed on a rapist? on the murderer? on the Thief?

Cont'd

- However, in modern times retribution is used in more than one sense. In the first sense, the idea is that of satisfaction by the state of the victim's desire to be avenged; in the second, it is that of the states marking its disapproval of the breaking of its laws by a punishment proportional to the gravity of the crime.
- In modern penological thought retribution is not so much considered in the sense of vengeance but in the sense of reprobation.

Cont'd

b) **Deterrence Theory:** The purpose of the punishment is to deter the criminal from committing crime in future and to set as an example to the prospective criminals.

- It carries the message that those who violate the law will be punished like wise. The idea is that punishment will curb the criminal activities of the potential criminals.
- Earlier times severe punishments and public executions were held mainly with the object to deter others from committing crimes and to set an example that violation of law will be punished.

Cont'd

- Thus, two types of deterrence: Specific and General
  - **Specific / Individual Deterrence:** Punishment of the criminal is assumed to keep that specific criminal from committing other crimes in the future. Some theories assume that criminals lack internal inhibitors, and hence unpleasant sanctions must be used to teach them a lesson.
- **General Deterrence:** The punishment of one criminal and the publicity given to it are assumed to discourage other potential law breakers.

Cont'd

- Advocates of the death penalty, for example, believe that fear of death may serve as a serious threat to people, and thus the death penalty serves the function of general deterrence of serious crimes.

c) **Preventive(incapacitation) Theory**: According to this conception, the purpose of punishment is to prevent the criminal from committing crimes by physically disabling him by separating him and keeping him in seclusion from the society for a certain period of time.

- In this way the society is spared from the disturbance created by the criminal. Thus it applies only for one type of punishment.

Cont’d

- The difference between specific deterrence and incapacitation???
- According to deterrent purpose the criminals and the prospective criminals learn a lesson by the fear of severe punishment and voluntarily abstain from committing crimes. In prevention they are physically in capacitated or disabled since they lack self-control and must be restrained. Here the restraint is external by deprivation of their liberty.

Cont’d

d) Reformative(rehabilitative) Theory:

- This theory is also known as corrective or rehabilitative theory'. Reformation means “the effort to restore a man to society as a better and wiser man and as a good citizen.”
- According to this theory, punishment attempts to make the criminal harm less by supplying him the understanding he lacks and cures him of those drawbacks which made him to commit crime.

Cont’d

- Punishment has, for that reason, been defined as “a physical measure adopted to excite in the soul of the guilty true repentance, respect for justice, sympathy for their fellow creatures and love of mankind.“
- By reformation of the criminal is meant the criminal’s moral regeneration, and developing the sense of honesty in him.
- A person, who committed a crime and suffered punishment for that, comes back to the society. Therefore, punishment must aim at making a man worthy of living in the society.

Cont'd

- This theory admits only such types of punishments which are educative and discipline the criminal, not those which inflict pain on him. Rehabilitative element of the punishment includes restoration of the criminal to effectiveness or normal life by training etc.

e) **The Integrative view:** Pure retributionist view makes punishment barbaric and leaves little room for reformation. On the other hand, such treatment is likely to make these criminals feel bitter and turn to habitual criminality.

Cont’d

- It is now recognized that ‘the prevention of crime and protection of society' are ends asserted by every one. Thus, an inclusive theory' which is a cultivation of all the elements of retribution, deterrence, prevention and reformation has been gaining ground in recent years.
- The theories of punishment adopted under our Criminal Code??? See the Preface and Art. 1
- Incapacitation and retribution? See art.108

Cont'd

❖**Kinds of Punishments**

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

Cont'd

- Punishments that can be imposed on adult criminals can be categorized into principal punishments, secondary punishments and measures. But, are measure punishments?
- **Principal Penalties:** Principal penalties can be put under the following heads:
- Pecuniary Penalties-art. 90-102.
- Punishments Restricting or Depriving Liberty and compulsory labor – Art. 103-116
- Death Penalty(capital punishment) – Art. 117-120. Its constitutionality(art.15,18? Arguments for and against, p.326 ff?

Cont’d

- **Pecuniary Penalties(Arts.90-102:** The Criminal Code includes the following types of penalties which are payable in terms of money:
- Fine
- Confiscation
- Sequestration and
- Other pecuniary effects

Cont’d

- **Determination and Suspension of Penalty**, See Arts.82-89, 178-210 and **Sentencing manual** for determination of penalty.
- **Discontinuance and Extinction of Penalty; see Arts.211-37**

Chapter Eleven: Special Part of the Criminal Code

- The ‘Special Part’ of the Code describes the various acts which are considered harmful and thereby, criminal. This part of the Code clearly identifies the conduct it seeks to prohibit and defines the essential elements of each of such crimes.
- Each of the prohibited conduct is given a specific name, for example, homicide, theft, robbery, adultery etc., and the material and moral ingredients essential for the commission of such crimes are laid down clearly in those articles defining crimes.

Cont'd

- Further, the articles prescribe the punishment considered appropriate for each crime. The two parts of the Code do not operate independently. The applicability of the General Part to the Special Part can be understood in the following ways:
- **a. Establishing the Commission of the Crime:**
- For instance, suppose 'A' is killed in what appears like a car crash, and the driver of the vehicle has been apprehended in relation to the death of 'A'. To attach criminal liability to the accused as per the requirements of Art 23, three essential elements of the crime i.e. the legal, the material and moral elements of the crime have to be established.

Cont'd

- To begin with in establishing the commission of crime, we have to find out the 'cause' of the harmful result. The material element of crime i.e. whether the 'death' in the question was the consequence of the conduct of the accused or was there any other adequate reason for the death, such as death due to nervous shock being involved in the car crash or death due to heart attack or mistaken administration of medicine which could be attributed to medical negligence etc.
- These things can be established by consulting the provisions of General Part i.e. Articles 23 and 24.

Cont'd

- To find out whether the alleged incident was an intentional killing of the victim or a consequence of rash and negligent driving or was it a pure accident we need to analyze the facts in the light of the principles of criminal liability provided under Articles 57-59 which define an accident, intention and negligence respectively.
- **b. To Fulfill the Requirements of the Principle of Individualization of Criminal Punishment:**
- Once the criminal liability of the accused is established the next important question is to determine his sentence.

Cont'd

- The provisions of the Special Part not only define the crimes but also prescribe the appropriate punishment for the crime. However, these articles do not necessarily require the imposition of maximum sentences prescribed thereunder.
- The minimum and maximum amounts of punishments are provided for and the judge is supposed to look into the circumstances of each and every case and assess the sentence which best suits the occasion for the purposes of deterrence, prevention and reformation of the criminal.

Cont'd

- The principal guiding principles relating to how the sentences are calculated are found in the following important provisions:
  - **Article 87 of the Criminal Code**: It refers to Article 1 and says that ***"the penalties and measures provided by this Code punishment must be applied in accordance with the spirit of the Code and so as to achieve the purpose it has in view".***
- This means that the objectives of prevention, general deterrence, specific deterrence and reformation have to be kept in mind while determining sentence for every specific crime defined in the Special Part of the Criminal Code irrespective of the fact that the articles defining specific crimes provide for a minimum and maximum sentence to be given in each case.

Cont'd

- **Article 88 of the Criminal Code**: This provision lays down very important guidelines relating to calculation of sentences including the individualization of criminal justice and further emphasize the relationship between the General and Special Parts of the Criminal Code:
  - The Court shall determine the penalties and measures in conformity with the provisions of the General part of the Criminal Code and the special provisions defining crimes and their punishments (Art 88/1).

Cont'd

- The penalty shall be determined according to ***the individual guilt***. The individual guilt can be determined by taking the following things into consideration:
  - The dangerous disposition of the criminal
  - The antecedents of the criminal
  - Motive and purpose of the crime
  - Gravity of the crime and circumstances of its commission
  - Personal circumstances of the criminal such as age, economic conditions, standard of education, etc. (Art 88/2).

Cont'd

- The Court shall carefully examine from the lightest to the most severe punishment and determine only the penalty appropriate for each case, subject tot the provisions of the Special Part of the Code. Therefore, the Court is under the obligation to choose the right and proportionate sentence in each and every case within the range of minimum and maximum length of sentence (Art 88/3).
- In order to give full effect to the principle of individualization of criminal justice and uniformity of sentencing the Code require the Federal Supreme Court to issue a sentencing manual (Art 88/4).

Cont’d

- **Aggravating and Mitigating Circumstances:**
- Arts 82-86 enumerate the circumstances in which the punishment to a crime may be increased or decreased as the circumstances warrant in each case though the provision defining that crime suggests a specific punishment. These provisions thus give further guidance to the application of the principle of individualization of criminal justice.

Cont’d

- **Special Treatment for Young Criminals, Women and Mentally ill:**
- The provisions of Criminal Code that provide for the special treatment of these special groups also emphasize the need to make references to the General Part of the Code while deciding the cases involving women, children and the feeble minded.

Finding the Relevant Law

- One has to have a clear idea about finding the law relevant to the case at hand. Let us understand the method with the help of an example. Alemayu and Cherinet had an argument over an issue and it resulted in physical altercation between the two on a dark night. In the course of the fight Alemayu aimed a blow with his stick at the head of Cherinet.
- Off the blow Cherinet's wife who had a child on her arm intervened between them. The blow missed its aim and fell on the head of the child causing severe injuries, due to which the child died. Alemayu has been charged with homicide of the child. Decide.

Cont'd

- Now the first step to find the relevant law in this case is to look for the specific crime that prohibits causing the death of the human being in the Special Part of the Code.
- Was the killing 'intentional'? Or Was it a 'negligent' killing?
- To establish the state of mind of the accused towards the victim we have to consult either Art 58 or 59 as the case may be.
- In fact the accused's act and mind both were directed towards injuring Cherinet with the stick.

Cont'd

- Since it was dark in the night he missed the aim and the unexpected interference of Mrs. Cherinet' wife also could not be noticed by him.
- So now, had the blow rightly landed on Cherinet it would have caused only a common willful injury. This is what could be expected in his "foresight of consequences".
- Therefore, the death of the child may be considered as an accident and he should be convicted for Common Willful Injury under Art 556 which was in his intention and could not be achieved because of the circumstances beyond his control. Art 58/3 too lays down this principle

Cont'd

- Here we cannot even say that he had been negligent to avoid injury to the child because the entry of both mother and the child was unexpected and could not even be noticed due to darkness.
- That's how we locate the relevant law and ultimately we may land up in a provision which we might not have expected. The injury which he had in fact contemplated was never caused but he will be held liable for that and the death of the child which he neither intended nor expected cannot be attributed to him.

Interrelationships of Provisions

- Understanding the interrelationship of provisions gives us an idea about the order in which different provisions relating to crimes are arranged in the code and this further simplifies our efforts to find the relevant law. In every section of the Special Part we will find the crimes being arranged in the following order:
- The principle relating to the crime
- Aggravated forms of the crime
- Ordinary or simple form of the crime
- Extenuated form of the crime
- Negligent commission of the crime, in any.

Cont'd

- Thus, we find that the crimes are arranged in an order starting for more serious forms to less serious forms. For example:
- Book-V
- Title-I Crimes Against Life, Person and Health
- Chapter-I Crimes Against Life
- Section-I Homicide and It's Forms
- Art. 538- Principle
- Art. 539- Aggravated Homicide
- Art. 540- Ordinary Homicide
- Art. 541- Extenuated Homicide
- Art. 542- Instigating or Aiding another to Commit Suicide
- Art. 543- Homicide by Negligence

Cross-References within the Code

- In the Code we find a certain article referring to other articles. We find this on two different occasions:
- **To Find Complete Picture of Crime or a Concept:**
- The articles referred to in a certain article are important to understand that article otherwise the article may be obscure or sometimes the definition and meaning of the crime may remain incomplete. For example:
- **Conspiracy:** To get a complete picture of the concept of criminal conspiracy under the Code we need to make several cross references.
- a) Art. 38/1: Defines conspiracy in general and it refers to Art. 84/1/d from which we understand that is to be considered as a 'general aggravating circumstance.

Cont’d

- Art. 38/2: Refers to specific kinds of conspiracies which have been defined by the articles it mentions at the end, namely, Arts. 257, 274, 300 and 478.
- **Where one provision serves in some respect as a general article to a series of articles:**
- A general rule applicable to a series of provisions may be laid down in an article which makes it important to consult that article whenever we deal with any of such provisions it refers to.

Cont'd

- For example, Art 628 deals with 'Other Grounds of Aggravating the Crime' in relation to rape and other sexual outrages. The article starts with the statement "In all cases of rape or sexual outrages (art 620-627), the punishment shall be….."
- Therefore, the aggravating circumstances enlisted thereunder have to be read into every related provision in the series. This is the other important purpose of cross-references within the Code which cannot be ignored.

Specific Crimes

- You have to read the Code and discuss in your assignment some selected crimes among those listed in the course outline.

Chapter Twelve: The Code of Petty Offences

- Broadly speaking, petty offences can be described as ***'public welfare offences'***. These are also called ***'the regulatory offences'*** which in fact assumed more importance in the twentieth century. These are conducts declared by special statutes as offensive to the social interest. They are offences of minor character involving minor punishment.
- They are offences connected to sale of adulterated food or drugs, or offences of possession of prohibited articles, offences connected to road traffic, or offences against custom rules and foreign regulations.

Petty Offences - Definition

- Within the meaning of Art 735 of the Criminal Code commission a ‘petty offence’ lies in anyone of the following conducts:
  - An infringement of the mandatory or prohibitive provisions of law, or
  - An infringement of a regulation issued by a competent authority,????? or
  - Commission of a minor offence which is not punishable under the Criminal Law.
- About the power to enact criminal law and the principle of delegation of power by the parliament????????

Cont'd

- 'In accordance with the principle of legality (Art. 2 (1 to 4)), petty offences by the provisions of this Code or by a special provision are alone liable to punishment and the penalties applicable shall be those which are expressly prescribed in respect thereof'…Art.736(1)
- 'Such provisions are enforceable only if the act does not fall under an express provision imposing a more severe penalty.'..Sub 2

Cont'd

- We may find offences of similar nature being defined under Petty code and the Criminal Code too. For example, Articles 830, 831, 832 etc, define the petty offences mentioning that cases apart from those falling under Articles 514-533 are to be punished under the provisions of the Petty Code.
- Thus, only if there is no provision that punishes the conduct more severely, it becomes punishable under the Petty Code.

Cont'd

- But, under no circumstances the same conduct becomes punishable under both the criminal Code and the Petty code at the same time. That would clearly amount to double jeopardy (Art 2/5 and Art 736/1 Para 3).
- Petty offences shall always be punished under the provisions of laws which are in force *at the time of their commission.* They shall not be punished retrospectively…**Art. 736(2)**
- Upon the coming into force of this Code, its provisions shall apply to all petty offences mentioned in. the Special Part of this Code..sub 2, para.2. Is it an exception to Art.5(1)?

Jurisdiction of Petty Code

- Within the meaning of Art 738/1 the petty offences shall be governed by *the principle of territoriality* (Art 11). The place of commission of the offence is the place of where the offender had either committed or omitted the act resulting in the offence (Art 25).
- Petty offences committed on the territory of Ethiopia shall always be tried in accordance with Ethiopian laws when the offender is in Ethiopia. The following rules relating to jurisdiction ***do not apply*** to the petty offences.

Cont'd

- There is no question of either delegation of jurisdiction or extradition of the offender in case of petty offences. Thus, Articles 12 and 21 have no application to petty offences.
- 'Petty offences committed in a foreign country by an Ethiopian or against an Ethiopian shall not be punished in Ethiopia' ..sub 3)
- 'Petty offences committed in a foreign country by an Ethiopian enjoying immunity shall not be punished in Ethiopia'…sub 3, para.2

Cont'd

- Why these exceptions? What about other rules of jurisdiction(see art.734), but, is there a petty offence of a nature like Art.13, 15, 17, 18(2)?
- 'Petty offences of a purely military character provided by Ethiopian military law {Art. 792) shall always be tried .by the military authority and punished according to Ethiopian law whether they were committed in Ethiopia or in a foreign country'…Sub 4
- However, if such offender was already tried for the same act by the foreign Court he may not be punished here again…para.2

Cont'd

- **Effect of Foreign Sentences: Art 739**
- In case of crimes, the Criminal Code Art 22 provides that foreign sentences shall be taken into consideration which amount to antecedents and aggravating circumstances and thereby enhancing the punishment of the criminal.
- But in relation to petty offences, foreign sentences fail to produce any consequential effects in Ethiopia. Convictions or sentences passed by a foreign Court shall not be taken into consideration for the assessment of sentence as regards to crimes or petty offences tried by Ethiopian Courts.

General Principles of Liability in case of Petty Offences

- **Conditions for liability(art.741):** It is evident from the provisions of Art 741 that the doctrine of *mens rea* is generally applicable to petty offences too. The latter part of the Article 741/2, says that even all negligent petty offences are punishable except where the law creating the offence expressly exempts from liability to punishment in respect of an act committed by negligence.

- This means that the principle relating to the liability for negligent crimes under the main Code goes exactly in the opposite direction.

Cont'd

- Under Art 59/2 a negligent crime is not generally punishable but exceptionally punishable. That is, the negligent crimes are punishable only where the law so expressly provides that negligent commissions/omissions of certain specific crimes are punishable by reason of their nature, gravity or the danger they constitute to the society. In other words, in case of ordinary crimes negligent crimes are not always punishable unless expressly provided whereas in case of petty offences negligent offences are always punishable except where expressly exempted from liability.

Cont'd

- 'The provisions of the Criminal Code Concerning criminal responsibility and irresponsibility (Arts. 48-50) shall apply to petty offences'…sub 1
- 'Responsibility and liability to punishment for petty offences shall always be individual(. Arts. 41 and 88)'…sub 3
- The provisions relating to petty offences shall apply also to young persons within the meaning of the Criminal Code (Arts. 52-55)…Art.740(4)

❖ **Principles of Liability that Differ from the Criminal Code: Art 740**

- In case of petty offences only completed offences are punishable. The stages of preparation and attempts are not punishable.

Cont'd

- In these cases only principal offender (Art 32) is punishable. Inciters, co-offenders, and accessories after the fact are not punishable. Each offender shall be punished for his own act irrespective of the participation of another.
- Juridical persons are also not liable for incitement or complicity relating to petty offences. A juridical person is punishable only when its employee violates laws, regulations or directives as a petty offender in accordance with Art 32 of the Criminal Code.

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❖**Justification and Excuses(Arts.743 & 44):**

- The provisions governing lawful acts (Art. 68), the performance of a legal, official or professional duty (Art. 69), consent of the victim (Art. 70), absolute coercion (Art. 71), necessity (Art. 75) and self-defense (Art.78), shall apply to petty offences.
- In cases of resistible coercion or excess of necess.ity or self-defense the petty offender shall be punishable but the Court shall reduce the penalty within the limits authorized by law (Art. 766).

Cont’d

- In the case of a hierarchical order the subordinate
- shall not be punishable if he obeyed a person of higher rank acting within his authority and did not exceed the order received. The person who gave the order shall be fully responsible (Art.73).
- Is it hierarchical order of any type and irrespective of the knowledge of the actor about the illegal nature of the act and the absence of authority?
- The subordinate shall be responsible for any conscious and intentional excess in the performance of the order received.

Cont'd

- He Who committed a petty offence may not plead as justification ignorance of the law or a mistake as to right (Art. 81)…Art.744
- Why this difference from ordinary crimes? i.e. in the latter case ignorance of law may be a defense(art.81(3)
- If he acted under a proven mistake of fact which excluded knowledge or intention to commit an offence he shall not be liable to punishment (Art 80)…Art.744(2)

Cont’d

❖ Extenuating and aggravating circumstances: Art.745

- Where a person guilty of. a petty offence acted in extenuating circumstances as provided by the Criminal Code (Art. 82 and 83), the Court may take such circumstances. into account..by reducing the penalty or altering its nature as provided hereafter (Art. 766).
- Where the petty offender acted in 'aggravating circumstances as provided by the Criminal Code (Arts.' 84 and 85) the Court shall increase the penalty as provided hereafter (Art. 767-770).
- Where there exists a combination of extenuating and aggravating circumstances, the Court shall have due regard to both in determining the penalty(Art. 189).
- Is there any difference from the ordinary crimes?

Penalties and Measures under the Petty Code

- Art 746 declares that, *'Petty offences differ from ordinary crimes by reason of the different penalties they merit'*. Petty offences 'shall. not be punished with rigorous or simple imprisonment .prescribed for ordinary crimes.
- The only penalties which may be imposed for petty offences are those specified in the following provisions subject to the special forms of punishment applicable to military petty offenders or young persons.
- What do these exceptions mean? Does for instance it mean that juveniles may be imprisoned?

Cont'd

❖ **Principal penalties**

A) Arrest: Arrest is the only penalty involving deprivation of liberty which may be imposed in the case of petty offences.

- The duration of such arrest shall be of one day at least and of three months at most, subject to case of recidivism (Art. 769) and cases where special provisions of the law provide a higher maximum.
- The Court shall determine the penalty taking into account the degree of guilt of the petty offender (Art.88) without going below the special minimum or beyond the special maximum where such period are fixed by law.

Cont'd

- Arrest may be an ordinary one which shall be undergone in special premises for detention attached to Courts or in the home of the person sentenced or in the home of a reliable person or in a lay or religious community designed for this purpose.
- The provisions on conditional release (Arts. 201-207) shall not apply to arrest…Art.747(2)
- Why?
- Ordinary arrest shall be .. undergone in special premises for detention attached to Courts or police stations. Convicts shall be separated according to sex…Art.748(1)

Cont'd

- No person sentenced to arrest shall be detained in penitentiary or corrective institutions nor confined with prisoners sentenced for crimes to imprisonment (Art. 746 (1))…sub 2
- A person sentenced to arrest shall. not be compelled to work nor be entitled to remuneration (Art. 111).
- He may[?] receive food, mail and visitors from outside to the extent compatible with the tranquility and general good order of the place of detention.

Cont’d

- In cases where the penalty of arrest can be pronounced, the Court may, if the circumstances or the conditions of enforcement so justify, replace this penalty by a term of compulsory labour of equivalent duration, with or without restriction upon liberty, coupled with a deduction from the petty offender's earnings for the benefit of the State (Art. 103 and 104).
- The duration and the amount of money to be deducted shall be fixed by the Court in its judgment.
- These provisions shall not apply to members 01 the Defense Forces on active service, nor to young persons…Art.751.

Cont'd

B) Fine(art.752): This penalty may be imposed in addition to arrest, where circumstances justified. This is particularly followed where the law provides arrest and fine as alternative penalties or where the petty offender acted for unlawful gain (Arts 91 and 92).

- The amount of fine may be normally fixed between 1Birr and 300 Birr. In cases of recidivism (Art 769), however, it may extend to a higher maximum as the law provides. Particularly, when the offender has acted for unlawful gain the fine may be increased to 500 Birr, without prejudice to aggravation in case of recidivism. The amount of fine shall be fixed having regards to the financial state of the petty offender, the gravity of the petty offence and the degree of guilt.

Cont’d

- In the event of non-payment of the fine within the fixed period of time, the Court shall order the conversion of the fine, or of such part of the fine as remained unpaid, into compulsory work performed freely or with restriction on liberty, together with the deduction for the benefit of the state.
- Is it an automatic conversion, unlike in ordinary crime?
- The Court shall determine the duration of the compensatory term on the basis of the relevant general provisions (Arts. 96 "and 103).

C) Reparation for damages(Art.755): Is it necessary to provide such a stipulation in the face of Art.734?

Cont'd

❖ Secondary penalties

A) Warning and Reproof(Art.756): A Warning, reproof, reprimand or the making of amends (Art. 122} may be imposed by the Court I addition to a penalty of arrest, compulsory work or fine.

- The Court may substitute the above mentioned penalty for. the principal penalty in the case of Extenuating circumstances or minor offences.
- Incase of petty offences forfeiture of civic or family rights or rights to discharge an office. or exercise of profession (Art. 123) may not be ordered. No order may be made for reduction in rank and exclusion from the Defense Forces (Art. 127) on a solider Who has committed a petty offence....Art.757

Cont'd

❖Safety Measures

A) Guarantee for good conduct(Art.758): A guarantee for good behaviour (Art. 134?) can only be ordered in cases of repeated petty offence against public order or tranquility, or the safety of persons or things; and only when the Commission of further offences is probable.

- Where an petty offender who is able to provide guarantee **refuses** to provide one, arrest (Art. 748) for a period not exceeding fifteen days, shall be ordered..sub 2

Cont'd

B) Confiscation and Forfeiture to the State: Confiscation of objects or material mean endangering security, order, health or decency, of intended. to facilitate, or to be used for the commission of an offence, or which have been use for the commission of an offence..Art.759

- The Court may order forfeiture to the State of such objects and means..sub 2
- What is the difference between seizure, confscication and forfeiture?

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C) **Prohibition of undertaking and suspension of work permit(Art.760)** :Withdrawal of a license (Art. 142), closing of an establishment or suspension of its activity (Art. 143), whether total- or partial, may be ordered **only as a temporary measure** in case of repeated petty offences connected with the use of a license or the management of an establishment.

D) Restrictions affecting liberties(Art.762):Measures restrictive of personal liberty, such ,as prohibition. to reside in a place, obligatory residence, placing under supervision, withdrawal of official papers or expulsion (Arts. 146-150) may not be ordered in respect to a person who committed a petty offence…Sub 2

Procedural Requirements in Petty Offences

- **Prosecution:** petty offences against the person of another, his freedom or honour, or against private property, shall be prosecuted and punished only on a complaint lodged by the injured party, his representative or those having rights from him, duly authorized by law..Art.771(a)
- breaches of laws, orders, regulations and directives of administrative or executive authorities shall be prosecuted and punished on complaint by the Authority concerned...Sub b

Cont'd

- other breaches shall be prosecuted ex officio by the public prosecutor in accordance with the directives of Criminal Procedure…sub c. See Arts.167-70 of the Criminal Procedure Code.
- Where the law requires that a complaint be lodged as a condition precedent to the prosecution of a petty offence (Art. 771) the general provisions governing conditions, time-limit and right to lodge such a complaint shall apply (Arts. 211-213)…Art.772

Cont’d

- In the case of petty offences of any nature whatsoever the right to prosecution shall be statute-barred after one year, and the sentence passed 'after two years….
- The general provisions relating to the beginning, suspension, interruption and absolute' end of the limitation periods (Arts. 219 - 222 and 225 - 228) shall apply.‘…Art.773
- Penalties imposed in respect of petty offences. may be cancelled by a pardon or an al"!'U'1esty on the usual conditions laid down in the Criminal Code (Arts. 229-231)…Art.774

Cont'd

- An offender who is sentenced to a. penalty shall as of right be reinstated after one year has elapsed since the penalty was undergone in whole or in part or barred by limitation, or remitted by pardon….Art.775
- The provisions concerning suspension of pronouncement of sentence or the enforcement of the penalty as well as those regarding conditional release shall not apply to petty offences by reason of their formal nature and the fact that the punishment imposed should be uniformly rapidly enforced…Art.765

Chapter Thirteen: Criminal Law in a Changing World

- the purpose of penal law is to express the social condemnation of forbidden conduct, buttressed by sanctions calculated to prevent it".
- 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 itself is not only according to the values of a particular group and society, such as, 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.
- At the same time we should remember that 'public order' itself is not a static concept.

Social Values and the Ambit of Criminal Law

- Obviously, the type of conduct that a particular society considers as sufficiently worthy of condemnation to prohibit it by criminal sanctions is deeply influenced by the values governing that society.
- It therefore varies greatly, from one country to another and from one period of history to another.

Economic Crimes against Community

- In *a laissez-fair* economy, the waste of property is, like its accumulation, a matter of private concern. Damage to the earth, through deforestation, overgrazing, waste of water, dust-bowl farming, is a matter for the individual owner, who is presumed to suffer the appropriate penalty through the diminution of his crops and financial returns.
- A major cause of change in the public philosophy has been the incidence of total war in the twentieth century.

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- Scarcity of food has made the careful use of land a vital necessity, in blockaded countries, such as Germany in the First World War, or densely populated, entirely industrialized countries, dependent largely on sea supplies, like England in both world wars.
- Outside the emergencies of war conditions, the growing recognition of the social function and use of property has led to more permanent changes in legal values. The changed evaluation of the relation of property and individual has gone to the greatest extent in socialized legal systems.

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- Following the constitutionally enshrined concept of ‘public, socialist property as the sacred and inviolable foundation of the socialist system….’, in the Soviet Constitution the destruction, the theft and the misuse of state-owned property-that embraces the bulk of the industrial, commercial and agricultural assets of the nation- is attended with criminal sanctions.

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- The growth of the world's population will increasingly outstrip available resources, the conservation of agricultural, mineral and other natural assets will become an increasingly vital social and legal value, strengthened by harsh criminal sanctions.
- By making it a misdemeanor to contract or engage in any combination or conspiracy in restraint of trade or commerce among the several States or with foreign nations, or to monopolize such trade or commerce, the Sherman Act of 1890(US.) clearly recognized that

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- it was *the function of criminal law not only to protect private property against unlawful interference, but also to protect the basic economic order of the nation,* and the conditions of its existence, against unlawful interference by private subjects of the law.
- In the United States, a few years ago, criminal proceedings were instituted against a small number of middle senior executives of some major corporations, including the General Electric Company and Westinghouse, for violation of the anti-trust law provisions prohibiting price-fixing.

Environment Pollution and the Criminal Law

- An increasing use of the criminal sanction – often complementary to damages and administrative sanctions – is likely to result from the belated but traumatic recognition in the industrially developed nations that a massive pollution of the environment, through despoliation of land, water and the air, by industrial waste, chemical, oil, the dumping of garbage, the indiscriminate use of pesticides and by many other means, threatens the very conditions of social survival.
- Thus, an area, which until very recently, has remained outside legal regulation altogether is likely to become a major object of social condemnation buttressed by criminal sanctions.

Criminal Law in a Welfare State

- A whole new area of criminal law has developed out of the steadily increasing responsibilities of the modern state for the maintenance of certain crucial standards demanded by the proper functioning of a modern industrialized and urbanized society.
- These standards are embodied in a great variety of statutory regulations. They concern safety appliances and sanitary standards in factories and mines, minimum standards in housing accommodation, purity and minimum quality of foodstuffs, drugs and medical preparation offered to the public, compliance with statutory obligations, unemployment insurance and other forms of social security, registration of professional and trade qualifications, and a multitude of other matters which have become the accepted responsibility of a properly governed contemporary state.

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- In 1902, a German legal scholar, James Goldschmidt, characterized this whole area of criminal law as 'administrative penal law'
- Much more recently, common lawyers have directed their attention to this type of criminal offence, and characterized the whole group as *'public-welfare offences'*.
- A vast proportion of these offences are nowadays imputable to corporations rather than individuals in such areas as social-insurance obligations, safety and health standards, and the like.

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- On a balance of social interests, the widespread – though by no means universal – tendency of modern statutes to impose strict liability for violation of public-welfare laws is therefore justifiable.
- a clear distinction should be made between vicarious liability of the master for acts of the servant, and imputation of the actions of a person in the employment, or acting on behalf, of the corporation which are properly imputable to the latter.
- Imputed liability is not vicarious, but original, liability.

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- The principle of vicarious responsibility has been developed in the law of tort, because it has seemed socially and economically necessary to hold the master- and that is in many cases a corporation – liable vis-à-vis third parties for acts committed within his sphere of operations.
- Secondly, Corporations cannot be executed or imprisoned.
- This would seem to exclude certain intensely personal offences, such as murder, rape and bigamy, and neither practice nor doctrine has hitherto extended the criminal responsibility of corporations to these offences.

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- Third, the rejection of vicarious, as distinct from imputed, liability in the field of criminal law makes it necessary to define the type of relationship which makes it proper to impute the criminal action of an individual to the corporation. The basic criterion for this was laid down many years ago by Viscount Haldane L.C. in a classical passage:
- *" The fault or privity (of the company within the meaning of a statute) is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable up on the footing* ***respondeat superior****, but somebody for whom the company is liable because his action is the very action of the company itself".*

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- What Lord Haldane has characterized in this way as the *alter ego* of the corporation is essentially described in the definition of the Model Penal Code suggested by the American Law Institute, by the term 'high managerial agent'.
- This is defined as, "An officer of a corporation or an unincorporated association, or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association

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- Special questions arise where the offending body is a government or a government-controlled corporation. Can a government be held capable of a criminal offence? If it is, can it be punished by a fine, which, in a sense, the government pays to itself?

Modern Science and Responsibility of the Individual

- Modern psychology has explored the complex web of instincts and the area of the unconscious, and its impact on human behaviour.
- More recently, biological research and more particularly modern genetics – has led to the discovery and isolation of man's genetic structure, which determines his character and behaviour.
- These developments may profoundly affect the traditional bases of moral and legal responsibility.

Modern Psychology, Control over Behavior and the Criminal Law

Changing Purposes of Punishment

- Generally, the philosophy of deterrence still prevails in modern criminology. We continue to be concerned with preventing, by appropriate punitive sanctions, both the individual offender and other members of the society from the repetition of the crime, or the imitation on the part of others by similar actions.
- But the contemporary approach to the best way of achieving this general objective has undergone a profound transformation.

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- We are no longer certain that the harshest punishment is necessarily the best way of preventing repetition of the offence. Where we have to concede that the severest possible punishment – execution – will certainly prevent the particular criminal from committing this, or any other, offence again, we are no longer sure that this specific prevention will also have the effect of general prevention, i.e. that it will reduce the proportion of capital offences

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- the older philosophies of retribution-in its various shades (Report, section 50-61) are increasingly inadequate although they continue to be supported by some eminent theologians, jurists and others.
- Modern civilized society has, in general, receded more and more from this philosophy of 'an eye for an eye, a tooth for a tooth'.
- The reason is for some, but only a minority, a revulsion against the arrogation by society of the right to take the life of a human being

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- A more practical reason is the danger of an irretrievable error of justice. Both these arguments apply, of course, only to the capital punishment, and not to the theory of punishment in general.
- What is of far greater importance to the theory of punishment as applicable to all major offences is, the progress of social science in a manner parallel to that of the modern psychology and psychiatry.

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- Generally speaking, the increasing understanding of the social and psychological causes of crime has led to a growing emphasis on *reformation* rather than deterrence in the older sense, as the best way to protect both the individual criminal from himself, and the society from the incidence of crime.
- In practical terms, this has meant the increasing use of corrective and educational measures, either in addition to, or in substitution for, punishment proper.

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- The consideration of such alternatives has gradually spread from specialized categories of offenders to criminal offenders in general.
- A revolution of far greater proportion has, during the last generation, taken place in the treatment of juvenile offenders. Almost universally today, in civilized countries, the juvenile offender (usually a person between the ages of eight and eighteen), who not so long ago used to be subjected to the harshest penalties and thrown together with hardened criminals – is now subjected to a special procedure.

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- The predominant pattern is that of the juvenile court – as introduced, during the last half century in England, Germany, in the great majority of the American States and in many other countries – a court differs radically, in procedure and the type of sanctions to be imposed upon the offender, from the ordinary criminal court.
- The substitution of corrective measures for punishment proper has spread from the juvenile offender to the adult offender. The principal emphasis is on probation of first offenders, as a conditional alternative to punishment.

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- This vital and needed change causes, however, in its turn, some grave problems:
  - There must be a degree of coordination between the judicial authorities proper, i.e. the judge and jury, or the judge alone, land the various welfare and administrative authorities, which is still often lacking.
  - The distribution of functions between judicial authorities and various administrative and welfare officers emphasizes the need for adequate training and social and professional status of the latter

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- The change from a purely repressive to an educative function also emphasizes the need for properly trained prison officers. This, too, is far from being the case.
- Lastly, and perhaps, the most important is that the blurring of the borderlines between the criminal and the administrative procedure that holds not only benefits, but also dangers for the effect on the individual. The administrative process is in its essence discretionary, whereas criminal procedure has, at least in the democratic scheme of values, been surrounded with safeguards against arbitrariness.

Cont’d

- The administrative process is in its essence discretionary, whereas criminal procedure has, at least in the democratic scheme of values, been surrounded with safeguards against arbitrariness.
- So, the fear has grown that benevolent but autocratic authority may be able to deprive persons falling under its jurisdiction of liberty, for indefinite periods, without the judicial safeguards attending criminal trail.

Alternatives to the Criminal Sanction

- To those who consider retribution as the principle or exclusive purpose of punishment, there can be no alternative to the criminal sanction for offensive and prohibited conduct. But for the adherents of a utilitarian philosophy there are alternatives.
- In a recent discussion of this question Professor Packer proposed a classification of sanctions into four categories: *compensation, regulation, punishment and treatment.*

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- **Compensation** involves the exaction of money or performance to recompense an identifiable beneficiary or class of beneficiaries for damage done or threatened by the actions of another. **Regulation** embraces a constellation of devices used to bring the impact of public authority directly to bear on private conduct, both before and after the fact. The granting and withdrawal of licenses is a prominent example of regulation.
- **Treatment** is essentially a diagnostic response. It implies the appraisal of socially condemned conduct as a disease rather than a crime.

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- *"the criminal sanction is the best available device we have for dealing with gross and immediate harms and threats of harm. It becomes less useful as the harms become less gross and immediate. It becomes largely inefficacious when it is used to enforce morality rather than to deal with conduct that is generally seen as harmful"*

What Future for the Criminal Law?