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A Handbook on the Criminal Code of Ethiopia

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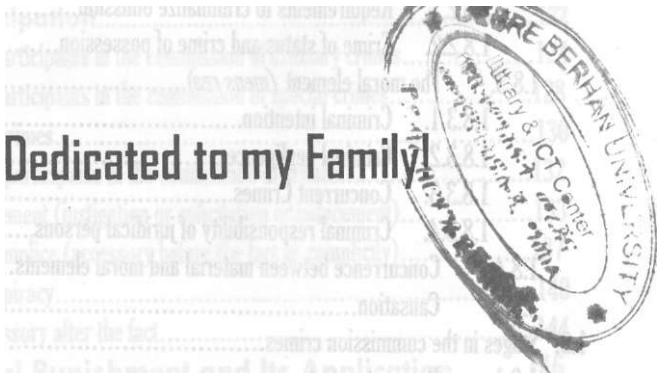

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3 4 1 2 Compulsory labour ..... . Communal life. In the absence of legal regimes, it would be very difficult, if not impossible, to
3 4 1 3 Penalt tT I fi'li .....^lead a peaceful life. That is one of the reasons for the presence of multitude of legal regimes
3 4 1 4 Death penalt * "..... ^in any state. Of these legal regimes, criminal law is among the most important ones because
3 4 2 Secondary unishme t ..... ^it is the law that tries to rehabilitate people so that they will be fit to peaceful communal life,
K i,,,, ,• ... , , ... 17% deter them from their wrongful activities, or sometimes to remove them from circulation in
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^ j . . .. J 1 1 the society either temporarily or permanently. Accordmgly, it is necessary lor everyone to
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«V V n . ....."..... .....^Becauseunderstanding the general principles of criminal law is like finding a path which
3 6 S ' f | StenCe gravalin§ 31.(1 miti§ating Circumstances ..... 185 leads to all the right places in the field of criminal law. It is, therefore, with a view to
c 1011 V ^j- • ^..... . providing an introduction to the general principles of criminal law with special emphasis on
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3.62. Conditional release or parole ..... . been written. To this end, the book contains three parts. The first part deals with the
• • umsnments lor petty offences ..... purpose, scope and characteristics of criminal law, the premises of criminal law, stages in the
3.7.1. Principal penalties .... commission of crimes, and other related matters. In the second part, basically, two subject-
3.7.2. Secondary penalties..... matters are discussed: grounds that persons may invoke to avoid criminal liability (criminal
3.7.3. Aggravation and mitigation of penalties..... J92 'aw defences) and participation in the commission of crimes. In the last part, the book covers
3.8. Discontinuance and extinction of prosecution and penalties..... 192 crTM'na] punishment and its application. To understand this book, readers are strongly
3.8.1. Discontinuance of prosecution ..... advised to have the Criminal Code by their side because, sometimes, only reference to
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Part One: Objectives, Characteristics, Scope and Premises of Criminal Law and Stages in the commission of crimes

1.1 The Need for the Criminal Code[4,]

The FDRE Constitution, which was promulgated in 1995, vests the power to enact penal code in the Federal Government[1] Thus, it is the responsibility of the House of Peoples' Representatives (HPR to make a criminal code. As a result, the HPR enacted a Criminal Code, in accordance with article 55(5) of the Constitution, in 2004 which came into force in May 2005. This Criminal Code is the third independent Criminal Code of Ethiopia.[2] The preceding Penal Code was enacted in 1957 G.C, which was kept alive for nearly half a century despite the fact that the country underwent quite considerable changes in all aspects of life such as economic, social, and political. At the end, these changes dictated the introduction of some changes to the existing Penal Code. Among others things, the need to criminalize certain conducts, to amend some provisions of the Penal Code, and to repeal some provisions of the Penal Code triggered the enactment of the Criminal Code. Therefore, the Criminal Code could be taken as having at least three purposes as elaborated below.

Gap-filling: The 1957 Penal Code was among the best and most comprehensive Penal Codes on the world at the time of its enactment[3] But, as time passed by, it could no longer maintain this quality. Among other things, the Code started revealing different gaps. For example, the 1957 Penal Code did not deal with hijacking and computer crimes; nor did it deal with certain aspects of environmental crimes. Thus, any of these acts would go unpunished if one has to use the Penal Code although they can conveniently be regarded as wrongful and socially undesirable acts. In other criminal systems, such acts are criminalized. Therefore, the Criminal Code has tried to fill up these and other gaps in the 1957 Penal Code by bringing some wrongful and socially undesirable conducts under its purview.

*In this book the expression the "Criminal Code" or "the Code" refers to the 2004 FDRE Criminal Code. All the articles in this material are the articles of the Criminal Code unless their contexts dictate otherwise.

[1] However, the Constitution does not completely deprive States of the power to make penal legislation. Rather, it stipulates that they can enact penal legislation in areas not specifically covered by the Federal penal legislation. See article 55(5) of the Constitution.

[2] The first independent Criminal Code of the country is the 1930 Penal Code whUe the second is the 1957 Penal Code. It shall be borne in mind that even if the Fetha Negest regulated criminal matters before the enactment of the 1930 Penal Code, it cannot be said it was an independent criminal code as it governed civil matters (like family, property, and successions), too.

[3] Aberra Jambere, *An Introduction to the Legal History of Ethiopia (1434-1974)*, Mursler, 2000, p. 179.

Amendment: There were many legal provisions under the 1957 Penal Code which needed amendment for various reasons. For instance, the provisions of the 1957 Penal Code were too inadequate in relation to crimes like rape and homicide by negligence to achieve the purposes of the current criminal law; that is, they entail lenient penalty which could hardly deter contemporary criminals. Under the Criminal Code, however, the penalties for such crimes are increased in accordance with the objectives of criminal law. Likewise, the 1957 Penal Code provided for fine which is too small to serve the purposes of criminal law, in particular, in relation to financially .potent criminals. This amount is, nonetheless, considerably increased under the Criminal Code. Further, the Criminal Code has made amendments to the 1957 Penal Code in areas of criminal law defence, execution of penalties, the scope of certain crimes like corruption, money laundering, and crimes to be committed by juridical persons.

Repeal: Certain provisions of the 1957 Penal Code are repealed by the Criminal Code becauseof their obsolescence. For instance, under the 1957 Penal Code flogging was recognized as one of the penalties to be imposed. But this practice could no longer be maintained becauseit is archaic and also unconstitutional. Hence, the Criminal Code has abolished this and other similar provisions and replaced them by appropriate provisions.

In short, the Criminal Code is meant to remedy the emerging defects in the 1957, which are the results of the myriad of changes Ethiopia has undergone for the last 50 years.

1.2 Structure and the relationships between the different parts of the Criminal Code

The structure of the Criminal Code is the same with that of the 1957 Penal Code. It contains three parts: the General Part (Part I), the Special Part (Part II), and the Part of Code of Petty offences (Part III). The first part, the General Part, contains different criminal law principles which are the bases for application of the other parts. The second part, the Special Part, is a catalogue of crimes. It contains the list of conducts which are deemed to be crimes and the penalties the commission of such crimes would entail. Any conduct which is not mentioned in the special part is not a crime without prejudice to the other part of the Criminal Code (Part III) or other penal legislation. The third part, the Code of Petty offences, deals with offences which are of minor importance. This part has its own general part, which contains general principles applicable to petty offences, and special part, which contains list of petty offences together with the punishments they would entail.

As far as the relationship between these parts is concerned, Part 1 is a basis for Part II. Therefore, the general principles of Part I should be heeded any time Part II is to be applied. However, if Part II contains, something which is not compatible with what is provided in Part I, Part II should prevail as it is a special part. Moreover, Part I is somewhat a basis for Part III as well. Of course, Part III has its own general part containing the general principles applicable to petty offences. However, this part of Part III sometimes makes cross-reference to Part I. So, if inconsistencies exist between Part I and Part III, the later prevails. In relation to Part II and Part III, there will hardly be any relation between them since the subject- matters regulated in the two parts are different. But if any relation exists and this relation gives rise to some sort of incompatibility, though unlikely, Part III prevails in as long as petty offences are concerned and Part II prevails as far as major crimes (non-petty offences) are concerned.

1.3 Object and purpose of criminal law

Criminal law is one of the oldest laws that ever existed. It can be said that its existence is closely related the existence of society since it is a law which is indispensable for communal life. After all, what makes criminal law different from civil law is the fact that its purpose is protecting the society while civil law is meant to protect persons and their properties.[4] This law protects the society by encouraging the performance of desirable acts and discouraging the commission of acts that are deemed socially undesirable. Coming to the object and purpose of the Criminal Code, Article 1 clearly states that criminal law aims at ensuring the peace, order, and security of the State and its inhabitants for the public good. This means, the Code is aims to preserve *public good,* not individual good though the protection of individual good is a necessary accompaniment to the achievement of public good or a means to that end.

For the achievement of its objectives, article 1 provides for the use of three means. Firstly, it stipulates that the *principle of due notice* should be used. This principle states that individuals should be given advance warning about conducts amounting to crimes, the penalties attached thereto and the absence of defence based on ignorance of law.[5] The last element of the due notice principle is, of course, missing form article 1. But it does not mean that ignorance of law can be raised as a defence. Under article 80(1), it is expressly provided that ignorance or mistake of law is no defence. Thus, if the due notice principle is heeded by

[4] Daniel E. Hall, *Criminal Law and Procedure*, 5[1.1] ed, Thomson Debar Learning, USA,2004, p. 16.

[5] Wayne R. La Fave and Austin W. Scott, *Criminal Law: Handbook*, west publishing Co, ST. Paul, Minn, 1972, p. 5.

everyone, the peace, order, and security of the state and its inhabitants will be achieved thereby resulting in the promotion of public good.

The second mechanism article 1 recognizes to be used for the achievement of the purpose of criminal law is *punishment* It is stated that in case the due notice becomes ineffective punishment should be provided. Punishment normally refers to measures taken by the government against criminals as the consequences of their criminal activities so as to affect, inter alia, their property, liberty and at times lives. And criminals are punished for different reasons such as deterrence, reform, prevention and retribution. In the Criminal Code, there is an express stipulation that punishment aims at achieving two gojls. Firstly, it is meant to deter criminals and the other members of the society from committing future crimes. So, punishment, in this sense, has the purpose of reducing the commission of further crimes. Secondly, punishment aims at rehabilitating criminals. At times, individuals may commit crimes due to the problems, external or internal, they are suffering from. Thus, since they may get rid of their problems through punishment, the Criminal Code stipulates the use of reformative penalties. For example, individuals who steal becauseof poverty may be given vocational trainings in jails so that they will be able to use their vocations after they are released.[6] The third means to be employed to hit the target of criminal law is measures. They can be used to prevent the commission of further crimes and this can happen where there is an indication to the effect that a crime will be committed. For example, if a person has health problem, hospitalization may be ordered.

1.4 Characteristics criminal law: the principle of legality

Criminal Law, unlike other laws, has certain unique features. Some of these features are embodied in what is known as *the principle of legality.* This principle is one of the fundamental criminal law principles. It is claimed that there will be no fair play in the field of criminal law in default of the principle of legality.[7] Accordingly, this principle is enshrined in almost all criminal laws. Article 2 of the Criminal Code also provides for the principle of legality. So, it can easily be discerned how important the principle is from the fact that it is coved by the second article of the Code. This principle has the following important ingredients or sub-principles.

[6] You will find more explanation in relation to the purposes of punishment in Part 111 that deals with " *Criminal Punishment and Its Application*".

[1] Wayne R. La Fave and Austin W. Scott, p_6.

1.4.1 No law, no offence

No person shall be penalized for an act or omission which does not constitute a crime at the time of doing or omitting to do it, respectively. This has to do with giving due notice about criminal conducts before imposing penalties when they are performed or omitted, as the case may be. For example, prostitution is not a crime under the Criminal Code. Thus, current prostitutes should not be punished in accordance with the law to be enacted subsequently to penalize the conduct This ingredient of the principle of legality is embodied in article 2(1) of the Code becausewhen it states that *criminal law specifies the various crimes*it means an act which is not specified as a crime is not a crime. Incidentally, it is important to note that this part of the principle of legality is also recognized by the FDRE Constitution.[8]

1.4.2 No law, no punishment

No person shall be subject to penalty that is not recognized at the time he commits the criminal act. This means, he should be given the penalty prescribed by law at the time of violating the law becauseit is this penalty that the criminal assumes as a risk at the time of violating the law. This sub-principle of the principle of legality is also enshrined in the Criminal Code, article 2(1), which provides that *criminal law specifies the penalties and measures applicable to criminals.* The FDRE Constitution also recognizes this same principle under article 22. Accordingly, if a given penalty or measure is not specified at the time of committing a crime, then, it cannot be applied, at least as a rule.[9] For example, article 37 of the Copyright and Neighbouring Rights Proclamation[10] stipulates that the Proclamation can apply to literary, scientific and artistic works created before the coming into effect of this Proclamation provided that the rights in these works did not lapse before the coming into effect of this Proclamation. Article 36, on the other hand, provides that the intentional violation of the rights the Proclamation protects (through both retroactive and prospective application) entails rigorous imprisonment from five to ten years. If, therefore, someone's copyright was violated before the coming into effect of this Proclamation, the infringer of the right can be made to pay, for instance, compensation in light of this Proclamation. Hence, the Proclamation can apply retroactively. However, article 36 of the proclamation cannot apply retroactively becauseit is about the criminal liability of the infringer even if the Proclamation is a subsequent law (the 1957 Peal Code was applicable at the time the Proclamation was

[8] Article 22, Criminal Code. Since the Constitution predates the Code, the latter simply repeats what the former recognized.

[9] We can apply a penalty or measure that is not stipulated at the time of committing a crime if it favours the criminal.

[10] Copyright and Neighbouring Rights Proclamation, Proclamation No.410/2004.

enacted and it provides for lenient penalty; that is simply imprisonment or fine or both, as the case may be, in accordance with articles 675,676, and 90).[11]

1.4.3 Execution of penalty in a prescribed manner

Punishment should be enforced in the manner provided by the criminal law.[12] As a result, if the criminal law provides for a certain manner of enforcing imprisonment, the imprisonment should be executed in that manner. For example, a prisoner should not be kept at his home when the law says he should be kept in a jail. This element of the principle of legality is not provided under article 2 of the Criminal Code. Yet, it does not mean that penalties can be executed in manners different from the ones provided by law. For example, under article 117, the Criminal Code provides that death penalty should be executed within the precincts of a prison by humane means. Consequently, death penalty cannot be executed publicly and by using inhuman means such as hanging, burning (branding), burying alive and mutilation. Therefore, even if the third ingredient of the principle of legality is not recognized under article 2, the other provisions dealing with the execution of penalties such as articles 90 and the following for line, article 106 and the following for imprisonment, and article 117 for death penalty provide for the modes of their executions which should be adhered to.

1.4.4 No offence by analogy [and no penalty by analogy]

Sometimes, judicial organs may create offences by analogy. That is to say, judges may treat a given conduct as a crime which is not expressly declared to be so by criminal law merely becauseit resembles another conduct declared to be a crime.[13] For example, if installing a concubine by a male is prohibited while it is not for a female, a judge may treat the latter's conduct as a crime because, in his opinion, the act due to its similarity to the one that is penalized deserves condemnation regardless of the sex of the author thereof. To take some examples from the provisions of the Criminal Code, article 565 criminalizes *female circumcision.* So, if one is to follow the *principle of analogy,* it is possible to treat *male circumcision* as a crime, too. Likewise, articles 654-655 criminalize sexual act or act corresponding to sexual act between relatives whose marriage is forbidden on grounds of *blood relationship.* By following the principle of analogy, it is possible to extend the application of these articles to relatives whose marriage is forbidden on grounds of *affinity.* However, such practice is prohibited. A judge has to apply the existing law as it is in as long

[11] If article 36 of the Proclamation is made to apply retroactively, the general rule that criminal law is non-retroactive will be violated. More importantly, article 22 of the FDRE Constitution will also be violated.

[12] Wayne R. La Fave and Austin W. Scott, p. 8.

[13] Philippe Graven, *An Introduction to Ethiopian Penal Code,* Faculty ofLaw, Haile Sellassie I University, A.A, 1965, p. 9.

as there is no doubt in its meaning or unless the **application** of the clear meaning of the law leads to absurdity. He should not include conducts excluded by the law-maker into the realm of criminal law under the guise of interpretation, it should, nonetheless, be known that a judge can interpret the law when there is doubt or absurdity in applying the law as it is.

This ingredient of the principle of regality is regulated under article 2(2) and (3). The Criminal Code prohibits not only the creation of offences by analogy, but also the creation of penalties by analogy. It stipulates that, firstly, an act or omission not regarded as a crime should not be treated as a crime. Secondly, different penalty than the ones provided by the law cannot be imposed. For example, article 621 of the Code criminalizes the compulsion of a man by a woman to submit to sexual intercourse. This means, the provision regulates raping a man. So, the idea is courts cannot impose the penalty provided for raping a woman (article 620) merely becauseunder both provisions the conduct regulated is the same (rape) but the one provided for raping a man (article 621). If article 620 is applied, the judge is said to have created penalty by analogy.

1.4.5 Interpretation of criminal law

Normally, criminal law is drafted in such a way that it is possible for a common man to understand what is permitted and what is prohibited becausethere is a possibility of going to jail if mistake is made.[14] Despite this, there are instances where the language of the law is not clear and necessitates interpretation by courts. So, the fact that courts are prohibited from creating offences or penalties by analogy does not mean that they are not free to interpret the law. For instance, under article 2(4), this power of courts is explicitly recopized. The provision states that in case doubt exists courts are free to interpret the law by relying on the rules of interpretation. From the different rules of interpretation, article 2(4) mentions only one; that is, interpretation in accordance with the legislative intent. This is probably so becauseit is the intention of the legislature that is a law. At any rate, in case this rule fails to solve the problem of interpretation, other rules of interpretation should be used.

But there is one rule of interpretation which is unique to criminal law and worth discussing here; that is, the rule of *strict construction* of criminal law. Criminal law, unlike other laws, should be interpreted strictly. This does not, however, mean that judges should narrow down the scope of criminal law through interpretation. What it means is that if the meaning of a given criminal provision is eqiiivnral and the equivocation cannot be avoided by using the other rules of interpretation, that provision should be interpreted in favour of the suspect or

[14] Strauss, Peter L, "*Interpreting the Ethiopian Penal Code,* Journal of Ethiopian Law, V 5, NoZ, l%S.p.378

-to a criminal.[15] As such, the rule is a rule of last resort Let's see one of the provisions of the 0?de as an example.

Article 621: Compelling a man to sexual intercourse:

A woman who compels a man to sexual intercourse with herself is punishable with

rigorous imprisonment not exceeding five years. What would happen if a woman compels her husband to submit to sexual intercourse? The article does not say *out of wedlock* Hence, it is possible to argue that *maritalrape* on a man is recognized. On the other hand, it can be argued that since the law-maker has not criminalized compelling one's wife, the same intention was (and has to be) held in relation to article 621 since women have the right to get equal protection with men as stipulated under article 4 of the Criminal Code and also article 25 of the FDRE Constitution.[16] So, in cases where difficulties like this arise, the principle of strict construction of criminal law commands the interpretation of the law in favor of the suspect This means, article 621 should be interpreted to exclude marital rape for a woman compelling her husband to submit to sexual intercourse.

It should be borne in mind that if the difficulty created can be resolved by making the Amharic version prevail over the English version, the rule of strict construction should not apply. Because, in our legal system, in particular in relation to federal laws, the Amharic version is clearly stipulated to trump the English version in case disparity exists between them[17] and as such the prevalence of the Amharic version over the English version can be taken as another rule of interpretation unique to Ethiopia. For example, article 585(1) of the English version of the Code provides that the crime of illegal restraint may entail *three years* imprisonment while the Amharic version says the penalty for this crime cannot exceed *three months.* So, the disparity between the two versions is crystal clear. As a result one may wonder which version to apply. But the problem can be resolved by letting the Amharic version prevail. Hence, the rule of strict construction should not be applied even though its application under such circumstance may produce the same effect with making the Amharic version prevail.

1.4.6 The principle of prohibition of double jeopardy

In the field of criminal law, double jeopardy is strictly proscribed. That is to say, if a person is tried and punished for his criminal conduct he will not be subjected to subsequent trial and

[ls] Wayne R. La Fave and Austin W Scott, p. 72.

[16] Tlie draft of the Code alto shows neither of the two possibilities.

[17] See artide 2(4), Federal Negarit Gazeta Establishment, Proclamation No. 3/1995.

punishment for the same criminal conduct So, there are two prohibitions in this principle: prohibition of double trial and prohibition of double punishment The rationale behind such prohibitions is the fact that any criminal, upon serving his sentence, becomes an innocent person. Thus, subsequent trial and punishment for the same criminal conduct amount to the trial and punishment of an innocent person.

This principle is recognized under article 2(5) of the Code. Accordingly, double trial or punishment, regardless of the accused person's conviction or acquittal, for the same criminal conduct is prohibited. Under the 1957 Penal Code, it was only double punishment that was prohibited.[18] This means, double trial was possible. The Criminal Code, however, prohiH' double trial as well. Article 23 of the FDRE Constitution also prohibits both double trial and! punishment Thus, the Code is only in line with the Constitution, and it is not introducing something new into our criminal system.

It should be known that article 2(5) of the Code has an exception. Becausearticle 16 of the Code stipulates that a person who is subject to Ethiopia's principal jurisdiction and is tried and sentenced in a foreign country may be tried and sentenced *again m* the same charge if he is found in Ethiopia or extradited to it This means, his acquittal or conviction in a foreign country is irrelevant for new trial or sentence in Ethiopia. But the punishment served abroad will be taken into account to fix the extent of sentence to be served in Ethiopia. If the sentence served abroad is greater than what he would have served had he been tried and convicted in Ethiopia, he will be released. If, however, lesser sentence was served abroad, he would be made to serve the balance. What this, in effect means is that the double trial in Ethiopia is meant only to check whether or not the sentence imposed by a foreign court is adequate to achieve the purpose of our criminal law. Thence, in strict sense, there will be no double punishment resulting from the double trial but possibly the extension of the already imposed penalty.

However, if the person tried and punished abroad is a foreigner, be cannot be tried and sentenced to punishment *again* if he is found in Ethiopia. His conviction or acquittal will be taken into account Besides, pardon, amnesty and period of limitation under the foreign law should be considered in his favour.[19] So, we have a sort of exception to an exception.

[18] Article 2(3), 1957 Penal Code.

" Article 12(2), Criminal Code.

One may wonder why the Code tends to give more privilege to a foreigner than to a Ethiopian. By critically reading article 16(1), one may argue than foreigners are not subjei to Ethiopian principal jurisdiction (becausearticle 12 is not mentioned) and that is therefor why the Code relieves them from double trial and punishment in Ethiopia once they are trie and punished or acquitted abroad. However, this argument fails to take us too far because article 11 makes any person who commits a crime in Ethiopia subject to Ethiopia's principal jurisdiction. Thus, there must exist another reason for not trying such person again ii Ethiopia. And such other argument can spring from the fact of delegation. Those persons whi are envisaged under article 12 cannot be tried in Ethiopia because they are foreigners whi have taken refuge in foreign country and whose extradition cannot be obtained. In this case Ethiopian authorities can request the authorities of the countries in which they have taker refuge to try them thereby *delegating their powers*. Hence, if these persons are tried ir accordance with the request or other measures are taken by the authorities requested ir relation these persons, Ethiopian authorities must accept the consequence of their trial or the measures taken by the authorities requested as the logical consequences of the act ol delegation. Therefore, for legal purposes, these persons are regarded as though they were tried in Ethiopia.

1.5 The principle of non-retroactivity of criminal law

Society undergoes different changes constantly. To cope up with these changes, it needs, among others things, to change its legal regimes. Becauseobsolete laws may not solve the various problems these changes would cause. But, sometimes, the change of a law may by itself pose different legal problems. One of such problems pertains to the determination of the scope of a new criminal law. The principle of non-retroactivity of criminal law is, therefore, meant to answer the question that may arise in relation to the scope of application of a new criminal law. The principle states that any criminal law is prospective in nature. Accordingly, it cannot be applied retroactively; that is, it does not apply to acts that are committed or omitted before its coming into effect. This principle is corollary to the principle of legality; no law, no offence.

The principle of non-retroactivity of criminal law is one of the principles of criminal law the FDRE Constitution has recognized. Under article 22, the Constitution proscribes the application of criminal law retroactively. The Code also reiterates the same principle under article 5. Accordingly, ii a conduct is declared to be a crime by the Criminal Code while it was not criminalized by the preceding Penal Code and it was done before the Criminal Code

came into force, it will not be penalized.[20] For example, under the 1957 Penal Code, raping a man was not recognized as a crime. But under the Criminal Code this act is a crime.[21] So, if a woman raped a man before the coming into force of the Code, she will not be punished becauseher case will be seen in the light of the 1957 Penal Code, which did not penalize the act The same is true in relation to computer crimes committed before the coming into force of the Criminal Code.

Moreover, if a given conduct is declared to be a crime under both the Criminal Code and the 1957 Penal Code and it was committed when the latter was in force, the 1957 Penal Code should apply. For example, under both Codes, raping a woman is a crime. Hence, as per article 5(1), all crimes of rape committed under the 1957 Penal Code should be tried thereunder.

Interestingly, however, the principle of non-retroactivity of criminal law has got many exceptions. That is to say, there are circumstances under which criminal law may be applied retrospectively. Some of the important exceptions are the following.

1. If an act was a crime under the 1957 Penal Code, while it is not declared to be so under the Code, it will not be penalized.[22] If, however, sentence is passed and it is being served with respect to this crime, the execution of the penalty will be discontinued.[23] For example, under the 1957 Penal Code, termination of pregnancy on account of rape or incest was a crime. The existence of rape or incest would only mitigate the penalty to be imposed on the accused.[24] According to the Criminal Code, however, termination of pregnancy by a recognized medical institution within the period permitted by the profession is permitted where the woman is raped or subjected to incest So, if a doctor of any recognized medical institution terminated pregnancy within the time limit permitted by the profession before the coming into force of the Criminal Code, he would not be punished. If he is being tried, the trial should be discontinued. If he is in a prison, he should be released.
2. The second exception comes into picture where the criminal act performed under the Penal Code of 1957 is declared to be a crime under the Criminal Code, too. In this case, the Criminal Code should apply only if it provides for lesser penalty.[25] However, the

[20] Article 5(2), Criminal Code.
[21] Article 621, Criminal Code.
[22] Article 5(3), Criminal Code.
[23] Article 9(1), Criminal Code.
[24] Articles 534 and 533, Criminal Code.
[25] Article 6, Criminal Code.

Criminal Code will not be applied if it provides for a severe penalty. For example, a rapist under the 1957 Penal Code should be tried thereunder. Becausethe 1957 Penal Code provides for a relatively lenient penalty which would, under no circumstance, exceed fifteen years imprisonment Under the Criminal Code, on the other hand, there is a possibility of sentencing a rapist to life imprisonment[26] So, since the application of the Criminal Code will not benefit the rapist, it should not apply to his case.

In short, the principle of non-retroactivity of criminal law may be derogated from if the application of the new criminal law either at the time of *charging, trial,* or *executing sentence* is favorable to the offender. This exception is founded on the public policy that any person should get benefit from the betterment made by the law-maker.[27]

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

It is important to know that the application of the principle of non-retroactivity of criminal law presupposes the consummation of a crime under a single law. Accordingly, it cannot be an answer to the problem at hand; nor the Criminal Code gives us any solution to the problem. Hence, it is imperative to look at the different scholarly positions in relation to the issue. There are arguments in favour of two possible answers to the issue. The first solution is that the new law should apply since the commission of the crime is consummated under this law although the intention to commit the crime was conceived and the act has

[26] Article 620(3), Criminal Code.

[27] Philippe Graven, p. 19.

commenced under the old law. The second solution, on the other hand, makes both laws applicable. It says the crime has to be tried partly under the old law and partly under the new law. The justification for this solution is the fact that the offender, by his conduct, violated both laws.[28]

A right solution can, however, be given only by first answering another question: When is the crime said to have been committed? If it is possible to answer this question, it will be very easy to solve the problem. But the question is not that easy. For that matter, no one can give a flawless answer to it except the law-maker. Even the law-maker answers the question not becauseit is capable of knowing the exact time the crime is said to have been committed but by making a policy decision. So, what should be done until such policy decision is made?

In the field of criminal law, there are different rules of fair play. One of these rules is the rule that stipulates *'doubts shall benefit criminals'-,* that is, any inescapable doubt in the application of criminal law should not work against the suspect; rather, it should benefit him. Stated differently, any balance in the application of criminal law should be struck in favour of the criminal. For example, in one case[29] two persons wanted to rob another. In the meantime, however, one of them declined to pursue the criminal design while the other proceeded and committed the intended crime. But it was not possible to identify who declined and who continued and committed the crime. As a result, both persons were acquitted. Similarly, in another case[30] five men were charged for the crime of murder. The crime was committed by one of them. The other four persons did not commit it But it was not possible to clearly and positively ascertain the exact criminal. As a result, the court entertaining the case ruled out that all of them should be discharged. Now, the idea is, it is not uncommon in the field of criminal law that doubts benefit suspects (criminals). Therefore, in as long as the crime committed is only one and it is not possible to pinpoint the exact time the crime is said to have been committed, the crime should be deemed to have been committed under the law that is more favourable to the criminal and he should be tried thereunder. This is, by the way, different from applying the exception to the principle of non-retroactivity of criminal law. It shows that the balance is struck in favour of the criminal. The application of the principle of non-retroactivity of criminal law and its exceptions presupposes that the time of the commission of a crime is impeccably known.

[28] See Philippe Graven, pp. 21-22.

[29] Steven lowenstein, *Materials no the Study of the Pens! Law of Ethiopia,* Haile Sellassie I University, Addis Ababa, 1967. pp. 255-6.

[30] Id., p. 256.

interestingly, the problem raised above becomes a real problem only if both laws accord different treatments to the crime at hand. If the crime is given the same status under both laws, the problem will have no practical danger since the application of any of the two laws will produce the same effect For example, if the commission of a crime of illegal restraint was started under the 1957 Penal Code and consummated under the Criminal Code, the problem will arise since the two laws provide for different penalties.[31] If, on the other hand, the crime committed is adultery, the problem will exist but it will be of no practical significance since both laws provide for the same treatment[32]

Another interesting point worth considering is whether the principle of non-retroactivity of criminal law applies to the law of criminal procedure as well or only limited to substantive criminal law alone. It is possible to argue that since the principle requires *criminallawin* be non-retroactive and *criminal law* consists, in its wider sense, of substantive criminal law and procedural criminal law, both laws are non-retroactive. Hence, they can apply retrospectively only if their application benefits criminals. Is this the position in our criminal system?

First of all, the FDRE Constitution which proscribes the retroactive application of criminal law covers that part of criminal law that specifies conducts amounting to crimes and providing penalties therefor. Thus, since it is only substantive criminal law that criminalizes conducts and also attaches penalties thereto, the prohibition of the retroactive application of procedural criminal law may not have constitutional basis in Ethiopia. Besides, the Criminal Code prescribes the application of some rules to cases which are not yet finally decided regardless of the effect they may have on the fate of criminals. For example, pursuant to article 8, the Code states that the period of limitation provided under the 1957 Penal Code does not apply notwithstanding that the crime at issue was committed under that Code. So, since the law of period of limitation is more of procedural than substantive, it seems that our law-makers did not have the intention to make the principle of non-retroactivity of criminal law apply to criminal procedural law. Nevertheless, since by their very nature procedural laws are meant to facilitate the application of substantive criminal laws, they cannot by working retroactively, deny criminals the benefits they are entitled to in accordance with the applicable substantive criminal law.

[31] Articles 557 at 1957 Penal Code **and** Article 585 the Criminal Code.

[32] Article 618,1957 Penal Code, Article 652, Criminal Code.

1.6 The scope of the Criminal Code[33]

The determination of the *scope of criminal law is* perhaps one of the most controversial issues in the making and study of criminal law. This is particularly so becausevery state has its own conception of punishable behaviour, its own definitions of offences, its own principles for determining questions of self-defence, necessity, negligence, and complicity. That is why criminal law is known as a state law, parochial law. If there was much unity among the criminal laws of countries, there is none now. The bodies of criminal law we have are as many as the number of distinct flags flying over sovereign states.[34]

However, in any criminal system, it is possible to find one or the blend of more than one theory in favour of how the scope of criminal law was/is determined. In the following few pages some of these theories, namely, Legal Moralism, Liberal theory, Economic Theory and the Feminist Theory will be considered as examples of the various theories competing for the determination of the scope of criminal law.

A. Legal Moralism: According to this theory, criminal law should preserve moral principles. Thus, the determination of the scope of criminal law should be based on what moral principles need to be enforced by criminal law. In these regard, the arguments advanced by Sir Patrick Devlin, who is of the opinion that criminal law has to protect and preserve moral principles and nothing else,[35] is extremely fascinating. The gist of Devlin's argument is that the scope of criminal law should be determined in the light of what makes a society a society. According to him, the equation is very simple: *society equals politics plus morality.* If one is missing, he argues, that society will not subsist. Thus, criminal law should be used to enforce morality in the same way it is being used to preserve an established government. Here, a point of caution is necessary. Devlin does not support the enforcement of all moral principles by using criminal law. He rather argues for the enforcement of moral principles without which society cannot exist and he uses a reasonable-man standard (a man on *Clapham's omnibus)*to know what such moral principles are. In any case, if Devlin's advice is accepted, the type of criminal law that one is going to have will have the broadest scope becausethere will be no limit to the area criminal law can get in and seek behaving in a given manner. For example, criminal law should prohibit acts like homosexuality and prostitution even if they are performed in private.

[33] For the discussion in this part, see generally Smith and Hogan, *criminal Law: cases and materials,* ^ed, Butterworths, London, Edinburgh.Dublin.I999, p. 70-79, and Steven Lowenstein, pp. 43-45.

[34] George P. Fletcher, *Basic Concepts of CriminalLaw,* 1998, New York, Oxford University Press, pp. 3-4.

[35] Steven Lowenstein, pp. 43-45.

B. Liberal Theory: On the other extreme, there is John Stuart Mill, for example, who advances a liberal view. Mill argues that the only reason to exercise power over a person is to prevent harm to others.[36] This means, there is no reason to criminalize a given conduct unless it is believed to have harmful effect on others. According to this formulation, the scope of criminal law should be narrow becauseindividuals will be left with too much latitude to make their own free choices without any fear of prosecution.

Another position which is somehow between the two extremes, yet still remains part of the liberal theory, is reflected in the report of the 1957 Wolfenden Committee on Homosexual Offences and Prostitution. According to the Committee's report, the scope of criminal law should be determined in light of the functions of criminal law and the functions of criminal law are *to preserve public order and decency, to protect citizens from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable becausethey are young, weak in body or mind, inexperienced, or in state of special physical, official or economic dependence?*[1] Anything which is not inimical to these functions of criminal law should not be criminalized. Thus, there should exist an area which is immune from interference by criminal law so as to enable individuals to make their own free choices without any fear of prosecution.

C. Economic Theory: According to this theory, what needs to be criminalized is any conduct which makes the *economy inefficient w a conduct which violates market rules.* Thus, two types of acts can be identified here: *acquisitive acts* and *acts of passion.* Acquisitive acts are acts performed to acquire something by bypassing market rules. For example, acts of theft and unfair competition can form part of the domain of acquisitive acts. So, whenever they are performed, the theory argues, they should be punished and the crime they entail is known as *acquisitive crimes.* On the other hand, acts of passion, which entail *crimes of passion,* are not performed to obtain anything but to satisfy our desires such as by killing our enemies. Such acts make the economy inefficient not directly but indirectly becauseif they are not punished people will spend more on safety measures. This reduces saving and that is how acts of passion are capable of affecting the economy. Therefore, the scope of criminal law can be wider or narrower based on how many of these acts need to he criminalized.

D. Feminist Theory: This theory does not seem to provide for its own criteria to determine the scope of criminal law. Rather, it emphasizes on the need to consider acts

[36] Id., **p.** 46.

[37] Id., **p.** 41.

affecting the interests of women as criminal acts becausepast criminal laws were not/less gender sensitive. As a result, acts like wife beating, marital rape and female circumcision need to be criminalized.

E. Ethiopian Criminal Law: Coming to Ethiopia, if one considers the scope of the Criminal Code in the light of the first two theories, he will arrive at the conclusion that it has a modest scope: it is not too wide becausecertain public immoralities such as suicide and prostitution are not criminalized; nor is it too narrow since it criminalizes other public 'immoralities' like homosexuality (Article 6291f), incest (Article 654), and adultery (Article 652). So, the Code adopts neither of the two theories in their totality but it stands somewhere in between the two theories. Further, it is possible to find elements of the last two theories in the Code becauseit criminalizes some conducts whose criminalization is advocated by both of them.

1.7 Distinction between crimes and civil wrongs[38]

The criminal law and the civil law have much in common. For example, both laws aim to shape the conducts of people along lines which are beneficial to society by preventing them from doing what is bad for the society or by compelling them to do what is good for the society. Moreover, both laws use sanctions to achieve their objectives. Becauseof such similarities, it is argued with force that the only real basis for distinction between crimes (the results of violating criminal law) and civil wrongs (the results of violating civil law) lies in the moral condemnation which the community visits upon crimes but not (at least so powerfully) upon civil wrongs. In other words, crimes are those wrongs which attract high moral condemnation than civil wrongs.[39]

It is also argued that crimes are public wrongs while civil wrongs are private or individual wrongs. In other words, crimes are the violations of the rights of and duties to the public while civil wrongs are the violations of the rights of and duties to private individuals. For instance, murder is a crime becauseit is the violation of the right of the public to maintain one of its members; or it is a violation of a duty owed to the public as the killer has the duty not to deprive the society of its member. In this case, the violation of private right; that is, the right to life, is said to be swallowed up by the public wrong. Further difference between crime and civil wrong lies in the consequences they entail. Crimes entail punishment and criminal

[38] The discussion in this part see generally Wayne R. La Fave and Austin W. Scott, pp. 10-14, Steven Lowenstein, pp. 32- 40.

[39] At this point in time, one may wonder whether crimes are always more morally blameworthy than civil wrongs.

punishment, with emphasis on incarceration, is more drastic than civil sanctions such as payment of compensation. Further, crimes are the business of the government while civil wrongs are not As a result, criminal cases are prosecuted by public a prosecutor while actions for civil wrongs are brought before courts by the victims or their legal representatives.[40]

Interestingly, criminal law has striking similarity with the law of torts than with any other civil laws. All the same, the two laws are different as they deal with different subject-matters. Criminal law aims to protect the society by punishing conducts resulting in harms or which are likely to result in harm if allowed to proceed whereas the law of tort aims at compensating the victim who has suffered loss from someone's wrongful act In addition, with crimes there is emphasis on bad mind, on immorality, while with tort emphasis is more on the 'adjustment of conflicting interests of individuals to achieve a desirable social result' with morality taking on less importance. Further, crimes do not require the existence of actual damage (but threat to the public) while tort does although tort action can exist in relation to moral damage and future (actual) damage.[41] For example, if someone shoots at a sleeping man and misses him, there will be no damage (material or moral) that will give rise to tort action. However, the act of shooting is sufficient for a crime to exist becausethe revelation of the shooters unequivocal bad intention, not damage, suffices for crimes to exist

There are also differences between crimes and civil wrongs in general and torts in particular in the fields of defences and responsibilities. For instance, consent of the victim is not, in principle, a defence against criminal liabilities where as it is a defence against civil wrongs (torts). This means, a person cannot, as a rule, authorize the commission of a crime while he can do so in relation to a civil wrong. Likewise, infants and insane person are not responsible for their criminal acts while they are for their civil wrongs since civil law (the law of tort in particular) is concerned about the victim than about the victimizer.

It is also important to note that civil wrongs can arise from the violation of both civil laws and criminal law whereas the violation of civil law cannot give rise to crimes. For example, killing a person is, in principle, a violation of criminal law and such act can be a crime and a civil

[40] Nevertheless, the existence of certain crime in relation to which private prosecution is allowed makes the use this parameter to distinguish crimes from civil wrongs blurred. It is also indicative of the fact that the distinction between crimes and civil wrongs is not clear and watertight

[41] It is argued that tort action based on *trespass* does not require the existence of damage. This makes the distinction between crimes and torts apparent.

wrong. As a result, the family of the deceased can bring civil action against a killer for the loss they have sustained while the criminal aspect will be taken care of by the state. But it must not be forgotten that the commission of certain crimes will not entail civil wrongs. For instance, if the crime committed is against the state or its essential interests such as treason and forgery, there will not be civil wrong.

1.8 Basic premises of criminal law

So far, the purposes, characteristics, scope of criminal law and the distinction between criminal law (crimes) and civil law (civil wrongs) have been discussed. The next point worth discussing is the application of criminal law itself. Criminal law does not apply in abstract. It applies only when there is a crime. And for the existence of a crime, there are certain conditions precedent that need to exisL These conditions, as expressly and impliedly envisaged under the Criminal Code, are:[42]

1. the legal element;
2. the material element;
3. the moral element;
4. concurrence between the material and the moral elements; and
5. the causal element.

Although these conditions are important, it does not mean that their cumulative existence is always required for the application of criminal law. As it will be seen later on, in the absence of one of them, like the causal element, criminal law may still apply. Hence, they are not necessarily cumulative requirements for crimes to exist

1.8.1 The legal element

Under article 23(2), the Criminal Code stipulates that the existence of the legal ingredient is necessary for the completion of the commission of a crime. This means, if there is no criminal law that is violated by a given conduct, there will be no crime. So, by providing for the legal element, article 23(2) is referring to article 2; that is, the principle of legality-no law, no offence- which was already discussed.

1.8.2 The material element *(actus* reus)

The next requirement recognized under article 23(2) for the existence of a crime is the material elemenL It refers to a conduct which isjrahibitedLand made punishable-by law. The existence of bad thought to violate criminal law by itself is not sufficient to punish ajerson. The law requires the manifestation of this thought through some outwardly physical conduct

[42] Articles 23,24,57-59, Criminal Code.

which is the material element of a crime. At this juncture, it should be noted that the conduct required under article 23(2) is a voluntary conduct. The concept material element does not include involuntary human conducts since these conducts cannot be discouraged or stimulated,[43] which is the purpose of criminal law. Hence, criminal law does not deal with involuntary human conducts and the material element that is stated, as a guilty conduct, under article 23(2) is a voluntary human conduct

The voluntary conduct envisaged under article 23(2) may take two forms; commission and omission.[44] Commission refers to a conduct which is done contrary to law while omission refers to fadure to do what is ordered by law under the pain of penalty. This means, a person can commit a crime either by positive conduct; that is, by doing, or by negative conduct; that is, by abstaining. For instance, if a person takes other's property contrary to article 665, the material element will be commission becausehe has done what he is prohibited from doing. If, however, he intentionally refrains from giving assistance to a person who is in grave and imminent peril, when he could have given him the assistance without any problem to himself or others, contrary to article 575, the material element will be omission becausehe has failed to do what he is required to do. For instance, in one case[45], a woman who let her husband die while she could have saved him without any trouble to herself was convicted for omitting to help him.

One may feel that a person who abstains from doing anything should not be punished. But the law is interested in punishing such person becausehis intentional failure to do what he is required to do under the pain of penalty is as good as doing what he is prohibited from doing. For example, in the preceding case, the woman's abstention is as good as her action, like shooting, to kill her husband. Therefore, punishing omission can serve the purpose of criminal law equally as punishing commission can. All the same, most crimes are crimes of commission.[46] Becausein most cases, individuals do what they are prohibited from doing, and also the law does not, under many circumstances, impose the duty to act[47] since such duty affects individuals' liberty or it has the effect of enslaving one to another.

[43] Wayne R. La Fave and Austin W. Scott, pp. 179-180.
[44] Article 23(1), Criminal Code.
[45] Steven Lowenstein, pp. 82-83.
[46] Wayne R. La Fave and Austin W. Scott, p.183.
[47] Ibid.

Crimes resulting from omission are generally classified into two: crime of *commission by omission* and crime of *pure omission*.[48] Crimes of commission by omission are those crimes which are, under the circumstance, committed by abstinence but which can also be committed by doing. For example, in the previous case, the crime the woman committed is the crime of commission by omission since the crime of homicide can be committed through positive human conduct although the woman produced it through her inaction. These types of crimes are envisaged under different provisions of the Criminal Code and they include crimes of Failure to Lend Aid to Another (Article 575), Maltreatment of Minors (Article 576), Failure to Maintain (Article 658), and Failure to Bring-up (Article 659).

On the other hand, the crimes of pure omission are those crimes which cannot be committed by doing. These crimes result only from failure to act. Any positive behaviour in relation to them will amount to obeying the law. For example, Failure to Report (Article 443), Failure to Pay Tax (Article 349), Failure to Register the Birth of a Child (Article 656), and Unjustified Refusal to Render Military Service (Article 284) are crimes of pure omission becauseif the concerned persons do what they are expected to do, they will not be criminals. It is only failure to do what is required that will make them criminals.

1.8.2.1. Requirements to criminalize omission

Normally, criminal laws make the existence of the crimes of omission subject to the fulfillment of different requirements. These requirements include the existence of duty to act, the existence of knowledge as to the existence of the duty and the situation giving rise to its performance, physical possibility to perform the duty, and absence of danger to oneself or third party in the performance of the duty.[49] In Ethiopia, article 23 does not provide for the requirements of crimes of omission. All the same, the different special part provisions defining crimes of omission recognize the requirements that should be satisfied whenever omission qualifies as a crime. For instance, pursuant to article 575, omission becomes a crime only if the following conditions are met.

A. Intention: A person must know that he has a duty to act and the duty is due to be discharged. Of course, knowledge in relation to the existence of the duty to act is presumed since article 575 imposes the duty to help on every person, and ignorance of law is no defence.[50] But knowledge in relation to the existence of the situation giving rise to the

Philippe Graven, pp. 58-59.

[49] Wayne R. la Fave and Austin W. Scott, pp. 183-190.

[50] Article 81, Criminal Code.

performance of the duty must be proved. If a person does not know that somebody is drowning in a sea, he will not violate article 575 becausethe element of intention will be missing (due to ignorance of fact) since what is not known cannot be intended. As far as the type of intention is concerned, it can be either direct or indirect.

B. Imminence and gravity: The assistance sought must be to avert imminent and grave peril. If the danger to be averted is not imminent and grave, the crime of omission will not be committed pursuant to article 575. Similarly, even if the danger may be grave, the crime will be committed only if the danger is imminent Hence, the omission of giving assistance for the aversion of grave but remote danger will not set the application of article 575 into motion. Likewise, imminence by itself does not suffice. The imminent danger should be grave or serious, too. Therefore, the two requirements are cumulative. Interestingly, article 575 imposes the duty to help only in relation to dangers revolving around life, person, or health. Thus, no one will violate article 575 by abstaining from giving assistance to avert imminent and grave perils revolving around other interests such as property.

C. Physical possibility: Under article 575, a person is required to help others only if he can give the assistance. If rendering the assistance required is physically impossible for him, he will not violate the article even if he has the necessary intention. But the article requires the assistance to be given either directly or indirectly. Hence, a person who cannot render the assistance by himself but capable of informing others to lend the assistance will violate article 575 if he refrains from giving this indirect assistance. For example, assume that A, who cannot walk, sees a child drowning in a shallow pool. Although he cannot help the child, he is capable of calling the mother of the child. Now, if he deliberately keeps quiet and the child dies, he will violate article 575.

D. Absence of risk: The other element of the crime of omission as defined under article 575 is the absence of risk to oneself or third party while lending the assistance required. If there is a possibility to expose the interest of oneself or third party to danger while rendering assistance, refraining from giving the assistance will not constitute a crime under article 575. This means, a person is not required to protect other's interest at the expense of his or third party's interest

But article 575 is not clear whether a person can refuse giving assistance to protect any interest belonging to him or to a third party or only to protect his or third party's life, person or health. For example, is a wealthy man obliged, under article 575, to give sufficient money

to a critically sick person to go to hospital? If he refuses to give money, and as a result, the person dies, will he be a criminal pursuant to article 575?

Arguably, the closer reading of article 575 suggests that refusal is justified only if it is meant to protect one's or third party's life, person, or health. In particular, the Amharic version which reads H/. A- *O>)£>9"* MfW-? *aW)'-* (to himself or third party) instead of fl^A- llAiVB" (DTTf (to his or third party's right) seems to have only these interests in mind. Besides, it can also be arped that since other interests of the person concerned are not as important as the interest of the victim; that is, life or person or health, society will be better off if the duty to act exists.

On the contrary, it can be argued that the law will be self-defeating if the obligation it imposes is stretched too far enough. It is very less likely that individuals give their money, for example, to protect the lives, persons, or health of others. Moreover, since criminal law is interpreted strictly in case ambiguity exists, article 575 should be interpreted so as to allow individuals to refuse lending assistance if any of their or third party's interest is at stake. Hence, article 575 will not be violated if a person refuses to lend assistance to protect his or third party's property right

Article 575 of the Criminal Code imposes the duty to act on everybody. But there are still some provisions which impose the duty to act only on people with certain qualifications. For example, article 658 (Failure to Maintain), article 659 (Failure to Bring-up), and article 576 (Maltreatment of Minors) apply only to specific persons. No one will commit a crime of omission against article 576 unless he is a custodian or is in charge of a minor. Similarly, no one will commit a crime of omission against article 658 unless he has a duty to pay maintenance in accordance with the relevant family, law. Further, no one will commit a crime of omission against article 659 unless he is a parent or a guardian or a tutor of a minor. Therefore, it can be, for the sake of convenience, said that the duty stipulated under article 575 is *general* since it applies to all and the duties under the other provisions are *special* since they apply only to certain people. For example, assume Kiflu is the academic staff of Jimma University. He established a family in 1990 EC and he has ten years old son. He takes his son to Jimma Central Hotel to teach him swimming. His son is a fast learner and he has shown a promising progress in this regard. Last Sunday, while Kiflu was sitting by the swimming pool, he saw his son talking to a boy of his age. This boy, pretty well known to Kiflu, cannot swim. In the course of their communication the two boys heard an exploding sound from behind and they instantly turned back to see what it was. Unfortunately, however, the feet of both of them slipped and they fell into the swimming pool for adults. They, then, started crying for help. Kiflu was the only sitting nearby and he

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hurriedly dived into the pool and saved his son although he could have first saved the other boy. By the time Kiflu wanted to save the other boy, it was too late; the boy was dead and his body was floating. Based on these facts, and in the light of the relevant provisions of the Criminal Code, first, argue against Kiflu's failure to help the other boy and, second, defend Kiflu's action of saving his son first. You may need to examine, among others things, whether article 575 of the Code gives the right to choose whom to help in case two or more persons are in the same situation.

1.8.2.2. Crime of status and crime of possession

Although article 23(2) makes the existence of omission or commission mandatory for the completion of the commission of crimes, there are instances where the two factors become dispensable. For example, there are crimes in which the material element required is neither omission nor commission. Assume our Criminal Code penalizes addiction to alcohol while it leaves the sell, purchase and use of alcohol unpunished. In this case, neither of the two material elements stipulated under article 23 is an element since no one is required to use or not to use alcohol. So, the law is simply punishing the status of a person. It is being addicted to alcohol that attracts the attention of the Code, not using alcohol. This type of crime is called crime of *status.*[51] For instance, the crime that is regulated under article 477 of the Criminal Code, that is, Dangerous Vagrancy, is a crime of status.

Moreover, sometimes individuals are punished merely becausethey have something under their possession. For example, no one is prohibited from carrying a knife. But if the possession of the knife raises a doubt that it may be used for the commission of a crime, the possessor can be punished. In this case, as well, the person is not prohibited from possessing a knife; nor is he ordered to carry it Hence, strictly speaking, there is neither commission nor omission. All the same, he will be punished. These types of crimes are called crimes of *possession.*[52] For example, the crime regulated under article 854 of the Criminal Code is a crime of possession. Therefore, the material element stipulated under article 23 has an exception. That means the completion of the commission of crimes requires the existence of either commission or omission only as a rule.

1.8.3 The moral element *(mens rea)*

The moral element of a crime, in short, refers to a reprehensible state of mind of a person at the time of violating the provision of criminal law. 'Virtually, all crimes require the proof of mental element of some sort. An act does not make a man guilty of a crime unless his mind

Stephen \ Njtlihiin; John L. Diamond, kit kinports, Thomas H. Morawetz, *Criminal Law: cases and materials.* The Wwhw I ompan>, Virginia, 1994, p. 91.

also be guilty.'[53] This means, the existence of a conduct which is contrary to criminal law alone does not suffice for a person to be criminally responsible and punished. The conduct must be attributable to some sort of bad thought or evil state of mind. This requirement of crimes is justified on the idea that a man should not be held criminally responsible and so liable to punishment unless he is morally blameworthy.[54] Obviously, a person will be morally blameworthy only if he has guilty mind at the time of contravening criminal law. Accordingly, since the full definition of every crime contains expressly or impliedly a proposition as to a state of mind, the requisite mental state should exist if any conduct contrary to criminal law should constitute a crime.

The Criminal Code, under article 23(2), provides for this moral element as one of the necessary conditions precedent for crimes to exist Thus, it is only when this element is fulfilled that the commission of a crime is said to be completed, and the author thereof will be punished.[55] But it should be understood that since the moral element refers to the state of mind of a person at the time of violating the provision of criminal law, it applies only when the law is violated by human beings since entities other than human beings lack moral element. Nonetheless, it is still possible for legal persons to violate criminal law. If the moral element is, therefore, a requirement for legal persons as well, criminal law will fail to produce its desired results in relation to such persons. So, it is necessary to recognize an exception to the requirement of the moral element of a crime. Under the 1957 Penal Code, no exception is expressly provided to this requirement although on very few occasions juridical persons were held criminally liable for certain crimes. However, the Criminal Code has made an express exception to the requirement of the moral element (Article 23(3)) and has also recognized relatively fair number of crimes that can be committed by juridical persons. (The criminal responsibility of juridical persons will be dealt with later on under a separate topic.)

Save for juridical persons, the requisite moral element should be present for a crime to exist. What type of moral element is, then, required for a crime to exist? In common law legal system, the mental state necessary for the existence of a crime takes three forms: Intention, Recklessness (indirect intention and advertent negligence), and Negligence, whereas in continental systems, it takes four forms: Direct Intention, Indirect Intention, Advertent

[53] Smith and Hogan, p. 3.

[54] Ian McLean, and Peter Morrish, *Harris's Criminal Law*, 22nd ed. London, Sweet and Maxwell,1973, p. 29.

[55] Article 23(4), Criminal Code.

Negligence, and Inadvertent Negligence.[56] The Ethiopian criminal system follows the continental system. It recognizes two broad classes of moral elements (Intention and Negligence) which are further classified into four (Direct Intention, Indirect Intention, Advertent Negligence, and Inadvertent Negligence) as regulated under articles 57-59. Accordingly, it is necessary that any of these moral elements exists if a crime is to exist and the author thereof is to be punished. So, prosecutors are expected to prove their existence since they cannot be presumed. This conclusion is further strengthened by the *presumption of innocence fa* FDRE Constitution makes under article 20(3). Corollary to this, if a person violates the criminal law by accident or due to *force majeure,* he will not be punished.[57] Becausethe violation is not reprehensible since he cannot help and punishing such person is less likely to serve the purposes of criminal law.

1.8.3.1 Criminal intention

Criminal intention is the upper degree and more reprehensible part of the moral element. This type of moral element exists when a person *knows what he is doing* and *the consequence thereof.W* a person knowingly performs an act contrary to criminal law becausehe desires the result thereof, the criminal intention is said to be *direct*l[58] Similarly, if a person knows what he is doing and he is also certain or nearly certain that his act will produce a result contrary to criminal law but proceeds with his own plans, his intention is said to be direct. This is so becausehis *knowledge of certainty or near certainty*is assimilated to his desire.[59] This part of direct intention is not recognized under the 1957 Penal Code. The Criminal Code also contains the same gap. It does not recognize knowledge of certainty or near certainty as part of direct intention.

Nevertheless, a person who knowingly lets the occurrence of a given result contrary to criminal law which he is sure or nearly sure about should be punished as though he desired the result This would not amount to creation of offence by analogy for logical reasons. First since such knowledge is assimilated to desire, we can interpret article 58(l)(a) of the Criminal Code to include it Second, to let such person go free would lead us to an absurd conclusion since the Code punishes a lesser degree of guilt[60] For example, if Ato A wants to kill Ato B, who is in a car, by using hand bomb and does so by throwing the bomb on the car,

[56] Steven Lowenstein, pp. 146-147,

[57] Article 57, Criminal Code.

[58] Article 58(l)(a), Criminal Code.

[59] Ronald Sklar, *"Desire,"Knowledge of Certainly,'andDolus Eventualis.*Journal of Ethiopian Law, V 8, No.2, p. 378.

'"Article 58(IXb), *Dolus eventualis,* which is a lesser degree of criminal guilt as compared to knowledge of certainty or near certainty is punishable.

he should be punished for intentionally damaging the car in addition to A's death. This is so because, Ato A lets the harm, which he knows will certainly happen, transpire even though he does not desire it Of course, it can be argued that he has at least indirectly desired the destruction of the car as he bows that without damaging the car, he cannot kill Ato B.

The other component of criminal intention is //nfc/intention. A person is said to commit a crime with indirect intention if he knows that his conduct will *probably* cause a punishable consequences but proceeds to act becausehe does not care.[61] This person does not desire the criminal consequence; nor is he certain or nearly certain that it will happen. But he knows that the result will *probably* (not certainly or nearly certainly) occur. Thus, he gambles; that is, *he is ready to accepts* result if it happens. Such persons are those who are pursuing something else which they believe is more important to them. For instance, if a person drives beyond the maximum speed limit and also foresees that he may kill another but keeps on driving at the same speed becausehe has an appointment for which he is almost late, he will be said to have an indirect intention in case he kills a pedestrian. Therefore, he is a person who sacrifices other's interest as an opportunity cost to promote his own interest

Sometimes, the determination of indirect intention may be very difficult, firstly, becauseit is difficult to prove mental state, and secondly, it has a lot to share with conscious negligence. All the same, the following factors can be used to establish ifiis type of mental state:[62]

A. If the end the actor is seeking is important to him than the harm he has foreseen, then it is more likely that he has accepted the result That is, if the price of the harm is lesser to him than the price of what he looks for, it is probable that he has accepted ike occurrence of the harm.
B. Any act or statement made by the actor before the occurrence of the harm can be used to ascertain his moral element For instance, if he responds to the advice of a friend to take care by saying '1 do not care, or other equivalent expressions," it is obvious that he is ready to accept any eventuality of his conduct[63]
C. The accused person's own admission can also be used. This is a least problematic means to use to know whether a person has *dolus eventualis* (indirect intention) mind or not For instance, he may inform the court that he was driving at an excessive speed becausehe did not want to lose what he was chasing. This, undoubtedly, shows his

[Sl] Article 58(1)(b), Criminal Code.

[62] Ronald Sklar, Journal of Ethiopian Law, V 8, No.2, pp. 398-399.

[0] It is likely that individuals sometimes use these types of expressions for a joke. Hence, it is not possible to say that this means is always reliable.

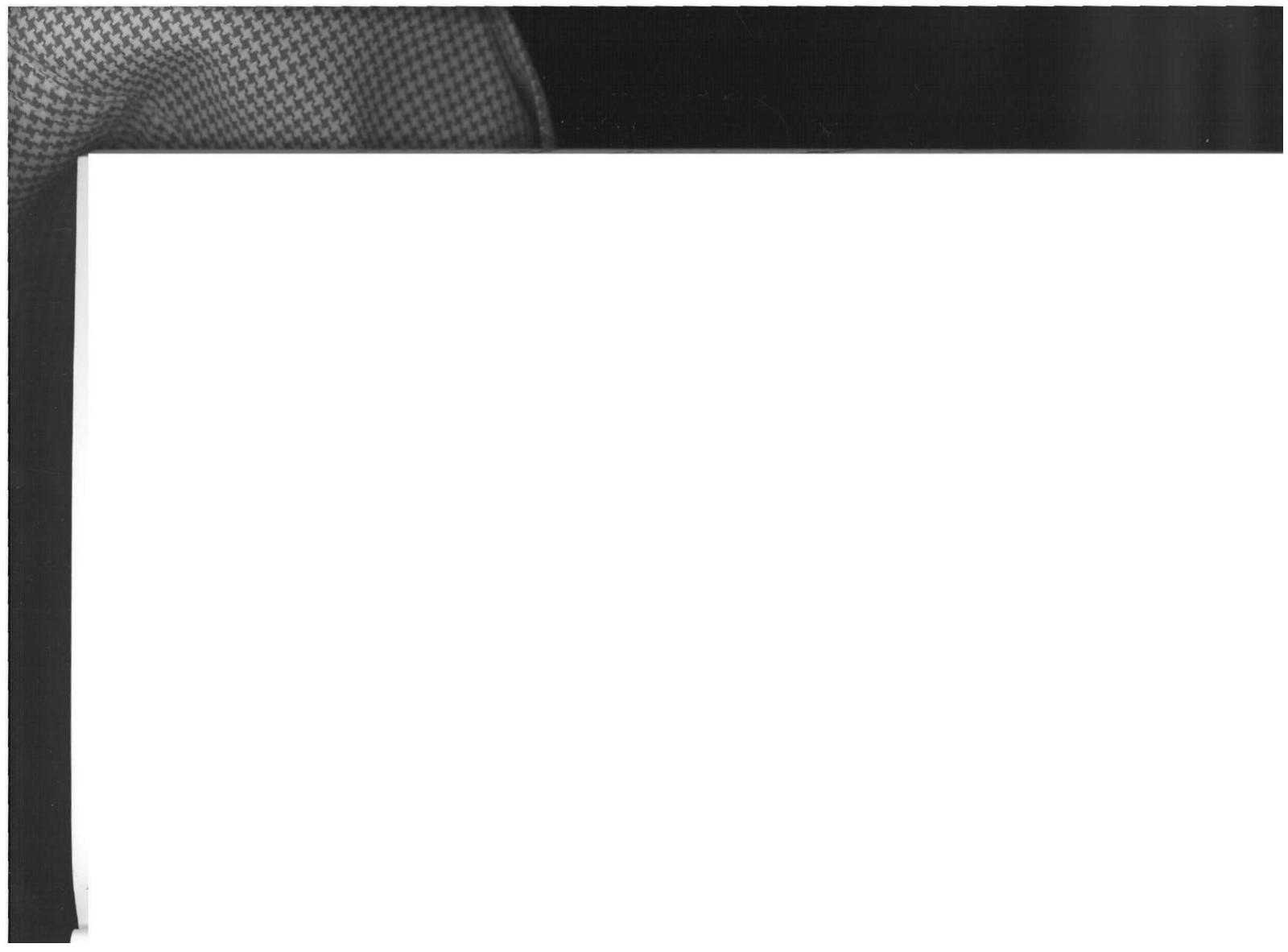
acceptance, assuming that the admission is sincere, of the harm as an opportunity cost of the thing he wanted to obtain. D. The probability of the harm's occurring is another method of ascertaining indirect intention. This is the most objective way of establishing *dolus eventualisstite* of mind. The point is, if there is, under the circumstances, less probability of going safe but the accused continues without taking any care, it will be taken as he accepted any eventualities of his move. For example, it is highly improbable that a person drives safely at the speed of 100km/hr or more in Merkato in the middle of a day. Hence, if a person drives at this speed and causes harm to a pedestrian, it is probable that has accepted the result

These are some of the guidelines which are deemed helpful in the determination of *dolus erentualis* state of mind. It is not necessary that we use them all at a time. If all of them can be used, that will be fine. But, at times, this will not be the case in which case reliance on only one of them may suffice.

As far as the legal effect of criminal intention (both direct and indirect) is concerned, a person who commits a crime intentionally will always, regardless of the type of intention, be punished unless the law expressly exempts him from liability. This is so becauseintention is the upper degree of criminal guilt Besides, it is a more blameworthy and deterrable state of mind. The exception to the rule that intention is always punishable works when a person has one of the criminal law defenses to invoke.[64] Therefore, if the special part of the Criminal Code does not mention the requisite moral element though it recognizes a given conduct as a crime, the requisite moral element will be intention. Becauseby virtue of article 58(2), this moral element is made an element of all special part provision unless the Code excludes it by mentioning the other type of moral element, that is, negligence.

Amazingly, despite the stipulation under article 58(2), there are instances where the special part provisions exclude indirect intention impliedly. For example, if some special part provisions use terms such as *in order to, with a view to, for the purpose of, with the object of, and with the intent,* the moral element that is necessary for the commission of the crimes they define is direct intention becausethese expressions show that criminals under these provisions need to have desire to violate the provisions. Hence, indirect intention is not their element For instance, article 665 defines theft as the abstraction of other's property *with the intents* get unlawful enrichment for oneself or third party. So, if a person takes third party's

[64] Articles 68-X1. Criminal Code



remained inadequate to avert the harm foreseen. That means, he did not reduce his speed enough.

One may wonder what the difference between conscious negligence and indirect intention is. Their difference lies in the mental stand that exists against the harm foreseen. A person who has an indirect intention accepts the result, and that is why he does not take any measure against the harm he foresees. A person who is consciously negligent, on the other hand, rejects the result. He also takes a measure against it although the harm occurs due to his miscalculation or contrary to his expectation. It is for this reason that ***dolus eventualis*** is considered morally more reprehensible than advertent negligence.[66]

As far as the determination of negligence is concerned, article 59 (1), the last paragraph, provides for the guidelines to be employed. Accordingly, it states that the lack of precautions which is reasonably expected of a person, under the circumstance, amounts to negligence. For this purpose, different factors such as the age, experience, education, occupation and rank of a person should be taken into account. Thus, article 59 adopts an objective/reasonable man standard. But this objective standard is qualified becausea reasonable man is to be selected from among individuals who are in the same boat with the suspect Therefore, strictly speaking, article 59 adopts an objective-subjective standard, not a pure objective standard. For example, if the actor is a farmer, the reasonable man to be used to check whether or not the farmer's conduct amounts to negligent conduct, should be selected from among farmers; that is, a reasonable farmer standard should be employed. If he is a doctor, the reasonable man standard must be a reasonable doctor. Hence, it is in the light of what reasonable persons of their kinds would do that individuals' negligence is to be determined. The ordinary reasonable man standard does not apply. By the way, adopting such standard is beneficial becauseit makes our expectations, in relation to the cares to be exercised, from different categories of people different The pure objective standard, however, obliges us to expect the same thing, for example, from a professor and an uneducated person. So, the objective-subjective standard will reduce the possibility of punishing some people unfairly while it, at the same time, denies some people the chance to evade liability unfairly.

With regard to its legal effect, article 59(2) stipulates that negligence can be liable to punishment only when the law expressly provides. Therefore, the silence of the special part provisions in relation to negligence means that the negligent doing of the conduct they

[66] Ronald Sklar, Journal of Ethiopian Law. V 8, No.2, p. 387.

regulate is not punishable. For example, article 665 of the Code does not mention negligence in relation to the act of negligently taking other's property without permission. Hence, there is no crime of theft by negligence. For example, a person who carelessly takes other's property without the permission of the rightful owner is not a thief.

One may wonder why negligence is not, as a rule, punishable. But the rationale behind such stand is the fact that negligence shows person's mistake.[67] Everybody commits a mistake. Therefore, we should not, in principle, be punished for our mistakes.[68] But, at times, the mistakes we commit are so gross that they cause grave consequences. In this case, punishment is proper to discourage such mistakes or to encourage taking precautions not to cause grave harm/danger.[69]

In short, no court should find a person guilty of an offence against criminal law unless he has a guilty mind (intention or negligence). The burden of showing this state of mind is that of the prosecution. Of course, the proof of guilty mind, unlike the proof of guilty act the existence of which can be proved by producing witnesses, is very difficult and onerous. Despite such difficulty, it has to be proved at all times unless its proof is legally and expressly excluded. In some countries, there are crimes whose commission will be completed even in the absence of the moral element These crimes are called crimes of absolute or strict liability.[70] So, in these systems, insofar as the necessary *actus reus* is fulfilled, the moral element will be immaterial or irrelevant For example, offences related to road traffic are among those crimes the commission of which will be completed even in the absence of the moral element[71] This holds water in Ethiopia, too. For example, if a stranger to a town uses a one-way road as a double-way road unknowingly and without being negligent, he will be liable for violating traffic regulations. Similarly, articles 525ff also seem to regulate the cr[00]* of strict liability.

[67] Wayne R. La Fave and Austin W. Scott, pp. 211-216.

[68] Compare this with article 80(1) where mistake or ignorance of fact an serve as a defence.

[69] This line of argument fails to be tenable in relation to petty offence where negligence is, as a rule, punishable (Article 740). In fact one may still argue that mistakes in relation to petty offences may be made always unless individuals are reminded not to commit them under the pain of penalty (although the penalties are lenient). So, negligence is punishable in principle becausethe law wants to remind people to take care not to commit criminally reprehensible mistakes. In relation to major crimes, however, for one thing the mistakes are not as such usual for almost everybody takes, to the extent possible, cares without there being any need to be cautioned by way of punishment. Besides, since punishments attached to major crimes are serious, it would not be fair to subject a mistaken person to them any time he errs.

[70] lan McLean, and Peter Morrish, pp. 40-1.

[71] Ibid.

1.8.3.3 Concurrent crimes

It is possible that persons, by their single or multiple conducts, commit two or more crimes. If such crimes are committed in the same transaction, they can be called concurrent crimes (if the transaction is not one the crimes can be consecutive, not concurrent). Normally, it seems that there are three cases where concurrent crimes can be committed. Under the Criminal Code, however, the tendency is to recognize four cases where concurrent crimes can be committed.

A. Material concurrence (Article 60(a)): This type of concurrence exists where there are *many criminal* ^producing *many different* or *similar* crimes. For instance, if a person breaks into somebody's house, steals some property, and also rapes a lady in the house, there will be three different crimes eventuating becauseof the three different acts: breaking into other's house without permission (crime of violating other's privacy); taking other's property without permission (theft); and outrage against sexual liberty (rape). Moreover, if a person fires three bullets to kill three persons who are standing and chatting, there will be three acts resulting in three similar crimes; homicide. In both cases the criminal can be charged for all the three crimes.

B. Notional concurrence (Article 60(b)): This type of concurrence comes into picture where there isonly one criminal act which, however, violates two or more criminal provisions. For example, if a married person publicly rapes his sister many legal provisions will be violated notwithstanding that there is only one actfsexual intercourse. Firstly, the fact that he is a married person renders him incapable of having legal sexual intercourse with others in as long as his marriage subsists. Hence, if he engages in sexual intercourse with others, he will commit the crime of adultery (Article 652). Secondly, the fact that he forces the lady to submit to the intercourse makes his act rape (Article 620). Thirdly, since the sexual intercourse is with a sister, it will be incest (Article 654). Lastly, since the act is committed publicly, it offends public morality; that is, outrages against public morals (Article 639). The offender can, in this case, be charged for offending all the provisions mentioned here. However, it should be noted that if one act repeatedly violates the same provision, it will not give rise to notional concurrence becausefor notional concurrence to exist, the provisions violated need to be different

C. Concurrence of victims (Article 60(c)): Under sub-article (c), article 60 regulates a kind of concurrence which is neither material nor notional nor imperfect So, for the sake of convenience, I will call such concurrence the *concurrence of victims as* the article deals with a situation where a single criminal act (heficernoliiaterial l:oncurrence) gfies

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contrary the interests of two or more persons. The act does not violate more than one legal provision; lience, there is no notional concurrence, too.

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For this type of concurrence to exist, the criminal fault has to be one. Besides, the harm has to be the same though it victimizes more than one person. For instance, if a person throws a bomb on a group of people standing somewhere because he wants to kill them all, his case will give rise to the concurrence of victims under article 60(c). The act is one, the criminal fault is one (intentional kill), and the harm is also the same (homicide) but the victims are many. In this case, it is possible to charge the offender for committing *crimes* of homicide against all the victims. This type of concurrence was not recognized under the 1957 Penal Code. As a result, such persons could only be charged for one crime of homicide. Currently, however, the Criminal Code has expressly created conducive environment to charge such persons for the harm against all the victims involved and by so doing rectified the problem of the previous Penal Code. gy^J

D. Imperfect concurrence Article **61**(1)): This is not the case of concurrence so to say. The crime is only one and the victim is ajso^^jpe. But it seems that there is concurrence merely because there is /are an act/acts which is/ are common elements) to two or more legal provisions. For instance, act A may be an element of three legal provisions: X, Y and Z. In this case ifojl^one of the three provisions can cover everything that has happened, the offender should be charged only under that provision, not under all .merely becausetheir common element has happened. For example, if a person takes other's property by force, two things will come into picture: abstracting other's property and use of violence. Out of the two things, the first belongs to both the crime of theft (Artickj$5) and the crime of robbery (Artick.670). But this does not mean that the offender will be charged under both provisions. For the purpose of charging, we have to see the provision that can fully cover everything that has happened. Since article 665 does not cover the *violence* element while article 670 covers both, the offender should be charged only under article 670, not under article 665. This is the message of article 61**(1).** If a persoiTElls another by shooting, he will not be charged for killing and causing bodily injury since bodily injury is a necessary element of homicide by shooting. So, the concurrence is *imperfect met.* one article can cover the injury and the death.

But if, for example, in the robbery case, the public prosecutor is uncertain about the existence or non-existence of the violence element, he can institute alternative charge against the offender for both crimes pursuant to article 113(1) of the Criminal Procedure Code.

However the punishment will be for violating only one provision depending on which crime the prosecution proves during trial

For the application of article 61(1), there should exist a single criminal provision fully covering what has happened (and the elements thereof). If such provision does not exist the offender can be charged for all the provisions his single act (and its elements) violates* This means, in other words, notional concurrence will come into picture. The case of a married person publicly raping his sister, for instance, cannot be fully covered by any single provision in the Criminal Code. That is why he should be charged for all the articles his act violates.

Similarly, the application of article 61(1) of the Code requires the existence of the same criminal fault. If the criminal act or the combination of criminal acts does no) flow from the same criminal fault (from single intention or negligence), article 61(1) does not apply. For instance, if a person intends to injure his enemy and hits him on his head repeatedly but unfortunately causes his death, there will be two criminal faults. The criminal fault resulting in the act of causing bodily injury is intention while the criminal fault resulting in the homicide is negligence. Hence, article 61(1) will not govern this case. Instead, the person can be charged for the crime of causing intentional bodily injury (Articles 555,556, or 557, as the case may be), and for homicide by negligence (Article 543). In other words, this seems to give rise to material concurrence than to imperfect concurrence.

Further, article 61(1) requires the criminal act or the combination of criminal acts to be against the same legally protected right This seems to mean the offender must violate one provision in relation to the interest of a single person. Because if the victims are many, it is article 60(c), not article 61(1), that will be applicable even if there is only one provision that is violated For example, if a person has an intention to cause ***bodily injury*** his enemy and the first day he meets his enemy he beats him, shoots him on his leg and also cuts off some of his fingers, there are about three different criminal acts but against the same legally protected interest-physical integrity of the victim- and flowing from a single criminal fault- intention. This perfectly falls under article 61(1). Accordingly, the offender will be charged for a single crime-although it can be aggravated- and not for the act of beating, shooting and mutilating the victim separately.

1.8.3.4 Criminal responsibility of juridical persons

/ A "juridical person" is an artificial person created by law. As such, it does not have physical existence; nor does it have moral element like human beings. Hence, it cannot commit crimes

except through its members. It is for this reason that until the 19th century the concept criminal responsibility of juridical persons was rejected.[72] Today, however, it is generally accepted that legal persons can incur liabilities: both civil and criminal. For instance, if one considers different transnational corporations, sometimes, the way they do businesses results in the commission of different crimes. For instance, they endanger the lives and persons of many people by polluting their environment, they deliberately fail to take safety measures at work places and they even engage in trafficking in human beings. So, these legal persons can be criminally liable. ^

But the criminal Liability of legal persons is always in a sense vicarious becauseit is necessarily incurred through theacts of their members.[73] This means, juridical persons can be criminally responsible and their responsibility is premised upon the theory_ofjgen£y. It is onlyJhe act of their employees that is imputed to the juridical person.[74]

In Ethiopia, the 1957 Penal Code recognized the liability of juridical persons.[75] But it did not deal with them adequately. The Criminal Code also recognizes the concept 'criminal responsibility of juridical persons' and this recognition is by far better than the recognition under the 1957 Penal Code. Under article 23(2), while it states the legal element, the material element, and the moral element as the basic premises for criminal responsibility to exist, the Code expressly makes an exception to this rule, under the third sub-article, and states juridical persons are also responsible for their criminal acts notwithstanding that the moral element requirement canngjt.be fulfilled. For example, it is possible that juridical persons engage in illicit trafficking in women,[76] currencies,[77] and precious minerals.[78] So, they can be punished for these crimes although they cannot form guilty mind.

^Nonetheless, the responsibility of juridical persons comes into picture only when the law so expressly provides. This is so becausearticle 23(31 makescross reference to article 34 and article 34(1), first paragraph, stipulates that juridical persons are criminally responsible only when the law expressly provides. Hence, the silence of the law in relation to the responsibility of juridical persons with respect to a given crime means that juridical persons

[72]Stephen A. SaJtsburg, John L. Diamond, kit kinports, Thomas H. Morawetz,, p. 254.

[73] Smith and Hogan, p. 275.

[74] Stephen A. Saltsburg, John L Diamond, kit kinports, Thomas H. Morawetz, p 254.

[75] See articles 147,567,575,1957 Penal Code.

[76] Article 597, Criminal Code.

"Article 346, Criminal Code.

[78] Article 347, Criminal Code.

will not be liable if they commit such crime. Therefore, it can be argued that still the criminal responsibility of juridical persons is not fully recognized in our criminal system. Becausethe liability of such persons exists only exceptionally; that is, when it is expressly provided by law (the law can be any criminal legislation).

At this juncture, it is important to note the problems posed by the cross reference made by article 23(3) to article 34. Firstly, article 34 regulates cases where juridical persons participate in the commission of crime regardless of their capacity. Tjjis implies that unless the special part provisions expressly provide for their liability, juridical persons are not criminally responsible for their criminal acts in the absence of participation element So, it is only when they commit crimes either as principal offenders (being with others) or as inciters or accomplices that they are regulated by virtue of articles 23(3) and 34. For example, falsification of weights and measures is a crime (Article 367). It is possible for juridical persons to falsify weights and measures to be used in commerce or trade. Moreover, it is possible for juridical persons (like political parties) to provoke individuals or the public to commit crimes against the constitutional order of the country as envisaged under articles 257 and 238. However, regardless of their capacity to commit these crimes, juridical persons are net held liable in case they perform such activities since article 34 is not pertinent to these cases.

Under such circumstances, the only thing that can be done is to hold the personnel involved criminally liable, not the legal person itself. But it is very much doubtful that holding them liable is proper while letting the juridical person go unpunished. Therefore, the cross- reference made under article 23(3) to article 34 should not have been made. Or, alternatively, it may be argued that the cross-reference applies only when legal persons participate in the commission of crimes and article 23(3) applies independently of article 34 when legal persons commit crimes without participation. Similarly, if the special part provisions provide that juridical persons can be held liable in respect of a given crime even in the absence of participation, these provisions should prevail becausethey are special. So, if these two possibilities are adhered to the problem posed by the cross-reference made under article 23(3) will be solved. In any case, it is hoped that in the next amendment such confusion will be dispelled particularly by removing the reference to article 34 under article 23(3) so that article 23(3) will be applicable to other instances, other than participation cases, as well.

Responsible juridical persons: Even though it is claimed that juridical persons are criminally liable for their acts, it does not mean that all juridical persons are so exposed to criminal liability. Some of these persons are excluded from the realm of criminal responsibility. The exclusion covers *administrative bodies is,* provided under article 34(1). The term 'administrative bodies' in this case should be understood in its broadest sense so as to include other organs of the government, and not narrowly so as to include only administrative agencies. Anyway, all administrative institutions are free from any criminal responsibility. For instance, if the Federal Police Commission commits an act which would otherwise be a crime for non-administrative organs, the act will be at most a civil wrong, not a crime. This is, however, without prejudice to the possibility of punishing individuals authorizing the wrongful act without legal mandate.

Under the Criminal Code, juridical persons which can have criminal responsibility are described as institutions or associations which have governmental or non-governmental, public or private structure, and set up for commercial, industrial, political, religious, or any other purpose.[79] The Commercial Bank of Ethiopia, Ethiopian Airlines Corporation, Ethiopian Electric Light and Power Corporation, Telecommunication Corporation, Ethiopian Orthodox Church, and all legally recognized Political Parties in the country are among the legal persons which can be criminally liable within the above description. For example, if any political party provokes or incites individuals to disregard military ordersjt will be liable to punishment as per article 332(3) of the Code.

Juridical persons may commit crimes in both primary and secondary capacities.[80] If they act as principal offenders (like forging documents), they are participating in the commission of crimes in primary capacity. If they act as instigators or accomplice, they are participating in the commission of crimes in secondary capacity. In both cases, they are liable to punishment although this happens, as discussed before, only when it is expressly provided.

Types of crimes juridical persons can commit: Juridical persons can commit crimes does not mean that they can commit any type of crime. It is claimed that juridical persons cannot commit crimes for which they cannot be sentenced. For instance, they cannot commit homicide if the punishment is mandatory life imprisonment since legal persons are incapable of being imprisoned.[81] But, in our system, it is hardly possible to use

[79] Article 34(1), Criminal Code.

[80] Ibid.

[81] Smith and Hogan, p. 275.

the impossibility of imprisoning juridical persons to say crimes entailing loss of liberty cannot be committed by such persons. Becausethe Code, after providing that a juridical person an be a party to a crime either as a principal or an instigator or an accomplice when it is expressly provided, provides for the conversion of imprisonment to fine if the crime committed entails imprisonment[82] Hence, the fact that the special part of the Code provides only for imprisonment in relation to certain crime does not mean that that crime will not be committed by legal persons. The crime can be committed and the liability thereof will be determined via the conversion provision of the Criminal Code (Article 90(3)). Of course, it was possible to imagine the existence of crimes that could not be committed by legal persons under the 1957 Penal Code becausethis Code did not contain provisions providing for the conversion of imprisonment to fine. That means, the logic *juridical persons can commit only crimes for which they can be sentenced* would work and make the existence of crimes insusceptible to commission by them possible.

It should, however, be noted that it is still possible to raise some issues in relation to punishing legal person in the light of the Criminal Code, too. Under article 90(3), what is provided is only the conversion of imprisonment to fine. The Code does not provide for the conversion of death penalty to fine. So, it can be argued that, to some extent the abovementioned logic can work to argue that still there are crimes which juridical persons cannot commit These crimes are crimes that are punishable solely by death and legal persons cannot be killed since they lack physical existence. For example, it is not uncommon for political parties to have their contenders killed in a manner that would entail death penalty (like as provided under article 539 of the Criminal Code). In this case, one may find a difficulty as to how to go about entertaining such case. Nevertheless, since no crime entailing death penalty is recognized as capable of being committed by juridical persons in the Code, providing for the conversion of such penalty to fine may not have practical significance. As a result, the gap that seems to exist is only apparent.

Another point which reveals a real problem has to do with the situation where the crime committed by a juridical person entails both fine and imprisonment as alternative punishments. Article 90 provides for the conversion of imprisonment to fine only when the crime committed entails imprisonment as a *sole* penalty. If the crime committed entail fine as a *sole* penalty, the same provision provides for making such fine *fwefold.* Therefore, the

[82] Art 90(3), Criminal Code.

situation where a juridical person commit crimes entailing the two penalties as *alternative* penalties is not regulated under article 90.

As a possible solution, one may suggest that courts can change the imprisonment part to line as per article 90(3) if they opt for it and make the fine fivefold if they opt for the fine as per article 90(4). But both the conversion of imprisonment to fine and making fine fivefold are allowed only when they are provided as *sole* penalties, not when they are provided as alternative penalties. Accordingly, such measures of courts, if taken, may be considered as creating penalty by analogy. Likewise, as a third possibility, it is possible to suggest that courts can impose both penalties at a time and convert the imprisonment to fine and then add up the two fines. However, still the circumstance under which conversion is allowed does not give them such leeway. So, the gap is indeed inescapable.

Equally important and concomitant to the above issue is a problem of imposing punishment on juridical persons in case they commit crimes entailing fine and imprisonment as cumulative punishments. For example, juridical persons can commit crimes of trafficking in women and minors (Articles 535 and 538) and these crimes entail both penalties. For the same reasons mentioned before, one cannot use article 90 and this gap is also is inescapable.

In conclusion, it is the word 'only' in article 90 (3 and 4) that creates problems. In its absence, the problem will not arise. Amazingly, the comment given on the draft article 90 of
the Code states something different but still with problems. It states: "h-tfl tO-h h'H-X
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h f i a v t - p * - ') n"iK7T?n-K -t-^aiat- vfoi rtri)-'/^
P-fAmo)- n^ITMI)- 7.H, M^-fc mf?*- mrtfli'PIVM
!)■'/,;)■ '/a>::" (The translation is, *a new sub-article 3 is added in order to allow the conversion ofimprisonment to fine when the special part provision provides for imprisonment and line as alternative punishments.)* So, according to this comment, article 90(3) is meant to apply to cases where the crimes committed entail fine and imprisonment alternatively. This means, cases where the crimes committed entail imprisonment or fine as a sole penalty were not meant to be regulated under such provision.

Whose acts are the acts of juridical persons: As stated before, juridical persons can commit crimes either as principal offenders or instigators or accomplices.*[1] At the same time, it is also stated that they lack physical existence and the moral element to

But juridical persons will not be liable to punishment if thev act as secondary participants (instigators or accomplices) in relation to petty offences. See Article 740(3).

commit crimes by themselves. So, whatever is done is done through their members. It is the acts of their members that are taken as the acts of juridical persons. The point worth considering, then, is whether the acts of each and every member can be attributable to a juridical person for the purpose of criminal liability.

There is a position that a legal person is not criminally liable for the act of each and every member. Its criminal liability arises only in relation to the acts of persons who are regarded as 'the directing mind and will of the organ'. These persons are called the controlling officers; that is, individuals who control the affairs of the legal person.[84] Therefore, if a member of a juridical person lacks supervisory or controlling role, his criminal act will not be imputed to the juridical person. For example, the criminal act of a janitor or a guard cannot make a juridical person criminally liable becausethey are not in control of and directing the business of their institution.

It should be known that even as regards the acts of the controlling officers, juridical persons are criminally liable only for acts performed within the scope of their employment Anything done out of their scope of employment is not imputable to the juridical persons. The officers alone will pay for such acts. The determination of the scope of their authority together with who the controlling officer really is can be made on the basis of the constitution and the rules of the juridical persons concerned.

Under the Criminal Code, the question whose act is juridical person's act is not expressly answered. So, whether the so-called "managerial staff s" act is to be regarded as the juridical person's act or that of all employees may be a matter of interpretation. If one follows the abovementioned generally accepted position, non-controlling members' acts are not the acts of juridical persons for the purpose of criminal law. And there seems to exist some provisions in the Criminal Code in favour of this position. Under article 716(2), the Code chooses the members of the legal person's administration to be personally liable for the crime committed in addition to the legal person's liability. This has an implication that the law wants to attribute the acts of these people to legal persons, not everybody's act All the same, the existence of this provision alone may not be a sufficient guarantee to say the Code has adopted the above position.

On the contrary, there is another equally strong argument in favour of making all members' acts the acts of a legal person. That is, if a person is employed, then he is the agent of his

[84] Smith and Hogan, pp. 275-276.

employer in as long as he is acting within the scope of his authority. Owing to this, his act, even if he is not a controlling officer or a managerial staff, should be ascribed to his employer like any other contractual obligation.[85] Article 34(1) also seems to support this position becauseit simply regulates the acts of officers or employees in general. This second argument has some merit in it The juridical person will be encouraged to strictly supervise its employees if everybody's act is to be ascribed to it for the purpose of criminal liability. By so doing, observance for criminal law will be facilitated.

What type of penalty on juridical persons: Juridical persons cannot be killed becausethey lack souls, and they cannot be put in jails becausethey lack body. As a result, the only principal penalty that can be imposed on them is fine. This means, juridical persons will be fined in case they are found criminally liable. Of course, to achieve the purpose of criminal law, the fine to be imposed can be greater than the one provided for natural persons.

Under both the 1957 Penal Code and the Criminal Code, fine is recognized as a penalty to be imposed on juridical persons. But the maximum amounts fixed by the codes greatly differ. Under the 1957 Penal Code, the maximum line was fifty thousand (50, 000) birr[86] while under the Criminal Code it is five hundred thousand (500,000) birr.[87] The Criminal Code has increased the past general maximum fine by tenfold. Yet it is still arguable whether today's 500,000 birr has more value than the 1957's 50,000 birr. Probably, 50,000 birr in the 1950s had more purchasing value than today's 500,000. In that case, the increment in the amount of fine may simply remain increment in number and nothing more.

When we compare the fine provided for juridical persons with that of natural persons, the difference is considerable. Under the Criminal Code, natural persons may be subjected to fine up to one hundred thousand (100,000) birr under exceptional circumstances although there is another exception to this exception, too.[88] The rule is the general maximum fine is ten thousand (10,000) birr.[89] So, it is not difficult to imagine why this difference between the two categories of persons is made. As legal persons are financial more potent than natural persons, subjecting them to the same fine as natural persons cannot achieve the purpose of criminal law.

[85] Wayne R. La Fave and Austin W. Scott, p. 229.

[86] Articles 147,567, and 575, Penal Code.

[87] Article 90(1), Criminal Code. One must bear in mind that the special penal enactments may provide for higher penalty.

[88] Article 92(1), Criminal Code.

[88] Article 90(1), Criminal Code

It is a generally accepted rule that criminals are subject to the penalty provided for by thefl,j$ is equivalent to saying the court should impose *death penalty M* a juridical person can law they violate. However, this rule may be derogated from in case the law violated **provides**$_{ser}$ve and it can be more effective than fine itself.
for imprisonment as a sole penalty and the crime is committed by a juridical person This is . fi ,
so becausesince these criminals cannot be imprisoned, another equivalent penalty should be **Why conviction of juridical persons:** Normally, juridical persons are tined
stipulated. That is why the Criminal Code has expressly provided for the conversion ofbecausethey cannot be imprisoned or subjected to other kmd of physical punishment. Bu
imprisonment to fine when criminals are juridical persons. Generally the following is the can fine produce the effect it can on human beings? In particular, if the legal person is big it
method of calculating the extent of fine for juridical persons is less likely that the fine is perceptible or, sometimes, it may be shifted to customers,
tor its tvilio. (« »' ' ^ ^ e « - P - ' - » «
1. If the crime committed entails fine as a sole penalty, the maximum fivefold the one provided for b. the law violated."
If the crime committed entails simple imprisonment not exceeding five years as a sole of fine to its students an o er • ^ ^ ^ ^ $_{flot}$ ^ shareholders but by
the price of its goods or services so that the fine is ^ ^ ^ ^ ^ ^
If the crime committed entails rigorous imprisonment not exceeding five years, it will be consumers. Therefore, what is the justification behin p conviction of
converted to fine not exceeds twentv thousand birr ' that the conviction of a jundical person has an of a conviction, it is
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e cnme committed entails ngorous imprisonment of five to ten years, it will be individual officers does not. If directors are so concerned aooui me eueu u.<« .....
converted to fine not exceeding fifty thousand. If the crime committed entails rigorous imprisonment
exceeding ten years, it will be converted to fine not exceeding five hundred thousand (the general maximum).[94]

f they do so, it means that criminal law has served its purpose. Therefore, no further lustification is necessary.[97] The idea here is that the conviction of a juridical person affects its goodwdl or reputation. To maintain the goodwill of a juridical person, its officers will strive to control that everything is done in compliance with the law. This is, after all, the whole purpose of law: to encourage its own observance. Thus, fine is justifiable.

Of course, it can be contended that the goodwill or reputation of a juridical person may not be affected unless conviction is publicized. But in the current world, the publication of such conviction seems inevitable becauseof the existence of diverse press and mass media organizations particularly if the legal person is well-known. Nevertheless, in Ethiopia, there is
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still one problem that may limit the effectiveness of fine as a sole penalty. If the juridical person has a monopoly over the goods or services only it consumers have alternative sources of goods or services to the ones provided by a juridical person convicted. If the juridical person has a monopoly control over its supplies, people will be forced to stay with it For example, Ethiopian Airlines Corporation, Telecommunication Corporation, Ethiopian Electric Light and Power Corporation, etc. are monopolies in respect

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penalty, it will be converted to fine not exceeding ten thousand birr.[5] increase claimed

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Other measures: Criminal law permits the imposition of fine on juridical persons for their criminal responsibility. But this is not the only measure to be taken against juridical persons. At times, other measures which are worse than fine can be taken. For instance, the Criminal Code authorizes courts to *suspend, close,* or *wind up* juridical persons, as additional penalty if such measures are deemed necessary.[95] From these additional measures, it is possible to equate suspension with imprisonment since the juridical person's operation ceases temporarily thereby depriving it of its capacity to commit a crime while winding up or dissolution can be equated with death penalty for'the existence of the juridical person as a person ceases like the death of a natural person. For example, if a juridical person commits the crime of trafficking in women or' children, the court should impose fine not in excess of one hundred thousand. In addition, itshould order the dissolution of the juridical person.[96]

"Article 90(4). Of course, this is not about conversion. It is mentioned in this part only to make the discussion of the liabilities juridical persons ran be subjected to somewhat comprehensive.

" Article 90(3), Criminal Code.

92 IbitL

"Ibid.

"Ibid.

***> Article 34(2). Criminal** (ode. **96 Article 599, Criminal Cod.**

[97] Smith and Hogan, p. 283.

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what they get becauseconsumers will not have other choices to resort to.[98] Therefore, t(effectively deter these and other similar juridical persons, the fine has to be greater than tht maximum provided; that is, five hundred thousand. In fact, it is possible to suspend, close, 01 wind up such entities. But in the absence of alternatives to them, and also the indispensabilitj of the services they render, taking such measures is almost practically impossible and even unreasonable.

Of course, in some jurisdictions, since fine can hardly deter financially potent institutions, they punish the officers so as to achieve the objectives of criminal law." But it is doubtful that this measure can be taken in Ethiopia. Becausethe Criminal Code expressly provides that the punishment of a juridical person cannot exclude the penalty to be imposed on its officials or employees for their *personal guilt,*[m] *not official guilt* For their official guilt, however, the punishment, by implication, of a juridical person can exclude the penalty to be imposed on its officials or employees unless it is expressly provided as in the case of article 716(2). Hence, it seems there is no way of punishing officials for their official acts (crimes). For instance, assuming that one political party has committed the crime of incitement to disregard military services (article 332), its officials should not be punished for their official crimes. But the political party can be sentenced to fine or the court may order its suspension or closure or winding up if such measure is deemed necessary.

To conclude, in the past, juridical persons were not criminally liable because, among other things, it was believed that they lack the moral element which is indispensable for the completion of the commission of crimes. Currently, however, this stand has changed and juridical persons are generally criminally liable. Their liability is, however, vicarious in its nature since it is the acts of their employees that are attributed to them. In Ethiopia, juridical persons save administrative bodies can be criminally liable for the acts of their agents. The other point is, although in some jurisdictions, there are crimes which cannot be committed by juridical persons becausethey entail imprisonment as the sole punishment, the Ethiopian criminal system has adopted a different position by providing for the method of converting imprisonment in similar situations. But when the crime committed entails loss of liberty and fine as either alternative or cumulative penalties, the Code does not tell us how to proceed

with the determination of penalties. As far as imputability is concerned, since juridical persons lack physical existence, it is their employees' acts that are attributed to them. In some jurisdictions, it is not the acts of all workers but only of the controlling officers that are attributed to juridical persons. In Ethiopia, however, the law is not clear. Hence, it is a matter of interpretation to say the acts of the controlling officers should be regarded as that of a juridical person or that of all employees' can be attributed to it. There are also provisions which seem to support both positions. However, regardless of whose act is attributed to a juridical person, there will be fine if it is found criminally liable. The fine is meant to deter the juridical person from committing further crimes. If the imposition of fine is deemed inadequate to achieve the purpose of criminal law, courts can suspend, close or wind up the concerned juridical person.

1.8.4. Concurrence between material and moral elements

The presence of the requirements of article 23(2); that is, the legal, material, and moral ingredients may be necessary for the existence of a crime. But they may not be sufficient. Some more requirements are required for the existence of a crime. Among others things, the requirement of concurrence between the material and moral elements must be satisfied. By concurrence between the two elements what is meant is that they must be brought together' in the sense of a causal relation between the *mens rea* (the moral element) and the *actus reus* (the material element). Stated differently, the *actus reus* be attributable to the *mens rea,* or the *actus reus m%* be the manifestation of the *mensrea.*[m]

The idea is that the moral element must come first and result in the material element. If the existence of the moral element is interrupted at the time the material element is met, there will be no concurrence. Thus, punishable crime will not exist. Therefore, for punishable crimes to exist, the two elements must exist simultaneously although normally the *mens rea* comes first. For example, if a person takes others property thinking that it is his, he will not commit the crime of theft although he intentionally retains it upon subsequent discovery that it belongs to someone else. Because, the moral element required under article 665; that is, intention, is formed after the act. The act of taking was not the result of the intention. So, his decision to keep the property of another which he has come into possession by mistake will give rise to another crime which is misappropriation (article 697), not theft.

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[100] Article 34(3), Criminal Code.

"" Steven Lowenstfin, p. 74.

The Criminal Code does not expressly make the concurrence element a requirement. But if one reads articles 57,58 and 59 very closely, he will arrive at the conclusion that it is indeed one of the necessary requirements for a crime to exist. For example, when article 58(1) states: "a person commits a crime intentionally where he performs an unlawful and punishable act with *full knowledge and intent* [desire] in order to achieve a given result", the implication is the full knowledge and intent (desire) should exist at the time the unlawful and punishable act is done. This is what is meant by concurrence. Similarly, under article 59, the negligence foreseen is the one that exists at the time the criminal act is performed. If a person was too negligent before the criminal act was committed but he started to be too careful few minutes before the act was performed but unfortunately the result foreseen occurs, there will be no punishable crime. The negligence envisaged under article 59 is the one that continues without interruption until the crime is committed.

In short, the concurrence element is just an implied element within articles 57-59. No one can be guilty unless his intention or negligence subsists when the criminal act is performed. Nonetheless, this rule should not be considered to be an absolute rule. It is possible that individuals can be punished even if the concurrence element is missing. For instance, pursuant to article 50(1), a person is liable to punishment provided for a crime he commits if he puts himself in a state of absolute Responsibility by means of alcohol or drugs or otherwise in order to commit the crime. In this case, the moral element that is taken into account is the one that exists before the' person puts himself into such circumstance. Otherwise, it is very difficult to say his evil intent can exist when the crime is committed being in a state of absolute irresponsibility J[102] So, the concurrence element may at times be missing.

1.8.5 Causation

The causal element is another basic premise of criminal law. That is, if the casual element is fulfilled the application of criminal law will be set into motion. Nonetheless, unlike the other basic premises of crime, the causal element is indispensable only when certain result is achieved contrary to criminal law. Stated differently, the causal element is relevant only when the application of criminal law requires the achievement of a given result. Under circumstances where criminal law applies even in default of results, such as to preparatory acts, attempts, and forgery, the causal element is immaterial. However, in relation to crimes which can be completed only upon the achievement of results such as homicide, theft and

[102] Indeed, it is arguable that a person, in such state of mind, can go ahead with his original plan and implement it properly. If he does so, maybe, he is not in absolute state of irresponsibility.

destruction of others' property, the causal element is material. What, then, is a *cause!* Unfortunately, no precise definition can be given to the concept *cause.* For example, to define *cause is* a factor that produces a given result is far from being precise as it includes every factor that has almost zero contribution to the result So, instead of trying to define the concept, it is more helpful to look at its type first

A. Cause in fact: *Cause in fact xeim* to an event forming part of the set of antecedent conditions resulting in harm.[103] This means, anything that comes before the result and makes certain contribution, however trivial it may be, to the occurrence of harm is a cause in fact For instance, if A called his friend B, and B while going to visit A, was knocked down by a car and was taken to a hospital where he received wrong treatment and eventually died, all the calling, car accident and wrong treatment are causes in fact This is so because all of them contributed to the occurrence of the death.

Because in law: *Cause in laws* a cause in fact that is selected by law-maker as a c- sole cause of certain result.To^example, in the previous scenario, the law-maker may say, under such circumstances, the wrong treatment should be regarded as the cause of the death. It should, however, be noted that a cause in law is selected from among causes in fact The law-maker, for the purpose of selection, simply adopts one or more of the theories of causation. Some of these theories are discussed below.

I. *Sine quo non (but-for)* theory: If this test is adopted, a cause in law will be defined as an event without which the result would not have occurred. Stated in other words, * if certain result would not occur *but for* a given event, then that event is a cause in law. For instance, if Abebe shoots Belay on his head and Belay dies, the shooting is a cause in law becauseBelay would not have died had it not for the shooting. This theory of causation has got certain drawbacks. First and for most it sometimes ridiculously widens the scope of the concept *cause.* That is why it is claimed that the but-for theory takes us back to Adam and Eve: the criminal's mother is a but-for cause of his crime, and so is his grandmother, and all his ancestors to infinity.[104] Secondly, in case two but-for causes exist (which are attributable to different persons), this theory leads us to a paradoxical conclusion^ renders both of them non-causes.[105] For example, if A and B shoot on the part of his body and C dies as a result, the theory states that neither of the two shootings is a cause because the result could

[103] Wayne R. La Fave and Austin W. Scott, pp. 249-250.

[104] Stephen A. Saltsburg, John L Diamond, kit kinports, Thomas H. Morawetz, p. 621

[105] Id.,, p. 625.

be achieved in the absence any of the shootings: C would die even if A did not shoot becauseof B's act; and, C would die even if B did not shoot because of A's act So, the but-for test does not work.

II. Adequate cause theory: The theory of *adequate causation* was formulated to rectify the defects of the *but-for* theory. If this theory is adopted, a cause in law is an event which, *in the normal course of things,* produces the result achieved.[106] That is to say, if the occurrence of a given event in most cases produces a given result, then that event is a cause in law for that result It does not matter whether the case is one or more but whether the cause is adequate or not For example, shooting a person on his head normally entails death. Thus, it can be a cause in law for homicide. But if a given conduct produces an extraordinary result, it will not be regarded as a cause. For instance, stubbing a person on his feet with cutlass does not in normal course of thing, cause death. But if it exceptionally produces death, the stubbing will not be taken as a cause in law. If somebody is slapped on his face and dies, the slapping will not be treated as a cause in law becauseit is not, in the normal course of things, capable of producing death.

This theory leaves intervening factors which facilitate the commission of crimes intact For example, if a person sprawls gasoline on a property someone wants to burn, his act makes the completion of the commission of the intended crime quick. For that matter, it practically denies any chance of putting out the fire. Thus, the contribution of sprawling the gasoline on the property is great. In spite of this, the theory does not permit the consideration of this act as a cause in law sprawling gasoline does not in itself cause the burning of property.

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III. Proximate cause theory: This theory says a cause in law is an event which is the *necarest in time and placed* the result achieved. That is to mean, a cause in law is an event

which is proximatfe or closer to the result For example, in the scenario under section A above, the event that is closer to the death of the person (B) is the wrong treatment. Hence, this theory regards the wrong treatment as a cause in law. The obvious problem with this theory is the fact that sometimes the act closer in time and place to a given result may not be that relevant for the production of the result. For instance, the theory considers the act of beating another slightly as a cause in law by leaving shooting aside merely becausethe former might have happened at last.

[106] Philippe Graven, p. 60.

Therefore, since every theory has got its own drawbacks, it would be a matter of policy decision to choose and adopt any of them. But the test that is adopted or to be adopted should not be the one that unnecessarily widens the scope of the concept causation; nor should it be the one that unnecessarily narrows it down. Then, once a given theory of causation is adopted, defining a cause (in law) is will no longer be a difficult task. With this general remark in mind, the following part will consider how the notion of causation is treated under the Criminal Code.

The element of causation is replated under article 24 of the Criminal Code. Firstly, article 24(1), first paragraph, stipulates that the causal element is necessary only where the commission of a crime requires the achievement of a given result If the commission of a crime does not require the achievement of a given result the requirement of cause and effect will become irrelevant For example, the commission of the crime of forgery does not require the achievement of any result like damage to the public. Hence, the causal element becomes dispensable. Secondly, in the same paragraph, article 24 stipulates that when causation is important the crime committed is deemed to be non-existent as far as a given person is concerned, unless it is produced by the act or omission with which he is charged. That is to say, if his commission or omission has not contributed to the occurrence of the result then he is not deemed to have committed the crime in question. Hence, his commission or omission should form part of the domain of cause in fact But the existence of contribution, by one's act or omission, to the occurrence of the result is not by itself sufficient to render a person a criminal in relation to the result achieved. Article 24 (1), ***2nd*** paragraph, stipulates that in addition to the contribution, a person's act or omission should be the one which would, in normal course of things, produce the result achieved. That is to say, if his act or omission does not in the majority of the cases produce the result he is charged with, his act or omission will not be regarded as a cause in law. Hence, he will not be responsible for the result What this, in effect means is that the Code adopts the ***adequate causation theory.*** For example, cutting one of the fingers of a person does not, in normal course of things, produce death. If, however, it extraordinarily produces death, the person who cuts the finger of another will not be deemed to have committed homicide becausehis act does not qualify as a cause in law under article 24(1), second paragraph.

Interestingly, article 24(3) provides for an exception to the adequate causation theory adopted under article 24(1). It states that if there are many causes which are, independently treated, incapable of producing the result achieved, they may be considered causes in law if their cumulative effect has produced the result So, complementary events can be regarded as

causes in law. For example, if five individuals beat up a person with their fists and the victim dies becauseof the combined effect of the beatings, all the five individuals are said to have killed the victim: their beatings will be considered causes in law.

One may want to know what would happen when all the causes are by themselves capable of producing a criminal result If the causes are more than one and they are all, in normal course of things, capable of producing this result, the issues of *concurrent* and *intervening* causes will come into picture. While article 24(2) answers the issue of intervening causes, it is article 24 (1), 2nd paragraph, that answers the issue of concurrent causes. „

Intervening cause refers to "an event that occurs after another event which has set the production of a given result into motion and makes its own contribution to the achievement of the result. The intervening cause may be more than one. Likewise, they can be concurrent if they occur simultaneously or non-concurrent if they occur at different times. In relation to concurrent and non-concurrent intervening causes, article 24(2) states, they will interrupt the relationship established between the initial cause and the result if they are:

a) attributable to third party or natural or fortuitous event;
b) extraneous to the initial cause; and
c) by themselves produce the result

If one of these conditions is missing (for example, if the intervening cause is attributable to the victim himself) the relationship between the original cause and the result will not be broken. If all are met, however, the relationship will be interrupted and the author of the initial act will be punished only for the crime his act constitutes, not for the result achieved. For example, he can be punished for attempting to kill.

It has to be noted that article 24(2), first paragraph, contains some uneasy points. Firstly, it states that *preceding causes* can interrupt the relationship of cause and effect. This seems anomalous because if a cause is the first cause it has nothing to interrupt Rather, its relation with the result may be interrupted. Hence, it seems necessary to remove the term *preceding causes* both from the Amharic and the English versions of the Code. The 1957 Penal Code did not contain similar expression. The commentary on the draft of the Criminal Code reveals that this addition to the previous provision of article 24 was taken from the 1930 Italian Penal Code. And according the draft, the intention of the law-maker seems to suggest that *the relation between the conduct of the accused and the result will not be established and the initial relationship will continued* the accused person's (intervening) conduct is not adequate in itself. But such stipulation in the draft by itself is not necessary for it is obvious that any

relation between the accused's act and the result will be established only if it is adequate *per* #to produce the result

On the other hand, a philanthropic argument may be advanced to give value to the term *preceding cause* under article 24(2). This argument relies on the disparity between the expression used under the 1957 Penal Code and the Criminal Code. Article 24(2), first paragraph, of the 1957 Penal Code contains the expression *...when the extraneous cause was in itself sufficient to produce the result* while article 24(2), first paragraph, of the Criminal Code contains the expression *...when the extraneous cause in itself produced the result* The two expressions are different in that the first one emphasizes whether or not the intervening cause is *adequate* to produce a given result while the second one emphasizes whether or not a given cause, be it intervening or preceding, *actually produced a given result* So, by relying on this line of argument, it is possible to think of a first cause interrupting a relationship between a second cause and effect on condition that even if the second cause is adequate in itself to produce the effect, the effect is in fact produced by the first (preceding) cause. So, the first (preceding) cause can reinstate itself to its position as a cause.

This philanthropic argument apparently provides for a way out to rescue the term *preceding cause* under article 24(2) from being rendered useless. Yet it concomitantly creates absurdity because it will eventually end up by saying an adequate cause whose relation with the result it has set into motioned is already interrupted by another intervening adequate cause will further interrupt the relationship between this second cause and the effect and reestablish its own connection to the result (effect). So, if this argument is taken, then, there will be no need to provide for the principle of interruption as what matters will be what actually produces something than what is adequate to produce it. Similarly, it seems hard to understand interruption, under article 24(2), as *suspension* whereby resumption of cause and effect is awaited depending on what actually causes a given effect. On the other hand, it sounds easier (and makes more sense) to understand interruption as a final termination of a relationship between cause and effect and no resumption of relationship is possible.

Secondly, the word *"concurrent"* under article 24(2) seems misleading. It is meant to refer to *intervening* concurrent causes. If, for example, three concurrent causes intervene after a single cause has set the achievement of a given result into motion, they will interrupt the relationship between that cause and the result. Therefore, the article should have used expressions" *Concurrent" or "non-concurrent" intervening causes* instead of simply using the word *concurrent* Because, if there are concurrent causes, the principle of interruption

does not apply as between themselves since interruption presupposes the occurrence of causes at different times. If causes are concurrent; that is, if they occur at the same time, neither of them is capable of breaking up the relationship of cause and effect of the other. Instead, they are all, if they are adequate in themselves to produce the result, causes in law (Article 24(1), first Paragraph). Hence, their authors will be answerable for the result achieved. For instance, if two persons shoot another on his chest and both bullets enter the victim's body at the same time causing his death, both bullets are causes in law and they are concurrent causes. Thus, both persons may be punished for killing the victim.

Thirdly, if two or more persons, acting in concert, have the required *mens rea* for the achievement of certain result, it does not matter who acted first or whose act actually brought about the result.[107] For example, if Abebe and Belay assault Chala intending to kill him, both will be guilty of murder even if it is only the act of one, say Belay, that has produced the result while Abebe's act was inadequate. In short, in cases like conspiracy, the adequate cause theory should not exclude the authors of some conducts from responsibility. The mere fact that they share the necessary *mens rea* and make some contribution should suffice. Therefore, both adequate and inadequate cases should be regarded as causes in law.

Article 24 does not make any reference to this exception. But it does not mean that conspirators should be treated differently according to the contribution of their conducts. Under article 38, for example, conspiracy to commit serious crimes against public security or health, person or property is a crime (Article 478). One of the crimes envisaged under this provision is the crime defined under article 539(1)(b)-aggravated homicide. If two persons, in concert, commit aggravated homicide, they will be treated alike for both crimes: conspiracy by virtue of articles 38 and 472 and aggravated homicide as per article 539(1)(a). There will be no difference in respect of treating them in relation to the second crime based on their contribution. The existence of, maybe, trivial contribution by one of them suffices to hold the participant's act a cause in law and make him liable for the crime.

1.9 Stages in the commission crimes

At the beginning, it was stated that the purpose of criminal law is to protect the society and its citizens. To achieve this objective, it intervenes in individuals' liberty under two circumstances. Firstly, it intervenes when a crime is committed with a view to deterring the commission of further crimes and also rehabilitating criminals. Secondly, it intervenes where there is an indication that a crime will be committed in order to abort the criminal design. It

[107]Ian McLean, and Peler Morrish, p. 24.

is this second instance that deserves detailed discussion here. At what stage should criminal law intervene in individuals' affairs and restrict same where there are indications that crimes will be committed? The stages in the commission of, particularly, intentional crimes are *bad thought-preparatory acts-attempt-commission of the crime.* For various reasons, such as its insusceptibility to proof, bad thought is non-punishable. If the result is achieved, the criminal will be punished becausehe has caused some harm to the society and the society has to make sure that another crime will not be repeated. In relation to preparatory acts and attempt, the application of criminal law is discussed below.

1.9.1 Preparatory acts

As stated before, bad thought is non-punishable because, among others things, it is insusceptible to ascertainment. Preparatory acts are, however, not insusceptible to proof because they are overt acts through which individuals' bad thoughts are manifested. That is to say, individuals' decisions to commit crimes can be revealed by the acts of preparation they make. All the same, in principle, criminal law refrains from punishing acts of preparation because of their equivocation and remoteness form results. Firstly, no one can speak with sufficient precision or certainty that acts of preparation have the commission of crime as their sole objectives.[108] For example, the buying of a gun may mean different things such as killing, hunting, and self-defence. Hence, punishing a person before the equivocal nature of his act disappears amounts to punishing him for a *presumed,* not ascertained, intention which would be contrary to the principle of presumption of innocence. Secondly, preparatory acts are both materially and psychologically remote from the result[109] Many other acts, in fact, the decisive ones are yet to be performed to come closer to the result (material remoteness) thereby making the danger remote. As a result, there is a possibility that the author of these acts may change his mind to commit the crime (psychological remoteness). Thus, the law by staying away should give individuals the chance to reconsider their criminal decisions. It is obvious that not all those who decide to commit crimes will commit crimes as not all who have laid foundation stones will build houses. So, there should be ample chance for dropping one's criminal decision. If this chance is not given, criminal law will defeat its own purposes because criminals will be encouraged to go ahead with their criminal designs and implement them since there will be no difference between preparation to commit a crime and committing it.

[108] Steven Lowenstein, p. 98.
Philippe Graven, p. 68.

Article 26 of the Criminal Code regulates the issue of preparations to commit crimes and stipulates that preparatory acts are not liable to punishment. However, it provides for two exceptions where preparations become punishable. Firstly, if the preparations in themselves constitute independent crimes, the authors will be punished not for the intended result but for the crime they have already committed. In this case, the intervention of the law is justified on the need to deter the commission of further crimes, not to abort the intended crime, since their preparations have incidentally produced criminal results. So, this is, strictly speaking, not an exception to the rule that preparatory acts are not punishable although article 26 provides it as an exception.

Secondly, if the law expressly provides that, under the circumstance, preparations to commit certain crimes will constitute special crimes, preparatory acts will be punishable. At times, criminal law penalizes preparatory acts if the crime intended is grave or the interest to be protected is so important. In this case, the law does not allow individuals to take even a single step towards the commission of the intended crimes becauselet alone committing the crimes even attempting to commit them may cause grave consequences.[110] So, in such situations, the law wants to avoid attempt by itself, and to do that, it has to penalize preparations which is proximate and capable of leading to attempt. Under the Criminal Code, for example, any preparations to commit the crimes defined under articles 238, 239, 240, 241, 246, 247, 248, 249, 250, 251, 252 (via article 256); 269, 270, 271, 272, 273 (via article 274); and 385 and the following by virtue of article 390 constitute special crimes. So, as far as these provisions are concerned, individuals can be punished at three stages; that is, when they make preparations to violate them, when they attempt to violate them, or when they succeed in violating them.

Note that if the crimes intended are committed, the authors of the preparatory acts will not be charged for both preparations and the crimes they have committed. Their charge should be only for the completed crimes because, according to article 61(1), preparation is a necessary element of the crimes committed. The same logic applies in the case of attempt, too. Therefore, no one will be punished for preparing to commit a crime, attempting to commit it, and finally committing the crime. If the crime is completed, the charge should be solely for committing the crime.

[110] Id., p. 68-69.

1.9.2 Attempt

Preparatory acts are acts of laying foundation to commit a crime. So, attempt refers to a step taken on the basis of the foundation laid (that is, preparatory acts) to consummate the **commission** of a crime. All the same, the author of the preparation fails to obtain the result for various reasons which may be attributed to his own effort or external factors. That is why attempt is characterized by failure. If there is success, we can only talk of completed crime, not attempt. Accordingly, failure is necessary to consider issues pertaining to attempt. But failure is not the only requirement for attempt to exist There are some other elements that must be present. These are:

a. Normally, for attempt to exist, the requisite moral element is intention. Hence, there is no attempt by negligence.[111] In as long as the intention element is fulfilled, the material element can be either commission or omission. So, there is no distinction in relation to the *actus reus.*
b. Attempt within the meaning of criminal law can exist only if the result intended, if achieved, is a crime. If the result intended is innocent, attempt to do it can in no case be a crime.
c. Attempt can be completed only if the elements of the intended crime are completed. For example, no one can be charged for attempting to commit arson (Article 494) if his intention is not to case collective injury. Nor can a person attempt to commit a crime against article 539 (Aggravated Homicide) by omission since the material element required under this provision is commission. Similarly, no one will commit criminal attempt against article 620 (rape) if he *tries* to have sexual intercourse by force with his wife.

Anyway, it is only when the above conditions are met that we can talk of criminal attempt. If they are fulfilled, normally, the attempter will be punished. That is to say, upon the fulfillment of the above requirements, attempt becomes a crime. However, sometimes, it is very difficult to know where preparatory acts end and attempt begins. It is said that if a person commits some appreciable fragment of the crime or if he has started consummating the commission of the crime, he is attempting to commit the crime he has in mind.[112] This means, if a person has taken decisive steps; that is, acts which he deems are necessary for the achievement of the result and he has come close enough to success, he is said to have attempted the

[111] It is possible to serve the same purpose if negligent attempt is punished. For instance, if a nurse, by negligence, gives a wrong injection which is capable of killing a patient within few minutes but fortunately a doctor discovers the wrong injection and gives the patient an antidote and saves him, punishing the nurse can make her prudent for the next time.

[112] Steven Lowenstein, p. 99.

commission of a crime. Accordingly, the law steps in to stop him becausehis acts are no more equivocal as to their objectives and he is no more remote to be given the chance to abandon his criminal design. After all, at this stage, he can be said to have reached the point of no return.[113] This means, if the person is presented with choices of abandoning or continuing to commit the crime, he will usually opt to continue.

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

The other relevant point is. article 27(1), 2[1m1] paragraph, states that attempt commences if there is an act whirh ***clearly*** *aims, by way of direct consequence,* at the commission of a

[m] Plllllppr l.ijvrll, p XL

crime. This means, if one act is performed and this act, without any ambiguity, shows that the author is going to commit a crime, then attempt is said to have begun, and the author thereof can be charged therefor. One point should be clear here. That is, the element of proximity is not expressly recognized in the Code. The article makes express stipulation only for the absence of the equivocation element. But the requirement of proximity can be read into the requirement of *unequivocality* and the expression *by way of direct consequence.* This is due to the fact that something that is remote never ceases to be equivocal. On top of that, it will not have the commission of a crime as its direct consequence. That is to say, if what a person is performing unequivocally shows, by way of direct consequences, that he is committing a crime, then the person must have come closer to the result.

If the existence of attempt is proved, the attempter will, as a rule, be punished (Article 27(2)). The extent of penalty is, as per Art 27(3), the same as the penalty for a person who has succeeded in the commission of the result intended. But there are certain considerations that should be taken into account while determining punishment for criminal attempt.

1- Exceptionally, attempts are made non-punishable. Hence, if the law does not expressly exclude attempt from punishment, attempters will be punished. For example, even if instigation and accomplice are punishable, attempt to instigate or assist is as a rule excluded from the realm of punishment (Article 27(2), 2nd paragraph). Similarly, any attempt to commit petty offences is non-punishable (Article 740).
2- An attempter will not be punished by death even if the crime he attempted to commit would entail death penalty. Because, article 117(1) stipulates that death penalty can be imposed only for completed crimes. Interestingly, in one case, the Federal High Court sentenced a person who attempted to commit the crime defined under article 539(1) to death, which is obviously wrong."[1] This case will be considered in Part III in relation to death penalty.
3- Even if an attempter is to be punished as though he committed the intended crime, he may be granted a mitigated penalty (Article 27(3), 2nd paragraph).

Therefore, a person who attempts to commit a crime will be punished as though he committed that crime (article 27(3)) except that he may be entitled to the abovementioned benefits. Nonetheless, article 80(3) seems to provide for some sort of exception to article 27(3). For instance, if Cetahun wanted to kill Alemayehu but he killed Guta who wore Alemayehu's clothes, there is no doubt that Getahun attempted to kill Alemayehu. However,

[114] Of course. the Federal Supreme Court, after considering the appeal against the decision of the High Court, amended the sentence and changed it In imprisonment instead of death penalty

article 80(3) stipulates that he should be punished as though he killed Guta deliberately. Hence, there will be no punishment for attempting to kill Alemayehu separately as stipulated under article 27(3). Consequently, Getahun will not benefit from the (last two) advantages attached to attempt as explained above. For instance, he can be sentenced to death depending on his degree of individual guilt and the absence of any mitigating ground.

As stated before, attempt represents failure. But one may wonder why individuals, after making all the necessary preparations, fail to commit the crimes they want to commit They may fail to succeed in the commission of crimes because:

1. they could not pursue their criminal activity to its end due to the existence of factors external to them;
2. they might decide not to pursue their criminal activity to the end;
3. even if the criminal activities are pursued to their end, the result may not be achieved due to the existence of factors external to them; or
4. even if the criminal activities are pursued to their end, the result may not be achieved as the actor may decide not to succeed; that is, he may undo what he did.

The first two factors give rise to what is known as *incomplete attempt* If the failure is due to the second factor the actor is said to have *renounced^* intention. As a result the court shall, as per article 28(1), mitigate the penalty to be imposed on him either within the limit allowed by law (Articlel79) or freely (Articlel80), as the case may be, provided that the renunciation is *freely willed.* If it is proved that the renunciation was prompted by reasons of honesty or high motives the court is obliged to exempt the person from liability. This is so becausethe goodness in the person tends to be greater than the evil in him. Besides, it could be argued that the law wants to encourage people to renounce their criminal decision by reasons of honesty or high motives. Incidentally, it is necessary to note that if the renunciation is not *freely willed,* article 28 does not allow mitigation. But to encourage willed renunciation, even if it may not be free, courts shall mitigate penalty by virtue of article 86 (This provision authorizes courts to create mitigating grounds if they have good causes). Otherwise, individuals will pursue their criminal activities to their ends and at any expense if renunciation does not entitle them to any benefit

The last two factors give rise to what is known as *completed attempt* If the result does not happen becauseof the fourth factor, the attempter is said to have *repented actively.* Accordingly, the Criminal Code provides for mandatory free mitigation of his penalty on condition that the repentance is *freely willed* and *active {*that has prevented or contributed to

the prevention of the crime from occurring) (Article 28(2)). If the repentance is lA/but not *freely* it is active, courts shall mitigate the penalty to be imposed as per article 86 notwithstanding that article 28(2) does not allow such mitigation. The reason is clear: encouraging willed active renunciation, whether or not it is free.

Pursuant to article 28(1) and (2), the Criminal Code regulates r*enunciation* and *active repentance.* A person who renounces his criminal design is less dangerous than a person who activity repents becausethe latter has pursued his criminal activities to its end while the former has not Hence, mandatory free mitigation should have been allowed for a person who renounces his criminal design than for a person who activity repents. But the law favours the latter since mandatory free mitigation for a renouncing person is only optional to ordinary mitigation and courts can choose ordinary mitigation than free mitigation. For an actively repenting person, however, the mitigation is always free provided that he freely willed the repentance. This seems anomalous and the treatment should have been reversed for a repenting person is more dangerous than a renouncing person.

Finally, the concepts *renunciation* and *active repentance* also apply to instigation and accomplice. That means, individuals who freely renounce their intention to incite or help, or who actively repent and have done everything that is expected of them to prevent the occurrence of the crimes incited or the crimes for which assistance is given will get the benefits provided under article 28. At this point, it is necessary to suss out that succeeding in preventing the occurrence of the crime incited or for which assistance is given is not a requirement The only requirement is doing what is required of a person and the reason seems clear: the completion of the commission of the crime incited or for which assistance is given is no more within the control of the repenting person.

1.9.2.1. Crimes impossible of completion

Sometimes, individuals may try to commit crimes which cannot be committed either becausethe object of the crime is absolutely insusceptible to harm or the means used is absolutely incapable of producing the result intended. For example, if a person tries to kill a dead person or to steal his own property, the offence of homicide or theft, respectively, cannot be committed. Becausethe crime of homicide can only be committed against a person who is alive while theft can only be committed against other's property. Similarly, if a person adds sugar into a cup of tea to kill another, thinking that sugar is deadly, the means used is absolutely incapable of producing the result intended. Therefore, this person is said to have committed a crime impossible of completion.

This crime is a crime of attempt[115] becausethe actor fails, despite his efforts, to produce the result. This type of attempt can be called a *special* attempt becausethe result intended can never be produced by any person against the same object or by using the same means. Therefore, if the crime amounts to an attempt, then it is, as a rule, punishable.[116] That is why article 29 provides for the penalty to be imposed on such person. Accordingly, he is liable to p'j the punishment attached to the crime he intended to commit. However, the court should reduce his penalty without restriction (Article 180) becausepersons who try to commit crime >l' impossible of completion are more of bird-brained than dangerous. Even, exceptionally, the h- > court shall exempt a person from liability if he uses a *means or processes (not against an object which is never susceptible to harm)* which could in no case have a harmful effect and ' \ the person uses such means or processes owing to his *superstition* or *simph'city of his mind.* \ For example, if a person tries to kill another by *sorcery ox cursing,* he should be exempted from liability as such means will never produce death and it also reflects the user's gross stupidity than his dangerousness.

H $ Crimes impossible of completion can also be committed in relation to instigation and accomplice. For instance, if a person incites someone to kill a dead person or a living person by using innocent means like milk, or if he gives assistance to kill a dead person or to buy * * milk to kill a person, he is said to have committed a crime of instigation or accomplice in yj relation to a crime impossible of completion. Such person, under the Code, is put on equal footing with those who incite or assist in the commission of crimes possible of completion.

[115] **As** a result, all the **condition necessary for the ciotence** of attempt shall **be Article 27(2), Criminal Code.**

Part Two: Criminal Law Defences and the Law of Participation

2.1 Criminal law defences

In criminal justice system, accused persons may raise any ground to avoid liability. This ground is what we call *defence.* So, a *defence,* in criminal law, is an assertion made by a defendant to claim that he/she is innocent or does not deserve penalty.[117] For instance, if a person commits a crime becauseof health problem, age, or intoxication, he may be allowed to invoke these grounds to avoid criminal liability and these grounds can be his defences against liability. In this part, a detailed discussion is made on the factors that authors of acts contravening criminal law can invoke to escape criminal liability.

2.1.1 Insanity

Currently, there is virtually no doubt that an insane person will not be punished for his criminal act But there are some fundamental problems pertaining to the issue of insanity. Firstly, is insanity a condition or an excuse? If insanity is a condition, like infancy, for the existence of a crime, then there will be no criminal charge against an insane person. Accordingly, the question whether or not a person is sane has to first be entertained. Prior to the 19lh century, the general practice was to treat insanity as a condition. In the 19th century, however, in particular after the advent of the *M'Naghtenp.st,* the position that insanity is an excuse started prevailing.[118] Therefore, a person can be charged before proving that he is sane, but it has to be proved that he has committed the said crime and he should be convicted before he is acquitted on the ground of insanity. In short, the procedure that has to be followed to acquit an insane person should be similar to the one that is used to acquit a person who is coerced to commit a crime.[119]

The second fundamental issue pertains to the determination of the extent to which insanity remains a scientific issue. Since insanity is a health problem, it is imperative that health professionals get involved in its determination. 'If people once knew a lunatic when they saw one, that sense of confidence in identifying the criminally insane has long since disappeared. But since there may be nothing in the accused's behaviour that reveals his incapacity, the

[117] See for example, Daniel L Hall, *Criminal hw and Criminal Procedure,* 4lk ed, Thompson Delmar Learning, United States,2004, p. 222.

[118] George P. Fletcher, *Rethinking Criminal law,* Little, Brown and Company Boston Toronto, 1978, p. 837.

If one tries, after reading articles 57(1). second paragraph, and 48(2). to determine whether insanity is a condition or an excuse in our criminal system, he will probably arrive at the conclusion that both positions are reflected.

investigation of insanity has come to presuppose expert diagnosis.'[120] The issue then is, if science should be used to determine insanity, to what extent should legal professionals be bound by scientific findings? Can they consider other factors in drawing legal conclusions, or should they be bound solely by experts' reports to make conclusions? If so, what should they do in cases where there are disagreements between experts' findings? Anyway, some of these questions can be answered by making policy decisions while others will continue to persist But for the purpose of this book, what is important is to fathom the fact that insanity still remains a legal issue insofar as drawing a legal conclusion from the data presented by experts is concerned. Thus, legal professionals should make legal conclusions based on the scientific findings tabled before them.

The third fundamental problem pertaining to the issue of insanity relates to the identification of a person who is considered insane in the eyes of the law-the identification of 'legal insanity'. There are disagreements between reasonable minds on whom to treat as a legally insane person. As a result, many tests were formulated to identify legally insane persons from others. Some of these tests are said to be traditional while others are considered to be modern. Some of these tests from both categories are discussed below.[121]

A. M'Naghten (Right-Wrong) Test: The 1854 *Daniel M'Naghten* Urease is the source of this test According to the test everyone is presumed to be sane until the contrary is proved. Hence, to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the criminal act, the accused was labouring under such a defect of reason from disease of the mind as not to bow the nature or the quality of the act he was doing, or if he did bow it, that he did not know he was doing wrong.[1/2] Stated differently, if a person does not bow what he is doing or that he does not know that what he is doing is wrong, he should be considered insane provided .that the incapacity to bow the nature or the wrongfulness of his act is due to mental disease.[123] Incidentally, it is worth . mentioning that this test focuses on the loss of cognitive power; thus, excluding the loss of volitional power since loss of control over one's conduct is not recognized to render one a legally insane' person.

[M]George P. Fletcher, *Rethinking Criminal hw,* pp. 839-840.

[121] For the discussion in this part see also Daniel L Hall, p 222-225 and Steven Lowenstein, p 161-176.

[122] lan McLean, and Peter Horrish, p. 91.

[123] The test does not tell us what *menial disease* refers to or includes. Hence, it is not as clear as it may seem at first glance at least with regard to the cause on insanity. This also applies to the Irresistible Impulse TesL

B. Irresistible Impulse Test: This test is supplementary to (not a substitute for) the M'Naghten's test. As a result, it stipulates that a verdict of not guilty by reason of insanity should be entered if it is found that the defendant had a mental disease which kept him from controlling his conduct[124] This means, emphasis should be given to the volitional power of a defendant at the time of committing the criminal act. Hence, if he could not resist his impulse which forced him to do the criminal act, or if the acting power within him was the disease he suffers from, he should not be responsible for his act even if he knew what he was doing and that it was wrong. One of the problems related to this test however, is the problem of distinguishing what is resistible from what is not

C. Durham (Product) Test: The Durham test was adopted in 1954 and it provides that a person who does something wrong due to a mental disease or defect is to be considered insane.[125] Put differently, this test states that a person should not be responsible for his criminal act if the act is the product of his mental disease or defect So, persons having mental disease or defect are to be considered insane for the purpose of criminal law provided that their criminal acts are the results of their mental diseases or defects. Yet the test does not tell us what is meant by mental disease or defect. These are nebular notions and the application of the test is not easy without knowing what they cover and what they do noL

D. Substantial Capacity Test: This test is the test that is adopted by the Model Penal Code of the USA. It provides that a person will be considered insane or will not be responsible for his criminal act if, at the time of the act he lacks, due to mental disease or defect, substantial capacity either to appreciate that his conduct is wrongful or to conform to the requirement of the law.[126] Therefore, unlike the preceding tests, this test does not require the total disappearance of a person's capacity. Rather, it requires the absence of substantial capacity. By so doing, it, unlike the other tests, widens the scope of insanity plea. Yet, the test still suffers from certain drawbacks. To mention but one the determination of what constitutes *substantial*still remains problematic/subjective.

At any rate, the determination of insanity has never been an easy task. That is why, it is argued, few aspects of criminal law have received as much public attention as the insanity defence.[127] This is also a cause for the formulation of different tests for the determination of insanity.^ Interestingly, there are some people, like Barbara Wotton, who argue that

[124] Wayne R. La Fave and Austin W. Scott, p. 283.

[125] George P. Fletcher, *Rethinking Criminal tow,* p. 840.

[125] Wayne R. La Fave and Austin W. Scott, p. 292.

[127] Daniel E. Hall, p. 223.

everybody is insane (whatever test she is using) except that some are more insane than others.[128] This means, insanity is a matter of degree and hence everyone is, under certain circumstances, sick and incapable of thinking of evil. Therefore, it is just a matter of policy decision to adopt any of the existing tests for the purpose of identifying legally insane persons from mere lunatics.

It is worth noting that all the tests discussed before have something in common. That is, legal insanity exists only if a person suffers from mental disease or defect and this disease or defect leads to the commission of a crime by causing loss of either cognitive or volitional power^Thus, they all incorporate what is referred to as the 'bio-psychological' method of determining legal insanity. The 'biological' method of determining insanity provides that an v- insane person is a person who suffers from certain biological problems such as mental disease or defect, other illness, and senility. There is no emphasis on the psychological consequences of the problems. The 'psychological' methods, on the other hand, provides that an insane person is a person who does not have cognition or volition at the time of bis act whatever the cause may be like anger, hatred and lust. So, it suffices that a person lacks cognitive or volitional power at the time of acting regardless of the cause of the loss of the power. The "bio-psychological' method is the combination of the two methods. It provides that a legally insane person is a person who is deprived, at the time of his act, of his cognition or volition due to the mental disease or defect he suffers from.[129] By combining the two tests, this method reduces the number of individuals who can be considered insane in the eyes of criminal law. '

Finally, it should be borne in mind that a person who is acquitted on the ground of insanity should not be allowed to go home unless it is unlikely that he will commit another wrong. This is becausethe public at large ought to be protected from the danger this person will pose or the risk he will create by being let go home. Therefore, it is likely that acquittal on the ground of insanity will be followed by commitment to hospitalization for mental treatment until the person gets rid of his problem. Having said this much about the defence of insanity in general, the next few paragraphs will be devoted to the status of insanity plea under the Criminal Code.

The Criminal Code does not mention the term ***insanity.*** Nonetheless, this does not mean that issues pertaining to insanity are not regulated by the Code. Instead, the Code deals with these

[128] George P. Fletcher, *Rethinking Criminal Law,* p. 844.

[IM] Philippe Graven, p. 134.

issues under a different title: *criminal responsibility^ irresponsibility.* Therefore, despite the absence of the term insanity, article 48 of the Code covers issues related to insanity plea. In the first place, it is important to note that the Criminal Code classifies and tries to regulate individuals having biological problems under two different provisions[130] depending on the seriousness of the consequences they have on person's mental faculties. Accordingly, these persons are grouped into those who are not responsible and those who are partially responsible for their criminal conducts. Both groups of persons will be considered below.

A. Non-Responsibility (Irresponsibility): The question of non- responsibility (irresponsibility) is regulated under article 48 of the Criminal Code. The first sub-article of this article stipulates that only individuals who are *responsible* for their acts are liable to punishment However, it does not define responsibility. Instead, the Criminal Code provides for factors which will, if they exist, exclude responsibility. This amounts to defining responsibility in a negative manner or by exclusion. Accordingly, article 48(2) provides that *if a person is incapable, at the time of his act, of understanding the nature or consequences of his act, or of regulation of his conduct according to his understanding, be will not be responsible for his act provided that the incapacity arises from biological problems* Put differently, if a person loses his cognition or volition or both due to biological causes, he will not be responsible for what his acts cause. These biological causes are listed under article 48(2) and article 49(1). For example, illness, age (senility, not infancy), abnormal delay in development, deterioration of mental faculties, and derangement of mind are some of the biological causes. So, what matters is not the type of the biological cause but the effect it has on the person's cognitive or volitional power.[131] If any of these causes exists and absolutely abolishes a person's cognitive or volitional power, then he will not be responsible for the crime he commits however heinous the crime may be.

But, at this juncture, some points need to be taken into account. Firstly, the causes must be biological. For example, anger, hatred or lust is not a biological cause. Hence, its effect cannot relieve a person of his criminal liability. Secondly, the biological causes should produce psychological effect(s). That is to say, the two must have a causal relationship. Thirdly, the effects of the biological causes (that is, loss of intelligence) should exist at the time of doing the criminal act. Subsequent or previous loss of intelligence is irrelevant for the purpose of criminal responsibility. Lastly, the loss of intelligence should be total. Partial loss

[130] Articles 48 and 49, Criminal Code.

[131] For example, problems of XYY Chromosome and Automatism are not certainly known to have biological grounds. Hence, it is difficult to argue that article 48 covers persons with these problems.

of intelligence is not regulated under article 48; hence, not an exempting ground. So, if these eligibility conditions are satisfied, a person will be considered irresponsible and will not be punished for his criminal act.

Moreover, it seems relevant to point out that the Criminal Code has something to share with all the tests discussed before. For instance, the fact that it requires the total abolition of cognitive or volitional power of a defendant at the time of his criminal act makes it similar to the first three tests. Likewise, the fact that it requires the existence of biological causes for the loss of cognitive or volitional power makes it similar to all the tests. But as far as the psychological effect of the biological problems are concerned, there is reasonable difference between the position of article 48 and the substantial capacity test Becausethe substantial capacity test, unlike article 48, does not require the total elimination of one's intelligence. As far as the legal effect is concerned, the Criminal Code attaches two consequences to irresponsibility (insanity). Firstly, as indicated above, irresponsible (insane) person will not be punished. Becausepunishment cannot serve its purposes in relation to such person since he cannot understand the reason why he is punished. Besides, an irresponsible person is not/less morally blameworthy since he could not help in relation to what happened. Secondly, the person can be subjected to measures since unless something is done he will continue committing crimes. So, the society must he assured that such person will not commit a crime again by subjecting him to measures. But it is interesting to notice that there is a discrepancy between the English and the Amharic Versions on article 48(3) which provides for the imposition of measures. The Amharic version makes the imposition of measures mandatory by using the word '.fWHA' (Shall) while the English version makes it optional by using the word 'may'. But it seems that both versions are correct if they are viewed from different angles. If the term *irresponsible* under article 48(3) refers to the mental condition of the accused person at the time of disposition (giving decision), the Amharic version seems correct Becausethe accused person should be subjected to a proper measure and there is no need to give courts discretionary power to impose or not to impose measures. However, if the term refers only to the mental condition of an accused person at the time of his act, the English version seems correct Becausethe imposition of measures may not be necessary if the accused person fully regains, at the time of disposition, his responsibility and it is believed that he is no more dangerous to the society.

At any rate, if a court decides that an accused person should be subjected to measures, the Code has provided for different curative or preventive measures to be imposed under articles 129-131. Accordingly, he can be subjected to confinement at a suitable place if he is found

dangerous to public safety or to persons living with him, or to treatment if his need of treatment outweighs his dangerousness. If a confined person is in need of treatment, he can be given treatment either at the place where he is confined to or by having him transferred to a suitable institution. But, unlike persons who are initially subjected to treatment who can be treated either as an out-patient or in-patient, as the case may be, it is less likely that this person can be treated as an out-patient as he shows some element of dangerousness which initially won him confmement instead of treatment.

Anyway, whichever measure is imposed, it is going to stay for indefinite period. This is because, when it comes to measures, it is not possible to speak with certainty and in advance that the desired result will be achieved on a particular date. So, keeping them in force until the desired result is obtained is necessary. But the order imposing measures is subject to court's review every two years to check the progress of the condition of the irresponsible person. If the person is showing a promising propriety, there is a possibility of releasing him on probation subject to certain conditions and also under the supervision of someone or appropriate government organ. And if the probation is undergone successfully, the release will be final; if not, it can be revoked and he will be restored to his previous position.[132]

Lastly, since the determination of insanity is a 'medico-legal' issue, a judge should, in its determination, be assisted by medical experts. But the question that needs to be answered first is the extent of such assistance. To what extent should a judge be assisted by an expert or what is the extent of the role of experts in the determination of insanity? The Criminal Code, under article 51, resolves this issue. It obliges courts to obtain expert evidence when there is doubt as to the *responsibility {m \.* irresponsibility) of the accused person. Likewise, it authorizes judges to order an inquiry to be made as to the character, antecedents, and circumstances of the accused to get further information about the accused person. If he shows signs of deranged mind or epilepsy, is deaf or dumb, or is suffering from chronic intoxication due to alcohol or drugs, the court is duty bound to order expert examination although it does not have doubt as to his responsibility. In this case, the law itself doubts the responsibility of the accused person.

The experts are to be appointed by the court itself.[133] Upon appointment, the court should tell them what to do; that is, it has to tell them that they have to check the status of the

[132] For better understanding, reading articles 129-132 is strongly recommended.

[133] However, expert's role can be brought into picture even if the court does not appoint him/her. This happens when an accused person claims that he/she was not responsible at the time of his/her act and wants to rebut the presumption of

intelligence of the accused person *at the time of doing the criminal act* Besides, the court has to inform them that they need to describe the present condition of the accused and recommend the expediency and type of any measure to be taken so that it *can order the proper disposition.* But any legal analysis or recommendation made by the experts should be disregard. Courts should take only their scientific, not legal, findings and recommendations because, in respect of legal analysis, they are not qualified.[134]

Therefore, experts do have four roles in the determination of non-responsibility: description of the condition of the intelligence of the accused person at the time of his criminal act, description of the present condition of the intelligence of the accused person, advising a court on whether taking measures is expedient, and if so, the nature of such measures (medical treatment or safety measures). At this juncture, it may be necessary to note that the second paragraph of article 51(2) of the English version does not contain the expression *"the condition of the accused person at the time of his acl"* which is found in the Amharic version («)'>£fV> m..JJrt(n.-> th'i,.+..). The mistake was probably committed during translation from Amharic to English since the Code was first written in Amharic and subsequently translated to English. Similarly, the omission will not cause any fatal problem since the expression "terms of reference" under article 51(2) covers the duty to describe the mental condition of a person at the time of his act.

With regard to courts, their role is limited to making legal conclusion based on the scientific findings of experts. They cannot use anything else to make decisions. But one may wonder whether courts are bound by the testimony of non-professionals since the term *experimier* article 51 is not limited to professionals alone.[135] The term expert under article 51 refers to anyone who can give court relevant information. All the same, it is very difficult to claim that the testimony of non-professionals would amount to scientific finding. Accordingly, it should not be everyone's testimony but that of professionals' that must bind courts since only their testimony can be taken as scientific finding. Moreover, even with regard to professionals' scientific findings, courts are bound only if the scientific findings are *delinite.* Hence, *indefinite* scientific findings do not bind courts. For instance, scientific finding made on the

responsibility. Then, the prosecution an hire his/her own expert to counteract. So, under such circumstances, an expert need not be appointed by the court. [134] Article 51(2X3), Criminal Code.

[135] The determination of who a *professional*s by itself gives rise to another problem but in this case the term professional is used to refer to those persons who have the necessary expertise to decide on the mental conditions of individuals such as psychiatrists and psychologists.

basis of mere glance of an accused person should not be taken as definite becauseit is not the result of proper research on or examination of the concerned person.[136]

B. Partial Responsibility: Sometimes, the existence of biological causes may deprive a person of his cognitive or volitional power only in part This means, the person still retains his intelligence even if it is reduced. In relation to such person, therefore, article 49(1) provides that he will be liable to punishment in part He should not be treated like other 'normal' persons becausehis capacity is somewhat reduced. Again, he does not need to be exempted from liability since his capacity is not totally annihilated. So, the fact that the Code makes him entitled to a freely mitigated penalty pursuant to article 180 seems appropriate. Therefore, in our criminal system, persons with reduced capacity will not be acquitted although the reduction of the capacity may be substantial as envisaged by the substantial capacity test of the Model Penal Code. The disappearance of one's capacity substantially will only serve as an extenuating circumstance.

In relation to the determination of the partial loss of capacity, the court should follow the same procedure with the one it follows for the determination of absolute irresponsibility. That is to say, it should follow the procedures the Code stipulates under article 51, as discussed before, to see whether the eligibility requirements are fulfilled save for the loss of cognition or volition which can be partial.

The other legal consequence of partial responsibility is the subjection of the person concerned to measures of treatment correction or protection (Articles 129-133, as discussed before). This is so, becausesince the person is having some problem, he has to be helped, and the society should also be assured that this person will not cause damage any more. Finally, it is necessary to note that there is a possibility of letting partially responsible person go free upon the termination of the measures applied to him if the court deems such step expedient Likewise, it can reduce the penalty such person was sentenced to at the time of sentencing if it is deemed necessary.[137] So, there is a kind of double mitigation becausethe already mitigated penalty under article 49 may be further reduced in accordance with article 133(2) of the Code.

[IM] The reading of article 51(1) of the Amharic version of the Code reveals that the scientific finding should he the result of-proper research.

[137] Article 133(2), Criminal Code.

2.1.2 Intoxication

Sometimes, individuals may get intoxicated (either due to drinks or drugs or other substances) and thence commit crimes. At the time of committing the crimes, they are like insane persons becausethey may lose their cognition or volition. The issue then is whether or not they can raise their intoxication as a defence by assimilating it to insanity. Before trying to resolve this issue, it is important that the different types of intoxication are known. Normally, intoxication can be either voluntary or involuntary. It is a generally accepted practice that an involuntary intoxication is a defence.[138] The reasons seem self-evident This type of intoxication can be assimilated to insanity since the loss of cognition and/or volition is caused contrary to the will of an intoxicated person. It is also imperative that criminal law shows compassion to persons committing crimes under such circumstances as it does to insane or coerced persons. Moreover, punishing a person who commits a crime as a result of involuntary intoxication will not serve the purposes of either deterrence (both general and particular) or rehabilitation.

As far as voluntary intoxication is concerned, however, the position is different In most common law and continental law criminal laws, voluntary intoxication is not a defence becauseit is believed that the fault of the actor before getting intoxicated will deprive him of the benefits of the loss of cognition and/or volition at the time of his act[139] Therefore, a person who willingly gets intoxicated, unlike insane person, is seen as a self-induced insane. Accordingly, he is denied any benefit that he would be entitled to if the intoxication was not voluntary or if he was insane. After all, he may be a person who gets intoxicated to get 'Dutch courage' to a commit crime. Hence, there is no reason to show his compassion. Interestingly, some criminal codes such as that of Italy aggravate the punishment for the crime committed under such circumstance let alone granting defence based on voluntary intoxication.[140]

Incidentally, it is important to suss out that in relation to the criminal liability of intoxicated persons, the principle of concurrence between the moral and material elements is put aside. A person who has put himself into the state of absolute irresponsibility cannot be said to have the necessary moral element at the time of committing a crime. AO the same, he will be punished for his criminal act by taking into account his mental state prior to putting himself

[138] Ian McLean, and Peter Morrish, p. 9.

[139] George P. Fletcher, *Rethinking Criminal law,* pp. 846-847.

[140] Philippe Graven, p. 139.

into such state. This means, even if the moral element ceases to exist at the time of performing the criminal act, a crime can still exist.[141]

Nevertheless, there are still some countries which permit voluntary intoxication to serve as a defence. For example, under the German Penal Code, voluntary intoxication is a defence against the crime committed although it penalizes the intoxication itself if the actor had an intention or was negligent in relation to the commission of the crime that has transpired. Similarly, the punishment for the intoxication may go up to the maximum of the punishment that is attached to the crime committed, but never greater.[142] So, the German Penal Code seems to penalize intoxication becauseof the risk created, not merely a person has got intoxicated. At any rate, a person will not escape penalty in both cases although the crime for which he is liable may be different; for the crime committed or for the intoxication itself.

Interestingly, it is claimed that even in those countries where voluntary intoxication is not generally a defence, there are certain exceptions. Firstly, it is claimed that voluntary intoxication is a defence if a man is charged with an offence in which a specific or ulterior intent is essential, such as murder, since this man cannot form the intent required being in the state of intoxication. Secondly, it is claimed that voluntary intoxication is a defence if it causes insanity, though temporarily, so as to make the man incapable of knowing or understanding what he is doing or that it is wrong, or if he knows or understands that it is wrong but he cannot act accordingly.[143] However, the close scrutiny of these *exceptions* reveals that they are not genuine exceptions to the rule that voluntary intoxication is not a defence. Because, in the first scenario, the intoxicated person will be acquitted not becausehe was intoxicated at the time of his act but becauseone of the definitional elements of the alleged crime is missing; that is, the specific intent. So, intoxication in this case is raised only as a cause for the absence of the requisite intent, not as a defence. The defence is, after all, the absence of the alleged crime due to the non-fulfillment of its definitional elements. In the second scenario, voluntary intoxication is only an apparent defence. Because, in reality, what makes a man go unpunished is not the intoxication but the insanity that his intoxication ignites. Thus, intoxication in this case is, instead of being a defence, a factor that makes the biological problem(s) the man has to work so as to render him insane at the time of his act.

[141] Well, this assertion can give rise to a number of logical questions. For example, as stated before, how can a person who is absolutely intoxicated correctly identify his enemy, being such state, and hit his target? If he does so, would it not be doubtful that he is absolutely intoxicated?

[142] Philippe Graven, p. 139.

[143] Ian McLean, and Peter Morrish, pp. 94-95.

Therefore, voluntary intoxication, according to the second exception is, strictly speaking, a pseudo defence.

The Criminal Code regulates issues of intoxication under article 50. The Code perceives the issue from two different angles. If a person commits a crime while intoxicated which he is coerced into or for which he has no fault on his part, the intoxication can be raised as a defence provided that it is ***absolute.*** That means, involuntary intoxication is a defense provided that the loss of cognition or volition or both is absolute or total, or if the intoxication is voluntary, if there is no fault on the side of the person.[144] For example, if a person is compelled to take an intoxicant or maybe he is given it forcibly by way of injection, or if he does not know that the substance is intoxicating though he takes a reasonable care to know about its effects, or if the substance is taken according to medical order, he can raise his intoxication as a defence against the crime he commits being in such situation.

At this stage, it is necessary to question whether the coercion required under article 50 should be the same as the coercion that is required under article 71. That is, whether the coercion has to be absolute or if a lesser degree of coercion can suffice. It is logical that a person should resist any coercion which is resistible, in particular, when he is required to do something contrary to his will such as committing a crime. If a person gets intoxicated as a result of a resistible coercion, then there may be some element of willingness on his side to get intoxicated. Besides, permitting a person to raise the defence of intoxication although the coercion he was subjected to was resistible would encourage individuals to easily submit to the unlawful demands of others. Further, for the purpose of consistency, in as long as the nature of coercion is not explained under article 50(4), the tests provided under article 71 should be employed. Therefore, unless the coercion is absolute, the defence of intoxication should not be allowed in accordance with article 50(4). That is to say, the intoxication should not be regarded as involuntary intoxication.

As far as voluntary intoxication, which is attributable to the fault of a person, is concerned, the Code holds the following positions. If the intoxication is meant to commit a crime, or the person knows that he may commit a crime if intoxicated but keeps on getting intoxicated, he will be liable as if he committed the crime intentionally. This means, he will not get any benefits from the loss of his cognition or volition at the time of doing the criminal act; rather he will be treated as if he were sober at the time of his criminal act. If, however, the person was negligent about the result he would cause after getting intoxicated, he will be.trgjted as

[144] Article 50(4), Criminal Code

though he committed the crime by negligence and punished for it if negligence is, under the circumstance, punishable.[145] If he was not negligent but unfortunately he committed a crime as the result of the intoxication that is attributable to his own fault (voluntary intoxication),[146] he will not be punished for the crime committed on condition that the intoxication has put him in a state of absolute irresponsibility. In this case, this person will be held liable for the commission of another crime against public safety as defined under article 491.[147] So, the fact is voluntary intoxication is a defence against the crime committed. But the person will be punished for an independent crime; that is, the crime of creating risk to the society; the risk that caused him to commit a crime. To this extent, it seems that there is some sort of similarity between article 50(3) and the position of the German Penal Code. For example, 'if a person who wants to get intoxicated hires another to look after him so that he will not commit a crime after getting intoxicated', but due to the failure of the person hired, the intoxicated person, being in a state of absolute irresponsibility, commits the crime of rape, he will be answerable only for violating article 491, not for the rape (Article 620).

One may wonder the position of a person who does not have any intention to commit a crime after getting intoxicated or who is not negligent in relation to the commission of a given crime, but who unfortunately commits a crime while being in a state of *partial responsibility* due to intoxication. Article 50 does not seem to make this person liable to the punishment provided for the crime he commits;[148] nor does it make him liable for creating risk to the society in accordance with article 491. The question then is, whether it is fair to punish a person who commits a crime while being in a state of absolute intoxication or irresponsibility while a person who is in a state of relative intoxication or limited responsibility is let go free. But it must be known that a person who is in a state of limited responsibility becauseof intoxication still retains his intelligence. Hence, he knows what he is doing or the consequence thereof and he can control his conducts. Thus, if he commits a crime, he must be punished either for intentionally or negligently committing the crime, as the case may be. So, it is a matter of impossibility for him not to have some kind of knowledge or being negligent in relation to what he is doing if he is not in a state of absolute irresponsibility.[149]

Article SO (2), Criminal Code.

The fault has to do with gettms intonated, not with the result as such, becauseif he is at fault in relation to the result, it means that he has Intention or he is negligent, which is covered under article 50(1) and (2).

[141] Article 50C!). Criminal Code.

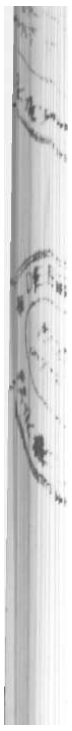
[14*] His case may be considered as an accident since the lault element pertains not to the result but to getting intoxicated. On (be contrary, he may be held liable like any normal person and without having regard to article 50.

[14'] See lor example llulip liraven, p 110 Ml

In other words, if a person, being in a stated of limited responsibility, commits a crime he will necessarily have intention to commit the crime or be negligent in relation to that crime.

In conclusion, the Criminal Code recognizes that both voluntary and involuntary intoxication may serve as a defense against a crime committed upon the fulfillment of certain conditions.
The most important of these conditions are the fact that the intoxication has to put the person
in a state of absolute irresponsibility and there should be no fault on the side of the criminal.

2.1.3 Infancy



Maturity is a condition for criminal liability and there will be no crime if the actor is an infant. Therefore, infancy is a universal defence, like insanity, and infants are absolutely exonerated from criminal liability. The rationales behind such exoneration are; first, infants are deemed incapable of forming guilty mind necessary for the commission of crimes; second, punishment cannot serve its purpose in relation to them; and, third, punishment is not a proper means to deal with them.[150] It is important to note that the controlling age for the purpose of determining a person's criminal position is the age at the time of doing an act contrary to criminal law, not his age at the time his case is entertained. The question then is, who is infant? Since, there is less debate that infancy commences at birth. So, the question worth considering is not the lower limit of infancy but the upper limit As far as such upper limit is concerned, there is no uniformity between different criminal systems. Accordingly, a person who is considered infant in one system may not be considered so in other systems. For example, the maximum age of infancy in Switzerland is 6, in France 13, in England 8, and in Ethiopia 7 (under the 1930 Penal Code).[151] Under the Criminal Code, the upper limit of infancy or immaturity, as regulated under article 52, is eight years. This means, infants are individuals who *have not attained* the age of nine or who are between 0-8 years.[152] So, if these individuals commit criminal acts, they are not answerable therefor. Instead, the Code stipulates that their families, schools and guardianship authorities may take appropriate steps to correct them. As long as they remain under nine, they are not the responsibilities of the society, so to say.

One may wonder how the duration of infancy is determined. Obviously, the determination is made arbitrarily. However, there are certain factors which must be taken into account when

[150] Wayne R. La Fave and Austin W. Scott, p. 351.

[151] Philippe Graven, p. 145.

[152] Philippe Graven states that a person who has not completed his ninth year is still considered an infant. This is contrary to the wording of article 52 of the 1957 Penal Code, to which no amendment is made by the Criminal Code.

the maximum limit of infancy is determined. Normally, it is believed that the mental development of a person is contingent upon his physical development[153] Thus, if the existing realities in a given country facilitate fast physical development, the duration of infancy has to be shorter. For example, in underdeveloped countries, the existing realities greatly hamper fast physical development mainly due to malnutrition which in turn has a pernicious effect on the psychological development of infants. Owing to this, the duration of infancy needs to be longer. On the contrary, in developed countries, the duration of infancy needs to be shorter since the physical development of their people is very fast resulting in fast mental development The other point is the fact that the longer children are kept away from courts, the greater the disadvantage will be. If courts are allowed to intervene early, it will be easy to disassociate them from criminal life. If, however, the intervention is delayed, it will be difficult to disassociate them from criminal life becausethey will develop the propensity for committing crimes. Therefore, *the sooner the better* should be the guiding policy to determine the duration of infancy.

2.1.3.1. Youth

Young persons within the meaning of the Criminal Code are persons who have attained the age of nine but who have not completed the age of fifteen.[154] So, they are individuals between nine and 15, inclusively. Like anyone, these individuals may commit crimes for various reasons. For example, it is possible that they develop the propensity for committing crimes becausemeasures were not taken while they were infants (by their families, guardians, or schools) for the crimes they committed, or these measures have failed to produce the desired results, or for other reasons. In this case, they will be responsible for their criminal acts since, unlike infancy which is recognized as a defence, youth is not recognized as a defence. Nonetheless, unlike adults, they are subject to special treatments. This means, the measures and penalties they are exposed to are special and different from the ordinary ones. Under the Criminal Code, these measures and penalties are those which are provided under articles 158-168, not the ones provided in the special part of the Code. The measures are admission to a curative institution, supervised education, reprimand (censure), school or home arrest, and admission to a corrective institution. These are non-punitive actions that can be taken against juvenile offenders depending on their reliability to produce the desired results. So, whenever a young person commits a crime and is convicted therefor, article 157 obliges courts to impose any one of the above measures. However, the provision does not limit the

[153] Philippe Graven, p. 145.

[154] The cumulative reading of articles 53(1) and 56(1) reveals that young offenders are those who are between the age of nine and fifteen, inclusively.

power of courts to the imposition of many measure at a time. Accordingly, depending on their reliability to produce the desired result; that is the rehabilitation of young offenders, courts can impose more than one measure at a time. For instances, reprimand as stipulated under article 160 can be imposed in addition to other measures. But it must be noted that whenever two or more measures are imposed, they should be capable of simultaneous enforcement For instances, it is very difficult to simultaneously enforce the measures of home or school arrest and subjection to corrective institution. On the other hand, admission to a curative institution can be enforced simultaneously with supervised education.

If a young person commits a crime because of irresponsibility, as envisaged under article 48, the measures to be applied are those that are provided under articles 129-133, [155] not those which are provided under articles 158-168. This is because, unlike the measures recopized under articles 129-133, the measures recopized under articles 158-168 are not suitable to persons who have biological problems that lead them to the loss of their copitive and/or volitional power while those measures.

For the purpose of taking measures against a young offender, the court should first convict him. Otherwise, there will be no legal ground to apply any of the measures or penalties provided for young offenders. If the person is convicted, the court can take any relevant step against him. For taking any action against a young offender, the Criminal Code stipulates different factors to be taken into account under articles 54 and 55. Among others things, the court should take into account his age, character, degree of mental and moral development, and the educational value of the actions to be taken against him. For this purpose, it can seek information about the person from any relevant sources such as family, school, medical institutions, experts, and law enforcement agencies. Any information so required will be binding upon courts if it amounts to scientific finding.[156] But it is less likely that information provided by some institutions such as family and schools will amount to scientific finding. Hence, courts will not be bound by their testimonies even if it may take them into account

Interestingly, the Criminal Code authorizes courts to vary their orders when such variation is **deemed** to benefit the criminal.[157] But the variation applies only to orders pertaining to measures, not to penalties as it can easily be discerned from article 164 of the Code. In fact the application of penalties to young offender is a last resort For that matter, no young

[155] **Article** 53(2), **Criaual Code.**

[«] **Article** 54(3), Criminal Code.

[15J] **Article** 55, Criminal Code.

offender who has appeared before a court for committing a crime for the first time will be liable to punishment under the Code. Because, under article 166, the Criminal Code stipulates that, in the first place, measures shall be applied and they must prove failure before penalties are resorted to. Therefore, it is imperative that a young offender fully undergoes the measures applied to him to say a given measure has failed to produce the desired result If the application of measures to a young offender is, for some reason, interrupted and, in the meantime, he commits another crime, penalties cannot be applied to him because the interrupted measure cannot be said to have failed to bring about the desired result; that is, the reformation of the young offender. Accordingly, this person will be subjected to another measure, not penalty. In short, the Criminal Code favours the exhaustion of measures, which should be fully undergone, before the application of punishment is set into motion. This shows that the need of the society in relation to young offenders is rehabilitation. If the application of penalties to a young offender is justified, the penalty can be either fine or imprisonment Fine is to be applied only if two conditions are met First, the criminal must be in a position to pay it; and second, he must be in a position to realize the effect of the fine.[158] Imprisonment on the other hand, can be applied only if the crime committed is ***serious,*** that is, if it is punishable with rigorous imprisonment of ten years or more or with death penalty. The extent of the imprisonment will be from one year to ten years.[159]

2.1.3.2. Intermediate age persons

In our criminal system, persons who have attained the age of 16 but who are below the age of 18 are said to have attained majority. So, criminal majority is attained at the age of 16. These persons are also referred to as persons of intermediate or transitory age since they are in the transitory period from criminal majority to civil majority. But for the purpose of criminal law, a person who has attained the age of 16 can be treated like an adult[160] However, the following considerations may/shall be made if he is below 18.

1. The court /za/mitigate his penalty[161] merely becausehe is below 18.
2. The court ***may*** apply one of the special penalties provided for young offenders, if it deems necessary.[162] It is likely that such person can change if he is subjected to special penalties stipulated for young offenders since he is still a child.

[158] Article 167(1), Criminal Code.
[1M] Article 168, Criminal Code.
[160] Article 56(1), Criminal Code.
[lel] Article 56(2), Criminal Code.
[162] Article 56(2), Criminal Code.

3. The court *may* apply measures provided for young offenders, if it deems necessary.[163] The fact that he has attained the age of 16 does not mean that his susceptibility to rehabilitation, if measures are applied, is total or even substantially annihilated. Hence, when there are promising prospects of reform, courts can subject such person to measures provided for young offenders.
4. There is a less likelihood that such person can be sentenced to life imprisonment This is due to the fact that Ethiopia is a state party to the UN Convention on the Rights of the Child and the Convention wants states parties not to impose life imprisonment on children and, when they do so, it prohibits them from doing it without the possibility of release.[164] Moreover, if we consider the *best interest ofthe child* as recognized in both domestic and international law, the imposition of life imprisonment may not be justified.[165]
5. Finally, under no circumstance can a court sentence a person under 18 to death.[166]

Except for the last point the other stipulations are optional. Thus, the court may impose the penalty attached to the crime committed if it considers such step appropriate to achieve the purpose of criminal law. The law has provided for the first three possibilities becauseit is believed that a person who has not attained the age of 18 is still liable to reform. Death penalty is, however, prohibited becausea person under the age of 18 cannot be as dangerous as a person envisaged under article 117. Moreover, though it is not clearly proscribed, it is unlikely that a minor will be sentenced to life imprisonment becauseit is less likely that he is that dangerous to deserve life in jaiL

Jf,"
P'V

2.1.4. Other non-affirmative (negative) criminal law defences

The Criminal Code provides for some defences which can be treated as negative defences under articles 48 (irresponsibility), 50 (intoxication) and 52 (infancy). There are also other negative defences which a defendant can raise to show his actual innocence thereby avoiding liability to punishment The following two constitutional defences are explained as examples of other negative criminal defences.

[10] Article 177, Criminal Code.

[14] Article 37(a), Convention on the Rights Of Tie Child, UN General Assembly Resolution 44/25 of 20 November 1989.

[15] See for example article 36(2) of the FDRE ConsiiMio«, Article 3(1) of Ike Convert* *m* the Rights of the Child, and article 4(1) of the African Charter oi the Rights and Welfare of the Child, OAU Dot. CAB/LEG/249/49 (1990), *entered lintoforce* Nov. 29,1999.

« Articles 117(1) and 176, Criminal Code.

2.1.4.1. The defence of prohibition of double jeopardy

The prohibition of double jeopardy is a constitutional prohibition. It has two sub-prohibitions: prohibition of second prosecution for the same crime and prohibition of second punishment for the same crime.[167] If a person is prosecuted for the second time for the same offence, he can object to such prosecution claiming that he has already been jeopardized by prosecution for that crime, if, regardless of such objection, the prosecution is sustained and punishment is to be imposed, the accused can claimed that he cannot be punished for the crime in question becausehis/her criminal liability for that crime is already paid. After all, as far as the accused is concerned, there is no crime and he is innocent

The defence of double jeopardy is recognized under article 23 of the FDRE Constitution. It provides that *no person shall be h'able to be tried or punished again for an offence (or which he has already been finally convicted or acquitted in accordance with the criminal law and procedure.* Article 2(5) of the Criminal Code also makes the same stipulation. Accordingly, prohibition of double jeopardy can be invoked as one of the negative criminal law defences to avert liability.

However, the Criminal Code stipulates that there are instances where double trial and punishment can be justified. Under Article 16, the Code provides that the prohibition of double jeopardy does not apply when a person who is subject to Ethiopia's principal jurisdiction is tried and punished in a foreign country. Hence, when such person finds himself in Ethiopia, he may face double trial and punishment without being able to raise the prohibition of double jeopardy as a defence.[168] This leads one to conclude that the prohibition of double jeopardy by the Constitution is applicable only with regard to criminal cases tried and decided in Ethiopia. Of course, this is what the words of article 23 of the Constitution also imply.

2.1.4.2. The defence of non-retroactivity of criminal law

A retroactive criminal law is one that makes an act illegal after the act was taken, increases the punishment or severity of a crime after it occurred, changes the procedural rules so as to increase the chances of conviction after the crime occurs.[169] So, if a liberal act was done

[167] Daniel E. Hall, p. 246.

[168] As started before, the effect of such double trial and punishment is to check the adequacy of the sentence imposed by **a** foreip court becausethe sentence served abroad will be deducted from the new sentence to be served. However, if **a** person was acquitted abroad, he/she may face punishment in Ethiopia

[169] Daniel L Hall, p. 251.

before a given penal legislation comes into being, that act cannot constitute a criminal act If the actor thereof is charged for violating this penal legislation, he can raise the absence of a crime as a defence for he acted in accordance with his right at the time of performing the act So, non-retroactivity of criminal law is a defence. In our case, such defence is recognized under article 22(1) of the FDRE Constitution. The Constitution states: '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.' Article 5(2) of the Criminal Code also provides for the same principle. Hence, non-retroactivity of criminal law is one of the negative criminal law defences as it challenges the very existence of the crime in question, not the liability of the accused person.

2.1.5 Affirmative defences

So far, different grounds that can serve as defences have been discussed. These grounds can be treated as *negative defences* \)tvmz their target is rebutting claims that crimes exist For instance, a person who raises infancy as a defence does not accept the satisfaction of the definitional elements of a crime. He rather challenges their fulfillment by claiming that the necessary guilty mind is missing; hence, there is no crime. In accordance with the principle of legality, therefore, if there is no crime, there will be no punishment On top of these negative defences, there are certain factors which are recopized by the Criminal Code as criminal law defences. These factors are known as *affirmative or proper defences* becausethey assume the complaint or charge to be correct but raise other facts that if true, would establish a valid excuse or justification or a right to engage in the conduct in question. In other words, the accused person *affirms* the allegation that something was committed or omitted but claims that punishment is improper. Hence, an affirmative defence does not concern itself with the elements of the offence at all; it concedes them. Rather, a person who produces an affirmative defence says, "Yes, I did, but I had a good reason'.[170] So, the target of affirmative defences is avoiding liability, not responsibility for what is done. These defences include the defence of lawful acts, justifiable acts and excusable acts. In the first case, the accused admits that he committed or omitted the act in question but maintains that his commission or omission was lawful. In the second case, the accused claims that he committed or omitted the act in question and also admits that his act is not lawful but challenges that it is wrong. In the third case, the accused admits that he committed or omitted something and also asserts that his commission or omission is wrongful but claims that he is not answerable therefor.[171]

[170] Thomas J. Gardner, Terry M. Anderson, *Criminal Law,* 8[111] ed,, 2003, USA, p. 128.

[171] For the discussion on these notions in the following parts, see generally George P. Fletcher, *Rethinking Criminal law,* pp. 759-774.

Some of these affirmative defences are *incorporated* under articles 68-81 of the Code and they will be considered below one by one.

2.1.4.1 Lawful acts

Lawful acts are neither justifiable nor excusable acts. Justifiable acts are acts which are prohibited by law but the violation of the law will be acceptable under the circumstance becauseit brings about some benefit to the society. Excusable acts, on the other hand, are acts which are prohibited by law and do not bring benefit to the society. But the author of an excusable act will not be punished becausehe suffers from certain disabilities, external or internal, in the case of lawful acts, they are just lawful and they do not give rise to crimes. Therefore, giving coverage to them in the Criminal Code may seem absurd. Despite that, the Code classifies these acts into acts required or authorized by law and acts performed in the exercise of a professional duty and deals with them under articles 68 and 69, respectively. So, if individuals cause harm to others in the performance of acts required or authorized by law, or while exercising their professions, they will not commit crimes provided that they are done within the limits provided by law and also the conditions attached thereto are observed. The acts which are considered to be lawful pursuant to articles 68 and 69 include the following.[172]

a. Acts performed in respect of public duties:-this applies to non-state official who cause harms to others in furtherance of public goods. For instance, if civilians cooperate with a police officer to effect arrest, in accordance with the Criminal Procedure Code, their act of restricting the liberty of others will not amount to a crime. (See articles 57 of the Criminal Procedure Code and 806 of the Criminal Code).
b. Acts performed in respect of state duties:-this applies to state official, save the military, causing harm to others in the course of discharging their duties. For instance, if a police officer arrests a person or effects bodily search on her or seizes her property in accordance with the Criminal Procedure Code, the arrest, bodily search and seizure of property will not give rise to crimes although they affect the interest of the person involved.
c. Acts performed in respect of military duties:-this applies to members of the armed force. For instance, if a military pilot drops a bomb on enemy soldiers to save his colleagues, his act of killing these enemy soldiers, and in accordance with the law of war, will not constitute a crime.

[172] For the discussion in this part, see generally Philippe Graven, pp. 178-185.

d. Acts performed in exercising the right of correction or discipline provided that it is reasonable. For instances, if a father restricts the liberty of his seven years kid to disassociate him from his bad friends, the restriction of his liberty is not a crime becausethe father has a right to correct his kid (See article 52, second paragraph, Criminal Code).

e. Acts performed in exercising private rights recognized by law within the conditions and limits permitted thereunder. At times, governments may not be able to protect people becausethey cannot be omnipresent. So, there will be gaps in the protection people get from their governments. In such cases, people are permitted to take the law into their hands and do themselves justice which is known as *private justice is,* opposed to *public justice.* For example, repelling a usurper of one's property by using reasonable force as permitted under article 1148 of the Civil Code or killing other's animal to prevent substantial damage as permitted under article 2076(2) of the Civil Code are acts of private justice. So, damages caused in such situations will not give rise to crimes.

f. Acts performed in exercising one's professional duty provided that it is in accordance with the accepted practice of the profession and there is no grave professional fault in causing the harm. This part is regulated under article 69 of the Criminal Code and some important points need to be elucidated in relation to this provision. First, the use of the term *professional duty* under the provision tends to be misleading as it gives the impression that these acts are limited to acts *required* by law although acts *authorized* by law are also included. Second, it does not define the concept *profession* even if *profession can be taken as something someone regularly does to earn living.* Third, the provision applies only to real professionals, not to those who pretend to be professionals. For instance, if a kidney doctor performs an eye operation and as a result the eye is destroyed, he cannot rely on article 69 becausehe is not a professional as far as the operation he performed is concerned. Fourth, the act of exercising one's profession should not deviate from the accepted practices of the relevant profession.[173] For instance, no surgery can be performed on a street and if such operation is undertaken, the affirmative defence based on lawful act cannot be raised. However, this requirement is problematic as it leaves no loophole for the use of new and useful scientific methods of doing things. Filth, there should exist no grave professional fault. For instance, if a doctor injects someone with poison instead of medicine, this can be taken as a grave professional fault to deny him the defence of lawful act. Similarly, the

[173] To know what the accepted practice in a given profession is, it may be necessary to look at the code of conduct regulating that particular profession. If such code of conduct is missing, then the custom of doing things in the profession should be considered.

use of kitchen knife to perform kidney operation will constitute a grave profession fault if harm is caused as a result[174]

In short these are some of the lawful acts the Criminal Code lists under articles 68 and 69. But the list is not exhaustive as the expression *in particular,* under article 68, shows. Hence, other lawful acts can be brought into picture and reliance on article 68 for the purpose defence is possible. For instance, under article 575 of the Criminal Code, everyone is required to lend assistance to someone who is in imminent and grave peril of his life, person or health when he could have lent him assistance without risk to himself or third party. If A is in imminent danger to his life becausehe is committing suicide in C's house and B can help him but only by breaking into C's house, B can raise lawful act as a defence if he is charged for breaking into C's house to save A's life. This is so becauseB is required to lend assistance to A under article 575 of the Code.[175] Punishing B will be contradiction in terms becausethe same Code will require individuals to do two incompatible things. So, to avert such ludicrousness, the Code lets B go free and even encourages him to continue to do what he did.

2.1.5.2 Justifiable and excusable acts

A person may be confronted by two evils-one lesser and the other greater. Although he can choose any of the two evils, it is only the choice of the lesser evil of the two that will make his act justifiable. Thus, justifiable acts are those acts which bring about greater advantage to society than the harm they cause. For example, society will be better off if A kills B to save the lives of C, D and E becausethree fives will be saved at the expense of one. So, justifiable acts, though unlawful, are non-punishable becausethey are morally right That is why it is argued that justified conducts represent superior social interest and therefore ought to prevail.[176] The implication here is, if someone is engaged in a justified conduct, another person whose interest is to be affected by this conduct (the victim) is not allowed to resist whereas third parties are allowed to assist the author of such justified conduct to promote the superior social interest represented by the author a justified conduct Resistance against justifiable conducts amounts to objection to superior social interest Accordingly, in the eyes

[174] To mention one real case, it was reported that in 2001 EC, one specialist doctor of Jimma University Specialist Hospital cut off his patient's wrong leg instead of removing the leg that had health problem. This is undoubtedly a grave professional fault and as such the doctor will not be allowed to raise the defense of professional duty under article 69 if a criminal case is brought against him.

[175] The risk foreseen here can be understood as a risk to one's or third party's life, health or person without extending it to property or other rights. If such extension is made, one can argue that B is not under any obligation to act

[176] George P. Fletcher, *Rethinking Criminal law,* p. 765.

of the society, it is not resistance but submission and assistance to such conducts that is encouraged.

On the other hand, excusable acts are neither lawful nor justifiable (becausethey do not represent superior social interest). They are inimical acts to the society. For example, if an insane person kills another, there is nothing that the society will gain; rather, the society will be worse off. Hence, the acts are wrong both legally and morally. Nevertheless, the authors of excusable acts will not be punished becausethey are persons suffering from certain disabilities (external or internal) at the time of their unlawful and wrongful acts. Hence, they deserve excuse regardless of the loss they cause to the society. So, unlike justification which focuses on conducts, excuse focuses on the authors. A person who raises a defence of excuse claims that he is not accountable for the crime committed becausehe was disabled either by internal (like insanity) or external (like duress) factors to avoid the commission of a crime. The following parts are devoted to the consideration of some justifiable and excusable conducts permitted under the Criminal Code as valid defences.

2.1.5.2.1 Consent of the victim

Ordinarily, we think of crimes as acts performed contrary to the will of victims. But at times victims may initiate or invite the doing of harms (which constitute crimes) onto themselves. For instance, euthanasia refers to homicide committed upon the consent of the victim. The question then is whether the victimizer should be allowed to invoke the consent of his victim as a defence. This issue leads to another issue; that is, who is the victim of a criminal act?

Criminal matters are, by their nature, not individual matters but public. Hence, crimes are harms to the public, not to individuals. If this is so, it would be illogical to argue that individuals can license the doing of harm to the public.[177] It is for this reason that their consent is generally not accepted as a defence against punishment If it is to serve as a defence, it has to be obtained from the public, not from the direct victim of the criminal act All the same, the absence of defence based on the consent of a victim is just a rule. Hence, consent of the victim can serve as a defence under exceptional circumstances. For example, in some jurisdictions "consent of a victim is a defence when it negatives an element of the offence or precludes infliction of harm to be prevented by the law defining the harm".[178] In these jurisdictions, consent serves as a defence if lack of the consent of a victim is an element of the crime defined by law. In fact the defence in such situations should focus on the non-

[177] f ayne R. La Fave and Austin W. Scott, p. 408. "• Ibid.

existence of the crime alleged to have been committed. Hence, consent cannot serve as a defense proper for affirmative defences are those defences which necessarily presuppose the commission of a crime but are meant to challenge the appropriateness of punishment under the circumstance. For example, a person who raises coercion as a defence does not deny that he committed the said crime. He rather argues punishing him is not proper becausehe committed the crime contrary to his will. So, in the light of this argument, consent is not strictly speaking a defence in these jurisdictions. For instance, in these jurisdictions, it is claimed that consent is a defense against charge for the crime of rape.[179] A person raising the issue of consent should not be punished not becauseconsent is a defence but becausethe alleged crime by itself does not exist Therefore, for consent of the victim to serve as a defence it should not be an element of the crime committed.

With this general remark, let's consider the position of our legal system. Under the 1957 Penal Code, article 66 prohibits consent of the victim from serving as a defence even under exceptional circumstances. In fact, this position of the legislature was contrary to many special part provisions of the Penal Code. Presumably, courts were avoiding the absurdity that the application of the clear meaning of article 66 of the Penal Code would entail by making the special part prevail.[180] The Criminal Code has rectified the problem of the 1957 Penal Code by permitting consent as a defence. Firstly, the Criminal Code classifies crimes, under article 70(1), into crimes which are liable to punishment only upon complaint and those which are liable to punishment even in the absence of complaint from the victim or his legal representative. The first category of crimes is crimes against rights which are relatively protected while the second is crimes against right which are absolutely protected.[181] For example, under the Criminal Code homicide, rape, and theft are liable to punishment whether the victim has lodged a complaint or not Hence, the rights protected by the laws defining these crimes (Articles 598ff, 620 and 665) are absolutely protected rights. On the other hand, the commission of certain crimes calls for the attention of criminal law only if the direct victim of the criminal act lodges a complaint to the effect that the criminal be punished. For instance, if crimes defined under article 580 (Intimidation), article 625 (Taking advantage of the distress or dependence of a woman), and article 686 (disturbance of possession) of the Criminal Code are committed, the criminal will be liable to punishment only if the direct

"Ibid.

180 Peter L Strauss, *Interpreting the Ethiopian Penal Code,* Journal of Ethiopian Law, V 5, No2,1968, p. 397.

181 Philippe Graven, p. 187.

victims complain. Then, article 70(1) stipulates that consent of the victim can serve as a defence with regard to crimes liable to punishment upon complaint[182]

But one may wonder why, if criminal matters are public matters, the complaint of a victim is required for the purpose of punishment The justification is not crimes which are punishable upon complaint do not affect the public but the prosecution of such crimes will affect the victim again.[183] For example, if the crime committed is adultery (Article 652), the adulterous spouse will be punished if the other spouse complains. If he, for any reason, keeps quiet there will not be any punishment If, however, the adulterous spouse is prosecuted without the complaint of the other spouse, the latter may sustain damage like publicity in particular if the person is a well-known figure in his society. So, the requirement of complaint is meant to avoid double harm to the victim, not because the crime is innocuous to public interest.

The unwritten version of article 70(1) provides that consent of the victim is not a defence in respect of crimes which are liable to punishment *without^* complaint of victims. However, article 70(2) provides for an exception to this rule. For instance, in principle, if a person removes one of the essential organs of another, he will be liable to punishment in accordance with article 555 for committing grave willful injury. But under article 70(2), it is provided that the victimizer can raise the defence of the consent of his victim if the removal is for personal use (by himself or another person) or for appropriate and necessary scientific research or experiment to be conducted by a legal person and also *the victim does not have commercial purposes* disposing of his body or part thereof. But if the victimizer is securing part of the body of the victim for commercial purpose, he cannot raise consent as a defence notwithstanding that the victim does not have commercial purpose in the disposition of the organ of his body (Article 573(2)). Similarly, if the victim disposes his body or part thereof to get money or other advantage, he will be liable to punishment in accordance with article 573(1). In as long as the disposition of part of his body has taken place, it does not matter whether the money or advantage agreed upon is given or not If the disposition of his body or part thereof is to take place alter death, the agreement to do so by itself is regarded as a crime[184] although the giving of the money or the advantage agreed upon according to the agreement is pending unless it is a condition for the existence of the contract At this

[182] So, to know whether consent of the victim is a defence in principle or not one needs to bow whether the number of crimes punishable upon complaint is less than the number of crimes punishable without complaint

[183] Philippe Graven, *Prosecuting Criminal Offences Punishable only upon Private Complaint,* Journal of Ethiopian Law, V.2, No.l, pp.121-7.

[184] Compare this with the crimes envisaged under article 26(a) of the Code. Does this amount to punishing preparatory act?

juncture, it is important to raise one issue in relation to *whether human blood is considered body partmtim* the meaning of articles 70(2) and 573. If the answer is in the affirmative, then human blood will be extra commercium and those who get involved in any commercial activities involving blood will be liable to punishment in accordance with article 573. If, on the other hand, the answer is in the negative, then selling blood will not entail liability to both the buyer and the seller provided that it is done with the consent of the seller (giver).

It is also important to note that the disposition of one's body in part or totally for scientific research or experiment purposes is not unlimited. Article 70(2) stipulates that the scientific research or experiment must be *appropriate* and *necessary.* What is *appropriate* and *necessary* may be debatable. However, it can be said that such scientific research and experiment should be capable of furthering public goods. Hence, any scientific research and experiment that does not aim at furthering public goods may not be appropriate and necessary. And, if the disposition of one's body or part thereof is meant for this type of scientific research or experiment, consent with regard to such disposition cannot serve as a defence.

In any case, unlike the 1957 Penal Code which never permitted consent as a defence, the Criminal Code allows consent as a defence under two circumstances: when the crime committed is punishable only upon complaint and when the harm caused is bodily injury and it is caused upon the consent of the victim free of commercial purpose and for appropriate and necessary scientific research or experiment or for personal use.

A. Considerations to use consent as a defence I. Effective consent: As it is indicated before, consent can serve as a defence only exceptionally. Even under this exceptional situation, it can serve as a defence only if it is effeetive.[185] The issue then is; when is consent said to be effective? Consent is said to be effective only if two requirements are satisfied. First, it has to be given by a capable person.[186] If consent is given by a person who cannot make reasonable judgment as to the nature and consequence of the conduct to be performed onto him, it cannot serve as a valid defence. Thus, a person cannot raise as a defence the consent of a minor, insane person, or even that of an intoxicated person for such person is deprived of his cognition at the time of his intoxication.[187]

[185] Wayne R. b Fave and Austin W. Scott, pp. 408-9.

'◊lbid.

Ibid.

Under article 70, capacity is not expressly provided as a condition. It is simply provided that consent given by the victim or his legal representative is a defence. But the expression *his legal representative* implies that the victim is not capable of giving a valid consent. Hence, impliedly capacity is made a requirement Besides, the second sub-article of article 70 deals with *the conclusion of contracts* give consent This also shows that capacity (the ability to make a reasonable judgement about the consequence of the act to be done) is a requirement Otherwise, the contract concluded will be invalid.[188]

The second requirement for consent to be effective is the absence of defect It is provided that consent which is affected by defect is not a defence.[189] Consent can be affected by defect if it is extorted by duress, fraud or mistake. The requirement is that consent has to be given out of the victim's own free will. If he is coerced or deceived or commits a mistake and as a result gives his consent, the consent is not free and does not serve as a defence. It has to be noted that the mistake, to render the contract invalid, has to be the one that the law wants to prevent Hence, it is not any minor mistake that can make consent defective but the one that can affect the essence of the consent; that is, the one that would have prevented the victim from giving the consent had it been known to him. Under article 70 of the Code, this requirement is not provided. In particular, the first sub-article simply refers to capacity (though implicitly) and leaves the issue of *defectisAt.* But this does not mean that defective consent can serve as a defence. The element seems an inbuilt requirement of article 70(1). Giving consent is a legal transaction and for this legal transaction to be lawful, the consent has to be willed, free of deceit and basic mistake. Of course, the second sub-article of article 70 makes free consent a requirement since it deals with the conclusion of contract (valid contract) freely willed and, according to articles 1678(1) and 1696 of the Civil Code, a contract can only be valid or enforceable at law if it is free from defect (that is, fraud, duress and mistake). As a result, for effective consent to exist under the Criminal Code, it should not be affected by defects as provided under the provisions of the Civil Code on contracts.

II. Time of giving consent: As indicated before, consent can serve as a defence only if it is effective. But when should this effective consent be given? Should it necessarily be given before or at the time of doing the criminal act or does it suffice if it is obtained even after a criminal act is **performed?** The general understanding is that consent given after the

[188] Article 1678(a). the Civil Code of the Empire of Ethiopian, 1960.

[189] Wayne R. La Fave *///* A‹t› W Scott, pp. 408-9.

fact cannot serve as a defence.[190] It simply amounts to ratification of the act for various reasons such as the victim is compensated. But prosecution is controlled by the public interest, not by victim's interest Hence, in as long as the condensation or ratification is not made by the public, the victimizer should be punished. Accordingly, satisfaction by the victim is not a bar to prosecution. For example, if the act envisage under article 70(2) is committed, the actor can be prosecuted even if the consent of the victim is obtained subsequently.

However, a problem in our legal system arises with regard to crimes punishable upon complaint In relation to these crimes, whether the consent is given before or at the time of or after the act the effect is the same for the criminal-he will escape punishment Because, no prosecution can be made against him unless there is a complaint and, obviously, the victim will not complain if he is satisfied like by obtaining adequate compensation. If he resorts to criminal proceeding, none of the proceeds of such proceeding will accrue to him but in case of personal negotiation. So, in practice, subsequent consent is *L'ke* a defense since it bars prosecution. Otherwise, the rule is consent is a defence only if it is obtained before or at least at the time of the act

Of course, in some jurisdictions, it is expressly provided that condonation or ratification of the act is a defence for certain crimes, such as adultery and seduction followed by marriage.[191] But this type of express permission seems untenable. First the permission will be discriminatory as the rich can do anything to avoid punishment by using money while the poor cannot The law should treat the rich and the indigent alike. Second, such permission will be contrary to the purpose of criminal law to discourage criminals. The rich will not be discouraged becausethey can pay compensation. That may even embolden them to engage in repeated similar activities in as long as they are capable of giving satisfaction to victims. Third, punishment presupposes the dangerous disposition of a criminal. If a person acts contrary to criminal law without obtaining the consent of the right holder in advance or at the time of his act he reveals his dangerousness. Hence, it would be unwise to expressly permit him to secure the victim's consent subsequently to avoid criminal liability. Therefore, ratification should not serve as a defence, or at least it should not be made an express defence. For instance, under the Criminal Code, ratification is indirectly a defence if the crime committed is the one punishable only upon complaint and the victim refrains from lodging his complaint Under the 1957 Penal Code, it is expressly provided that subsequent consent which has led to the conclusion of marriage is a defence for the crime of rape, indecent

[190] Id., p. 410.

"i Id., p. 411.

assault or seduction, abuse of a lady's state of distress or dependence upon another provided that the marriage is concluded freely and it is valid. Appropriately, such provision is repealed by the Criminal Code. But the Criminal Code expressly makes subsequent consent a defence in relation to the crime of adultery. Article 652(1) of this Code stipulates that no proceeding should be brought against the criminal if the complainant has condoned it or derived benefit from it. The criminal can, therefore, raise the condonation obtained from or satisfaction given to the victim subsequently to have any proceeding brought against him for adultery discontinued.

In conclusion, the Criminal Code does not, in principle, recopize consent as a defence. However, under exceptional circumstances, it recognizes consent as a defence provided that certain requirements are fulfilled.

2.1.5.2.2. Coercion

Criminal law gives individuals due notices of the crimes together with the penalties the commission of such crimes entails. Nonetheless, sometimes individuals disregard the notice and commit crimes. But it cannot be claimed that the notice is always disobeyed out of one's own free will. At times, individuals violate the literal meaning of criminal law contrary to their will. This may happen, among others things, when one person is compelled by another to disobey the law.[192] In such situation, and upon the fulfillment of certain conditions, criminal law lets them go unpunished. Thus, the defence of duress (coercion) is recopized in almost all legal systems and the following are some of the reasons behind the recopition of the defence.

A. Loss of Volition: A person who is coerced to commit a crime is a person who does not have a say on his act Like an insane person, he is totally deprived of his freedom of choice. Hence, he deserves the same treatment in as long as the loss of volitional power is not willed. Alter all, some scholars argue that duress should sometimes serve as a negative defence and not as an affirmative defence since physical compulsion negates conduct[193] In other words, criminal law concerns itself with voluntary human conduct and someone who is physically compelled such as at pn point to do something cannot be claimed to have acted voluntarily. Hence, his conduct should be taken as involuntary and the defence of such person should focus on the absence of the crime in question due to the non-fulfillment of the material element of the crime.

[192] Stephen A. Saksburg, John L Diamond, kit kinports, Thomas H. Morawetz, p. 8.

[193] George P. Fletcher, *bethinking Criminallaw*, p. 830.

B. Social Benefit: The defence of duress is based partly on society's compassion towards an actor[194] because society excuses some criminals even if it gains nothing from their criminal activ ities. In the eyes of the society, a person who is subjected to duress is a disabled person becauseif he has to avert a given danger he has one and only way to do so; that is, doing what his coercer is telling him to do. On the other side, the recognition of the defence of duress can be based on societal benefit[195] That is to say, sometimes the permission of duress as a defence may be socially beneficial for individuals may avoid greater harm by submitting to the unlawful demands of others thereby making the society better off. For instance, a person should not be denied the right to invoke coercion as a defence if he saves his life at the expense of other's property right. Similarly, a person who gives information on someone's bank deposit to save his life should not be punished becausethe harm he will avert is greater than the harm he will cause. In fact it may be argued that he can raise necessity to avoid criminal liability. However, the defence of necessity is raised only if the triggering force is a natural force.[196]

C. Purpose of punishment: In any jurisdiction, law-makers must first determine their audience before proceeding to make criminal law. They should ask themselves whether the law is for extremely hero or for extremely coward or for an average person. It would be self-defeating to make laws for both extremes. Hence, the law to be made shall not demand extreme heroism; nor shall it encourage cowardice. It has to be the one that an average person finds easy to obey for it is only then that criminal law can achieve its purposes.[197]

So, punishing a person who is, for instance, irresistibly coerced to commit a crime is not going to serve the purpose of criminal law. Because, first he will not be deterred as naturally everybody worries about an immediate dangers revolving around himself, not about something to happen in the long run; that is, punishment[198] This means, a coerced person, in most cases, submits to the unlawful demand of his coercer whether or not he was punished before for similar incident It is said that regardless of this fact some criminal laws such as the criminal law of the Soviet Union do not recognize duress as a defence[199] thereby creating a kind of unrealistic expectation from persons to be extremely hero at all times. Second, it is very hard to think of rehabilitation in relation to a coerced person becausethe problem does

194 Ibid.

195 Ibid.

196 Wayne R. La Fave aid Austin W. Scott, p. 38!.

197 Stephen A. Saltsburg, John L. Diamond, kit kinports, Thomas H. Morawetz, p.8.

198 Philippe Graven, p. 192.

199 George P. Fletcher, *Rethinking Criminal Law*, p. 830.

not lie with him but with his coercer. So, one can think of rehabilitation in respect of the coercer, not in respect of the coerced person.

D. Disposition: Punishment presupposes that the criminal is a dangerous person. However, a coerced person is not dangerous since the crime is committed contrary to his will. Thus, it would not seem appropriate not to recopize the defence of duress.

In Ethiopia, the defence of duress developed quite slowly. Under the 1930 Penal Code, duress was not a defence at all regardless of its nature and intensity.[200] A coerced person was rather treated as a co-offender with his coercer.[201] So, the 1930 Penal Code demanded extreme heroism from any person. Nevertheless, that position was modified by the 1957 Penal Code. This Penal Code classified coercion into moral and physical Physical coercion, which refers to coercion denying freedom of movement, was permitted as a defence. Accordingly, a person who committed a crime being at a gun point could escape criminal liability.[202] On the other hand, moral coercion, which denies freedom of choice, was not recognized as a defence; rather, it was recognized as a mitigating ground.[203] Under the Criminal Code, coercion has become a full-fledged criminal law defence. Under article 71, coercion is recognized as a defence regardless of its nature: physical or moral. So, as of May 1,1997 E.C, everybody is entitled to avail himself of the defence of moral coercion as welL For the crime committed, only the coercer is liable to punishment as an indirect offender.[204]

Although coercion is a defence, it is accepted only if the following conditions are met First, the *source* of the compulsion should be a human agent[205] if the compulsion emanates from extra human agents like fire and flood, coercion cannot be raised as a defence although other defences such as necessity may be raised. Second, since the law does ;iot want to encourage cowardice, it demands relative and resistible coercion to be avoided.[2"6] No one is supposed to submit to the unlawful demand of another where the coercion is not absolute and is irresistible. Thus, coercion qualifies as a valid defence only if it is *absolute* and *irresistible.* Of course, absoluteness and irresistibility has to be checked by using the reasonable man standard. So, the coercion does not need to be absolute and irresistible for all human beings.

»a Philippe Graven, p.192. [2.1]
Ibid.
[2/2] Article 67, first paragraph, 1957 Penal Code. [213] Article 67,1957 Penal Code. Article 32(lKa). Criminal Code. Wayne R. La Fave and Austin W. Scott, p. 374-8. [m] Philippe Graven, pp. 194-5.

To require that kind of coercion amounts to demanding extreme heroism and this would be contrary to the very existence of the defence. But the expectation of the society from different persons varies. For instance, it is said that more is expected of persons occupying special offices such as police officers and soldiers than of ordinary citizens.[207] Third, the defence of coercion is sustainable only if the coerced person causes a lesser damage.[298] But still there are some jurisdictions in which it is possible to cause *proportional* damage to the harm avoided. If, however, greater damage is caused, the defence will not be acceptable. The coerced person had better sustain lesser harm than causing greater damage. Fourth, coercion as a defence is accepted only if the damage feared is *imminent,* that is, very close. If the danger is not imminent, the coerced person should say no to the demand of his coercer. He has other alternatives to avoid the danger feared than by committing a crime. Therefore, a danger which is remote is resistible and submission to such coercion entails liability. Fifth, the defence of duress is permitted only if it exists throughout.[209] If there is interruption, the law expects the coerced person to make use of the gap to avoid the commission of a crime. Becausethe coercion at that moment becomes resistible and many alternatives to avoid the commission of the intended crime will come into picture. Sixth, in some jurisdictions, the defence is permitted only if the coerced person has not contributed by his own fault to the occurrence of the coercion.[210] But in others, the existence of coercion at the time of the commission of a crime suffices regardless of the contribution of the coerced person and provided that the other conditions are met.[211] Therefore, if these conditions are satisfied, duress can be raised as a valid defence irrespective of the type of injury avoided or caused. Of course, there are some jurisdictions which limit the injury to be avoided to life and bodily integrity. But this does seem tenabl^in as long as the above requirements are fulfilled. Besides, the holder of the right protected is not material.

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Under article 71 of the Criminal Code, only some of the above conditions are expressly recognized. Firstly, it is provided that the coercion has to be *absolute and irresistible* n^.Trta)- W'i l?: wr It is also provided that

the court has to take the type of coercion, circumstances and age of the coerced person, the relationship of the strength of the coerced and the coercer, and other factors into account to

[207] George P. Fletcher, *Rethinking Criminal law,* p. 833.

[208] (u.je. <»£: *r/vMA in<n>uwewctrtsvcw -n iwri.-r* ims- "*7l™lSZ C Z h* p.101.

^ Philippe Graven, pp. 173-5.

[210] 0,1.JP. fl)^5:p.l03.

[211] Wayne R. La Fave and Austin W. Scott, pp. 173-5.

determine whether the coercion is absolute and irresistible. Secondly, the law expressly mentions *proportionality* by using the expression 'without causing greater harm than he could have suffered' (A.£CfM^ hWa> "M-l- *n'7epA 7*") as a condition to avail oneself of the defence. The other requirement which is provided is that the duress has to emanate from another person. Becausearticle 71, first paragraph, refers to article 32(l)(a) which deals with persons committing crimes by using other human beings as means. Besides, the second paragraph of article 71 implies that the coercer has to be a human person by using expressions like 'the relationship between the strength of the two persons'.

The remaining requirements are not expressly stated in the Criminal Code under article 71. Therefore, whether they have to be taken as conditions or not remains a matter of interpretation. But it seems that *imminence* and *continuity* are inbuilt requirements of article 71 becausein the absence of the two requirements, coercion can hardly be absolute and irresistible. Hence, absoluteness and irresistibility cover the conditions of imminence and continuity. This can best be inferred from the cumulatively reading of articles 71 and 72. If one of these requirements is missing, then, coercion becomes resistible and entitles a person subjected to it only to compulsory mitigation (Article 72), not exoneration from liability.

The requirement of fault is, however, very difficult to infer from articles 71 and 72. Nonetheless, it can be argued that fault is a requirement for individuals are not permitted to benefit from their own wrongs. On the contrary, it can also be argued that fault is not a requirement and what matters is the position of the coerced person at the time of committing a crime. If he was totally deprived of his volitional power, he has to be allowed to invoke the defence. But in the field of criminal law, since the rule of *strict construction* applies, the second position seems tenable. Therefore, coercion can serve as a defence even if the fault of the coerced person has contributed to the occurrence of the coercion. For example, a person who joins the group of robbers can raise coercion as a defence if he is forced contrary to his will to commit a crime with them.[212]

Interestingly, the Criminal Code does not seem comprehensive on the defence of compulsion. Normally, the defence is permitted whether the right safeguarded belongs to the coerced person or a third party upon the fulfillment of certain conditions. For the Criminal Code, however, the defence can be invoked, it seems, only if the right at stake belongs to the actor himself. It uses the expression *he could hare suffered {t\.?.C(\l\)-* hW'Zrt>- *M"H

[212] If the agree »ent by itself constitutes a crime (of conspiracy) be will be answeraWe therefor.

instead of saying *that could have occurred (t\.?.C.t* \ h'/fl^fl)- *1 ^),* which limits the defence to actions taken to safeguard only one's own interest So, it can be argued that this defence cannot be raised, at least, by reading the clear meaning of article 71, if a crime is committed to defend third party's interest Of course, it is not a tenable requirement in particular, if the other requirements are met All the same, the limitation of the defence may be an oversight becausesuch limitation was not made even under the 1957 Penal Code even though moral coercion was not a defence. On the other hand, it seems possible to advance a philanthropic argument claiming that article 71 allows the defence of duress even when harm is caused to protect others. For instance, if a man destroys the property of another to save the life of his wife, it can be argued that he will avert the harm that he can suffer since the death of his wife will cause psychological harm to him. So, the harm a person sustains, as envisage under article 71, is not limited to the harm one sustains as a result of the violation of his right Yet one problem still lingers under article 71; that is, a person who commits a crime to safeguard the right or interest of someone to whom he is not related in any manner cannot raise duress as a defence becausethere will be no harm (physical and psychological) that the actor will sustain if the coercion exerted on him is not complied with. However, this person may be entitled to free mitigation as provided under articles 72 and 180 if one thinks that he should have avoided the commission of the crime.

2.1.5.2.3 Superior order

For collective life, the establishment of different institutions is necessary. These institutions will have many members in which superior-subordinate relationships will inevitably be created. Once such hierarchical relationship is created, the superior will have the right and duly to give lawful orders whde the subordinate will have the right and duty to execute these orders. But this relationship gives rise to one problem which is worth considering in the study of criminal law: who should be liable for harm is caused through the execution of the order of a superior? Should the superior be liable for the damage caused by another? Or should the subordinate be liable for the damage caused in the course of obeying his superior's order?

To begin with the liability of the boss, it is known that a superior's mandate is to give only lawful orders. Hence, if they give lawful orders and as the result of the execution of such orders harms occur, they will not be answerable becausetheir acts will be lawful acts.[213] But if they give unlawful orders and as the result of the execution of such orders harms transpire,

[2,3] For example, see article 68(a).

then they will be liable for such harms provided that they constitute crimes. If that is the case, one may wonder when superior's order becomes unlawful.

It is claimed that an order becomes unlawful if it fails to pass the tests of *service matters* and *relevance.*[214] In the first place, the order, to be lawful, should pertain to the service rendered by the institution to which the superior belongs. For example, no superior cah give a lawful order to rape a lady since there is no legal institution established to give raping service. Secondly, even if the order pertains to the service rendered by his institution, it has to, under the circumstance, be relevant A given military general may order the conquest of the land of a neighbouring country if he is at war with them. If, however, the order is given after the war ends, it will not be relevant Hence, it will be unlawful order.

Under the Criminal Code, article 73 makes the following stipulation:

In the case ofan act committedby 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)). The above provision makes a person giving order liable if his subordinate commits a crime on condition that certain requirements are fulfilled. First, the two persons must have superior-subordinate relationship regardless of the rank of the superior; that is, whether he is a high-ranking boss or not Second, the relationship must exist in administrative or military institution. This is so becausein other institutions such as the parliament and the judiciary, we do not have superior-subordinate relationship that will lead to the commission of crimes. For example, a judge should be guided not by other's order but by the law to render decisions. A parliamentarian should also be guided by a constitution and his conscience. This is, on the other hand, not the case in military and administrative institutions. Subordinates in these institutions expect the orders of their superiors to do their jobs. Incidentally, it has to be noted that both the superior and the subordinate should belong to the same^dministrative or military institution if article 73 is to apply. Third, the superior must give an order. If the subordinate commits a crime without the order of his superior, no issue involving the superior's liability will arise. Fourth, the order must be unlawful. Fifth, the unlawful order must be express. A superior is made liable for the act of his subordinate only if the subordinate executes an express order. Hence, if the superior has not given an express order but the subordinate makes a move presuming that there will be such an order, the superior will not be liable for the harm caused on the basis of such presumed order. Sixth, the

[214] Philippe Graven, p. 200.

superior must be competent to give such express order. So, being a superior by itself does not suffice. For instance, if a remote military superior does not have the power to exact obedience from a low-ranking soldier, the soldier cannot raise superior order as a defence by enforcing his order. Seventh, the order of the superior must be executed. Eighth, the execution of the order must cause harm. Ninth, the harm should amount to a crime. If it simply constitutes a civil wrong, then the criminal liability of the boss cannot arise. Tenth, the subordinate should not exceed the order of his boss since the superior will be liable only for the direct consequence of his order. For any excess, the subordinate alone will be liable although this does not affect the liability of the superior for negligence pursuant to article 59. Therefore, if these conditions are satisfied, the superior whose order is enforced and caused a crime will be held liable to punishment

As far as the liability of the subordinate is concerned, there are some more points that need special consideration. First a subordinate to whom an unlawful order is given will be faced with two evils: to obey the order and violate the law, or to refuse the order and confront any possible measures to be taken against him by his superior. But normally, since the measures taken by superiors are immediate, subordinates opt in favour of executing orders. The question then is whether or not they should be liable for the crimes they commit in the course of implementing their superiors' orders.

The response to this issue is different in different legal systems. In some systems where the philosophy of *blind* or *passive* obedience is adopted, subordinates are absolutely immune from liability. Because, there will be no difference between order and law in such system. Hence, a person executing an order is the same as a person executing a law. On the other hand, in systems where the philosophy of *intelligent infantry* is adopted, a subordinate who executes an unlawful order is liable to punishment This is because, in these systems, a subordinate has the right to question the legality of any order given by his superior. If he fails to question the legality of the order and implement an unlawful order, he will be answerable for any eventuality. Lastly, in systems where the philosophy of *manifest illegality^* followed, a subordinate is liable only if the unlawful order he executed is apparently or clearly illegal. Hence, a subordinate who executes an order which is illegal but not manifestly will not be liable to punishment.[215] At this juncture, it important to note that the gravity of the crime may not be important in as long as the order is manifestly illegal. Hence, a subordinate who

[215] Philippe Graven, pp. 201-202.

executes a manifestly illegal order leading to the commission of a less serious crime will be liable to punishment

The position adopted by the Criminal Code is closer to the last philosophy although it does not exactly dovetail with it[216] It provides that a subordinate is liable to punishment if he was aware of the illegal nature of the order but executes it[217] For the purposes of determining the awareness of a person about the illegal nature of a given order, the Code seems to provide for two examples. First it expects any subordinate to bow the illegality of an order if he knows that the order giver does not have the mandate to give it. Second, the Code expects subordinates to know the illegality of an order if the acts ordered are criminal in nature and it provides for examples where subordinates are supposed to know the illegal nature of an act such as homicide, arson, genocide, mutiny and forgery. In addition to these two examples, one can add the following two examples. If a subordinate knows that the order given does not serve any of the purposes of his institution, he should be presumed to know the illegal nature of the order. Further, if a subordinate knows that the order given is irrelevant for the proper operation of his institution, he knows that the order is illegal. Hence, he should not enforce these orders so much so that he will not be liable to punishment for the crime he commits in the course of enforcing the orders.

Therefore, if an order is given by someone who, the subordinate honestly believes to have authority to give the order, the subordinate will not be liable to punishment becausehe does not know the illegal nature of the order. Similarly, if the subordinate does not know that the act ordered is a crime, for instance, a crime defined by recent international criminal law, the subordinate will not be liable if he executes an order requiring the commission of such crime becausehe does not know the illegal nature of the act ordered. On top of that if he genuinely believes that the order given is pertinent to the services rendered by his institution and is also relevant under the circumstance, he will not be liable to punishment becausehe cannot be presumed to be aware of the illegal nature of his superior's order.

At this juncture, few points are worth considering. First, article 74 does not regulate the case of inadvertent negligence. If a subordinate who does not bow the illegality of the order he receives from his boss is inadvertently negligent he will not be liable to punishment becausehe lacks awareness as required by article 74. Second, one must notice that whether the superior giving an order is immediate or ultimate does not matter in as long as the remote

[216] Article 74, Criminal Code.

[217] In relation to petty offences, superior order is an absolute defence. See article 743(2).

superior is lawfully mandated to exact direct obedience from the subordinate. Third, becausearticle 74 stipulates that the subordinate who is unaware of the illegality of the order given to him is not liable to punishment for the crime he commits, it recognizes an exception to the rule *ignorance of law is no defence.* Thus, a subordinate can raise his oblivion of the illegality of the order he receives as a defence.

A subordinate who is found liable in accordance with article 74 may be entitled to a freely mitigated liability. Exceptionally, he may be excused if a court, having regard to all relevant factors such as the exigencies of his discipline, feels that he could not discuss the order with his superior and its implementation was the only chance available to him (Article 74(2)). For example, if a military general orders his subordinate to wound one of his prisoners of war telling him that this measure is necessary to avoid greater danger, the subordinate may be exempted from liability provided that he lacks sufficient time to discuss the order with the general and also he could not act otherwise than he did.

2.1.5.2.4 Necessity

At times, the pressure of natural forces may put someone in an emergency situation where he has to make a choice between two evils: to violate the clear meaning of criminal law and produce a harmful result, or to comply with the law and let greater or equal or lesser harm occur.[218] As a matter of social policy, if the law is violated to avoid grater harm, the violator will not be punished unless the emergency situation is created by his own fault[219] In the absence of fault on his side, his act is considered necessary for the society and hence justified. So, a necessary act is a non-condemnable act though contrary to law, becausecondemnation is (should be) based on the cost-benefit analysis of the society. If there is societal benefit there will not be condemnation. The society accepts and even encourages acts which bring about societal benefits, such as necessary acts. Therefore, if an act performed is a necessary act though contrary to criminal law, it is accepted as an affirmative criminal law defence.

The Criminal Code recognizes the defence of necessity under article 75. The article stipulates that a person performing a necessary act is not liable to punishment However, under the Code, necessity is accepted as a valid defence only if the following requirements are fulfilled.

[218] Philippe Graven, p. 208.

[215] Wayne R. La Fave and Austin W. Scott, p. 381.

A. Imminence: The Code demands the danger feared to be imminent or very close. The defence of necessity applies only where a person is in an emergency situation and faced with the choice of two evils. If the available choices are more than two, like if there is a third choice which can be used to avoid the danger instead of disobeying the law, the defence of necessity will not exist Necessity is a defence only if the law is violated upon the disappearance of any hope to avoid violating the law. For instance, a person starving to death cannot raise necessity as a defence if he steals bread from bakery becausehe has other alternatives to avert the danger (starvation) like begging. Therefore, in as long as there are other possibilities to resort to, the law should not be violated. So, in the absence of a third choice, the danger feared can be regarded as imminent

B. Seriousness: The Code further requires the danger at hand to be *serious {h^!?:* hiTV *h&P*

In fact what constitutes *'serious'* is vague and relative. For a very poor person, any danger against a thing which is worth $100 may be serious while for a rich man it is a negligible danger. Even the very stipulation of this requirement seems unwise. Becausethe justification of the defence is based on social benefit and it is immaterial whether the danger at hand is serious or not in as long as the society gets benefit when criminal law is disobeyed. For example, a person violating the law and affecting an interest which is worth 500 Birr should be permitted to raise the defence of necessity if the interest he safeguards is worth more, like 1000 Birr. Of course, it can be argued that the seriousness' requirement is stipulated to demand causing lesser damage by avoiding greater damage, or maybe to discourage law violators. But this is an argument based on interpretation as the clear meaning of the law requires the danger feared to be serious.

C. Fault: Under article **76** of the Code, it is provided that the defence of necessity ceases to exist if the emergency situation is created by the fault of the actor. The Code stipulates that *ifthe actor, by bis own fault, placed himselfin the situation involving danger or necessity in which he found himself .0)- Y-tTliV)- hhm'P:lh't.,h*

U 'h.'h n^ <v T4.fr P^l h-mfv). he will be entitled to mitigated penalty, not exoneration. So, the absence of fault on the side of the criminal is another requirement to use the defence of necessity. If a person intentionally creates the situation of necessity, he will be held liable for intentionally causing the harm caused. If he, by negligence, produces the state of emergency triggering the necessary act he will be liable for causing the harm by negligence provided that the negligent doing of the act is punishable. For instance, a person driving at an excessive speed cannot raise necessity as a defence if he runs-over a pedestrian to save the passengers in case the brake of his car fails to work

Because he is at fault in the first place. It has to be noted that a person who commits a crime being in a state of necessity is not to be treated alike with others though the necessity is created by his fault. Article 76 provides that he is entitled to optional free mitigation (Articlel80).

D. Intention: A necessary act is an intentional act[220] If an act is not performed with the intent to avert a certain danger, it cannot amount to a necessary act This requirement is implied under article 75. The article defines a necessary act as an act which is performed *to protect** legal right from immanent and serious danger *{?£■{]')* fl]j&?" CM *wabj*
tfD-n* n^c-n im^cA hm *him VMS*™*
£C7. •'/■.... *hfWlV).* The expression *toprotect* (rt^'}) implies that the act has to be performed with the sole objective of averting the imminent danger at hand. Accordingly, if 'X' kills Y for retaliation and later on he discovers that by killing Y he saved 'R' and'S,' he cannot raise necessity as a defence. The lives of the two individuals are saved incidentally, not as a matter of X's choice.

E. Source: In some jurisdictions, it is provided that a necessary act is a reaction against natural forces such as storm, fire, flood, starvation, landslide, etc.[221] Thus, measures that are taken to avert dangers created by human forces do not constitute necessary acts. Under articles 75 and 76, however, such requirement is not stipulated either expressly or tacitly. Hence, it can be argued that the defence of necessity can extend to reactions against human forces provided that these forces are not covered by article 71 (coercion), article 73 (superior order), and article 78 (legitimate defence).[222] For example, article 77 of the Code regulates military state of necessity and obviously the state of necessity in this case is created by human force.

F. Proportionality: The underlying justification for the defence of necessity is social policy; that is, the act benefits the society. Yet, in some legal systems, the defence is accepted even when the society is neither better off nor worse off.[223] That is to say, individuals causing proportional harms are allowed to benefit from the defence. Under the Criminal Code, the requirement of proportionality is not clearly provided although article 76 contains an ambiguous expression which excludes the defence of necessity when the balance is not

[m] Id., p. 386.

[221] Stephen A. Saltsburg, John L Diamond, kit kinports, Thomas H. Morawetz, p. 786.

[222] It is claimed that necessity in its broader sense includes all of them.

[m] (I)-'!: p. 117.

positive and entitles a person to a mitigated punishment The expression reads: *if the encroachment upon third party's rights exceeded what was necessary /flMd)- ip<j>-* OB-ftl- w. V'I'fX(fl> en>mr)n^j]P.hlWt...).

The underlined expression may have two meanings. Firstly, it means that what is done should not be in excess of what renders an act a necessary act; that is, it has to be lesser according to the justification of the defence. Secondly, causing equivalent harm (or even greater) is possible if such harm is necessary under the circumstance. So, it is a matter of interpretation to take proportionality into account But in the light of the rationale behind the recognition of the defence, the first interpretation seems tenable while the balance seems to tilt in favour of the second interpretation if one is to disregard the justification behind the defence of necessity and solely base his argument on the literal meaning of the Code.

G. **Means used:** Under article 75, it is provided that a person in an emergency situation should use a means proportionate to the requirement of the case. If the means is disproportionate, under the circumstance, obviously excess of necessity will come into picture. Hence, a person who can cause bodily injury by using his fist to avert certain danger should not use bullet, or if killing with a bullet is possible, hand grenade should not be used. Interestingly, the English Version of the Criminal Code does not recognize this requirement So, there is seemingly a difference between the two versions. But according to the Federal *Negarit Gazeta* Establishment Proclamation No. 3/1995 (Article 2(4)), whenever there is discrepancy between the two versions, the Amharic Version shall prevail Hence the requirement of the *means used \os,* to be satisfied for the defence of necessity to be accepted.

At any rate, if the requirements provided under both article 75 and article 76, either expressly or impliedly, are met necessity can be raised as a defence. The types of harms avoided and caused are irrelevant However, if the requirements are not satisfied, the defence does not exist Instead, excess of necessity may exist like if the state of necessity does not exist becausethe danger is not imminent or it is created by the fault of the actor, or the measure taken is in excess of what is necessary. Excess of necessity entitles the actor only to a mitigated penalty.

Under the 1957 Penal Code, the defence of necessity covers everyone in a state of emergency.[224] So, its scope was wide. Under the Criminal Code, however, the scope of the defence is somewhat limited. The second paragraph of article 75 provides for an exception where necessity cannot be raised as defence notwithstanding that all the necessary

[224] Article 71,1957 Penal Code.

conditions are met The Code stipulates that necessity cannot be invoked by persons who have special professional duty to protect life or health. Indeed, the existence of necessity entitles them to mitigation, not to exemption from liability. Accordingly, if a given boat has some people in excess of its carrying capacity (and this is not attributable to the fault of the crews of the boat) and as a result it is about to drown, it is possible to throw some of the people into a sea to save the lives of the others. But according to the exception, except for the crew members who are necessary to navigate the boat, the other crew members must be sacrificed first Among themselves, the crew members may draw lots. Then, the lives of the passengers have to be saved at the expense of their lives. The same is true with pilots and drivers. In fact death is the risk they assume at the time of their recruitment for such jobs. They should not breach the special duty imposed on them to take care of others' fives and health. If the duty is breached, they will be liable to punishment even if the punishment is to be extenuated (Article 180). Therefore, the Criminal Code has reduced the scope of the defence of necessity. However, the feasibility of this exception may be questioned becauseindividuals may not be willing to sacrifice their interests, particularly their life, if they bow that they may get a mitigated penalty. After all, life is better than death even if it is in a jail.

2.1.5.2.5 Legitimate defence

Legitimate defence is one of the oldest criminal law defences. It has about three components: self-defence (the defence of 'self-preservation'), the defence of others and the defence of property. According to the theory of legitimate defence, if a person causes harm to another to defend his own or third party's right he must be allowed to go free. This is so, because, in particular, when the issue pertains to self-defence, individuals must be allowed to protect themselves where the state fails to accord them protection against aggressors.[225] That is to say, everybody should be allowed, under certain circumstances, to take the law into his hands to achieve private justice. Similarly, the non-recopition of self-defence should not hit the target of criminal law since it is a natural human reaction against attack or a threat to attack. Further, it can be argued that the recopition of legitimate defence has a deterrent effect on would-be criminals. **But one may** wonder why the law permits a person who causes harm to another for the purpose **defending other**'s interest for that matter, without being invited by **the** victim, to go free. The **reason is** it **is** not **because**the law wants the interest of the victim to prevail over that of the aggressor that it permits an intruder to go unpunished; rather, **the law has** the stand that in a civil society every person has the right to protect the

[m] George P. Fletcher, *HH-Hmtmr Cnmnl/k**, p. 867.

other becausean attack against one is an attack against alL[226] Anyway, whether or not a person causes harm to another for the purpose of defending his own interest or that of third party, the following conditions should be fulfilled to validly invoke legitimate defence.

A. Attack or threat to attack: First of all, the issue of legitimate defence can only be raised if the harm caused to another is triggered by the attack of or threat to attack posed by an aggressor. In the absence of this condition, no one can be let go free, on the ground of legitimate defence, after violating other's right/violating criminal law. For example, if a person who is slapped by another chases his victimizer and beats him up, he is not defending any right (becausethere is no threat to attack) since the right is already violated. Instead, such person engages in an act of vengeance and there is no right to engage in an act vengeance.

B. Culpable Aggression: Legitimate defence will be available to people only if the responsive actions they take are meant to repel aggressors' unlawful conducts.[227] Stated differently, legitimate defence is permitted only against unlawful attack or unlawful threat to attack. Hence, there is no right of legitimate defence against lawful attack or lawful threat to attack. For instance, one cannot lawfully defend his liberty against a police officer who is effecting arrest according to the law.

C. Non-aggressor defender: The defender should not be the aggressor himself. There is no legitimate defence for the aggressor against the defensive action of other's since the latter's action is lawful. But any aggressor has the right of legitimately defending himself against any excessive action for the excess becomes unlawful[228] Likewise, it is claimed that if a person withdraws his attack [or his threat to attack] and informs his victim about this, or makes a reasonable step to inform him, he will be restored to his right of self-defence.[229] For example, if a person is trying to rob another but upon discovering that his intended victim has a gun runs away, the intended victim cannot chase and cause harm to him. If the intended robber is attacked, he will have the right to defend himself becausethe intended victim is not entitled to chase and injure him as there is no threat to harm him.

Id., p. 869.

[227] Ibid.

[228] Wayne R. la Fave and Austin W. Scott, pp. 394-395.

-'"Ibid.

D. Proximity: Inflicting harm on other's interest is permitted only if the aggression is imminent or immediate.[230] In other words, a person is permitted to cause harm to another to defend a lawful interest only if he cannot resort to the law for its protection. Accordingly, the right of legitimate defence does not exist against remote aggression since there are many avenues to a person to avert it such as reporting to the appropriate government officials. It should be borne in mind that the right of legitimate defence undoubtedly exists against an aggression which is underway. This is self-evident as the law will be self-defeating if it avoids the right under such circumstance when it recognizes the right even before the execution of the aggression commences.

E. Retreat: Normally, legitimate defence is taken as the last avenue to avert the unlawful attack or unlawful threat to attack. If there is another choice to resort to than causing harm to a person, it is believed that that choice should be exploited. However, a problem arises when this choice pertains to retreating. Is a person obliged to retreat instead of standing his ground and confronting his aggressor? Several states have adopted the duty to retreat[231] That means, a person may be required to retreat, if it can be performed with complete safety, than standing his ground and confronting his aggressor. Of course, such measure would be ignominious to him. Moreover, it can be taken as an incentive to aggressors. To alleviate these consequences of the duty to retreat, some states have limited the duty to situations where the use of deadly force is required.[232] Hence, if a person can repel, in these jurisdictions, the aggression without using deadly force, he will not be required to retreat

The duty to retreat is not a blanket duty as it has got an exception. The exception is, a person is not required to retreat from his home, the surrounding land, or his work or business place.[233] This is so becausea person has got nowhere to flee to from these place; they are supposed to be his safe places. However, this exception itself has got another exception. That is, the duty to retreat still exists even from these places if the assailant is a co-occupant[234]

F. Belief: It is claimed that the existence of a real situation giving rise to legitimate defence is not necessary. A person can still avail himself of the defence if he reasonably believes that he is defending an unlawful aggression For example, there should exist no hesitation to take action against a person who uplifted a knife although it might subsequently

[230] Id., p. 394.
[231] George P. Fletcher, *Rethinking Criminal Law*, pp. 867-868.
[232] Wayne R. La Fave and Austin W. Scott, p. 395.
[233] George P. Fletcher, *Rethinking Criminal Law*, pp. 867m
[234] Wayne R. La Fave and Austin W. Scott p. 396.

be discovered that the uplifting was meant only to intimidate and not to kill.[235] So, it is tenable that the law is not requiring a person to first ascertain the intention of his assailant before taking action against him becauseascertainment of other's intention is hardly possible. But if the belief of a person is not reasonable, he can be made answerable for the result of his act This means, the so-called 'imperfect' or 'putative' legitimate defence; that is, the defence emanating from honest but unreasonable belief about the existence of unlawful threat to attack, is not permissible. At best an 'imperfect' or a 'putative' legitimate defence can serve as a mitigating ground.

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G. **Proportionality:** The question of legitimate defence necessarily raises the issue of proportionality. The requirement of proportionality should be fulfilled if a person is to avail himself of the defence of legitimate defence. Here, the proportionality element has two ingredients. First, the means chosen to repel the unlawful attack or unlawful threat to attack should be the minimal force necessary under the circumstance; and, second, the harm to be caused to the aggressor should not be greater than the harm to be averted.[236] Therefore, both proportionality of the means and proportionality of the harm should be observed. For example, a person should not use hand grenade when he can use a gun. Likewise, he should not cause death to protect property. It is important to note that the proportionality element keeps the society better off. For instance, in the above example, the society will better off if the property is damage and life is saved although the life is that of the aggressor. But it is argued that if a person says to another: 'your money or your life' and the owner of the money kills the intimidator, he may invoke legitimate defence as he cannot defend his property without placing his fife in danger, it is actually his life which is ultimately at stake.[237]

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When it comes to the legal system of Ethiopia, one can argue that legitimate defence is one of the oldest criminal law defences. For instance, the *Fetha Negest* provided that "no guilt...falls upon one who kills a man who comes into his home at night for the purpose of injury, as it is for the purpose of defending his own life".[238] Although this stipulation is by no means comprehensive, it can be taken as a provision recopizing legitimate defence, particularly, the defence of self. The 1930 Penal Code also recognized the defence under

[235] Id., p. 393.

[236] George P. Fletcher, *Rethinking Criminal law,* p. 870.

[237] Philippe Graven, p. 226. However, it can he questionable whether refusal, under such .-'-cumstance, is necessary becausethe owner of the money can have, later on, both civil and criminal remedies against the intimidator. So, the requirement that an act of legitimate defence should be an act of last resort, without prejudice to the possibility of retreat where it is not recognized, will not be satisfied.

™ Steven Lowenslein, p. 229.

article 145. The article states that "there is no punishment for the man who commits a crime in defending himself against a strong man, if he thinks that he is guarding and saving his life and honour, his money and family".[239] This is also not comprehensive but undoubtedly better than the *Fetha Negest'm* many ways. For instance, the act of legitimate defence does not have to be done, under article 145, at night as it is required under the *Fetha Negest* Similarly, the scope of legitimate defence under the 1930 Penal Code extends to the protection of others (for instance, family members) while this is not, at least, clearly discernable from the stipulation of the *Fetha Negest* The 1957 Penal Code also recognized legitimate defence under article 74, which is better and more comprehensive than the preceding stipulations.

The 2004 Criminal Code has, on its part, recognized the defence under article 78, for that matter, without any substantial change to article 74 of the 1957 Penal Code. The Code also deals with other related matters (excess in legitimate defence) under article 79. So, according to the Code, a person can be exempted from criminal liability if he can successfully invoke legitimate defence; that is to say, if all the conditions attached to the defence are satisfied, then he will not be punished for inflicting harm onto others to defend his or third party's legally protected right What then, are these conditions? The conditions are:

a) there must be an attack or threat to attack;
b) the attack or threat to attack should be directed against a legally protected right;
c) the attack or threat to attack has to be unlawful;...
d) if there is unlawful threat, it should be imminent;
e) the defensive action should be the last resort to avert the threat or attack; and
0 the defence should be proportionate to the needs of the case.

Except the second condition, all of them were mentioned and discussed before. Hence, there is no need to repeat the same discussion again. In relation to the second condition, which can be made part of to the third condition, the law wants to prohibit the defence of a right whose legal protection is withdrawn. For instance, if a person is sentenced to death and, following all the procedural requirements, a police officer is required to kill him, the convict will not have a legally protected right to light Hence, neither the convict nor another person can defend his life becausethe life does not have legal protection, which means, there is no legitimate defence in favour of his life.

There are also other points worth considering at this stage. First if one or more of the conditions mentioned above is missing, the question of excess of legitimate defence or

[239] Ibid.

'imaginary legitimate defence' will come into picture and it will warrant only a mitigated punishment[240] But if the excess of legitimate defence is imputable to excusable fear, surprise, or excitement caused by the *unlawful attack {not threat to attack},* the court may exempt the defender from liability.[241]

Second, any condition discussed before and which is not, at least, implicitly stipulated in the Criminal Code should be read into it Because, in default of such reading, some sort of injustice may be done to individuals. For example, the Criminal Code does not provide for the *reasonable* Mi/requirement But it would obviously be unjust to deny a person the benefit of legitimate defence if he acts on the ground of a reasonable belief that he is repelling an unlawful threat to attack. Similarly, it is not necessary to exempt a person from liability to punishment if he commits a crime with honest but unreasonable belief that he was repelling an unlawful and imminent threat to attack. For instance, a person who believes that his father (who is a *Wukab!)* is trying to kill him by using magical power and as a result takes his father's life can be said to have an honest belief that there is a threat to his life. However, this belief is obviously not reasonable. This person must be simple-minded and that is why he believes that there exists a deadly magical power. Hence, he should not be allowed to raise legitimate defence to escape criminal liability.

Third, the Criminal Code recognizes the duty to retreat since it permits defensive actions only when the unlawful attack or imminent attack cannot be averted otherwise. But it fails to provide for the generally accepted exceptions to the duty to retreat Accordingly, it is possible to argue that a person is, in our criminal system, duty bound to retreat even from his home or his work or business place and even if such retreat exposes him to dangers which can be less than the one to avert But the law will be less pragmatic if the duty is that blanket It is also not clear that the parliament intended to impose the duty without exceptions. Thus, the exceptions should be read into the Code for two reasons. One, the application of the clear meaning of article 78 may lead to an absurd conclusion becauseit would amount to demanding too much from individuals. The absence of the exception would in effect eicourage people to become extremely coward. Similarly, one may wonder where else than one's home is safer for a person to retreat to. Two, since it is not unusual to construe criminal law in favour of a suspect or an accused in case doubts exist and the doubt cannot be avoided in any other way, article 78 should be construed in such a way that it delivers the generally accepted exceptions to the duty to retreat

[2«] Article 79(1), Cnmiiut Codt.

[241] Article 79(2). Cnnunal Code.

Fourth, unlike article 75 (that deals with necessity) which welcomes the doing of harm onto others only to avert a *serious danger,* article 78 does not require seriousness. So, as long as the conditions attached to the defence are met, the type of harm caused and/or averted and the *gravity* of the harm caused and/or averted are immaterial to invoke the defence.

Fifth, unlike article 75 which requires the act of encroaching upon others' rights or interests to be *intentional,* article 78 does not seem to require intention. It is argued that one will arrive at an absurd conclusion if he holds that a person who repels an unlawful assault will not be justified unless he acts intentionally.[242] Similarly, since an act of legitimate defence is an act of exercising a right, it can be performed negligently. Hence, a person who protects his right from imminent threat to attack by negligently disabling his would-be assailant can raise legitimate defence as a defence against liability for the disablement provided that all the other requirements are fulfilled.[243]

2.1.5.2.6 Ignorance or mistake of fact

A person may commit a crime thinking that he is doing something innocent either becausehe is ignorant of the existence of a given fact which renders his conduct criminal or he misunderstands that fact Under such circumstance, justice requires that this person be treated differently. It is held that if the crime committed requires intention, ignorance or mistake of fact can serve as a defence whereas if the crime committed requires negligence, ignorance or mistake of fact can serve as a defence only if it is reasonable.[244] So, when ignorance or mistake of fact is a defence against intentional crimes unconditionally, it serves as a defence against crimes by negligence only if it is reasonable; that is, if the same position would be held by a reasonable person. Consider the following case, *Crown Y. Tolson,* decided in 1889 by Queen's Bench Division.[245]

> After the defendant was deserted by her husband, she was informed by the people she considered reliable that her husband has been lost at sea while on a ship bound from England to America. After waiting for more than five years, during which time she considered herself a widow, she married again. Her first husband then reappeared, and

[242] See Philippe Graven, p. 227.

[243] What will happen if a person who was planning to kill but who did not bow that his intended victim also had the same plan killed his intended victim but, later on, it was discovered that, unknown to him, the killer was under imminen; danger to his bfe which could be averted only by killing the deceased? In this case, is he not abusing his right? And should the abusive exercise of one's right be accepted? On the other hand, he could have died if he had not killed his enemy.

[244] Stephen A. Saltsburg, John L Diamond, kit kinports, Thomas H. Morawetz, pp. 216-217.

[245] Thomas J. Gardner, Terry M. Anderson, *Crown V. Tolson,* p. 131.

she was charged with bigamy. The court held that she was not guilty of bigamy becauseshe had believed, in good faith, and on reasonable ground, that her husband was dead. So, this is a quintessential example where mistake or ignorance of fact serves as a defence. In fact, the point in the above case is not that there is mistake of fact but ignorance of fact since the lady did not know about the existence of her husband. Mistake relates to misunderstanding or misconstruction of a given fact while ignorance relates to lack of awareness about the existence of a given fact which renders one's act a crime.

The Criminal Code, under article 80(1), tries to regulate this issue only in part becausearticle 80 deals only with mistake of fact 'riC </'><"i<1-H and not about ignorance of fact (f*P<J. "*iiC "°<rc M°7a>H The 1957 Penal Code also treated, under article 76, mistake of fact (fliz-^.-i-rai ft A*t* «*»"i<VH not ignorance of fact (u^aD*i* MTP*). So, the Criminal Code failed to make a correction to article 76 of the 1957 Penal Code. Therefore, based on the literal meaning of the Criminal Code, as it was possible under the Penal Code, it is possible to release a person who commits a crime because of *mistake of fact vMz* punishing a person who commits a crime because of *ignorance of fact*

However, it would be an anomaly to think that ignorance of fact does not entitle a person to the benefits mistake of fact does. This is so because a person who does something wrong not knowing that there is a fact which makes his conduct a crime is less blameworthy, if he is blamable at all, than a person who does something wrong by misunderstanding that the fact does not entail a crime. For example, a person who shoots into a swimming pool at (dark) night and kills a friend thinking that there will be no person in the pool at that time is less blameworthy than a person who shoots into the pool at the same time and kills a friend believing that he is shooting at a wild animal swimming in the pool. Becausethe latter has the intention to kill something, though not a human being, as the result of which his blameworthiness is greater than the former who does not have an intention to kill anything, even a wild animal, as a result of which his blameworthiness is lesser.

However, it is possible to argue that defence based on ignorance of fact cannot be accepted particularly by relying on article 182 of the Code. This article stipulates that defences are only those which are expressly provided by law. Hence, it has the tendency of prohibiting courts from extending the scope of defences by interpretation. But since the use of the clear meaning of article 182 in relation to article 80 will definitely lead to an absurd conclusion, it **needs** to be interpreted. Accordingly, article 182 can be said to have, in mind, cases which

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cannot be justifiably extended. Article 80 can, on the other hand, be justifiably extended to cases where ignorance of fact exists. Thus, ignorance of fact should serve as a valid defence.

In relation to mistake of fact, the Criminal Code stipulates that a person who commits a crime as a result of mistake of fact will be treated according to his understanding (appreciation) of the fact If, for example, he thought that he was shooting at a hyena, and he never intended to cause harm to a human being, he will not be punished unless killing a hyena is a crime. The court entertaining his case has to ask if killing a hyena a crime. Therefore, mistake of fact is a defence against intentional crimes basically becauseit affects the person's mental stand towards the result achieved.

If the mistake committed pertains only to the identity of the victim or the object of the crime, the mistake cannot be a defence (Article 80(3)). For example, if Abebe wants to kill Belay but by mistake he kills Chala who wears Abebe's clothes, he will be punished as if he intentionally killed Chala. Similarly, if Abebe wants to steal Belays property but by mistake steals Chala's property becausethe two items are the same/similar, he will be punished as though he intentionally stole Chala's property. The idea in this case is as long as the intention of the person to commit a given crime is ascertained with sufficient precision, the law should take measures against him so as to achieve its purposes. Hence, the law should not excuse a person who claims that he wanted to kill Belay, not Chala, since whether Belay or Chala is killed, the effect of the crime is the same, and also it does not affect the dangerous disposition of the criminal. Moreover, mistake as to the identity of the victim or the object of a crime is not as such fundamental to earn a person an excuse.

There are few points worth considering at this juncture. First ignorance or mistake of fact cannot relieve a person from liability if he is found negligent (in the light of article 59) in doing something and the negligent doing of that thing is punishable. For instance, if Abebe kills Belay thinking that he is shooting at a hyena, he will be liable for negligently killing Belay if he could or should have avoided the consequence by taking care or sufficient care. Second, if what a person does gives rise to an independent crime, he will be punished therefor.[246] For example, if Abebe throws a bomb to kill a Hon standing nearby Belay's house (which in fact is only a goat), he will be liable if damage is caused to the house (Article 685), not for killing the goat, since this is another crime following his mistake.[247]

[246] Article 80(2), Criminal Code.

[247] Well, if killing a lion is a crime, he will be punished for that Hence, his act will give rise to the notion of notional concurrence. For more on this point, refer to the discussion on notional concurrence.

2.1.5.2.7 Mistake of law and ignorance of law

Mistake or ignorance may also exist in relation to law becauseindividuals may commit crimes either becausethey are mistaken on the law or they are ignorant about it. Ignorance of law in this case simply refers to unawareness about the very existence of a law prohibiting certain conduct while mistake of law refers to error committed while interpreting/understanding the law. The issue then is whether such persons need to be punished or excused. Reasonable minds disagree on the answer to this issue. Some people claim that the plea of ignorance or mistake of law should serve as an excuse. It is said, in particular, in relation to ignorance of law that it is absurd to assume that everybody knows the law especially in the current society where many laws are being made every day. This problem becomes worse when laws are imported and it will become worst if the laws are concerned with minor crimes, even for lawyers themselves. On the other hand, there are people who argue that ignorance or mistake of law should not serve as a defence becausethe recognition of this defence would encourage ignorance or mistake of law. So, this position is premised on public policy to encourage people to know existing laws or their proper meanings. Besides, it can be argued that recognizing ignorance or mistake of law as a defence may defeat the purpose of criminal law since it is hardly possible to prove knowledge in case ignorance or mistake is claimed as a defence.[248] In criminal cases, suspects are required just to create a shadow of doubt in the minds of judges and it is the responsibility of a public prosecutor to clear this doubt This means, many criminals will go unpunished, even if they commit crimes, owing to the stringent requirements that are used to penalize them.

For example, in one case,[249] a person was convicted of an offence which he committed on the high seas although the statute creating the offence was passed while he was on the high seas. The person could not possibly have known the law but he was convicted because ignorance of law is not a defence. This is a typical example of the rigid application of the rule *ignorance or mistake of law is no excuse* On the other hand, there are some jurisdictions which permit mistake or ignorance of law as a defence. For example, in the Republic of South Africa, ignorance of law can be a defence.[250] Moreover, there are some jurisdictions which permit

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[248] For the discussions on these two positions see generally Philippe Craven, pp. 235-237.

[249]Ian McLean and Peter Morrish, R JfM?/(1800) A. & R. I, pp. 52-53.

[250] See Andries Marthinus Coetzee vs. Kohus Steenkarap, In The High Court of South Africa (Northern Cape High Court, Kimberley), Case No: 579/2009, Heard: 13/05/2010, Delivered: 18/06/2010. In paragraph 10, the court made the following important points.

"At this stage of our legal development it must be accepted that the cliche that "every person is presumed to know the law" has no ground for its existence and that the view that "ignorance of the law is no excuse" is not legally applicable in the light of the present day concept of mens rea in our law. But the approach that it can be expected of a

mistake or ignorance of law as a defence under exceptional circumstance. Consider the following case (***Cheek V. US)*** decided by US Supreme Court in 1981.

> Mr. Cheek is an airline pilot who did not file federal income tax returns for five years. Cheek argued that he did not "willfully" fail to file income tax returns and that he honestly believed his failure to file returns was lawful The court held that the "willfully" requirement of the criminal charge against Cheek could not be met if the alleged violator was honesdy confused about the meaning of the law. Accordingly, he escaped punishment.[251]

This is a good instance where mistake, not ignorance, of law can serve as a defence.

In Ethiopia, the position adopted with regard to ignorance or mistake of law is not pure. In principle, article 81(1) provides that neither ignorance nor mistake of law is a defence. Hence, prosecutors are relieved of showing the knowledge of defendants on the existence or correct understanding of the existing penal legislation. It is up to the defendant to show that he lacked legal knowledge or he misunderstood the existing law to get whatever benefits are available to him due his ignorance or mistake. Interestingly, the Code under article 81(2) provides for a possibility whereby ignorance or mistake of law can serve as a mitigating ground. On the other hand, article 81(3) provides for a situation whereby ignorance or mistake of law may serve as an excuse.[252] However, the following conditions should be

person who, in a modern State, wherein many facets of the acts and omissions of the legal subject are controlled by legal provisions, involves himself in a particular sphere, that he should keep himself informed of the legal provisions which are applicable to that particular sphere, can be approved."

"In the interpretation of the definition of a statutory offence it is presumed, until the contrary appears, that the Legislature did not wish to make an innocent illegal act punishable —. In such a case it must be accepted that, when the State has led evidence that the prohibited act has been committed, an inference can be drawn, depending on the circumstances, that the accused willingly and knowingly (i.e. with knowledge of the unlawfulness) committed the act. If the accused wishes to rely on a defence that she did not know that her act was unlawful, her defence can succeed it it can be inferred from the evidence as a whole that there is a reasonable possibility that she did not know that her act was unlawful; and further, when culpa only, and not dolus alone, is required as mens rea, there is also a reasonable possibility that juridically she could not be blamed, i.e. that, having regard to all the circumstances, it is reasonably possible that she acted with the necessary circumspection in order to inform herself of what was required of her in connection with the question of whether or not permission was required to take money out (of the country). Should there be, on the evidence as a whole, i.e. including the evidence that the act was committed, a reasonable doubt whether the accused did in fact have mens rea, in the sense described above, the State would not hare proved its case beyond a reasonable doubt.

[251] Thomas J. Gardner, Terry M. Anderson, *Cheek V.US*, p. 133.

[252] It must be noted that article 81(2) seems to deal only with mistake of law while article 80(3) seems to deal only with ignorance of law. Yet, the two sub-articles must be interpreted so as to include both concepts since contrary interpretation will lead to absurd conclusion.

satisfied for these benefits to accrue to a defendant First, to get mitigation, article 81(2) stipulates that a person must act in *good faith believing he had a right to act and had definite and adequate reasons for holding this erroneous belief. So,* if a person lacks good faith, for example, if he suspects the legality of his act becausehe suspects that there is a law or the existing law prohibits his act, he will not get a mitigated penalty if he commits a crime being in such state of mind. Moreover, good faith by itself is not enough. The provision requires his belief about the existence of his right to act to be supported by *definite* and *adequate* reasons. If, for example, someone who does not understand Amharic reads the English Version of the Criminal Code (together with the commentaries written thereon) and finds that there is no prohibition of a given conduct but after performing the conduct he is told that the Amharic Version forbids and indeed makes his conduct a crime, he can be taken as someone who has definite and adequate reason for his mistake of law. Similarly, if the wordings of one provision under the two Versions are different and as a result this person makes a correct interpretation but based on the English Version by honestly thinking that the two Versions are not different in wordings, his mistake can be said to be supported by definite and adequate reasons. Hence, he will be entitled to a mitigated penalty.

On the other hand, Article 81(3) stipulates that in exceptional cases of absolute and justifiable ignorance and good faith and where criminal intent is not apparent, someone who has committed a crime becauseof his ignorance or mistake of law may be excused. This is a kind of true exception to the rule that *ignorance or mistake of law excuses no one* However, the requirements to benefit from this exception are more stringent than the requirements to get a mitigated penalty. First, the ignorance or mistake of law must be *absolute* and *justifiable* Second, such ignorance or mistake must emanate from good faith. Third, there should exist no criminal intention to commit a crime. Indeed, the third requirement will be satisfied if the first two are fulfilled. Here, it is important to note that many people can benefit from this exception, particularly in relation to minor crimes, given the existing realities in Ethiopia. One, many people are not educated and this makes reading legal texts not possible. Two, even if some of them may be educated, they may not understand either English or Amharic, the two legal languages of the Federal criminal law. Three, even if they may understand both or either of the two languages, they may not get access to penal legislation becausedistribution of legal documents in the country is very much limited. However, in the absence of adequate distribution of legal documents to citizens, it is extremely doubtful how one can talk of giving due notice about crimes and their consequence as stipulated under article 1 of the Code. Hence, courts can take these factors into account to determine whether a person who committed a crime acted in good faith and his ignorance or mistake was

absolute and justifiable. For instance, had the case mentioned before; that is, the case of a person who was convicted of an offence which he committed on the high seas although the statute creating the offence was passed while he was on the high seas and he could not possibly have known the existence of such statute, happened in Ethiopia, our courts might have been justified to excuse the actor in the light of this exception. Moreover, if the House of Peoples' Representatives makes a new tax law which requires everyone earning more than 100 birr per month to pay income tax and sanctions failure to pay the tax by fine, many illiterate people living in far countryside of the country may not be punished. This is so becausedue to the factors mentioned before, their ignorance of the new law will be absolute and justifiable provided that they act in good faith.

2.1.5.2.8 Other affirmative criminal law defences

Article 58(2) of the Criminal Code stipulates that intentional crimes are always punishable save in cases of justification and excuse expressly provided by law under article 68-81. This stipulation gives the impression that affirmative defences are only those which are provided under articles 68-81. However, there are other affirmative defences which can be invoked to escape liability to punishment for intentional crimes. Some of them will be considered below.

A. Immunity: There are different forms of immunity which a person can raise to avoid criminal liability. For example, one can mention diplomatic and legislative immunity in this • regard. In this section, we will briefly consider some of them and see how they can serve as defences against criminal liability.

Diplomatic immunity: Diplomatic immunity, a principle of international law, is broadly defined as the freedom from local jurisdiction accorded to duly accredited diplomatic officers, their families and servants.[253] So, the holders of this immunity; that is, diplomatic officers, should not be arrested or detained for any crime unless their home countries waive their immunity in the case of grave crimes.[254] This defence is recognized under the Criminal Code. Article 11(1), in principle, recopizes that the Criminal Code applies to any person including foreigners. However, the second sub-article stipulates that the Code should not apply to persons enjoying immunity as recognized under international law such as the Vienna Convention on Diplomatic Immunities. Hence, if, for example, the US ambassador in Ethiopia commits adultery in Addis Ababa, he will not be arrested and prosecuted in Ethiopia. If he is prosecuted, he should not deny the commission of the crime of adultery but raise his

[253] Thomas J. Gardner, Terry M. Anderson, *Crown f. Tokon*, pp 128-129.

[254] Ibid.

diplomatic immunity as a defence. One of the reasons why such individuals are not liable to punishment is the fact that they may be punished in accordance with their home countries' criminal laws.[255]

Legislative immunity: Usually, members of legislative organs are immune from prosecution for certain crimes. Hence, they can allege that they cannot be punished if they are prosecuted for crimes against which they have legislative immunity. Under the FDRE Constitution, for example, members of the House of Peoples' Representatives (K?R) have been granted legislative immunity under two circumstances. First, article 54(5) of the Constitution prohibits the prosecution of any member of the HPR on account of any vote he/she casts or opinion he/she expresses in House even if even such vote or expression of opinion may give rise to a crime. For instance, what one member of the HPR says may amount to defamation or incitement to do something. All the same, the speaker will not be prosecuted for such speech. If prosecution takes place, the proper point to put forward is not denying what is said but raising legislative immunity as a defence. Similarly, article 54(6) of the Constitution stipulates that members of the HPR may not be arrested and prosecuted for committing crimes without the permission of the House save in the case of *flagrant delicto.* This is a temporary defence, though, becauseif the HPR permits, the prosecution of the concerned member can take place. Similarly, if his mandate in the HPR expires, he can be prosecuted. All the same, as long as his mandate of representation is active, he can raise legislative immunity against prosecution in order to avoid criminal liability.

One may wonder whether the members of Regional Councils' can also raise legislative immunity they are given under their respective Regional Constitutions against the provisions of the Criminal Code, which is a federal law. The FDRE Constitution does not extend legislative immunity to the members of Regional Councils. Hence, it seems that they cannot raise legislative immunity as a defence in relation to crimes defined by the federal Criminal Code. If Regional Constitutions provide for legislative immunity to their members against federal crimes (that is, crimes created and regulated by the Criminal Code), such provision of immunity can be taken as disrespect for the power of the Federal Government in contravention of article 50(8) of the FDRE Constitution. In relation to crimes created by their respective Regional Councils as envisage under article 55(5), however, Regional Councils can grant legislative immunity to their respective members. Philanthropically, however, one can argue that the logic behind giving immunity to the members of the HPR against the provisions of the Criminal Code should be used to argue that the members of the Regional

[255] See, for example, article 14 of the Criminal Code.

Councils should also be immunized from the provisions of the Criminal Code subject to the same conditions with the members of the HPR. The purpose of legislative immunity is, after all, to prevent unnecessary harassment to legislators[256] and this same purpose can be served if the members of Regional Councils are given immunity from the Criminal Code.

The other immunity the FDRE Constitution recognizes pertains to the members of the House of the Federation (HOF). The immunity the members of the HOF enjoy is the same as the immunity the members of the HPR enjoy and the circumstances under which they can be removed are also the same. For instance, if the member of the HOF is found committing a crime red-handed, he can be arrested and prosecuted. The issue that was raised above can be relevant here again in relation to SNNPRS (The State of the Southern Nations, Nationalities and Peoples') becausethis Regional State can have an organ which is similar to the HOF.[257]

Witness immunity: In some jurisdictions, witnesses who are compelled to testily are granted immunity from criminal liability that may possibly arise from their testimonies and this immunity is premised on the principle of freedom from compulsory self-incrimination.[258] If a person is compelled to give information and the information he gives reveals that he has committed a crime (for instance, his participation in the commission a crime with a defendant), prosecuting him on the basis of such testimony amounts to forcing him to testify against himself.

Under the FDRE Constitution, article 19(5) prohibits compelling an *arrested person* from making confessions or admissions while article 20(3) recognizes the right of *accused person* not to be compelled to testify against himself. However, the provisions do not regulate individuals who are *neither accused nor arrested.* Apparently, therefore, witness immunity is not recognized under the Constitution becausea witness is neither an accused nor an arrestee. Nevertheless, unless the right not to be compelled to testify against oneself is recognized in relation to other persons too, the purposes of article 19(5) and 20(3) can be defeated. Becausepersons can be compelled to testify against themselves before they are arrested or accused and subsequent accusations can rely on such testimony/confession. Hence, the right of non-arrestee or non-accused person against compulsory self- incrimination is a necessary accompaniment of the right of arrested and/or accused person against compulsory self-incrimination. Therefore, one can deduce the immunity of witnesses

[256] Thomas J. Gardner, Terry M. Anderson, *Crown V. Toyson*, p. 130.

[257] See article 47 of the FDRE Constitution.

[258] Thomas J. Gardner, Terry M. Anderson, *Crown V. Totson*, p .129.

from the cumulative reading of the two provisions; that is, articles 19(5) and 20(3) of the Constitution, so much so that a person can raise this immunity to avoid liability to criminal punishment if he is charged on the basis of his testimony as a witness.

Other immunity: A person may also be granted immunity if he confesses to the commission of a crime and help the administration of justice in some way. When this happens, such person may not be prosecuted for the crime he committed. For example, in our case, the *Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation* allows granting immunity from prosecution to someone who committed corruption crime upon the fulfillment of certain conditions. In this regard, article 43(1) of the Proclamation states: "Any person who has been involved in corruption offence and who, before the case is ' p taken to the court, provides substantial evidence as to the offence and the role of his partners, may be given immunity by the Commissioner of the Federal Ethics and Anti-Corruption Commission or the Head of the Appropriate Organ." Thus, if a person involved in the commission of corruption crime does everything that this provision requires him to do, he may be granted immunity against his prosecution for the crime and this immunity can be

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B. The defence of period of limitation: The defence of period of limitation can be regarded as one of the oldest criminal law defences. For example, in the USA, statutes of limitation appeared as early as 1652 while the Federal Government adopted time limits for the prosecution of most federal crimes in 17 90.[260] The recognition of this defence is closely related to the protection of individuals' right to speedy trial.[261] Generally, individuals have the right to be tried within a reasonable period for the crimes they commit This is necessary for the aversion of certain dangers that may ensue if trial does not take place within a reasonable period. For instance, it is argued that 'a limitation statute is designed to protect individuals from having to defend themselves against charges when the basic facts may have becpme obscured by the passage of time and to minimize the danger of official punishment becauseof acts in the far-distant past'.[262] In other words, the passage of time can cause the oblivion of some materials facts that may be used by defendants to defend themselves. Moreover, it might create a chance for abuse becausethe crime committed can be used

[259] For more on this immunity, see article 43 of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation, Proclamation No. 434/2005.

[260] Thomas J. Gardner, Terry M. Anderson, p. 157.

[281] Ibid.

[262] Ibid.

against a person, whenever need arises, just to harass him but not to serve the purpose of criminal justice, so to say. This, on the other hand, creates perpetual anxiety to individuals about the possible prosecution and punishment for the crimes they have committed in old days. The provision of period of limitation for the prosecution of crimes in a reasonable period will avoid or at least minimize this anxiety. Interestingly, it is also argued that the prosecution of criminals within a reasonable period has societal benefit as well because, by affording the right to speedy trial, society will be protected from unpunished criminals.[263] However, the duration of the period of limitation for different crimes can be different It is usually based on the seriousness of the crime committed. Moreover, it is not necessarily the case that the prosecution of all crimes is barred by limitation. The passage of time may not stop the prosecution of certain crimes.

In our case, the Criminal Code has recognized the defence of period of limitation. Article 216 of the Code makes the following stipulations:

(1) Unless otherwise provided by law, in all criminal cases, the prosecution and the criminal action shall be barred and may no longer be instituted or brought upon the expiration of the legal period of time...

Limitation extinguishes the liability to punishment in respect of any of the participants. As soon as the limitation period has elapsed, neither a conviction nor penalties or measures may be pronounced.

(2) Even where the defendant fails to raise the barring of the charge by a period of limitation, the Court or the Prosecutor shall, at any time, consider the barring of the charge by limitation

So, according this provision, a person who has committed a crime can, whenever charge is brought against him, claim that the charge is not appropriate without needing to challenge what is included in the charge. Or else, since this is an affirmative defence, the defendant can concede what is claimed against him but challenge the appropriateness of the time when the claim is made against him. In principle, all criminal charges should be brought within a definite period of time and this time is stipulated under articles 217, 218 and 222. For instance, if a crime that entails death penalty or rigorous imprisonment for life is committed, the criminal should be charged within twenty-live years. If no charge is brought against him in 25 years, then he will not be charged for the crime after the passage of this time unless the running of the period of limitation is interrupted.[284] However, whether there is interruption

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[244] Article 221, Criminal Code.

or not, the limitation period cannot go beyond fifty years.[265] The passage of fifty years after the commission of a crime that entails death penalty or rigorous imprisonment for life will be an absolute bar to prosecution. Hence, there will be an absolute immunity against liability to punishment after fifty years of committing a crime that entails death penalty or rigorous imprisonment for life. The expiry of limitation period extinguishes liability to punishment altogether. That means, the person will be become innocent.

An interesting thing about this defence is, as stipulated under article 216(2), the fact that the Code imposes the duty to bring it into picture on both courts and prosecutors. So, while defendants have the right to raise it, the other two have the obligation to take cognizance of the defence. If they know that the charge is barred by limitation, they must stop the prosecution and discharge the defendant. This makes the defence of period of limitation somewhat different from other affirmative defence most of which should be invoke by defendants themselves.

The other point worth noting is the exception envisioned by article 216(1). When the Code uses the expression 'unless otherwise provided by law...' it recognizes that there can be certain crimes in relation to which the defence of period of limitation may not exist. One may wonder what these laws are but they can be both domestic and international laws (since international agreements duly ratified by Ethiopia become an integral part of our law by virtue of article 9(4) of the FDRE Constitution). For example, the Anti-Terrorism Proclamation, Proclamation No. 652/2009, makes the statute of limitation inapplicable to crimes of terrorism. Under article 24, it stipulates that criminal liability for crimes of terrorism cannot be barred by limitation. Hence, the authors of terrorist acts cannot invoke period of limitation as a defence to avoid criminal liability. Moreover, article 28(1) of the FDRE Constitution stipulates that the *criminal Lability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture shall not be barred by statute ofhmitation.* To add one more example, if a person enslaves certain group of people, this person will not be able to benefit from the defence of period of limitation becauseslavery is considered a crime against humanity; hence, its prosecution is not barred by the passage of time.

C. The defence of amnesty: Amnesty is an act of effacing and forgetting past offences. It is granted by a government to persons who have been guilty of crimes. It differs

[265] Article 222, Criminal Code.

from pardon in that amnesty causes the crime to be forgotten, whereas pardon, if given after a conviction, exempts a criminal from further punishment. Amnesty is usually granted to a class of criminals or group of persons who may have committed a crime and is offered in order to restore tranquillity in the state.[266]

So, if a person is charged for the commission of a crime after he has been granted amnesty therefor, he can raise the amnesty as an affirmative defence to avoid liability for the crime. This defence is recognized by the Code, too, under article 230. Article 230(2) stipulates that amnesty bars or discontinues any prosecution after its promulgation. Hence, a person who is granted amnesty can have a valid defence based on it to avoid criminal punishment However, article 230(1) provides that amnesty may not be granted whenever there is a law prohibiting such granting it One of such laws is article 28(1) of the FDRE Constitution which proscribes the promulgation of amnesty with respect to crimes against humanity such as genocide and forced disappearances. Hence, even if, in principle, amnesty can be had as an affirmative defence against crimes, exceptionally this defence may not exist

2.2. The Law of participation

In the commission of criminal offence, there may be several persons or groups which play distinct roles. Collectively, these persons or groups are called parties to the crime.[267] So, the purpose of the law of participation is to deal with issues arising from the participation of several persons or groups in the commission of a crime. The most relevant of these issues include the determination of parties to crimes, their degree of involvement whether they are liable or not for the crimes they take part in, and the extent of their liabilities.

At common law, parties to a crime are classified into three: principal in the first degree, principal in the second degree, and accessory before the fact.

1. **Principal in the first degree:-** This is a criminal actor. He is the one who, with the requisite mental state, engages in the act or omission concurring with the mental state that causes the criminal result It should also be known that he can be present at the scene of the crime either physically or constructively (liking putting poison in one's food and leaving the place although waiting for the result).[268]
2. **Principal in the second degree:-** This is a person who assists the principal in the first degree. Moreover, for a person to be principal in the second

[266] Microsoft En carta Encyclopedia Deluxe. 2004.

[247] Stephen A. Saltshurg, John L Diamond, kit kinports. Thomas H. Morawetz, p. 671.

[268] Ibid.

degree, it is necessary, in addition to giving assistance, that he is present at the scene of the crime so that he will be in a position to engage in the commission of the crime intended as a principal in the first degree if need arises. But the presence can still be constructive and it does not have to be physical.[269] 3. **Accessory before the fact:-** This is also a person who gives assistance to criminals: the assistance can be given to either of the above-mentioned offenders. This person differs from principal in the second degree becausehe lacks the element of presence. An accessory before the fact is not required to be present at a scene of a crime either physically or constructively. He is interested only in giving assistance. So, unlike the principal in the second degree, an accessory before the fact is not on standby to commit a crime if the principal in the first degree fails to do so. A person can be an accessory before the fact if he lends aid to either a principal in the first or second degree regardless of whether his assistance is used or not, or whether his assistance is used sooner or later, or whether his assistance is substantial or not.[270] Hence, for a person to become an accessory before the fact, the use of the aid he lends, the time when the aid is used or to be used, and the quantity of his aid are immaterial. At this juncture, it is important to note that a person can be an accessory before the fact and a principal in the second degree if he, after lending the aid that can make him an accessory before the fact, decides to be present at the scene of the crime, physically or constructively, to help the principal in the first degree when need arises. Both involvements result from different mental elements.

The Criminal Code has recognized parties to crimes and regulated their status as well.[271] But it does not follow the method of classification of parties to crime followed in the common law system. Rather, it classifies parties to crime into participants in principal capacity (principal criminals) and participants in secondary capacity depending on their degree of involvement in the commission of crimes. Some persons are said to participate in the commission of crimes in primary (principal) capacity becausetheir participation in the commission of a crime is so close, direct and active. Besides, they are persons who pose greater danger to the society. On the other hand, participants in the commission of crimes in secondary capacity are those persons whose participation in the commission of crimes is not so close, direct and active. Relatively, the danger they pose to the society is also of lesser importance becausetheir involvement in the commission of crimes is more of indirect than direct.

[269] Ibid.

[270] Id., p. 672

[271] Articles M I nmmal Code.

On top of that, the Criminal Code classifies the crimes persons may participate in into two[272] which can, for the sake of convenience, be called *ordinary* and *special* crimes. Ordinary crimes are those crimes which can be committed by any person whereas special crimes are those crimes which can be committed only by persons possessing certain qualities.

At any rate, the Code provides for the criminal liabilities of all the parties to crimes regardless of the type of crimes they commit It also stipulates that any personal circumstance that tends to benefit or harm a particular criminal works for or against him, respectively; and hence, non-transmissible.[273] This means, any exempting or mitigating or aggravating circumstances is applicable only to a person for or against whom it exists. These parties will be considered below one by one.

2.2.1 Principal participants in the commission of ordinary crimes

Principal criminals or criminals who get involved in principal capacity in the commission of ordinary crimes are defined and regulated under article 32 of the Criminal Code. Accordingly, the family *principal criminals,* made to include three types of criminals. 1. **Material offenders:** Any crime has got a material element For example, the material element of the crime of homicide is killing while that of theft is abstracting other's property. A person can perform this element of a crime either directly; that is by personaUy and physically getting involved, or indirectly; that is, by using animals (different from human beings) or natural forces such as fire and flood. A material offender is, therefore, a person who performs this element of a crime.[274] The Criminal Code defines material offender as a person who actually commits a crime either directly or indirectly, in particular, by means of an animal or a natural force.[275.] So, if a person directly gets involved in the commission of a crime, he will be a material offender for the crime committed. Similarly, if a person trains his monkey to bring him other's property and the monkey brings him, as calculated, a friend's wallet, he will still be a material offender for the commission of the crime of theft Hence, a material offender under the Code is equivalent to the common law principal in the first degree.

[272] Article 32 cum Article 33, Criminal Code.

[273] Article 41, Criminal Code.

[274] Philippe Graven, p. 94.

[275] Article 32(l)(a), Criminal Code.

2. **Moral offenders:** Sometimes, persons may not perform the material elements of crimes. Instead, they may associate themselves with the commission of crimes and the results intended. For example, they may organize material offenders, select the possible victims, the place and time of committing the crimes, and the like. By so doing, these persons adopt the crimes committed or to be committed by others as their own. Such criminals are called moral offenders.[276] They are regarded as moral offenders becausethey are morally fully participating in the commission of the crimes. The roles they play in the commission of the crimes are so vital. For that matter, they are called the *waster minds ox* the *working minds.*[111] In the Code, these offenders are regulated under article 32(1)(b). The Code defines them as persons who, without performing the criminal acts by themselves, fully associate themselves with the commission of crimes and the intended results. This means, if a person makes himself part of the criminal decision, he can be regarded as a moral offender. Besides, if he makes himself part of the execution of a criminal decision in which he did not take part, he can still be a moral offender. Thus, a moral offender is ready to commit the crime intended in case the material offender fails to succeed. Owing to this, the Code puts the two on equal footing; that is, it treats them as principal criminals. And this is justifiable from deterrence point of view since moral offenders are not less, if not more, dangerous than material offenders. It is helpful to note that what the Code regard as moral offender is equivalent to the common law principal in the second degree.
3. **Indirect offenders:** At times, to be immune from punishment, some individuals may use human agents to commit crimes. These persons are referred to as *indirect offenders.* Normally, the persons used as agents are those who do not draw criminal liability onto themselves.[278] The common law system does not recognize the concept indirect offenders. Instead, it uses the doctrine of *innocent agency* which may serve the same purpose with the recognition of indirect offenders. The doctrine stipulates that a person who uses an *innocent agent* to commit a crime; that is, someone who has a defence of insanity, immaturity, duress, or mistake, is deemed to be a principal for the crime and is convicted on that basis.[279] Under the Criminal Code, indirect offenders are defined as those persons who use infant, a person who is mentally deficient [insane person] or unaware of the circumstance [person who is mistaken as to the true fact of

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[275] Stephen A. Saltsbtirj, John L Diamond, kit kinports, Thomas H. Morawetz, p. 6XI

the situation] as means or compel others to commit crimes.[280] As compared to the 1957 Penal Code, the scope of the Criminal Code is fairly wide because, unlike the latter, the former did not recognize persons using infants and those who are mistaken as to the true fact of the situation as indirect offenders. Nevertheless, the Criminal Code still suffers from certain defects in relation to indirect offenders. That is, article 32(l)(c) is not exhaustive becausethere are other persons who are irresponsible under the Criminal Code but who are counted out from the reach of this article. For example, pursuant to article 50(4) a person who is involuntarily intoxicated and as a result commits a crime is not responsible for his criminal act Similarly, there are situations when voluntarily intoxicated persons are considered not responsible for their criminal acts.[281] So, the use of such persons should give one the status of an indirect offender. Under article 32(l)(c), however, the use of these persons is not stipulated to render the user an indirect offender. This means, neither the intoxicated person nor his user is responsible for a crime committed by using intoxicated persons (within the meaning of article 50) although there is no reason to let the user go unpunished. This shows that the parliament, in the course of amending the 1957 Penal Code, did not foresee as much as it could and should have foreseen to make the article exhaustive.

All the same, the legal gap in this respect should he filled to bring those persons who are left out within the purview of the Criminal Code either by making another enactment or by amending the Code itself. The following proposed text should be adopted if amendment is to be made.

Existing Text of article 32(1)(c)

(1) Any person shall be regarded as having committed a crime as a principal criminal and punished as such if:

(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.

Proposed Text of article 32(1)(c)

(1) Any person shall be regarded as having committed a crime as a principal criminal and punished as such if:

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

[280] Article 32(1)(c), Criminal Code.

[281] Article 51(3), Criminal Code.

As we can see, article 32(l)(c) in the proposed text is as *succinct* as it is in the existing text However, the proposed text is more *comprehensive* and *ilexible* than the existing text First, the expression *irresponsible person* includes, among others things, infant, insane person and an unanswerable intoxicated persons. Moreover, the expression *any other person who is not answerable for his criminal act* brings any other person using human agent to commit a crime into the scope of criminal law. For example, if A intentionally creates a state of necessity to make 6 kill C, and B kills C, as calculated by A, to avert the state of necessity, A should be treated as an indirect offender and punished accordingly although B will not be punished. In short, if, through time, other persons are recopized as not liable for their criminal acts, the use of such persons to commit crimes will render their users indirect offenders without wanting to amend the law becausethe expression is open-ended. By so doing, it will be possible to close doors to fugitives from criminal justice.

The other important point to consider at this juncture is the fact that the status of a coerced person or a person mistaken as to the true fact of the situation is immaterial to render one an indirect offender. It suffices that he uses them, and the human agents may or may not be liable to punishment.

Under article 32(2), the Code repeats what is stated under article 58(3). It states that persons should not be punished for intentional crimes if they did not intend, directly or indirectly, the commission of crimes. Similarly, they should not be punished for negligently committing crimes unless they are found negligent and negligence is punishable under the circumstance.

The third sub-article of article 32 regulates the legal consequences of participating in the commission of crimes in principal capacity. Accordingly, it provides that all are liable to the penalty attached to the crime committed as though they committed the crimes alone. But the extent of the sentence may be different depending on the participants' degree of individual guilt (article 88). Moreover, although article 32(3) fails to specify it there are certain groups of criminals who are not subject to the punishment attaching to the crimes committed although they participate in their commissions in principle capacity. For example, the following two instances reveal that article 32(3) should have foreseen few exceptions.

First if a young person participates in the commission of a crime in principal capacity, he will not be liable to the punishment attaching to the crime committed. Instead, he will be

treated in accordance with article 53 of the Code. On the other hand, article 53 refers to articles 157-168 of the Code. So, unlike what is stipulated under article 32(3), young offenders are liable to special measures and penalties provided in the Code, not the penalties stipulated by the specific special part provisions they participated in violating. Second, one has to bear in mind that principal participants in the commission of crimes could be either legal persons or physical persons. If legal persons are involved in the commission of crimes in principal capacity, they will not be liable to the punishment provided by the law they violate. Instead, they will be liable to fine in accordance with the mode of calculation of fine provided under article 90. Therefore, the penalties of legal persons will be determined based on articles 32(3), 34 and 90 of the Code. This shows that while natural persons can be imprisoned, juridical persons will be fined.

So, realizing that there can be exceptions to article 32(3), the law-maker must leave a room to accommodate such exceptions. In this regard, article 32(3), first paragraph, should be amended as follow.

Existing Text

Where two or more persons are involved as principal criminals in the commission of a crime, each shall be liable to the punishment attaching thereto. **Proposed Text**

Unless otherwise expressly provided by law, where two or more persons are involved as principal criminals in the commission of a crime, each shall be liable to the punishment attaching thereto. The insertion of the underlined expression in article 32(3), first paragraph, can avoid the problem discussed before. Thus, unlike the current text, the proposed text will allow us to treat those offenders who need to be treated differently for various reasons. Incidentally, it should be borne in mind that the law that may provide for an exception to article 32(3) could be the provisions of the Criminal Code themselves or provisions in other penal legislation.

2.2.2 Principal participants in the commission of special crimes

As indicated before, special crimes are those crimes which can be committed only by persons possessing certain special qualifications (For the sake of convenience, these persons will be called *special offenders* in this part). Persons lacking these qualifications cannot commit them. However, it can easily be discerned that those persons who are unable to commit these crimes can still play vital roles in the commission of the crimes. That is to say, they can facilitate or make the commission of the crimes possible. By so doing, they will become no

less, if not more, dangerous to the society than the actors themselves since they participate in the commission of these crimes with full knowledge and intent [desire]. Probably, in the absence of their participation the crimes might not be committed, which shows the vital role they play in the commission of these crimes. As a result, the Criminal Code, under article 33, treats them as principal offenders and also subjects them to the same penalties the actors are exposed to unless they are young offender (in which case they will be governed by special provisions) or legal persons (which are subject to fine). For example, the following are some of the special crimes envisaged under article 33.

1. **Unlawful Refusal to pay Income Tax:** This crime is defined under article 349. It is a crime that can be committed only by a person who has income. If a person does not have the required amount of monthly or yearly income, he wdl not commit the crime of unlawful refusal to pay income tax.
2. **Desertion:** To commit this crime, one needs to be a member of the defence force.[282]
3. Thus, persons who are not members of the defence force cannot materially commit the crime.
4. **Usury:** The crime of usury is committed when a person lends money at an interest rate exceeding the official rate.[283] That is to say, only lenders will commit it Therefore, those persons who cannot lend money cannot materially commit the crime.
5. **Rape:** The crime of rape is defined under the Criminal Code as a crime that can be committed only by males.[284] Hence, females cannot materially commit the crime of rape.

5. **Corruption:** Corruption is a unique crime to public officials. A person who is not holding public office cannot act as material offender as far as this crime is concerned.
6. **Incest:** The crime of incest is a crime that can be committed when persons who are prohibited from getting married due to their blood relationship perform sexual activities as between themselves.[285] Thus, the crime can only be committed by relatives having consanguinal relationship. People who are not, related by consanguinity or even consanguinal relatives who are not prohibited from getting married cannot commit incest.

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7. **Homosexuality:** This crime is special in the sense that it cannot, unlike other crimes, be committed by people of different sexes acting together.[286] Therefore, its commission necessarily requires the acts of persons of the same sex.
8. **Perjury:** This is also special crime becauseit can be committed when a person acts as a witness.[287] If a person is not acting as a witness, he will not commit the crime of perjury. Hence, perjury is a crime that can be committed materially only by witnesses.

The above crimes are some of the special crimes the Criminal Code has in mind pursuant to article 33. The idea, therefore, is those persons who cannot act as material offenders in the commission of these crimes can be treated as principal offenders if they have full knowledge about the commission of the crimes and also fully associated themselves with the results intended. For example, if a lady, after hiding her brother in her bedroom, calls her friend whom she wants to be raped by him, and leaves the house telling her friend that she will pick some staff from the nearby shop, and also locks her in pretending that she does so for safety, the lady will be treated as a principal offender to the crime of rape if it is committed by virtue of articles 33 and 620.

One may wonder the difference between moral offenders and persons helping special offenders as envisioned under article 33. The two categories of criminals have similarity in the sense that both of them have full knowledge and intent with regard to the commission of the crimes they participate in. That is to say, both of them fully associate themselves with the commission of the crimes. But while moral offenders *have the capacity* \o materially commit the crimes concerned, those who help special offenders *do not have such capacity.* Becausethe crimes moral offenders are concerned with are ordinary crimes, the commission of which does not require any special qualification, whereas the crimes those who help special offenders are concerned with are special crimes, the commission of which requires the possession of some special qualities.

2.2.3. Collective crimes

Under article 35, the Criminal Code regulates issues pertaining to collective crimes. Collective crimes, within the meaning of the Code, are those crimes which are committed by persons acting in concert The Code, when it provides for a separate provision regulating collective crimes has, in mind, persons acting in similar capacity. Similarly, the closer reading of article 35 shows that these persons need to be principal offenders, in particular,

[286] Article 629, Criminal Code.

[287] Article 652ff, Criminal Code.

material offenders. If they are different from material offenders, the other provisions of the Code such as articles 32,36, or 37 will apply, as the case may be.

An interesting issue under article 35 pertains to the presumption it makes. The first paragraph of this provision presumes guilt. Becauseit states: *where two or more persons commit a crime in concert, the person who is proved to have taken no part in the commission of the crime shall not be punished.* This means, innocence should first be proved if a person is to be released. Stated differently, innocence should be established by dismissing the presumption of guilt. If, however, it is not proved that the person did not take part in the commission of a crime, he will be punished for the crime he is charged with. This is contrary to the constitutional principle of presumption of innocence.[288] Hence, by virtue of article 9(1) of the FDRE Constitution, article 35, first paragraph, can be considered null and void.

Interestingly, article 35, first paragraph of the Amharic version of the Criminal Code, is compatible with the constitutional principle of presumption of innocence. Its states: አንድ ወንጀል ቁጥራቸው ከአንድ በላይ በሆኑ ሰዎች በህብረት በተደረገ ጊዜ የወንጀሉ ተካፋይ መሆኑ ያልተረጋገጠበት ሰው አይቀጣም:: ሆኖም በአንድ ከፍል በተመደቡ ሰዎች እንደአድማ እና አንዳንሮ የመሳሰሉ ወንጀሎች በተደረጉ ጊዜ በህብረቱ ውስጥ መገኘቱ የተረጋገጠበት ሰው የማይቀጣው በወንጀሉ ተካፋይ አለመሆኑን ሲያስረዳ ነው:: (Where a crime is *committed by more than one person acting in concert, a person whose participation in the commission of a crime is not proved shall not be punished)* The Amharic Version requires proving the participation of a person in the commission of a crime for the purpose of punishment while the English Version requires the proof non-participation. So, there was an oversight on the side of the translators of the law form the Amharic to the English Version. The error is gross as it has made that part of the English Version contravene the Constitution.

In relation to the second paragraph, there is no discrepancy between the two Versions. Both provide that in case the participation of a person in acts such as conspiracy and brawl is proved, the person will be released only if he proves that he did not take part in the commission of a crime. That is to say, under such circumstances, he will escape criminal liability only if he proves his innocence. This is also equally unconstitutional as it erodes the constitutional right of accused persons to be presumed innocent until proved guilty. Therefore, article 35 of the English Version in its totality and the second paragraph of the Amharic Version are not compatible with the Constitution.[289]

[288] Article 20(3), FDRE Constitution: "Accused persons have the right to be presumed innocent until proved guilty according to the law..."

[289] Articles 20(3) and 9(l L&QRE Constitution. If suspects have the right to be presumed innocent, public prosecutors will have the burden of proof. That is to say, they have the duty to produce evidence and convince judges that the suspects are not innocent. ^

One more point worth noting under article 35, is the status given to conspiracy. The article uses the expression 'where a crime such as conspiracy...is committed...' This expression seems to suggest that conspiracy is a crime. But, as it will be discussed later on, conspiracy is not, in principle, a crime under the Criminal Code. It is only under exceptional circumstances that conspiracy is treated as a crime.[290] Hence, the Code seems to refer to this exceptional circumstance by using that expression.

2. 2.4 Secondary participants in the commission of crimes

Secondary participants in the commission of crimes (For the sake of convenience, these offenders are called *secondary offenders m* this part) are those persons whose participation is not so close and active in the commission of crimes. They are considered to be so because, relatively, the danger they pose to the society is of lesser degree and importance and their involvement in the commission of crimes is also limited and is more of indirect than direct Like principal offenders, however, they can participate in the commission of both ordinary and special offences.

he expression *secondary offenders* refer to instigators and accomplice.[291] That is, any person who incites or helps the commission of a crime is considered to be a secondary offender. Under the Criminal Code, those persons who perform acts of instigation and accomplice are not expressly regarded as secondary participants in the commission of crimes although the Code recopizes the acts as punishable.[292] Nevertheless, these persons should be regarded as secondary offenders for at least two reasons. First and obviously, since the roles they play in the commission of crimes are not usually, as important as that of principal offenders, their capacity should be different from that of principal offenders. Instigators or accomplice do not adopt the crimes committed or to be committed as their own. Hence, they are not fully associated with the results intended despite the fact that they have bowledge about the commission of the crimes. If this is so, there is no reason to put them on equal footing with those who adopt the crimes of others as their own. Second, the Code lists those criminals who can be regarded as principal criminals and goes on without saying anything about secondary offenders. But, although it is silent about their status, the Code regulates instigators and accomplices under the title *Participation in the Commission of a Crime,* which means, the two are recognized as participants in the commission of crimes. So, by way of exclusion, if these persons are considered participants but they are not principal offenders,

[290] Article 38, Criminal Code.

[291] Philippe Graven, pp. 99,105.

[292] Articles 36 and 37, Criminal Code.

then they can only be secondary offenders. With this general introduction in mind, we will now examine the two types of secondary participants in the commission of a crime as regulated under the Code.

2.2.4.1. Incitement (instigation or solicitation or inducement)

Soliciting or inciting a person to commit any offence is itself an indictable offence.[293] Thus, a solicitor or an inciter is an offender. But for solicitation or incitement to become a crime or for a solicitor or an inciter to be regarded as an offender, the following conditions must be satisfied.

1. Intention: No one will be a solicitor unless he knows that he is causing another to commit a crime. The type of intention is, however, irrelevant[294]
2. Commission: Since incitement means convincing, one is not able to convince another through omission. Hence, the material element required for instigation is commission.[295] If we take a look at the means of persuasion mentioned under article 36 of the Criminal Code, all of them are attributable to positive human conducts. Hence, this requirement seems implied in, and it is even a necessary element of article 36.
3. Absence of prior inducement: For a person to become an inciter, it is necessary that the person to be incited is not previously induced.[296] That is to say, it is only a person who has not made up his mind to commit a crime that can be induced. If a person has already decided to commit a crime, any subsequent attempt to induce him to commit the same crime will be in futile, impossible.

If the above-mentioned conditions are satisfied, the means used to instigate a person to commit a crime is immaterial. Similarly, whether a person is incited to act as a principal or a secondary offender is immaterial.[297]

Under the Criminal Code, incitement is regulated under article 36. It is stipulated that any person who intentionally induces another to commit a crime is regarded as a criminal. Interestingly, the Code requires the mental element of the criminal to be intention to become an inciter. Hence, if one induces another by negligence, he will not be a criminal within the meaning of article 36.[298] Moreover, the absence of prior inducement element is also

[233] Ian McLean, and Peter Morrish, p. 62.

[294] PhiUppe Graven, p. 101.

[295] Steven Lowenstein, p. 261.

[294] Ibid.

[297] Philippe, Graven, p. 99.

[298] Even with intention, the law particularly the Amharic Version seems to require direct intention as the conducts mentioned reflect the existence of desire to have a crime committed on the side of an inciter.

impliedly recognized. Becausewhen the Code states *who intentionally induces another,* the implication is, the person to be induced needs to be innocent before the inducement: otherwise any attempt to induce him will only amount to perhaps assistance or mere encouragement to go ahead with the already existing plan. A person decides only once to commit a crime and the subsequent activities he performs to pretend to be convinced are just pretexts to get whatever he needs. The Criminal Code is open as far as the means to be used to incite a person to commit a crime is concerned. It has the stand that anything can be used to induce a person to commit a crime. For instance, a person can induce another by way of persuasion, order, advice, promise, financial payment, gifts, threats, pressure, goading, flattery, using other human agents (like prostitutes), giving false information knowing that the information will make a person commit a crime, etc. So, what matters is the existence of inducement, not the type of means used to induce.

In respect of the capacity of the persons to be incited, the Criminal Code is silent It simply provides that inciting a person to commit a crime is culpable. Hence, it can be argued that as long as incitement by itself is culpable, a person can be an inciter if he incites one to instigate another. This means, it is possible to incite persons to act in both principal and secondary capacities to commit crimes. On top of that, it is possible to argue that inciting a person to act in secondary capacity is the same as using this person as a means to incite the required person. Accordingly, since article 36 is open-ended as to the means to be used to incite, it is possible for a person to be an inciter as per this article if he incites another to act in secondary capacity. On the other hand, one may argue that since the Code makes accomplice culpable (Article 37) only in relation to principal criminals, the same should apply to instigation because both are secondary participation in the commission of crimes.[299]

Moreover, the Code does not say anything as to whether incitement can be effected by more than one person. But it is logical that two or more persons, whether they know one another or not can incite a person to commit a crime and still be held inciters. So, what matters is the fact that their efforts make a person decide to commit a crime.

As far as the legal effect of incitement is concerned, normally, the punishment for inciter is not more than the punishments provided for the incited crime. But in some countries,

[289] But this position will unarguably face a question whether instigators and accomplice are, though both are secondary participants in the commission of crimes, exactly equally dangerous. It can be argued that instigators are more dangerous than accomplice becausethey are persons who change innocent minds to criminal minds while accomplice are persons who give assistance to already resolute minds.

sometimes, incitement entails a greater punishment than the incited crime does. The reason is, at times, those persons who incite others to commit crimes are more blameworthy. For example, gang leaders who organize and send out criminals to commit offences without themselves committing the crimes are more blameworthy than the perpetrators since without their organizational skills, the offences would probably never have happened.[300] Under the Criminal Code, the legal effect of incitement is the same as committing the crime intended.[301] This means, an inciter is put on equal footing with a perpetrator unless, of course, the inciter is a young offender or a legal person. The fact that an inciter is not subjected to a lesser penalty than the penalty an incited person is subjected to seems tenable from deterrence point of view. But the Code makes incitement liable to punishment only if the incited crime is attempted. Accordingly, convincing a person to commit a crime *perse* does not suffice for the purpose of punishment although it still remains culpable.

But one may wonder why the Code requires the attempt of the incited crime to punish incitement insofar as incitement by itself is culpable. It is provided that the distinctive feature of secondary liability is that, as a rule, it is derivative from the guilt (not the conviction) of the principal. If the principal is guilty, whether he is tried in his presence or in absentia, then the secondary participant in the commission of a crime will be liable.[302] Therefore, since under the Code, no one will, *as a rule,* be guilty of any crime unless it is attempted, an inciter of a crime will not be punished insofar as the incited crime is not attempted. In fact this justification is capable of subjecting instigators to liability in case individuals are liable to punishment for preparations. This is so becausethe fact that the incited person is found guilty suffices to derive the guilt of an inciter.

Besides, it is said that the crime of instigation is completed when the principal offender commits the crime envisaged.[303] Thus, it is logical to draw a conclusion that the crime of instigation will be attempted when the crime envisaged is attempted. If the crime envisaged is not attempted, logically, then the crime of instigation is also not attempted. Hence, there will be no reason to punish an inciter if the instigation is not believed to be at least

[300] Jimmy OKiordon, *A2 Law for OCR,* Heinemann, 2003, p.41.

[301] Article 36(2), Criminal Code. In relation to petty offences, instigation is not punishable. See article

[302] Smith and Hogan, p. 211.

[303] Steven Lowenstein, p.261.

justification seems weaker as compared to the first one. Becausethe crime of incitement should be completed as soon as a person convinces (induces) another to commit a crime. To convince means 'to provoke a decision to act' and this happens as soon as a person accepts the offer of his inciter. Moreover, this justification does not enable us to punish an inciter in case an incited person is guilty of preparations made in accordance with the incitement unless his liability expressly stated under such circumstance.

The other point worth entertaining is the fact that the Code does not provide for severer penalty for incitement than the one it provides for the incited crime. For that matter, let alone making it susceptible to severer penalty, the Code permits courts to mitigate penalties for inciters, if circumstances so justify.[304] Moreover, it may sometimes happen that incited persons go beyond what their instigators intended. In this case, the Code has the stand that inciters will not be liable for what they did not intend.[305] For example, if A is instigated to rape a lady but he kills her after raping, his instigator will not be liable for the homicide unless he intended it either directly or indirectly. His liability will be limited to inciting the crime of rape. For the crime of homicide, the perpetrator alone will be liable. This is just a reiteration of article 58(3).

Notwithstanding the preceding discussion, there are cases were instigation is not seen in light of article 36. This happens where instigation by itself, becauseof the importance of the interest to be safeguarded, is made an independent crime.[306] For example, under the Criminal Code, to provoke or incite the public, to incite a person not to pay tax, to incite another to commit suicide, etc. are instigations which are not treated in the light of article 36 but in the light of the specific special part provisions. Hence, the penalties these provisions provide for may be lesser or greater than the penalties inciters may be subjected to if their cases are seen in the light of article 36. Further, in relation to these instigations, the instigators are considered principal offenders, not secondary offenders; hence, article 36 is inapplicable.

Finally, it is helpful to consider that even if instigation is liable to punishment an attempt to instigate is not liable to punishment (Article 27(2)). This is so because, unlike attempt in other cases, an attempt to instigate is too remote to represents any danger to the society. It seldom represents any danger, after all, and that is why such attempt is not made to fall

^Article 36(3), Criminal Code.

^Article 36(4), Criminal Code. Though article 36(4) makes reference to article 58(3) which in turn makes reference to article 59, inciters will not he liable for being negligent in relation to convincing others to commit additional crimes since incitement is an intentional act.

[306] Philippe Graven, p. 104.

within the ambit of the criminal law. Therefore, it is only a completed and successful instigation that is liable to punishment unless the instigation by itself is declared to constitute an independent crime (like under article 255) in which case an attempt to instigate will be liable to punishment

2. 2.4.2. Accomplice (accessory before the fact or complicity)

An accomplice, who is a secondary offender, is a person who gives supports for the commission of principal offence or to a principal offender.[307] As a result, lending assistance to a perpetrator is a crime. For example, a person who gives inside information on when money will be available on premises; a person who keeps lookout in case the police arrive; a person who acts as a getaway driver; and, a person who provides support for criminal activities are all accomplice or accessory before the fact[308]

The Criminal Code recognizes accomplice as a crime under article 37. It defines the act as *an intentional assistance extended to a principal offender before or during the commission of a crime.*[m] The form of the assistance is immaterial: it can be material (like giving money or lending gun) or intellectual (like counseling). But the assistance has to be intentional; that means, the person should know that he is helping another to commit a crime. Negligent assistance does not make a person an accomplice. In addition, in some jurisdictions, the assistance has to be made for the purpose of enabling a person to commit a crime.[310] So, bowing that the assistance is to be used for the commission of a crime does not suffice. What this indirectly means is that the intention has to be direct. The Code does not expressly limit the intention element to direct intention. In particular, a cursory look at the English Version of the Code conveys the message that both direct and indirect intention can be elements of accomplice. But the wording of the Amharic Version tends to imply the existence of desire as to the commission of the intended crime which in turn implies direct intention. It reads: **Am. nm'}£A £C7> M6 Vta +-AA- P^m^m. 'P'.'**

ar>£A **n***A.)-9"* **IfV f***WSZtK))-* **7H...**

t\ary£t\- hA.TW" n^nvT-r (l^S'-Tm//" M hf.vfr OV-HK hhn

lY^ai >fp.- The underlined expression shows some element of desire to have the intended crime committed on the side of the assister. Hence, possibly, this Version of the Code has direct intention in mind.

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[3M] Article 37(1), Criminal Code.

[3,0] Stephen A. Saltsburg, John L Diamond, kit kinports, Thomas H. Morawetz, p. 684.

Likewise, the assistance should be lent to a principal offender. Hence, assisting a secondary offender does not make a person an accomplice. Further, the assistance has to be given either before or during the commission of a crime. Any intentional assistance given to a principal offender after the commission of a crime does not make a person an accomplice. Becausethis person cannot be said to have participated in the commission of the crime since his role comes into picture after the commission of the crime is consummated. Hence, he is normally treated as accessory after the fact As such, he commits an independent crime against the administration of justice.[311] Therefore, it is only giving assistance before or during the commission of a crime that renders a person an accomplice.

It should be noted that, unlike instigation, accomplice can also be committed by omission.[312] For example, if a policeman is requested to give blind eyes when one wants to steal and he accepts the request, he will be an accomplice. His assistance is effected by negative conduct This type of assistance is also foreseen under article 37 for it states that *assistance of any kind whatsoever in the commission of a crime* can make a person an accomplice.

As far as the legal effect of accomplice is concerned, the Criminal Code attaches the same effect it attaches to instigation.[313] Accordingly, an accomplice is liable to the penalty provided for the crime intended provided that its commission is at least attempted and the accomplice is not a young offender or a legal person. This is, however, subject to mitigation if courts deem mitigation is necessary. The reason why the attempt of the intended crime is required is the same with the reasons mentioned before in relation to incitement That is, an accomplice will be liable to punishment only if the principal offender is liable to punishment and the principal's liability comes into picture, as a rule, only if he attempts to commit a crime. It has to be borne in mind that the rule that no accessory before the fact could be convicted or suffer any punishment where the principal offender was not attainted is an ancient common law principle.[314] So, it seems that the Code has embodied this principle. Moreover, the liability of an accomplice is limited to the crime for which assistance is given. Anything in excess of the intention of the accomplice will not make him liable to punishment[315]

[311] Article 39, Criminal Code.

[312] Ian McLean, and Peter Morrish, p. 74.

[313] Article 37(2-5), Criminal Code. It shall be known that accomplice is not punishable in relation to petty offences. See article 740(2).

[JL]< J. W. Ctdjjper, *Kenny's Outlines of Criminal Law,* 18* ed. Camkndje. At the University Press, 1962 p. 103.

[315] There wjl be no punishment for aid given by negligence (Artide 58(3) cum Article 59) since accomplice is an intentional conduct.

It is worth noting, at this juncture, that the Code does not regulate whether or not the assistance given should be used by the receiver to make the assister liable. On one hand, it can be argued that unless the assistance is used while the crime is at least attempted, the assister should not be punished. On the other hand, it can also be argued that as long as the assister has performed everything that is expected of him to help a criminal, he should be punished as an accomplice. It is the second position that is widely accepted, though.[316]

Another relevant issue may arise when the assistance given is used for the commission of a different crime. In this case, should the accomplice be held liable to punishment? If assistance is given for the commission of any crime, then there will be no ***different*** crime as far the accomplice is concerned. Hence, he will be liable to punishment Moreover, if the change made by the actor pertains to the identity of the victim or the object of the crime, the accomplice should still be liable. For example, if assistance is given to hijack Ethiopian Airlines' aircraft and the actor, unknown to the assister receives the assistance to hijack a different aircraft, and attempts to hijack Kenyan Airways aircraft, the accomplice should be punished. Of course, there is mistake of fact while giving assistance but this mistake is not fundamental so as to affect the moral element of the accomplice. However, if the assistance is used for a completely different crime, such as homicide though theft was intended by the accomplice, he should not be punished. We can say the commission of the crime of homicide is something that has gone beyond what the accomplice intended (article 58(3)). Like instigation, there are instances where accomplice becomes an independent crime. For example, aid to a person who wants to commit suicide is an independent crime. Hence, this case will not be seen in the light of article 37 but the special part provision dealing with aid given to persons committing suicide (Article 542). So, an accomplice is, in this case, a principal offender.)

Lastly, it is relevant to consider that even if accomplice is liable to punishment, an attempt to assist is not liable to punishment (Article 27(2)). This is due to the fact that unlike attempt in other cases, an attempt to help is too remote to pose any danger to the society. After all, it infrequently represents any danger to the society and that is why such attempt is not made to fall within the purview of criminal law. Therefore, it is only a completed and successful complicity that is liable to punishment unless it is declared to constitute an independent crime (like under article 255) in which case an attempt to assist will be liable to punishment

Stephen A. Saltshurg, John L Diamond, kit kinports, Thomas H. Morawetz, p. 672.

2. 2.4.3. Conspiracy

Conspiracy can be defined as a confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act.[317] The essential elements of this act are *agreement intention.*[318] The agreement can be written, unwritten, express or tacit[319] So, what matters is the existence of agreement, not the form in which it is made, or the mode of expressing it. Moreover, conspiracy is an intentional act That is to mean, the agreement has to be entered into with the knowledge of what is to be done and that it is criminal.[320] A person cannot be a conspirator if he does not have any intention to participate in the commission of a crime. Therefore, agreement and intention are the essences of conspiracy: if any of the two is missing, conspiracy is also missing.

The legal approach to the problem of conspiracy is different in the common law and the civil law legal systems. In traditional continental legal system, conspiracy is punishable only exceptionally (like if it is meant to commit serious crimes), whereas in the common law system, it is punishable even where no crime has been committed as the result of the conspiracy.[321] Well, it is helpful to question why conspiracy is not as a rule, a crime in the civil law legal system. The criminal codes of countries belonging to this system consider conspiracy (agreement to commit a crime) as a preparatory acL Hence, since preparatory act is not as a rule, punishable, conspiracy should not, as a rule, be punishable. If that is the case, one may wonder the measure that is taken to discourage individuals from joining hands to commit crimes. Continental courts are authorized to use conspiracy as an aggravating circumstance.[322] By so doing, it is believed that conspiracy can be discouraged becausea conspirator will be subject to a severer penalty than he will be subjected to if he acts alone.

On the other hand, in the common law system, the criminalization of conspiracy is justified on the need to punish inchoate criminal behaviours. Despite this need, in the past, the liability for the crime of conspiracy was merged with the penalty for the crime intended if it was committed. That is to say, conspiracy was punishable as a crime only if it did not entail the substantive crime it was meant for. Presently, however, most courts impose cumulative penalty for the crime of conspiracy and the intended crime. In fact there are still some courts

317 Bryan A., Gamer(eil), *Black's Law Dictionary,* Abridged T* ed. West Group, St Paul, Minn, 2003, pp. 214.

318 Jimmy O'Riordon, p. 41.

319 Stephen A. Saltsburg, John L Diamond, kit kinports, Thomas H. Morawetz, p. 700.

320 Id., pp. 711-712. But one may question how the requirement of knowledge on the criminal nature of the act to be performed can be reconciled with the principle that *ignorance of law is no excuse.*

321 Steven Lowenstein, pp. 272-3.

322 Id., p. 275.

which follow the merger principle and, for that matter, the Model Penal Code of the USA also adheres to this principle.[323]

The stand of the Criminal Code is the same as that of the civil law penal codes for obvious reason that the 1957 Penal Code was made largely on the basis of continental penal codes and the Criminal Code has made no change to it Hence, conspiracy is, as rule, an aggravating ground in our criminal system (Article 38(1)). At this point, it is important to note that although conspiracy has intention as its element, the intention element does not extend to knowledge about the criminal nature of what is to be done in pursuance of the agreement. This is so becausethe Criminal Code has expressly stipulated that ignorance or mistake of law is no defence.[324] As far as knowledge of what is going to be done is concerned, however, it has to be fulfilled.

The Criminal Code has not totally liberalized conspiracy. There are instances where an agreement to commit a crime is considered a crime. These instances are mentioned under article 38(2) which provides that conspiracy can be penalized pursuant to articles 257, 274, 300, and 478. These exceptions pertain to crimes which are against the essential interests of the state and its defence, the forming of unlawful associations and the participation therein, as well as to the organization of gangs or associations of wrongdoers. So, if an agreement is made to commit any of these acts, the agreement *per se* becomes a crime. Hence, the conspirators can be charged for committing two crimes: the conspiracy and the crime for which the conspiracy is made if it is at least attempted. That means, sometimes, conspiracy ceases to be an aggravating circumstance and calls for its own penalty which will be imposed in accordance with the principles of determining penalties

Of all the exceptions stated under article 38(2), the exception made in relation article 478 is relatively of some importance to discuss here. Under article 478, conspiracy to commit a crime becomes a crime if:

1. two or more persons make an agreement;
2. the purpose of the agreement is to commit a crime;
3. the crime to be committed is serious; and
4. the conspiracy materializes.

The first two elements are recognized under article 38(2) and they were discussed before. **But** the last two elements are not included under article 38(2). To begin with, the **concept**

[323] Stephen A. Saltshurg, John L Diamond, kit kinports, Thomas H. Morawetz, pp. 704-5.

[324] Article 81(1), Criminal Code.

serious crime could have caused ambiguity had it not be for the definition given under article 478. The provision defines it as a crime which is punishable by rigorous imprisonment for five years or more. Therefore, an agreement to commit a crime which may entail rigorous imprisonment of five years or more may be a crime. But it should be known that five years imprisonment by itself is not sufficient to make an agreement a crime. The imprisonment has to be rigorous since there are exceptional situations in which five years simple imprisonment may be imposed.[325]

The other element which is missing from article 38(2) but which is embodied in article 478 is the *materialization* element The provision requires the conspiracy to materialize before it becomes a crime. Hence, pursuant to this article, it is the materialization element that consummates the crime of conspiracy and not the agreement by itself. But, unlike the concept of serious crimes, article 478 does not define the concept *materialization.* Accordingly, this unclear and confusing concept may give rise to divergent opinions. To explore what is probably meant by materialization, it is necessary to see the experiences of other countries.

In most common law jurisdictions, it is held that the crime of conspiracy will be consummated and become punishable only if there is, in addition to the agreement and intention, an *overt act* in furtherance of the agreement[326] This means, the crime of conspiracy requires, for its existence, the performance of some acts to implement the agreement. For instance, if conspirators purchase a rope to hang a person, they are performing an overt act in addition to their agreement to kill the person. As a result, it can be said that as soon as the rope is bought the crime is also consummated, interestingly, there are still some jurisdictions which require the magnitude of the overt act in furtherance of the agreement to be substantial or, at times, to be equivalent to the overt act required for the crime of attempt[327] But in the majority of jurisdictions, insignificant overt act can suffice to consummate the crime of conspiracy.[328]

So, it seems that by some chance, the overt act requirement of the common law system is embodied in article 478. Thus, the concept materialization under this article conveys the message that conspiracy pursuant to article 478 is consummated only if the agreement is followed by some overt act The magnitude of the overt act should not be considered since

[325] Article 106(1), Criminal Code.

[326] Stephen A. Saltsburg, John L Diamond, kit kinports, Thomas H. Morawetz, p. 695.

[327] Id., p. 715.

[328] Ibid.

the law may be self-defeating if substantial overt act is required. If such overt act is expected, then the intended crime will probably happen since conspirators join their hands, which in turn makes the materialization of the crime quick. Moreover, the substantial overt act requirement does not have majority support. Thus, the interpretation of the concept materialization under article 478 should be in accordance with the majority view of the existence of at least insignificant overt act

The other point worth considering, at this juncture, is the necessity of articles 254,274, and 300 in the presence of article 478. The crimes these provisions deal with are the same as the crimes envisaged under article 478. For example, crimes against the constitutional order, the defence force, and international law are among the crimes regulated by these provisions. These crimes can also fall within the reach of article 478. Hence, it can be said that these provision are superfluous. But it seems that the Criminal Code wants to make conspiracy, in relation to these crimes, ripe by reducing some of the requirements like the materialization element. Thus, conspiracy to commit these crimes can be punished earlier than conspiracy to commit the crimes envisaged under article 478. Therefore, article 478 is meant to apply only when these provisions do not apply becausethey are more specific provisions.

Finally, one needs to keep in mind that there are crimes which cannot be committed by a person acting alone. For example, the commission of the crimes of adultery, incest, and dueling inevitably requires the existence of prior agreement Stated differently, the commission of these crimes would necessarily give rise to conspiracy. This raises the question whether the persons involved in the commission of these crimes can be held conspirators. But there is a general understanding that 'where it is impossible, under the circumstance, to commit the substantive offence without co-operative actions, the preliminary agreement between the same parties to commit the offence is not an indictable offence'.[329] Therefore, those who commit crimes such as adultery, incest dueling, giving and taking bribes, and gambling are not treated as conspirators. These are offences of 'necessary participation' and offences which cannot be committed by one person alone. After all, conspiracy is one of the definitional elements of these crimes. For instance, in the absence of agreement, the crime of adultery cannot exist; instead the sexual intercourse performed may be taken as a rape. Therefore, such persons should not be charged for committing two crimes, when conspiracy is a crime, or their conspiracy should not be used to aggravate their

[329] **Stephen A. Saltshurg,** John L **Diamond, kit** kinports, Thomas H. Morawetz, p. 704.

2.2.4.4. Accessory after the fact

Article 40 of the Criminal Code replates the case of an accessory after the fact According to the Code, an accessory after the fact is a person who gives assistance to someone who has already committed a crime. So, it is different from accomplice in that his assistance comes after the fact As for the form of assistance, it may be hiding the criminal or helping him escape prosecution or punishment or receiving the proceeds of the crime committed. For example, if someone hides a criminal so that he will escape arrest, he will be an accessory after the fact Similarly, if a person helps a criminal to abscond from his country to avoid criminal prosecution and punishment, he will be an accessory after the fact A person who receives the gains obtained from the commission of a crime like corruption to help the criminal avoid liability or greater liability is also an accessory after the fact So, granting a criminal any type of help so that he can avoid criminal liability in whole or in part will render someone an accessory after the fact.

However, as mentioned before, an accessory after the fact is not a participant in the commission of a crime. Instead, he commits an independent crime. Thus, his punishment has nothing to do with the punishment for the crime committed by another person. That is why article 40 stipulates that an accessory alter the fact is punished not in accordance with the provision violated by the criminal obtaining assistance from him but in accordance with articles 445,460, and 682. These are provisions which make each act of an accessory after the fact a crime. For instance, article 445 criminalizes helping a criminal, in any manner, to avoid prosecution. Article 460 criminalizes helping a criminal to avoid punishment by obstructing, in any way, the execution of sentence. Article 682 criminalizes receiving the fruits of a crime. This shows that it is not what is done by another person that entails criminal liability to the accessory after the fact but his own act

It is, however, necessary to note that article 40 is silent about the mental state of the accessory after the fact For example, incitement and accomplice are intentional acts. Should accessory after the fact also be an intentional act, too? For example, what would happen if a father receives stolen money from his son and uses it with asking where the money has come from? What would happen if a person hides his sister who is sought for corruption or terrorist crime by the government without asking why she needs to hide? Assuming, in both cases, the accessories after the fact are negligent, should they be liable to punishment? Based on article 40, it is possible to argue both ways. For instance, in relation to incitement and accomplice, the Code expressly states the mental element; that is, intention. In relation to accessory after the fact, however, the Code is silent and this silence could be construed to

cover not only intention but also negligence. However, it is the reading of article 40 together with the above-mentioned special part provisions (articles 445, 460, and 682) and the provisions of other penal laws that will lead us to a conclusive answer. Accordingly, accessory alter the fact is an intentional crime under articles 445 and 460, whereas it can be committed either intentionally or by negligence under article 682. Similarly, according to the Anti-Terrorism Proclamation, receiving the proceeds of a terrorist act knowing that it is obtained from such crime or having reason to know that it is a proceed of terrorist act (meaning, being negligent) is a crime.[330] Thus, unlike for incitement and accomphce, the requisite moral element to criminalize accessory after the fact depends on the type of act performed by the accessory after the fact

Finally, article 39 of the Code stipulates that failure to report the preparation, attempt or commission of a crime or of a person who committed the crime does not make someone an accessory after the fact or an accomphce despite the fact that an intentional failure of a person to report may amount to helping a person escape prosecution. On the contrary, the Code stipulates that failure to report can entail liability under certain circumstances, as provided under articles 254, 335, and 443 of the Code. Moreover, there are times when failure to report is criminalized by special penal laws. For instance, the Anti-Terrorism Proclamation criminalizes failure to disclose terrorist acts.[331] So, like accessory after the fact failure to report does not render someone a participant in the commission of a crime although, at times, it may entail criminal liability.

[330] See article 9, Anti-Terrorism Proclamation, Proclamation No. 652/2009.

[331] Id., article 12.

Part Three: Criminal Punishment and Its Application

3.1 Introduction

In any legal system, the stage at which legal sanctions are applied is perhaps the most important stage in the application of law. Becausethe protection that laws give would become complete only if the sanctions attached thereto are properly imposed and applied whenever these laws are violated. In like manner, if the protection accorded by criminal law is to be complete and effective, criminal sanctions should be imposed and applied. Such imposition and application of criminal sanctions should also be *proper* for failure to do so would defeat its purpose; that is, the protection of society. This implies that the protection of the public against crimes is highly contingent upon the extent to which a judge makes appropriate sentencing decisions. The more appropriate decisions are, the more protection the public gets; and, of course, more relief for the police from re-arresting, for prosecutors from recharging, for judges from further trial, and for prison personnel from enforcing another penalty.[332]

Nevertheless, in cases resolved by trial, sentencing is often considerably problematic. In plea bargaining, a judge generally accepts the sentence recommended by a public prosecutor while in case of summary trial the sentence is often standardized by specific fines for specific offences.[333] In cases resolved by trial, however, there is no such thing as standardized penalty or prosecutor's recommendation. The court considering the case should determine the specific penalty to be served by a criminal as this falls within its exclusive jurisdiction.

During sentencing, judge's decision will be affected by different factors such as his view about the criminal, the political ramifications of the case, the nature of the offence, the availability of prison place, etc. So, there are both legal and non-legal factors affecting sentencing decisions and these factors make sentencing a complex process and the most difficult duty of a judge.[334] This is the main reason for having sentencing disparities. Judges with prior exposure to sentencing practice impose more appropriate sentences than judges with no prior experience in sentencing practice.

[332] Steven M. Cox and John E, Wade, *The Criminal Justice Network: An Introduction*, 3rd ed, Mc Graw Hill, USA, 1998, p. 195.

[333] Id., p. 192.

[334] Id., pp.192-195.

In Ethiopia, the Criminal Code urges making appropriate sentencing decisions and it has tried to avoid sentencing disparities by, firstly, providing for the factors to be taken into account during sentencing (to be discussed later on); secondly, by mandating the Federal Supreme Court to issue a manual relating to sentencing (Article 88(4)); and, thirdly, by adopting the *determinate* sentencing approach. In some countries, judges are allowed to sentence a convict to an indefinite period of imprisonment like from 2-5 years and leave the determination of the date of release to prison administrations. This type of sentencing approach is known as *indeterminate sentencing approach.* On the other hand, in other jurisdictions, judges are required to fix the date of release of a person convicted. This type of sentencing approach is known as *determinate sentencing approach?^* This approach seems preferable to reduce sentencing disparities. The Criminal Code adopts this approach becauseit requires judges, pursuant to article 88(3), to determine, from a range of possible sentences provided in the special part, only the penalty that is appropriate for the crime committed. By so doing, the Code has denied prison administration to get involved in the determination of the date of release of a criminal.[336]

As far the roles that are played by the different organs of a government in the determination of penalty are concerned, the legislature determines what type of sentence may be imposed and judges impose the sentence.[337] That means, it is up to the legislature to decide on the extent of sentence to be employed in relation to a given crime so as to serve the purposes of criminal law. The role of judges, on the other hand, is to fix the specific penalty to be used with regard to a given crime and criminal in the light of the purposes of punishment So, judges play the role of'individualizing' penalty within the ranges stipulated by the legislature. However, sometimes, the legislature may provide for a specific penalty thereby denying judges any latitude for the determination of sentence. In this case, the role of a judge is simply to pronounce the specific penalty the legislature has prescribed. For instance, article 95 of Income Tax Proclamation makes the following stipulations:

> If a person subject to tax is convicted of obtaining more than one TIN (Taxpayer Identification Number), that person shall be liable to pay a fine of not less than 20,000 Birr and not more than 50,000 Birr *and to imprisonment ofhve (5) years* per additional TIN obtained.[338]

335 Id., p. 193.

336 This is, however, without prejudice to the possibility of releasing criminals on parole.

337 Daniel E. Hall, p. 406.

338 Income Tax proclamation, Proclamation No.286/2002. Emphasis added.

Those individuals who are supposed to pay income tax in the light of this Proclamation can obtain one TIN but not more.[339] If they obtain more than one TIN, every additional TIN will entail five years imprisonment. For example, if the additional TINs obtained are five, a judge has to sentence the criminal to 25 years imprisonment.[340] Therefore, under this circumstance, there is no room for a judge to impose a penalty which is different from 25 years imprisonment

With regard to the role of the executive, it is supposed to enforce the decisions of the judges unless judges are allowed to impose penalty for indefinite period in which case the executive can have a role to play in the determination of the actual sentence to be served. In this case, the legislature provides for a wider range of sentences and the judges provide for narrower range of sentences. The executive, however, provides for the specific penalty to be undergone. Indeed, the executive cannot do this in advance but on the basis of the propriety of the criminal after serving part of his sentence.

This part aims at elucidating some of the important points pertaining to sentencing and execution of criminal punishments (application of criminal sanctions) as regulated under the Criminal Code for the protection of the society and its inhabitants. To that end, attempt will be made to expound the concepts punishments, purposes of punishments, types of punishments, how punishments can be determined and applied, and factors triggering the imposition of severe and lenient punishments. Similarly, suggestions will also be made as to which type of penalty should be applied where there are chances to choose between punishments together with their cons and pros. Moreover, sometimes, the administration of criminal justice may require the non-execution of criminal sentences or the interruption of the execution of sentences. Accordingly, attempt will be made to explain the possibility of suspending penalties either in the form of conditional suspension or conditional release together with the conditions attached thereto. Finally, a brief discussion will be made on the determination and execution of penalties for petty offences.

339 Id., Article 43(a).

340 However, it should be noted that there is a possibility to argue that imprisonment cannot go beyond 25 years even if the extra TINs obtained are more than five. Becausearticle 108 of the Criminal Code, which is a subsequent law, provides that the maximum imprisonment is 25 years in principle and life imprisonment under exceptional circumstance. Hence, if a judge is forced to go beyond 25 years, the only choice available to him is life imprisonment On the other hand, the principle of legality obliges him not to create penalty by analogy. Thus, it is questionable whether article 95 of this Proclamation can be interpreted to mean life imprisonment in case more than five TINs are obtained. Most importantly, however, article 5 of the Criminal Code stipulates that special penal legislation prevails over the provisions of the Code if they expressly stipulate different treatments. This renders article 95 of the Proclamation valid even in the presence of article 108 of the Code.

3.2 Punishment in general

Criminal law is among the guardians of the society and its inhabitants. Becauseit is the law that proscribes the performance of undesirable conducts and also prescribes the performance of conducts which are deemed desirable for the protection of the society and its inhabitants.[341] For example, if we see the very first article of the Criminal Code, it states that criminal law has the purpose of protecting the society by ensuring the peace, order, and security of its peoples and inhabitants. This shows how important criminal law is for the protection of the public and its members.

If the objective of criminal law is to protect the society and its inhabitants, therefore, there should exist certain mechanisms to employ for the achievement of this lofty objective. These mechanisms are expressly provided for in any criminal law. In the Criminal Code as well, the use of different means is recognized under article 1. For example, the use of the *principle of due notice* is among the mechanisms recognized to be used to serve the purpose of the criminal law. That is to say, individuals should be given advance warning about conducts amounting to crimes, the penalties attached thereto and the absence of defence based on ignorance of law.

Although criminal law gives due notice to prevent the commission of crimes, individuals still commit crimes in disregard of the notice. This happens because, at times, persons want to promote their own interests in case their interests are in conflict with that of the society; or they feel that they will not be punished since the chance of being caught and prosecuted is 50-50; or, maybe, they are in difficulties which make them commit crimes, etc. Under such circumstances, the Criminal Code prescribes the use of another means; that is, *punishment,* so that the protection it gives will be complete and effective. Article 1 states that in case *due notice* becomes ineffective punishment shall be provided. Therefore, if the commission of a given crime in disregard of *due notice* is ascertained, the author thereof is known, and no defence is presented or it is rejected, the next step is imposing criminal punishment so that the purpose and object of criminal law will be served. In other words, if an accused person is convicted of the crime he is charged with, then, punishment should be meted out Punishment normally refers to measures taken by the government against criminals as the consequences of their criminal activities so as to affect, *inter alia,* their property, liberty and, at times, lives.

341 Steph A. Saltshurg, John L. Diamond, kit kinports, Thomas H. Morawetz, p. 1.

In the following parts, two important topics related to punishment-proportionality of punishment and the theories of punishment-will be discussed briefly.[342]

3.2.1 Proportionality of punishment[343]

The principle of proportionality of punishment has been deeply rooted in the common-law jurisprudence since Magna Carta. According to the principle, in a just society, punishment ought to be proportional to the crime committed. This means, punishment should 'fit' or 'match' the crime for which it is assigned. The principle is premised on the following justifications.

1. According to the theory of *social contract,* individuals agree to give the state power over themselves only to the extent that is necessary to create order and harmony. Therefore, the state should punish only to the extent that is necessary to deter crimes, and no more than that is required. Any excess punishment is an abuse of power by the state. In the language Benjamin Franklin, 'a legal system "founded on the Eternal Principle of Justice and Equality" must reasonably concur that "the punishments should be proportioned to the offences".' So, according to Franklin, excessive punishment is contrary to the spirit of justice.
2. If punishment were not proportional, then the state would in fact encourage and create more crimes. For instance, if a person who steals 20 birr is to be punished equally with a person who steals 20,000 birr, then the person who intends to steal 20 birr will change his plan and risk stealing the 20,000 birr. After all, human beings are hedonistic or self-interested if forced to choose between less serious and more serious crimes that are assigned equal punishment

[342] The Criminal Code, under article 1, further provides for the use of measures as the third means to accord complete protection to the public. Hence, courts should not use punishment if they think that the use of measures is more promising than penalties to protect the society and there is authorization to that effect The Code, indeed, provides for the use of measures under many circumstances. For instance, in relation to irresponsible persons, the use of confinement and treatment is allowed under articles 129-133. In relation to juvenile offenders, the Code provides for different types of measures to employ to rehabilitate them (see articles 157-164). Further, the Code contains provisions on measures in relation adults (See article 142ff). For instance, if there are indications that crimes are going to be committed, then measures for the prevention of the crimes can be taken even if there are no concrete threats to the society. Further, measures can be added to penalties if courts deem such step necessary for the prevention of further crimes. Well, this issue is not discussed here in detail becausethey have already been discussed before under relevant topics.

[343] For the discussion in this part see generally Allison Friedly, *Pragmatic and Conceptual Concerns Regarding Proportional Punishment,* Spring 2004, available at httD://www.morris.umn.edu/academic/philosophy/friedlv/defense.html, accused on 1 August 2008, and Beccaria, *On Crime and Punishments, available\ at* http://www.crimetheorv.com/ClasPos/proportion.htm accessed on 1 August 2008.

3. In order to best function as a general deterrent, punishment should not only be proportionate to the crime committed but also symbolize the crime it is assigned for. In other words, punishment should symbolically recall the crime in the mind of observers (would-be criminals). Hence, disproportional punishment can hardly symbolize the crime in the mind of the public.

Actually, the principle of proportionality of punishment is not without objection or problem. For example, people like James Madison rejected the principle and favoured the use of excessive punishment to give punishment maximum deterrent effect As a result, they supported the use of death penalty even for the crime of theft In addition, there are other problems concomitant to the principle of proportionality of punishment First the principle adheres to the imposition of penalties proportionate to the severity of the crime committed. But how can just punishment be given to a recidivist? The purpose of punishment can be served if the punishment for a recidivist is increased becauseof his repeated criminal act Indeed, it can be argued that the gravity or severity of the crime increases with the repetition of criminal acts. But the counter-argument will be unless it is proven that some sort of additional malice is involved in relation to the new crime, it will be unjust to assume that the repeated crime is severer than the previous one. Second, the fundamental idea of the principle of proportionality is that the degree to which the offender is to suffer by being punished must 'fit' the harm or suffering caused by him. In other words, the offender must suffer the harm he caused and to the extent he caused it The first problem is the fact that it may not be possible or fair to make a person suffer the harm he caused. For instance, if a person destroys someone's right eye and he does not himself have right eye, it is not possible to destroy the offender's right eye. Second, it may not always be possible to calculate the exact harm caused by an offender to make him pay for. This is particularly true if the effect of the crime is lingering. For instance, if the crime committed has continuous economic effect on the victim or his dependents, how can we know the exact penalty to be inflicted on the offender since the principle of proportionality requires the infliction of the same harm to the same extent? The third problem relates to the way of making people suffer. If punishment aims at making people suffer, then one must understand that people suffer differently. For instance, for rich people prison life can amount to suffering. Yet, for indigents living under poverty line, prison life provides shelter and sustenance; thus, it is not suffering as compared to their lives outside prisons. It is rather pleasurable.

All the same, with all its conceptual and pragmatic problems, the current trend is in favour punishment's being proportional to the gravity of the crime committed. In Ethiopia, for

example, article 88(2) of the Code requires taking into account the gravity of the crime at hand for the determination the degree of individual guilt which is, in turn, used for the determination of appropriate penalty. Hence, to some extent, the principle of proportionality of punishment has a place in our criminal system. Moreover, since the constitutional prohibition of cruel and unusual punishment is being interpreted as prohibitive of excessive punishment and the FDRE Constitution also prohibits cruel, inhuman and degrading punishment, one can argue that, to the extent possible, punishment ought to be proportional to the severity of the crime for which it is to be imposed. Yet, it must also be noted that such constitutional principle is also interpreted as not to prohibit the use of severer penalty for some criminals such as recidivists in order to make criminal law serve it purposes.

3.2.2 Theories of punishment

When punishment is imposed on a criminal, the aim of the society is not to undo the harm already done. Indeed, that may not be possible. For instance, by sentencing a killer to death the deceased cannot be brought back to life. Hence, the institution of punishment has myriad other goals to serve rather than aiming at the impossible. To know what these goals are, some theories of punishment are discussed briefly hereunder.[344]

Retribution: According to the theory of Retribution, also known as *retaliation* or *vengeance,* punishment is imposed as retaliatory measure on a criminal for the wrong done to the society. Sometimes, such punishment is known as 'just deserts' or 'commensurate deserts' to imply that it is an appropriate goal of criminal justice system to make a criminal pay for a crime in *direct proportion* to the harm done. So, as compared to the other goals of punishment, retribution is backward looking as it concentrates on the past criminal behaviour of an offender than on his future behaviour and that of the remaining members of the society. All the same, more than other types of punishments, retributive punishment can satisfy the anger instinct of the society for the wrong done to it

Deterrence: The theory of deterrence claims that punishment aims at reducing the commission of further crimes. Such punishment can serve two purposes: particular deterrence and general deterrence. The former refers to discouraging a criminal from

[344] For the discussion in relation to the theories of punishments and the controversies surrounding them, see generally Steven Lowenstein, pp. 19-26, Patrick R. Anderson and Donald **J.** Newman, *Introduction to Criminal Justice,* 5" ed, McGraw-Hill, New York and others, 1993, p 288, and Wayne R. La Fave and Austin W. Scott, **pp.** 21-25. See also Dejene Girma Janka, *The Relevance of Hobbesian Principles of Punishment in Today s World m light of the Ethiopian Criminal System.* Jimma University, V.4. No.l, 2012, ISSN 2074-4617, pp. 35-62.

committing further crimes by inflicting punishment on him for the crime already committed while the latter refers to discouraging would-be criminals from committing crimes by punishing criminals as examples. So, unlike retribution, deterrence is forward-looking in that it aims at shaping the future behaviour of criminals and would-be criminals.

Rehabilitation: The theory of rehabilitation, also known as *reformation,* supports the claim that sentence should be designed to provide treatment for conditions in offender's attitude, personality or general personal history that may have led him to the commission of a crime. So, punishment, according to this theory, aims at reforming the criminal or curing him from the problem that might have led him to the commission of a crime. This is also a forward-looking theory of punishment as it aims at rehabilitating criminals so as to enable them to lead normal (crime-free) life after completely serving their sentences.

Incapacitation: Incapacitation, also known as *preventions restrain or disablement,* as one of the theories of punishment, favours the prevention of a criminal from committing further crime by restraining/incapacitating him. This type of penalty aims at denying individuals, either permanently or temporarily, the chance to commit further crimes. Death penalty is the best way of incapacitating a person from committing further crimes becauseit removes him from circulation in a society for good.

Inclusive theory: All the above theories of punishment have got their own pitfalls. For instance, the theory of retribution is backward-looking. Punishment needs to be forward- looking if further harm is to be prevented. Moreover, retribution requires punishment to be directly proportional to the harm caused. After all, it is 'eye for eye, tooth for tooth' principle. Yet, at times, the imposition of such punishment is not possible. For instance, if a person kill ten people, killing him ten times will be directly proportional to the harm caused, which is plainly impossible. Further, the infliction of a harm which is directly proportional to the harm caused by an offender may not be acceptable in the light of the current practice. For instance, if a person destroys his friend's eye, retribution allows the destruction of his eye, too. Nonetheless, such punishment will be contrary to the prevailing constitutional prohibition of cruel, inhumane and degrading punishment.

The theory of deterrence, on its part, allows the use of *excessive* punishment as long as the use of such punishment can serve its purpose. However, such punishment may not be appropriate particularly when it is seen in the light of the principle of proportionality of punishment Moreover, although deterrence claims that punishment aims at reducing crime rate, the rate i le to time. Further, deterrence favours the use of criminals

as means to teach the public not to commit crimes but one may question the fairness of using a criminal as a tool to teach the public instead of picking anyone randomly from the members of the society and use him as a means to give lesson to the members of the society.

The theory of rehabilitation is more *human rights principles* friendly than the other theories of punishment However, it cannot be free from defects. The first blow to this theory comes from criminals who are incorrigible. Some people are incurably bad and the only way to get rid of them is by killing them. Yet, rehabilitation does not allow the use of death penalty; nor can it give any other solution to avoid the danger they pose to the society. Second, the use of rehabilitative punishment may be contrary to the principle of proportionality of punishment This is so because, rehabilitation allows the detention or treatment of the criminal until he gets rid of his problem and such detention may go well beyond what is required by either deterrence or retribution. Moreover, rehabilitative punishment can be severer than the other types of punishments. For instance, if curing the criminal requires the removal of part of his brain, then rehabilitation allows it[345] Third, rehabilitation has the tendency to turn prisons to luxury places becauseverything, according to the theory, should be given to criminals to facilitate their reformation. Eventually, such treatment may lead to the commission of further crimes. Fourth, rehabilitation is individual-oriented. Hence, it does not have a place for would-be criminals.

The theory of incapacitation is also susceptible to criticisms. As stated above, the only effective way of incapacitating a person from committing further crime is by taking his life. Nevertheless, death penalty is not a common practice. As a result, the incapacitation of a person such as by sending him to a jail is only temporary. Even in the case of life imprisonment; first a criminal can get back to the society by obtaining parole; and, second, he can commit an in-prison crime such as against his fellow prisoners or prisoner properties.

Then, the question is since all the theories of punishment have their own inherent defects, which one of them ought to be adopted. It is argued that no single theory of punishment can justify any perfect criminal system. Put differently, neither of the above theories can, standing alone, fully justify the imposition of punishment at all times. As a result, currently, it is held that the *inclusive theory* (also known as *integrated* or *unified theory),* that is using all or most of them together, can be the justification for punishment or *perfect* criminal system. All the same, the question which of them should, in this situation, be given predominance over the other in case they conflict while determining penalty still remains

[345] However, such treatment should ml aaunnl to cruel, inhuman and degrading treatment or punishment.

unanswered. Indeed, the legislature can, while making criminal law, stipulate that punishment should be primarily retributive or deterrent or rehabilitative or disabling, as the case may be.[346] But in the absence of such legislative answer to the question, a judge should give priority to any of them on case by case basis. For instance, if the criminal is a young person, rehabilitation should be given predominance over the other theories of punishment On the other hand, if the criminal is a recidivist, deterrence or incapacitation, based on which is recopized, can be given predominance.

In our criminal system, punishment mainly and primarily aims at *deterring* and/or *rehabilitating* criminals.[347] That means, it aims at reducing the commission of future crimes by giving lesson to a criminal and the society through punishment and also to improve criminals so that they will be able to lead a normal life after serving their sentences. So, the Criminal Code justifies punishment based on, at least as expressly provided under article 1, two theories-deterrence and rehabilitation. The issue of predominance is, however, left to judges to decide on case by case basis. Hence, judges can subject persons who are vulnerable to reform to rehabilitative punishment whereas they can impose deterrent punishment on those who are less vulnerable to reform.

3.3 Determination of appropriate punishments

Courts engage in a bifurcated process; that is, the trial or guilt determination process and the sentencing process. Of the two processes, "determinations regarding sentencing convicted offenders are perhaps the most difficult tasks judges face. They make other important decisions but most of them are pretty well constrained by law. In area of sentencing, however, judges may exercise considerable discretion based on their own philosophy of sentencing and personal attitudes towards the offenders or the offences."[348] For instance, in the US, judges say: "We'll take the greatest pain not to get the wrong person and to that end will extend many rights, but once we've got you, we don't really care how we dispose of you."[349] Nevertheless, there are still a few factors that judges must take into account in the course of exercising their discretion in order not to misuse the discretion. For instance, the penalties provided in the Criminal Code should always be applied in accordance with the *spirit* the Criminal Code so as to achieve its purpose. That is to say, punishment should aim

[346] Patrick R. Anderson and Donald J. Newman, pp 2X8-289.

[347] Article 1, Criminal Code, and the Preamble ol the Code.

[348] Patrick R. Anderson and Donald J. Newman, p. 286.
Frederic A. Htissey and David E. Duffee, *Probation, Parole. and Community Field Semre: Policy. Structure, and Process,* Harper and Row Publishers. **New** York, 1980, p. 102.

at reducing future crime rate and/or reforming criminals in particular and protecting the society in general. Moreover, the penalties to be imposed should always be in conformity with human dignity. Accordingly, judges cannot impose sentences which would amount to inhuman and degrading treatment/punishment[350]

For the purpose of calculation or determination of a specific penalty for a given crime, the Code stipulates that the penalty should be determined in conformity with the General Part provisions and the Special Part provisions. For instance, in the general part, the Code stipulates that simple imprisonment extends from ten days to three years. Hence, if the Special Part provisions simply prescribe the imposition of simple imprisonment without providing for the range of possible sentences to impose, the General Part stipulation on simple imprisonment should be used to determine the range of the penalties. For the purpose of maintaining the appropriateness of penalties, on the other hand, article 88(2) of the Criminal Code stipulates the use of the *degree of individual guilt®,* a controlling criterion. So, depending on the degree of individual guilt, therefore, courts can impose penalty from the lightest to the severest one: the greater the degree of individual gudt, the severer the punishment should be. The degree of individual guilt will be determined by taking the following factors into account

1. *The dangerous disposition of the criminal:* If the criminal is dangerous, his degree of guilt will be great and, hence, he deserves severe punishment For example, under the Criminal Code, four types of moral elements are recognized: direct intention, indirect intention, advertent negligence, and inadvertent negligence in order of decreasing seriousness. As a result without prejudice to the other factors to be taken into account the penalties for crimes with these types of moral elements should differ accordingly: *greater* for direct intention, *great* for indirect intention, *less* for advertent negligence, and *lesser [w* inadvertent negligence since their authors' dangerous dispositions to the society vary accordingly.
2. *The Antecedent of the criminal:^?,* history of a criminal is another relevant factor to be taken into account for the determination of his penalty. That is to mean, whether the criminal was convicted previously or not should be checked before determining his

[350] See article 18(1), FDRE Constitution. At this juncture, one may wonder whether imposing retributive punishment is possible or is in line with human dignity. Indeed, the Code does not expressly recognize retribution as one of the justifications of penalty but the interpretation of some of its provisions can justify arguments in favour of its existence. For instance, the recopition of death penalty can be taken as the recognition of retribution although the same penalty can be justified based on other theories such as deterrence. Actually, issues around death penalty by itself can arise becauseat times this penalty is considered to be contrary to human dignity although one can argue that the recognition of death penally is a kind of exception to the rule that penalties should be humane in nature.

penalty. If he was convicted previously, the penalty to be imposed needs to be increased so that the objectives of criminal law can be achieved. Normally, without prejudice to the other factors, a person who commits a crime for the first time deserves lesser penalty than a recidivist since his degree of criminal guilt is lesser. For example, in one Ethiopian Case,[351] the lower court rendered severe sentence without having due regan. to the antecedent of the criminal. Then, the criminal appealed against the sentence and the appellate court reduced the sentence on the ground that the criminal had not committed crime before. So, this shows the importance of inquiring the antecedent of a criminal for the determination of appropriate punishment

3. *Motive and purpose.*The motive behind and the purpose for which a crime is committed should be considered. If the motive behind and the purpose for which a crime is committed is bad, the criminal should be punished severely. For example, if a crime is committed to obtain gain or for the purpose of revenge, the penalty must be high. If, on the other hand, the commission of a crime lacks such reprehensible motive or purpose, the penalty should be lesser. Thus a person who is provoked and commits a crime should be treated leniently than a person who commits a crime for gain or revenge becausethe degree of individual guilt is lesser in the former than in the latter case.
4. *The personal circumstances ofthe criminal:* At times, their personal circumstances may lead individuals to commit crimes. For instance, if a person is destitute and steals food from a store just to consume it, his penalty should be lesser since the degree of his criminal guilt is less than that of a person committing the same crime without being in thg same boat Likewise, if a person having the problem of sexual obsession commits rape, he deserves a reduced penalty than a person committing the same crime without being in the same situation. So, regard should be had to the personal situation of a criminal. For instance, in *R v Dudley and Stephens* (1881) case,[352] Dudley and Stephens were made to serve six months imprisonment for killing and feeding on the flesh of a boy that was on the high seas with them. It was noted that these individuals stayed for eight days without food and six days without water. As a result they were stricken by extreme huger and probably they might have died if they had not fed on the boy's flesh. The bottom-line is the situations in which people find themselves play important role for the determination of the exact sentence to be imposed to hit the target(s) of criminal law. v

[351] Steven Lowenstein. *Captam Kassaye Lemmars. the Public Prosecutor,* Criminal Appeal No ..ISO/53,1961, P 322.

[352] See Smith and Hogan. pp. 335-338.

5. ***Level of Education:*** The degree of individual guilt of an educated person and an uneducated person may not be the same. Hence, providing for the same punishment for the two categories of persons for the same crime may be contrary to criminal justice. Normally, the two categories of people need to be treated differently: an educated person deserves, without prejudice to the other factors, a severer penalty than an uneducated person. Because, *citrus paribus,* the degree of individual guilt of the former is greater than that of the latter and this dictates severe treatment for the former than for the latter. Even with respect to educated persons, the level of his education should be taken into account It does not mean that first degree holders and professors will be treated alike. The severity of penalty should normally increase as the level of education increases. But it is claimed that the practice in some of our courts, in particular, lower courts, shows that educated persons are treated more leniently than uneducated persons. The reason is self-evident: educated persons are respected and also feared. As a result judge of these courts will not impose severe penalties on them. But this is plainly contrary to the right of equality before law.[353] In principle, educated persons should be punished more severely than illiterates becausethey are more blameworthy.
6. *The Gravity of (he Crime. Vms,* is an obvious factor to consider to determine the penalty of a criminal. For instance, the mere fact that the crimes committed are crimes of homicide does not mean that all authors of such crimes deserve mathematically the same penalties. Becausethe gravity of the crimes of homicide may be different: like intentional homicide is graver than homicide by negligence, homicide committed with direct intention is graver than homicide committed with indirect intention, homicide committed by advertent negligence is graver than homicide committed through inadvertent negligence. Thus, the punishments to be imposed for them should vary since they are of different seriousness: the graver the crime, the severer the penalty must be.
7. *The circumstances of committing the crime:* Eventually, the Criminal Code provides for the consideration of the circumstance of the commission of a crime to determine penalty. Sometimes, the way crimes are committed may justify differential treatment of criminals despite the fact that all the other factors are the same. For example, both article 539(1) and article 540 deal with intentional homicides. The homicides may be committed with direct intention. AO the same, the circumstance under which homicide defined under article 539(1) is committed reveals that the criminal is exceptionally cruel, abominable, or dangerous. Hence, the penalty to be imposed on such person should be greater than the one to be imposed on a person who has committed homicide

[353] Article 25, FDRE Constitution and article 4, Criminal Code.

with direct intention under article 540. Moreover, if the same crimes are committed but one at night and the other during the day or one during peace and the other at the time of war, the sentences to be awarded need to be different becausethe circumstances of the commission of the crimes are not the same.

Interestingly, the factors provided under article 88(2) to be taken into account while determining criminal punishments are not the only ones. The Criminal Code provides for additional factors to be taken into account depending on the nature of the penalties to be imposed. These additional factors will be considered later on in relation to the penalties they pertain to. However, judges should be mindful of the above factors while determining punishments for failure to do so will undoubtedly affect the purpose and object of the criminal law. Similarly, a judge has to expressly state the factors that trigger fixing a specific penalty. For example, if a judge imposes fine which is less than one hundred birr, he can state that the determination of the fine is made becausethe criminal is a child, unhealthy, and a very poor person, and this lenient penalty is believed to be capable of achieving the purpose of the law. But in practice, some judges do not give reasons why they fix certain penalties For instance, in one case,[354] the judge sentenced the criminal who was convicted fo committing a crime that would entail rigorous imprisonment of five to twenty-five years to *nine* years rigorous imprisonment In his decision, nothing was said as to why the number *nine* was selected from all the other possible numbers. But he should have given his reasons however bad they might be. Of course, there are still judges who do not even mention, in their decisions, the provisions in fight of which they are determining punishment[355] This is the worst of all. The legal provisions in the light of which penalties are determined should te mentioned and analyzed in a judgement and the penalties they provide should be applied in accordance of article 88 and the other relevant provisions.

3.4 Types of punishments

The punishments that can be imposed for the purpose of achieving the objectives of criminal law may take different forms. For example, in the past in England, death (by hanginS beheading, burning, etc.), drawn [dragging along the ground by the tail of a horse], croppy [clipping of ears], blinding, amputations of the hand, branding [burning with heated iron to make scar on the body of the criminal], whipping, pillory, fine, and imprisonment were

Set, lor example, *Abdella Baker Umar Vs. Public Prosecutor.* West Wollega High Court, No 03267,1997 E.C. [315] See, lor example, *Mo Degefa and Others Vx Public Prosecutor,* Arsi Zone High Court, Criminal Case No. oI'561/125/95.

imposed.[356] In Ethiopia, too, some of these penalties were used to punish criminals. For instance, mutilating the body organs of habitual offenders, flogging, confiscation of property (to totally impoverish some criminals) and exile were among the penalties recognized and applied in our past criminal system.[357] Currently, however, most of them are not in use becausethey are contrary to fundamental human rights and dignity. The following part will consider the types of penalties that are currently in use.

The Criminal Code generally classifies the different penalties it has recognized into two: principal and secondary punishments. Principal punishments, which will be considered right below, include pecuniary penalties, compulsory labour, penalties entailing loss of liberty, and death penalty whereas secondary punishments include caution, reprimand, admonishment, apology and deprivation of rights.

3.4.1 Principal punishments

3.4.1.1 Pecuniary penalties

Pecuniary punishments are criminal measures taken by a government against criminals so as to affect their property right leaving their liberty, person, or life intact So, there are instances where the imposition of such penalties is proper to serve the purposes of criminal law. Under such circumstances, they should be imposed. These penalties may take any of the following forms.

A. Fine: Fine is, perhaps, the most important pecuniary penalty that the commission of a crime entails. It refers to the pecuniary liability owed by a criminal to a state due to the damage he causes or the danger he creates to a society through his criminal conducL It is imposed becausethe society wants to be sure that the criminal gets a lesson from paying fme for his wrong-doing.

Fine as one of the criminal punishments is recognized and regulated under the Criminal Code.[358] Hence, our courts are free to fix the fine they deem necessary to achieve the purpose of criminal law. But for the determination the exact amount of fine, courts should take into account the criminal's degree of guilt, financial condition, means, family responsibility, occupation and earning therefrom, age, health conditions and the gravity of the crime committed.[359] That is to say, first, the court has to check whether the criminal is

[356] Thomas J. Gardner and Terry M. Anderson, p.165.

[357] See Aberra Jembere, p. 198.

[358] Articles 90, Criminal Code.

[359] Article 90(2), Criminal Code.

dangerous or not (For example, whether he has committed the crime intentionally or by negligence). If he is found dangerous, without prejudice to the other factors to be considered, the fine to be imposed on him should be higher. Otherwise, the criminal will not be deterred and/or reformed. Second, if the criminal is financially potent, he deserves higher fine so that the fine will be deterrent and/or reformative. To take a little from what the criminal has may not mean anything to him. Hence, a judge should order the taking of what the criminal has, within the limit permitted by law, until it means something to him. He has to be forced to feel the effect of the fine or the fine has to be fair enough to make him feel guilty for his wrong act for it is only then that the fine can produce the desired result Third, the court should consider the means or the source of income of the criminal. If, for example, the criminal has reliable and lucrative source of income like working for the United Nations, the fine to be imposed needs to be higher. If, on the other hand, he has non-promising and non-lucrative source of income, the fine to be imposed needs to be relatively lower since this amount may be sufficient to deter and/or reform him. Fourth, whether or not the criminal has dependents should be taken into account If the criminal has more dependents, subject to the other factors, his fine should be low. A judge is not supposed to impose fine which is exorbitant if the criminal has dependents since the purpose of punishment is not retributive. If he does so, he will be doing injustice to the dependents of the criminal. Therefore, an inquiry whether or not the criminal has dependents, and the burden of such dependence, should be made before fixing fine. On the contrary, if he has no/less dependents, the fine should be relatively greater. Fifth, the type of his occupation and the amount he derives therefrom should be considered. For example, subject to the other factors, a poor farmer should not be fined equally with a well-known business tycoon although they have committed the same crime becausethe amounts they derive from their occupations are substantially different Put differently, since these individuals' economic positions are not the same, the fine should be > determined having regard to their abilities so that it will be severe enough to deter or reform. Sixth, the age of the criminal should also be taken into account to fix the amount of fine. If the criminal is under 18, lesser fine can serve the purpose of criminal law becausehis age renders him easily susceptible to change. For example, in one Ethiopian Case,[360] the appellate court reduced the Sentence imposed by the lower court by taking, among others, the age of the criminal who was a minor into account This shows that there is in principle a need to impose a lesser fine on a minor than on an adult. Similarly, if the criminal is old, his fine should in principle be lesser becausethis person can have no/little capacity to work and earn income. Seventh, the health condition of the criminal should be considered. A person

[360] Steven Lowenstein, *Captain Kassavet&nmh vs. the Public Prosecutor,* Criminal Appeal No.350/53,1961, p. 322.

who has health problem and commits a crime due to, in one way or another, this problem is morally less reprehensible. As a result, the extent of his fine should be lesser than that of a healthy person. Eventually, the gravity of the crime committed should be taken into account to fix the amount of fine. Normally, the graver the crime, the higher the fine should be.

If the criminal is a juridical person some of the above factors may not be taken into account becauseof its nature. For example, issues like family responsibility and age will not arise. On the contrary, there are factors like the gravity of the crime committed, the financial position of a juridical person and the type of work it is engaged in which are equally important to a juridical person as well.

The extent of fine to be imposed by taking the above-mentioned factors into account extends, in principle, from 10 birr to 10,000 birr for a natural person and from 100 birr to 500,000 birr for a juridical person.[361] In relation to natural persons, sometimes, the fine may extend beyond the 10,000 birr limit. For example, if the commission of a crime is motivated by gain or the criminal makes business of a crime in a way that acquires or tries to acquire a gain whenever a favourable condition presents itself, he may be subjected to fine which may extend up to 100,000 birr.[362] Stated differently, if the crime at hand is committed to obtain gain or if the criminal considers the commission of a crime as a source of income, the fine he Wll be exposed to may extend up to 100,000 birr. Similarly, the Criminal Code has provided -for fine in excess of the 10,000 birr for individuals committing crimes in relation to insurance, computer programmes, corruption, and forgery.[363]

Interestingly, article 92 envisions the possibility of imposing fine in excess of 100,000 on natural persons. Such fine may be stipulated either in the Code itself or in any other legislation having penal nature. For instance, article 373 of the Code authorizes the imposition of fine to the extent of 250,000 birr in relation the crime of forgery. At this juncture, it is necessary to note that there is a disparity between the English and the Amharic Versions becauseaccording to the latter version the fine under article 373 can extend up to 550,000 birr. At any rate, the 100,000 birr fine provided under article 90 is not an absolute maximum fine that can be imposed on natural persons. There is a possibility of going beyond this limit

[341] Article 90(1), Criminal Code.
[342] Article 92(1), Criminal Code.
[343] For example, see articles 707(2), 407-411,387(1)(2), Criminal Code.

At any rate, the court should, having regard to all the relevant factors, impose the line that can really make the criminal feel guilty or regret for what he has done to the society. But if a crime is committed by a juridical person and it entails only fine, then that fine should be made five fold.[364] That is to say, the juridical person will pay five times what a natural person will. For example, if the crime committed entails 100,000 birr fine as a sole penalty and the crime is committed by a legal person, the fine the legal person will pay is 500,000 birr.

If the special part provisions of the Criminal Code provide only for fine, the court has to impose the fine. However, if the Code provides for both fine and imprisonment as *alternative* penalties, the court may impose *both* of them if it thinks fit.[365] Moreover, fine may be imposed in addition to imprisonment even if the special part provisions provide only for imprisonment provided, however, that the imposition of fine is necessary.[366]

Advantages of Fine: If the law the convicted person violated provides for fine and imprisonment as alternative punishments and the imposition of fine can serve the purpose of criminal law, it is advisable to impose fine than the imprisonment. Becausethe imposition of fine does have many incidental benefits, in addition to serving the purpose of criminal law, which imprisonment does not have. The benefits include:

- First, fine, as the study of the law of public finance reveals, is one of the sources of public revenue. So, a judge should not deny the government the chance to derive income, whenever favourable conditions present themselves, by resorting to jail.
- Second, the imposition of fine can ease some of our administrative problems. For example, many prisoners are being kept in a single cell (class). As we know, many (if not necessarily most) of the prisons in Ethiopia are over-crowded. This means, putting more prisoners in a jail while they can be fined would only worsen the situation whereas fine has the capacity to ease this problem.
- Third, the government will be able to divert some of its budgets for the execution of imprisonments to other developmental activities. At first glance, the cost the government incurs by putting criminals in a jail may seem trivial. But the close investigation of this cost may reveal that it is high because, among others, prison houses must be constructed, prisoners have to be fed and provided with medications, and the prison authorities should be paid-all these costs are covered from government treasury.

[364] Article 90 (4), criminal Code.
[365] Article 91. Criminal Code.
[366] Article 92(2), Criminal Code.

- Fourth, given the objective realities in Ethiopia, adding prisoners on prisoners when they can be fined would create conducive environment for inhuman treatment of the prisoners. For example, due to their great number, some of them may not get (sufficient) food, they may be required to sleep turn by turn, and they may be forced to use the same room as a toilet These treatments go contrary to the country's international commitment not to subject individuals to cruel, inhuman or degrading treatment or punishment[367] So, to put a convicted person in a jail when he can be lined is no less than determining to inhumanly treat him which will be against the tenet of criminal law pertaining to execution of punishments as well. The Criminal Code orders the execution of any punishment to be in line with human dignity.[368] Resorting to fine, when possible, can, therefore, reduce this danger.
- Fifth, the criminal will maintain his liberty and continue to be productive. If a convicted person is imprisoned, he may not be able to do what he can. However, if he is let go free after being fined sufficiently so as to achieve the purpose of criminal law, he will do what he can and his productivity is a contribution to the country's development. Accordingly, a judge has to consider this incidental advantage of imposing fine.

Therefore, since the imposition of fine is tantamount to killing many birds with a stone, judges are strongly advised to resort to it whenever fine is provided as an alternative punishment provided, of course, that its imposition can serve the purpose of criminal law. This is so becauselocking up a criminal in a prison, for whatever period, does not make sense if there is something useful to be done in the interest of the public and that of the criminal as well. If the criminal is dangerous or violent or recidivist, then putting him behind bars may be the best solution. If that is, however, not the case, the measure would only be draconian. Indeed, it is argued that imprisonment should normally be ordered only if the physical separation of the criminal is necessary for the protection of the society.[369]

It has to be remembered that there are situations where the law has expressly provided for the possibility of imposing fine in lieu of simple imprisonment These situations are envisaged under article 89 of the Code. As per this article, courts are mandated to impose one of the penalties provided for Petty Offences if the crimes committed are minor; that is, crimes which do not entail simple imprisonment in excess of three months. This means, since fine is

[367] See the Convention Against Ldlre and Other Cruel, Inhuman or Degrading Treatments or Punishment, UN General Assembly resolution 39/46 oMAWcember 1984.

[368] Article 87, Criminal Code'*

[369] Stephen A. Saltsburg, JphjL Diamond, kit kinports, Thomas H. Morawetz, p. 138.

one of the main penalties stipulated for petty offences, courts can impose fine as a substitute for simple imprisonment provided for ordinary minor crimes.

Execution of Fine: Once imposed, fine will be paid to the state forthwith because, since a crime is a wrong against the society, fine is like compensation to the society. If the criminal cannot pay it forthwith he may be given a grace period of up to six months.[370] In principle, the debtor is supposed to pay the fine at once. Nonetheless, the court may make him pay the fine by installments if it is expedient to do so. If the court permits the payment of fine to be effected by installments, it should take the actual means of the criminal into account to determine the amount and of the date for the payment of each installment However, the whole payment should be effected within three years. Similarly, the installments should not be lesser so as to mitigate the effect fine is supposed to have on the criminal. It has to be severe enough, within the capacity of the criminal, so that the purpose of criminal law can be served. Hence, a judge cannot and should not unnecessarily divide fme into multiple installments for to do so will defeat the purpose for which fine is imposed.

If fine is not paid, the court may require the criminal to produce sufficient security, which will be determined having regard to the circumstance of the case such as the condition of the criminal and the interest of justice, to ensure its payment within the period ordered. If the payment of fine is not effected within the period provided, the court may order the security, if any, given by the criminal to warrant the payment of fine to be disposed of or the fme may be converted to compulsory labour, as the case may be.[371]

B. Other Pecuniary Punishments: Although fine may be the most important of all the pecuniary penalties, there are other pecuniary penalties recognized by the Criminal Code. These penalties include confiscation and sequestration. — .

Forfeiture (Confiscation): The concept 'forfeiture' as punishment refers to seizing the property that is used to commit a crime and the profit that is derived from such crime. This has deterrent effect as it takes away the means of committing a crime from the criminal and the benefit for which a crime is committed. Similarly, it benefits the government since the means and the profits forfeited can be used or sold.[372] For example, by seizing contraband

[370] Article93 (2), Criminal Code.

[371] Articles 94,95 and 96, Criminal Code.

[372] Thomas J. Gardner and Terry M. Anderson, p. 177.

goods, governments get money by selling the goods. Similarly, if means like cars and ships are involved, the confiscation and sale of them will bring significant income to a government. Forfeiture in its widest sense includes confiscation. But in our criminal system, forfeiture is made not to include confiscation and, as such, the two are separately recognized under different provisions (article 98 and article 100). In relation to confiscation, the Code stipulates that, first of all, any property that the criminal has acquired, directly or indirectly, from the commission of a crime for which he is convicted should be confiscated (Article 98(2)). No one is allowed to enjoy the fruits, direct or indirect, of his criminal act The confiscation of such property should be ordered in addition to any penalty to be imposed. Besides, the court may order the confiscation of the whole or part of the other properties of the criminal if such confiscation is *expressly provided.* This refers to the confiscation of the property the criminal has acquired lawfully. For example, if a person is using his car as a means to commit crimes like transporting prohibited items, the car may be confiscated. The confiscation is, nonetheless, conditional becauseit is possible only when certain conditions, which are listed under article 98(3), are met For example, domestic articles normally in use, instruments of trade or profession, and agricultural implements, necessary for the livelihood of the criminal and his family cannot be confiscated.[373] In the past, while such penalty could be imposed, no such conditions were attached.[374] Accordingly, criminals could be deprived of all their belongings if the crimes they committed would entail such penalty. So, the penalty had the effect of impoverishing criminals so that they would start owning property from zero. In relation to forfeiture, the Code, under article 100, provides that all benefits, material or financial, given or to be given to the criminal should go to the state. If the material benefits derived from the commission of a crime do not exist in kind, the receivers will be made to refund the values thereof. But if the victim from whom the benefits are derived is known, the benefits returned will not go to the state but to him. Therefore, ultimately, forfeiture, as one of the pecuniary measures to be taken against criminals, has a victim rehabilitation impact when that is possible.

Sequestration of Property: Sequestration, on the other hand, refers to the act of taking control of the property of a criminal. Under the Criminal Code, this type penalty is recognized but only for serious crimes.[375] Becausethe Code stipulates that the property of a criminal who is convicted and sentenced in his absence for conspiring or engaging in hostile

[373] For the rest of the conditions attached to confiscation, read article 98.

[374] This is one of the oldest penalties in our criminal system that the Criminal Code has retained. See AberraJambere, p. 199.

[375] Article 99, Criminal Code.

acts against the constitutional order or the internal or external security of the state may be sequestrated in addition to any other penalty. The sequestration should be effected in accordance with the conditions provided for confiscation (Article 98).

3.4.1.2 Compulsory labour

Compulsory Labour is another form of principal punishment recognized under the Criminal Code. This type of penalty has more to do with imprisonment since it somehow involves restriction of the liberty of a criminal. But unlike imprisonment, it is not a common form of penalty as it is imposed only under certain circumstances. First, compulsory labour can be imposed as a substitute for fine. Becausethe Criminal Code has given courts the mandate to convert fine to compulsory labour in case the criminal is unwilling or unable to pay fine.[376] The duration for which the compulsory labour is to last will be determined having regard to the amount of fine. All the same, it cannot exceed two years. Second, compulsory labour can be imposed as a substitute for simple imprisonment since courts have discretionary power to impose compulsory labour, even without restricting the liberty of the convict, in lieu of simple imprisonment for minor crimes which do not entail imprisonment in excess of six months provided that the criminal is healthy and is not dangerous to the society.[377] The execution of such compulsory labour will take place at the place where the criminal normally works or is employed or in a public establishment or public works.

Unlike compulsory labour that is imposed in lieu fme, compulsory labour that is imposed as a substitute for simple imprisonment should not exceed six months. It normally extends from one month to six months. The work of the criminal is also not gratuitous. It is only a maximum of one third of his total salary that will be taken by the state from what he earns from his labour. This means, he is entitled to at least two-third of the fruits of his work.

If circumstances so justify, any court can impose compulsory labour with restriction of the criminal's personal liberty. For example, if a court believes that the criminal is somehow dangerous to the society, it can impose compulsory labour with the restriction of his liberty. The restriction may be effected by making the criminal remain at a particular work place, or with a particular employer, or in a particular establishment, or without leaving his residential area or a restricted area under the supervision of government officials. If the criminal fails to

[376] Articles 95 and 96, Criminal Code.

[377] Article 103(1), Criminal Code.

comply with the conditions to be fixed in his sentence, the court should make the criminal serve the remaining part of his sentence of compulsory labour in a prison.[378]

The other important situation where simple imprisonment can be converted to compulsory labour is envisaged under article 107 of the Criminal Code. That is, where there are administrative difficulties to execute the sentence of simple imprisonment or the execution of this sentence in a prison is not conducive to reform the criminal, compulsory labour can be imposed in lieu of simple imprisonment But the conversion of imprisonment to compulsory labour in accordance with this provision is possible only if the crime committed does not entail simple imprisonment in excess of six months. So, if the crime committed does not entail simple imprisonment exceeding six months, courts can impose compulsory labour notwithstanding that the provision violated does not provide for compulsory labour. As far as the extent of compulsory labour under article 107 is concerned, cross-reference is made to articles 103 and 104, which means it can extend from one month to six months.

Finally, compulsory labour can be imposed in the form of a mitigated punishment BecauseArticle 179(0 provides that sometimes, sentence of simple imprisonment may be mitigated to compulsory labour if there are grounds entitling the criminal to such extenuation.

Advantages of the sentence of compulsory labour: Penalty should aim at devoting the criminal's talents and professions to the good of the society.[379] In other words, penalty should enable the society to use the criminal's talents and profession. A judge should be mandated to require the criminal to use his abilities and knowledge in public service until it is deemed that the society is adequately reinstated for the wrong done onto it. Therefore, in criminal justice system, the move towards other measures like imprisonment should not be automatic; rather, it has to be slow if it is to make sense. If compulsory labour is not imposed, when it can be imposed without prejudice to the purpose of criminal law, the society will undergo at least double loss. One, it will unreasonably face all the problems related to the execution of the criminal's confinement **(imprisonment)** such as his cost **of** confinement medication and prison congestion. **Two,** failure to subject **a** criminal to compulsory labour when it can be effected amounts to unwisely wasting human resource. **That** is, **the** society will lose the benefit that can **be** obtained by putting **the** criminal at the disposal **of** the community or by making him **render** community service. As a result, the

[378] Article 104(3), Criminal Co*.

[379] Stephen A. Saltshurg, John L Diamond, kit kinports, Thomas H. Morawetz, p. 138.

sentence of compulsory labour should be given priority if it is authorized and it is deemed that its imposition can serve the purpose of criminal law.[380]

Suspension of sentence of compulsory labour: The imposition and execution of the sentence of compulsory labour presuppose that the criminal can serve it. For example, under article 103, the sentence of compulsory labour can only be imposed if the criminal is healthy. Thus, it cannot be imposed if the criminal is not healthy. But, at times, the execution of this penalty may be suspended even if the criminal was healthy at the time of its imposition. The grounds for suspension are provided under articles 97 and 105. Accordingly, the execution of the sentence of compulsory labour will be suspended where the criminal is unable to carry it out due to his poverty, family responsibility, state of health (if he falls sick) and for any other good cause. If the suspension is due to the illness of the criminal, the execution will resume upon his recovery. If he cannot, even after his recovery, carry out the work, he will be given another suitable work. If the criminal cannot serve sentence of compulsory labour at all, the court should not subject him to another penalty whatsoever. He should be release from his punishment.[381]

3.4.1.3 Penalty entailing loss of liberty

Penalty entailing loss of liberty refers primarily to imprisonment Imprisonment, on the other hand, refers to measures taken to subject criminals to the substantial and involuntary deprivation of their liberty. Hence, it is a measure that affects the personal liberty of a criminal. This penalty is regulated in the Criminal Code under articles 106 and 108. The Criminal Code classifies imprisonments into *simple* and *rigorous* imprisonments.

A. Simple imprisonment: Simple imprisonment is a sentence to be imposed for the commission of crimes which are of *not very serious nature* and *committed by a person who is not a serious danger to the society*™ This means, if the crime is almost non-serious and the criminal is also not dangerous to the society, the imprisonment to impose should be simple imprisonment Normally, simple imprisonment extends from 10 days to 3 years. However, the court may extend it to five years if the crime is somewhat *grave* or *concurrent crimes entailing simple imprisonment are committed or the criminal is punished repeatedly,*

[380] One may question the deterrent or reformative effect of this penalty. But. I believe that making a person, for example, a street cleaner or a guard, in particular if he is ready for that position, will at least be equally deterrent or reformative with the other penalties appropriate under the circumstance.

[381] Article 105, Criminal Code.

[382] Article 106(1 (.CriminalCode.

or the *special part so provides?*® So, the 3 years maximum is a rule since there is a possibility of extending it to five years. Anyway, the court should fix the period of simple imprisonment by taking the factors stipulated under article 88(2) into account As far as its execution is concerned, sentence of simple imprisonment should be served in a jail. But, as it was expressed previously, there is a possibility of converting it to compulsory labour or fine, if circumstances so justify.

B. Rigorous imprisonment: Rigorous imprisonment is a more serious penalty than simple imprisonment. As such, it is a sentence that is imposed when crimes of *a very grave nature* are committed *by criminals who are particularly dangerous to the society.* Such imprisonment ordinarily, extends from one year to 25 years but where it is expressly provided it may be for life.[384]Unlike simple imprisonment the Criminal Code has not at least expressly provided for the conversion of rigorous imprisonment to either fine or compulsory labour. The reason seems self-evident: the crime for which it is imposed is very serious and the author thereof is also very dangerous. Accordingly, putting him behind bars is perhaps the most effective way to achieve the purpose of criminal law. If this criminal is made to maintain his liberty, he will be a threat to the society. Nonetheless, it is still possible to make him work while serving his sentence.[385] Hence, rigorous imprisonment does not bar any order of hard (compulsory) labour.

The duration of rigorous imprisonment should be determined in accordance with article 88(2). Once it is determined, rigorous imprisonment is executed in a place where the criminal can be strictly confined for the special protection of the society. Likewise, the mode of the execution of this imprisonment has to be severer than that of simple imprisonment so that the punishment can be deterrent and/or educative. However, under no circumstance can the mode of execution of this penalty amount to torture and other cruel, inhuman or degrading treatment or punishment This is so because, in addition to its Constitution, Ethiopia is under an international obligation not to treat any of its citizens in such manner.[386]

3.4.1.4 Death penalty

Death penalty, which is also referred to as capital punishment, mav sometimes be imposed if the crime committed is exceptionally senous. It is claimed thai the imposition of such penalty

» **Article 106(1),** Criminal Code

Article 107. Criminal Code *

Article 1 1 1 , Criminal Code

[3,6] See **the Convention Against Tortive aid Otfw Cruel, Inhuman or Degrading Treatments or Punishment, UN General Assembly resolution 39/46 of 10 December I9K4**

is a scintillating example of state's power to do whatever it likes to its citizens. It is the most serious criminal punishment and it is the last thing a state can do to individuals. On the other hand, death penalty is the most controversial and divisive topic in the study of criminal law becauseit raises issues related to respect for human life, the possibility of imposing and executing it arbitrarily and mistakenly as it is irreversible.[387] That is why while some countries have maintained it others have abolished it

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Death penalty, as the most draconian of all the criminal punishments, is imposed only as a last resort and it is recognized for *very serious crimes and'A* is imposed on *extraordinarily dangerous criminals.* In Ethiopia, the recognition of death penalty has a constitutional basis. Under article 15, the FDRE Constitution provides that nobody may be deprived of his life *except as a punishmentim* a serious criminal offence determined by law. So, the Constitution allows taking persons lives in the form of punishment and by so doing permits the imposition of death penalty. The Criminal Code also recognizes and regulates this penalty under article 117. The Code stipulates that it should be passed only for grave and completed crimes and on exceptionally dangerous criminal and who has attained the age of eighteen and in the absence of any mitigating grounds. This means, in the absence of any of these five elements; that is, *if the crime is not grave,* or *if the crime is not completed,* or *ifthe criminal is not exceptionally dangerous,* or *the criminal has not attained the age of 18,* or *if there are mitigating grounds,* death penalty cannot be imposed. These stringent requirements show the need to limit the application of death penalty to exceptional cases. That is why it is not a common practice in Ethiopia; we don't normally hear about the imposition of death penalty.

Yet, examples of the improper imposition of death penalty could be mentioned. For instance, in one case, the Federal High Court, 3rd Criminal Division, sentenced Ato Demisew Zerihun to death and his co-offender to 20 years imprisonment on 30 January 2008. The individuals were charged for attempting to kill Kamilat Mehadin (who was the girlfriend of the former) in violation of articles 32(2)(a), 27(1) and 539(1) and causing grave bodily injury to her sisters in violation of articles 32(2)(a) and 555(a) of the 2004 Criminal Code by using sulphuric acid on 28 December 2007 at around 10:00 pm.[388] Of particular importance at this juncture is the imposition of the death penalty. The Code clearly stipulates that death penalty can be imposed only for completed crimes. However, the Federal High Court sentenced Demisew to death for attempting to kill Kamilat and for causing grave bodily injury

[387] Stephen A. Saltsburg, John L Diamond, kit kinports, Thomas H. Morawetz, p. 139.

[388] *Public Prosecutor v Demisew Ieribun and Yacob Hailemariam,* Federal High Court, File No. 54027, January 10,2008, Addis Ababa. See also at http://www.elhioiMafir\| com news I html accessed on 12 February 2008

telling the public that it was executed. Stated differently, what is more chilling is what we see than what we hear. So, since deterrence by its very nature appeals to the fear instinct of individuals, punishments should be enforced in such a manner that their executions initiate the fear instinct of the public. Accordingly, the prohibition of the Criminal Code in relation to the public execution of death penalty does not seem tenable in the light the principle of deterrence it has recognized under article 1.

Likewise, there is no possibility of violating the other personal rights of the criminal by killing him publicly. For that matter, for a person who is sentenced to death, the loss of all his civil rights is concomitant to the penalty (Article 124(2)). Further, if one wants to argue that public execution of death penalty is contrary to human dignity (and hence article 87), the counter argument would be what is contrary to human dignity is not the public execution of death penalty but the imposition of the penalty itself. Hence, when its imposition is not challenged as contrary to human dignity, its public execution cannot be justifiably challenged as contrary to human dignity. Furthermore, it is possible to argue that the public execution of death penalty is contrary to the public's conscience and that is why its hidden execution is preferable. However, the main purpose of deterrent punishment is to produce such impact in order to make sure that what the criminal did to deserve death penalty will not be repeated. Therefore, it is hardly possible to justify the prohibition of the public execution of death penalty from this perspective, too.

Interestingly, according to article 119 of the Code, death penalty cannot be executed on a person who is fully or partially irresponsible or on a person who is seriously sick or on a pregnant woman as long as they continue to be in that state. It has to be noted that the *irresponsibility* referred to here must be the one that existed before or after, but not at the time of, the commission of the crime for which death penalty is imposed. Otherwise, a fully irresponsible person at the time of committing the crime will not be punished let alone being sentenced to death. Similarly, a person who is partially irresponsible at the time of committing a crime will be entitled to a freely mitigated penalty as per article 49(1) of the Criminal Code. As far as the sickness is concerned, the time of its existence is immaterial unless it pertains to mental illness in which case it may raise the issue of hill or partial irresponsibility. The same holds water in relation to pregnancy. It may happen after or before the commission of the crime but the occurrence of pregnancy while committing a crime is barely possible.[390]

[3.0] Actually, the chance **is** not zero since a woman may first rape, as part of her plan to kill, and then atrociously kill a man as envisage under article S39 of the Criminal Code.

Finally, it is important to briefly look at article 117(3), second paragraph, of the English and Amharic Versions. The two Versions provide for different things in relation to death penalty. The English Version states:" The execution of the sentence shall be carried out without any cruelties, mutilations or *other physical suffering"* So, according to this stipulation, what is prohibited is causing any physical suffering, which includes cruelties and mutilations, in the course of executing the penalty. For example, the penalty cannot be executed by hanging becausesuch method is cruel or it involves physical suffering. Hence, other sufferings such as *psychological sufferings* due to delay in the execution of the sentence are not prohibited.

The Amharic Version, on the other hand, makes the following stipulation: \\oa$£or>- f\ (i t - t - a \ O X

ffl^je,: Pfl+A ?iC5>°2:

ai&r PhhA -M-)- JiJtfcCfm* nzn f-f hrthrt Voo.::" (The equivalent translation of this stipulation is *'before* the execution of death penalty, the criminal shall not be subjected to *any suffering, retaliatory measure ox physical harm).* At first glance, the Amharic stipulation seems wider than, and inclusive of, the English Version becausethe prohibition is not limited to physical sufferings. It extends to psychological sufferings as well. Hence, unnecessary delay in the execution of death penalty or doing something which psychologically affects the criminal (such as insulting him by using derogatory words) until the penalty is executed is prohibited. However, the two Versions deal with different subject- matters and; hence, neither of them is wider than, and inclusive of, the other. While the English Version concerns itself with what should not happen *during* (not before) the execution of death penalty, the Amharic Version concerns itself with what should not happen *before* (not during) death penalty is enforced.

A. Delay in executing death penalty and its ramifications: In recent years, there have been a number of cases in which delays in carrying out sentence of death has been described as 'unacceptable' and the condemned person has brought proceedings based on a claim that, becauseof the inordinate delay, the execution of the sentence would amount to cruel and inhuman punishment and, as such, would be unconstitutional[391] Therefore, if the execution of death sentence is to be humane and constitutional, it should be executed in a reasonable period. Such period can neither be too long nor too short Of course, what is a *reasonable period*®difficult to decide on. Yet, at times, the length of the period wasted before enforcing death penalty may be manifestly

[391]61 South African, Journal of Criminal Law, 1997, p. 313.

unreasonable. For instance, in *Zimbabwe v Attorney-General case*[392] it was decided that the execution of death penalty on four criminals after 52 and 72 months was declared unconstitutional. It was stated that when it was proposed, the execution of the penalty had been rendered unconstitutional in that the dehumanizing factor of the prolonged delay between the date of their being sentenced and the date of proposed execution contravenes constitutional principle and this is particularly so when the delay was accompanied by the harsh and degrading conditions under which they had been confined. Under such circumstance, the court entertaining the case opted for setting aside the death penalty and substituting life imprisonment instead.[393] In other case, *Guerra rBabtiste*,[394] death penalty to be executed about five years later was declared to constitute cruel and unusual punishment as a result of which the sentence was commuted. Hence, in those countries where there are constitutional principles (or principles of international law) prohibiting cruel and unusual or degrading punishment, delay in the enforcement of death penalty has the tendency to convert or commute death penalty to life imprisonment

Interestingly, it is argued that problems of resources in the legal system could not be allowed to excuse long delays. Regard must be had to the inhumanity of prolonged periods awaiting execution on death row. Such delays constitute cruel and unusual punishment.[395]

On the other side of the fence, the time for the execution of death penalty should not be too short For example, in *Guerra rs. Babtiste.* it was declared that giving short notice of the carrying out of death penalty would amount to cruel and unusual punishment Justice and humanity requires that a man under sentence of death should be given reasonable notice of the time of his execution.[396] Another purpose of such a reasonable notice is to enable the criminal to exhaust the existing chances not to be killed[39'] such as appeal, amnesty or pardon. For example, when it comes to Ethiopia, the execution of death penalty should not be ordered until the appeal time of a convict lapses provided that the right exists.[398]

[392] *Zimbabwe rs. Attorney-General, Zimbabwe* 1993 (2) SACR 432 (ZS), 7 South African Journal of Criminal Justice, 1996. p. 406. [393]Id.. pp. 406-407.

Cuerra vs. Babtiste (Trinidad and Tobago), Nov 6,1995, Privy Council, 1 Journal of Criminal Law, 1996, pp. 71-72.

* Id., p. 72.

Ibid.

[3]>Ibid.

[398] Appeal right does not exist if the case is seen by the Federal or State Supreme Court unless luadamental error of law is pleaded Stt.als» article 185ffofthe 1961 Criminal Procedure Code of the Empire of Ethiopia

B. Solitary confinement: It is also worth mentioning whether solitary confinement can be used in relation to criminals who are sentenced to death, merely becauseof the type of their penalty, while they are awaiting the execution of their death. Since solitary confinement is a psychological punishment and this type of punishment is unacceptable, becauseit is cruel and unusual *perse,*®[9] it should not be imposed on such criminals merely becausethey are condemned to death. But if the behaviour of the criminal warrants, for instance, if the criminal is committing 'in-prison' offences, he can be subjected to solitary confinement like any other prisoners. In Ethiopia, psychological harm to a criminal awaiting the execution of death penalty is prohibited under the Criminal Code (article 117) merely becausehe is sentenced to death. Moreover, the Constitution prohibits cruel and unusual punishment or treatment (article 18). Hence, solitary confinement cannot justifiably be imposed on criminals condemned to death solely on the basis of the type of penalty they are about to serve.

3.4.2 Secondary Punishments

In addition to the principal punishments discussed so far, the Criminal Code has provided for the application of different secondary punishments which are believed to have effect on Lie behaviours of criminals. These penalties include caution, reprimand, admonishment, apology, temporary or permanent deprivation of rights, and reduction in rank if the criminal is a soldier.[400] That is to say, courts can give warning to criminals, appeal to their feelings by way of reprimand or admonishment, or require them to make apology publicly or even deprive them of certain right such as family rights, the right to elect, and the right to be elected. If the criminal is a juridical person, the secondary punishments may, in addition to the above ones, include its suspension, closure and winding up.[401]

But it should be known that secondary punishments cannot be applied alone. They are always additional penalties to principal penalties.[402] Further, courts should apply these punishments only if they believe that the penalties are required by the safety and rehabilitation of the criminal. Under such circumstances, these penalties can be applied in relation to any crime notwithstanding that the law violated does not provide for their application. For example, a

[399] See Thomas B. Benjamin and Kenneth Lux, *Solitary Confinement as Psychological Punishment, California Western law Review,* VoL 13,1977, pp. 273,284. [400] Articles 122-128, Criminal Code.

[401] Article 34 (2), Criminal Code.

[402] Article 121, Criminal Code.

father who is convicted of raping his daughter may be deprived of his family right in addition to the principal penalty he has to serve.

3.5 Aggravation, mitigation, and their co-existence

Since the law-maker simply provides for a general penalty; that is, the extent of penalty to be imposed when a given crime is committed, the work of individualizing this general penalty to a particular case is that of courts. As stated before, courts should determine penalties based on the degree of the criminal's guilt which requires the consideration of different factors like his dangerous disposition, antecedents, motive and purpose of committing the crime, personal circumstances and standard of education, the gravity of the crime committed, and the circumstances of its commission. By taking these factors into account, the court can impose from the lightest to the severest punishment attached to the crime committed. But for the imposition of either severe or lenient penalty, the court should have due regard to aggravating or mitigating circumstances, respectively. We will see these factors below. However, we must bear in mind that the Sentencing Manual issued by the Federal Supreme Court[403] also assists judges to determine punishment as it provides, among other things, for the range of penalties to impose on a criminal for a given crime. Of course, the Manual does not cover all crimes. As a result, it is being amended. Yet, although the amending Manual covers more crimes than existing Manual, it does not cover all the major crimes covered by the Criminal code or other penal legislation. So, the issuance a complete sentencing manual by the Federal Supreme Court is a work in progress.

3.5.1 Aggravation

If a given crime is committed, the author thereof may, depending on the surrounding circumstances, be subjected to the severest penalty recognized for the type of crime he has committed. At times, such circumstances may even justify the imposition of severe penalty in excess of the maximum penalty provided for the type of crime committed. These circumstances are in crude terms referred to as *aggravating circumstances.* As such, they are expressly stated in the Criminal Code. The Code classifies aggravating circumstances into *generalvA* ^ma/aggravating circumstances. General aggravating circumstances are those which are listed under article 84 while special aggravating circumstances refer to *concurrence* and *recidivism* as provided under article 85.

If the ground for aggravating penalty is the one that is provided under article 84 (general aggravating circumstances), the aggravation will be effected in light of article 183 of the

[403] See ffl)'>£A >ifl)<1(V> *tmtm^f-t>.VC* 1/20021 m-Mf. *VC?: nh:*

Code. That means, courts cannot go beyond the maximum penalty stipulated in the special part for the crime committed. But within that limit, they can increase the penalty as they think fit depending on the relevant factors such as the nature and the number of the available aggravating circumstances. For example, if two individuals agree to commit the crime of theft and as a result they steal their friend's car at night, the court entertaining their case should aggravating their penalty under article 665 very severely because, pursuant to article 84(1)(c and d), there are two aggravating circumstances: conspiracy and acting at night

However, if the crime committed contains one of the aggravating circumstances mentioned under article 84 as its element, that same ground cannot be used to aggravate his penalty within the meaning of article 183. For example, the penalty for a person who violates article 539(1) cannot be aggravated in light of article 84(l)(a) and article 184 becausearticle 539(1) has already embodied the grounds under article 84(1)(a) as its elements. Thus, there is no double jeopardy by using the same circumstance(s) more than once.

If, however, the aggravating circumstances are *concurrence mi recidivism,* the calculation of the aggravated penalty should be effected in accordance articles 184-188, which contain different principles. Issues pertaining to concurrent crimes were entertained before and a brief reference to that discussion is advisable. Anyway, if a person commits concurrent crimes, whatever its nature may be, and he is found responsible therefor, his penalty will be determined in light of article 184 of the Criminal Code.[404] Accordingly, a judge should assess his penalty according to the following principles.

A. If capital punishment or life imprisonment is imposed for one of the crimes committed, the punishments for the other crimes will be disregarded. The judge should not pay attention to them. Such penalties are deemed to have *absorbed* the penalties for the remaining crimes. Likewise, if the maximum term of imprisonment provided in the general part (Articles 106 or 108) is imposed for one of the crimes, the punishment for other crimes will, as a rule, be disregarded. For example, if all the crimes entail simple imprisonment or rigorous imprisonment and the judge imposes 5 or 25 years (or life) imprisonment, respectively, other crimes will not be considered to aggravate these penalties. The penalties so imposed are also believed to have *absorbed*the punishments for the other crimes. However, if the preceding penalties are not imposed, the court should determine penalty for the most serious crime first and then add up the penalty

[404] Articles 184(land 2) and 187, Criminal Code.

for the other crimes in as long as the general maximum penalty for the *most serious crimes* not exceeded.

B. If two or more crimes entailing loss of liberty are committed, the court should determine penalty for all and add them up. However, the total penalty should not exceed the general maximum of the kind of penalty applied. That is, if the penalties are simple imprisonments, the aggregate cannot go beyond three or, at times five, years. If the crimes entail rigorous imprisonments, the aggregate penalty cannot, as a rule, exceed 25 years with the possibility of making it life imprisonment. If the crimes committed entail penalties of different nature, that is, simple imprisonment and rigorous imprisonment, two years of simple imprisonment should be, for the purpose of addition, considered as one year rigorous imprisonment For example, if one of the crimes committed entails rigorous imprisonment of 4 years and the other crime entails 2 years simple imprisonment, the total imprisonment the criminal must serve will be 5 years.

C. If the crimes committed entail imprisonment and fine, both may be imposed. However, the imprisonment should be imposed as stated in the preceding paragraph while the total fine cannot exceed the general maximum.[405]

D. If all the crimes committed entail fine, the court has to first decide fine for all the crimes and then add them up. However, the aggregate cannot exceed 10,000 birr for a natural person and 500,000 birr for juridical person. But the maximum limit of fine may, sometimes, go to the extent of 100, 000 or more for a natural person as discussed before.

L If the forfeiture of the criminal's property is ordered in relation to one of the crimes committed, no fine can be imposed for the remaining crimes since he cannot pay it However, the court can impose imprisonment if it thinks fit

On the other hand, if the aggravating circumstance is *recidivism,* the penalty will be calculated in accordance with articles 67 and 188 of the Criminal Code. But aggravation based on recidivism is permitted only if the criminal has committed a *fresh intentional* crime the minimum penalty of which is *six months* simple imprisonment *within live years* of serving a sentence of imprisonment in whole or in part or having been remitted by pardon (Article 67). In this case, the court is not bound by the maximum penalty provided in the special part for the crime committed. It can go beyond this limit and impose a severer penalty without however going beyond the general maximum limit stipulated in the General Part of the Code. At this juncture, it should be noted that the minimum *six months* requirement seems a

[4,5] Article 90(1), Criminal Code.

mistake. The law-maker should not have provided for this requirement becausethere are many crimes the minimum penalties of which are less than six months but in relation to which the concept recidivism should work to aggravate penalties so as to serve the purposes of criminal law. For example, the minimum penalties of the crimes of Theft (Article 665), Misappropriation (Article 679), Adultery (Article 652), and Incest (Article 654) are less than six months. Accordingly, a person will not qualify as a recidivist even if he commits these crimes as many times as possible. But from all indications, it does not seem that the law-maker wanted to count out the authors of such crimes from the scope of the concept recidivism. Therefore, it should be an oversight Under the 1957 Penal Code, recidivism works as an aggravating circumstance in relation to any crime regardless of its minimum penalty (Article 82(l)(b)). So, this Code is by far better becauseit permits the application of the concept recidivism to crimes such as theft, misappropriation, and adultery which are committed repeatedly and in relation to which many criminals can be recidivists.

But it seems that there is still a leeway forjudges to consider recidivism cases which do not fall under articles 67, 85, and 188 as aggravating circumstances within the meaning of article 82, and use it pursuant to article 182 (not article 188), by invoking article 86 which gives them the discretion to create general aggravating circumstances. What this, in effect, means is that there can be two types of aggravating circumstances based on recidivism: special (Article 85) and general (Article 86). So, attention must be paid to article 86 of the Code in addition to articles 67 and 85 when recidivism is at issue as an aggravating ground.

The other point worth considering pertains to the meaning of *recidivism* \\s>&[. Can a person who commits a crime for the second time be a recidivist? Or is a person required to commit a crime for more than two times to be called a recidivist? Black's Law Dictionary defines recidivists as *a habitual criminal, a criminal repeater, an incorrigible criminal.*[406] This definition, in particular, if the terms *habitual* and *incorrigible* are considered, tends to say that a person is required to commit a crime more than twice to be regarded as a recidivist. Otherwise, it may be difficult to call him a habitual offender or an incorrigible criminal.

Under the Criminal Code, what constitutes recidivism is not expressly defined. But the close reading of article 67 of the English Version seems to consider recidivism as an act of committing fresh intention crime after a previous crime. The same conclusion will be drawn if the content of the Amharic Version is also read between the fines. Hence, one is not supposed to commit a crime for more than two times to be a recidivist Nevertheless, the

[406] Black's Law Dictionary, p. 878.

caption of article 67 of the Amharic Version clearly shows that committing a crime for the second time does not render a person a recidivist. It uses the term which suggests the commission of crimes for more than twice, not the term which suggests the commission of crimes for the second time. Hence, it is possible to contend that the commission of a second crime cannot make a person a recidivist All the same, since the contents of both Versions suggest the existence of recidivism even in case a person commits a crime for the second time, at least, legally, it seems tenable to follow the contents. After all, it is the body, not the caption of an article, that should have a controlling effect

At any rate, having regard to the nature and multiplicity of recidivism, and the degree of the criminal's guilt the court can aggravate his penalty as it thinks fit It can even double the penalty provided for the fresh crime committed or that of the most serious fresh crime in case of concurrence without any restriction but without crossing the general maximum limit stipulated in the General Part If the criminal is a persistent recidivist the aggravation may be more than double the penalty for the fresh crime insofar as the general maximum limit is not crossed.[407]

Failure to aggravate penalty when circumstances justifying such aggravation are present would amount to defeating the purpose of criminal law because, sometimes, criminals can only be deterred and/or rehabilitated by serving aggravated penalties. Hence, a judge should be watchful to consider whether these grounds exist or not before pronouncing sentence. And that is why, under article 149(3) of the Criminal Procedure Code, a judge is duty bound, after the criminal is convicted, to ask the public prosecutor whether or not there are grounds justifying aggravation.

Taking a cursory look at the practice, however, shows that some judges may not aggravate penalties even if there are grounds justifying aggravation. For example, in one case decided by the Jimma High Court,[408] the criminal who was convicted of robbery (Article 637(l)(c), 1957 Penal Code), which would entail rigorous imprisonment of 5-25 years was subjected to five years rigorous imprisonment on the ground that he did not have previous convictions. However, the crime, as indicated in the charge, was committed *at night* and this justifies

[407] Article 188, Criminal Code.
[408] *Taniku Takele Vs. Public Prosecutor,* Jimma High Court, No. 403/92,1995 E.C.

aggravation as per article 81(l)(c) which the judge failed to do. So, this case tells us that sometimes grounds affecting the extent of punishment may not be considered.[409]

Eventually, one should bear in mind that courts are allowed to aggravate penalty even on the bases of grounds which are not expressly provided in the Code. This is so becauseas per article 86, the Code mandates them to create *generalaggravating circumstances* as long as they have good reasons to do so. Therefore, courts can, for example, use recidivism which does not fall within the scope of article 85 and article 67 as a general aggravating circumstance. This means, one can use recidivism as both special aggravating circumstance (as recopized under article 85) and general aggravating circumstance (to be created by virtue of article 86).

3.5.2 Mitigation

Mitigation is a counterpart of aggravation since unlike aggravation, which justifies the imposition of severe penalty, it justifies the imposition of lenient penalty. The Criminal Code has provided for the different mitigating circumstances. These circumstances are classified into *general*and ^eaa/extenuating circumstances.[410] These mitigating circumstances may entitle criminals to either *ordinary* or *[ree* mitigation. Mitigation is ordinary if the extent of the mitigated penalty to be imposed is determined by law in advance. The Criminal Code has provided for such mitigated penalty under article 179. Hence, in case ordinary mitigation is permitted, courts are not bound by the lower limits provided in the special part provisions but by the one provided under article 179. For example, ordinary mitigation for rigorous imprisonment for life is a rigorous imprisonment from ten to twenty years.

The grounds entitling criminals to ordinary mitigation are those which are provided under article 82 *{generalmitigating circumstances).* But if any of the grounds listed under article 82 is made an element of the special part provision the criminal has violated, that same ground cannot be used as a mitigating ground.[411] For example, provocation is an element of article 541. Hence, a person who violates article 541 cannot avail himself of article 82(l(d)) becausearticle 541 has already provided for a mitigated penalty owing to provocation.

[409] The problem, in most cases, seems that judges rely on what prosecutors say. But they are equally, if not more, expected to be meticulous in knowing and applying aggravating circumstances properly. In the case at hand, the time of committing the crime is indicated in the charge against the criminal. All the same, the judge overlooked this fact and failed to aggravate the penalty for the crjme.

[410] Articles 82 and 83, Criminal Code.

[411] Article 82(2), Criminal Code.

The mitigating circumstances mentioned under article 82 are not the only ones entitling criminals to ordinary mitigation. There are other mitigating grounds recognized in the Criminal Code to have the same effect For example, attempt,[412] renunciation,[413] instigation,[414] and accomphce[415] are recognized as general mitigating circumstances in accordance with article 179. Moreover, creating general mitigating circumstances is permitted pursuant to article 86 if there are grounds warranting such creation. For example, if a person renounces his criminal intention which he can successful execute becausethere are few things that he fears, we cannot say his renunciation is free. Accordingly, he is not entitled to mitigation as per article 28(1). However, even if the renunciation is not free, it is still initiated by himself as he quits committing a crime he can commit Thus, he deserves some preferential treatment than others who are forced to quit Courts can, thus, use his renunciation as a general mitigating ground. But if this does not happen, such persons will proceed and finish their criminal activities becausetheir renunciation will not entitle them to any benefit

On the other hand, mitigation is said to be free if the extent of the mitigated penalties to be imposed is not stipulated by law and courts are at liberty to fix them.[416] So, if grounds justifying free mitigation are available, courts can impose a more lenient penalty than the one stipulated in the special part provisions of the Code without restriction. The only limit to such extenuation is that the general minimum limit provided in the General Part of the Criminal Code for the kind of punishment to be imposed cannot be crossed. Accordingly, a mitigated line cannot be less than 10 birr (for natural person), simple imprisonment cannot be less than 10 days and rigorous imprisonment cannot be less than one year.[417] These are the general lower limits which cannot be crossed even where courts are mandated to mitigate punishments without restriction. So, insofar as these limits are observed, the most lenient penalty can be imposed provided that there are grounds justifying such step. For example, pursuant to article 83 *(specialextenuating circumstances),* family and affection relationships are recognized as special mitigating circumstances entitling criminals to free mitigation. Accordingly, if a person commits a crime becausehis family or affection relationship has

[412] Article 27(3), Criminal Code.

[413] Article (28(1), Criminal Code.

[414] Article 36(3), Criminal Code.

[415] Article 37(4), Criminal Code.

[416] Article 180, Criminal Code.

[417] Articles 90(1), 106(1), 108(1), Criminal Code, respectively.

exposed him to such criminal act, the court entertaining his case should reduce his penalty freely.

On top of that, if the crime committed is not very grave and the relationship that has made the criminal commit the crime is so close as to place him in a moral dilemma of committing and not committing the crime, the court may exempt him from liability.[418] For example, if a person commits a crime becausehe believed that he had to help his father who is involved in a fight with an enemy that is almost winning, the court may exempt him from liability provided that the crime committed is not serious. Similarly, if a person hides his wife who is wanted for committing a crime, he may be granted exemption if the crime is not serious.

The other point worth considering is the fact that there are other special mitigating grounds, in addition to family and affection relationships, which justify free mitigation. These grounds are found scattered in the Criminal Code. For example, committing a crime impossible of completion,[419] partial irresponsibility,[420] committing a crime being under resistible coercion,[421] excess of necessity,[422] and excess in legitimate defence[423] are some examples of grounds which entitle a criminal to a freely mitigated penalty in accordance with article 180 of the Code.

At any rate, be it free mitigation or exemption from the penalty attached to the law violated, courts can apply it only when the law expressly authorizes them to do so.[424] In default of such express authorization, any mitigation of or exemption from the punishment stipulated would amount to making laws. By so doing, court will defeat the object and purpose of criminal law. Likewise, the measure would be contrary to the principle of legality since the application of the unstipulated penalties amounts to creating penalties.

The other point worth considering is the need to ascertain the existence of extenuating circumstances before mitigating penalties. The mere fact that the cnminal has claimed the existence of certain extenuating circumstance is not sufficient to impose a mitigated penalty. The court has to require him to produce sufficient evidence to prove that the ground really

»[8]Article 82(3) Criminal Code.

[419] Article 29, Criminal Code.

[420] Article 49, Criminal Code

[421] Article 72, Criminal Code

[422] Article 76. Criminal Code

[423] Article 79(1), Criminal Code

[424] Article 182, Cnminal U*.

exists in his favour. At times, criminals may claim that they are entitled to mitigated punishments simply to avert severer penalty. That is why the law requires judges to give reasons for either mitigating penalties or exempting criminals from penalties.

Further, a look at some decisions of our judges may show that there is confusion between mitigating circumstances and factors to be taken into account to fix penalties for crimes. Some judges, for example, take family responsibility as a mitigating circumstance and reduce penalties within the limit permitted by the law. In one case decided by Arsi Zone High Court,[425] for instance, the criminal who was convicted of aggravated fraudulent misrepresentation claimed that, becausehe had 13 dependents, he deserved a mitigated penalty. Accordingly, the judge entertaining his case mitigated the penalty under article 184 of the 1957 Penal Code. But family responsibility is not a mitigating ground. It is rather a factor to be taken into account to fix penalty within the limit provided by the law violated.

3.5.3 Co-existence of aggravating and mitigating circumstances

It is possible that both aggravating and mitigating circumstances are available to a particular criminal. For example, if the criminal is a recidivist but the commission of the crime for which he is tried is attributable to his family or affection relationships, the court should not disregard both of them. In such case, priority to calculate the penalty should be given to the aggravating circumstance. That is, his penalty should be increased first by taking the aggravating circumstance into account Then the increased penalty should be reduced having regard to the mitigating circumstance.[426] So, the two circumstances have the effect of canceling one another to the extent possible.

3.6 Suspension of penalties

Execution of penalties is, perhaps, the final important stage in the administration of criminal justice. Once imposed, penalties must be enforced if criminal law is to serve its purpose. The study of our criminal system also reveals that, in the past, all forms of sentences were executed[427] while the current criminal system does not require the execution of all forms penalties and under all circumstances. So, according to our current criminal system, sometimes, the interest of justice may demand the suspension of penalties before execution commences *{conditional suspension of penalties)* or even when their execution is underway

[425] *trio Dege/a and Others Vs. Public Prosecutor,* Arsi Zone High Court,Criminal Case No. o 1/561/125/95.

[426] Article 189, Criminal Code.

[427] Aherra jembere, p. 199.

{conditional release). Such measure is justified because, under certain circumstaness, criminal law aims at rehabilitating than punishing criminals."[23]

3.6.1 Conditional suspension qf penalties (proba&'en)[429] One of the purposes of the Criminal Code is the rehabilitation of criniinals'[530] as rehabilitating a criminal can be a cornerstone of crime control.[431] One of the ways of rehabilitating offenders, on the other hand, is granting probation (suspending the enfoi cement of penalties). In this sense, probation can be defined as 'a procedure under which a defendant, found guilty of a crime upon a verdict or plea, is released by the court, without imprisonment, subject to the provisions imposed by the court and subject to the supenision of the probation officer'.[432] Probation, if properly administered, is considered to be one of the best correctional programs to achieve the purpose of rehabilitation of offenders.[433] This is so becauseprobation offers a variety of rehabilitative services unavailable in prison such as jobs, counseling, therapy and education in addition to being cheaper for enforcement purpose.[434] At this juncture, it is necessary to keep in mind that probation remains punishment It is a sentence to local community supervision by a probation agent[435] It will be subject to different conditions. Hence, probation or conditional suspension of penalties, which is a temporary postponement of the execution of penalty, does not prohibit the execution of the penalty imposed on an offender if the conditions subject to which it is granted are not observed.

In the Criminal Code, courts are authorized to conditionally suspend the execution of penalties if they believe that such measure will promote the rehabilitation and reinstatement of criminals.[436] This implies that it is not all criminals that can be released on probation. Instead, it is up to courts to select those criminals who are believed to be vulnerable to change. However, courts should also observe certain requirements stipulated by the legislature before choosing those criminals that are eligible for probation. For instance, the

[428] Ibid.

[425] On the early development of probation, read Frederic A. Hussey and David L Duffee, pp. 34-41.

[430] Article 1, Criminal Code.

[431] Patrick R. Anderson and Donald J. Newman, p. 287.

[432] Frederic A. Hussey and David E. Duffee, p. 35.

[433] Id., p. 288.

[434] Ibid.

[435] Id. P. 289.

[436] Article 190, Criminal Code.

Criminal Code, under article 194, stipulates that, without prejudice to secondary punishments, conditional suspension of penalty can be granted to any criminal unless:

A. the criminal, although he does not have previous conviction, is sentenced to rigorous imprisonment exceeding five years;

B. the criminal has previously already undergone a sentence of rigorous imprisonment or a sentence of simple imprisonment exceeding three years and he is sentenced again to one of these penalties for the crime he is tried. However, if the previous simple imprisonment exceeding three years is the result of aggravation in accordance with articles 67 and 188, suspension can be granted.[437]

C. the criminal appears to be dangerous. If, after considering the relevant factors such as the antecedent, character, and attitude of the criminal, the court believes that there is a reasonable presumption that suspension of penalty will not produce the desired result, it will not grant suspension.[438] Stated differently, suspension can be granted only if there is a reasonable prospect of rehabilitating and reinstating the criminal by granting the same.

So, if requirements from a-c are met, probation can be granted and the granting courts should give reasons for their decisions. Besides, they should fix the period of probation imposed by taking factors such as the gravity of the crime committed, the risk of a relapse (the possibility that the criminal may commit another crime), and the criminal's reliability into account Yet, the period cannot be less than two years and greater than 5 years.[439]

Moreover, suspension of penalty should be granted subject to different conditions. Some of these conditions, and the factors to be taken into consideration to stipulate the conditions, are stated in the Criminal Code.[440] For example, the conditions may include prohibiting the criminal from taking alcohols, consorting with certain people, not leaving a given place, and reporting to the appropriate authorities. Thus, if the criminal has to benefit from the suspension of penalty, he must observe the conditions attached to his probation.

It should be known that the order granting the suspension/probation may be revoked at any time if circumstances so justify. For example, if the court that granted the suspension deems ti)at the suspension will no longer promote the rehabilitation and reinstatement of the

[131] Article 194, Criminal Code.

Articles 191,192,195,196, Criminal Code.

[28S] Article 196, Criminal Code.

Articles 197-200, Criminal Code.

criminal becausethe probationer is not observing the conditions of the probation, it can withdraw the suspension and order the execution of his penalty. Similarly, if grounds disallowing the suspension of penalties, as stated before, are discovered subsequently, the suspension order will be revoked. Further, if the criminal commits an intentional fresh crime during the period of probation, the order of suspension will be revoked.[441]

But if the order of suspension is to be revoked becausethe probationer has committed a fresh intentional crime, he should be given the right to be heard before revocation takes place. This is meant to check whether or not the commission of the crime is justified. For instance, if a person commits a crime being in a state of necessity or self-defense, the suspension should not be revoked. If, on the other hand, the commission of the crime is not justified, the suspension will be revoked and he will not be entitled to a second suspension; instead he might be subjected to an aggravated penalty for the fresh crime on ground of recidivism.[442]

3.6.2 Conditional release or parole

It is not easy to give *a* single and comprehensive definition to the concept *conditional release,* which is also referred to as *parole,* becauseveryone tries to define it from the angle he looks at it For instance, an inmate can define it as a grant of freedom; a correctional official may define it as a confinement within expanded prison walls; the public may define it as a lenient treatment of immoral people; a parole administrator may define it as an opportunity to undo or rectify the negative effects of imprisonment; etc.[443] But it is undeniable that it refers to the suspension of penalty which is under execution. So, a person is sentenced to imprisonment and the execution of the penalty has commenced does not mean that that is the end of everything. There is still a possibility to interrupt the enforcement of the penalty and release the prisoner on parole. The manifest goals of such release are *the protection of the society and the rehabih'tation of the offender:*[444] However, such release should be granted only if certain conditions are met For instance, under the Criminal Code, it is permitted to release any prisoner conditionally if:

A. his conduct has been satisfactory; that is, if, during his stay in a prison, the criminal, by his work and conduct gave tangible proof of his improvement;

441 Article 194(4), Criminal Code.

442 Article 200(2)(3), Criminal Code.

443 Frederic A. Hussey and David E. Duffee, p. 60.

444 Id., p. 61.

B. the criminal has served two-third of the sentence of imprisonment or twenty years in case of life imprisonment;
C. the criminal has repaired, as far as he could reasonably be expected to do, the damage found by the court or agreed with the aggrieved party;
D. the character and behaviour of the criminal warrant the assumption that he will be of good conduct when released and that the measures will be effective; and,

L he is not a recidivist[445]

As far as the initiation of conditional release is concerned, the court may order the conditional release upon the *recommendation ofthe prison management* or *upon the request of the criminals,* director of the prison has the *My to recommend the conditional release of the prisoner where the conditions for granting it are satisfied.* Besides, if the prisoner petitions, he has the duty *to submit the petition to the court together with his opinion.*[446]

If a court permits the conditional release of the prisoner, it should fix the period for which the parole is to last Normally, the period of probation/parole should extend from two to five years. However, if the probationer was serving sentence of life imprisonment the period shall extend from five to seven years.[447]

Similarly, if conditional release is granted, the court should state the conditions the probationer will be subjected to during the period of probation. If these conditions are not observed, the conditional release can be revoked and the probationer will be sent back to the place where he was serving his sentence. However, if the criminal completes the period of probation without disregarding the conditions attached thereto, his release will be final and his remaining penalty will be extinguished.[448]

3.7 Punishments for petty offences

Petty offences are, as compared to ordinary crimes, minor crimes. They are crimes that can be created by any competent government organ: the parliament, the council of ministries, ministries, departments, etc. These crimes, becauseof they are less serious, do not entail the punishment provided for ordinary crimes. That means, for example, death penalty, rigorous or simple imprisonments cannot **be** imposed. Instead of these penalties, the Criminal Code

[145] Articles 113 **aid** 202, Criminal Code.
[446] Article 203, Criminal Code.
[447] Article 204. Criminal Code.
[448] Article 206. Criminal Code.

has provided for different, and of course, more lenient penalties. These penalties are classified into principal and secondary penalties. The principal penalties refer to arrest, compulsory labour and fme, whereas secondary penalties include warning, reprimand, and reproof.

3.7.1 Principal penalties

A. Arrest: In matters of petty offences, arrest is the only penalty entailing loss of liberty. A court should determine whether or not the criminal has to be subjected to arrest by taking the factors provided under article 88(2) into account If a judge decides to order arrest its extent should, in principle, be from one day to three months.[449] If, however, the criminal is a recidivist, the arrest may extend to six months. But recidivism, as an aggravating circumstance, can be used only if one year has not lapsed since the penalty for previous petty offence is enforced in whole or in part or it is remitted by pardon or barred by limitation.[450] Interestingly, there is a possibility of going even beyond the six months limit if certain circumstances are present For example, if the offender commits concurrent offences, the arrest may last for one year (Article 768). Moreover, the arrest may still extend to two years if the offender is a recidivist and also commits concurrent crimes.[451]

As far as its execution is concerned, the Code provides that ordinary arrest is executed in the premises for detention attached to courts or police stations. Offenders of petty offences should not be kept at the same place with prisoners for,ordinary crimes becausearrest by its nature is different from imprisonment Similarly, the arrestee cannot be compelled to work during his arrest[452] The practice in some part of our country shows that judges send petty offenders to jails where those who committed ordinary crimes are kept This is, however, contrary to the spirit of the Criminal Code. The Code does not want petty offenders to be kept at the same place with ordinary offenders. If circumstances so justify, for example, if there are no places to keep offenders of petty offences, or if there are personal circumstances justifying such measure, the court can order, subject to control, the offender's arrest to be effected at his home or in a given institution or in a religious community established for this purpose. If this type of arrest is ordered, the offender can be allowed to leave the place of confinement only if there is *force majeure* or upon court's permission by showing good cause

[449] Article 747(1), Criminal Code.

[450] Article 769, Criminal Code.

[451] Article 770, Criminal Code. Well, in this case, one may argue, there is no difference between imprisonment and arrest except for the name. This is even more so in a situation where we don't have many places to keep persons who are subjected to arrest as a result of which they are kept at the same places with those who are imprisoned for major crimes.

[452] Article 748, Criminal Code.

such as medical case.[453] Finally, unlike a person who is serving a sentence of imprisonment, a person who is subjected to arrest for committing petty offence cannot be conditionally released.[454] But the arrest can be conditionally suspended since there is no express prohibition of such measure.[455]

B. Compulsory Labour: Like for ordinary crimes, there is a possibility of imposing the sentence of compulsory labour for committing petty offences, with or without restricting the liberty of the offender. Of course, the imposition of compulsory labour is not a rule. It is to be imposed only when circumstances justify its imposition. For instance, if there is difficulty to execute arrest, compulsory labour can be imposed. If such labour is imposed, the duration for which it lasts has to be equivalent to the duration of the arrest Interestingly, the offender is entitled to, at least three fourth of the amount he drives from his labour.[456]

C. Fine: Fine is another principal punishment that the commission of petty offence entails. Its determination is to be effected like the determination of fine for ordinary crimes. The extent of fine for petty offences is different though. It normally extends from one birr to three hundred birr. But if the petty offence is committed to get gain, it can be up to five hundred birr. Likewise, the fine can be increase to 600 birr if the offender is a recidivist and it can still be increased to 1,200 birr if the offender commits concurrent crimes. Further, the fine may be made to extend up to 2,400 birr if the offender is a recidivist and also commits concurrent petty offences. If the criminal is a juridical person, the only applicable penalty is fine. Hence, the arrest aspect cannot be converted to fine. The fine for a juridical person may extend from ten birr to ten thousand birr.[457]

Even if the special part of the Code of Petty Offence does not provide for the cumulative imposition of fine and arrest, the two penalties can be coupled when they are provided alternatively provided that such step is necessary to serve the purpose of criminal.

The execution of fine imposed for petty offence is not as such different from the execution of fine imposed for ordinary crimes. Once imposed, it has to be paid to the state forthwith. If the offender cannot pay it forthwith, he may be granted a grace period which cannot exceed one year. Similarly, he may be allowed to effect the payment by installments. If the offender

[453] Article 749, Criminal Code.
[454] Article 747(2), Criminal Code.
[455] Article 734 cum article 190, Criminal Code.
[454] Article 751, Criminal Code.
[457] Articles 752,768, and 770, Criminal Code.

cannot pay the fine or if he wants it, he may be permitted to have the fine converted to compulsory labour of equivalent monetary value.[458]

3.7.2 Secondary penalties

For petty offences as well, secondary penalties can be imposed if they are believed to produce the desired result The secondary penalties include warning, reproof, and reprimand. But unlike for ordinary crimes, deprivation of rights cannot be imposed as secondary punishment for petty offences.[459]

3.7.3 Aggravation and mitigation of penalties

Finally, the principles applicable to mitigation, aggravation and their co-existence in cases of ordinary crimes are also equally applicable to petty offences if grounds justifying aggravation and/or mitigation are present[460] For example, a petty offender may be subjected to fine of 2,400 birr if the two special aggravating circumstances; that is, concurrence and recidivism, co-exist The same applies when mitigating circumstances exist

3.8 Discontinuance and extinction of prosecution and penalties[461]

A person has committed a crime does not mean that he will necessarily be tried and/or punished therefor. Anything that has a beginning has an end. So, criminal justice system starts working 'against' a criminal at a given time in point; that is, when a crime is committed, and it stops at some point in time. The operation stops when either the prosecution of the criminal or the execution of the penalty imposed on him is not proper for various reasons. Some of the reasons barring prosecution and/or execution under the Criminal Code will be briefly seen below.

3.8.1 Discontinuance of prosecution

No charge will be brought or prosecution continued against a criminal if period of limitation run against such measures (Articles 213, 216-218), the criminal dies (Article 214), or he obtains amnesty (Article 230).[462] First, a criminal matter is a public matter. Hence, the

[458] Article 752, Criminal Code.

[455] Article 756, Criminal Code.

[460] Article 745, Criminal Code.

[461] Reading articles 211-237,771-775 is strongly recommended to better understand this part.

[442] If the criminal dies or obtains amnesty, he will not be charged or prosecuted. This has got one problem. If the criminal liability of secondary participants depends on the conviction of principal criminals and these criminals will not be convicted under such circumstances, bow can the liability of the secondary participants be determined? It seems that what bars charge or prosecution against principal offenders also bars charge or prosecution against secondary participants.

public wants timely justice. If justice is delayed unnecessarily, the public prefers to drop its case than bothering the criminal by upholding a stale case. Hence, after a given period of time, the criminal will be restored to his previous position. Accordingly, no charge or prosecution is allowed to proceed against him after the period of limitation (as provided under articles 213,216-218) has elapsed. For that matter, the Code imposes a duty on both courts and public prosecutors to observe period of limitation even if the criminal fails to raise it as a defence against prosecution and punishment (Article 216(3)). Nonetheless, there are instances, as discussed before, where the limitation provisions of the Criminal Code become inapplicable. For example, as discussed before, limitation does not work in relation to crimes like terrorism or crimes against humanity.

Second, the death of a criminal puts an end to everything. No charge can be brought against a dead person; nor should prosecution continue against him. Becausenone of the purposes of criminal law will be served by bringing charge or letting prosecution continue against a dead person. Similarly, such measure will unwisely entail loss of resource.[463]

Third, if a criminal is granted amnesty by the appropriate government organ, he will not be charged; nor will prosecution against him continue. If amnesty is given, the person will be treated as though he has not committed the crime for which amnesty is granted. (It has the effect of making the crime void.) That is why amnesty given after sentencing cancels the sentence and bars the entry of such sentence into the criminal records of persons. However, like limitation, there can be no amnesty for certain crimes.[464]

3.8.2 Discontinuance of the enforcement of penalties

As we have seen before, sentences are imposed does not necessarily mean that they will always be executed. At times, they may be discontinued either before execution commences or while it is underway. The reasons for such discontinuance include impossibility to execute or continue to execute sentences, fairness, or other factors such as politics. In the following section, we will consider some grounds which necessitate the discontinuance of the execution of penalties.

[463] Well, it may be said that the conviction of a person who is dead can have a symbolic value. However, the disadvantage of such conviction outweighs its advantage.

[464] Generally, see the discussion on amnesty in part two under the topic *Other Affirmative Criminal Law Defences*.

3.8.2.1 Death of the convict

Under article 215, the Criminal Code provides that the death of a convicted person *after* a sentence has been passed puts an end to the enforcement of the penalties and any measures pronounced. The rationale behind such stand is obvious. It is not possible to execute any penalty on a dead person. For example, if a person convicted of a crime was sentenced to death penalty but he dies before his execution, the penalty cannot be executed. For imprisonment, too, a dead person's corpus cannot be imprisoned. In relation to other penalties such as line, it is not about impossibility as such but about the purpose of punishment by itself that matters. If line is executed on the property of the deceased, the fine cannot serve its purpose becausea dead person can neither be deterred nor rehabilitated.[465] Therefore, the death of a convict puts an end to the execution of any penalty.

3.8.2.2 Period of limitation/Statute of limitation

Generally, period of limitation refers to a definite period of time within which something has to be done. Therefore, in relation the execution of penalties, period of limitation simply refers to a definite period of time within which penalties should be enforced. This implies that penalties imposed on someone need to be enforced in a given period of time. If the execution does not take place within such time framework, it will not be executed at all. But it must be noted that such period of limitation varies depending on the type and extent of penalties.

Under the Criminal Code, the running of period of limitation is recognized as one of the grounds causing the discontinuance of the execution-of penalties. Article 223 of the Code states that unless otherwise expressly provided by law, when for any reason whatsoever the sentence has not been enforced within the period of time stipulated for its enforcement, the right to enforce it will be extinguished and the sentences ceases to be enforceable. There are three important points to note here. First, the running of period of limitation kills the right to execute penalty. Second, the running of period of limitation further makes the penalty non- enforceable. Third, the loss of right to enforce penalty and the non-enforceability of a given penalty after sometime works only so long as there is no contrary stipulation made by law. This means, if there is any law that expressly proscribes the barring of the execution of penalty for a given crime, then, the execution of sentence in relation to that crime will always remain possible; that is, the right to enforce the sentence will exist forever and the sentence also remains enforceable forever. So, the crime committed here is not subject to the statute of limitation. What are these crimes? For example, article 28(1) of the FDRE Constitution

[465] However, it may be argued that at least the purpose of general deterrence; that is, deterring the general public from committing future similar crime can be served if line is executed on the property of the deceased.

and article 24 of Anti-Terrorist Proclamation, which prohibit the application of statute of limitation to the prosecution of certain crimes, do not forbid the application of statute of limitation to the execution of penalties for the crimes they envisage. On the other hand, it could be argued that if execution of the penalties for the crimes they envisage is to be barred by limitation, proscribing the application of the statute of limitation to the prosecution of such crimes would not make sense.

It should be noted that the Code imposes duty, under article 223(2), on appropriate judicial and administrative authorities to observe period of limitation on their own initiative. This means, the defence of period of limitation against the enforcement of penalties can (and should) be raised by courts, prosecutors or convicts. At this juncture, it is necessary to bear in mind that the running of period of limitation before the execution of a given penalty does not erase or prohibited the entry of the criminal's conviction into the judgement register of the criminal.[466] Hence, statute of limitation prohibits execution of penalty, not the entry of the conviction into a criminal's record.

In the Criminal Code, two types of period of limitations have been recognized: ordinary and absolute. Ordinary period of limitation can be extended if its running is stopped, whereas absolute period of limitation cannot be although there are stoppages. Article 224 of the Code provides for the list of ordinary period of limitations. It states that ordinary period of limitation of penalties or measures shall be as follows:

a. thirty years for death sentence or a sentence for rigorous imprisonment for life;
b. twenty years for a sentence for rigorous imprisonment for more than ten years;
c. Ten years for a sentence entailing loss of liberty for more than one year;
d. Five years for all other penalties or measures.

The provision further stipulates that the execution of lighter penalties will be bared at the same time with severe penalties in the event of concurrent penalties. For example, if someone is sentenced to five years rigorous imprisonment for committing rape, in principle, this penalty will not be executed after ten years have lapsed. If, however, he committed homicide as a concurrent crime with the rape and he was sentenced to 11 years for the homicide and five years for the rape, then, the execution of the penalty for the rape will be barred only after twenty years have elapsed becausethe period of limitation for the severer penalty controls the duration of the execution of the penalty for the crime of rape. Not only that; with regard to those crimes in relation to which the period of limitation works, the limitation of the

[466] See article 223(3) of the Code.

principal penalty entails the limitation of secondary penalties or measures. Such limitation further applies to the confiscation of property related to the fine as well.[467]

As far as the calculation of ordinary period of limitation is concerned, article 225 of the Code makes the following stipulation. The period starts running from the day the sentence has, being final, become enforceable. If enforcement has already commenced but it is interrupted becausethe convict has evaded it, the calculation begins from the date of the evasion. If the execution of the sentence is interrupted becausethe convict has been granted suspension but the suspension is revoked for whatever reason, the period of limitation starts running from the time the resumption of the execution of the sentence has been ordered. In the case of concurrent crimes, the calculation of the period of limitation depends on the calculation of period of limitation for the most severe penalty.

Another point worth considering pertains to the stoppage of the running of period of limitation. The operation of period of limitation may be stopped under two circumstances: when there is suspension or interruption. First, the limitation of penalty or measures will be suspended if:[468]

a. the penalty or measure cannot be carried out or continued under the provisions of the law as long as such impediment subsists;
b. the convict enjoys the benefit of suspension or probation or was granted time for payment;
c. the convict is imprisoned pursuant to a penalty entailing loss of liberty or an order of measure.

For example, if penalty or measure cannot be executed becausethe convict is seriously sick although the illness was caused deliberately to avoid the penalty or measure, period of limitation will not run against the enforcement of such penalty or measure. If it has started running, it will be suspended until such time that the person becomes fit to serve his sentence. Moreover, the running of period of limitation will be suspended if the convict is on probation or released on condition. In this case, action has been taken against him although the type of action is not strictly speaking the same with imprisonment. Further, if the convict is already serving another sentence or is detained in accordance with law, then, his period of limitation cannot run becauseit may not be possible to executed another penalty or measure against him simultaneously in as long as the imprisonment continues.

[441] Article 223(2) of the Code.

[468] Article 226, Criminal Code.

Second, the running of period of limitation will be stopped if it is interrupted. Article 227 instructs that limitation shall be interrupted by any act for the enforcement, or aiming at the enforcement, of the penalty performed by the authority responsible for such enforcement In other words, if the process to execute the penalty is set into motion, the period of limitation that has commenced running will be interrupted. But such process will interrupt the limitation only if it is taken by the authority responsible for the enforcement of the penalty. For example, if the court that has sentenced a criminal to jail term some time later issues warrant of imprisonment, such measure can be taken as an appropriate order capable of interrupting limitation period since no one can be imprisonment without court warrant to that effect Hence, to some extent courts are also responsible for the enforcement of penalties. On the other hand, if the warrant was already given but the executive organ has not yet taken measure to enforce the penalty or measure, the limitation will be interrupted as soon as measure for or aiming at the execution of the sentence is taken. But one may question how far this measure should go to interrupt the limitation. For instance, should an act aiming at enforcing sentence of imprisonment be notified to the convict to be able to interrupt the limitation with regard to such penalty? Or, does it suffice if the responsible organ makes some sort of efforts to start enforcing the sentence?

With regard to absolute period of limitation, article 228 of the Code states that the limitation of penalty or measure shall in all circumstance be final when the ordinary period of limitation discussed before is exceeded by *one half mt* when, during this period, the criminal showed that he is dangerous by committing an intentional crime punishable with at least rigorous imprisonment. Put differently, if a given penalty or measure is not enforced during the ordinary period of limitation, it will be barred by limitation. However, the running of ordinary period of limitation can be stopped either by suspension or interruption. However, the running of absolute period of limitation cannot be stopped by these facts. Thus, if the ordinary period of limitation for the execution of a given penalty is ten years, its absolute period of limitation is 15 years (ordinary period of limitation plus half of this limitation) regardless of any suspension or interruption during this period and such penalty cannot be enforced after the expiry of fifteen years as it has already become finally non-enforceable.

Although absolute period of limitation is not subject to stoppage as a result of suspension or interruption, there still is a factor that can stop its running. Such factor is imputable to the convict himself. If the convict manifests his dangerousness by committing another crime before the absolute period of limitation becomes operative, the running of such period of limitation can be interrupted. But, the crime has to be intentional and it must entail rigorous

imprisonment to stop the running of absolute period of limitation. Accordingly, if the convict commits a crime by negligence while absolute period of limitation is running a crime, the running of absolute period of limitation will not be stopped. Likewise, if the crime committed is intentional but it does not entail rigorous imprisonment or the crime is justifiable or excusable, the running of the limitation period will (and should) not be stopped.[469]

3.8.2.3 Pardon

Pardon, in relation the execution penalties or measures, refers to an act of exonerating a person or group of persons from the consequence of committing crimes. The obvious consequence of committing a crime is criminal punishment and a person who is pardoned will not be punished. Or, if his punishment has begun, it will be interrupted or discontinued. But why is pardon given to someone convicted of committing a crime? It is argued that pardon may be granted fully or partly and full pardon serves two purposes: remedying miscarriage of justice and removing the stigma of a conviction (and disabilities entailed).[470] But unlike amnesty which implies the abolition of the offence committed, pardon implies only forgiveness.[471] In one case, the following points were made in relation to the effect of pardon. Pardon restores civil rights and terminates legal consequences flowing from the conviction, but the record of guilt cannot be obliterated. Even a presidential pardon with a recital of the belief that the offender was innocent will not eradicate the judicial finding of guilt Although pardoned, one is still a convicted criminal becausethe executive has no power to direct the judiciary to forget the fact of the prior conviction; it is a record of the court that cannot be erased or blotted ouL[472]

The bottom-line is pardon does not entail the eradication of the crime committed but it simply brings about forgiveness for the crime committed. Hence, if a convicted criminal is serving his sentence, the enforcement of the sentence will come to an end if he is fully pardoned. Then, he will be treated as though he had served his sentence fully, not as someone who has never committed a crime, whether or not he has started serving his sentence.

In Ethiopia, too, pardon can be granted and the main purpose of granting pardon is to ensure the welfare and interest of the public.[473] For instance, article 229 of the Criminal Code states

[469] What is the justification of not letting a dangerous convict benefit from absolute period of limitation?

[470] *Amnesty and Pardon-Clemency Powers in the Twentieth Century,* available at I Pardon-Clemency-powers-in-twentieth-century.html, accessed on 17 July 2008.

[471] Ibid.

[472] *People vs. Carlesi* 154 App. Div. 481,139 N.Y. Supp. 309, (1914), *Miami law Quarterly,* 'Criminal Law-Pardons- Habitual Offender Laws', p 148.

[473] Article 11 of the Procedure of Pardon Proclamation, Proclamation No. 395/2004.

that *unless otherwise provided by-law, a-sentence way be remitted in whole or in part or commuted into a penalty of a lesser nature or gravity by an act ofpardon ofthe competent authority.* Moreover, it provides that *pardon may apply to all penalties and measures whether principal or secondary and whatever their gravity, which are enforceable.* As one can see from this stipulation, the effect of pardon in our criminal system is wide. First, the Code states that it can be granted in whole or in part. Second, it may be granted to remit or cancel penalty in whole or in part or to mitigate or commute the penalty imposed to a lesser penalty. Therefore, full pardon that is granted to remit penalty or measure has the ability to abort the execution of a penalty or a measure if it is already underway, or to prevent the commencement of its execution if it has not yet begun.

Interestingly, as the previous excerpt reveals, pardon does not entail the abolition of the crime committed even when it is granted in full. The Criminal Code also takes the same stand. Under article 229(2), it provides that *pardon shall not cancel the sentence the entry of which shall remain in the judgement register of the criminal and continues to produce its other effects.* Accordingly, pardon does not make a pardoned criminal innocent but only relieves him of his criminal liability. As a result, if he commits another crime in the future, his record in relation the crime for which he has been pardoned can be used to assess his sentence for his new crime or to treat him like a habitual offender.[474]

3.8.2.4 Amnesty

The term *amnesty* comes from Greek word *amnestia* which means *obh'vion.* As such, it refers to a legislative or executive act by which a state restores those who may have been guilty of an offence against it to the position of innocent persons. Indeed, amnesty is more than pardon in as much as it obliterates all legal remembrances of the offence.[475]

In international law, amnesty refers to an act of effacing and forgetting past offenses granted by the government to persons who have been guilty of neglect or crime. The term is applied to rebellious acts against the state. Amnesty differs from pardon in that amnesty causes the crime to be forgotten, whereas pardon, given after a conviction, exempts the criminal from further punishment Amnesty is usually granted to a class of criminals or group of persons who may have committed a crime and is offered in order to restore tranquility in the state.[476]

[474] In Ethiopia, who does have pardoning power? Can the office of prime minister give pardon? What about the President? Parliament' Council of Misters? Courts? Can pardon be granted in relation to all kinds of crimes? See article 28 of the FDRE Constitution and articles 3,4 and 10 of the Procedure of Pardon Proclamation, Proclamation No. 395/2004.

[475] Amnesty, available at http://en.wikipedia.org/wiki/Amnestv. accessed on 17 July 2008.

[476] Microsoft Encarta Encyclopaedia Deluxe, 2004.

Therefore, in the expression of Blackstone, amnesty is an act that makes a criminal a 'new man'. It is an act that changes or cleans the past Nothing in relation to the offence committed is to be remembered in the future. If there are criminal records available in relation to those who are granted amnesty, those records will be erased, rendered valueless or void. So, for all practical purposes and in the eyes of the law, a criminal who has been granted amnesty will be treated as though he had never committed the crime in respect of which the amnesty is obtained. But one may wonder why amnesty is granted to criminals. Indeed, there are different reasons why amnesty is granted. First, it may be granted when the authority decides that bringing citizens into compliance with law is more important than punishing them for past offences. Second, amnesty avoids expansive prosecutions especially when massive numbers of violators are involved. Third, it promotes violators to come forward who might otherwise have eluded authorities. Fourth, it promotes reconciliation between violators and society. Fifth, in countries like France, amnesty may be granted to reduce prison populations.[477] These are some of the purposes to be served when amnesty is promulgated or granted to 'criminals'.

The Criminal Code provides for the possibility of granting amnesty by making the following stipulations under article 230.

> (1) Unless otherwise provided by law, an amnesty may be granted in respect of certain crimes, or certain classes of criminals, either absolutely or subject to certain conditions or obligations, by the appropriate competent authority, when circumstances seem to indicate that such a measure is expedient.
>
> (2) . . . . .

When a sentence has been passed an amnesty cancels it as well as all its other consequences under criminal law. The conviction shall be presumed to be non-existent and the entry deleted from the judgement register of the criminal. Pursuant to the first sub-article, in principle, amnesty can be granted by competent authority to certain criminals or in respect of certain crimes. Such grant can be conditional or unconditional. However, there are certain criminals or crimes in relation to which amnesty cannot be granted. For instance, criminals who commit crimes against humanity cannot be granted amnesty. Thus, crimes against humanity such as genocide, torture, slavery, forced disappearance, summary execution, etc. are crimes in respect of which amnesty cannot be promulgated.[478]

,7; *Amnesty,* available at http://en.wikipedia.ori; wild'Amnesty, accessed on 17 July 2008, *Amnesty and Pardon-Clemency Powers in The Umtieth* /ivitoTmentioned before

[478] See article 2S of the Constitution. Who is the competent authority to grant amnesty? Can the House Peoples Representatives pi oaiigatc amnesty? What about the Council of Ministers[7]

The second sub-article of article 230 regulates the effects of granting amnesty. As it can be understood from the provision, amnesty has a sweeping effect If granted, amnesty turns the clock back and makes things that have happened non-existent After all, the conviction of a person who is granted amnesty by itself will be presumed to be non-existent and its entry into the judgement register of the criminal Wilfhe deleted. This means, if sentence is passed against such person and its execution is underway, the execution of such sentence should come to an end immediately. If its execution has not commenced, it will never be enforced becausenforcing the sentence against a person who has been granted amntsty is as good as, in the eyes of the law, punishing an innocent person. Therefore, if a person who is granted amnesty in relation a given crime commits another crime, he will be treated as though this crime was his first crime. Hence, he will not be regarded as a recidivist since nothing exists in relation to him in the judgement register of the criminal.

3.8.2.5 Parole

As discussed before, parole can be granted to some criminals who can fulfill the requirements attached thereto. When it is operative, parole has the effect of discontinuing the enforcement of penalty. However, at the beginning, unlike other grounds, parole discontinues the execution of penalty only temporarily. Such discontinuance will become permanent only after some time and on condition that the parolee effectively undergoes his period of parole. Therefore, parole, if effectively undergone, has the effect of discontinuing the enforcement of penalty (imprisonment) like the other grounds discussed before such as pardon.

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Exit Exam Questions with their Model Answers
A. Public Laws 2004 E.C (2011/2012) Academic Year

The following arc the Criminal Law questions taken from 2004 EX. (2011/2012) Public Law Exit Examination Paper. The choices underlined are the answers to the questions in the multiple choices and matching parts. For
the other questions, model answers are given next to the questions. These models answers are meant to indicate
the minimum points that should be raised to answer the questions.

Part I. Multiple Choices (25%): Choose the best answer for each question from lhe alternatives given. Note that there is only one best answer for every question.

1. Identify the method that the Criminal Code allows to be used to prevent the commission of crimes.
   A. Giving appropriate warning about the behaviours that constitute crimes.
   B. Subjecting criminals to appropriate penalties.
   C. Explicitly stating the possible criminal sanctions the commission of crimes would entail.
   D. Applying corrective and/or protective measures. E. All.
2. Which one of the following is true about punishment under the Criminal Code?
   A. It could be used before due notice is giving to persons about crimes and their consequences.
   B. It can serve the purpose of particular deterrence.
   C. It may not be used to frighten the public.
   D. It does not serve any rehabilitative purpose. E. None.
3. Which one of the following choices is wrong about causation?
   A. A cause in law is necessarily a cause in fact.
   B. The ***sine qua non*** theory of causation recognizes concurrent causes as causes of a given criminal result.
   C. The adequate causation theory does not regard as a cause an event that unusually produces a criminal result.
   D. The fulfillment of the causal element is not relevant for the operation of criminal law in relation certain crimes. E. None.
4. Select the choice that correctly explains criminal negligence.
   A. Criminal negligence shows the commission of a mistake on the side of the criminal.
   B. In relation to major crimes (Special Part or Part II Crimes), negligence does not, in principle, entail punishment.
   C. Negligence represents a lower degree of criminal guilt.
   D. In relation to petty offences, negligence is, in principle, punishable. E.A1I.
5. The determination of the degree of individual guilt requires the consideration of all but one of the following factors.
   A. Age of the criminaL C. Nationality of the criminal
   B. Level of education of the criminal. D. The gravity of the crime committed LNone.
6. Robbery is different from theft in that:
   A. it involves abstracting other's property.
   B. it could he committed with the intent to get unlawful enrichment
   C. it could be committed to enable a third party to obtain unlawful enrichment.
   D. it involves violence or intimidation. E. AIL
7. Which one of the following penalties does not apply to petty offence?

Part II. Matching (10%): Choose the best match for the items under A from the items under B. There is only one best match for the items under **A** from the items under **B.**

A. B.

Q.10. Infancy..... C. Immunity from criminal responsibility

Part IV: Essay Questions (20%)

1. Write a short essay on the concept of ***prohibition of double jeopardy*** in light of the Ethiopian legal system. 10%: While writing this essay, you must raise the points in the following paragraph. The principle dictates that no person could be tried and punished for the same criminal act more than once. This is a generally accepted principle of criminal law. In Ethiopia, it is recognized in the Constitution (art. 22) and the criminal code (art. 2(5)). But, this prohibition has got an exception. According to article 16 of the criminal code, a criminal who is subject to Ethiopia's principal jurisdiction and who was tried and punished aboard may be tried and punished again on the same charge in Ethiopia if he is found in Ethiopia or extradited to it. **Part V: Cases (30) Case II: (20%)**

Yonas, a married man with two children, is a well-known businessman residing in Jimma. He frequently travels to Addis and Hawassa due to the nature of his business. This enabled him to install concubines both in Addis and in Hawassa. Hence, he spends his time with Aida when he is in Addis and with Helen when he is in Hawassa. His wife does not bow about these facts. However, Aida knew that Yonas was a married man. However, it was only recently that she came to know about his affairs with Helen in Hawassa. She was angered by the fact and started looking for Helen's address. Thanks to technology, Aida got Helen's address, including phone number, from the facebook. About two weeks ago, she called and told Helen that Yonas is her husband and warned her to quit her affairs with him. Surprising, Helen also told her that Yonas is her Husband, loo, and asked Aida to stop her affairs with him. The phone conversation ended with terrible conclusion where Aida warned Helen to face serious consequences if she chose to continue the affairs and refused to do what she was told to do. Helen paid deaf ears to the warning and in fact continued her affairs with him. This led Aida to go to Hawassa and look for Helen. After two days, she discovered the residence of Helen. The next day, Aid went to Helen's house and started waiting for her to come out. When the unsuspecting Helen emerged from her house, Aida started moving towards her. Helen recognized that it was Aida becauseshe saw her picture before and Aida was her eighth grade classmate. As she was moving towards Helen, Aida was calling her, "you stupid prostitute! You refused to heed my warnings and 1 am here to kill you now! Call that stupid man to save you!" Helen could get back and close her door but she found that ignominious as many people were standing around and watching the drama. So, she stood her ground and waited for the angry Aida to come closer. As she was approaching, Aida was putting her hand into her purse which led Helen to believe that she was taking out a gun. Then, Helen did not want to waste time; she quickly took out her gun and shot Aida on her lower left leg. After receiving the shot, the bold Aida fell on the ground and started crying like a baby and calling for help. In matters of five minutes, three police officers arrived at the scene and arrested Helen. Aida was then taken to a nearby hospital where she is now receiving a medical treatment

a. If Helen is charged with causing intentional bodily injury to Aida, **what possible defence could she raise?7%** Your answer to this question must include the following points.

She can raise legitimated defence (self-defence) because, according to article 78 of the Criminal Code, everyone can defend himself against an unlawful attack or an unlawful threat to attack. Helen can

that there was a threat to attack which was unlawful and imminent as Aida was getting closer to inflicting harm on her and she used a means that was proportionate to the needs of the case to avert the threat **b. If you were the public prosecutor handling the case, what possible argument could you present against Helen's possible defence? 8%** Your answer to this question must include the following points.

Helen did not have the right to defend herself under the circumstance. This is so becausethe right to self- defence exists, according to article 78 of the Criminal Code, only as a last resort, whereas Helen's action was not a last resort action. She chose to shoot Aida while she could have averted the danger by retreating as required by article 78 of the Code. She could have gotten back home and called the police to avert the danger than taking the law into her hands and shooting the lady. Therefore, Helen's action amounts to excess of legitimate defence, according to article 79 of the Criminal Code, not legitimate defence according to article 78. **B. PUBLIC LAWS 2005 E.C. (2012/2013) ACADEMIC YEAR** The following are the Criminal Law questions taken from 2005 E.C. (2012/2013) Public Law Exit Examination Paper. The choices underlined are the answers to the questions in the multiple choices and matching parts. For the other questions, model answers are given next to the questions. These models answers only show the minimum points that should be raised to answer the questions.

Part I. Multiple Choices (25%): Choose the best answer for each question from the alternatives given. Note that there is only one best answer for every question.

1. One of the following is not true about the purpose punishment under the FDRE Criminal Code. A. Deterring criminals from committing further crimes.

6. Using criminals as means to give lesson to the public that criminal behaviours are not tolerated.

C. Facilitating the rehabilitation of criminals.

D. Showing criminals that they deserve penalties for their legal conducts. E. None.

2. In order to invoke the defence of necessity, the defendant has to explain to a court that:

A. he was forced by another person to take the action he took.

B. he was obeying the order of his superior.

C. he was forced to take the measure he took by the force of nature.

D. though it was not intended, his action averted a more serious and imminent danger.

E. C and D.

3. Which one of the following could be regarded as a special crime under the Criminal Code?

A. Theft. B. Terrorism C. Incest D. Espionage E. None

4. In Ethiopia, if a judge decides to impose death penalty on a criminal who is charged for the commission of concurrent crimes and the death penalty is necessitated becauseof the seriousness of one the crimes, which one of the following systems of calculating penalty can best justify the judge's sentencing?

A. The System of Aggravation. C. The System of cumulation/adding-up.

B. The System of Absolution. D. All L A and C

Part II. Matching (10%): Choose the best match for the items under A from the items under B. There is only one best match for the items under A from the items under B. _A _B

1. Instigation ..... L. Convincing a person to commit a crime
2. Accessory after the fact ..... G. Crime against the administration of Justice

Section V. Cases (30%): Read the following cases very carefully and answer the questions which follow them. Case I: (15%)

Getahun is the head of the Yeka Sub-City of Addis Ababa City Administration. He has been at the post for the last 7 years. Indeed, he is one of the most diligent heads of the sub-cities in Addis Ababa. Consequently, the clients and workers of the Sub-City respect him a lot On the other hand, Getahun is a highly corrupt public official. Indeed, there is ample evidence that shows his engagement in corrupt practices, in particular, receiving bribes from the clients of his Sub-City. It is, however, interesting to note that he does not receive the bribes by himself. Instead, he uses two ***Lada*** (a small taxi) drivers who work around the Sub-City. In fact, these two drivers are the ***liaison*** between Getahun and the clients giving bribes (otherwise called ***corrupt client%*** Without them, it is difficult for Getahun to get his bribes. Equally, without the help of the two drivers, it is difficult for the ***corrupt clients*** to get to Ato Getahun with their bribes. For the drivers, they receive 15% of the bribes as a commission for their work. In any case, with the available evidence, it is clear that Getahun could be prosecuted for committing the crime of corruption. In this regard, the concerned public prosecutor, a lady with three years of experience as a prosecutor, has completed her preparation to charge him in the coming two weeks. However, she is not sure for which crime to charge the two drivers; that is, **corruption** or **accomplice**. As a result, she approaches her boss for advice on the matter. If you were her boss (and also a senior prosecutor), which crime would you advise her to charge the drivers for? (15 %) **Your answer to this question must include the following points.** • The more probable crime committed by the drivers is corruption. Thus, she has to :harge them for

corruption becauseof the following reasons, o Corruption is **a special crime** which cannot be committed by any person. In the case at hand, it is only Ato Getahun who **materially** committed corruption becausehe is a **public official**. So, the drivers did not **materially** commit corruption simply becausethey were not public officials, o However, article 33 of the criminal code allows prosecuting a person who cannot commit a special crime as a principal offender if he **fully participates** with **full knowledge** and **intent (desire)** in the commission of such crime, o In the case at hand, the drivers knew what they were doing and in fact they wanted it to exist because

they were somehow deriving benefit from the commission of the crime, o Thus, the fact that they were **fully participating**, with **full knowledge** and **intent**

(desire), in the commission is indubitable, o As a result, the lady can prosecute the two drives, as per article 33 of the Code (together with article

408 of the Criminal Code), for the same crime with Getahun; i.e., corruption, o On the other hand, they should not be charge for accomplice becauseaccomphce does not require **full participation**, with **full knowledge** and **intent (desire)**, in the commission of a crime. It only requires **giving assistance** to enable a criminal to commit a crime. In the case at hand, the drivers went way beyond giving assistance to Ato Getahun. They really are part of the crime. That is why the more likely crime for the two drivers is corruption, not accomphce.

Note: Any answer that provides for charging the drivers for crimes other than corruption or accompli'" is not acceptable becauseyou are not asked to give advice on crimes other than corruption and accomplice, ltimd you, you could be right if you indicate that the relevant crime to charge the drivers with is neither corruption nor accomplice but you must stick to the instructions.