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AN INTRODUCTION TO ETHIOPIAN PENAL LAW

(Arts. 1-84 Penal Code)

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FOREWORD

Since there is hardly any sphere of human activities with which criminal law is not directly or indirectly connected and since, as stated by Portalis, *"les lois pinoles ou criminelles sont fnoins une espece particuli&rc de lois que la sanction de routes les autres*", penal prescriptions are essentially relative; not only are they seldom laid down once and for all. but when they are amended, they are seldom amended in isolation, that is, independently of amendments in '•all other laws". Criminal laws do indeed reflect the conditions generally prevailing in the country where they apply, and they necessarily change, therefore, if substantial modifications occur in the rules, legal and others, by which such country and its inhabitants live.

Some ten years ago, th< need was felt to adjust Ethiopia's legislation to what the Preface of the new Penal Code calls "the complexities of modem life". Consequently, new law? have recently been enacted, in particular civil and commercial laws, which, to quote again the said Preface, respond to "the influences, not only juridical, but also social, economic and scientific which are in the process of transforming the nation" and are also intended to pave the way tc further progress in Ethiopia. This made it necessary to specify which of the rules that would hence apply were so essential that the nation as a whole was determined to see that they be observed and that action be taken against those who would fail to comply. Furthermore, as the codification task above all aimed at bringing about new ways of life, it was equally important generally to ensure, in the terms of the same Preface, "that legislative prescriptions may have the efficacy intended for them as regulators of conduct." Obviously, the success of this venture to a large extent depended on what criminal law could contribute to the accomplishment of the objectives which Ethiopia was set on attaining. At the time, Ethiopian criminal law was mainly contained in the Penal Code of 1930 as supplemented by subsidiary legislation published in the Official newspaper (Negarit Gazeta). But, considering how much Ethiopian conditions and legislation had changed in the past thirty years and how much more they were expected to change in the future, the 1930 Penal Code was clearly no longer adequate, and it appeared that the efTorts made in all other fields might be wasted unless further and better provisions were made in the criminal field.

From there on, the question was whether merely to revise the 1930 Code or to replace it. If it was replaced by the new Penal Code promulgated on July 23, 1957, and put into force on May 5, 1958, it is for technical reasons which the above-quoted Preface describes as follows: "New concepts, not only juridical, but also those contributed by the sciences of sociology, psychology and, indeed, penology have been developed and must be taken into consideration in the elaboration of any criminal Code." The Code of 1930, which represented the first consistent endeavour to unify and to systematize Ethiopian traditions in criminal matters, combined customary with comparatively more modern notions, as it drew its inspiration both from the well-known XITlth century Law of the Kings (Fetha Negast) and from the then in force, if not always the more advanced, European Penal Codes. It is not surprising therefore, that the 1930 Code, though it marked a step forward in the legal development of Ethiopia, should have been rather far from satisfactory even at the time of its enactment. Casuistic and lacking in general principles, it showed too many and deep traces of the ancient and formalistic conception of the criminal law with regard in particular to attempts, participation, excuses, aggravating and extenuating circumstances, the imposition of fines, the punishment for injuries to persons. It was also incomplete or out of date in matters such as criminal responsibility and guilt, the treatment of juveniles and habitual offenders, probation, and the like.

A revision of the 1930 Penal Code, albeit possible, would have given rise to numerous difficulties. Moreover, what would have come out of it would probably have been so close to an entirely new Code in spirit, method and substance (just as the so-called Revised Ethiopian Constitution actually is a new Constitution) that it appeared more convenient to legislate from beginning. This, however, did not mean that Ethiopia would be satisfied with a law which would be no more than a copy of the best foreign Codes. When convening, on

March 24, 1954, the Codification Commission which was to co-operate with the drafter of the Penal Code (Professor Jean Graven, of the University of Geneva, Switzerland), Hil Imperial Majesty Haile Selassie I made it quite clear that if the new Code were to serve any purpose at all, it had to be truly Ethiopian and to be based on "the genius of Ethiopian legal traditions which have origins of unparalleled antiquity and continuity". From where the draftsman was to derive his inspiration, His Majesty also made it clear by recalling that "although Ethiopia claims what is perhaps the longest-standing system of law in the world, we have never hesitated to adopt the best that other systems of law can offer, to the extent that they respond and can be adapted to the genius of our particular institutions." Thus, the new Code would resemble the former one insofar as it would incorporate such rules as were successfully applied outside Ethiopia and as were compatible with Ethiopian tradition, while at the same time preserving such customary rules as it was desirable to retain.

The main national and foreign sources which have been made use of with a view to achieving the combination that was required are the Fetha Negast, the 1930 Penal Code and the subsidiary legislation published in the Negarit Gazeta, on the one hand, and the Penal Codes of Europe, on the other hand. Regard has been had firstly to the Fetha Negast, which con* tains several prescriptions of a penal nature. It is obvious that, by reason of its antiquity and the fact that it was not so much a law as a collection of moral and religious principles to be observed by Ethiopian Christians in their daily life, the Law of the Kings could not directly influence the contents of the Code which was being prepared. Yet, therein lay the source of Ethiopian legal tradition and therein could be found a number of fundamental precepts which, owing to their permanent value, had to be borne in mind in the drafting of an Ethiopian Code. The Code of 1930, too, was carefully consulted for, despite its imperfections, it usefully illustrated how the transition from ancient to modem criminal law could be effected. Being partly Ethiopian and partly Continental, it showed which customary rules had been deemed indispensable and which modem rules had been deemed acceptable in 1930 and, as such, served as a springboard for a further jump forward. Finally, all subsidiary legislation containing penal provisions enacted since 1942 was also taken into consideration because the Codification Commission proposed to incorporate the said provisions in the Penal Code and had, therefore, to list the various matters with respect to which punitive clauses were required.

In addition to these national sources, foreign sources have been resorted to, and among them European Penal Codes. This choice can be explained by recalling that there was no intention completely to upset Ethiopia's legal traditions, of which the Continental law formed a part to the extent that it had already influenced the 1930 Penal Code, the Preface of which stated that "because the basis of our code of laws in many places fits in with the European Code, we have, without changing the law which has been in the country up to now, harmon* ised the two". This is not to say that Anglo-Saxon law, which in any event could not readily serve as a model, has been disregarded altogether; quite the contrary, it has inspired the solutions adopted, *e.g.* with regard to juveniles, suspended sentences and probation. However, its impact on the new Code is not comparable with that of European Codes, in particular the Italian (1930), Swiss (1937), Greek (1950) and Yugoslav (1951) Penal Codes. The Swiss Code has been given special attention, not only because of the deep and lasting influence it has had in and outside Europe and because it ranks among the most recent Codes as it was partially revised in 1950, but also because it was drafted to apply to conditions somewhat similar to those in Ethiopia (diversity of people, languages and legal traditions). Certain provisions of the Ethiopian Code either are directly derived from the Swiss Code or incorporate views expressed by Swiss courts and legal writers. This is why, in the fields where there exists an unmistakable resemblance between Ethiopian and Swiss solutions, the said Swiss Code, judgments and literature have been quoted rather extensively in these comments on the Ethiopian Code, for they may contribute to the better understanding of the latter Code and guide the courts in applying it. (Incidentally, most of the judgments quoted hereinafter are those which the Swiss Federal Court gave before 4957 and which were known,

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therefore, lo the drafter of the Ethiopian Code. As such, they could obviously not be ignored. In some instances, however, reference is made to judgments given after 1957 but which seem particularly relevant because the Swiss Federal Court, when called upon to settle doubtful points, derived from Code provisions a number of rules which are in the logic of the system and consistent with the spirit of the Code. Since the need to settle similar points will sooner or later arise in Ethiopia, it was felt that Ethiopian lawyers might be interested to know how provisions similar to those of their own Code had been interpreted in a country the Penal Code of which bears so much resemblance to the Ethiopian Code.) Extra-European legislation has been utilized also. Since the new Code was to take "new concepts" into account, such as those of "social defence" and "*redoutabiliti",* regard had to be had to the laws which had already incorporated the said concepts, mainly the laws of Latin America. As for African laws, they had not much to offer; insofar as they were not a mere copy of the laws of the colonial powers, they were inspired by traditions bearing little resemblance to those of Ethiopia.

What has come out of the draftsman's work, of the Codification Commission's discussions and of parliamentary debates is a Code of a Continental type which is neither too conservative nor too progressive. The law-maker went further than his predecessor in that which concerns incorporating "the contributions of the most significant systems of jurisprudence in the world of today", though he resisted the temptation of being modern at any cost. On the other hand, he did not go as far as his predecessor in that which concerns preserving "venerable and well-established legal traditions", though he did away only with such customary rules as were, according to Ethiopian estimations, unlikely to serve, or possibly susceptible of defeating, the purpose of the codification, which was "to provide a fresh impulsion to the forces of progress, justice and humanity".

So far as concerns the form and arrangement of the new Code, the Codification Commission at the outset expressed certain wishes with which the drafter has endeavoured to comply. Firstly, the Code ought to be complete and. unlike so many laws which take for granted a number of principles because they arc defined in the literature or in judgments, it should omit nothing that might be necessary to its proper understanding and application. For a course which may be taken in countries where there are anciently codified laws, precise law reports and an abundant legal doctrine, would be dangerous in Ethiopia where statutes are recent, judgments for the most part unpublished and the literature almost non-existent. Therefore, nothing has been deemed to be a matter of course. But, although no basic principle has been left out, several details have been dispensed with so as to give effect to the Commission's second wish, which was that the Code should be clear. It is evident that a Code, however complete, cannot provide for everything, not only because it will then be exceedingly complicated. but because allegedly exhaustive provisions inevitably miss something and soon require amendment. Consequently, the Code docs not enumerate, *e.g.* all the means whereby an offence may be committed, but constantly makes use of so-called general clauses. *i.e.* it sfcts out the principle and illustrates it in a non-exhaustive manner. This is true of most of its provisions, whether or not of a purely penal character; for instance, in matters such as extradition, enforcement of sentences, probation, and the like, the essential rules are laid - down, but for the modalities of application one is referred to subsidiary legislation. Finally, the Commission expressed the desire that the Code be written in a language as simple as possible so as to avoid ambiguities and be accessible to everyone, layman and scholar.

As for its method, since nothing in Ethiopia's legal traditions required that distinctions be made between felonies and misdemeanours, or between "*crimes*" and *"delits",* the 1957 Code follows the so-called bi-partite classification of offences which permits laying down principles applicable to all offences, regardless of the kind or term of punishment they carry or of the court by which they are triable. The Code accordingly deals with serious offences (Arts. 1-689) and petty offences (Arts. 690-820).

The provisions concerning serious offences are either general or special and are respectively

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contained in the General Part and the Special Part of the Code. A similar division will be found with regard to petty offences.

The General Part sets out rules common to all serious offences and explains what is meant by a criminal offence, irresponsibility, criminal intention or negligence, imprisonment, probation, limitation, and the like. The Special Part describes the various acts which are deemed to be criminal and lays down the penalties applicable thereto; it defines the elements of offences such as murder and theft, as well as the fate awaiting a murderer or a thief. However, the said penalties may not be ordered unless the conditions prescribed by the General Part with respect to liability to punishment are fulfilled. In other words, the Special Part does not stand by itself but has to be considered together with the General Part, fora person who behaves in a manner contrary to a provision of the Special Part is not as of right punishable; he is so punishable only where he is found guilty in accordance with the General Part. Furthermore, where the liability to punishment is established, one cannot merely impose the punishment mentioned in the pertinent Article of the Special Part. Since those who administer justice are not dealing with offences as much as with offenders, or with cases as much as with human beings, they are expected to individualize their decisions. To this end, they must bear in mind the provisions of the General Part, for these provisions, more than those of the Special Part, will enable them to arrive at a decision truly reflecting the circumstances of each individual case. For instance, where the Special Part prescribes that a given offence is punishable with three years imprisonment, it does not mean that whoever commits the said offence should be punished by three years. Therefore, in order to decide whether, in a particular case, imprisonment should be ordered for three years, or for six months, or at all, the court, of necessity, has to make reference to the General Part. Moreover, as any action taken under the law must serve the purposes of the law, those who administer justice will have to satisfy themselves that their decisions are really capable of achieving these purposes as defined in the General Part.

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CHAPTER I

GENERAL PRINCIPLES REGARDING THE APPLICATION OF THE CODE

[ARTS- 1—4]

Article 1. Object and purpose

The purpose of criminal law Is to ensure order, peace and the security of the State and its inhabitants for the public good. It alms at the prevention of offences by giving due notice of the offences and penalties prescribed by law and should this be ineffective by providing for the punishment and reform of offenders and measures to prevent the commission of further offcnces.

Provisions similar to Art. 1 are not commonly found in other Penal Codes, for it is often assumed that the purposes of a law can be deduced from the law itself and need not be specifically defined. However, it has been experienced that this assumption, which may be correct insofar as it applies to the purpose of a law, does not always hold good when it is extended to the means whereby the said purpose should be achieved. For inasmuch as *"les besoins et les idies du milieu et du moment determinent la politique criminelle selon laquelle I'organisation de la repression se diveloppe"*, some incoherence in the treatment of offenders will almost inevitably arise if there does not exist a minimum of consistency in the "criminal policy*' of a nation and if the courts are to be guided solely by their own conception of what ought to be done to fulfil the aims of the law. Given two identical cases tried, one by a court which would think more in terms of punishment, and the other by a court which would think more in terms of protection or correction, the decisions in each case are likely to be quite different, this difference being ultimately attributable to the absence of directive principles in the law regarding what steps can best serve its purposes. By describing the objectives of criminal law and how they are to be accomplished, Art. 1 precisely aims at eliminating this risk of uncertainty, which is all the more to be feared when a new law is enacted. As the draftsman noted in the *Expos* des Motifs* submitted to the Codification Commission: *"Les codes modernes ne visent plus uniquement A chdtier et intimlder; tls ouvrent des perspectives de prevention, de corrк ction et de reeducation sociale* (. . .). // *appar ait tris opportun que ces objectifs soient expressement inscrits en tSte de la lot qui les consacre. Dans un pays ou, par antique tradition, le droit penal est avant tout expiatolre et intimidant, la vue nette de son orientation novatrice est essentielle pour la saine application et Vefficaclte du present Code."*

There seems to be no question today that the main function of the criminal law is to preserve a certain amount of order and peace without which no human collectivity can exist. By stating that penal prescriptions are intended to ensure such order and peace "for the public good". Art. 1 indicates that the criminal law is not primarily concerned with the protection of private rights but with the protection of society at large. As such, it regulates the behaviour of human beings in their capacity as members of a group more than as individuals and, in order to determine what a person should or should not do, it considers whether and how the whole group may be affected by the deeds of this person. Insofar as the peace of the collectivity firstly depends on the amount of peace enjoyed by each of its members, the criminal law contains provisions designed to ensure that this individual peace is not disturbed; if it penalizes attacks against private interests, it is only to the extent that, in addition to causing individual harm, they are a source of public disturbance and destroy or call in question the peace of the collectivity. But the "order, peace and security of the State'* actually exist independently of the order, peace and security eruoyed by the citizens, and are protected as such. For, if the security of the State depends on the security of its

inhabitants, the contrary is equally true. Therefore, apart from penalizing attacks against private rights because they endanger the security of the community, criminal laws also penalize attacks against the community because they endanger the security of its members even though no individual is in direct or immediate jeopardy. Thus, from whichever angle one looks at them, penal prescriptions aim at protecting society and are, in this sense, purely utilitarian.

How does the criminal law achieve its protective purposes? This question is answered in the iiecond alinea of Art. 1.

Inasmuch as the preservation of public order depends upon the compliance with certain rules, these rules have to be made known. Accordingly, the Penal Code gives "due notice of tho offences". It informs the citizens of how they are expected to behave and calls their attention to the rules the infringement of which is deemed contrary to the general interest; furthermore, by stating that ignorance of the rules is no defence to an infringement thereof, it supposes that everyone is aware of the existence and meaning of such rules. But the Penal Code also gives "due notice of the penalties". Penal prescriptions differ from moral prescriptions by reason of the immediate and tangible consequences which follow if they are not observed. Since knowledge of the law and respect for the law do not necessarily go together, and since human beings are not by nature law-abiding or responsive to considerations of public interest, respect for the law is ensured by sanctioning violations of the law. Therefore, the Penal Code also informs the citizens of what would happen to them if they should fail to comply with the law; it makes them realize that it is worth while, in their own interest, not to break the rules, for such a breach would, in the terms of Locke, bean "ill bargain" in all respects (see for instance Art. 90, imposition of fine in cases of offences committed for gain, and Art. 99, forfeiture of the fruits of an offence). In this sense, a Penal Code is not so much an educational as a formidable instrument because it assumes that prospective offenders may be refrained bv fear, if by nothing else, from violating the law.

Although it is almost impossible to ascertain how effective the fear of punishment may be, the increase in the figures of crime and recidivism would tend to show that a great many people are little impressed by the general warning which the law gives them. Either their motives for committing an offence overpower their fear, or they act in the belief that they will not be caught. Therefore, when a perron fails to take "due notice" of the future ahead of offenders as the Code describes it, steps must be taken to prevent the order, peace and security of the community being disturbed again, whether by the same person (special prevention) or by others (general prevention); in some instances, action may even be taken before any such disturbance occurs, with a view to lessening the chance that it should occur (Art. 145).

The most common counterpart of crime is punishment. The view that a man who has done something wrong should be made to pay for it and to suffer, in his life, his liberty or his pecuniary interests, the consequences of his misconduct, is as ancient as mankind. The justifications of punishment are innumerable but arc generally centred on two ideas, namely the idea of retribution or expiation *(punitur quia peccatuni est)* and the idea of prevention *(punitur ne peccetur*). Although it is unquestionable that a penalty cannot fully serve its preventive purpose unless it retains some moral significance, the former conception has today lost a good deal of its influence and retribution is no longer the principal goal of punishments. The Preface of the Code makes this quite dear when it states that "punishment cannot be avoided since it acts as a deterrent to crimes. It will serve as a lesson to prospective wrong-doers". The importance of this consideration, which is by no means a modem one as it dates back to the Roman criminologists according to whom penalties are inflicted *"ii/ *uni us poena met us possit esse multorum"*, is further emphasized by Art. 1 which directly relates the imposition of punishments to the prevention of "the commission of further offences'\

Punishments contribute to the preservation of public order not only through the harrr they cause to the offender, who is consequently expected to behave in the future so as tt

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avoid further harm of a similar nature, and through the fear they inspire in anyone “who witnesses the punishment of a wrong-doer" and who is consequently expected to “become prudent*, but also because they disable the convicted person from committing fresh offences either permanently (if he is sentenced to death) or temporarily (if he is sentenced to imprisonment). In the Ethiopian Penal Code, the importance of the disablement factor is stressed by a number of provisions empowering the court to apply so-called “secondary punishments” and “measures” {*e.g.* Arts. 122, 146, 147) involving prohibitions or disqualifications which, again, have disabling effects, either permanently or temporarily. However, as the prospect of punishment is not sufficient in itself to prevent violations of the law, so the mere infliction of a punishment does not guarantee that further offences will not be committed by the convicted person or by others. Not to mention that “one who witnesses the punishment of a wrong-doer” will often think: “How stupid of him to have been caught”, the wrong-doer himself may be determined to be more skilful or carcful on the next occasion. Thus, punishment alone does not ensure that there will be no next occasion, for it does not eliminate the causes of the breach of the law with respect to which it is applied, and the objective *ne peccetur* cannot be accomplished only through deterrence and affliction. Inasmuch as an offence is prompted by a combination of elements such as character, education, family circumstances, social condition, and the like, the commission of further offences cannot be efficiently prevented except through a change in the said elements. Punishments must, therefore, be coupled with definite steps so that a next occasion does not present itself or that, should it present itself, the former convict does not avail himself thereof.

These steps are protective or corrective, or both. In the first place, orders may be made with a view to reducing the risk that a person who was led to commit an offence because he found himself in a certain situation or in certain surroundings should again be placed in such situation or surroundings {*e.g.* Arts. 149—151, 163). Insofar as these orders attain their main goal, which is to protect the wrong-doer from his own weaknesses or to remove him from bad influences, they will also serve the more general purpose of protecting society from the wrong-doer. The said orders are of particular importance in cases where an offender is not sentenced to deprivation of liberty and cannot, therefore, be subjected to penitentiary training, which is an essential instrument for purposes of correction. It is a fact that punishment for the sake of punishment is seldom conducive to the reform of offenders. To detain convicts in a prison without taking advantage of their stay therein to attempt to correct them, is necessary and may be sufficient if one thinks in terms of expiation, deterrence and disablement; in most cases, however, it will result in offenders emerging from prison more dangerous than they were when they entered it. Thus, it is while an offender is serving sentence that efforts must be made to lessen the danger he represents and to ensure “that the sentence has the effect of reforming the prisoner and of enabling him to resume a m *mal life on his release” (Art. 111).

It has often been pointed out that there is an inevitable irreconcilability between correction and deterrence. Since the purpose of corrective training is to turn convicts into good citizens and this can hardly be achieved without treating them to some extent like good citizens, the fear of punishment, it is said, will diminish in the same proportion as the harshness of punishment diminishes. However logical the argument may appear, it is nevertheless not decisive because it is based on an exaggerated faith in the efficiency of the fear of punishment. Criminal statistics would tend to show that the connection between the severity of punishments and the incidence of crime is not as close as one might imagine. FoiJnManfif., Ihc number of capital crimes did not increase in Switzerland after the death penalty was abolished. There is as yet no conclusive evidence to support the view that crime proliferates when convicts are treated like responsible human beings. Furthermore, there are misunderstandings as to the nature of this treatment. Those who advocate the corrective or reformative theory do not suggest that prisons be turned into luxurious dwelling-houses, for the essence of corrective training does not lie in the comfort which prisoners may enjoy nor in their being allowed to listen to the radio, to watch television or to play football. All they contend

is that *"il ne s'aglt plus de digrader ou d'humilier le dillnquant pour le forcer au repentir, mats tout au contraire de lul rendre le sens, qu'il a mdconnu, de sa digniti d'homme"* (Ancel). To this end, prisoners should be made to look forward rather than backward; they should be made to believe that they have a future as useful citizens and should be trusted accordingly, rather than be distrusted by reason of what they have done in the past; they should be treated according to their merits, and those who behave well (Art. 111 (3)), should be granted privileges, so as to be reminded that it pays to be of good conduct, which is not the same as being reminded that it does not pay to be of bad conduct. The "improved treatment" of prisoners consists in increasing the amount of confidence placed in them more than the benefits which they are given, and the change which one aims at bringing about in their character depends on the mentality and methods of those who deal with them more than on the material conditions in which they are detained. These principles can be enforced even in the shabbiest prisons, and it does not seem that the execution of sentences in accordance with such principles will substantially affect the efficiency of punishment as a deterrent. Finally, it may be noted that, however well prisoners are treated, they generally agree that the harshness of punishment basically lies in the forfeiture of one of their most precious possessions, that is. their freedom. So long as this element of privation remains, it is unlikely that the fear of punishment will disappear.

The importance of the part played by reformative ideas in the Ethiopian Penal Code is further demonstrated by two provisions (Arts. 195 and 196) which enable the court to suspend, on specific conditions, the passing or the enforcement of the sentence when it considers that this suspension will serve the preventive purpose of the law better than the infliction of a penalty would. When the diagnosis of the offender's character is such as to justify an optimistic prognosis of his future behaviour, when a wrong-doer, normally young in crime, is deemed to be still morally sound and, therefore, capable of correcting himself without requiring penitentiary training or, generally, without having to suffer the rigours of punishment, then the court may order suspension and place him on probation for a given period of time on the condition that he complies with certain rules of conduct (Art. 202). Orders for suspension, which necessarily imply an appeal to the offender's honour and to his "co-operation for his own reform" (Art. 194), are made in the hope that he will take it to heart to show himself worthy of the confidence with which he is treated. Punishment is then dispensed with, not because it is undeserved, but because it is inappropriate in that it would, do more harm than good. In these cases, and in other cases of equal significance (Arts. 106 and 121 (2)), the notion of deterrence is absent, and the pertinent orders have been criticized on this ground. However, to the extent that these orders are intended to serve purposes of special prevention, and not of general prevention, they are quite efficient; for it does not seem that the proportion of recidivists is higher among former probationers than among former prisoners.

The conclusion to be drawn from the above remarks is that the Ethiopian Penal Code, like most modem Codes, is inspired by the principle that "reformative justice is in all respects preferable to punitive justice" (Beccaria). This is not to say that penalties are no longer regarded as essential instruments in the struggle against criminality, or that punishment and prevention are incompatible. Quite the contrary, the Codification Commission repeatedly expressed the view that punishment should remain "the pillar of Ethiopian criminal law". What the principle actually means is that punishments, if applied only to retaliatory ends, will but in a limited number of cases contribute to the preservation of public order and that, when the law permits choosing among several actions, whether of a punitive nature or not, such action should be taken as will best prevent the commission of further offences, even if it does not best compensate for the wrong done. Although there are instances where the purpose of the law cannot be achieved except by purely deterrent or disabling steps (Arts. 116 and 128), the rule which should guide the application of the Code is that, more thgn on deterrence and disablement, the eradication of criminality and, consequently "the order, peace and security of the State and its inhabitants" depend on the

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correction of criminals. In the terms of the Preface, the concern for "the prevention and suppression of crime "must not lead to disregard for "the welfare and, indeed, the rehabilitation of the individual accused of crime".

Article 2. Principle of legality

(1) *Criminal law specifies the various offences which are liable to punishment and the penalties and measures applicable to offenders.*

The court may not treat as a breach of the law and punish any act or omission which is not prohibited by law. it may not impose penalties or measures other than those prescribed by law.

The court may not create offences by analogy.

(2) *Nothing in this Article shall prevent interpretation of the law.*

in cases of doubt, the court shall interpret the law according to its spirit, in accordance with the meaning intended by the legislature's so as to achieve the purpose it has in view.

(3) *Nobody shall be punished twice for the same act.*

Article 2 is based on two principles inherited from Roman law. which are also enshrined in the Ethiopian Constitution: *Nullum crimen, nulla poena sine lege* (Art. 55 Constitution) and *Non bis in idem* (Art. 56 Constitution).

Under a system of absolute retribution any act or omission contrary to the interests of the community or to generally accepted moral standards ought to be punished, whether or not it is expressly declared by law to be a criminal offence. However, history would supply numberless illustrations of the fact that abuses and arbitrary actions take place when the powers of the courts are restricted only by their own conception of what is right and what is wrong. Therefore it is desirable that those who are entrusted with the administration of justice carry out their duties within well-defined limits. The fact that Arts. 55 and 56 of the Constitution have been inserted in a Chapter dealing with the rights of the people confirms that the principle of legality aims at protecting individuals from such arbitrary actions as they might be exposed lo, should it not be provided that the written law is the only source of criminal law.

1. The first ingredient of the principle of legality is that there are no offences other than those which arc expressly provided for by law. “Criminal law” within the meaning of Art. 2 is not only the Penal Code, but any law duly passed and published which contains penal provisions. Thus, no person may be deemed to be committing an offence who performs an act which, at the time of its performance, is not regarded as criminal by the laws in force at the place where this act is performed (see also Art. 77). The second ingredient of the principle of legality is that a person who has committed an offence may not be subjected to a punishment other than that which is provided for by law with respect to the offence committed; a court may make with regard to a convicted person only such order as he knew or should have known would be made. Finally, although Art. 2 does not specifically say so, the principle of legality also implies that any judgment given in accordance with the law must be enforced in the manner provided for by law, since the failure to comply with the legal provisions regarding execution of judgments may in fact result in creating new penalties.

The compliance with these rules is ensured by the prohibition stated in Art. 2 (1). para. 3, according to which the creation of offences by analogy is not permitted. The view that any act deserving punishment ought to be punished even in the absence of legal provisions to this effect, resulted in formulating the so-called principle of analogy, which is directly contrary to the principle of legality. Pursuant to the principle of analogy, a penal provision in force, as it denotes the legislature's intention to punish a particular act, may apply to any similar or analogous act which is not an offence under the law. This means that legal provisions may be extended to cases which were not contemplated by the law-giver, if such cases are of the same nature as those to which the said provisions expressly apply.

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Such an extension may be justified when the law is not or not fully codified, as the courts are then able to give effect to these requirements of justice or public order of which a code is but one expression. This was the situation in Ethiopia where the Penal Code of 1930 permitted the creation of offences by analogy (Preface, Arts. 11 and 12). Nevertheless, the principle of analogy is dangerous owing to the uncertainty it brings gbout, especially when the judges do not all have the same background and training, and to the abuses it may give rise to, since the courts may be tempted to extend legal provisions to acts quite different from those which are punishable under the said provisions. The principle of analogy is now replaced in Ethiopia by the principle of legality because the circumstances which warranted the existence of the above - mentioned Arts. 11 and 12 in the Code of 1930 no longer exist. The new Code is by far more complete than the former one and is supplemented by subsidiary legislation which increases every year. It is, therefore, not to be feared that acts deserving punishment should remain unpunished owing to gaps in the criminal law. If a given act is not declared to be an offence, it may not be punished until additional laws are passed making it an offence. Thus, prostitution may not be punished under the provisions regarding public indecency; writing sorcery books may not be punished under the provisions regarding seditious publications.

2. Compliance with the principle of legality docs not result in the courts being, so to speak. enslaved by the provisions of the law, and the duty not to depart from what the law prescribes for the purpose of creating new offences does not preclude a court from interpreting the law in cases of need. However, Art. 2 (2) sets out specific conditions so as to ensure that the courts do not misuse such power; for not every legal provision is open to construction, nor should construction take place in disregard of certain basic rules (see in particular Halsbury. *op. dr.,* 31, pp. 477 *et seq.*\ see also ATF 69 IV 4. JdT 1943 IV 13, and ATF 69 IV 174, JdT 1944 IV 117).

(a) Interpretation is firstly necessary in cases of ambiguity of the law, *i.e.* when the law contains provisions which are on the face of them inconsistent (for instance, read together Arts. 589 (2) (a) and 594 (1) cum 598 (a); Arts. 594 (2) and 608 (2); Arts. 605 (a) and 606 (a); Arts. 609 (2) *(b)* and 613 (*b*)) or w'here, by reason of the language used, a provision is of such uncertain or obscure meaning that its true sense is doubtful (for instance, see the words “have failed” in Art. 170; the words “basic penalty” in Art. 189(1) (b); the words “strikes*’ and “uses physical violence” in Art. 333 (1) and (2); the words “criminal negligence” in Art. 485). This form of interpretation, sometimes referred to as interpretation of equivocal provisions, may not be used when and as often as a court should like the law to say something else, or more, or less, than what it actually says, but only when the actual meaning of a legal provision must be sought. The principle of legality docs not cither prohibit what is known as the interpretation of unequivocal provisions, which may be necessary when a provision the meaning of which is clear is drafted in terms so general that there is reasonable doubt as to what it includes. For example, where a provision supplies illustrations regarding the means whereby an offence may be committed and it occurs that the injurious result which this provision aims at preventing is achieved by means not mentioned therein, the courts will have to decide whether the offence may be deemed to have been committed within the meaning of the law although acts have been performed or methods have been used which the pertinent provision docs not contemplate.

(b) Whether a doubt arises as to the meaning or the scope of a legal provision, the court which interprets such provision must have regard to "the meaning intended by the legislature'*. This meaning may be sought from within (grammatical and logical interpretation) or without (historical interpretation) the text of the law, bearing in mind the general purposes of the law as defined in Art. 1 and the particular purposes of the provision calling for construction (teleological interpretation). Whether the meaning thus arrived at militates towards application of the law to the benefit or to the detriment of the accused appears today to be irrelevant, so long as it renders the law operative. Although disputes have arisen as to whether interpretation should be restrictive or extensive, and although it is still quite generally

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admitted that criminal laws must be strictly construed (*poenalia sunt restrirtgenda),* the view that interpretation is merely declarative seems to be gaining growing support. The sole purpose of interpretation, it is often contended nowadays, is to give full effect to every provision of the law and this purpose must be achieved regardless of the fact that "the consequences may be hardship upon individuals". As the drafter of the Code pointed out in the *Expos4 des Motifs,* the courts must interpret and apply the provisions of the law **'comnit' le lifgislateur a voulu qu'elles le soient; leur interpretation est ntcessaire, et parfaite- ment justifice, pourvu qu'elle ne sollicite pas le texte mais en degage le sens exact. Le present Code a pris so in de le dire expresstment. Les juges, par rant du texte legal auquel ils sont ten us, donneront done d celui-ci ton tv sa par tie, et Vappliqueront non settlement a la let t re, mais dans son esprit. Ils ne perdront jamais de vue, ce faisant, le but de la loi et les fins socialement et moralement i levees que le Itgislateur se propose d'atteindre par elle."* This actually is a restatement of the opinion of the Swiss Federal Court, which held that "any construction is permissible which is in accordance with the spirit of the law. The judge has the right and the duty to interpret the law extensively, that is. to give a legal provision a scope which at first sight it does not appear to have, whenever the true meaning of this provision so requires. His powers in this respect arc restricted only by the duty to comply with the rule *nulla poena sine lege* which prohibits him from punishing, by analogy, acts which the law does not contemplate" (ATF 72 IV 101, JdT 1946 IV 187). It is only when the rules of construction have failed to remove the ambiguity, obscurity or uncertainty of the law that the doubt must be resolved in favour of the accused. This conception which, incidentally, makes it absolutely necessary that legislative material should be published, leaves intact the distinction between interpretation, which takes place within the framework of the law. and analogy, which takes place outside the scope of the law.

Illustrations

Art. 35 prescribes that a person who induces another, by persuasion, promises, money, gifts, threats or otherwise, to commit an offence, is deemed to have incited the commission of this offence. If a person incitcs another to commit an offence by flattering or challenging him, there is nothing in Art. 2 or Art. 35 to prevent the court from regarding this person as an instigator, since he incited the commission of an offence by means implied in the expression **or otherwise" appearing in Art. 35.

Art. 618 (3) states that there is an aggravated case of adultery when a married man who is a Christian keeps a concubine in the conjugal home while not separated from, or abandoned by. his wife. It seems that Art. 2 would prohibit a court from extending this provision to the case where a married woman who is a Christian keeps a lover in the conjugal home while not separated from, or abandoned by, her husband.

Art. 622 penalizes indecent acts between relatives if practised with, or committed upou, an infant or young person, *i.e.* (Art. 53) a person under fifteen years of age. Yet the same acts, if practised with, or committed upon, persons who are not relatives, arc penalized even where one of the parties is above fifteen years of age (Art. 595). Although il would seem natural that minors should be strictly protected in all cases, it is doubtful whether the words "young person" in Art. 622 can be taken to include minors over fifteen and under eighteen years of age, and the doubt should be resolved in favour of the accused.

3. The last principle to be found in Art. 2 is that a person who has been punished for a given offence may not be punished a second time for the same offence. To the extent that the enforcement of this prohibition involves procedural questions, *i.e.* the effects of judgments given by Ethiopian criminal courts (as for the effects of foreign judgments, see Arts. 12 (2) and (3). 16 (2) and (3) and 20), Art. 2(3) need not be discussed here. It must be clear, however, that the latter provision does not mean that only one punishment may be imposed with regard to any one offence committed. Where the law prescribes that a person who commits a given offence may be punished with five years rigorous imprisonment and fine and must in

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addition be deprived of his political rights, any person who commits the said offence may be sentenced to these three different penalties, and he may not allege that he is being punished more than once. It is true that more than one penalty is inflicted for one offence, but this does not amount to punishing the offender twice within the meaning of Art. 2, for nothing in this Article precludes various punishments being combined or cumulated in the manner and within the limits provided for by law so as to achieve the various purposes of the law.

Article 3. Other penal legislation

Nothing in this Code shall affect Police regulations and special laws of a penal nature:

Provided that the general principles embodied In this Code are applicable to those regulations and laws except as otherwise expressly provided therein.

It was mentioned in connection with Art. 2 that the Penal Code is not the only written source of criminal law, and that other legislation of a penal nature exists. A great many special laws have been published in the Negarit Gazcta which deal with matters such as currency, customs, taxes, transport or public health. These special laws, to the extent that they contain penal provisions, form a part of Ethiopian criminal law in the same manner as the Penal Code. However, in order to ensure that the criminal law be clear and consistent and that there be no conflict between the Penal Code and subsidiary legislation, it is necessary to unify as far as possible the general principles governing penal law as such. This is why Art. 3 states that the provisions of the General Part of the Penal Code, as well as those of the Code of petty offences (see Arts. 690 and 691). apply not only to offences under the Penal Code or Code of petty offences, but also to offences under subsidiary legislation, except where such application is expressly excluded by the pertinent special law. Thus, unless otherwise provided in the special law concerned, the criminal responsibility or guilt of a person having committed an offence under such law will be determined in the same manner as though he had committed an offcnce under the Penal Code. If he has acted by negligence or in a state of necessity, he will be tried in accordance with the provisions of the Penal Code regarding negligence or necessity; if he is an habitual offender, he may be interned as provided for by the Penal Code; if he is a first offender, he may be placed on probation on such conditions as are laid down in the Penal Code; if he is sentenced to a fine, the amount thereof will be assessed and recovered in the manner provided for by the Penal Code. In other words, no exception may be made to the general rules set out in the Penal Code or Code of petty offences unless such exception is expressly provided for by the particular special law infringed.

It is worth noting that, as the Code of 1930 was incomplete, a number of special laws in force provide for offences which are hcnceforth covered by the new Penal Code. The said laws or the penal provisions which they contain have not been expressly amended or repealed on the coming into force of the Penal Code. It follows that there is a certain amount of duplication between the Code and subsidiary legislation and that, unless earlier penal provisions should be deemed to have been impliedly repealed by the Penal Code, proceedings might be instituted under the Code or a special law. A person having acted in violation of both the Code and such law might accordingly be sentenced under that law to a higher penalty than that provided for in the Code, although the Code was enacted later than the relevant special law. To avoid duplication or inconsistencies, all subsidiary legislation passed prior to the coming into force of the Code should be made to conform to the latter.

Although Section 3 of Proclamation N° 158 of 1957 introducing the Penal Code is not as general with respect to repeals as Art. 3347 of the Civil Code, the records of the Codification Commission and the *Expose des Motifs* show that the intention behind Art. 3 was not only to ensure that, saving all just exceptions, *future* subsidiary penal legislation would be consistent with the Code, but also to preserve *earlier* subsidiary penal legislation, though only insofar as it did actually supplement, and not contradict, the Code.

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Therefore, even though it is desirable that a law should be enacted clearly specifying which provisions in earlier legislation have been repealed by the Code, there can be no doubt that *e.g.* Arts. 19 and 20 of the Police Proclamation N° 6 of 1942 or Arts. 4 *et seq.* of the Imperial Army Proclamation N° 68 of 1944 no longer apply since offences committed by or against members of the Police or Armed Forces arc now fully dealt with in the Code. Nor is there any doubt that, whenever a proclamation or regulations define an offence with respect to which the Penal Code merely lays down a punishment, as is the case with most petty offences consisting of breaches of regulations, this subsidiary legislation is not affected by the Code. For purposes of punishment, however, the Code will apply unless the said proclamation or regulations were made after the coming into force of the Code and lay down a penalty other than that which is provided for by the Code (Arts. 3 and 733).

Article 4. Equality before the law

Criminal law applies to all alike without discrimination as regards persons, social conditions, race or religion.

No difference in treatment of offenders may be made except as provided by this Code which are derived from immunities sanctioned by public international and constitutional law, or relate to the gravity of the offence or the degree of guilt, the age, circumstances or special personal characteristics of the offender, and the social danger which he represents.

Under Art. 37 of the Constitution, "no one shall be denied the equai protection of the law". The principle of equality before the law, which will also be found in the Universal Declaration of Human Rights of December 10, 1948, means that the law, whatever its nature, applies to all individuals alike and governs the conduct of all inhabitants of a State, and not only of certain classes among them. This principle is not relevant solely to criminal law but, *e.g.* to constitutional or civil law as well. Applied in the criminal field, the rule laid down in the Constitution and recalled in Art. 4 means both that all individuals may claim the same legal protection if they have been injured by an offence, and that all persons who have come into conflict with the law must be treated equally and tried exclusively in accordance with the provisions of the law they have infringed, regardless of their race, religion, social position or other circumstances of a similar nature which do not affect their degree of guilt.

However, the principle of equality before the law does not prohibit certain differences from being made in the treatment of offenders. These differences are by no means particular to criminal law and similar differences may be found in constitutional law, which makes the exercise of political rights depend on conditions of age, good behaviour or wealth (Arts. 95 and 96 Constitution) or in civil law, under which the enjoyment of certain rights or the capacity to undertake certain obligations may depend on the age, nationality or mental condition of the person concerned (Arts. 192—194 Civil Code). All that is required is that no differences be made in the application of any law other than those which are expressly provided for in such law. Under Art. 4, criminal laws apply to all alike except in three cases where some discriminations are made owing to the offender's special status (immunities under constitutional and public international law) or to the requirements of individualization.

1. The Constitution being the supreme law of the Empire, any provision it makes for immunities is binding upon the prosecutors and the courts as regards prosecution and punishment. However, immunities under constitutional law exist only in the cases provided for by the Constitution. Therefore, when a doubt arises as to whether or not a person who has committed an offence does or does not enjoy immunity, the decision will be made exclusively in accordance with constitutional law.

(a) The first immunity to be mentioned is that of the Emperor, which is provided for in Arts. 4 and 62 of the Constitution. The immunity of the Sovereign or Head of State is very generally recognized by law or tradition. Whether, in Ethiopia, the justification for this

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immunity is that “the King can do no wrong" (which is the English conception), or that the King, as he is the source of the law, is not subjected to the law nor is he triable by those to whom he delegates his power to enforce the law (which was the French conception), the immunity of the Emperor is traditional, as is indicated by Art. 62 of the Constitution, which states that “in accordance with tradition and the provisions of Art. 4 of this Constitution, no one shall have the right to bring a suit against the Emperor”. This entails three consequences.

(i) The immunity of the Emperor is personal and a comparable immunity is not enjoyed by other members of the Imperial Family. The reasons which explain the immunity of the Sovereign, whichever they may be, cannot apply to justify its extension to the family of the Sovereign and, as a matter of fact. Ethiopian tradition goes against this extension. The Fetha Negast declared that the Emperor shall try all persons equally and with impartiality, whether they be "His son. His parents or His friends” and Ethiopian history supplies the example of Emperor Zara Yacob who sentenced to death under the ordinary law His son who had murdered a slave. It is. therefore, on historical as well as juridical grounds that the Ethiopian Constitution provides for the immunity of the Emperor, and of the Emperor alone.

(ii) The immunity of the Emperor is absolute, as it commonly is in monarchies, whereas the immunity of the Head of State in other regimes is only relative. Thus, in no case may any action of whatever nature be brought in court against the Emperor.

(iii) A distinction need be made between “the Emperor" and “the Crown”. Sub-art. ***(a)*** of Art. 62 of the Constitution prohibits the bringing of suits against the Emperor, but sub-art.

(b) authorises any resident of the Empire to bring suits in the courts of Ethiopia against the Government. The fact that the Emperor never incurs any personal liability docs not imply that the State incurs no liability either (see Art. 2126 Civil Code).

(6) Reference is sometimes made to the immunity of the members of the legislative and executive authorities and of the judiciary. This should not be taken to mean that members of Parliament, minister or judges may not be prosecuted and punished if they commit an offence. Quite the contrary, these persons, whatever their duties and rank, arc punishuble for any offence they may commit whether in a personal or official capacity, and the punishment they may be liable to is in many cases increased owing to their special status. Admittedly, they may in certain circumstances perform acts or make statements which are declared by law to be not punishable, whilst such acts or statements, if performed or made by different persons, would be punishable *(.e.g.* Art. 84 Constitution. Arts. 2048, 2064 Civil Code. Art. 578 Penal Code). This, however, properly speaking, does not constitute an immunity; if no liability is incurred in these circumstanccs, it is for reasons derived from Art. 64 of the Penal Code.

The erroneous belief that members of the constitutional authorities enjoy immunity originates from the commonly admitted practice that, when these persons commit an offence, special rules of procedure will apply. It is often provided that members of the public authorities may not be prosecuted without the prior agreement of the authority of which they arc members or that they are to be tried by special tribunals, and not by the ordinary courts ***(e.g.*** Arts. 75 and 85 Constitution). In which cases and with regard to which persons are these particular rules applicable, and what is their nature? These are questions to be decided in accordance with the relevant provisions of the Constitution and of the Criminal Procedure Code. Thus. Art. 85 of the Constitution prescribes that “no member of Parliament, during a session thereof, may be arrested or detained or summoned to answer a criminal chargc. unless the permission of the chambcr of which he is a member be obtained or he be arrested in *fiagruntv* ***dvlicto.*** A comparable immunity docs not apply to civil cases.” The effects of such immunity ate specified in Arts. 39 (I > (c) and 130 (2) (<•) of the Criminal Procedure Code. It is ciear that these rules do not conflict with the principle of equality before the law; thev do not provide for any exception to the ordinary provisions of the Penal Code and only result in creating a temporary immunity from prosecution, and in no case an immunity from punishment. The fact that special formal conditions govern the institution or the continuance

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of the proceedings does not affect the fundamental rule according to which no discriminations may be made among offenders which are based on social conditions only.

2. Art. 4 also reserves the existence of such immunities as are enjoyed in pursuance of public international law by certain categories of foreign officials who may commit an offence while in Ethiopia. These officials benefit from so-called diplomatic immunities founded on international usages of mutual courtesy. “Persons who partak to a greater or lesser extent of a diplomatic character enjoy the same immunity as the Head of the State which they represent and are for ail juridical purposes deemed to be still in their own country and not in the country in which they carry out their official duties.** These persons are accordingly considered not to be subject to the laws of ic State of residence or sojourn and may, therefore, not be prosecuted and punished in that State.

This immunity, again, is not an immunity properly speaking as it only is an immunity from prosecution in Ethiopia. Foreign diplomats who violate the laws of Ethiopia are not punishable in Ethiopia under Ethiopian law, but they are naturally liable to prosecution and punishment in their own country under their national law, the application of which may, however, be conditional upon the fulfilment of certain requirements laid down in territorial law (see para. (2) (a) and (4) in comments under Art. 14), since they are deemed to remain subjected thereto at all times. The effect of diplomatic immunity is then merely to create an exception to the general principle of the territorial application of the law, as the offender is not punishable at the place where he committed the offence under the law which he violated (Arts. 11 (2) Penal Code and 39 (I) (c) Criminal Procedure Code). Diplomatic immunity, therefore, only raises a question of jurisdiction and in no way creates a situation contrary to the principle of equality before the law.

Art. 4 does not specify the persons who enjoy diplomatic immunity as this question is not the concern of criminal law. Generally speaking, the privilege attaches to:

(a) public ministers who, under the treaties of Vienna (1813) and Aix-la-Chapclle (1818), are divided into ambassadors, legates or nuncios; envoys, ministers and other persons accredited to the Head of the State; ministers resident; charges d'affaires; and

(b) the family, suite and servants of public ministers, where they are not citizens of the State of residence; and

(c) persons of a quasi-diplomatic character (consuls and consular officers); and

(</) representatives of the United Nations and officers of international organizations when engaged on United Nations or other international business.

In addition to these persons, foreign Heads of State when in Ethiopia naturally enjoy immunity also.

Whenever a doubt arises as to whether a person who has committed an offence in Ethiopia does or does not enjoy diplomatic immunity, the decision must be made, not according to the rules prevailing in Ethiopia on this subject, but according to such laws or regulations as may have been enacted in the State of which the person concerned is a citizen or by the international organization which he represents or. failing such laws or regulations, according to international practice. In a majority of cases, it is possible to know with precision whether a person is a “diplomat” as most countries maintain a list of these persons (see also the definition of diplomats for purposes of customs in Legal Notice No. 252 of 1962).

3. The principle that punishments are imposed in proportion to the degree of individual guilt, having regard to all the circumstances of the case and not only to the material seriousness of the offence, is fundament?! in the Penal Code (Ait. 86). The necessity of individualizing the penalty renders it inevitable that certain differences be made in the treatment of offenders, since the degree of guilt depends on circumstances which may be purely personal to the offender, such as his age, mental condition or vntecedents. These differences do not contradict the rule of equality before the law so long as they are based on considerations which affect the liability to punishment and criminal guilt of the person concerned. Art. 4 does not mean that all persons who violate the same legal provision are liable to a mathe

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matically identical punishment, and a person having stolen a watch may be sentenced to three months imprisonment while another person having also stolen a watch may be sentenced to one year imprisonment without the principle of equality being thereby infringed provided that this difference is justified for reasons pertaining to the guilt of the accused.

On the basis of which circumstances may these differences be made? In addition to such differences as may relate to the conditions in which the offence was committed (at night, by violence, etc.), certain differences may exist among the offenders themselves, even where they have acted in similar conditions. It is obvious that the same sentence may not be passed on an adult as on a young person, on a first offender as on an habitual offender, on a person who is fully responsible for his acts as on a lunatic. Furthermore, special situations will be encountered which create special duties or re** msibilities not those of ordinary persons *{e.g.* public servants, members of the Armed I orces). A misappropriation of public funds cannot be dealt with as an ordinary breach of trust, an insult uttered by a soldier against an officer cannot be dealt with as an ordinary insult.

It is understandable that all these circumstances be taken into consideration whenever they are indicative of the greater or lesser degree of guilt of the offender. But it is not for the courts arbitrarily to decide whether or not differences ought to be made, for this might lead to discriminations contrary to Art. 4. The law itself makes provision for the cases where such differences may or must be made.

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CHAPTER II

APPLICATION OF THE CODE AS TO TIME [ARTS. 5-10]

The introduction of new legislation in the criminal field may give rise to doubts or disputes as to the law to be applied in cases of acts performed or offences committed prior to the coming into operation of such legislation. Although a penal code only legislates for the future, it must lay down precisely the principles governing the settlement of conflicts between its provisions and those of laws previously in force. Arts. 5-10, which are designed both to facilitate the application of the Code and to avoid injustice as a result of its introduction, prescribe the manner in which persons who have committed offenccs under previous legislation are to be dealt with, depending on whether or not they have already been tried for such offences on the day of the coming into force of the Code. The provisions of Arts. 5—10 arc of a temporary nature and will apply for only so long as all offences committed prior to the coming into effcct of the Code will not have been tried or will not be barred by limitation. However, the said provisions will also apply whenever there is a change in Ethiopian criminal law, whether the Code or subsidiary legislation; should new offenccs be created or should certain acts be declared no longer to be criminal, the consequences of such changes would be regulated by Arts. 5-10 of the Penal Code.

Article 5. Non-retrospective effect of criminal law

(1) *Whoever commits an offence after, the coming into force of this Code shall be tried under its provisions.*

If the offence was committed under repealed legislation it shall be tried in accordance therewith.

(2) *An act not declared to be an offence and committed prior to the coming into force of this Code is not punishable. Nor may a punishment not prescribed at the time of the commission of the offence be imposed.*

By recalling the well-known principle *lex retro non agit*, Art. 5 is an obvious, though essential, corollary to the principle of legality which demands that an offender be tried under the provisions of the law which he infringed or, in other words, of the law which was in force at the time when he acted, which law is not necessarily the same as that in force at the time of the trial. At that time, such law was the sole legal text providing for offences and punishments and a person, when committing an offence contrary to that law, could not expect to be punished by penalties other than those laid down therein. Art. 5 supplies the rules to be followed in the various situations that may occur.

1. Whosoever has committed an offence defined in the new Code after its coming into force will be tried and punished in accordance solely with the provisions thereof, although the act for which he is tried was not previously declared to be an offence. This applies to any offence committed after May 5, 1958. Offences committed prior to this day, and in particular during the period extending from the day of promulgation (July 23, 1957) to the day of enforcement (May 5, 1958), will not be deemed to have been committed under the new Code, but under the Code of 1930 or subsidiary legislation, as the case may be. In order to decide as to the applicable law, it will be necessary to fix as accurately as possible the day and lime of commission of the offence.

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When it is established [hat an offence provided far in the new Code has teen committed after its comine into force, full effect will be given to' all its proviaoni, in particular those governing the guilt of the offends and the punishment to be applied. *%* legard will te had to the provisions, if any. previously in force concerning the offence commined save, in appropriate casesL Tor the purjcse of decidin? whether any defence^based on mistake of law that may oe raised (Art. 78) is well-founded ftoceedmgs may be instituted even [hough such offence was crea'ted by the new Code and did not exist befooe. Similarly, the only penalties thaf maybe inflicted are chose which are prescribed by die Code and the nature of amount'o: punishment thaf might haw been imposed under previous legislation wife respect tc the offence, or the manner in which it would have been enforced, are not tote taken into consideration.

2. A conflict of laws may occur in cases of offences committed under previous legisla bon. uiiere such offences have not ye ['been tried on the comin? into force, of [he Code. In accordance with [he pinciple of le?ality. [he'offender is then to be Hied under previous legislation for it is the rime of the ocmmisaon of the'offence, and not the time of the trial, which governs the question of the law to be applied. Subjest: to the provisions of Art 6. the following consequences maybe dr a™ from this general rule. ' ' ... .

fa) Where, prior to [he comin?. into force of the Code, a psrson has done somethinE. which is an offence undsr the Code but was not an offence under previous legislation, no proceedings may be instituted, since the act in question was not declared by law to te an offence at the time ot its performance. For instance, to mate another person to commit Suicide is an offence under Art *525* of the Lode of 19*51* but was not an offence under die
1930 Code. Any such incitement having occurred prior to \ky *5.* 1958, is. therefore, not punishable.

(h) Where, prior to the comin? into force of the Code, a person has done something which was an offence under previous legislation but is no longer an offence under the Code, no pr-dinss may be instituted. Byway of exception (Art 6). the law in force at the rime of the trial applies if it is more favourable than earlier legislation. If proceedings have been "
instituted, they must be discontinued. If the offender is servin? sentence, the provisions of Art *9*(1) are applicable. ' "
'

(c) ttliere. prior to the comin? into force of the Code, a person has done somethin? which is an offence under bo th previ ous 1 ecislari on and the Code. he will, subj ect tc the provisions " of Art 6. be tried acceding to the former; the provisions of the law m force at the time of the offence are applicable, unless the provisions in force at the rime of the trial are more favourable. Ihus. not only his Ira oili ty tc punishmenL but also the na mre and amount of '
. punishment are to be'decided according to earlier le?islarion. For instance, rigorous imprisonment is a kind of punishment that has been introduced by the l£i7 Code and did not exist before, this punishment may therefore, not be ordered with re?ard to a person having committed an offence under previous legislation, uni ess i t is 1 ess sever e than [fie punishment ' '

which might have been ordered iii accordance with such legislation.

Art. *5* is designed to ensure compliance with [he principle of legality[7] since it prohibits a ptrscn from being prosecuted or punished if he could not expect so tc be ac the time of the offence. However, the provisions of this Article are without prejudi:e tc those of Art. *6* under which the Code may on certain conditions, be applied to persons having commined offences pi or to its coming into force. ... - . -

Article 6. Exception: application of the more faTourable Jaw

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The court shall decide in each case whether, having regard to all the relevant provisions, the new law Is in fact more favourable.

Notwithstanding the provisions of Art. 5, a person who has committed an offence under earlier legislation and has not been tried on the coming into force of the Code may be tried in accordance with the latter where its provisions are more favourable to him than those in force at the time when the offence was committed (sec also Art. 2 of the Swiss Penal Code). Thus, Art. 6 provides for an exception to the rule *lex retro non agit* by prescribing that the law in force at the time of the trial may prevail over the law in force at the time of the offence, but this is in no way contrary to the principle of legality nor is it inconsistent with the requirements of logic and equity.

1. The principle of legality aims at securing that no arbitrary action be taken against, nor injustice done to, any person, either by punishing him for an act which was not declared to be an offence at the time of its performance or by treating him more severely than he could exncct to be treated at the time when he acted. The provisions of Art. 6 do not conflict with those of Art. 2, as the Code may be applied to offenccs committed prior to its coming into force only in such cases where it is more favourable to the offender as regards the liability to, or the amount of, punishment. The retrospective application of the new law, which implies that an offence committed before May S, 1958, is deemed to have been committed thereafter, is quite natural, since the substitution of the Code for the laws previously in force justifies the assumption that the new' law is more satisfactory than the laws which it replaces. Where the legislature has thought it proper that an act which was previously declared to be an offence should no longer be punished or should be deserving of a lesser punishment, there is no reason why the offender should not be tried under this new and more satisfactory law, if its provisions are more favourable to him than those of the law which he infringed. Neither the principle of legality nor equity prohibit an offender from being granted the benefit of the improvement of the law where no injustice will result from the new law being applied to acts done prior to its coming into operation.

2. For the purpose of determining whether the Code is more favourable than the laws previously in force, regard must be had “to all the relevant provisions'*. This is to say that a court may not confine itself to considering merely the punishment prescribed by each law for the offence committed, but that it must examine all the provisions which govern the liability to punishment or affect the nature or amount of punishment, such as the provisions regarding criminal responsibility and guilt or extenuating and aggravating circumstances. The law constitutes a whole and is. as a rule, indivisible for the purpose of Art. 6; whether it is retroactive or not. it will normally be so as a whole. This, however, is without prejudice to the specific exceptions contained in Arts. 7, 8 and 10, and to such other exceptions as may be made where there is no interdependence between ”all the relevant provisions” of the more favourable law. and where some provisions of the said law can, therefore, be applied concurrently with some provisions of the other law.

Illustrations

A person who performs abortion on a pregnant woman without her consent was punishable with imprisonment from 15 to 20 years under Art. 384 of the 1930 Code, and is punishable with rigorous imprisonment from 3 to 10 years under Art. 530 (2) of the 1957 Code. On convicting such a person under the latter Code, the court may not set aside the provisions of Art. 123 (2), but it is bound to deprive the accused of his civil rights for such time as it shall fix, for the rules concerning the principal penalty (rigorous imprisonment) and the secondary penalty (deprivation of civil rights) are interdependent.

A person who uses false weights or measures was punishable with imprisonment from 1 month to 3 years under Art. 205 of the 1930 Code, and is punishable with rigorous imprison-

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merit not exceeding 5 years under Art. 375 (1) of the 1957 Code. On convicting such a person under the former Code, the court may suspend the passing or the enforcement of the sentence in accordance with Art. 195 or 196 of the latter Code, for the said Articles can be applied in isolation so long as the conditions governing their application are fulfilled.

(a) As mentioned before. Art. 6 will firstly apply when the Code no longer provides for the act previously regarded as an offence; if such an act has ceased to be criminal at the time of the trial, the offender may not be punished, for the Code is obviously more favourable.

Illustration

Under Art. 401 of the 1930 Code, “if any kind of sorcerer is found writing or causing to be written a sorcery book, he shall be imprisoned from 6 months to 1 year and shall pay a fine from 100 to 200 dollars." Such an act is no longer regarded as an offence by the 1957 Cpde. Therefore, after the coming into force of the Code, no person may be tried for having written a sorcery book before May 5, 1958.

(б) Where the act which was an offence under previous legislation also is an offence under the Code, regard must be had to the provisions of the General Part as well as those of the Special Part.

Illustrations

Under Art. 19 of the 1930 Code, "the man who is unable to know properly the edicts and laws of the Government by reason of his being mentally deficient through illness or any other cause shall have seven tenths (of his punishment) renlltted.” Under Arts. 48 and 49 of the 1957 Code, a person who is not fUlly responsible for his acts owing to his mental condition either may not be punished at all (if he is fully irresponsible) or is liable to a punishment which will be freely reduced (if he is partially irresponsible). Without prejudice to such other circumstances as may be present in the case, the 1957 Code will normally be held to be more favourable in this instance, since either no punishment may be imposed or the freely reduced punishment will be lower than the punishment reduced by seven tenths which could have been imposed under the 1930 Code.

Under Art. 42 of the 1930 Code, “a man who has committed crimes of many different kinds . . . shall be punished for the chief offence as laid down by law and not for each separate offence”. Under Art. 189 (1) (*b*) of the 1957 Code, "in case of several penalties entailing loss of liberty being concurrently applicable, the court shall (. . .) impose the penalty deserved for the moft serious offence and shall increase its length (. . .); it may impose a penalty exceeding by half the basic penalty (. ..)". Without prejudice to such other circumstances as may be present in the case, the 1957 Code will be held to be less favourable in this instance, since the punishment which may be imposed for concurrent offences is more severe than that which could have been imposed under the l?30Code in similar circumstances.

Under Art. 405 of the 1930 Code, "if it is made clear by witnesses or by a man’s own confession that a killing was done from hatred, out of revenge or in a sudden quarrel, he shall be sentenced to death". Without prejudice to such other circumstances as may be present in the cqse. a person who killed another in a sudden quarrel will be tried under the 1957 Code which is more favourable, since Art. 522 docs not permit the death sentence being passed on the sole ground that a murder was committed in a sudden quarrel.

An offence may be deserving the same punishment under both laws. But if one of the laws prescribes that such punishment is to be imposed for a minimum period of time or **a** minimum amount, such law will normally not be held to be more favourable, sinoe imprisonment from one month to one year is more severe than imprisonment from ten days to one year. Similarly, where both laws provide for the same term of imprisonment but one

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of the laws prescribes that a fine must be imposed in addition, the latter law will normally not be held to be more favourable.

Where the punishments under both laws differ in nature, the more favourable law will normally be that which provides for the more lenient form of punishment. In this respect, imprisonment is more lenient than the death penalty; simple imprisonment is more lenient than rigorous imprisonment; police arrest is more lenient than simple imprisonment; a fine is more lenient than any form of deprivation of liberty.

(c) In practice, some cases have given rise to doubts, namely the cases where, according to the 1930 Penal Code, the punishment could be waived upon payment of compensation. Art. 406 of the said Code stated that "though the killing was done from hatred, out of revenge or in a sudden quarrel, if it be found on examination not to be such as to deserve death, (the offender) shall be punished by imprisonment or he shall pay blood money", which was payable to "the relatives of the dead man to the amount agreed upon with the taker of life, and the judge cannot make an order as to the amount they are to receive and compel them to accept it" (Art. 408). The same solution applied in cases of homicide by negligence (Art. 409). The question was whether, after the coming into force of the new Code and notwithstanding the provisions of Arts. 5 and 6, it would not be contrary to public order to allow the substitution of a purely civil remedy (s**e Art. 100 of the 1957 Code) for a criminal punishment, even though this was possible under the law in force at the time of the offence. That such a substitution is hence deemed to be contrary to public order is clearly indicated by Art. 521, third alinea, of the new Code, which prescribes that "any homicide, whether committed intentionally or by negligence, shall be punished by lawful judicial process and in accordance with the following provisions". Yet it is certain that, in cases of this kind, the 1930 Code is more favourable than the 1957 one. Since the provisions of Arts. 5 and 6 are as general as they could possibly be. it was held that there was no reason why Art. 521 of the new Code, if not more favourable, should apply to homicides committed under earlier legislation and why the payment of bloodmoney should be prohibited in such cases. Attention had, however, to be drawn to the fact that the payment of bloodmoney was not, under the 1930 Code, a means whereby to discontinue proceedings. Since such payment could be made only after conviction, the public prosecutor could not decline to institute proceedings on the ground either that such payment had already been made or that it could be made forthwith because the case was obviously one where the relatives would accept it.

3. It was mentioned before that the question of the time when the offence was committed is of particular importance as regards the law to be applied. Certain difficulties may be encountered in deciding which is the more favourable law when the offence to be tried does not consist of a single instantaneous act but of combined, successive, repeated, continuous or concurrent acts.

(a) Where the offence is committed through a single instantaneous act, the answer will normally be easy as it should not be too difficult to ascertain the time of the offence and to decide on the applicable law accordingly. WTiere the act was performed under previous legislation, it will be tried in accordance therewith, unless the new law is more favourable; where it was performed after the coming into force of the Code, the Code will apply.

(b) However, an offence may be constituted by successive or repeated acts of the same nature performed partly before and partly after the coming into force of the 1957 Code *(e.g.* cashier repeatedly embezzling money) or by behaviour occurring prior to the coming into force of the Code and continued thereafter *(e.g.* desertion, false imprisonment). In such cases, which raise the question of the time when an offence may be deemed to be committed (see para. (2) *(a)* in comments under Art. 25), it is controversial whether regard should be had to the fact that the first act was done under earlier legislation or the last act under the Code. The answer suggested in the *Expose des Motifs* is similar to that which may be found in ATF 72 IV 132 (JdT 1947 IV 54); " the acts done in contravention of the new law must be tried in accordance therewith, even though the doer formed the intention of committing

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them, or merely continued an activity begun, prior to the coming into force of that law. Earlier legislation applies to the acts done in contravention thereof, unless the new law is more favourable, while the new law applies to the acts done after its coming into force." Yet one does not quite sec how this principle can operate when the acts repeatedly done constitute one offence according to Art. 60 of the 1957 Code because there is " unity of guilt.** When this unity exists, the new law obviously is more favourable as regards the question whether one or more offences- have been committed, but it does not follow that the offence is triable under that law (unless the acts of which it consists were not punishable under repealed legislation, for the doer may then be punished only for the acts repeatedly done after May 5. 1958). If only one offence is deemed to have been committed, it should logically be tried according to the law in force at the time when the first act was done; although the activity was continued after the enactment of the 1957 Code, this Code should not apply to the acts done before or after its enactment unless it should be found more favourable. The *Expose des Motifs,* however, would seem to prohibit this construction, for which there is in any event little support in Art. 6 itself. This would lead to the questionable conclusion that " unity of guilt " must be ruled out when the laws change while unlawful acts of a similar nature are being repeatedly done.

(c) A person may also have committed several offences of a different nature partly before and partly after the coming into force of the Code *{.e.g.* an assault on May 4, 1958, and a theft on May 6, 1958). In such cases of concurrent offenccs, any offence committed after the coming into force of the Code will be tried in accordance therewith and any offence committed before such coming into force will be tried in accordance with previous legislation, unless the Code be more favourable.

The courts will, therefore, ensure that none of the consequences drawn from the provisions of Art. 6 conflict with the principle of legality. In particular:

(i) where the 1957 Code is deemed to be more favourable, the punishment imposed thereunder may in no case be higher than the highest punishment that could have been imposed under the 1930 Code, and vice versa;

(il) where it is not possible to ascertain with precision the time of the offence and this affects the decision to be made on the applicable law, the offender will be deemed to have acted in violation of the more favourable law, whichever it mav be.

(d) The provisions of Art. 6 may be applied at any time, *i.e.* whether in first instance or on appeal. The fact that an accused person was convicted in first instance under the 1930 Code is no bar to the court of appeal making its decision under the 1957 Code, where it is of opinion that the latter is more favourable. It is the court which eventually decides on the more favourable law.

Although a public prosecutor may frame the charge under the law which he thinks is more favourable and, where he is in doubt as to which law is more favourable, under the other pertinent law (alternative charges), the choice he makes is not binding on the court, and the accused may be convicted of the offence with which he was or could have been charged in the alternative (Art. 113 Criminal Procedure Code).

Article 7. Application as to measures

Upon the coming into force of this Code, security measures and those relating to the treatment and education of offenders prescribed in this Code shall be applicable when passing sentence even where the earlier legislation provided the imposition of a penalty.

1. "Measures" (Arts. J28—169) are steps which a court may take for specific purposes (prevention of further offenccs, protection of public order, treatment and correction of offenders) and which are fundamentally different in character from punishments. In opposi

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tion to penalties, which are imposed by feason of, and in proportion to, the guilt of the offender, measures are ordered having regard either to the needs of a particular person, even though not liable to punishment, or to the danger which he creates to others, irrespective of his degree of guilt. While penalties may not be imposed unless an offence has been committed and the offender is found guilty thereof, some measures may be ordered even though no offence has been committed (Art. 145) or the offender is not guilty of the offence (Art. 48). Since measures do not aim at individual punishment, those which are provided for in the new Code may be ordered whenever they appear expedient, although the accused has acted prior to the coming into force of the Code and the laws in force at the time made no provision for such measures. For the question is not whether a measure is deserved, but whether it is nocessary, and no criterion other than this purely utilitarian one is to be taken into account.

2. The provisions of Art. 7 have a very general scope and are designed to ensure that the purposes of the Code as defined in Art. 1 be achieved as soon as the Code comes into operation. Thus, when deciding whether a measure ought to be ordered, a court need not consider whether this measure was also provided for by earlier legislation. As a matter of fact, the 1930 Code contained no rules regarding measures or, more correctly, it regarded as penalties certain orders which are more in the nature of measures (Art. 8, exile from a district; Art. 9, confiscation of dangerous instruments; Art. 11, guarantee against acts of violence). If it were not permitted to apply to persons having committed an offence under previous legislation measures other than those which were prescribed by the said Arts. 8, 9 and 11, it would not be possible forthwith to carry into effect the provisions of Art. 1 of the new Code, as one cannot expect to protect the public or to reform the offender merely by exile, confiscation or a guarantee. The 1957 Code provides for further measures of greater importance and usefulness, which experience has shown can be applied with good chance of success. There is, therefore, no reason why such measures should not be applied upon the coming into force of the Code, irrespective of the time when the offence was committed. Under Art. 7, a measure may be ordered in addition to, or in substitution for, a penalty despite the fact that only a penalty could have been ordered under previous legislation.

Illustrations

Where a person who violated the provisions of earlier laws regarding the keeping of hotels is tried after the coming into force of the Code, he will be punished under the more favourable law. Assuming that he is punished under the 1930 Code, he may in addition be ordered under the 1957 Code to close his hotel for a specific period of time, regardless of the fact that such an order could not have been made under the 1930 Code. The offender is not sentenced to a more severe punishment than that which could have been imposed at the time of the offence, for this would be contrary to Art. 2. On the other hand, if, for instance, the manner in which he runs his hotel creates a dancer to the public, it is natural that steps be taken immediately to prevent further danger.

Where a person who has already served several sentences of imprisonment is tried after the coming into force of the 1957 Code for an offence contrary to the 1930 Code, he will not necessarily be punished under the more favourable law and he may be interned in accordance with Art. 128 of the 1957 Code, although the law in force at the time of the offence did not permit the substitution of internment for the penalty.

The same applies to curativc measures ordered with respect to irresponsible offenders, educational measures for juveniles, protective measures such as placing under police supervision or expulsion. Failing'the p/ovisions of Art. 7, one would not be able, for instance, to send a partially irresponsible offender to a special institution, for this was not provided for in the 1930 Code. One would thereby disregard the fact that the offender may be in need of medical treatment and that his condition, if not taken care of, may lead him to commit

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further offences. This shows that the provisions of Art. 7 arc not only in the public interest, but also in the interest of the offender.

Article 8. Application as to periods of limitation

(1) *Upon the coming into fora of this Code the provisions of this Code concerning the periods of limitation applicable to the right to prosecute and to enforce a pen ilty .'t/tail apply.*
(2) *Wherever the provisions of this Code require official proceedings to be instituted in respect of offences committed under repealed legislation and which under such legislation could be prosecuted upon private complaint, such right of complaint shall he barred if not exercised within a period of two years after the coming into force of this Code.*

Art. 8 lays down the rules governing limitation in eases of offences committed prior to the coming into force of the Code. In this respect, a distinction need be made between the limitation of the right to institute proceedings *(i.e.* the period of time within which tht offender may be prosecuted), known in the Code as "limitation as to prosecution", and the limitation of the right to enforce a sentence *(i.e.* the period of time within which judgments may be executed), known in the Code as "limitation of the penalty".

1. Limitation of the penalty, which is dealt with in Arts. 233—238 of the Code, was not provided for by earlier legislation. A person who had been convicted and had for whatever reason succeeded in escaping the enforcement of the sentence could at any time be made to serve such sentenhe, irrespective of the time having elapsed since the sentence had been passed. The enforcement of punishments could in no case be barred by limitation. On the contrary. Arts. 233-238 specify periods of time within which sentences arc to be enforced. Upon the expiry of the said periods, no judgment, whatever its nature, may be executed any longer. It is, therefore, consonant with the rule laid down in Art- 6 to prescribe that the provisions of the 1957 Code regarding limitation of the penalty apply even in the case of sentences passed prior to its cortiing into force, as the said Code is more favourable to the convicted person than the law in force at the lime when the sentence was passed.

2. Limitation of the prosecution, which is dealt with in Arts. 225—232 of the 1957 Code, was also provided for in Arts. 153—156 of the 1930 Code. The question may arise as to whether the right to institute proceedings within a given period of time is governed by the 1930 or the 1957 Code and. consequently, until what time a person who has committed an offence under previous legislation may be prosecuted. Although the new provisions on limitation are generally less favourable as they lay down longer periods fsee Art. 153 of the 1930 Code as opposed to Art. 226 *(a)* of the 1957 Code; Art. 154 as opposed to Art, 226 (A); Art. 155 as opposed to Art. 226 (</)), Art. 8(1) prescribes that the provisions of the 1957 Code regarding limitation of the prosecution apply as from the day of the enforcement of the Code although the offence to be prosecuted was committed before such day. This can be explained by recalling that the rule *lex retro non agit* normally applies to substantive law only. But limitation is above all a procedural matter and it is commonly admitted that procedural rules apply as soon as they are enacted, regardless of the date when the matter to which they apply came into being (Art. 2 Criminal Procedure Code). The provisions of Art. 8(1), which anyway are not necessarily detrimental to the offender, are not contrary to those of Art. 2 as they only result in a person being liable to prosecution for a longer period than he would have been, had earlier legislation not been replaced, but not in his being punished more severely than he could expcct to be at the time of the offence.

3. The practical consequences which Art. 8 (1) entails are as follows.

(a) It must be perfectly clear that nothing in Art. 8 will cause the right of prosecution to revive if it is barred according to the law repealed by the new Code. Thus, the provisions of the 1957 Code regarding limitation will apply only if. on the day of their coming into force, prosecution would still be possible in pursuance of the laws previously in force. It follows

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that when, on the coming into force of the 1957 Code, the period of limitation prescribed by previous legislation has expired without proceedings having been instituted, such proceedings are finally barred and the fact that the new Code prescribes a longer period of limitation in the particular case is immaterial.

Illustration

An aggravated theft (Art. 420 of the 1930 Code) was committed on May 4, 1953. The punishment under Art. 420 was five years imprisonment and the period of limitation was five years (Art. 155). If proceedings have not been instituted before May 5, 1958, they are finally barred even though, under the 1957 Code, the period of limitation with respect to such an offence is fifteen years and proceedings could, therefore, be instituted until 1968.

(b) On the other hand, it must also be perfectly clear that nothing in Art. 8 will cause the right of prosecution to revive if it is barred according to the 1957 Code. It is not sufficient for the purpose of this Article that proceedings should not be barred under the 1930 Code, and it is necessary that they should not be barred under the new Code cither.

Illustration

Under Art. 156 of the 1930 Code, the period of limitation for so-called ordinary crimes *(i.e.* offenccs punishable with less than one year imprisonment, including petty offences) was three years. Under Art. 730 of the 1957 Code, the prosecution of petty offences is barred after one year. Therefore, the right to prosecute petty offences committed, at the latest, on May 4, 1958, was "absolutely** barred (Art. 231) on May 4, 1960, although it would not have been barred on such day under previous legislation.

(c) Therefore, the provisions of Art. 8 do not apply unless the period of limitation prescribed by both earlier legislation and the 1957 Code is still running. In such cases, the new periods of limitation have to be observed. This does not mean, however, that entirely fresh periods of limitation begin to run, and the period of time having elapsed prior to the coming into force of the Code will be taken into account and deducted from the period of limitation which is still to run under that Code.

Illustration

Under Art. 260 of the 1930 Code, a person who impaired the safety of public communications was punishable with imprisonment from three months to three years and the period of limitation was five years (Art. 155). Under Art. 500 of the 1957 Code, the punishment for the same offence is rigorous imprisonment not exceeding three years and the period of limitation is ten years (Art. 226 *(el)).* If any such offence was committed in 1956 and was not tried before the coming into force of the Code, proceedings will not have been barred in 1959 (as they would have been if the 1930 Code had not been replaced), nor can they be instituted until May 5,1968 (ten years from the coming into force of the new Code), but until 1966 only. The period of two years having elapsed prior to the coming into force of the Code is reckoned as part of the period of limitation laid down by the Code.

This shows that the new periods of limitation must be calculated from the day of the commission of the offence, and not from the day of enforcement of the Code, and that the deduction referred to in Art. 8 (1) is possible only when the new periods of limitation are equal to, or longer than, those prescribed by previous legislation and when proceedings are not barred under either the 1930 or the 1957 Code.

4. Some explanations may be given on sub-art. (2) of Art. 8, though the rules it contains have today ceased to be of any practical interest. However, they might prove useful in cases of amendment, should certain offences now said to be punishable on complaint be in the future declared liable to public proceedings.

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Proceedings are not necessarily instituted by the public prosecutor of his own motion, and the 1957 Code provides for offences which may not be prosecuted unless the injured party requires the public prosecutor to institute proceedings. A similar request had to be made in some cases under the 1930 Code. These cases could not be disposed of merely by applying the provisions of sub-art. (1) of Art. 8 dealing with offences which are not punishable on complaint for, in the case of offences which cannot be prosecuted except at the request of the injured party, a .different problem occurs; in addition to limitation of the prosecution, limitation of the right to make any such request or complaint has to be provided for.

There would have been no need for a provision similar to sub-art. (2) of Art. 8 if the offences which under the 1930 Code were punishable on complaint had been the same as those with respect to which a complaint is required under the 1957 Code, since one might then have prescribed that the right to make a complaint with respect to an offence committed prior to the coming into force of the new Code would be barred after such time as is laid down in the Code. But the offences which were punishable on complaint under the I 930 Code (see Art. 399 relating to the prosecution of "crimes committed by illicit sexual intercourse") are no longer punishable on complaint under the 1957 Code. The problem, therefore, was whether these offenccs, if committed before May, 5, 1958, should thereafter be prosecuted without a complaint being necessary, although such complaint was required at the time of the offence, or whether a complaint should still be made, although it was no longer required at the time of prosecution. This question could obviously not be left unanswered as, depending on how Arts. 6 and 8(1) would have been construed, one might have come to the conclusion that no proceedings could be instituted in the absence of a complaint or, on the contrary, that no complaint was necessary any more. Neither of these solutions would have been entirely satisfactory.

(a) In all cases contemplated by Art. 8 (2), the new law may not be deemed to be more favourable; the prosecution is easier than it was under the 1930 Code, since an essential prerequisite (complaint^ is dispensed with. It would, therefore, have been contrary to the principle of legality to institute proceedings without a complaint being made with respect to an offence which previously could not be prosecuted but on complaint.

(b) On the other hand, the fact that some offences which were previously punishable on complaint are henceforth to be prosecuted regardless of whether the injured party so requires indicates that these offences have been deemed to be so serious that the decision whether they ought to be prosecuted or not should no longer depend on what the injured party docs. Public order demands that these offences be punished on behalf of the State and that the public prosecutor be able to institute proceedings despite the fact that the injured party does not want proceedings to be instituted.

(c) Art. 8 (2) thus attempted to compromise between these somewhat conflicting requirements by prescribing that, where an offence punishable on complaint under previous legislation had been committed but not tried before May 5, 1958, the injured party would no longer be entitled to make a complaint at any time, as he was under the 1930 Code, but would have to make such complaint before May 5. 1960. If he failed to do so, the right of complaint and consequently the right to prosecute would be finally barred.

Article 9. Judgments passed under legislation repealed by this Code

Where a sentence has been passed in accordance with the legislation previously in force its enforcement shall be governed by the following principles:

(I) *If the Code no longer restrains the act in respect of which the sentence was passed the punishment shall no longer be enforceable or shall forthwith cease to have effect.*

However, where a sentence has been passed for the breach of a criminal law enacting a prohibition or an obligation limited to a given period of time for special reasons of a transi-

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lory nature, the expiration of the said period shall not bar the enforcement of the punishment, nor shall the prosecution be barred by such expiration.

(2) *Upon the coming into force of this Code punishments shall be enforced as provided in this Code. This shall also apply to the recovery of fines and the conditional release of prisoners.*

(3) *If a prisoner who is undergoing punishment at the time of the coming into force of this Code is found guilty of an earlier offence which renmined unknown and was punishable by a penalty entailing loss of liberty the court shall pass an aggregate sentence in accordance with the provisions relating to concurrent offences {Art. 191) and shall take into account the provisions regarding the application of the more favourable law {Art. 6).*

The period of imprisonment undergone in pursuance of the earlier judgment shall be deducted.

The preceding Articles, with the exception of that part of Art. 8 (1) regarding limitation of the penalty, were dealing with the question of the law to be applied in relation to offences committed and not tried before the coming into force of the 1957 Code. Art. 9 settles a different problem, namely that which arises when, on the coming into force of the Code, a person is serving a sentence passed with respect to an offence committed and tried before May 5, 1958. Here again, some of the new provisions are declared to be applicable forthwith either for reasons of public order or because they are more favourable to the convicted person.

1. It would be difficult to understand why a person sentenced prior to May 5, 1958, for an offence committed under earlier legislation should, after such date, continue to serve sentence if the act with regard to which the sentence was passed is no longer an offence under the new Code, whilst, if he had not been tried yet on May 5, 1958, he could no longer be tried thereafter by virtue of the provisions of Art. 6. This is why Art. 9(1) lays down a principle similar to that contained in Art. 6, the effect of which is that the new law. whenever more favourable, has a retrospective effect as regards not only prosecution, but also the enforcement of sentences. In other words, no sentence may, after May 5, 1958, continue in force except where it was passed for an act which is defined as an offence by the 1957 Code. In practice, this means that any person who would have been serving sentence *e.g.* for having written a sorcery book before the coming into force of the Code, had to be released on May 5. 1958.

2. Some attention must be given to the fact that there may be cases where sentences passed before the coming into force of the Code will continue to be enforced thereafter although the Code no longer provides for the offence with respect to which the sentence was passed. A person may have been sentenced for an offence contrary to a law enacted for a limited period of time owing to circumstances of a temporary nature *(e.g.* time of war. economic emergency). The said law may have been declared to be applicable for a specified period of time *(e.g.* three years) or until the disappearance of the circumstances which rendered its enactment necessary (end of war or economic emergency). Where, for example, a person has been sentenced to t«n years imprisonment for an offence contrary to wartime legislation, it is clear that the end of the war will not put an end to the enforcement of such sentence. Similarly, where, in the course of the enforcement of such sentence, the law creating the offence is repealed and replaced by new laws which do not provide for such offence or lay down lesser punishments with respect thereto, the replacement of the law under which the sentence was passed will not have the effect that such sentence may. no longer be enforced. In all such cases, only conditional release, pardon or an amnesty may put an end to the enforcement of the sentence prior to the expiration of the period for which it was passed. The second paragraph of Art. 9 (1). which so far as earlier legislation is concerned is of academic more than of practical interest, amounts to saying that offences contrary to a special law of a temporary character are to be dealt with as provided for by such law. So long as limitation has not occurred, proceedings for offences under such law may be instituted, and

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sentences passed under such law may be enforced, although the said law is no longer existence.

3. Where a sentence has been passed prior to May 5, 1958, and it is established that thei is no reason why its enforcement should be discontinued as provided for by Art. 9(1), th provisions of the 1957 Code will apply as regards the manner of enforcing the sentence although this Code was not in operation at the time when the sentence was passed.

(a) The Code contains a number of rules *(e.g.* Arts. 91—97, 108—118, and 120A) regarding execution of judgments, which rules are to be complied with in all cases of sentences being in the course of execution on May 5, 1958, and to be served thereafter. It is desirable, in the interest of both the administration and the convicted persons, that there be some uniformity in the enforcement of sentences and that judgments be executed in the same manner, irrespective of the day on which they were given. Furthermore, it would be difficult in practice to make discriminations in the treatment of convicted persons owing solely to the fact that some of them were sentenced before, and others after, the coming into force of the Code. The pertinent provisions of the Code regarding execution are much more detailed and complete than those previously in force, and all convicted persons should be granted the benefits resulting from the improvement of the law on such matters. This is the purpose of Art. 9 (2), according to which the provisions in the Code dealing with the enforcement of sentenoes also apply to sentences passed before May 5, 1958.

Illustrations

Where, before May 5, 19S8, a person was sentenced to pay a fine and he had not paid it on the coming into force of the Code, he could be allowed to pay it by instalments within two years (Art. 91 (2)), although this would not have been possible under previous legislation.

Where, before May 5, 19S8, a person was sentenced to imprisonment, he had as from such day to be kept separate from juveniles or habitual offenders and he might be conditionally released as provided by the Code (Arts. 109 and 112), although previous legislation contained no provision, or different provisions, on the subject.

Where, before May 5,1958, a person was sentenced to death and the sentence had not been executed on the coming into force of the Code, such sentence could thereafter be executed only by hanging, although the previous practice was to use the electric chair.

(b) Art. 9 (2) is applicable whether the punishment in the course of being executed on May 5, 1958, is regarded by the new Code as a penalty or a measure. It was mentioned before that Arts. 8, 9 and 11 of the 1930 Code provided for punishments which under the 1957 Code are considered to be measures. The provisions of the new Code apply as regards the enforcement of these punishments, although they are now deemed to be measures.

Illustration

Where, before May 5, 1958, a person was ordered to find a guarantor against acts of violence, the provisions of Arts. 139 *et seq.* apply as regards the carrying out and possible extension of such an order, although such extension was not provided for by Art. 11 of the 1930 Code.

4. Sub-art. (3) of Art. 9 deals with the case of so-called retrospective concurrence of offences. It was shown in connection with Art. 6 how the Code applies when some offences have been committed before, and some after, its coming into force. Under Art. 9 (3), the problem is different, as it consists in knowing how to deal with an offender who, while serving sentence on the coming into force of the Code, is found to have committed under previous legislation an offence which remained unknown and could not be tried at the same time as the offence with respect to which the sentence which he is serving was passed. In such a case, the court may not give a new separate judgment regarding such unknown offence, and it is required to pass an "aggregate sentence". *I.e.* it must make a new judgment

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relating to all concurrent offences, which judgment must be such that the offender is not punished more severely than he would have been, had all these offences been known and tried together at the time when the first judgment was given. Some preliminary remarks need be made regarding the conditions on which this sub-article applies.

(a) Art. 9 (3) will not be given effect unless the act which remained unknown at the time of the first trial is an offence under both the 1930 and the 1957 Codes, and unless proceedings are not L«*rrcd by limitation. If such act is an offence only under the 1930 Code, Art. 6 prohibits the institution of proceedings; if it is an offence only under the 1957 Code, Art. 2 prohibits the institution of proceedings; if it is an offence under both Codes, but limitation has occurred under cither Code, Art. 8 (1) prohibits the institution of proceedings.

(ft) Art. 9 (3) is said not to apply unless the offender who is serving sentence is found guilty of another offence which under earlier legislation was punishable with a penalty entailing loss of liberty. This condition is too restrictive and will, if strictly interpreted, defeat the purposes of Art. 9 (3).

(i) Bearing in mind that the aggregate sentence must be passed under the more favourable law, it is clear that the nature of the punishment prescribed by repealed legislation is immaterial; what has to be considered is the nature of the punishment prescribed by the more favourable law, whichever it may be.

Illustration

Where the offence which remained unknown was punishable by death under the 1930 Code, one might conclude that no aggregate sentence is to be passed as the death penalty overrides any other punishment. This conclusion would be wrong in all cases where the 1957 Code no longer provides for death as a punishment for this offence. In such a case, an aggregate sentence must be passed in accordance with the new Code, which is more favourable, and the death penalty may not be ordered.

(ii) Art. 9 (3) is so worded as to give the impression that an aggregate sentence may not be passed unless the offender is still serving sentence at the time when the offence which remained unknown is tried. One might conclude that no aggregate sentence is to be passed when the offender is at large either because he had previously been sentenced to a fine or because he has served the term of imprisonment previously ordered. This conclusion, again, would be wrong in that it would permit a new separate judgment being given which might result in the offender being treated more severely than he would have been, had all offences been tried together.

Illustration

In 1956. *A* was sentenced to two years imprisonment and was released in 1958. In 1960, it is discovered that *A* had committed, prior to being sentenced, an offence which would have been punishable by three years imprisonment under the 1930 Code and is punishable by two years imprisonment under the 1957 Code. Art. 9 (3) may lead to thinking that no aggregate sentence is then to be passed since *A* is no longer serving sentence and that he may. therefore, be sentenced to two years imprisonment under the 1957 Code, which is more favourable. This would be wrong. Having regard to the provisions regarding concurrent offences (see para. (5) and (6) *infra),* an aggregate sentence must be passed which may not exceed three years imprisonment, to run concurrently with the term of imprisonment previously ordered and served. It follows that *A,* who would have to serve two more years if no aggregate sentence were passed, as is implied in Art. 9 (3), will have only one more year to serve if an aggregate sentence is passed, as it ought to be.

(iii) In some cases, and subject, again, to the fulfilment of the conditions analyzed in para. (5) and (6) *infra,* the aggregate sentence which the court is required to pass will in fact

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amount to a separate judgment. This will occur whenever the punishment previously imposed differs in nature from the punishment applicable to the offence which remained unknown *(e.g.* the previous sentence was imprisonment and the offence which remained unknown is punishable with death or a fine; the previous sentence was a fine and the offence which remained unknown is punishable with imprisonment). In such cases, the court is not in a position to combine the various punishments to be taken into consideration as, for instance, the amount of fine to be imposed for the offence which remained unknown will not be affected by the term of imprisonment previously ordered, and vice versa.

5. Prior to examining all the implications of Art. 9 (3), a few words must be said regarding the various systems which exist concerning the assessment of the sentence in cases of concurrent offences. In this respect, the differences between the 1930 and the 1957 Codes are indeed fundamental.

(a) Under some laws, the court may sum up the punishments prescribed for each of the concurrent offences. Thus, a person charged with three offences each of which is punishable with two years imprisonment may be sentenced to six years imprisonment. Under this system, which existed with some restrictions in the 1930 Code as regards the punishment of those who break "many unimportant laws" (Art. 42) and which is preserved with similar restrictions in the 1957 Code as regards the concurrence of petty offences (Art. 725). the various punishments to be imposed are, therefore, *cumulated.*

(b) In addition to, or in substitution for, cumulation, some laws prescribe that the court must inflict only the punishment applicable to the more serious of the concurrent offences, which punishment is deemed to *absorb* all other penalties applicable to the less serious concurrent offences. This system existed in Art. 42 of the 1930 Code as regards the punishment for concurrent offences not committed against unimportant laws. Art. 42 stated that "if a man who has committed many crimes of many different kinds be accused at one time of all the crimes he has committed, though according to the law a case shall be taken against him for each separate crime, from these crimes of which he is accused he shall be punished for the chief one as laid down by law and not for each separate offence."

(c) The system in the 1957 Code regarding the assessment of the sentence in the case of concurrence of serious offences—as opposed to petty offences—is quite different. Under Art. 82, concurrence of offences is regarded as a special aggravating circumstance. The punishment imposed for such concurrent offences must reflect this aggravation, not by a mere mathematical addition of the various punishments, but by *increasing* the punishment prescribed for the more serious offence (Art. 189).

6. The consequences to be drawn from these explanations are essential if one bears in mind that the aggregate sentence to be passed under Art. 9 (3) must be parsed in accordance with the more favourable law. It was said before that the more favourable law is not necessarily that which provides for the lesser punishment, but that which actually is more lenient “having regard to all the relevant provisions” (Art. 6.) In the particular case, there can be no doubt that, so far as the punishment of concurrent offences is concerned, the 1930 Code is more favourable than the 1957 Code; the former provides for absorption, whereas the latter provides for aggravation. Although retrospective concurrence is not mentioned in Art. 42 of the 1930 Code, nothing permits one to say that the said Article was intended to apply only to ordinary cases of concurrence. The fact that the 1930 Code is more favourable as regards concurrence of offences entails that the provisions of Art. 9 (3) will be found to be inapplicable in a great many cases, since the taking into consideration of the more favourable law will often result in an absolute prohibition from passing an aggregate sentence or a separate judgment, as the case may be.

(a) Where the offence which remained unknown is under both the 1930 and the 1957 Codes of lesser gravity than the more serious offence with respect to which the first sentence was passed, the 1930 Code will be deemed to be more favourable; had this minor offence

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been tried together with the more serious one, absorption would have taken place and the offender would have been punished only for the more serious offence. Since the court which is called on to pass an aggregate sentence may not punish the accused more severely than he would have been if ail the concurrent offences had been tried together, there is hardly any point in passing an aggregate sentence which, in this case, would merely repeat the previous sentence.

Illustration

In 1956, *A* was tried for imitating the Emperor's seal (Art. 193 of the 1930 Code) and sentenced to ten years imprisonment. In 1960, it is discovered that *A* also had committed a theft which remained unknown and was not tried in 1956. To pass an aggregate sentence in such a case would be rather useless, since the court might not impose any punishment for the theft. Under the 1930 and the 1957 Codes, a theft carries a lesser punishment than that which was ordered in 1956. Therefore, if the theft had been known in 1956, this would not have affected the punishment imposed at the time, for the court had power in 1956 to order only the punishment applicable to the more serious offence. In other words, it could not have inflicted more than ten years imprisonment even if it had known of the theft. If an aggregate sentence were to be passed after the discovery of the theft, the court could not, without creating a situation less favourable to the accused, increase the term of imprisonment ordered in 1956.

(b) The same would apply whenever the offence which remained unknown is of the same gravity, under the 1930 and the 1957 Code, as the more serious offence with regard to which the previous sentence was passed, or where such offence is of greater seriousness under the 1957 Code but of lesser seriousness under the 1930 Code. In all these cases, although the court ought in principle to pass an aggregate sentence, such sentence w'ould merely confirm the previous sentence, and the institution of proceedings with respect to the offence which remained unknown would serve no other purpose than an informative one (entry of the conviction in the offender's record). An aggregate sentence would not even serve a preventive or protective purpose, since it would'be unjustified to withdraw, in pursuance of Arts. 7 and 146, the licence of a person who could have been convicted years ago of an offence connected with the use of such licence but did not further misuse his licence until the day when the earlier offence is discovered.

7. Art. 9 (3). therefore, applies only in such cases where the offence which remained unknown would have been liable under the 1930 Code to a greater punishment than the more serious offence with respect to which the previous sentence was passed. In these cases, the court, bearing in mind all rel vant circumstances, will assess the punishment it could have imposed under the 1930 Code. It will then assess the punishment it could impose under the 1957 Code, having regard to the provisions of Art. 189. Comparing the punishments respectively arrived at under the 1930 and the 1957 Codes, the court will order such punishment as is the more favourable to the accused. Whichever the Code under which the sentence is passed, it must be clear that the punishment thus ordered may in no case exceed the highest punishment that might have been imposed under the Code which the court deems less favourable in the particular case.

Illustrations

The first sentence was to five years imprisonment. The offence which remained unknown is punishable with twelve years imprisonment under the 1930 Code and with ten years imprisonment under the 1957 Code. The court considers that, had this offence been known at the time of the first trial, the maximum punishment prescribed by the 1930 Code, *i.e.* twelve years, would have been imposed, which would then have absorbed the punishment of five years applicable to the less serious concurrent offence. Examining the provisions of the 1957

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Code, the court considers that not only the maximum penalty of ten years should be imposed but that such penalty should be increased by half according to Art. 189. The court might well do so. but it might not increase the penalty so as eventually to order more than twelve years imprisonment, since it is bound by the highest penalty which could be inflicted under the 1930 Code. Although the 1957 Code is apparently more favourable because it provides for a shorter term of imprisonment, the more favourable law actually is the 1930 Code; under the latter law, not more than twelve years may be ordered whereas, under the former, the punishment may be up to fifteen years. The aggregate sentence is thus to be passed in accordance with the 1930 Code.

The first sentence was to five years imprisonment. The offence which remained unknown is punishable with ten years imprisonment under the 1930 Code and with five years imprisonment under the 1957 Code. Had it known of and tried the concurrent offences together, the court would have been entitled to order ten years imprisonment. However, the highest penalty that may be passed under the 1957 Code is seven and a half years (basic penalty as increased under Art. 189). The aggregate sentence is to be passed in accordance with the 1957 Code.

Whichever Code be applied, the aggregate sentence will run concurrently with, and not consecutively to, the sentence passed prior to the coming into force of the Code. In other words, if the first sentence was to five years, four years of which have been served already when an aggregate sentence to ten years is passed, the accused will have only six more years to serve, since the term of punishment served in pursuance of the first sentence must be deducted from the term of punishment to be served in pursuance of the aggregate sentence.

8. It may occur that the first sentence was a fine and that the offence which remained unknown is also punishable with a fine. As a rule, the Code providing for the lesser amount of fine will be deemed to be more favourable, but this is without prejudice to the provisions of both Codes regarding the possible cumulation of fines. Art. 42 of the 1930 Code provided that a person having committed many different offences punishable with a fine was liable to pay all these fines, which could, therefore, be cumulated without restriction. On the contrary. Art. 189 (1) (</) of the 1957 Code prescribes that, “in cases where several fines have to be applied, the court shall impose a single amount of fine which shall not exceed the aggregate amount of the separate fines, nor the general maximum provided by law *(i.e.* 5000 dollars), save in cases where the offender acted for gain" (in which case the amount may be increased to 10,000 dollars). Therefore, it may occur that, in cases of retrospective concurrence of offences punishable with fine, the 1957 Code is more favourable though the amount of fine it prescribes for the offence which remained unknown is higher than the amount prescribed by the 1930 Code.

Illustration

In 1956, *A* was sentenced to a fine of 3000 dollars. It was subsequently discovered that he had also committed an offence punishable with a fine the amount of which is 3000 dollars under the 1930 Code and 5000 dollars under the 1957 Code. The 1930 Code is apparently more favourable: However, if it is applied, the aggregate sentence may amount to a fine of up to 6000 dollars (3000 of which remains to be paid). On the other hand, if the 1957 Code is applied, the aggregate sentence may not provide for a fine exceeding 5000 dollars (2000 of which remains to be paid), unless, of course, the offender acted for gain, in which case the 1957 Code would be less favourable.

9. It may be noted that there is no problem of retrospective concurrence when a person is found to have committed an offence concurrently with another act which was an offence under the 1930 Code but is no longer an offence under the 1957 Code. In such a case, no aggregate sentence is to be passed. The enforcement of the judgment given with respect to the act which is not declared to be an offence any more will terminate (Art. 9 (1)). As for the

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Code, the court considers that not only the maximum penalty of ten years should be imposed but that such penalty should be increased by half according to Art. 189. The court might well do so, but it might not increase the penalty so as eventually to order more than twelve years imprisonment, since it is bound by the highest penalty which could be inflicted under the 1930 Code. Although the 1957 Code is apparently more favourable because it provides for a shorter term of imprisonment, the more favourable law actually is the 1930 Code; under the latter law, not more than twelve years may be ordered whereas, under the former, the punishment may be up to fifteen years. The aggregate sentence is thus to be passed in accordance with the 1930 Code.

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Whichever Code be applied, the aggregate sentence will run concurrently with, and not consecutively to, the sentence passed prior to the coming into force of the Code. In other words, if the first sentence was to five years, four years of which have been served already when an aggregate sentence to ten years is passed, the accused will have only six more years to serve, since the term of punishment served in pursuance of the first sentence must be deducted from the term of punishment to be served in pursuance of the aggregate sentence.

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In 1956, *A* was sentenced to a fine of 3000 dollars. It was subsequently discovered that he had also committed an offence punishable with a fine the amount of which is 3000 dollars under the 1930 Code and 5000 dollars under the 1957 Code. The 1930 Code is apparently more favourable! However, if it is applied, the aggregate sentence may amount to a fine of up to 6000 dollars (3000 of which remains to be paid). On the other hand, if the 1957 Code is applied, the aggregate sentence may not provide for a fine exceeding 5000 dollars (2000 of which remains to be paid), unless, of course, the offender acted for gain, in which case the 1957 Code would be less favourable.

9. It may be noted that there is no problem of retrospective concurrence when a person is found to have committed an offence concurrently with another act which was an offence under the 1930 Code but is no longer an offence under the 1957 Code. In such a case, no aggregate sentence is to be passed. The enforcement of the judgment given with respect to the act which is not declared to be an offence any more will terminate (Art. 9 (1)). As for the

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offence which remained unknown, a new separate judgment will be given in accordance with the more favourable law. Such a case would, therefore, come under Art. 6, and not under Art. 9 (3).

One may be driven to the conclusion that the provisions of Art. 9 (3) are quite complicated as regards the question whether and how an aggregate sentence ought to be pasx-. AJthough this sub-article requires redrafting, the principle on which it is based should not be altered for, here again, it is essential that the offender be granted the benefit of the improvement which may have taken place in the law between the time of commission of the offence and the time when this offence is discovered and tried. The truth of the matter is that retrospective concurrence as such creates difficult problems. The fact that the court which is required to solve such problems may have to take into account two laws which contain quite different provisions on the assessment of the sentence in cases of concurrence of offences creates further, though inevitable, difficulties.

Article 10. Application as to cancellation and reinstatement

The cancellation of entries in Police Records made prior to the coming into operation of this Code as well as reinstatement, even in the case of judgments given under provisions repealed by this Code or customary law fallen into disuse shall be governed by this Code.

The provisions of the 1957 Code regarding cancellation of entries in polioe records and reinstatement are applicable from the day of its coming into force. When a person is convicted by a criminal court, a note to this effect if normally made in his police record, which note may be cancelled on specific conditions. This system, which is now provided for by Arts. 160,179, 180, 205 and 242—247, did not exist in earlier legislation. One may, therefore, wonder whether the provisions of Art. 10 are of any practical use.

1. Though there was no legal obligation before May 5, 1958, to enter convictions in police records, the practice of making such entries had developed in the main cities and police records will be found to exist with respect to sentences passed prior to the coming into force of the Code. This being so, it is only right to prescribe that these entries may be cancelled whenever the pertinent requirements of the new Code are fulfilled, although such entries relate to sentences passed "under provisions repealed by this Code or customary law fallen into disuse." For, if there was a practice of making entries, there was no practice of deleting them, and mere fairness required that, as regards cancellation of entries, all convicted persons should be treated equally, whether they had been convicted under previous legislation or under the 1957 Code.

2. It is evident that, where a person had been convicted before May 5, 1958, of an act which is no longer an offence under the new Code, any entry that may have been made in his police record will be struck out automatically without it being necessary that the conditions for cancellation laid down in the Code be present. In this respect, the introduction of the Code has the same effects as an amnesty (Art. 240 (2), second alinea).

3. Reinstatement raises a similar question. Provisions were not made in earlie*' legislation regarding the possibility of a person applying to be relieved of all the consequences of a criminal sentence passed on him. Here again, no discrimination will be made among convicted persons depending on whether they were sentenced before or after the coming into force of the Code. As regards both cancellation of entries and reinstatement, the new law creates a more favourable situation, and the provisions of Art. 10 are in harmony with those of Art. 6.

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Code, the court considers that not only the maximum penalty of ten years should be imposed but that such penalty should be increased by half according to Art. 189. The court might well do so, but it might not increase the penalty so as eventually to order more than twelve years imprisonment, since it is bound by the highest penalty which could be inflicted under the 1930 Code. Although the 1957 Code is apparently more favourable because it provides for a shorter term of imprisonment, the more favourable law actually is the 1930 Code; under the latter law, not more than twelve years may be ordered whereas, under the former, the punishment may be up to fifteen years. The aggregate sentence is thus to be passed in accordance with the 1930 Code.

The first sentence was to five years imprisonment. The offence which remained unknown is punishable with ten years imprisonment under the 1930 Code and with five years imprisonment under the 1957 Code. Had it known of and tried the concurrent offences together, the court would have been entitled to order ten years imprisonment. However, the highest penalty that may be passed under the 1957 Code is seven and a half years (basic penalty as increased under Art. 189). The aggregate sentence is to be passed in accordance with the 1957 Code.

Whichever Code be applied, the aggregate sentence will run concurrently with, and not consecutively to, the sentence passed prior to the coming into force of the Code. In other words, if the first sentence was to five years, four years of which have been served already when an aggregate sentence to ten years is passed, the accused will have only six more years to serve, since the term of punishment served in pursuance of the first sentence must be deducted from the term of punishment to be served in pursuance of the aggregate sentence.

8. It may occur that the first sentence was a fine and that the offence which remained unknown is also punishable with a fine. As a rule, the Code providing for the lesser amount of fine will be deemed to be more favourable, but this is without prejudice to the provisions of both Codes regarding the possible cumulation of fines. Art. 42 of the 1930 Code provided that a person having committed many different offences punishable with a fine was liable to pay all these fines, which could, therefore, be cumulated without restriction. On the contrary. Art. 189 (1) (</) of the 1957 Code prescribes that, "in cases where several fines have to be applied, the court shall impose a single amount of fine which shall not exceed the aggregate amount of the separate fines, nor the general maximum provided by law *(i.e.* 5000 dollars), save in cases where the offender acted for gain" (in which case the amount may be increased to 10,000 dollars). Therefore, it may occur that, in cases of retrospective concurrence of offences punishable with fine, the 1957 Code is more favourable though the amount of fine it prescribes for the offence which remained unknown is higher than the amount prescribed by the 1930 Code.

Illustration

In 1956, *A* was sentenced to a fine of 3000 dollars. It was subsequently discovered that he had also committed an offence punishable with a fine the amount of which is 3000 dollars under the 1930 Code and 5000 dollars under the 1957 Code. The 1930 Code is apparently more favourable: However, if it is applied, the aggregate sentence may amount to a fine of up to 6000 dollars (3000 of which remains to be paid). On the other hand, if the 1957 Code is applied, the aggregate sentence may not provide for a fine exceeding 5000 dollars (2000 of which remains to be paid), unless, of course, the offender acted for gain, in which case the 1957 Code would be less favourable.

9. It may be noted that there is no problem of retrospective concurrence when a person is found to have committed an offence concurrently with another act which was an offence under the 1930 Code but is no longer an offence under the 1957 Code. In such a case, no aggregate sentence is to be passed. The enforcement of the judgment given with respect to the act which is not declared to be an offence any more will terminate (Art. 9 (1)). As for the

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offence which remained unknown, a new separate judgment will be given in accordance with the more favourable law. Such a case would, therefore, come under Art. 6, and not under Art. 9 (3).

One may be driven to the conclusion that the provisions of Art. 9 (3) are quite complicated as regards the question whether and how an aggregate sentence ought to be paiJ*-. rV)though this sub-article requires redrafting, the principle on which it is based should not be altered for, here again, it is essential that the offender be granted the benefit of the improvement which may have taken place in the law between the time of commission of the offence and the time when this offence is discovered and tried. The truth of the matter is that retrospective concurrence as such creates difficult problems. The fact that the court which is required to solve such problems may have to take into account two laws which contain quite different provisions on the assessment of the sentence in cases of concurrence of offences creates further, though inevitable, difficulties.

Article 10. Application as to cancellation and reinstatement

The cancellation of entries in Police Records made prior to the coming into operation of this Code as well as reinstatement, even in the case of judgments given under provisions repealed by this Code or customary law fallen into disuse shall be governed by this Code.

The provisions of the 1957 Code regarding cancellation of entries in polioe records and reinstatement are applicable from the day of its coming into force. When a person is convicted by a criminal court, a note to this effect ir normally made in his police record, which note may be cancelled on specific conditions. This system, which is now provided for by Arts. 160,179, 180, 205 and 242—247, did not exist in earlier legislation. One may, therefore, wonder whether the provisions of Art. 10 are of any practical use.

1. Though there was no legal obligation before May 5, 1958, to enter convictions in police records, the practice of making such entries had developed in the main cities and police records will be found to exist with respect to sentences passed prior to the coming into force of the Code. This being so, it is only right to prescribe that these entries may be cancelled whenever the pertinent requirements of the new Code are fulfilled, although such entries relate to sentences passed "under provisions repealed by this Code or customary law fallen into disuse." For, if there was a practice of making entries, there was no practice of deleting them, and mere fairness required that, as regards cancellation of entries, all convicted persons should be treated equally, whether they had been convicted under previous legislation or under the 1957 Code.

2. It is evident that, where a person had been convicted before May 5, 1958, of an act which is no longer an offence under the new Code, any entry that may have been made in his police record will be struck out automatically without it being necessary that the conditions for cancellation laid down in the Code be present. In this respect, the introduction of the Code has the same effects as an amnesty (Art. 240 (2), second alinea).

3. Reinstatement raises a similar question. Provisions were not made in earlic legislation regarding the possibility of a person applying to be relieved of all the consequences of a criminal sentence passed on him. Here again, no discrimination will be made among convicted persons depending on whether they were sentenced before or after the coming into force of the Code. As regards both cancellation of entries and reinstatement, the new law creates a more favourable situation, and the provisions of Art. 10 are in harmony with those of Art. 6.

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CHAPTER m

APPLICATION OF THE CODE AS TO PLACE [ARTS. 11-22]

The provisions of Arts. 11—22, which are intended to prevent conflicts of jurisdiction, determine the scope of application of Ethiopian criminal law by Ethiopian courts. All Penal Codes do not contain identical rules as to their own scope of application, and some of them do not even contain any rules at all on the subject. This may give ri«e either to positive conflicts of jurisdiction, if the courts of two or more places claim to have jurisdiction to try one and the same offence, or to negative conflicts of jurisdiction, if the courts of two or more plaoes decline to try an offence. In the first case, there is a risk that the offender will be placed in double jeopardy, whilst in the second case there is a possibility that he might escape punishment. Arts. 11-20 aim at ensuring that neither this risk nor this possibility should materialize.

Conflicts of jurisdiction may arise on a national scale, *i.e.* as between Ethiopian courts, and are then to be settled in accordance with Arts. 99-107 of the Criminal Procedure Code, or on an international scale, *i.e.* as between an Ethiopian court and a foreign court, and are then to be settled in accordance with Arts. 11 -22 of the Penal Code. The latter Articles, which are new in Ethiopian legislation but are obviously necessary in view of the increase in exchanges and relations of all kinds between Ethiopia and other parts of the world, distinguish between cases where, owing to the place of commission or to the nature of the offence, or to the special status of the offender, the courts of Ethiopia have *principal* jurisdiction to try the offender, and cases where Ethiopian courts have *subsidiary* jurisdiction only, *i.e.* cases where either the offence or the offender is in some ways connected with Ethiopia, though not as closely as in the afore-mentioned cases.

The system laid down in Arts. 11-22 is based on five fundamental principles:

(a) the principle of territoriality, according to which all offences committed on Ethiopian territory fall within the jurisdiction of Ethiopian courts (Art. 11);

(b) the principle of quasi-territoriality, according to which some offences directed against Ethiopia are to be tried in Ethiopia even though they have not been committed on Ethiopian territory (Art. 13);

(c) the principle of active personality, according to which some offences committed in foreign countries by Ethiopian citizens may be tried in Ethiopia (Arts. 14, IS (2) and 18 (1));

(d) the principle of passive personality, according to which some offences committed in foreign countries against Ethiopian citizens may be tried in Ethiopia (Art. 18 (1»;

(e) in addition, the Code provides for so-called universal jurisdiction in two cases; Ethiopian courts have jurisdiction to try offences against international law (Art. 17) as well as any other offence of extreme seriousness, whether or not carried out on an international scale (Art. 18 (2)), although the offence was not committed on Ethiopian territory, nor directly against Ethiopia, nor by or against one of her citizens.

L Principal jurisdiction [Arts. 11—16]

The courts of Ethiopia are deemed to have principal jurisdiction within the meaning of the Code in the cases provided for by Arts. 11, 13, 14 and 15 (2). The effect of their having principal jurisdiction is that they are entitled to try an offender even though he may also be, or has already been, tried in a foreign country for the same offence.

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Article 11. Offences committed on Ethiopian territory: Normal case

(1) *This Code shall apply to any person whether a national or a foreigner who has committed one of the offences specified in this Code on the territory of Ethiopia.*

The national territory comprises the land, sea and air. The extent of this realm is determined by law.

(2) *Nothing in this Code shall affect immunities of foreign persons enjoying an official status as sanctioned by public international law.*

(3) *If the offender has taken refuge in a foreign country his extradition shall be requested so that he may be tried under Ethiopian taw.*

1. The rule laid down in Art. 11 (1) is based on the principle of territoriality, according to which offenoes committed in a given country are triable by the courts and under the laws of such country, which laws are known as territorial laws, for they are the laws of the State on whose territory the offence was committed. Thus, as a rule, an offence committed on Ethiopian territory comes within the principal jurisdiction of the courts of Ethiopia and is triable in accordance with Ethiopian law, regardless of the nature of this offence, of the personal circumstances of the offender and of the fact that he may in addition be triable by a foreign court or may have been previously tried for the same offence in a foreign country. So that Art. 11 (1) be applicable, three conditions must be fulfilled.

(a) The offence must be *committed* in Ethiopia. For the purpose of deciding whether an offence may be regarded as having been committed on Ethiopian soil, reference will have to be made to Art. 25. As will be seen later (see para. (2) (6) in comments under Art. 25), the courts of Ethiopia have principal jurisdiction when the act or abstention constituting an ingredient of the offence has occurred in Ethiopia, although such act or abstention may have caused harm outside Ethiopia.

(b) The offence must be committed *on Ethiopian territory.* In this respect, Art. 11 confines itself to stating that the territory of Ethiopia "comprises the land, sea and air" and that "the extent of this realm is determined by law ". It is not for the Penal Code to define more clearly what the territory of Ethiopia actually is, as this is the concern of constitutional and public international law (Art. 1 Constitution). The land comprises not only that portion of the earth within the boundaries of Ethiopia but also certain places which are deemed to form part of the Ethiopian territory (Ethiopian embassies abroad, ships and aircrafts flying the Ethiopian flag, see Art. 104 Criminal Procedure Code). The sea comprises Ethiopian ports, roadsteads, anchorages, and the like, which materially form part of the national "land", as well as Ethiopian territorial waters, *i.e.* the sea extending from the national coast upto an imaginary line, the width of which often varies from one country to another and which, in Ethiopia, is of twelve nautical miles (Proclamation No. 137 of 1953, Art. *6(f)).* As for the air, according to international conventions of 1919 and 1944, it comprises the atmosphere above the national territory.

(c) The offence must be an offence *under Ethiopian law* since the principle of legality prohibits Ethiopian courts from trying a person who does in Ethiopia an act which is not declared unlawful by territorial law, even though it may be an offence under the national law of the offender. Contrary to what might be inferred from sub-art. (1), it is both necessary and sufficient that the act to be tried be penalized by any Ethiopian law, whether the Penal Code or another law containing penal provisions.

2. Territorial laws normally apply whatever the offender's personal circumstances or the nature of the offence may be.

(a) As a rule, no discrimination may be made which is founded on the nationality of the offender, and Art. 11 makes it clear that the former practice of trials by consular courts is abolished. Any person, whether an Ethiopian subject or not, who commits on Ethiopian territory an offence against the laws of Ethiopia is to be punished in Ethiopia. However,

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there are some persons who may commit offences in Ethiopia and nevertheless will not be subject to the laws of Ethiopia nor be punished by the courts of Ethiopia. These persons are those who enjoy diplomatic immunity. As mentioned in connection with Art. 4, diplomatic immunity only results in an exception to the principle of territoriality (Art. 11 (2)), since a person enjoying this immunity will be punished in his own country in accordance with his national law instead of being punished at the place and under the laws of the State where the offence was committed. Thus, Art. 11 (2) applies when, for example, an ambassador to Ethiopia commits an offcnce on Ethiopian territory proper; but if he commits the offence within his embassy, such offence will be regarded as having been committed in a foreign country.

(6) Ethiopian courts have principal jurisdiction to try offences committed on Ethiopian territory irrespective of the nature of the offence. However, principal jurisdiction is not always equivalent to exclusive jurisdiction and cases may occur where an offence committed in Ethiopia is of such a nature that it also falls within the principal jurisdiction of the courts of a foreign country. For instance. *A,* on Ethiopian territory, commits an offence directed against the essential interests of Switzerland. Whereas the Swiss Penal Code contains a provision (Art. 4) based on the principle of quasi-territoriality (similar to Art. 13 of the Ethiopian Code), the offence falls within the principal jurisdiction of both the courts of Ethiopia, by virtue of the principle of territoriality, and the courts of Switzerland, by virtue of the principle of quasi-territoriality. In such a case, owing to the nature of the offence, Ethiopian and Swiss courts concurrently have principal jurisdictidn, but this does not prevent the former courts from exercising their jurisdiction (Art. 16).

3. It may occur that a person who committed an offence in Ethiopia is able to escape and to take refuge in a foreign country prior to being prosecuted and tried in Ethiopia. In such a case, the Ethiopian Government will as a rule request the country of refuge to extradite the offender (Art. 11 (3)). Whpre the requisition for extradition is granted, the offender will be surrendered to Ethiopia for purposes of trial, subject to the provisions of Art. 16. However, the said requisition might be dismissed, and the courts of Ethiopia would be unable to get hold of the offender. To avoid that justice should then be defeated, Art. 12 provides for steps to be taken when the offender cannot be tried in accordance with territorial law.

Article 12. Special case: Delegation

(1) *Where a foreigner who has committed an offence in Ethiopia cannot be tried, because he has taken refuge in his country of origin and his extradition cannot be obtained, the Ethiopian Authorities shall request that he be tried in the country of refuge.*

(2) *The accused foreigner cannot be punished in Ethiopia for the same offence if he has been tried and acquitted in the foreign country by a judgment which has become final or, in case of sentence, if his sentence has been remitted or Is barred by limitation.*

(3) *If he has not undergone his punishment or only undergone part of it in the foreign country the whole or the unexpired part thtreof shall be enforced in Ethiopia if the offender is apprehended and the enforcement of the penalty Is not barred by limitation under the provisions of this Code.*

Should the punishments differ as to their nature or form, such punishment as is the closest to that imposed in the foreign country shall be enforced.

1. It may not always be possible to prosecute in Ethiopia a person who committed an offence on Ethiopian territory, for this person may have taken refuge in a foreign country before being apprehended. In such a case, a negative conflict of jurisdiction is likely to occur which, however, can tx. prevented in two different ways.

(a) If the country of refuge is unknown, the provisions of Art. 11 (3) cannot apply since there is no country to which a requisition for extradition may be made. Nor can the provisions

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of Art. 12 apply since there is no court to which Ethiopia can delegate her jurisdiction, *i.e.* entrust the task of punishing the offender in her stead. There is then no alternative but to sentence the offender in his absence, if the conditions for passing such a sentence, as laid down in Arts. 160-164 of the Criminal Procedure Code, arc fulfilled. Territorial law will in such a case apply although the accused is not present in court to answer the charge.

(A) If the country of refuge is known, a requisition for extradition will normally be made in accordance with Art. 11 (3). However, such requisition may be dismissed, and provision need be made to ensure that this does not result in the offender going unpunished. One might, of course, consider sentencing him in his absence also in this case, but, not to mention that the enforcement of Arts. 160-164 of the Criminal Procedure Code should remain exceptional, the giving ofa judgment by default is subject to specific requirements as to the seriousness of the offence charged, and such a judgment, which is not final, is in any event of limited practical usefulness. This is why, rather than sentencing the offender in his absence, the courts of Ethiopia must then consider the possibility of delegating their jurisdiction to the courts of the country of refuge in accordancc with Art. 12. It is only when such delegation appears inexpedient that a judgment by default should be given. As a matter of fact, sub-art.
(3) of Art. 160 of the Criminal Procedure Code implies that the provisions of Arts. 160-164 of the said Code are of a subsidiary nature.

2. According to Art. 12 (1), a delegation of jurisdiction may be effected when the offender's extradition cannot be obtained because he has taken refuge in his own country. It is a very commonly admitted rule that a State does not extradite to foreign countries its subjects who may have committed an offence in such countries, and this rule also appears in Ethiopian legislation (Art. 50 Constitution and Art. 21 (2) Penal Code). However, contrary to what might be inferred from sub-art. (1) of Art. 12, other cases may occur where a delegation of jurisdiction may appear expedient. A requisition for extradition may be dismissed not only because the offender is a foreigner who has taken refuge in his own country, but also because there is no extradition agreement between Ethiopia and the country of refuge, or because the offence to which the requisition relates is not provided for in the agreement, if any, made between Ethiopia and the said country. In the latter cases, the requisition may, therefore, be dismissed irrespective of the offender's nationality, and the dismissal means that he is not amenable to Ethiopian courts; however, it does not mean that he is not liable to prosecution at all. On the one hand, it is an internationally recognized principle that a State which is under the duty to extradite but cannot carry out this duty in a particular case by reason of the offender's nationality is then under the obligation to punish him itself. The alternative, as formulated by Grotius, is indeed: *Aut dedere autpunire.* On the other hand, a State which is under no obligation to extradite the offender or has no jurisdiction to punish him, may be empowered so to punish him by virtue of a delegation of jurisdiction effected under Art. 12.

3. The question may be asked whether the application of Art. 12 is subject to any specific conditions. It is clear, both from the place where Art. 12 appears in the law (after a provision concerning the territorial application of Ethiopian law, and not at the end of the Section dealing with the principal jurisdiction of Ethiopian courts) and from the very wording of sub-art. (1), that a delegation of jurisdiction is possible only with regard to offences committed "in Ethiopia" and, therefore, triable in Ethiopia according to Art. 11. A delegation is excluded in all other cases where Ethiopian courts have principal jurisdiction. In order to understand this restriction, it must be recalled that a delegation of jurisdiction may be made when it is expedient, and that it is expedient only when it will serve its purpose, *i.e.* when the judgment to be given in the country of refuge can be expected to be somewhat comparable to that which would have been given in Ethiopia. In this respect, it should be noted that some offences endangering Ethiopia's fundamental interests may be committed within (Art. 11) or outside (Art. 13) Ethiopia at the instigation of a foreign country. If the offender resides in, or escapes to, such country and the latter refuses to hand him over to Ethiopia for purposes of trial, a delegation is either prohibited by law, when the offence has not been committed in Ethiopia, or must be regarded as inexpedient, for instance when one of the offences mentioned

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in Art. 13 has been committed in Ethiopia. Since a delegation of jurisdiction implies that Ethiopian courts relinquish their right to punish the offender, they may not or should not do so when the courts in whose favour the delegation would have to be made are precisely those of the country which incited, encouraged or tolerated the commission of the offence. For such courts would then pass a sentence which, lenient and symbolic as it might be. would nonetheless be binding on Ethiopia; proceedings subsequently taken in Ethiopia with regard to the same offence would be deemed to place the accused in double jeopardy.

4. What exactly does a delegation of jurisdiction consist of? Ethiopia, which has principal jurisdiction, waives her right to try the offender and vests the exercise of this right in the country of refuge which will thereupon have principal jurisdiction and punish the offender under its own laws as though the offence had been committed on its own territory. This, of course, may entail that the sentence passed in the country of refuge may be quite different from that which would have been passed in Ethiopia. This is why, in order to ensure compliance with the principle of legality and to avoid punishing the offender more severely than he might have been under territorial law, some codes provide that he will be tried in the country of refuge under territorial law if the latter is more favourable to him. Wherever this rule prevails, the offender may, therefore, be liable to a lesser, but in no case to a greater, punishment than that which he would have been liable to in the country where he committed the offence. A rule of a similar nature will be found in Art. 19 (3).

5. The provisions of Art. 12 (1) entail some consequences as to prosecution in Ethiopia (Art. 12 (2)) and as to the enforcement in Ethiopia of the sentence passed abroad (Art. 12(3)).

(a) Although Art. 12 (2) does not expressly say so, it is clear that Ethiopia retains her principal jurisdiction when a delegation of jurisdiction has been effected but the offender has nevertheless not been tried in the country of refuge; if he is subsequently found in Ethiopia, he may, where proceedings are not barred by limitation, be tried by Ethiopian courts under Ethiopian law as though he had never left Ethiopia and as though a delegation had never been made. The same applies when Ethiopia has delegated her jurisdiction and the offender was discharged in the country of refuge, as a discharge is no bar to fresh proceedings being instituted for so long as the periods of limitation have not elapsed. The same also applies when the offender was sentenced in the country of r* fuge for an offence different from that to which the delegation relates, or when he was sentenced in such country, for instance by virtue of the principle of quasi-territoriality, without Ethiopia having expressly delegated her territorial jurisdiction to that country.

(b) Where the offender has been tried and sentenced in the country of refuge, Ethiopian courts may not try him again for the same offence, should he subsequently be found in Ethiopia. This rule applies not only when the offender has been convicted or acquitted abroad and no appeal lies from the foreign judgment, but also when the sentence passed abroad has been remitted by pardon or amnesty. Therefore, except in cases of discharge, Ethiopia is bound by any decision made abroad since, after she has delegated her jurisdiction to the country of refuge, the authorities, judicial or others, of such country have fully substituted themselves for the corresponding Ethiopian authorities. Any solution to the contrary would conflict with the rule *non bis in idem.*

(c) Where the offender has been sentenced in the country of refuge but has not served or fully served such sentence, the provisions of Art. 12 (3) will apply.

6. Sub-article (3) of Art. 12 lays down rules regarding the enforcement in Ethiopia of the sentence passed in the country of refuge. As mentioned above, it may occur that the convicted person, upon having been sentenced in the country of refuge, is able to escape the enforcement of the sentence. If he comes to Ethiopia before having served or fully served the foreign sentence, the latter may be enforced in Ethiopia unless limitation has occurred or the sentence has been remitted. The enforcement of a sentence will be deemed to be barred by limitation when the periods of time within which the sentence may be enforced have elapsed without it having been possible to enforce or to enforce completely the sentence passed.

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(a) Although this is not specified by Art. 12, it is evident that the scntcncc passed in the country of refuge may not be enforced in Ethiopia after limitatinn has occurred under the law of the country of refuge, even though it has not occurred under Ethiopian law; had the convicted person remained in the country where the scntcncc was passed instead of coming to Ethiopia, he could no longer have been made to serve the sentence. Thus, whatever the term of sentence still to run, no action may be taken in Ethiopia against the convicted person unless it would be possible to take similar action in the country where the sentence was passed. The situation is then the same as that provided for by Art. 20 (2).

(b) The sentence passed in the country of refuge may not be enforced in Ethiopia after limitation has occurred under Ethiopian law, although it has not occurred under the law of the country of refuge; had the offender remained and been tried in Ethiopia, the sentence could no longer be enforced. Whatever the term of scntcncc still to run, no action may be taken in Ethiopia against the convicted person which could not be taken if he had been sentenced by an Ethiopian court.

(c) Therefore, a sentence passed in a foreign country may be enforced in Ethiopia only when such enforcement is barred under neither Ethiopian law nor the law in accordance with which the sentence was passed. If the periods of limitation prescribed by both laws are still running, the competent Ethiopian authorities (penitentiary or other) will carry out the duties which would have been carried out by the corresponding authorities of the country of refuge, had the convicted person remained in that country. However, as a rule, the said Ethiopian authorities will not of their own motion enforce scntcnccs passed in a foreign country and the application of Art. 1? (3) will, therefore, normally be subject to a request for enforcement made to, and granted by. Ethiopia.

7. In enforcing a foreign scntcncc. the competent Ethiopian authorities arc bound by the order of the foreign court as to the kind and extent of punishment. This raises a number of questions which arc all the more difficult to solve since the two provisions which the Code devotes to the enforcement of foreign scntcnccs (Arts. 12 (3) and 20 (2)) are inconsistent. However, the following may be pointed out.

(a) A foreign sentence is enforceable in Ethiopia even though a similar sentence could not have been passed in Ethiopia. For instance, where the sentence is a fine amounting to Eth. $100,000, such fine can be recovered in Ethiopia although a fine of an equivalent amount can in no case be imposed undct Ethiopian law.

(b) A foreign sentence is enforceable in Ethiopia in the manner in which it would have been enforced at the place where it was passed. For instance, where the sentence directs the immediate payment of a fine, such fine is to be paid in Ethiopia as directed by the foreign court, and the provisions of the Ethiopian Penal Code regarding the recovery of fines are not applicable.

(c) The duty to enforce a sentence as it would have been enforced abroad is not without restrictions. For instance, where the sentence is simple imprisonment, the convicted person will be detained in Ethiopia under the same conditions as a person sentenced to simple imprisonment by an Ethiopian court. If Ethiopian penitentiary regulations prescribe that prisoners serving a sentence of simple imprisonment are to work seven hours a day, a prisoner sentenced abroad will bo made to work seven hours a day regardless of the fact that, had he been detained in the country where the sentence was passed, he would have had to work six or eight hours a day. However, this assimilation between persons sentenced abroad and persons sentenced in Ethiopia cannot be extended too far. Since no step may be taken in Ethiopia which it would not be possible to take in the country where the sentence was passed, it seems that a prisoner sentenced abroad to imprisonment may not be conditionally released in accordance w ith Art. 112 of the Penal Code unless conditional release is provided for by the law under which the scntcncc was passed.

(d) Should it occur that the kind of penalty inflicted abroad be without equivalent in Ethiopia, the penalty which is under Ethiopian law the closest to the penalty ordered in the

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country of refuge will be enforced in Ethiopia but, subject to what has been said in para.
(c) above, a person sentenced abroad should not be treated more severely in Ethiopia than he would have been at the place where the sentence was passed. Nor can he be made to serve in Ethiopia a penalty of a kind which does not exist in Ethiopian law. For instance, should the death penalty be abolished in Ethiopia and should a person found in Ethiopia have been sentenced to death abroad, such sentence would not be enforceable in Ethiopia and would have to be replaced by life imprisonment. Similarly, a sentence of imprisonment with hard labour would be enforced as a sentence of rigorous imprisonment.

Article 13. Offences committed in a foreign country against Ethiopia

This Code shall apply to any person who in a foreign country has committed one of the offences against the Emperor and the Empire. their safety or integrity, its institutions or essential interests as defined in Book III. Title I, Chapter /, and under Title V of the Special Part of this Code (Art. 248-272 and Art. 366-382).

Art. 13 lays down an exception to the principle of territoriality in that it declares the courts of Ethiopia to have principal jurisdiction with regard to several offences which, by reason of their nature and seriousness, are deemed to be always triable in Ethiopia under Ethiopian law even though they are not committed on Ethiopian territory.

If jurisdiction were exclusively governed by the principle of territoriality, the courts of Ethiopia would be unable to try offences which, although committed in a foreign country, endanger Ethiopia's vital interests. The offence having taken place abroad, no remedy would be enforceable in Ethiopia regardless of the fact that Ethiopia might be the main or possibly the sole victim of the offence. The offender would only be triable by the courts of the foreign country and yet, as mentioned in relation to Art. 12, such country might have encouraged or tolerated the perpetration on its soil of an offence directed against Ethiopia. In such a case, the courts of Ethiopia would be subsidiarily competent if the offender should not be prosecuted at the place where the offence was committed; but, should he be prosecuted and acquitted by the courts of such place, Ethiopia would have to accept this decision. The danger which this might entail for Ethiopia is obvious and it is precisely in order to prevent a person from placing Ethiopian interests in jeopardy with impunity that Art. 13, which is based on the principle of so-called quasi-territoriality, has been inserted in the Code. According to this principle, when an offence is committed which infringes upon the fundamental rights or interests of a given State, this State is entitled to protcct itself and to punish the offender under its own laws even though the offence has been committed in a foreign country and the offender may already have been tried and sentenced in that country.

1. The principle of quasi-territoriality is not applicable except in the cases specified by Art. 13. Where an offence is committed in a foreign country against Ethiopia. Ethiopia will not have principal jurisdiction by virtue of the provisions of Art. 13 unless the offence is an offence against the Ethiopian State (Arts. 248—272) or against Ethiopian currency (Arts. 366—382). Whether or not such an offence is also defined as an offence in the law of the State on the territory of which it was committed is immaterial since it is deemed to have been committed in Ethiopia. It may be noted that some of the offences mentioned in Art. 13 are hardly serious enough to justify an exception to the principle of territoriality *(e.g.* offences contrary to Art. 258 or 377).

2. For purposes of prosecution and punishment, offences contrary to Arts. 248-272 and 366-382 will be treated as offences committed on Ethiopian territory irrespective of the place where they have in fact been committed and may, therefore, be tried and punished in accordance with the provisions of \rts. 11 and 16 so long as the prosecution is not barred under Ethiopian law. This is to say that, as with Art. 11, so with Art. 13. the offender must be found in Ethiopia. If he is not in Ethiopia, his extradition will be requested in accordance with Art. 11 (3). If the requisition for extradition is not granted (which is possible since many

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of the offenccs referred to in Art. 13 are so-called political offences which are not extraditable offences according to international practice), a delegation of jurisdiction may not be effected and the provisions of Arts. 160-164 of the Criminal Procedure Code will apply, where appropriate.

3. The fiction on which Art. 13 is based does not mean that Ethiopia, which is given powers she would not have under Art. 11, substitutes herself for the State where the offence was committed and that the latter has no jurisdiction to try the offender. The courts of the place of commission retain their power to punish the offender under territorial law and.the effect of Art. 13 is merely that Ethiopia has principal jurisdiction concurrently with the State where the offence was committed.

Artivle 14. Offences committed in a foreign country by an Ethiopian enjoying immunity

(1) *This Code shall apply to members of the Ethiopian diplomatic and consular service and Ethiopian officials and agents who cannot be prosecuted at the place of commission of the offence by virtue of international principles of immunity, where they committed in a foreign country:*

(a) an offence punishable under the Ethiopian Code, provided such offence is of another kind than those specified in Art. 13 and is also punishable under the taw of the country where it was committed; or

(b) an offence punishable under the foreign law, provided such offence is also punishable under the Ethiopian Code.

(2) *Where according to either the foreign law or this Code, the offence is punishable upon a formal complaint no proceedings may be instituted where such complaint has not been lodged.*

It was mentioned before that persons who enjoy diplomatic immunity arc not liable to prosecution in the country, if not their own, where they commit an offence, but are triable in their own country according to their national law* An illustration of this principle has already been found in Art. 11 (2) which specifies that the laws of Ethiopia do not apply to foreigners enjoying immunity who commit offences in Ethiopia. A further illustration is supplied by Art. 14 which deals with the reverse situation, *i.e.* the case of Ethiopians enjoying immunity who commit offences in a foreign country. Since these persons are not triable under the law of the place of commission, it is natural that the Code should contain rules regarding the prosecution and punishment of such persons in Ethiopia. Thus Art. 14 provides for another exception to the principle of territoriality, this time with a view to preventing the miscarriage of justice when a person may not be tried under territorial law. However, the application of Ethiopian law in such cases, by virtue of the principle of so-called active personality, is subject to specific conditions which are not of general application in that they do not govern the prosecution of other persons who may be tried in Ethiopia for offences committed abroad (Arts. 15 (2), 17 and 18).

1. The only persons who may be tried in Ethiopia according to Art. 14 for offences committed abroad are the “members of the Ethiopian diplomatic and consular service and Ethiopian officials and agents who cannot be prosecuted at the place of commission of the offence by virtue of international principles of immunity”. Whether an Ethiopian subject does or does not enjoy diplomatic immunity is a question to be answered in the light of the explanations given in connection with Art. 4.

2. The laws of Ethiopia (and not only “this Code”) are firstly applicable to any Ethiopian enjoying immunity who commits in a foreign country an offence contrary to Ethiopian legislation. In such a ease, it is necessary that the offence:

(a) be also an offence under the law of the place of commission. A person may not be punished in Ethiopia if, had he not enjoyed immunity and had he been subject to territorial

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law, he would not have been punishable at the place where he acted. For instance, an Ethiopian diplomat committing an offcnce contrary to Art. 618 Ethiopian Penal Code in a country where adultery is not penalized may not be charged with the said offence on his return to Ethiopia; and

(b) be different from those mentioned in Art. 13. For if an Ethiopian enjoying immunity commits abroad an offence contrary to Arts. 248-272 or 366—382, it is Art. 13, and not Art. 14, which is to be applied, with the effect that the offence is punishable in Ethiopia even though it is not declared to be an offence by the laws of the place where the offender acted.

3. The laws of Ethiopia also apply when an Ethiopian enjoying immunity performs in a foreign country an act which is declared to be an offenc • by the laws of that country. However, it is then required that such an act be also an offence under the laws of Ethiopia. Since persons enjoying immunity remain subject to their national law and are expected to regulate their behaviour in accordance therewith, they may not be punished in Ethiopia if they did not contravene any provision of Ethiopian legislation, although they may have acted in violation of the provisions of a foreign law. For instance, an Ethiopian diplomat who, being a bachelor, has sexual intercourse with an adult unmarried female, with her consent, in a country where fornication is declared to be an offence, may not be charged with the said offence on his return to Ethiopia, since fornication is not penalized in Ethiopia.

4. Therefore, Art. 14 applies when an Ethiopian enjoying immunity commits in a foreign country an act which both the laws of such country and Ethiopian laws regard as an offence, and this offence is not one of those mentioned in Art. 13 (note that, for all practical purposes, there is no difference between paras, (a) and *(b)).* Such application, however, further depends on the fulfilment of the formal condition laid down in sub-art. (2) of Art. 14. Although it is established that the offender is liable to prosecution in Ethiopia, the offence to be charged may be of such a nature that no proceedings may be instituted. Since some offences cannot be prosecuted unless a formal complaint is made with a view to setting the prosecution in motion. Art. 14 (2) prescribes that, where the making of such a complaint is a condition precedent, proceedings may not be instituted in the absence of this complaint. Whether a similar condition should govern the question of limitation, with which Art. 14 does not deal, is debatable, though it seems that the answer should be in the affirmative.

(a) For reasons similar to those given under para. (2) *(a)* above, no proceedings may be instituted in Ethiopia when a complaint is required by the law of the place of commission and such a complaint has not been made.

(b) For reasons similar to those given under para. (3) above, no proceedings may be instituted either when a complaint is required by Ethiopian law and it has not been made.

Article 15. Offences committed in a foreign country by members of the Armed Forces

(1) *Where a member of the Ethiopian Armed Forces in such capacity commits an offence against the ordinary law in a foreign country he shall be subject to the ordinary law and territorial jurisdiction if he is arrested and tried in the country where the offence was committed.*

If he has taken refuge in Ethiopia, he shall be tried under the provisions of this Code, if extradition is not granted (Art. 21 (2)).

(2) *In cases of offences against international taw and specifically military offences, as defined in Titles II and III of Book III of the Special Part of this Code (Art. 281—33/) the member of the Armed Forces shall remain subject to national taw and be tried under the provisions of this Code by Ethiopian military courts.*

The last case where Ethiopian courts may on certain conditions have principal jurisdiction is that where an offence has been committed in a foreign country by a member of the

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Ethiopian Armed Forces. In this respect. Art. 15 supplies two different rules. The first rule, which is laid down in sub-art. (1), creates no exception to the principle of territoriality, whereas the second rule, which will be found in sub-art. (2), is based, like the provisions of Art. 14, on the principle of active personality. In the cases coming under sub-art. (1), Ethiopian courts have subsidiary jurisdiction, while they have principal jurisdiction in the cases coming under sub-art. (2).

1. Under Art. 15, the question whether the power to try a member **f the Ethiopian Armed Forces for an offence committed outside Ethiopia should be vested in the territorial courts or in the national courts is to be decided having regard to the nature of the offence. Before tackling this question, a number of remarks must be made.

(a) Art. 15 does not apply unless the offence has been committed by a member of the Ethiopian Armed Forces. It is not required that the offender should be of Ethiopian nationality, but merely that he should have enlisted in the Ethiopian Army, Navy o» Air Force, as the case may be. Thus, where an offence is committed in a foreign country by an Ethiopian military attachd, Art. 15 is not applicable; the diplomatic status of the offender overrides his military status and Art. 14 is to be applied.

(b) Art. 15 does not apply unless the member of the Ethiopian Armed Forces has committed the offence " in such capacity*, that is, in the capacity of a soldier. Therefore, if a retired Ethiopian captain commits an offence in a foreign country. Art. 15 is inapplicable to him, for he did not commit the offence in a military capacity.

(r) Finally, Art. 15 docs not apply unless the offence has been committed in a foreign country. This may occur on the occasion of an international police action, for instance (Korea, Egypt, Congo, etc.). All that is required is that the offence be committed on the territory of a sovereign State, the courts of which are not deprived of their jurisdiction, contrary to what may occur in cases of a protectorate, military occupation or annexation where the protected, occupied or annexed country may have lost its sovereignty.

2. Ethiopian courts will not have principal jurisdiction, and a member of the Ethiopian Armed Forces who commits an offence in a foreign country may be punished in such country in accordance with territorial laws, if the circumstances defined in sub-art. (1) of Art. 15 are present.

(a) There is no exception to the principle of territoriality when the offence is an Offence under "the ordinary law", *i.e.* an offence of a non-military character or, in other words, an offence that may be committed by anyone, even though not a member of the Armed Forces. Where an Ethiopian soldier commits an offence such as rape or theft, he commits an offence that can just as well be committed by a civilian. The fact that the offender is wearing a military uniform does not justify treatment different from that of a civilian having committed the same offence. Therefore, any offence under the ordinary law committed by an Ethiopian soldier in a foreign country will be dealt with as though the offender were not a member of the Ethiopian Armed Forces.

C*b*) It is evident that the offender must be punished in accordance with territorial law only insofar as he can be found in the country where he committed the offence. If he was able to escape and to take refuge in Ethiopia prior to being tried in the foreign country, and his extradition is not requested or the requisition for extradition is dismissed. Ethiopia will have subsidiary jurisdiction to try and punish him under Ethiopian law on the conditions laid down in Arts. 18 (1) and 19.

(c) It may also be that the offender was prosecuted in the country where he committed his offence. If he was acquitted or discharged, no action may be taken against him on his returning to Ethiopia (Art. 20 (1)). except disciplinary action, where appropriate; if he was convicted and took refuge in Ethiopia in order to escape the enforcement of the sentence, the provisions of Art. 20 (2) are applicable.

3. Ethiopian courts will have principal jurisdiction and a member of the Ethiopian Armed

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Forces who commits an offence in a foreign country may be punished in Ethiopia in accordance with Ethiopian law where the circumstances defined in sub-art. (2) arc present.

(a) Ethiopian courts have principal jurisdiction and Ethiopian law is applicable when the offence is not an offence under the ordinary law, but a military offence as defined in Arts. 296—331, *i.e.* an offence which can be committed only by members of the Armed Forces. Where an Ethiopian soldier commits* in a foreign country an offence such as mutiny or desertion, he commits an offence which a civilian could not commit in a principal capacity. If he is punishable under Ethiopian law in like cases, it is because this law provides for the offence and its punishment in view of the requirements of the discipline, order, might or safety of the Ethiopian Army. A military offence, wherever committed, creates a danger primarily to Ethiopia; if committed in a foreign country, it concerns Ethiopia more than such country. The reasons behind Art. 15 (2) are, therefore, quite similar to those behind Art. 13. The provisions of Art. 15 (2) are also justified on the ground that members of the Ethiopian Armed Forces regulate their conduct according to Ethiopian military law, which is the only law they may know. Furthermore, Ethiopian courts are in a better position than foreign courts to appreciate the real seriousness of the offence, having regard to the nature and degree of danger which it created to the Ethiopian Armed Forces.

(b) Ethiopian courts have principal jurisdiction and Ethiopian law also applies when the offence is a quasi-military offence as defined in Arts. 281—295, *i.e.* an offence which is normally committed by members of the Armed Forces but can also be committed by civilians (offences against international law and universal order). These offences are said to come within the principal jurisdiction of Ethiopian courts not only because, like military offences, they imply unsoldierly behaviour, but also because few foreign laws provide for them; should they be triable exclusively at the place of commission, one would often find that territorial law is silent as regards acts contrary to universal order. However, insofar as the purpose of Art. 15 (2) is to prevent negative conflicts of jurisdiction in cases of offences against universal law,*it seems that this purpose would have been sufficiently served by Art. 17.

Article 16. Effect of foreign sentences

(1) *In all cases where an offender who is subject to Ethiopia's principal jurisdiction (Art. II, 13,14 para. (1) and 15 para. (2)) has been sentenced in a foreign country, he may be tried and sentenced qgain on the same charge in Ethiopia, if he is found in Ethiopia or was extradited to her.*

(2) *His discharge or acquittal in a foreign country shall be no bar to a fresh sentence being passed in Ethiopia in accordance with the Ethiopian Code.*

(3) *Where by reason of the offence committed, the offender has already been convicted in a foreign country and has undergone the whole or part of the punishment, the court shall deduct the punishment already undergone from the new sentence to be passed.*

The concept of principal jurisdiction implies that Ethiopian courts may try an offender even though he has already been tried in a foreign country. However, as has been mentioned before, principal jurisdiction does not necessarily mean exclusive jurisdiction. On the one hand, Ethiopia may have principal jurisdiction concurrently with a foreign country (Arts. 13 and 15 (2)). On the other hand, foreign countries which have subsidiary jurisdiction may try offences which come principally within the jurisdiction of Ethiopian courts. In all these cases, a new trial is possible in Ethiopia, regardless of the fact that the offender may already have been tried for the same offence. This is by no means contrary to Art. 2 (3), since the rule *non bis in idem* prohibits a person being punished twice for the same offence, but not being tried twice.

1. The provisions of Art. 16 apply only when Ethiopia has principal jurisdiction, *i.e.* in the cases specified in Arts. 11, 13, 14 and 15 (2). Subject to what has been said in connection

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with Art. 12, in no other case may a person wno has been tried in a foreign country be triea again for the same offence in Ethiopia. A new trial is justified because the offender was previously tried by a court which either had only subsidiary jurisdiction or had not, in trying the offender, especially in the cases mentioned in Arts. 13 and 15 (2), the same interests in view as an Ethiopian court would have had.

2. A new trial may be held in Ethiopia when the offender is found in Ethiopia or is extradited to her (Art. 16 (2».

(a) Where the offender returns or is extradited to Ethiopia without having been tried abroad, there is naturally no question of a new trial, and the provisions of Art. 16 do not apply.

(б) Where the offender returns or is extradited to Ethiopia after having been tried abroad, he may then be tried again in accordance with Ethiopian law, though a new trial will not necessarily be held, since Ethiopia may be satisfied with the sentence passed in the foreign country and may renounce instituting new proceedings.

(c) It goes without saying that a new trial may be held in Ethiopia for only so long as the right to institute proceedings is not barred under Ethiopian law.

3. When it is decided to try the offender again, the rules laid down in Art. 16 (3) will apply.

(a) The fact that the offender was tried and acquitted abroad for the offence with respect to which new proceedings are instituted in Ethiopia, is irrelevant. In this case, Ethiopian courts are not bound by a judgment of acquittal passed by a foreign court. The same may be said for proceedings that have been instituted abroad but have been discontinued or when the accused has been discharged. In all like situations, the offender, if he is punished in Ethiopia, is not punished twice for the same offence.

(б) Where the offender was tried and sentenced abroad, and he served all or part of the sentence Art. 2 (3) demands that the term of sentence served in the foreign country be deducted from the sentence imposed in Ethiopia the court which tries him in Ethiopia must, therefore, have regard to the sentence passed abroad. If, for instance, this sentence is five years imprisonment and in Ethiopia the offence is liable to fifteen years imprisonment, the punishment is assessed as follows: if the foreign sentence has not been served, the offender may be sentenced to fifteen years imprisonment; if the foreign sentence has been fully served, the offender may not be sentenced to more than ten years; if the foreign sentence has been served to the extent of three years, the offender may not be sentenced to more than twelve years.

(c) In effect. Art. 16 (3) prescribes that the sentence passed in Ethiopia will be deemed to run concurrently with the sentence passed abroad, and it implies that a new trial cannot be held in Ethiopia if the offender was sentenced abroad to a penalty equal to, or higher than, that which would be inflicted under Ethiopian law. Should this penalty not have been executed there would then be no alternative but to secure its execution in Ethiopia. It seems that this solution could apply whenever Ethiopia is satisfied that justice has been done abroad but the foreign sentence has not been enforced.

(</) Finally, it may be noted that the deduction prescribed by Art. 16 (3) must be effected only insofar as the offender is convicted in Ethiopia of the same offence as that with respect to which the foreign sentence was passed. For example. *A,* who forged Ethiopian currency in a foreign country, was sentenced in this country to three years imprisonment, not for forgery, but for having stolen the moulds and metal which he used in the forgery, and served his sentence. If *A* is tried in Ethiopia for forgery and sentenced to twenty years rigorous imprisonment', the term of sentence served abroad will not be deducted from the sentence passed in Ethiopia since *A* is not punished in Ethiopia for the same offence as that for which he was punished abroad. In such a case. Ethiopian courts may not try the theft again, for it c omes within the exclusive jurisdiction of the territorial courts. But the Ethiopian court trying

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the offence of forgery may have regard to the sentence passed for the theft (Art. 22 (1)). with a view to increasing, on the ground of concurrence of offences (Art. 82 (1) *(a)),* the punishment deserved for the offence of forgery.

II. Subsidiary jurisdiction [Arts. 17—20]

The courts of Ethiopia are deemed to have subsidiary jurisdiction within the meaning of the Code with regard to the offences provided for by Arts. 17 and 18, in addition to those specified in Art. 15 (1). The main point these offences have in common is that they are not committed on Ethiopian territory and do not chiefly concern Ethiopia. The effect of an Ethiopian court having subsidiary jurisdiction is that it may try a person who ought to have been, but was not. tried in a foreign country, *i.e.* it may, on specific conditions, substitute itself for the courts of such country with a view to preventing a negative conflict of jurisdiction.

Article 17. Offences committed in a foreign country against international law or universal order

(1) *Any person who has committed in a foreign country:*

(a) an offence against international law or an international offence specified in Ethiopian legislation, or an internalionat treaty or a convention to which Ethiopia has adhered: or (ft) *an offence trains! public health or morals specified in Articles 510, 567. 605, 606. 609 or 610 of this Code,*

shall be liable to trial in Ethiopia in accordance with the provisions of this Code and subject to the general conditions mentioned hereinafter (Art. 19 and 20 (2)) unless he has been prosecuted in the foreign country.

(2) *Nothing in this Article sl\all affect the provisions of Articles 14 and 15 (2).*

International offenccs, which were alluded to in Art. 15, are offences of such a nature and gravity that they constitute a threat, not to one particular country, but to the entire community of nations. These offenccs are normally defined in international conventions, but there is nowadays a strong movement in favour of including them in domestic legislation. Accordingly, the Ethiopian Penal Code contains provisions for offences against international law, which provisions are of a substantive as well as of a procedural nature and can be justified as follows. Owing to the danger which offences against universal order represent, they should be triable throughout the world, irrespective of the place where they are committed. This would make it necessary to provide for a kind of universal jurisdiction, so that a country not being the place of commission should have subsidiary jurisdiction to try international offences committed in violation of its own laws or of a convention to which it is a party. The principle of universal jurisdiction, which defeats the old axiom according to which a judge is not mankind's avenger, is expressly recognized in Art. 17. It entails that Ethiopia may try a person of whatever nationality who has committed an international offence in whatever country and has not been tried for the offence at the place of commission or in any other place.

1. The first question raised by Art. 17 is the meaning of an international offence.

(a) An international offence within the meaning of Art. 17 is an offence against international law provided for in Ethiopian legislation. As has been mentioned in connection with Art. 15, ihe 1957 Code contains a Chapter on international offences (Arts. 281—295) which Ethiopian courts are subsidiarily competent to try if the conditions governing the subsidiary application of Ethiopian law are fulfilled.

(b) Art. 17 also regards as international offences the offences defined in Arts. 510 (traffic in narcotic substances), 567 (slave trading), 605 and 606 (traffic in women and minors), 609

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or 610 (traffic in obscene publications) of the Code. "These offences are deemed to be international owing to their effects more than to their nature. They are, in principle, offences against the national law but experience shows that they are often committed on an international scale. As such, they create a danger to the international community which justifies giving Ethiopia the power to try them by virtue of the principle of universal jurisdiction.

(c) Finally, an international offence is any offence provided for in an international convention to which Ethiopia is a party. The field of international criminal law is expanding and some offences which are at the moment regarded as offences against national law may in the future be deemed to be international offences. Such is the case in particular with piracy, which the Ethiopian Code does not regard as an international offence. Therefore, Ethiopia is subsidiarily competent to try any offence which a convention to which she has adhered declares to be an international offence, even though this offence is not expressly provided for as an international offence in Ethiopian law.

2. On what conditions may Art. 17 be applied when an international offence has been committed in a foreign country?

(a) Art. 17 may not be applied unless the general requirements laid down in Arts. 19 and 20 are satisfied. Since Ethiopia's jurisdiction is subsidiary, Ethiopia may try and punish the offender only on the condition that he was not previously tried for the same offence.

(б) In addition to these general conditions, the special conditions laid down in Art. 17 (2) must be present. Ethiopian law may be subsidiarily applied only when the person who committed an international offence is neither an Ethiopian enjoying immunity nor a member of the Ethiopian Armed Forces. If an Ethiopian enjoying immunity commits an international offence in a foreign country, he is liable to punishment under Art. 14, and not under Art. 17. Similarly, if a member of the Ethiopian Armed Forces commits in such capacity an international offence in a foreign country, he is to be punished in accordance with Art. 15 (2) and not with Art. 17. In both cases the principle of personality substitutes itself for the rule of universal jurisdiction. The effect therepf is that Ethiopia has principal jurisdiction and may try the offender although he was already tried abroad for the same offence, whilst this is not possible if Ethiopia has only subsidiary jurisdiction.

Article 18. Other offences committed in a foreign country

(1) *This Code shall also apply to any person who has committed an offence in a foreign country against an Ethiopian national or to any Ethiopian national who has committed in a foreign country an offence of another kind than those specified in the foregoing Articles, if the offender was not tried in the foreign country for the offence, provided that:*

(a) the act to be. tried is prohibited by the law of the State where it was committed and by Ethiopian law; and

(.b) it is of sufficient gravity under the latter law to justify extradition.

(2) *In the case of all other offences committed in a foreign country by a foreign national, the offender shall, save as otherwise expressly provided, failing extradition, be prosecuted and tried only if the offence is punishable under Ethiopian law with death or with rigorous imprisonment for not less than ten years.*

This Article provides for three different situations in which Ethiopian law is subsidiarily applicable, failing the normal application of territorial law, to persons who have committed offences abroad.

1. Firstly, the courts of Ethiopia are subsidiarily competent to try any person, whether an Ethiopian subject or a foreigner, who commits in a foreign country an offence against an Ethiopian citizen. This solution is based on the principle of quasi-personality, or passive personality, according to which the jurisdiction of a given State may extend not only to

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offences committed abroad against its essential interests (Art. 13), but also to offences of which its citizens may have been the victim in a foreign country. This extension permits protecting national subjects, but is justified only insofar as the jurisdiction of the national courts remains subsidiary. Since criminal laws are chiefly concerned with safeguarding general interests, it is understandable that a State should be given principal jurisdiction when national interests are at stake, but that it should have only subsidiary jurisdiction when private interests are involved.

2. Secondly, the courts of Ethiopia are subsidiarily competent to try any Ethiopian subject who commits an offence in a foreign country. This rule, which is based on the principle of active personality, will apply when an Ethiopian who committed an offence abroad took refuge in Ethiopia prior to being tried by the courts of the place of commission. Since he may not be extradited, Ethiopia is then bound to try him by virtue of the rule *Aut dedere aut punire.*

3. Art. 18 may not be applied in these two instances unless the following special conditions are all fulfilled together with the general conditions laid down in Arts. 19 and 20. When a question arises whether an Ethiopian court is subsidiarily competent to try an offence committed abroad. Art. 18 must, therefore, be read in conjunction with Arts. 19 and 20.

(a) The offence must be of a kind other than that with respect to which Ethiopia's jurisdiction is principal. Thus, Art. 18 does not apply *e.g.* where an offence has been committed in a foreign country against an Ethiopian national who is a member of the Imperial Family as defined in Art. 248. In this case, Art. 13 is applicable, and Ethiopia has principal jurisdiction. Similarly, Art. 18 does not apply where an offence has been committed abroad by an Ethiopian enjoying diplomatic immunity, or the offence is of a military nature and has been committed by a member of the Ethiopian Armed Forces. Here again, Ethiopia has principal jurisdiction in accordance with Arts. 14 and IS (2).

(b) The act to be tried must be an offence under both the laws of the place of commission and the laws of Ethiopia. In accordance with the principle of legality, a person may not be tried in Ethiopia if he performed abroad an act which is an offence under Ethiopian law but for which he could not have been tried at the place where this act was done, or an act which is an offence under the law of the place of performance but for which he could not be tried, had this act been performed in Ethiopia.

(c) The offence must be serious enough to justify extradition under Ethiopian law. Thus, assuming that the offender were not an Ethiopian subject, it should be possible, under the Ethiopian Extradition law (which is still to come) to hand him over to the country where the offence was committed. This condition is purely normative but is necessary with a view to fixing the limits within which Ethiopia may exercise her subsidiary jurisdiction, as the courts of Ethiopia cannot possibly try any offence, however trifling, committed abroad by or against an Ethiopian citizen. Therefore, only extraditable offences fall within the subsidiary jurisdiction of Ethiopian courts as defined in Art. 18 (1).

(d) Finally, the offender must not have been tried in a foreign country for the same offence. Since the courts of the place of commission have principal jurisdiction, the decision they make, whatever it may be. is final and binding upon Ethiopia. It is only when the courts having principal jurisdiction have not exercised it that the courts having subsidiary jurisdiction may substitute themselves for the former.

4. Sub-art. (2) of Art. 18 deals with an even more peculiar situation. It is understandable that Ethiopian courts be subsidiarily competent with regard to the offences defined in sub-art. (1), since Ethiopia is then to a certain extent concerned with either the offender or the victim of the offence. But it may appear rather questionable that Ethiopian courts should also be subsidiarily competent with regard to the offences defined in sub-art. (2), *i.e.* offences committed in a foreign country by a foreigner against another foreigner, since there is then no connection between Ethiopia and the offender or the victim of the offence or, more

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correctly, the only connection is that the offender happens to be in Ethiopia. Few laws contain provisions similar to Art. 18 (2), for it is held that the courts of the country of refuge cannot interfere in such cases and may not substitute themselves for the courts of the place of commission. This view, however, is contrary to the exigencies of international co-operation in the struggle against criminality and has, therefore, not been taken in Ethiopia. In connection with Art. 17, reference was made to the principle of universal jurisdiction. Art. 18 goes further in that direction; it is based on the idea that the principle of universal jurisdiction should apply not only in the case of international offences which endanger the whole community of nations, but also in the case of any offence of extreme seriousness committed in violation of any national law. Consequently, a person having committed in any country an offence of the utmost gravity and having taken refuge in another country, should be tried by the courts of the country of refuge, if he cannot be tried at the place of commission. This extensive conception of the principle of universal jurisdiction, though it is not unanimously admitted, has been included in the Ethiopian Code not only for reasons pertaining to international co-operation, but also because of the right of the country of refuge to protect itself. For, if a person should commit several offences of robbery in a foreign country and then take refuge in Ethiopia without having been tried for such offences in the said country, it might be dangerous to leave him at large in Ethiopia, where he might resume his criminal activity. He may, therefore, be tried by an Ethiopian court even though the country of commission has not expressly delegated its jurisdiction to Ethiopia.

5. What are the conditions which govern the subsidiary jurisdiction of Ethiopian courts in the case provided for by sub-art. (2)7

(a) The offence must be of a kind other than that with respect to which Ethiopia has principal jurisdiction. For instance, Art. 18 (2) is inapplicable if the offender, though a foreigner, is a member of the Ethiopian Armed Forces and has committed in such capacity an offence of the kind described in Art. 15 (2).

(b) The essential condition relates to the gravity of the offence committed abroad. Art. 18 (2) does not result in extending the principle of universal jurisdiction to all cases of offences committed in a foreign country, but only to the cases where complete immunity from punishment would be shocking. Art. 18 (2) is not applicable unless the act performed abroad is an offence under both the law of the place of commission and Ethiopian law and it is punishable under Ethiopian law with death or rigorous imprisonment for ten years at least. It is not possible to use here the criterion of extradition, for not all extraditable offences are of sufficient gravity to justify the subsidiary application of Ethiopian law to any foreigner having committed in a foreign country an offence against another foreigner. Therefore, the offence must be regarded as serious by Ethiopian law, since the Ethiopian reaction of selfprotection would otherwise be unjustifiable.

(r) The offender must not have been tried for the same offence in a foreign country. This condition is identical with the one analyzed under para. (3) (</) above.

6. It may be noted that the Code makes no provision for the case where a foreigner takes refuge in Ethiopia after having committed an offence abroad against another foreigner, and the country of commission delegates its jurisdiction to Ethiopia instead of requesting extradition. Should such a case arise, the offender would have to be tried in Ethiopia, even though the offence would not be of the seriousness defined in sub-art. (2) of Art. 18, since it would then be deemed to have been committed on Ethiopian territory. However, although the courts of Ethiopia would have principal jurisdiction in such a case, the conditions laid down in Art. 19, in particular under sub-art. (1), (a) and (c), ought to be fulfilled.

Article 19. Conditions for subsidiary application

(1) *In (he application of this Code it shall be presumed:*
(a) *that the complaint or denunciation by the victim or his dependents was lodged when It*

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is a condition for prosecution and trial under the law of the place of commission of the offence or under Ethiopian law;

(b) *that the offender is within the territory of the Empire and has not been extradited, or that extradition was obtained by reason of the offence committed;*

(c) *that the offence was not legally pardoned in the country of commission and that prosecution is not barred either under the law of the country where the offence war committed or under Ethiopian law.*

(2) *Prosecution shall be instituted by the Attorney General after consultation with the Minister of Justice.*

(3) *The punishment to he imposed under this Code shall not be more severe than the heaviest penalty prescribed by the law of the country of commission where such country is recognized by Ethiopia.*

As mentioned before, the subsidiary application of Ethiopian law depends on the fulfilment of special (Arts. 17 and 18) as well as of general conditions (Art. 19).

1. Where criminal proceedings with regard to an offence committed abroad may not be instituted except upon a formal complaint made by the injured party, such complaint must have been made so that proceedings may be instituted in Ethiopia. If this requirement is not fulfilled, whether it be provided for by territorial law or by Ethiopian law, Ethiopia may not try the offender. Were he still at the place of commission, he could not be tried under territorial law in the absence of a. complaint; on the other hand, had he committed the offence in Ethiopia, he could not be tried under Ethiopian law in the absence of a complaint.

It may be noted that this condition, which was introduced here as a mere safeguard, for it was not possible to go through all foreign laws in order to ascertain what provisions they contain with respect to offences punishable on complaint, will be found of very limited effect in practice. Offences punishable on complaint (the word "denunciation** should be deleted) are normally offences of a private nature and of little seriousness. Consequently:

(a) it is highly improbable that a complaint should under any law be a condition precedent to the institution of proceedings with regard to international offences as defined in Art. 17;

(b) *in* the case of offences committed in a foreign country by or against an Ethiopian subject (Arts. 15 (1) and 18(1)). it is unlikely that a complaint should be required, since these offenccs are triable in Ethiopia only if they arc extraditable offences, and offences punishable on complaint will presumably not be regarded as extraditable offences in Ethiopia (save, possibly, offcnccs of the nature defined in Art. 629);

(c) in the case of offenccs committed in a foreign country by a foreigner against a foreigner (Art. 18 (2)). no complaint will presumably be necessary, for it is unlikely that offenccs punishable with death or rigorous imprisonment for ten years at least should be regarded anywhere as offenccs punishable on complaint.

2. It is self-evident that Ethiopian law may be subsidiarily applied only when the offender is found in Ethiopia and is not cxtrauited to the country where the offence was committed. The offender may be found in Ethiopia either because he has taken refuge in Ethiopia or because he was extradited to Ethiopia by reason of the offence committed abroad.

(a) Where the offender has taken refuge in Ethiopia, he will, as a rule, be extradited to the country having principal jurisdiction. But it may be that his extradition is not requested or granted, in which case he is triable in Ethiopia.

(b) The offender may have been extradited to Ethiopia by reason of the offence committed ibroad, though this is rather improbable. If it is likely that an offender will be extradited

■> Ethiopia when Ethiopia’s jurisdiction is principa1.it is unlikely that he will be extradited hen Ethiopia's jurisdiction is subsidiary, for there is no reason why the country where the offence was committed should not, if able to do so, exercise its principal jurisdiction.

'wever, the following situation might occur: a German commits in England an

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offence against an Ethiopian national, and then takes refuge in France. If neither England nor Germany apply to France for the offender's extradition, such an application may be made by Ethiopia, since Ethiopia, besides England and Germany and more than France, is concerned with the offence committed and the punishment of the offender.

3. The offence must not have been pardoned nor made the subject of an amnesty in the country of commission, nor must the prosecution be barred by limitation under either territorial law or Ethiopian law. The former condition flows from the general rule according to which an offender may not be tried by a court having subsidiary jurisdiction in cases where he could not be tried by the courts having principal jurisdiction. As for the restriction regarding limitation, it calls for the same remark as the one made above (para. (1), first alinea) with regard to complaints.

4. Sub-art. (2) of Art. 19 lays down another formal condition; the institution of proceedings in Ethiopia depends on a prior decision to this effect being made by the Advocate General after consultation with the Minister of Justice. Two reasons can be given to explain this condition.

(a) The provisions regarding the subsidiary application of Ethiopian law are designed to prevent negative conflicts of jurisdiction. However, the salve should not be worse than the sore. Therefore, before the courts of the country of refuge exercise their subsidiary jurisdiction, regard must be had to all the consequences that may flow, on an international level, from a judgment given by a court other than that which should normally try the offence, so as to avoid a positive conflict of jurisdiction.

(б) The prior examination provided for by Art. 19 (2) may also be necessary with a view to preventing abuses, for a person coming to Ethiopia might well claim to have been abroad the victim of an offence committed by an Ethiopian subject. The said examination is expected to prevent such person from instituting rash proceedings. However, it seems that this purpose could today be served equally well under the pertinent provisions of the Criminal Procedure Code (which was not in force at the* time when the Penal Code was drafted).

5. As regards the sentence that may be passed by an Ethiopian court exercising its subsidiary jurisdiction. Art. 19 (3) contains a restriction calculated to ensure, in accordance with the principle of legality, that the offender tried in Ethiopia is not punished more severely than he could expect to be at the time when and place where he committed the offence.

(a) An Ethiopian court which substitutes itself for a foreign court may not impose a punishment higher than the highest punishment that could have been imposed under territorial law with respect to the offence it is trying. For instance, a person who committed an offence punishable with five years imprisonment under territorial law may not be sentenced in Ethiopia to more than five years, even though under Ethiopian law the punishment for the offence committed may be ten years imprisonment. Similarly, if the term of imprisonment is the same under both laws, but territorial law provides for simple imprisonment, the Ethiopian court may not sentence the offender to rigorous imprisonment. On the other hand, where the punishment prescribed by territorial law is, as regards its length or its form, more severe than the punishment prescribed by Ethiopian law, the Ethiopian court may not depart from the provisions of Ethiopian law. For example, where the offence is punishable with five years imprisonment under Ethiopian law, the court may not exceed this limit, although territorial law may provide for ten years imprisonment in the particular case. Though it does not go as far as Art. S of the Swiss Penal Code, for instance, which provides for the application of the more favourable law, whether Swiss or foreign. Art. 19 (3) pursues a similar object.

(б) The above restriction applies only when the offence to be tried in Ethiopia has been committed on the territory of a State recognized by Ethiopia. This rather unusual prescription, which may be justified on the ground that there is no reason why Ethiopia should give any attention to the laws of a State which she does not recognize, ought nonetheless to be struck out. On the one hand, it is essential to comply with the provisions of Art. 2 (3), and regard should, therefore, always be had to territorial law, even though that of a State which

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Ethiopia does not recognize. On the other hand, territorial law will in any event have to be taken into consideration with a view to ascertaining, for instance, whether a complaint is required by. or whether limitation has occurred under, the said law. It would seem both illogical and unfair that this law should be taken into account for the purpose of establishing that the offender is liable to prosecution in Ethiopia, and should be disregarded in that which concerns the assessment of the punishment to be imposed by the courts of Ethiopia.

Article 20. Effect of foreign sentences

(1) ***In all cases where Ethiopian courts have a subsidiary jurisdiction only (Art. 15 (I), 17 and 18), the offender cannot be tried and senter d in Ethiopia if he was regularly discharged or acquitted for the same act in a foreign country.***

(2) ***If the offender was tried and sentenced in a foreign country but did not undergo his punishment, or served only part of it in the said country, the punishment, or the remaining part thereof, may if It is not barred by limitation, be enforced according to the forms prescribed by this Code. The provisions of Art. 12 (3) shall apply mutatis mutandis to this Article.***

Art. 16 specifies the effects of decisions made in foreign countries with regard to offences coming within Ethiopia's principal jurisdiction. It has been seen that a discharge, acquittal or conviction abroad is no bar to proceedings being •' stituted anew in Ethiopia, provided that, where a new sentence is passed, the term of sentence served abroad will be deducted from such new sentence. Art. 20 specifies the effects of decisions made abroad with regard to offences coming within Ethiopia's subsidiary jurisdiction, which effects are quite different.

1. Ethiopian courts may exercise their subsidiary jurisdiction only insofar as no action has been taken against the offender in a foreign country, whether the country of commission or not. Offences as defined in Arts. IS (1), 17 and 18 committed abroad are not triable in Ethiopia when the offender-was previously prosecuted abroad, whatever the result of the proceedings (discharge, conviction, acquittal and also, presumably, ***nolle prosequi).*** Since Ethiopia is not vested with principal jurisdiction, she can but submit to the decision made abroad. The solution here is the same as in Art. 12 (2), with one exception; Art. 12 (2) does not prohibit proceedings being re-opened in Ethiopia if the offender was discharged abroad, but Art. 20 (1) does. This is of doubtful wisdom, for if new evidence is found in Ethiopia, there seems to be no good reason why the offender should not be indicted in Ethiopia. Thus, if an Ethiopian subject who was discharged abroad makes a full confession on his return to Ethiopia, he may neither be prosecuted in Ethiopia nor extradited to the country where his discharge was ordered.

2. When Ethiopia is prohibited from exercising her subsidiary jurisdiction, she may nevertheless ensure the enforcement of the sentence passed abroad if:

(a) the convicted person is found in Ethiopia; and

(b) such sentence has not been served or fully served nor remitted by pardon nor amnesty, and its enforcement is not barred by limitation under either the foreign law or Ethiopian law; and

(c) the State where the sentence was passed does not request the convicted person's extradition, or such requisition is dismissed.

As for the manner in which foreign sentences may be enforced in Ethiopia, Art. 20 (1) states that "the forms prescribed by this Code", will apply. However, as has been mentioned in connection with Art. 12, the competent Ethiopian authorities must, as a rule, enforce the foreign sentence in the manner in which it would have been enforced at the place where it was passed. In any event, as is stressed by the reference to Art. 12 (3) appearing in sub-art. (2) of Art. 20, the convicted person may not be treated in Ethiopia more severely than he would have been in the country where judgment was given.

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3. The enforcement of foreign sentences in Ethiopia raises further problems with which the Code does not deal.

(a) Assuming that the passing or the enforcement of the sentence should have been suspended abroad on the condition that the accused complies with specific rules of conduct for a given period of time, it may be asked whether the competent Ethiopian authorities would be entitled to secure compliance with such rules, should the probationer be in Ethiopia. The answer seems to be in the negative, since Art. 20 (2) merely enables Ethiopia td enforce such punishments as have not been undergone abroad; to ensure that a probationer does not break the rules of conduct that may have been ordered abroad does not amount to enforcing a punishment imposed abroad.

(b) Assuming that a person convicted abroad should have been released on parole on the condition that he complies with specific rules of conduct for a given period of time, it may also be asked whether the competent Ethiopian authorities would be entitled to secure compliance with such rules, should the released prisoner be in Ethiopia. The answer here seems to be in the affirmative since, in the terms of Art. 206 of the Ethiopian Penal Code, "conditional release must be regarded as (. . .) forming part of the progressive regime of enforcement". Therefore, to ensure that a released prisoner does not break the rules of conduct that may have been ordered abroad amounts to enforcing a foreign sentence. This, however, may naturally not be done unless the foreign sentence was passed with regard to an offence which, had it not been tried abroad, would have been triable in Ethiopia pursuant to the provisions of Art. 15 (1), 17 or 18.

(c) Assuming that a person with regard to whom an order of probation or parole has been made abroad should commit a new offence in Ethiopia before the expiration of the probation period, it may be asked whether the Ethiopian court trying this new offence would be competent to revoke such order. Here again, the answer seems to be in the affirmative, provided that the offence with regard to which the said order was made would, in the absence of a foreign judgment, have been triable in Ethiopia. The accused may not object to such revocation on the ground that he was discharged or acquitted abroad (Art. 20 (1», since he was actually convicted abroad, nor on the ground that the foreign sentence has been served (Art. 20 (2», since it was not served at all (in cases of probation) or fully served (in cases of parole). In such cases, the sentence passed in Ethiopia for the new offence will run consecutively to the foreign sentence or to such part thereof as remains to be served upon the order of probation or parole being revoked. However, if the country where such order was made requires the extradition of the probationer or released prisoner so as to revoke the order itself and if the requisition is granted, the courts of Ethiopia may only pass sentence for the new offence, and the offender will be extradited upon serving such sentence.

in. General provisions [Arts. 21 and 22]

Arts. 21 and 22 lay down a number of general rules regarding extradition and foreign sentences, which rules are not of an exclusively penal nature, though they are to some extent connected with those analyzed hereinbefore.

Article 21. Extradition

(1) ***Any fjreigne r who commits an ordinary offence outside the territory of Ethiopia and who takes refuge in Ethiopia may be extradited in accordance with the provisions of the law, treaties or international custom; extradition shall be granted on the application made in proper form by the State where the offence was committed for purpose of trial under the territorial law when the offence does not directly and principally concern the Ethiopian State (Art. 13).***

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(2) ***No Ethiopian national having that status at the time of the commission of the offence may, save as otherwise expressly provided, be handed over to a foreign country. Failing extradition he shall be tried by Ethiopian courts and under Ethiopian law.***

(3) ***In all cases where an offence raises a question of extradition the request shall be dealt with in accordance with the principles of Ethiopian law and provisions of existing treaties.***

1. A person who takes refuge in Ethiopia after having committed an offence in a foreign country may, if the following conditions are fulfilled together with such further substantive or procedural conditions as may be laid down in the Ethiopian extradition law or in the extradition agreement entered into by Ethiopia and the State requesting extradition (Art. 21 <3)), be surrendered to such country so that he may be tried under territorial law or serve his sentence at the place where it was passed.

(a) The offender must be a foreigner. As mentioned before, this condition already appears in Art. 50 of the Constitution. Notwithstanding the restriction "save as is otherwise expressly provided" contained in Art. 21 (2), a requisition for the extradition of a person who was an Ethiopian subject on the day of the offence may in no case be granted, even though he may have another nationality beside his Ethiopian citizenship. But it is not known whether the extradition law will in addition prohibit the extradition of a person who is an Ethiopian subject on the day of the requisition, even though he did not have Ethiopian citizenship on the day of the offence.

(ff) The offence must be "an ordinary ofTence", ***i.e.*** an extraditable offence within the meaning of the Ethiopian extradition law, the pertinent extradition agreement or international practice. For certain offences, such as political or military offences, are not normally regarded as extraditable offences.

(c) The offence must not be such as to fall also within Ethiopia's principal jurisdiction, for it would then, for all practical purposes, be deemed to have been committed on Ethiopian territory. However, a requisition for extradition made in such a case will not necessarily be dismissed, and the offender may be extradited after serving the sentence passed in Ethiopia for this offence, if it is an extraditable one.

2. As regards the manner of making a requisition for extradition and the procedure to be followed in deciding thereon, the provisions of the Ethiopian extradition law or of the relevant extradition agreement will apply, and Art. 21 confines itself to prescribing that the requisition must be made "in proper form". It may be mentioned that, when concurrent requisitions are made, they are usually dealt with as follows. It is provided either that they rank in order of reception or that priority is given to the State making a requisition pursuant to the principle of territoriality; that, if several requisitions are made pursuant to the said principle, priority is given to the State where the more serious offence was committed; that, if all the offences are of equal seriousness, priority is given to the State which first requested extradition.

3. Where a requisition for extradition is not granted, the offender will be tried in Ethiopia by virtue of the afore-mentioned principle ***Aut dedere aut punire,*** if the conditions governing the subsidiary application of Ethiopian law are fulfilled.

Article 22. Recognition of foreign sentences

(1) ***Foreign criminal sentences may be taken into account as regards antecedents and aggrava- ing circumstances, the granting or revocation of an order for conditional release, recidivism and its •punishment, the enforcement of safety measures, incapacities and forfeitures, conditions as to reinstatement, as well as compensation, restoration of property and other civil effects and all other legal consequences provided by this Code.***

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(2) ***The foreign sentence shall not be recognized unless passed by an ordinary court and not by a special tribunal for an offence punishable under this Code and its validity has been re- cognized by the appropriate Ethiopian authority.***

Such recognition may be made on the basis of a certified extract from the pot Ice record of the offender or of the judgment pronounced or by means of an official attestation delivered by the judicial or executive foreign authority, or in any other reliable manner.

Arts. 16 and 20, which define the so-called negative effect of foreign sentences, compel the courts of Ethiopia to take into account judgments given abroad, for such judgments **may** entail consequences which the said courts cannot ignore if they are to comply with Art. 2 when exercising their principal or subsidiary jurisdiction. Art. 22, which defines the so-called positive efTect of foreign sentences, has a much more general scope, and its purposes are quite different. The question here is to have regard to judgments given abroad, not with a view to establishing whether Ethiopian courts have jurisdiction to try an offence, or how they should exercise their jurisdiction, but with a view to deriving from such judgments **all** the **legal** consequences they would entail if they had been given by an Ethiopian court.

Under the Ethiopian Penal Code, previous convictions or, more generally, antecedents, have effects as regards not only the kind or term of punishment to be imposed for an offence, but also recidivism, probation, forfeiture of rights, and the like. Art. 22 enables the courts of Ethiopia to make their decisions in the light of such antecedents, even though reference need be made to a foreign judgment in order to establish them. Since a court should know the accused as fully as possible and should, when trying him, bear in mind all the circumstances mentioned in Art. 86, it is irrelevant whether some features of the picture it must have before itself are supplied by foreign judgments. Therefore, Art. 22 is intended to prevent, for instance, a person who commits a theft in Ethiopia from being regarded as a first offender if he has previously been convicted of theft ten times in the Sudan.

1. Under Art. 22, there are no restrictions as to the consequen es which an Ethiopian court may derive from a foreign judgment and any circumstance, whether of a material or of a personal nature, may be taken into account with a view to giving full effect to the provisions of Ethiopian law in the particular case which the court is trving. Such court may, for instance, order the internment of an accused who, by reason of his'previous convictions abroad, can be deemed to be an habitual offender (Art. 128), although he may have committed only one offence in Ethiopia; it may permanently withdraw the licence of an accused previously sentenced abroad for offences connected with the use of such licence (Art. 146), although he may have comnvtted the same kind of offence only once in Ethiopia; it may refuse to suspend the enforcement of a sentence on the ground that the offender has previously been sentenced to rigorous imprisonment (Art. 198), although such previous sentence was passed by a foreign court; it may cancel an order of suspension on the ground that the probationer committed a new intentional offence during the probation period (Art. 204 (2)), although such offence was committed abroad; it may order a medical investigation into the accused person's mental stability (Art. 51), although its doubts as to such stability originate from a foreign judgment having declared this person insane.

2. Sub-art. (2) of Art. 22 lays down three conditions governing the recognition of foreign sentences in Ethiopia. These conditions apply only for the purposes of Art. 22 and not for the purposes of Art. 16 or 20, since the duty to comply with the principle of legality requires that a foreign sentence has the effects defined in the latter Articles even though ***e. g.*** it was passed by a special tribunal and does not conform, therefore, to the requirements of Art. 22. Furthermore, whether these requirements apply for other purposes, in particular for the purpose of deciding whether a foreign judgment entails the disqualifications provided for by the Electoral Law (Proclamation No. 152 of 1956, Art. 19 (A)), is debatable.

(a) The sentence must have been passed with regard to an act which, had it been performed in Ethiopia, would have been an offence under Ethiopian law. Natural as it may seem, this

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condition appears, however, inconsistent with the purposes of Art. 22. which are to enable Ethiopian courts to make such decisions as are best suited to the circumstances and requirements of the case, having regard in particular to "the dangerous disposition of the offender.**

(6) The sentence must have been passed (in whatever country, since it is not required here, as it is in Art. 19 (3), that the foreign sentence should have been passed in a State recognized by Ethiopia), by an ordinary court, ahd not by a special tribunal *(tribunal d'exception).* For, if a court was specially established for the purpose of trying a given offence or offender, it may have convicted the accused without due process of law and its sentence does not, therefore, give accurate indications as to the offender's dangerous disposition. In order to decide whether this condition is fulfilled, reference will have to be made to the laws concerning the judicial organization in the country where the sentence was passed. However, the terms "special tribunal"* should be interpreted restrictively and should not be taken to include. *e.g.* juvenile courts, though under many laws they are not "ordinary courts" proper.

(c) Finally, no foreign sentence may be taken into consideration except after its regularity has been ascertained by the competent Ethiopian authorities, which, it would seem from Art. 149(4) of the Criminal Procedure Code, is the court trying the offence. This condition aims at ensuring that no denial of justice has occurred in the course of the proceedings in which the foreign sentence was passed. As for the manner in which this can be achieved. Art. 22 (2) is very general and supplies a number of illustrations (copy of entries in police record, certified copy of judgment, official certificate, and the like). The formal character of the means used in deciding whether a foreign sentence may have the effects mentioned in sub-art. (1) is. therefore, of no importance so long as the information thereby obtained is reliable.

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CHAPTER J.V THE CRIMINAL OFFENCE [ARTS. 23-25]

All offences, whatever their nature or seriousness, have some elements in common and the Code, before describing the various behaviours which are regarded as unlawful,.***'i.e.*** the special ingredients which permit distinguishing one offence from another, defines the essential conditions in the absence of which no such behaviour may be deemed to be criminal or punishable, ***i.e.*** the general ingredients which permit deciding whether an offence has been committed and whether the offender is guilty thereof. These definitions appear in Arts. 23 and 24. As for Art. 25, it lays down a number of rules regarding the time when and place where an offence is committed, which rules are of a procedural as much as of a penal nature.

Article 23. Offences

(1) ***A criminal offence is an act or omission which is prohibited by law.***

(2) ***The criminal offence is only completed when all its legal, material and moral elements are present,***

(3) ***A criminal offence is punishable where the court has found the offence proved and deserving ofpunishment.***

1. From among the numerous definitions of the criminal offence which jurists and philosophers have formulated throughout the ages, Carrara's definition appears to have influenced Art..23. For Carrara, "an offence consists of the violation of a legal prescription, resulting from human behaviour, whether positive or negative, which is prohibited under pain of a criminal sanction". This is also what Art. 23 (1) intends to mean by stating that an offence is an act or omission which is prohibited by law. Imperfectly drafted as it may be, this sub-article nevertheless specifies the general elements which will be found in any criminal offence.

(a) An offence firstly comprises a ***legal*** element, which is present when a legal prescription has been infringed. In accordance with Art. 2, no act or failure to act may be regarded as an offence unless the law so prescribes. Therefore, a person who performs an act which is not penalized by any law, such as fornication, commits no offence; the fact that he may erroneously believe such behaviour to be contrary to the law is irrelevant so far as the commission of an offence is concerned (Art. 77). It may be noted that this requirement as to the presence of **a** "legal element", which expression may be criticized on the ground that, strictly speaking, the law is an instrument of prevention or repression and not an ingredient of offences, is restated in Art. 23 rather unnecessarily, for it adds nothing to the principle ***Nullum crimen, nulla poena since lege*** expressed in Art. 2.

(б) An offence secondly comprises a ***material*** element. Since criminal laws do not punish mere thoughts, a breach of the law cannot occur in the absence of given behaviour which, in the terms'of Art. 23, may consist of an act or an omission. The notion of "material element" **is** of importance since it provides the grounds for a number of distinctions made by subsequent legal provisions, such as the distinction between instantaneous and non* instantaneous offences (Arts. 25 and 60), or between preparatory acts, attempts and complete offences (Arts. 26—29).

(i) Ah offence is committed when a person performs an act the performance of which is prohibited by law :^yiking- setting fire, abstracting something. Offences of this type, sometimes referred to as offences of commission, are thus characterized by the performance of a forbidden act.

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(ii) An offence is also committed when a person fails to perform an act the performance of which is commanded by law.frThe law often imposes the duty to do something (to report offenders, to register the birth of a child, and the like) and penalizes the failure to carry out this duty. Offences of this type, sometimes referred to as offences of omission, are thus characterized by the non-performance of a compulsory act.

(iii) So too, an offence is committed when a person fails to perform an act which he has the duty to perform ***(e.g.*** to a. Derson in danger) and thereby brines about a result ***(e.g.*** death) which normally arises, from the performance of an act ***(e.g.*** shooting). Offences oj this type, sometimes referred to as offences ol commission by omission. idiffer from offences of commission, since they are not characterized by positive behaviour, as well as from offcnceS-af **omission, sincc Lht latter hring** about a result which could **pot h<».** achieved by positive behaviour. According to the maxim ***Quipeut et n'empiche, piche,*** when a person intentionally or negligently abstains from doing something which he should and could have done, his passivity is assimilated to, and entails the same effects as, any act which he might have performed and which would have brought about the consequences flowing from his abstention (ATF 86 IV 218, JdT 1961 IV 152).

(c) The principle that a person commits no offence unless he behaves in a manner contrary to the law implies that criminal liability is always **personal,** in that nobody can be held to be criminally liable for an offence committed by another (see, however, comments under Art. 43). It is true that cases will be found where a person may be punished for something he did not do in person (Art. 32 (1), (6) and (c), for instance); but, even in these cases, he will not be said to have committed an offence unless an act or omission is attributable to him (full association with the offence, use of coercion, and the like, in the terms of Art. 32). The same holds good, for example, in cases of harm done by animals or lunatics; here again, a person may not be punished for a damage he did not inflict personally, unless he personally did something unlawful, such as deliberately taking animals on somebody else's property (Art. 649) or failing in his duty to exercise proper supervision over a lunatic entrusted to his care (Art. 779). That there is no vicarious liability in criminal matters is made quite clear by provisions such as those of Arts. 32 (2), 35 (3), 36 (3), 58 (3), 69 ***in fine*** and 70 (3).

(d) Although a criminal offence always results from human behaviour, because a prohibition against acting or a duty to act may be laid down only with regard to persons, the question may be asked whether the "act or omission which is prohibited by law" should necessarily be attributable to a physical person, or whether the material element of an offence may equally be constituted by the act or omission of a juridical person.

The problem is controversial. On the one hand, it is alleged that the concept of juridical personality is a mere fiction; that a juridical person has no understanding or volition of its own which would render it capable of acting in a guilty manner; that the nature of criminal penalties is such that they can be applied only to physical persons. On the other hand, it is contended that juridical personality is in fact real; that a juridical person has its own understanding and volition as is shown, for instance, by the fact that it enters into contracts: that a number of penalties, such as pecuniary penalties and disqualifications, can be enforced without difficulty if ordered with regard to juridical persons.

The Code expressly provides for only one case where a juridical person can incur a criminal liability (Art. 576; however, see also Art. 567). Admittedly, the Code also provides generally that "any undertaking or establishment", whether it has legal personality or not, may be temporarily or permanently prohibited from carrying out its activities (Art. 147). But Art. 147, which in any event does not lay down a penalty, is not applicable unless a physical person is liable also, and the undertaking or establishment concerned has been "utilized" by is person in ordef to commit the offence. In this sense, Art. 147 has much in common with Art. 144, since an order for the closing or winding-up of an undertaking is not designed to punish

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the undertaking as **such, but rather** to deprive a physical person of an instrument whereby **he might commit further offences.**

2. Although positive or negative hehavionr which is contrary tr» a legal prescription in force constitutes a criminal offence, this offence is not as of right punishable, for the ancient conception that a man should be punished for the sole reason that he contravened the law ***(le fait juge Vhomme)*** nowhere appears in the Code. Quite the contrary. Art. 23 distinguishes between criminal offences (sub-art. 1) and punishable offences (sub-art. 3) by stating that an offence is punishable only where the court finds it to be deserving of punishment or, in the terms of Art. **57,** where the offender is guilty, in that he acted "either intentionally or by negligence". In the absence of this condition as to guilt, or as to the presence of the so-called ***moral*** element, "no one can be punished for an offence" (Art. 57). "The Code must make it clear at the outset that it is chiefly concerned, not with the act and the result as such, but with the wrong-doer. for judgment is not given with respect to an act. but with respect to the human being who performed it. This subjective conception of criminal law should inspire the Code, the more so since it is in conformity with the tradition of the Fetha Negast. The said conception, which influences the whole Code, entails in particular that an act is^pot unlawful and punishable unless two typespf conditions are fulfilled, that is, material, pr external qt ohiective conditions, on the one hand and moral or internal, or subicctivc conditions, pn the other hand. An offence, therefore, is not complete so long as all its legal ingredients are not present. By laying down this principle, the Code aims at avoiding a double risk and at preventing a double injustice, namely that judgment be given having regard only to the act or, conversely, having regard onl> to the doer's intention" ***(Expos* des Motifs,)***.

Hence the rule laid down in Art. 23 (3), according to which there is no criminal and punishable offence unless the legal, material and moral elements are present together, for each of them is necessary, and yet not sufficient in itself. There is no criminal offence failing the legal element, and no punishable offencc failing the moral element. As for the material element, it governs the question whether an offence has been committed at all (Art. 26) or has merely been attempted (Arts. 27—29). However, it may be pointed out that the notion of "legal element", if widely interpreted, embodies the other two. Inasmuch as an offence consists of behaviour contrary to a legal provision, a person will not fall under this provision unless he does exactly what it prohibits him from doing. For instance, a person commits a theft (Art. 630) when, with intent to obtain an unlawful enrichment, he abstracts the property of another. Quite clearly, if a person, without intent to enrich himself, abstracts the property of another, or enriches himself with the property of another but without abstracting it, he does not commit a theft within the meaning of Art. **630,** since some of the ingredients of the legal definition of theft are missing; but the ingredients of the legal definition of another offence, such as an offence contrary to Art. **641, 643** or **644,** may then be present.

Article 24. Relationship of cause and effect

(1) ***In cases where the commission of an offence requires the achievement of a given result the offence shall be deemed to have been committed only if the result achieved is the consequence of the act or omission with which the accused person is charged.***

This relationship of cause and effect shall be presumed to exist when the act or omission within the provisions of the law would, in the normal course of things, produce the result charged.

(2) ***Where there are concurrent causes or in the case of an intervening cause whether due to the act of a third party or to a natural or fortuitous event, this relationship of cause and effect shall not apply when the extraneous cause was in itself sufficient to produce the result.***

If, In such a case, the act or omission with which the accused person is charged in itself constitutes an offence he shall be liable to the punishment specified for such an offence.

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If one analyzes the ingredients of many a criminal offence, one will find that some harm must be inflicted or some danger created so that the offence may be deemed to be complete. Although it is not required that the offender should necessarily attain the objective he was set on accomplishing when he acted or failed to act ***(e.g.*** forgery is complete even though the forged instrument is not used, and theft, even though the thief is not enriched), it is often required that this act or failure to act should produce some consequences. Thus, a person who stabs another with the intention of - killing him may not be said to have committed a complete offence of murder unless a given result, namely the death of a human being, follows upon the stabbing; but, although he who stabbed may then be punished for the stabbing, he may not be punished for having killed unless the death of the person stabbed is the result of such stabbing. For. as is prescribed by Art. 24 (1), a person is answerable for the consequences of his act or failure to act only insofar as there exists a relationship of cause and effect between this act or failure and these consequences.

1. The enforcement of this principle may give rise to difficulties, since it is impossible to define the concept of "cause" in such a way that a specific result can in each and every case be automatically traced to specific behaviour.

(a) Various tests have been suggested with a view to enabling the courts to decide whether a given act is the cause of a given result, and until not so long ago the only test applied in some countries was the so-called ***sine qua non*** test; any act in the absence of which the result would not have been achieved is deemed to be the cause of such result. Thus, if ***A*** strikes ***B*** and inflicts on him a slight injury, and if ***B*** is driven by C to a doctor but the car crashes and ***B*** dies in the crash, ***A*** will be held liable for ***B's*** death; had ***A*** not wounded ***B,*** the latter would not have had to be driven to a doctor and would not have lost his life in an automobile accident.

Although this theory, known as the theory of absolute causality, goes too far because it assimilates the “cause” and the “occasion" of the harm, it makes it clear that no person can be liable for a harm unless he did something which was a necessary condition of this harm. As such, the test is useful since it permits selecting possible candidates for liability (such as ***A*** and C in the above illustration), and excluding all persons whose behaviour had not even the slightest bearing on events.

(б) However, criminal liability quite clearly cannot be established through the ***sine qua non*** test alone. From a mere common sense point of view, it is evident that, in the above illustration, the relationship of cause and effect, which no doubt exists between ***A's*** act of striking ***B*** and the slight injury suffered by ***B,*** cannot be extended to anything that may happen after the striking and apply to ***B's*** death; the striking alone could not result in ***B's*** death and it is obviously the automobile accident, and not the striking, which in this case is the cause of the death. Yet, the answer to the problem of causation is not always so obvious and, unless one is prepared to regard as equally liable all the persons who have in whatever insignificant manner contributed to the infliction of the harm, a more precise selection must be made and further criteria applied with a view to deciding which persons are actually liable under the law. To this end, Art. 24 states that an act or an omission may not be deemed to have caused the harm in issue unless this act or omission “would, in the normal course of things, produce the result charged."

According to this rule, which is based on the theory of so-called adequate or proximate causality, the offender's behaviour must be, not only a necessary, but also a relevant condition of the harm. Circumstances which, though they may have contributed to the occurrence of the harm, are not in the ordinary course of things capable of bringing it about **may not** be regarded as the cause, in the legal sense of the term, of this harm. Only act* **which are** generally capable of producing the result in issue are deemed to have caused **it and any** relationship that may exist between the result and an act not normally capable of producing it has no juridical effects (see in particular ATF **68** IV **19,** JdT **1942** I **372,** and ATF **73** IV **227,** JdT **1948** IV **53).** As Art. **24 (1)** indicates also, reference **will** therefore **have to** be **made** to the normal or ordinary course of things for **the** purpose of **applying**

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the relevancy test. If an act is done which is followed by a certain result and experience shows that, whenever this act is done, this result follows, if not invariably, at least in a majority of cases, then this act will be held to be relevant and a relationship of cause and effect "shall be presumed to exist*' between the said act and result. So too, if an act is not done and the abstention is followed by a certain result, this abstention will be regarded as the adequate cause of the result if experience shows that the said act, were it done, would as a general rule prevent the said result from taking place. Whether a chain of causation exists in any given circumstances is a question to be answered ***in concreto.*** Thus, if ***A*** pretends to discharge his gun at ***B*** and ***B.*** who has a weak heart, dies of fright, the issue is not whether, in the ordinary course of things, one can kill a person by pretending to shoot him (for one can obviously not) but whether one can frighten to death a person with a heart condition (and one obviously can). In this instance, therefore, a chain of causation is deemed to exist between ***A's*** act and ***B's*** death and, although the implications of the latter phrase are not made clear, the presumption is probably meant to operate in favour of the prosecution, ***i.e.*** it is sufficient for the prosecutor to prove that acts of the same kind as the act charged, when done in the same circumstances as those in which the accused acted, are ordinarily capable of bringing about the harm done in the particular case, and he need not prove that this causal relationship also existed in the said case.

(e) When, by applying Art. 24, it is found that a given act has caused the harm in issue, it does not as of right follow that the person who did this act will be punished for this harm. Since nobody may be convicted for "what he neither knew of or intended, nor for what goes beyond what he intended" (Art. 58 (3)), nor furthermore, for what occurs without any "lack of foresight or imprudence'* on his part (Art. 59 (1)), the court must be satisfied that the moral element of the offence is present, ***i.e.*** the harm done was desired or the doer knew or could and should have known that such harm would ensue when he acted or failed to act (ATF 73 IV 227, JdT 1948 IV 53). In other words, the existence of a chain of causation is a necessary, but not a sufficient condition of liability. Firstly, the result may not have been foreseeable <***[e.g. A*** was not aware of ***B's*** heart condition). Secondly, even when the result was foreseeable, it does not necessarily follow that the offender foresaw it, let alone desired it, or even that he could and should have foreseen it. Thus, to come back to the above illustration, there is no doubt that ***A's*** act of pretending to shoot ***B*** is the cause of ***B's*** death, nor is there any doubt that a person who frightens someone who has a weak heart should ordinarily expect some harm to follow upon the shock thus given. Yet, this holds good only insofar as this person knows that the one he frightens has a heart condition. If be is unaware of it, he is not guilty of homicide, however relevant his act may be. The purpose of the relevancy test, thercforeusJxi establish whether there,exist* an objective liability and thf material ingredient of the offence is present. However, in the absence of guilt, this liability has no juridical effects under the Penal Code.

2. After defining in sub-art. (1) the conditions on which a relationship of cause and effect exists. Art. 24 specifies, in sub-art. (2), the circumstances in which such relationship must be excluded because a chain of causation does not exist or is broken.

(a) The first case to be provided for is that of concurrent causes. The problem arises when, through—or despite—the application of the relevancy test, two or more persons are found to be eligible for liability. If ***A*** and ***B*** simultaneously shoot C with the intention of killing him and ***C*** is hit by both bullets and dies, the question is whether they are both liable or whether ***A*** or ***B*** alone is liable. This question cannot be answered unless one investigates which bullet brought about the death, so as to establish which, ***A's or B's*** act, is the relevant, or in this case, more correctly, the efficient cause of 4Ts death. If it is proved that both bullets were fatal, ***A*** and ***B*** will be equally liable; but if the bullet fired by ***A*** hit C in the leg, whilst the bullet fired by ***B*** hit C in the heart, ***B's*** act will be regarded as the efficient cause of C*a death. The court, when deciding on liability, is not required to bear in mind everything that might possibly have occurred if C had only been shot in the leg by ***A*** and not also in the

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heart by ***B***\ although it is not altogether inconceivable that the wound in the leg, if not properly attended to, might have resulted in C's death, this is irrelevant in the circumstances because such death would not have occurred in the normal course of things. Therefore, ***A*** may be found guilty only of attempted homicide, whereas ***B*** will alone be liable for C's death; this, however, is without prejudice to the provisions of Art. 32 regarding co-offenders. The solution is the same when the concurrent cause is not constituted by human behaviour, but by a natural or fortuitous event. If ***A*** shoots ***B*** at the very moment when the latter is struck by lightning, and it is proved that ***B's*** death was caused by the lightning, ***A*** may be found guilty only of attempted homicide, either in pursuance of Art. 27 (if the bullet he fired would not, in the normal course of things, have brought about ***B's*** death) or in pursuance of Art. 29 (if the lightning had already killed ***B*** when he was hit by the bullet).

(b) The second case dealt with in sub-art. (2) is the case of intervening causes. Here again, the problem arises when a given result may be attributed to a multiplicity of causes; but the difference between this case and the case of concurrent causes lies in the time element involved; for the question is then to know which of two or more consecutive (and not simultaneous) events—whether or not they all are attributable to human behaviour—has caused the harm in issue. If ***A*** beats up his child and inflicts on him an iryury which, though not fatal, makes it necessary that he be taken to the hospital and if the child, while under treatment at the hospital, catches smallpox and dies, there is no doubt that the efficient cause of the child's death is not the injury, but the disease; the latter is an intervening cause the effect of which is that no chain of causatioil exists between the beating up and the death since the initial act done by ***A*** could not, in the normal course of things, produce the result eventually achieved. Therefore, the answer is here the same as in cases of concurrent causes and it logically flows from the general rule laid down in sub-art. (1).

(c) It may be noted that sub-art. (2) is so worded as to give the impression that a person incurs no liability if an event sufficient in itself to cause the harm occurs simultaneously with, or consecutive to, his own actor abstention. This, however, is only partly true*. Although the question whether the chain of causation is broken does not arise unless the concurrent or intervening event is a cause in the legal sense of the term, it is obvious from sub-art. (1) that a relationship of cause and effect may be deemed to be non-existent or interrupted only fcrtiiTfc, in addition, the initial act or abstention is not sufficient in itself to produce the result. Therefore, what Art. ***7A***.(2) intends to mean is that a concurrent or intervening cause is irrelevant if the .Initial act or abstention would in the normal course of things have brought about the harm in issue even in the'absence of such concurrent or intervening cau^e. Thus, if
A, sailing with ***B*** whom he knows cannot swim, throws him overboard in the middle of the Red Sea with the intention of killing him and ***B*** does not drown himself but is eaten by a shark, the latter intervening event, though sufficient in itself to cause ***B's*** death, will not be regarded as breaking the chain of causation. There can be no doubt that ***A*** is not relieved of liability, but is on the contrary guilty of intentional homicide; ***B*** would have died even if the shark had not interfered, since ,4's act was equally sufficient to cause ***B's*** death. Although the text of Art. 24 (2) does not support this interpretation, it seems that, one ought here "to have recourse to a construction by implication and to draw obvious inferences" from the provisions bf sub-art. (I) in the assumption that "it was not intended that a man should benefit from his own wrong or benefit where he has been at fault" (Halsbury, ***op. cit.***, 31, pp. 500-501).

3. The last alinea of sub-art. (2) derives a rather obvious consequence from the above principles, namely that an offence may be committed despite the interruption of the causal relationship. The offender may then be liable, if not for the result which he did not cause, at least for the act or abstention which was a necessary conditioa of such result, if this act or abstention is penalized by law. Coming back to the case where ***A*** beats his child who dies of smallpox in hospital, ***A*** may be found guilty, not of an offence of homicide, but of an offence contrary to Art. 548.

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4. In conclusion, it should be borne in mind that “the theory of adequate causality does not permit solving in advance all the problems that a judge may encounter. But this is not the only instance where the judge may and must be given the power to estimate in a reasonable manner the facts of life and the lessons of experience” (Logoz, ***op. cit.,*** p. 34). In other words. Art. 24 aims at no more than at supplying a number of guiding principles which cannot, however, be expected to enable the courts to decide without difficulties the more involved cases which they may be called upon to try.

Article 25. Place and time of the offence

(1) ***An offence is committed at the place where and at the time when the offender performed or failed to perform the act penalized by criminal law.***

An attempt is committed at the place where and at the time when the offender performed or failed to perform the preliminary acts which constitute such an attempt.

(2) ***IVith regard to non-instantaneous offences where the act and the criminal result do not coincide the offence is deemed to have been committed both at the place of the unlawful act or omission and that of its result.***

Similarly, an attempt is deemed to have been committed both at the place where the offender made it and the place he intended the result to be produced.

For purposes of prosecution, the jurisdiction of the place where the result was achieved is subsidiary to that of the place of commission.

Art. 25 lays down rules regarding the time and place of commission of an offence, most of which may appear irrelevant to the extent that they govern procedural problems. The reason why Art. 25 was nevertheless included in the Penal Code is that other provisions in the Code, such as those dealing with conflicts'of laws (Arts. 5—10) and of jurisdiction (Arts. 11—20) or with limitation (Art. 228), presuppose a clear answer to the question of when and where an offence is deemed to be committed.

1. The said answer may seem obvious, and so it is in cases of so-called, though legally undefined, instantaneous offences; one may infer from sub-art. (2) that they are offences where “the unlawful act or omission” and "the criminal result” are said to “coincide”* because, upon the doing of such act, the harm (if required for the completion of the offence) follows then and there. In like cases, the time and place of occurrence of both the act and the harm can ordinarily be fixed without difficulty. If, on January 1,1964, at 10 a.m., on Churchill Road in Addis Ababa, ***A*** runs down ***B*** and the latter dies instantly, there is no question as to where or when the offence is committed; it is committed “at the place where and at the time when the offender performed the act penalized by criminal law” (sub-art. (I), first alinea).

The rule which applies to complete offences also applies to attempted offences. Thus, if on January 1, 1964, at 10 a.m., on Churchill Road in Addis Ababa. ***A*** shoots ***B*** and misses him, the homicide will* in accordance with the second alinea of sub-art. (1), be deemed to have been attempted at the place where and at the time when the offender performed “the preliminary acts which constitute such an attempt” or, more correctly (in the terms of Art. 27), where and when he “pursued his criminal activity to its end without achieving the result necessary for the completion of the offence”. Similarly, in cases of offences consisting of several acts, such as rape or robbery, the offence will be deemed to be attempted or completed, as the case may be, where and when the offender began to perform or performed these acts.

2. It may occur, however, that the act or abstention and the harm do not coincide; the result may, for instance, be achieved in a place other than that where the act was done, or long after the doing of such act, or the offence may consist of several acts done in different places or at different times. In these cases, doubts may arise as to exactly where and when the offence is committed which doubts are to be resolved as provided for by sub-art. (2) of Art. 25.

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(a) How to treat an offence depending on the manner in which it is committed is a question which is not dealt with exclusively in Art. 25, but also in Arts. 6, 60-62 and 228 which, however, resolve it in a different perspective, namely in relation to the applicable law. concurrence of offences and the calculation of periods of limitation. Yet, in connection with Art. 25, the problem is not how or until when offences which are not constituted by a single unlawful act or abstention may be punished, but from what time they may be deemed to be committed. As regards these offences, distinctions are usually made between:

(i) continuing offences, **which** consist of a single unlawful act brinejne about a situation which must last for a certain period of time so that the offence mav be deemed to be complete ***(e.g.*** Art. 300, desertion; Art. 557, illegal restraint). Although limitation runs only from the day when such situation comes to an end, the offence is complete before such day, ***i.e.*** as soon as the situation created by the unlawful act has lasted long enough to enable one to say that, for instance, the soldier who quit his post did so "with intent to evade military service". Consequently, a soldier who quit his post on January 1, 1958, may be deemed to have committed an offence of desertion contrary to earlier legislation, even though he is arrested after the coming into force of the 1957 Code and limitation begins to run on the day of his arrest. -It will be noted that continuing offences are not to be identified with so-called permanent offences, which consist of a single unlawful act bringing about a lasting situation the duration of which is for all juridical purposes irrelevant, unless otherwise expressly provided for ***(e.g.*** Art. 495, infringement of building rules; Art. 616, bigamy). Permanent offences are as a rule (see. however, Art. 616 (3)) dealt with in the same manner as instantaneous offences;

(ii) successive offences, which consist of repeated **pets,** of **the same** nature **dnne** in carrying out a single criminal intention ***(e.g.*** employee stealing one dollar every day from his employer; married person repeatedly committing adultery with the same co-respondent). Although these repeated acts are regarded as constituting one offence and limitation runs only from the day when the last act is performed, the offence is committed before such day, /. ***e.*** as soon as the first unlawful act is done. Regarding the law to be applied when a successive offence is committed partly under repealed legislation, see para. (3) (***b***) in comments under Art. 6;

(iii) habitual offences, which consist of making a practice of acts of the .same nature, each of which is not unlawful in itsell ***(e.g.*** Art. 471, dangerous vagrancy; Art. 518, unlawful exercise of the medical profession). Although these acts are regarded as constituting one offence and limitation runs only from the day when the practice is stopped, the offence is complete before such day. ***i.e.*** as soon as a sufficient number of acts have been performed to enable one to speak of a practice. Therefore, a person who,without authority, started to make a profession of treating sick people on January I, 1958, and did so consistently until January 1, 1959, may be deemed to have acted contrary to earlier legislation although he stopped such practice and limitation began to run after the coming into force of the 1957 Code.

(б) Cases may present themselves where an unlawful act causes harm in a place other than that where it was performed or in many different places ***(e.g.*** to shoot on the train in Dire- Dawa a person who dies in Djibouti; to publish in Addis Ababa a libel which also circulates in Kenya), and it is then essential to fix the exact place where the offence was committed with a view to deciding in which court, domestic or foreign, such offence is triable and to preventing a positive or negative conflict of jurisdiction, whether on a national or on an international scale. To this end, various rules have been suggested or followed, among which:

(i) the rule that an offence is deemed to be committed at the place where the first unlawful act was done, irrespective of the place where the result may have been achieved (theory of the act. adopted in 1883 by the Institute of International Law). Thus, if ***A***, standing on Ethiopian territory, shoots ***B*** standing on Sudanese territory, the offence should be deemed to have

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been committed in Ethiopia, regardless of the fact that ***B*** was wounded or killed in the Sudan;

(ii) the rule that an offence is deemed to be committed at the place where the act produced its immediate consequences, in the same instance, at the place where the bullet hit the victim (theory of "remote acts" or ***action d distance).*** Thus, ***B*** having been hit on Sudanese territory, the offence should be deemed to have been committed in the Sudan, regardless of the fact that the initial act was performed in Ethiopia and that, after having been hit, ***B*** might have crossed the border and died in Ethiopia;

(iii) the rule that an offence is deemed to be committed at the place where the actual result is achieved (theory of the result). Thus, if ***B*** died on Sudanese territory, the offence should be deemed to have been committed in the Sudan, regardless of the fact that the unlawful act was performed on Ethiopian territory.

All these rules aim at coping with the different practical situations that may occur. Desirous to achieve the same purpose through the application of a single and more general principle, the Institute of International Law in 1931 recommended the adoption of the theory of "ubiquity", according to which an offence is deemed to be committed at any of the places touched during its commission. Thus, if ***A,*** on Ethiopian soil, shoots ***B*** who is on Sudanese soil but dies on Kenyan territory, Ethiopia, the Sudan and Kenya should all be regarded as being places of commission. Art. 25 (2) first alinea, though it is based on the principle of ubiquity, does not go to these lengths; the place of both the act and the result is deemed to be the place of commission (in the same sense, see Art. 100 Criminal Procedure Code; ***contra,*** see Art. 103 Criminal Procedure Code; as for continuing, successive and habitual offences, see Art. 102 Criminal Procedure Code). This rule applies whether the offence is complete or merely attempted (sub-art. (2), second alinea). Tims, if ***A,*** on Ethiopian territory, shoots ***B*** on Sudanese territory, and misses him, the offence is deemed to be attempted both in Ethiopia (place where the act was performed) and in the Sudan (place where the result was intended to occur).

The first and second alineas of Art. 25 (2) are designed to avoid a negative conflict of jurisdiction. However, one more rule is required so as to avoid a positive conflict of jurisdiction; since proceedings may not be instituted simultaneously where the act was done and where the consequences ensued, it is necessary, for purposes of prosecution and trial, to choose among the courts of the places that are deemed to be places of commission. Accordingly, the third alinea of Art. 25 (2) states that principal jurisdiction is located in the court of the place where the unlawfulact was done. This prescription, to which Art. 107 of the Criminal Procedure Code does not strictly conform.will govern the settlement of domestic conflicts of jurisdiction; thus, if ***A*** in Addis Ababa shoots ***B*** who dies in Dessie,
A will normally be tried in Addis Ababa. But the said prescription, to the extent that it also governs the settlement of international conflicts of jurisdiction, creates an exception to the principle contained in Art. 11. For if ***A*** in Djibouti shoots ***B*** who dies in Addis Ababa, the offence must, according to Art. 25 (2), first alinea, be regarded as committed in Ethiopia as well as in French Somaliland; as such, it should come within the principal jurisdiction of Ethiopian courts pursuant to Art. 11. Yet, pursuant to Art. 25 (2), third alinea, the said courts have only subsidiary jurisdiction. As mentioned before in connection with Art. 11, it would seem, therefore, that the courts of Ethiopia do not have principal jurisdiction unless the act or abstention occurs in Ethiopia, regardless of the place where the result is achieved.

3. Two final remarks may be made.

(a) It seems reasonably certain that the term "the offender" as used in Art. 25 must be construed in its broadest sense, so as to include not only the so-called principal offender, but any person having in whatever capacity participated in the offence. Thus, if ***A,*** in Addis Ababa, incites ***B*** to commit an offence in Nairobi and this offence is at least attempted, the courts having jurisdiction to try ***A*** are those of Addis Ababa, where the incitement occurred, as well as those of Nairobi, where the result of the incitement was achieved. Similarly, if an offence

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is committed by co-offenders acting in different places, the offence is deemed to be committed at the place where each of them acted.

(b) In applying Art. 25, regard will naturally be had to the general principles laid down in Art. 24, and the place where the result is achieved will be taken into consideration for purposes of jurisdiction only when this result has been caused, within the meaning of Art. 24, by an act done is a different place.

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CHAPTER V

DEGREES IN THE COMMISSION OF THE OFFENCE [ARTS. 26-31]

In connection with the preceding Articles, reference has often been made to complete offences as opposed to attempted offences. This indicates that there are degrees in the commission of an offence and that liability may be incurred even though an unlawful activity is not carried to its end. Indeed, the ***iter criminis,*** the path of crime, is not necessarily a short ono and many acts may be dope from the day. when a criminal intent comes into being until the day when it materializes. Although Art. 23jfetates that an offence may not be deemed to be committed in the absence oT'positive or negative behaviour, the need to prevent the commission of offences makes it impossible to wail until this behaviour has borne fruit before the law can run its course. The question, therefore, is what stage should have been reached in the execution of a criminal design so that a person may be regarded as a wrongdoer and how he should then be treated or, in other words, at what point the line should be drawn between what is criminal and what is not. This question is answered in Arts. 26 and 27. Arts. 28—30 provide for various cases of attempt, and Art. 31 lays down guiding principles regarding the assessment of the sentence in cases of attempt.

Article 26. Preparatory acts

Acts which are merely designed to prepare or make possible an offence, by procuring the means or creating the conditions for its commission are not punishable unless: '

(a) in themselves they constitute an offence defined by law; or
(b) they are expressly constituted a 'special offence by law by reason of their gravity or the general danger they entail.

The commission of an intentional offence is usually preceded by a purely ***internal*** or mental process, which begins with the thought of committing an offence and ends with the decision to commit it, but which does not manifest itself by any overt act. According to the rule ***nemo cogitationis poenam patitur*** implied in Art. 23. a mere criminal intention docs not in itself constitute an offence and is not punishable. History would show that abuses occur if a person may be punished for his thoughts; with a view to, or generally under the guise of, safeguarding alleged general interests, political, religious or others, action is taken against persons whose only mistake is or may be that they do not think along official lines, on the ground that they create a social danger and a menace to the community, and punishments are imposed only on the basis of suspicions. Yet, however extensive the subjective conception of criminal law and however compelling the exigencies of social defence, if the distinction between moral and criminal law is to be preserved and if justice is to mean anything at all, the courts must be prohibited from interfering so long as a person has not embarked upon a particular course of ***conduct.*** This prohibition, which exists in Art. 23, implies that the internal phase in the commission of an offence is beyond the grip of the law. The Penal Code does not apply unless a person crosses the line of demarcation between the mental and the material phases, which he may do firstly by preparing the commission of an offence within the meaning of Art. 26.

J. The external stage in carrying out a criminal design is reached when preparatory acts are done, ***i.e.*** when a person who intends to commit an offence takes such steps as are, objectively or according to his estimation, necessary to ensure that the offence can be committed, or successfully committed, or committed with impunity. This stage is still one of planning, but is no longer characterized by mere intellectual activity; the person concerned, having decided to kill his neighbour and having reflected on the best way to do so, resolves to use a

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gun and, realizing that he has no gun (internal phase), goes to a gunsmith and buys a gun (exj&n&l phase). Although he then begins to implement arrangements he has made in his mind, it is not apparent, to anyone who does not know of these arrangements, that he is "procuring the means or creating the conditions** for committing an offence. The buying of a gun may have several purposes, including perfectly innocent and harmless ones, and there is no means of telling with reasonable certainty to what ends the gun will be used. The buying is, therefore, equivocal, and the buyer, were he to be punished, would be punished for an assumed intention only. Furthermore, granted that the buying is significant only if one is aware of the buyer's intention, for example because he threatened to kill his neighbour, there is no means of telling with reasonable certainty that he will actually do so; there is a considerable distance, both materially and psychologically, between the buying of a gun ancLthe pulling of the trigger and, from a mere objective standpoint, the buying is not substantial enough in view of the harm which the buyer may intend to cause. Equivocality £tid remoteness **are** the **iwn reasons** why, under most Codes, preparatory acts are not.deemed to be unlawful. Rither the buying of a gun means nothing at all or, if it means something because the buyer's intention is known, it is not sufficiently proximate to the doing of harm.

It seems that these reasons also explain the solution contained in Art. 26, though the Codification Commission passed this Article without debate and nothing pertinent to the ***ratio legis*** can be derived from its records. In the ***Exposi des Motifs,*** however, it is stated that ••preparatory acts as well as acts done in an attempt aim at, dr tend towards, the commission of an offence/tfie first ones in a rather remote and indirect manner (***conatus remotus*** of the ancient doctrine), the second ones, immediately and directly (***conatus proximus***). Under modem criminal law, however, preparation is usually unpunished owing to its uncertain and^ equivocal character, save in certain cases where prosecution and .punishment appear to be justified having regard to its natme and the danger which it entails. Preparatory acts remain within the realm of planning and do not necessarily indicate that execution has begun. As a general rule, therefore, they should not be punished, and this rule is included in the Code. For these acts normally precede, but do not amount to, the execution of an offence. They do not always reveal the existence of an unlawful design ***(le dessein criminel)*** nor the willingness to carry it out ***(la resolution de l'accomplir).*** Furthermore, the doer may be so far away from success that the chance of abandonment cannot be excluded."

Those laws which declare preparation to be punishable in all cases do so with the hogejjf preventing the commission of offences—a goal which, in Ethiopia, might often be attained by applying Art. 145. However legitimate, this ambition may have the effect that, owing to the difficulties which are bound to arise in relation to evidence, only such persons will ordinarily be punished as do not have at hand the instruments necessary for committing an offence. Thus, if ***A*** and ***B,*** independently of each other, make arrangements to commit robbery and ***A*** has a gun but ***B*** has to buy one, # alone is punishable; yet. the point he reached on the path of crime is exactly the same as that reached by ***A***; in fact, ***B*** has merely caught up with ***A.*** If ***B*** were to be punished, the only justification would be that the buying of a gun indicates a greater firmness of intention—an assumption that might prove wrong in a great number of cases. Moreover, as is pointed out in the ***Expo si des Motifs*** and as has been said by Donnedieu de Vabres also, "the Jawmust encourage renunciation by promising the would-be offender that he will not be punished if he abandons in time the execution of his design". For, if a person should be punished for acts of preparation, he might think: "Since I'll be punished anyway, I might as well go on and do what I decided to do **

2. Although the rule is that preparation is not punishable, there are a few cases where exceptions to this rule are justifiable because the interests at stake are so important that no effort should be spared to stop prospective wrongdoers from proceeding one step further on the path of crime. Accordingly, Art. 26 ***(b)*** states that acts of preparation are liable to punishment if the law so expressly provides "by reason of their gravity or the general danger they entail". This is the case, for instance, with the preparation of offences against the State (Arts. 254 and 269) or international law (Art. 286), of a mutiny (Art. 313) or of an offence

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against currency (Art. 379). In these instances, action may be taken even before an **offence** is attempted, for a mere attempt might have consequences of such seriousness (ctvi? war, rebellion, counterfeiting of currency) that it must be prevented, if not at any cost, at Iraat earlier than is usually gossible. It is not to be feared, however, that this early intervention will take plaoe at the expense of justice or bring about arbitrariness and the pertinent pro .ons of the Code would show that, as a rule, preparation is punishable only when it has nr?ehed such an advanced stage and is so close to an attempt that there is little doubt as to the purpose of the arrangements made and as to the willingness of the person who made them to carry them further if he is given the chance of doing so. If these arrangements are treated as special offences of endangering, it is, therefore, because the arguments of equivocality and remoteness which justify immunity from punishment in ordinary cases of preparation have then lost the best part of their strength.

One question which may give rise to difficulties is whether a person who prepares an offence when mere preparation is punishable may, if he is not arrested except after having attempted to commit the offence he prepared, be charged both with preparation and attempt. For instance, if a person who makes arrangements to raise a revolt (Art. 254) is not caught before having attempted to raise the same (Art. 252), is he punishable for one or two offences ? Since the provisions punishing preparation have a preventive purpose, it would seem that they should apply only subsidiarily: they shoulcf be restricted to the cases where there is a danger of harm and should not apply when the harm they aim at preventing has occurred and the person who caused such harm is punishable under a different and more specific provision, as it is generally agreed that, when a danger of harm materializes, the doer may not be punished both for the danger created to certain interests and for the harm actually done to the same interests (see ATF 75 IV 122, JdT 1949 IV 114; ATF 76IV 123, JdT 1950 IV 123; ATF 87 IV 7, JdT 1961 IV 127). If this reasoning is sound. Arts. 252 and 254 may not be applied concurrently, for there is then unity of guilt within the meaning of Art. 60. Admittedly, it might be argued that, since Art. 472 (3) dealing with collective preparation and conspiracy provides that those who commit an offence in furtherance of a conspiracy are punishable for related offences as defined in Art. 62, ***i.e.*** both for the conspiracy and the offence perpetrated in carrying out the common design, there is no reason why this principle should not apply in cases of individual preparation also; this would mean that a person who is punishable for preparatory acts done with a view to permitting the commission of a second offence of causing harm is punishable in addition for the latter offence, if attempted, unless the punishment prescribed by law for this second offence is aggravated by reason of the commission of the first offence (which is not the case as between Arts. 252 and 254). But this, it seems, would extend the scope of Art. 62 beyond what it contemplates, for it is doubtful whether there is concurrence within the meaning of Art. 62 unless the commission of the first offence ***(e.g.*** killing a house-porter) is not a necessary condition of the commission of the second offence ***(e.g.*** setting fire to the said house). If this interpretation is correct, it follows that Art. 254 cannot appl* together with Art. 252 nor, for instance. Art. 379 (possession of means for counterfeiting currency) with Art. 366 (counterfeiting of currency), for there is a so-called "imperfect concurrence" between these Articles.

3. Not to be identified with the cases mentioned in Art. 26 (***b***) are those referred to in Art. 26 ***(a),*** which deals with the obvious since it prescribes that preparatory acts are punishable if "in therpselyes they constitute an offence defined by law". The difference between sub-art. ***(b)*** , which also provides for the punishment of preparation, and sub-art. ***(a),*** is that, under the former, liability, is. incurred by reason of what has been ***prepared*** whilst, under the latter, liability is incurred by reason of what has been ***achieved.*** Thus, if ***A*** buys a gun with the intention of discharging it at ***B*** and he lias no licence to carry a gun, he is punishable, not for having prepared the commission of a murder., but for having carried or detained a gun withoutA-licence (Art. 763 or 764, as the case may be). Also different are the cases where the mere expression of a criminal intention is unlawful, regardless of whether or not such intention is carried into effect. Thus, if ***A*** threatens ***B*** with death, he is not punishable for having

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prepared to kill ***B,*** but for such result as he may actually have achieved, namely for having induced in ***B*** "a state of alarm or agitation" (Art. 552). Finally, also different are the cases where acts of preparation done by one person are punishable as acts of assistance in the commission of an offence attempted or committed by another. Thus, if ***A,*** knowing that ***B*** intends to kill ***C,*** lends ***B*** a gun for that purpose and ***B*** kills or attempts to kill C, ***A*** is punishable as an accomplice, although he merely supplied ***B*** with the means necessary for the commission of the offence. Quite clearly, all these cases are not, properly speaking, cases of preparation and they might, therefore, have been left out of Art. 26.

Article 27. Attempt

(1) ***Whoever intentionally begins to commit an offence and does not pursue or is unable to pursue his criminal activity to its end, or who pursues his criminal activity to its end without achieving the result necessary for the completion of the offence shall be guilty of an attempt.***

The offence is deemed to be begun when the actperformed clearly aims, by way of direct consequence, at its commission.

(2) ***An attempted offence is always punishable save as is otherwise provided by law.***

A mere attempt to instigate or participate in an offence does not come within the provisions of the law unless it is expressly provided to the contrary.

(3) ***In the case of an attempted offence the offender is liable to the punishment attaching to the offence he intended to commit:***

Provided that if circumstances so justify the court may reduce the punishment within the limits provided by law (Art. 184).

Attempts obviously imply more than oreparation, since, in the terms of the ***Expos4 des Motifs,*** preparatory acts 'Vie ***constituent pas la phase d'exicution du dilit"*** white attempts do. The difference between the two, however, is not always apparent since there is in both cases a movement towards the commission of an offence. Although, as has been said in connection with Art. 26, the movement is more direct in the former than in the latter case, it is often a matter of individual opinion whether a movement is direct or not, or how direct ft is. Thus, on analyzing ***ex post*** a given sequence of events, one may have no doubt that a person who within five minutes of buying a gun fired it at another made a direct movement towards the commission of, and was actually executing, the offence wnen he purchased the weapon. On the other hand, if the purchase is considered in isolation, as it would have to be if the shot had not been fired, one may have no doubt either that buying a gun does not by itself disclose ***"le dessein criminel et la volonti de /* accomplir"*** for it is unpredictable to which use the gun might be put.

The decision as to whether there is preparation or an attempt should therefore, as far as possible, be made on the basis of, morefprecise.criteria than the directness of the doer's movements, and it seems that these criteria can be derived from the definition of preparatory acts given in the passage of the ***Exposi des Motifs*** quoted in Art. 26. Reasoning ***a contrario,*** one will find that this definition involves the following principles: there is no nnlno .an offence is in the course of being executed; an offence is not in the course of being executed unless the act done reveals jiot only that the doer has a/criminal intent, but also that he is /determined to carry it out;-the doer may not be deemed to have a criminal intent which he is determined to carry out unless he does something which is neither equivocal nor remote,.

1. The first principle is enshrined in Art. 27 (1), according to which a person attempts to commit an offence only when he intentionally begins to commit it.

The term attempt (***ad-tentare***) as well as the wording of sub-art. (1), first alinea. clearly show that, whatever a person does towards the commission of an offence, he must do it intentionally. ***i.e.*** with knowledge and volition (Art. 58 (1». As is implied in the other principles stated above, an attempt consists in carrying out an unlawful design ;_therefore, it

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necessarily requires purposeful behaviour. Admittedly, it often Occurs that persons, such as drivers, though not desiring to cause harm, embark upon a course of conduct which might bring about unlawful consequences, so that if these consequences followed, the said persons would be punishable for having negligently committed the offence of which these consequences are an ingredient. So long, however, as these consequences are not desired, these persons may not be deemed to have begun the commission of this offence. But they may be punished for a complete offence of endangering ***(e.g.*** under Art. 500) on the ground that they created the possibility for harm to occur.

^ 2. Although it is not disputed that an ^attempt implies a beginning of execution, there is little agreement as to the moment when the execution of an offence should be regarded as having started^/which disagreement reflects a more fundamental difference as to why attempts should be punished. It js certain that danger, and not harm, is the justification for punishment. However, the manner of estimating the beginning of execution and, consequently, the field of attempts, vary considerably depending on whether the danger is said to lie in what the attcmpter does or in whal Jic is, ***i.e.*** whether, in the terms of the passage of the ***Expost des Motifs*** quoted in relation to Art. 23, ***"on prononce un jugement pinal surl' acte"*** (objective conception) "ou ***sur Vhomme qui Va accompli"*** (subjective conception).

(a) Inasmuch as the attempter's activity, were it successful, would bring about an unlaw/yl state of facts, one might consider that this activity does not amount to a beginning of execution/unless* this state of facts is effectively being created. It may accordingly be held that a person does not attempt to commit an offence so long as he does not do anything implied in the legal definition of the state of facts in question. In this conception, the field of attempts is very narrow. As has been said (Donnedieu de Vabres, ***op. cit.,*** p. 60), ***"la-tMse qui enferme dans les limites les plus itroites la notion du commencement d'execution est celle qui exige, pour en reconnoitre l'existence, que Vagent ait accompli urt acte entrant dans la definition legale du dilit"*** (such as violence in case of rape) ***"ou, tout au moins, qui constitue, relativement d ce dernier, une circonstance aggravante"*** (such as trespass, in case of theft).

The main advantage of th»«* solution is that the djstinction between preparation and attempt is clear; there is, therefore, no risk that a person may be punished for preparatory acts. But its disadvantages are obvious, since there is hardly any room for attempts in the case of offences which do not imply a combination of acts or are not aggravated by reason of legally defined circumstances preceding the doing of the act. As has been pointed out in relation to French law, ***"cette conception objective laissefait impunis des dilinquants surpris trop tdt, alors que leur intention criminelle aurait iti cependant it an lie. En effet, d la difference de ce que la loi dicide pour le vol (Art. 384 C. pen.), Vescalade ou Veffraction n'est pas ligaie- ment circonstance qggravante du meurtre"*** (Vouin, ***op. cit.,*** p. 157).

In this conception, it is assumed (and the assumption would probably be wrong in relation to any penal code in the world) that the law-givers, when defining offenccs and aggravating circumstances, in each and every case thought in terms of attempted as well as complete offences and intended that, whenever anything would be doneinotl being; an ingredient or aggravating riccumstance of a given offence, the unlawful state of facts should not be deemed to be in the'course of being effectively created.

(b) Another definition of the beginning of execution, also based on the principle that the attempter's liability to punishment has its source in the danger involved in the act, is the one according to which a person attempts to commit an offence when he places legally protected interests in jeopardy. For the purpose, however, <frf distinguishing attempts from preparation, not any act may be deemed to be dangerous, but only an act which places these interests in concrete and, therefore, immediate jeopardy. Though wider than the previous one, this conception is also loo restrictive. As anjmmediate danger is one which is near materializing, the emphasis is ory material proximTty^with the result that the doer must be so close to success that the law will often step in too late. Furthermore, especially in the case of incomplete attempts, it can hardly be said that the person who failed created a concrete danger.

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(c) Rather different is the subjective conception of attempts, according to which the act is inseparable from the intent behind it. ***"Les auteurs favorables au point de vue subject if ne font pas abstraction des actes extirieurs. Mais, au lieu de pnftendre attacher it tel ou tel d'entre eux la qualification cons tan te d'acte priparatoire, ou de commencement d'execution, ils font tUpendre cette qualification de la volonti crimlnelle que cet acte manifeste, dans le cas concret sounds au juge"*** (Donnedieu de Vabres, ***op. cit.,*** p. 60).

The problem of beginning of execution cannot be reduced to a single test, especially not that of dangerous acts. For an act amounting to an attempt under the objective conception is not, if considered retrospectively, dangerous at all by objective standards, since the doer failed. If the latter is punished despite his failure, it is not, therefore, because he did something dangerous, but by reason of his "***volomi crimlnelle",*** of his. desire to c^xuse harm. This, however, is not to say that anyone who desires to cause harm shoula be punished; as the law does not penalize mere thoughts, it is in any event necessary that an act should be done to reveal the existence of this desire. Thus, an attempt requires intend and behaviour, whether positive or negative, and the attempter's liability la punishment is based on objective reasons (creation of abstract, and not concrete, danger) as well as subjective ones (intent to do wrong).

These elements must be present together so that an offence, whatever its nature, may be deemed to have been attempted. However, since an intention to causg harm does not create danger as soon as it manifests itself by an act, the question arises as to when the doer has the required ***"volonti crimine lie".*** In France, for instance, where the law of attempts is of subjective inspiration, one is agreed that "there is a punishable attempt when the acts done show that the doer has an irrevocable criminal intent, when the moral distance between what he did and what he desin*d to do is so small that, had he been left to himself, he would almost certainly have crossed it" (Saleilles, quoted by Donnedieu de Vabres, ***op. cit.,*** p. 60). So too, it is held in Switzerland that an act amounts to a beginning of execution when the intention ± behind it is ***"irrevocable d undegri 4lev€"*** (Waiblinger). The doer should, therefore, be beyond X what might be called thefpoirit of no return: ihc should have taken a decisive step towards the commission of the offence. ***I.e.*** a step such that only circumstances beyond his control, and^ota change of purpog5>would subsequently prevent or have prevented the desired result from being achieved. "The execution of the offence includes the doing of an act which, in the offender's plan, amounts to a decisive step towards the achievement of the result, after the taking of which there is normally no possibility of drawing back" (ATF 71 IV 205, JdT 1946 IV 81), which means that "leaving alone external obstacles that may compel him to abandon, the doer will normally not change his plans" (ATF 74 IV 132, JdT 1948 IV 138).
In yet other words, "{££C_ytioQ docs not begin with the doing of the yt which will complete the offence if all other legal requirements are fulfilled, such as abstraction in cases of theft or deoeit in cases of misrepresentation, but ^yith any] act which, in the doer's estimation (***dans I esprit de I'auteur),*** ^mounts to a decisive step towards the attainment of his goal. (. -.). Admittedly, even at that stage, the doer may still of his own motion abandon the execution of his design (...). But this abandonment is not in the ordinary course of things" (ATF 80 IV 173, JdT 1955 IV 84).

In this conception, mgntal mgre than .material proximity is the relevant factor. A person, begins to corpmit an offence when he does something such as to show that he is determined, to cause harm*. Whether what he does is capable of causing harm at all, or how close he would be to causing harm if everything went according to his plan, is immaterial; he may be found guilty of an attempt even though many movements remain to be made, by himself or another person (including the intended victim), in order to bring the scheme to fruition, provided that be has irrevocably committed himself to cause harm. He is punished by reason of 11 * danger imulted in his. determination, which is deemed to exist when he has overcomt ***"la crlse de I acte imminent*** that he will sooner or later experience when progressing on the path of cr*rn<- fEte point of no return test] however, is not entirely subjective since only an overt act (objective condition) permits saying whether this point has been reached or not. On the

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other hand, if one were to require in addition that this act should tend directly or immediately towards the commission of an offence or should speak for itself,***(dolus ex re),*** one would undermine the very foundations of the subjective conception. For the court is expected to rely "on the character of the accused and on the circumstances of the particular case with a view to deciding whether, to the doer's mind, the stage of non-punishable preparatory acts was already over" (ATF 87 IV 155, JdT 1962 IV 9). When the answer is in the affirmative and the court is satisfied that, in the circumstances, the accused (and not merely an ordinary man) was determined to cause harm and would have persisted, it is of little importance how proximate the act in issue was or whether it could at all be recognized as having any tendency towards the causing of harm. "If the subjective test is decisive for the purpose of distinguishing a preparatory act from an act of execution, it is immaterial whether the doer's design was clear to the victim or to witnesses" (ATF 83 IV 142, JdT 1957 IV 99).

(d) By way of conclusion, the following remarks may be made with regard to thesubjective conception of attempts.

(i) Whether a person did or did not begin to commit an offence is a question to be answered from case to case, on an individual basis, since the point of no-return may vary considerably according to the character and antecedents of the accused. As Donnedieu de Vabres points out, ***"la qualification de tentative punissable sera plus facilement admise A la charge d'un cUlinquant d'habitude que d'un dtlinquant primaire",*** for an habitual offender may overcome "the crisis of the imminent act" and reach the point of no return earlier than a person who has no previous convictions.

(ii) One of the key-words in all the above-quoted judgrpents is "normally*! As has just been said, this word should be taken to mean that the court must be satisfied that, in the circumstances of the particular case, the accused, and not a hypothetical person, would in all likelihood have persisted or was determined to cause harm. If reference should be made Only to the behaviour of an ordinary man, the essence of the subjective conception would be affected since the coUYt, having decided what can normally be inferred from certain acts, might systematically conclude that the accused had or had not an irrevocable intent depending on whether he did these acts or not. The reasons behind the whole theory would seem to prohibit the courts from laying down general rules by which the conduct of the accused should be judged. The danger involved in adopting as a standard the conduct of a notional person instead of having regard to what could normally be expected of the accused in the circumstances can best be illustrated by the following judgment of the Swiss Federal Court. After recalling that it held in ATF 74 IV 132 (JdT 1948 IV 138) that, "however determined to procure her abortion a woman may be. one cannot say that it is normally impossible for her to abandon when, with this determination, she goes for the tirst time to see a doctor" and that "the decisive step is taken only when she entrusts hersell to the doctor", the Court goes on to say: "This opinion cannot be maintained without reservations. For when a woman who has decided to procure her abortion goes to see a doctor with this purpose in mind, she will normally not abandon; only material difficulties or obstacles will make her change her mind (...). When a pregnant woman goes to a doctor with a view to terminating her pregnancy, it must be admitted, save in special circumstances, that she does at that time the act which she considers to be the last and decisive act conducive to the completion of her design" (ATF 87 IV 155, JdT 1962 IV 9). Yet, depending on the character of the woman involved, it seems that her going to a doctor for the first time may or may not be the decisive step.

(iii) In connection with the same problem, one may wonder whether the point of no return is necessarily reached when the doer does something which amounts to a beginning of execution by objective standards. This question was answered in the affirmative in Switzerland, where it was held that "since there is an attempt according to the objective conception, there is no need to examine whether the subjective conception, followed by this Court, would lead to the same conclusion. (. . .). A person who does an act which under the law is an

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ingredient of the offence is already, from a subjective standpoint, outside the realm of jwp&ration and has taken the step which he considers to be the decisive one towards the accomplishment of his design. (...). As a general rule. oj^ly external obstacles will prevent ***f*** the result from being achieved when the doer went so far as to do something which is an element of the offence" (ATF 80 IV 173, JdT 1955 IV 84). This judgment is not in accordance with strict subjective doctrine, nor is the above-quoted ATF 87 IV 155, since it is in both cases presumed, though not conclusively (note the expressions "save in special circumstances" and "as a general rule") that the accused began to commit an offence because a person who does what he did normally has an irrevocable intent.

(iv) The point of no return may be reached even though the doer has only a conditional intent, if he is irrevocably determined to act upon the fulfilment of the condition. Thus, a person caught when about to break in someone's house may be found guilty of attempted theft regardless of the fact that he had decided not to break in unless the occupant were not at home, which he had no time to ascertain before being caught.

(v) When the court is satisfied that the doer was irrevocably determined to commit an offence, it is immaterial whether some doubt remains as to the kind of harm which he sought to cause (threatening, wounding or killing, for instance). If the doubt cannot be resolved, the rule ***in dubio pro reo*** will apply and the accused must be deemed to have attempted the commission of the less serious of the possible offences. >

3. The above explanations conccming the problem of attempts as settled in France and Switzerland may help one to understand the provisions of Art. 27, for there is ample evidence ***r*** of the fact that the law, of attempts in Ethiopia is of subjectiv e inspiration, The passage of the ***Expoxi des Motifs*** quoted under Art. 23 expressly states that the subjective conception influences-the jwholc Code. In the same ***Exposi,*** it is said in relation to Art. 27: "As the Code is based upon a subjective conception of guilt and liability to punishmont corresponding to Ethiopian tradition, it has naturally adopted this conception in the field of attempts as in all other fields." Further evidence will be found in Art. 27 (3), since according to the. subjective conception.the.punishment **for** an attempted offence should be the same as for a complete jjffence. as well as in Art. 29. since "only a law which follows the subjective conception with regard to attempts will punish impossible offences" (ATF 71 IV 205, JdT 1946 IV 81).

It was said hereinbefore that the definition of preparatory acts as given in the ***Exposi des Motifs*** entails, with respect to attempts, the following consequence, namely that there is a beginning of execution when an act is done which denotes ***"le dessein criminel et la volonti de l'accomplir***" and tends towards the commission of an offence in a more "immediate and direct fashion" than a preparatory act. Accordingly, the second alinea of Art. 27 (I) prescribes that an offence is attempted when a person does or omits to do something which aims clearly and by way of direct consequence at the commission of an offence. What are the implications of this rule?

As a preliminary, one must naturally setde the general question whether, although the law of attempts in Ethiopia is subjective, the conditions laid down in Art. 27 (1) are intended merely to reproduce the tests applied in France and Switzerland and, if so. whether they ought necessarily to be analyzed in the light of French or Swiss literature and judgments. In the ***Exposi des Motifs,*** the answers are as follows. On the one hand, it is said that, under Art. 27. "the offence is deemed to be begun when the act done tends in an unequivocal manner and by way of direct consequence towards the commission of this offence. For the doer then shows that he is determined to run the risks of the venture and proposes, so to say, to blow off the bridges behind him." Like many other Codes, the Ethiopian Code adopts "the criterion of the unequivocal nature of the act. manifesting the doer's firm, irrevocable intent to achieve by way of direct consequence the result he seeks to achieve." On the other hand. It is said that the Code incorporates the subjective conception of attempts "in a reasonable and flexible way so as to arrive. In that which concerns liability to punishment as well as

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. penalties, at 'fair* solutions rather than at 'orthodox' solutions conforming to dogmas with ^which it need not concern itself."

jP ' By prescribing that anjoffence is not begun unless an act is done which clearly and directly aims at the commission of an offence. Art. 27 (1) lays down two conditions the respective implications of which may seem to be insufficiently precise. Since an attempt requires intent and behaviour, one may wonder which of either condition applies to which of either ingredient of an attempt, or even whether one of either condition would not enable the court to draw the line between preparation and attempt; for it may seem that an act tending directly towards the commission of an offence necessarily does so clearly, or that an act clearly aiming at causing harm always docs so directly. However, bearing in mind that preparatory acts are not punishable because they do not disclose both ***"le dessein criminal"*** and ***"la resolution de l'accomplir",*** there can, it seems, be no doubt that the purpose of the two requirements contained in Art. 27 (1), second alinea, is to indicate that there is no attempt unless the act under consideration discloses both the said design and determination. If this is what Art. 27 (1) really means, there is no need to argue as to which of a direct or clear act is the one which reveals the design or the irrevocable intent to carry it out. One question, however, is controversial, namely whether or not the "directness" condition implies that a person who has an irrevocable intent to commit an offence should in addition be near to causing harm. ***j*** Although the phrase ***"par voie de consequence immediate"*** appearing in the ***Expose des Motifs*** y. would tend to suggest that an attempt also requires/material proximity, it seems irrelevant, having regard to the law of attempts as a whole, how close the doer may have been to causing harm. If objective proximity were a condition for the existence of an attempt, it should logically follow that the execution of an offence is begun only v. hen an act is done which creates a concrete danger. This would be inconsistent with the provisions of Art. 29, according to which the doer is punishable because he did something such as to show that he was irrevocably determined to cause harm, even though the desired harm could not possibly have been caused in the circumstances. It seems, therefore, that' proximity, should not be y taken as a ***sine qua non*** condition of liability, but merely as an element amongst others, though a most useful one, on which one must rely for the purpose of deciding whether the doer had an irrevocable intent.

When does an act reveal that a person has a criminal intent which he is determined to Qa»y-out ? ***"Il appartient au juge de l'appricier, au vu de /'ensemble des elementspsychologlques et de fait, ainsi que des conditions particulieres dans lesquelles s'est manifestie et accomplie partiellement la volonti dilictuelle de Vagent" (Expose des Motifs***).

(a) In many cases, both questions can be answered at once because the doer has done so much towards the commission of an offence that it is virtually certain that the first condition (<***dessein***) is fulfilled and the existence of the second condition (***resolution)*** can be inferred from the existence of the first one. If the chain of causation between an act and its probable consequences is so obvious and so short as to raise a presumption that the doer has an unlawful purpose in mind, it raises at the same time the presumption that he has decided to achieve this purpose. Whether the said consequences are those which would follow in the ordinary course of things or according to the doer's estimation and whether or not the said purpose can be achieved at all, is irrelevant. In cases of incomplete attempts, where the activity is interrupted before harm is done, the shorter the chain of causation is, the stronger* is the presumption that the doer would have persisted because he was already beyond the point of no return when the interruption occurred. Thus, if ***A*** is caught with a finger on the triger of a gun which he aims at ***B,*** it is virtually certain, not only that he intends to cause ***B*** some harm, bul-^dso th.it he has nvrrminc ***"la crise de l'acte imminent"*** and would have, if not stopped in time, fired a shot at ***B.*** On the face of it, his act is clear and direct and it would be so even though, unknown to him, the gun were not loaded. In other words, the more, "imminent" or "proximate" the act is, the clearer it is that the doer has **a** criminal intent and the more likely it is that the point of no return is behind him. The presumption, however.

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is not conclusive and there is no attempt if the court is satisfied that ***A*** had not seen ***B*** or bed mistaken him for a gazelle or was about to shoot an elephant next to which ***B*** was standing after rejecting the possibility of hitting ***B*** instead of the animal. The same applies in cases of complete attempts, where the activity Js_puxaued J£i its end but the desired result is not achieved. Thus, if ***A*** mails a parcel containing a bottle of poisoned "tej" addressed to ***B*** but the bottle is broken when ***B*** receives it, the very fact that ***B*** would probably have died if the bottle had not been broken inevitably leads to the conclusion that ***A*** was irrevocably determined to cause ***B's*** death and took a decisive step towards the commission of the offence of homicide when mailing the parcel. There would, however, be no attempt if the court were satisfied that the drink was poisoned without A's knowledge or was sent to ***B*** for purposes of analysis.

(b) In some cases, however, it is doubtful whether the doer has a criminal intent at all or whether he is irrevocably determined to cause harm. This is so when the step taken is not decisive on the face of it or -the act may clearly and directly aim at bringing about several results which are not necessarily all unlawful. Vet, as Art. 27 (1) does not require that there should be ***dolus ex re,*** it does not follow that an act which docs not speak for itself never amounts to a beginning of execution. For, were it to be held that there is no attempt unless ***"les iliments de fait"*** show that the doer has an irrevocable intent, this would imply tnat ***"la crise de I'acte imminent"*** cannot break out until the achievement of an unlawful result is objectively near. As mentioned above, material proximity, which is one of the ways whereby to establish whether the doer was determined to cause harm, would thus be turned into an ingredient of attempts and one would consequently disagree with the view that a person who has progressed a long way on the path of crime may not yet have decided to persist while anothta- person may already be determined to act even though he has progressed a shorter way. The question whether they both have an irrevocable intent would not arise unless they both did the same things.

It seems that such a construction would not be consistent with the spirit of Art. 27. As is apparent from the above-quoted ***Exposi des Motifs,*** the latter provision is intended to mean that the doer should have an irrevocable intent. If it is agreed that the said intent exists when the doer ***"accompli! la demarche qui repriscnte, dans son esprit, le pas diclsif vers la riallsation de son objectif"*** or when ***"la crise de I'acte imminent"*** is over, then the crisis breaks out and the point of no return is reached, not necessarily when the result is imminent, but when the doer takes the step which, in his plan, is the decisive one; and the ***Exposi des Motifs*** would suggest that, when this step cannot be objectively recognized as being decisive and it cannot be inferred from the act itself whether the doer had an irrevocable intent, the inference may be drawn from other circumstances, namely ***"les ilimentspsychologiques"*** and ***"les conditions particuliires"*** of the case.

To come back to the above illustration, might ***A*** be deemed to have had an irrevocable intent to commit homicide if he had been caught when pouring poison into the bottle or on his way to the post-office or if the parcel had been stolen from him at the post-office? If the act were considered in isolation, the answer should be in the negative. On the other hand, if there were evidence to show that ***A*** had ensured that his finger-prints were not on the bottle or that he would not be recognized at the post-office, or that he is a violent and obstinate man who does not care much about the consequences of his acts, the answer might well be in the affirmative on the ground that, having regard to the scheme as a whole and to his personality, ***he*** would in all likelihood have persisted, although the achievement of the result was not yet imminent and a different person might still have abandoned. One may, however, ask whether such a conclusion could be based solely on ***"les iliments psychologiques"*** or whether there should in any case exist special factual elements ***(e.g.*** precautions regarding finger-prints). The decision should, it seems, be left in the discretion of the court, though it is by no means an easy one to make. ***"II faut bien reconnoitre que la lot, en met taut I'accent sur I'aspect subjectif de I'infraction, impose au juge une tdche singuliirement dillcate et difficile. Oii chercher des preuves de la conscience et de la volonti crimlnelles si ce n'est dans les diclara-***

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As will be seen later (see para. (1) in comments under Art. 29), abortive offences are not to be identified with impossible offences.

(c) An act may not be deemed to amount to an attempt unless it constitutes a beginning of execution of an offence. In other words, there is no attempt when the doer would not be guilty of an offence if he had succeeded. Thus, no person is punishable for having taken partin a brawl unless "injury to the person or health, or the death, of one of those present ensues" (Art. 549 (1)). Accordingly, a person may not be deemed to have attempted the commission of an offence contrary to Art. 549 if he endeavoured to take part in a brawl from which no injury ensued.

5. The above explanations, which apply when the attempter acts in a principal capacity (within the meaning of Arts. 32 and 33), also apply when he acts in a subsidiary or secondary capacity, ***i.e.*** as an instigator (Art. 35) or accomplice (Art. 36^

t ^ ***(a)*** A person may begin, not necessarily to commit an offence, but to incite another person to commit it or to assist such person in its commission. Since secondary participation implies an association with an offence which remains to be or is being committed by the principal offender, an attempt to act as a secondary participant consists of doing something which clearly aims, by way of direct consequence, at creating the required association. However, it is by no means easier in these cases than in those discussed hercabove to specify how much ought to be done so that there is a beginning of execution. Thus, if ***A*** sends ***B*** a letter wherein he promises him 5000 dollars for killing ***C*** or gives him information concerning C's whereabouts, whom he knows ***B*** intends to kill, does the mere writing of the letter amount to a beginning of execution or should the letter be sent, or even received by ***B,*** before ***A*** can be deemed to have attempted to incite or assist ***B7*** The answer, which may vary from case to case, must be given in the light of the general principles discussed in connection with sub-art. (I). As a rule, an attempt to incite, for instance, would require more than the writing of a letter stating the inducement and such writing would normally be taken as a preparation for an incitement because it does not indicate that the writer is irrevocably determined to incite anyone. Yet, it may rightfully be held in some cases that the point of no return is reached even before the letter is sent. This may be so ***e.g.*** when ***A*** pays the money into ***B's*** account prior to mailing the offer so as to make it more difficult for ***B*** to turn it down, or when ***A's*** wallet, which contains the letter, is stolen while he queues at the post-office to buy a stamp. At any rate, whether ***B*** receives the letter or not or accepts or rejects the offer, is immaterial for the purpose of deciding whether there has been a beginning of execution.

(b) An attempt to participate in an offence in a secondary capacity may be incomplete or complete and, when it is punishable (see para. 6 (***b) infra),*** the following rules apply.

(i) There is an incomplete attempt when the instigator or accomplice does not perform all the acts whichconstituteincitement or assistance. If he is unable to perform them ***(e.g. A'**** wallet containing the letter is stolen, or ***A*** gives ***B*** oral information concerning Cs whereabouts but a third party steps in the room and the conversation is interrupted before ***A*** has given ail the necessary information), he will be punished under Art. 27 (3). On the other hand, if he chooses not to perform these acts and "renounces" ***(e.g. A*** does not send the letter or of Ijis own motion interrupts his conversation with ***B),*** the sentence will be assessed in accordance with Art. 28 (1) and (3).

(ii) There is a complete attempt when the instigator or accomplice perform* all the acts which constitute incitement or assistance but fails to associate himself with the offence to he or being committed. If he fails for reasons beyond his control ***(e.g.*** the letter sent by ***A*** goes astray, or ***B*** turns his offer down), he will be punished under Art. 27 (3). On the other hand, if he decides to prevent the intended association from coming into being or breaks it after it has been created ***(e.g. A,*** after sending the letter, sends a second letter withdrawing his offer or. after supplying ***B*** with false keys, is able to recover them before any use is made of them), the sentence will be assessed under Art. 28 (2) and (3) as in ordinary cases of "active repentance.*'

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6. The liability to punishment of an attempter in no way depends on the form of attempt he commits nor, as a general rule, on the kind of result he intends to achieve, and the only factor which affects his liability to punishment is the capacity in which he acts.

(a) A person who begins to commit an offence in a principal capacity (Arts. 32 and 33) is always punishable. No regard is had to whether his conduct amounts to an incomplete or a compl«e~anempt, and the reasons for his failure influence only the punishment to be inflicted. No regard is had either, in principle, to the nature or seriousness of the attempted offence, fir- ? this again affects only the kind or term of sentence to be passed. Unlike some laws which keep to the tripartite classification of offences and declare that an attempt to commit a ***"crime"*** is always punishable, but that an attempt to commit a "</<*///" is punishable only when the law expressly says so ***(e.g.*** Arts. 2 and 3 French Penal Code), Art. 27 (2), first alinea, states that "an attempted offence is always punishable" unless the law expressly provides to the contrary. Thus, as is natural in a Code of subjective inspiration which considers that a person proves himself to be dangerous when he begins to commit an off§nce, and not only when he begins to commit a crime, any attempt (other than an attempt to commit a petty offence; Art. 696 (I)), is, as a rule, punishable. However, the restriction implied in the phrase "save as is GTtltrwise provided" suggests that there are cases where an attempter is not liable to punishment. For instance, if a witness who has made a false statement corrects it "before it has taken effect", he prevents the intended result from being achieved after having taken a decisive step towards the commission of the offence of perjury. For "***le timoignage n'est complet qu'une Jbis I'interrogatoire termini. Cest*** (. . .) ***d'apres le risultat final (des) declarations qu'il faut appricier s'ily a faux timoignage"*** (ATF 85 IV 30, JdT 1959 IV 80). In such a case, the sentence is assessed in accordance with Art. 448,.which allows the court to exempt the offender from punishment. Strictly speaking, however, this is not a case where the attempter is not punishable, but a case where the court, in assessing the sentence when there has been active repentance, may go further than it would be empowered to go under Art. 28 (2). .

(b) A person who begins to commit an offence in a secondary capacity (Arts. 35 and 36) is never punishable unless otherwise expressly provided for"Ey law.

(i) As a rule, an instigator or accomplice is not liable to punishment unless the **principal** offender at least attempts to commit the offence with which the secondary participant associates himself (Art. 35 (1), second alinea, and Art. 36 (1)). In other words, a person who, for instance, fails in persuading another person to commifan offence may not be punished since such latter person himself is not punishable. It is clear that, on this point, a purely objective solution has been adopted, which takes into consideration the fact that no harm has finally been caused. But it may be argued that the secondary participant is manifestly dangerous even though the offence is not committed, since he did all he could so that it be committed; leaving alone the cases of renunciation and active repentance, he is not responsible for the fact that no harm has been caused; from a subjective point of view (which the Code does not take here), there is no reason why be should not be punished regardless of the fact that his efforts have failed.

(ii) The above explanations are without prejudice to the cases where the Code expressly lays down that jm attempt to incite or to assist another in the commission of an offence is punishable. For rea: ons quite similar to those given in connection with Art. 26 ***(b),*** the law provides in two instances (Arts. 268 and 314) that a mere attempt to participate in an offence in a secondary capacity is punishable as though this offence had been at least attempted. Not to be identified with these special cases are those cases where instigation or assistance in itself constitutes an independent offence ***(e.g.*** Arts. 361, 418, 530), tor then any attempt to incite or to assist naturally amounts to a beginning of execution of this independ- er* offence and the attempter is punishable for having done, in a principal capacity, some- ining which aimed by way of direct consequence at the commission of the offence (see, however, Art. 525, according to which the instigator of, or accomplice in, a suicide is not punishable unless the suicide is at least attempted).

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7. It remains to be seen how attempts other than those coming under Art. 28 or 29 are to be punished, for there is little agreement on this. If regard should be had mainly to the danger represented by the attempt, the attempter should be liable to a mitigated punishment, since an attempted offence is less dangerous than a complete offence owing to the absence of the intended result. The supporters of this objective conception thus claim that it is wrong to provide ***(e.g.*** French Penal Code, Art. 2, Swiss Penal Code, Arts. 21 and 22) that thei attempter is to be punished as though he had completed the offence. If, on the other hand.) regard should be had mainly to the danger represented by the attempter, the latter should be punished as though the desired result had been achieved, since there is no reason why he should be credited for a failure which is not attributable to himself. According to the advocates of this subjective conception, it is wrong, therefore, to provide, as many Codes do or have done it ***(e.g.*** Ethiopian Code of 1930, Art. 151), that the attempter is always liable to a punishment reduced by one quarter or one third, or whatever other proportion may be laid down, on the ground that he committed a fraction of the offence and should, therefore, be punished with a fraction of the penalty prescribed for this offence.

As is done in other modem Codes, Art. 27 (3) combines both views and lays down a flexible rule, which is that the attempter is in principle liable to the full punishment prescribed with regard to the offence he began to commit (except the death penalty which, under Art. 116 (1). applies only to complete offences), but that the court may, having regard to all the circumstances of the case, reduce this punishment in the manner provided for by Art. 184 (see, hoWevex^ArL 527 (1), second alinea).

Article 28. Renunciation and active repentance

(1) ***If an offender of his own free will renounces the pursuit of his criminal activity the court shall reduce the punishment within the limits provided by law (Art. 184) or may reduce it without restriction (Art. 185) if circumstances so justify. No punishment shall be imposed if the renunciation was prompted by reasons of honesty or high motives.***

(2) ***If an offender, having completed his criminal activity, of his own free will prevents, or contributes to prevent the consequent result, the court may without restriction reduce the punishment (Art. 185).***

(3) ***This Article shall also apply to an instigator or an accomplice (Art. 35 and 36) who of his own free will renounced the pursuit of his criminal activity or has done everything incumbent upon him to prevent the commission of the offence.***

In connection with incomplete attempts, it was said under Art. 27 that a distinction must be made between the cases where the attempter who has an irrevocable intent to cause harm is prevented by an extraneous event from pursuing his activity, which would come under Art. 27, and those exceptional cases where he chooses not to pursue his activity, which would amount to renunciation within the meaning of Art. 28 (1). With regard to completc attempts, it was also said that a distinction must be made between the cases where the necessary acts have been done but the result is not achieved for reasons beyond the attempter's control, which would come under Art. 27, and those where such acts have been done but the result is not achieved because the attempter prevents it from being achieved, which would amount to active repentance within the meaning of Art. 28 (2).

1. It is generally agreed that there are two main elements in ***renunciation.*** Firstly, an offence is in the course of being committed, i.e. there is a beginning of execution as defined in Art. 27 (1), but the unlawful activity is interrupted after the point of no return has been reached, and at the latest before the last act necessary to bring about the result is done (whether or not it remains to be done by the attempter). Secondly, the attempter himself must hav« decided this interruption, in that, being in a position to opt between continuing or abandoning the execution of the offence, he opted in favour of abandoning it. Yet, there is little

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7. It remains to be seen how attempts other than those coming under Art. 28 or 29 are to be punished, for there is little agreement on this. If regard should be had mainly to the danger represented by the attempt, the attempter should be liable to a mitigated punishment, since an attempted offence is less dangerous than a complete offence owing to the absence of the intended result. The supporters of this objective conception thus claim that it is wrong to provide ***(e.g.*** French Penal Code, Art. 2, Swiss Penal Code, Arts. 21 and 22) that thei attempter is to be punished as though he had completed the offence. If, on the other hand,I regard should be had mainly to the danger represented by the attempter, the latter should be punished as though the desired result had been achieved, since there is no reason why he should be credited for a failure which is not attributable to himself. According to the advocates of this subjective conception, it is wrong, therefore, to provide, as many Codes do or have done it ***{e.g.*** Ethiopian Code of 1930, Art. 151), that the attempter is always liable to a punishment reduced by one quarter or one third, or whatever other proportion may be laid down, on the ground that he committed a fraction of the offence and should, therefore, be punished with a fraction of the penalty prescribed for this offence.

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(3) ***This Article shall also apply to an instigator or an accomplice {Art. 35 and 36) who of his own free will renounced the pursuit of his criminal activity or has done everything incumbent upon him to prevent the commission of the offence.***

In connection with incomplete attempts, it was said under Art. 27 that a distinction must be made between the cases where the attempter who has an irrevocable intent to cause harm is prevented by an extraneous event from pursuing his activity, which would come under Art. 27, and those exceptional cases where he chooses not to pursue his activity, which would amount to renunciation within the meaning of Art. 28 (1). With regard to compl$i£jittempts, it was also said that a distinction must be made between the cases where the necessary acts have been done but the result is not achieved for reasons beyond the attempter's control, which would come under Art. 27, and those where such acts have been done but the result is not achieved because the attempter prevents it from being achieved, which would amount to active repentance within the meaning of Art. 28 (2).

1. It is generally agreed that there are two main elements ***in renunciation.*** Firstly, an offence is in the course of being committed, i.e. there is a beginning of execution as defined in Art. 27 (1), but the unlawful activity is interrupted after the point of no return has been reached, and at the latest before the last act necessary to bring about the result is done (whether or not it remains to be done by the attempter). Secondly, the attempter himself must hava decided this interruption, in that, being in a position to opt between continuing or abandoning the execution of the offence, he opted in favour of abandoning it. Yet, there is little

agreement on this question of option, and the legal literature abounds in controversies regarding the precise conditions on which the attempter should have made his decision so that he may be regarded as having renounced. Similar controversies may arise in Ethiopia, depending on what meaning is given to the expression "of his own free will" which appears in Art. 28 (1).

(***a***) If emphasis is placed upon the word "***free",*** it logically follows that renunciation requires much more than a mere decision on the attempter's part; not only must he have chosen not to persist, but his decision must have been entirely spontaneous. Therefore, if he abandons due to the occurrence of an event in the absence of which he would have persisted, there is an incomplete attempt within the meaning of Art. 27 (1), and Art. 28 (1) is inapplicable. This restrictive conception implies that renunciation must be excluded not only, as is natural, when the attempter had no choice at all ***(e.g.*** if he was caught before he had time to shoot), but also when, although he could have taken an alternative course, he did not take it because he knew that he would in all likelihood be doomed if he persisted; practically, if not theoretically, he had no choice but to give up and his decision, therefore, was not free. In support of this subjective interpretation, it is relevant to quote a judgment given by the Swiss Federal Court (ATF 83 IV 1, JdT 1957 IV 70) with regard to Art. 21 of the Swiss Code, for the latter provision makes it a condition of renunciation that the offender should have acted "of his own motion" (***de son propre mouvement),*** which very same words are used in the unofficial French master-text of Art. 28 (1) of the Ethiopian Code and have been translated as "of his own free will" in the official Amharic and English texts. In a case where the accused, after making a fraudulent claim for compensation to which, however, she had not attached all the documents necessary to obtain payment, withdrew her claim on hearing that the insurance company was suspicious and prepared to inquire into it, the said court ruled that ***•*/auteur se disiste de son propre mouvement quand sa decision de ne pas exicuter l'acte repose sur la libre volonte de ne pas atteindre le but alors qu'il le pourrait. En revanche, il ne se disiste pas spontaniment dans le cas ou sa.decision est diterminie par des circonstances extirieures, independantes de sa volonte et qui, en fait ou pritendument, s'opposent d l'execution.*** (. . .). ***La recourante ne s'est pros d&sistie de son propre mouvement car elle avait des raisons de penser que la Suva*** (the insurance company) ***se defierait de ses declarations. Or, cela s'opposait d ce qu'elle poursuive jusqu'au bout son activity coupable. En effet, la Suva se defiant, la decouverte de la supercherie etait si probable que la recourante Vescomptait serieusement et se disait que, mime si elle le voulait, elle n'atteindrait plus le but qu'elle s'etait propose."***

(,b) If emphasis is placed upon the word ***"own,"*** it logically follows that it is sufficient for the purposes of Art. 28 (1) that the decision should be made by the offender himself; whether his decision is free of any kind of pressure or constraint, or whether the circumstances are such as to compel him to make this decision, is immaterial so far as concerns the distinction between an incomplete attempt and renunciation. This construction implies that renunciation must be excluded, as it also is with the previous interpretation, when persistence is physically impossible ***(e.g.*** the attempter is caught before the last act is done, or his false keys do not fit the lock, or his crowbar breaks), but that it must be admitted, as it is not with the previous interpretation, when the execution of the design could theoretically be continued then and there, however hypothetical its success might then be, but in such unexpected conditions that drawing back is, in fact, the only possible solution.

(c) Which interpretation is "in accordance with the meaning intended by the legislature" (Art.^), and whether the expressions "of his own motion" and "of his own free will" should be taken to be synonymous, remain to be decided by the Ethiopian courts.

This question, to be sure, may appear to be of academic more than of practical interest as spontaneousness is without influence on the attempter"s liability to punishment; whether he is prevented from continuing or decides, willingly or unwillingly, not to continue, he is equally guilty of an attempt. There is, however, one difference between these two cases for the punishment may be reduced in accordance with Arts. 27 (3) and 184 when the doer is unable

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to continue, while it must be reduced under Arts. 28 (1) and 184 when he decides not to continue; the sentence may. therefore, vary considerably depending on how Art. 28 (1) is interpreted. On the one hand, it may be argued that renunciation should be admitted whenever the attempter decides, even though reluctantly, to abandon the execution of the offence since a restrictive construction would as often as not result, not only in making a confusion between intent and motives, ***i.e.*** the decision and the driving force behind it, but also in rendering almost purposeless the distinction between the cases where, in the terms of Art. 27
(1) , the attempter does not pursue his criminal activity and those where he is unable to pursue it; should he abandon because he is driven into a corner, he should be deemed unable to continue and there would be little room for renunication as few are the cases where abandonment is entirely spontaneous. On the other hand, with an extensive construction, mitigation is compulsory even when the attempter has no choice other than abandonment and is, subjectively speaking, as dangerous as if he were prevented from continuing; this, of course, is inconsistent with the purpose of Art. 28 (I), which is chiefly to encourage renunciation and reward honesty. It is apparent, however, that only this extensive construction explains why three different steps (mitigation under Art. 184 or 185 or exemption from punishment) may be taken under this sub-article. If Art. 28(1) applied only when renunciation is spontaneous, then the sole question that would arise, obviously, is whether the attempter who freely decided not to continue was prompted by high motives (in which case no punishment should be ordered) or not (in which case the punishment should be reduced) and one would fail to understand why two forms of mitigation should be provided for. The only possible explanation for the reference to Arts. 184 and 185 is that the court must, before questioning the doer's motives, investigate whether he abandoned spontaneously or not. It is submitted, therefore, that the true meaning of Art. 28 (I) is the following. There is renunciation whether the attempter abandons of his own motion or of his own free will; when he abandons of his own motion but not entirely spontaneously, the court must reduce the punishment under Art. 184; when he abandons spontaneously but not out of honesty, pity or other high motives, the court may reduce the punishment under Art. 185; when he abandons spontaneously and out of high motives, he must be exempted from punishment. The fact remains, however, that this solution is not in conformity with subjective doctrine; when renunciation is not entirely spontaneous, mitigation under Art. 184 should be optional, as it ts in ordinary cases of incomplete attempts.

2. Like renunciation, ***active repentance*** comprises two elements. Firstly, all the acts necessary for bringing about the intended result must have been performed, but this result does not ensue. Secondly, the attempter himself must have prevented the result from being attained. Thus, although active repentance differs from renunciation on the ground that the “last act” has been performed in the former, but not in the latter case, these two special forms of attempt have one feature in common, namely an act of will, a decision whereby the failure of the design is ultimately attributable to the offender himself. For the criterion which distinguishes renunciation from an incomplete attempt a Iso distinguishes active repentance from a complete attempt; the expression “of his own free will” which appears in sub-art. (1) also appears in sub-art. (2) of Art. 28 and active repentance raises, therefore, the same problem of interpretation as renunciation (see M. A. Schaffner, ***Le repentir actif,*** in JdT 1963 IV pp. 130 ***et. scq.).***

It is a matter of course that active repentance, inasmuch as it implies that the desired result is not attained, can occur only when the achievement of a given result is an ingredient of the intended offence. Thus, if ***A*** counterfeits currency but destroys it before it is put into circulation, there is no active repentance for the uttering of the currency is not an ingredient of the offence of counterfeiting. It also goes without saying that, when the achievement of a result is an ingredient of the offence, active repentance can take place only for so long as this result has not been attained or as the attempter has not failed for other reasons. Thus, if ***A*** steals ***B's*** cow and for whatever reason brings it back to ***B*** on the following day, there is no active repentance since the offence of theft is completed by the act

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of abstracting. However, some attention must be given to the fact that the destruction of counterfeit currency or the returning of stolen goods, though it does not amount to active repentance within the meaning of Art. 28 (2), may amount to sincere repentance within the meaning of Art. 79 (1) ***(e).*** The difference between both forms of repentance is to be made having regard to the definition of the offence committed. Acts performed, not with a view to preventing the desired harm from being done, but with a view to limiting its extent or repairing it, do not come under Art. 28 (2) and, if they may constitute a ground for mitigating the sentence, it is not because the unlawful activity has missed its objective.

(a) The first condition for applying Art. 28 (2) is that there should be a "repentance". Like renunciation, which implies that the doer decides not to continue, active repentance implies that he decides not to succeed. Whether he should make such decision of his ***own*** motion or of his own ***free*** will (see ATF 69 IV 211, JdT 1944 IV 48) is a question which need not be dwelt on any longer, since it calls for the same comments as those made above with respect to renunciation. (See, however, ATF 80 IV 212, JdT 1954 IV 122, where in a case of correction of false statement by a witness it was held that "i7 ***est sans importance que le timoin soit amen4 d dire la viriti de son propre chef ou au contraire parce quil risque d'etre confohdu, ou que lejiige I'admoneste, ou pour toute autre raison semblahle***.") Whatever the construction of the pertinent expressions, it should at any rate apply equally in cases of renunciation and active repentance.

(b) The second condition for applying Art. 28 (2) is that the repentance should be "active", in that the attempter's decision to prevent the intended result must express itself in an act such that this result does not occur (***actus contrarius***). It is not required that the doer should albne perform this act or all the necessary acts, if more than one is required. He may as well contribute to the prevention of the result by taking the first step to this end. In any event, a passive attitude, which would suffice in cases of renunciation, would not be sufficient in cases of active repentance. Thus, i***LB*** is given an antidote after drinking a cup of coffee in which ***A*** had put a fatal dose of arsenic, there is active repentance whether the antidote ts given by ***A*** himself or by a doctor whom ***A*** called in. It is a necessary condition, therefore, that the repentance should be successful and that there should be a causal relation between the ***actus contrarius*** and the success. There is no active repentance—but there may be sincere repentance—if the efforts made to prevent the result are made in vain ***(e.g.*** when the antidote is given too late) or the success is attributable to another cause than these efforts ***(e.g.*** when ***A*** rushes out to buy an antidote and, on coming back to give it to ***B,*** finds that the latter has in the meantime been given an antidote by C).

(c) As for the sentence to be passed when there has been active repentance, it differs, for objective and subjective reasons, from that which may be passed in cases of renunciation. Since the last act necessary to bring about the result has been done, the menace created by the attempter as well as the danger involved in his behaviour are greater. Therefore, Art. 28
(2) does not provide for the compulsory mitigation of the penalty, nor does it authorize or oblige the coUrt to exempt the attempter from punishment if he repented out of honesty or for other high motives. On the other hand, the sentence also differs, for subjective reasons, from that which may be passed in cases of abortive offences. Since it is the attempter himself who is responsible for the failure of his design, this may indicate that there is still some good in him. Therefore, Art. 28 (2) does not provide merely for so-called ordinary mitigation under Art. 184, but for free mitigation under Art. 185. This will enable the court, when deciding whether or to what extent the penalty should be reduced, (which may raise difficult questions in cases of concurrence of offences, for it may be uncertain to which of the various desired results the repentance applies), to take into consideration how much choice the attempter had when he decided to act so as to defeat his original purpose as well as the motives behind his decision.

3. Like Art. 27 (2), second alinea, which indicates that a person may be guilty of an incomplete attempt or of an abortive offence whether he acts in a principal or a subsidiary

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capacity. Art. 28 (3) makes it clear that renunciation or active repentance may be attributable to an instigator or accomplice as well as to a principal offender. However, the application of Art. 28 (3) is naturally subject to the provisions of Art. 27 (2) regarding the liability to punish* ment of a secondary participant in cases of attempt. Therefore, whether there is an incomplete attempt or renunciation, or whether there is a complete attempt or active repentance, a secondary participant is not punishable unless the law so prescribes.

(a) Renunciation by a secondary participant raises the same questions as renunciation by the principal offender. The execution of the incitement must be begun, or assistance must be in the course of being given, but the instigator or accomplice decides not to perform the last act necessary to complete the incitement or assistance.

(i) One who begins to incite another to commit an offence but stops doing so before all the acts which constitute incitement are done (regardless of whether these acts would have met with success), cannot properly be said to have incited this other person; he has merely attempted to do so, and he is as a general rule not punishable on this ground. As was mentioned in connection with Art. 27 (2), the instigator's liability is conditional upon the doing of an unlawful act by the principal offender; since the latter can obviously not commit an offence in consequence of an incitement which is not made known to him. the instigator "who of his own f ee will renounced the pursuit of his criminal activity** is not punishable. Thus, if ***A*** writes ***B*** a letter wherein he promises him 5000 dollars for killing ***C,*** but he is able to recover the letter before it reaches ***B,*** his attempt to incite is not punishable according to Arts. 27 (2) and 35 (1). since ***B*** did not attempt to kill C. This, however. is without prejudice to the eases where instigation is an independent offence or a mere attempt to incite is declared by law to be punishable (Arts. ***268*** and 314). Thus, if ***A*** writes ***B*** a letter wherein he incites him to raise a mutiny in his battalion. ***A*** is punishable under Art. 314 although the letter does not reach ***B,*** but the punishment will be assessed in accordance with Art. 27 (1).

(ii) The same rules apply with regard to renunciation by an accomplice. Thus, if ***A*** promises to supply ***B*** with house-breaking instruments but he Anally does not keep his promise, his attempt to assist is not punishable according to Arts.27 (2) and 36 (I). However, this principle Is subject to the same restrictions as above. Thus, if ***A*** promises to supply ***B*** with hand grenades so as to enable ***B*** to attack the House of Parliament but he finally does not keep his promise, ***A*** is liable to punishment by virtue of Art. 268 even though ***B*** does not commit the envisaged offence, but Art. 28 (1) will govern the assessment of the penalty. The same holds good when assistance of itself constitutes an offence.

(b) Active repentance by a secondary participant raises slightly more intricate problems than active repentance by a principal offender, and the very concept of repcntancc is more extensive in the former than in the latter case.

In relation to Art. 27 (2), second alinea, it was said that secondary participation implies an association with an offence which is to be or is being committed. Acts tending to incite or to assist another thus have one immediate purpose, namely to create this association. For instance, an incitement under Art. 35 basically consists of doing something in consequence of which another person decides to commit an offence, which decision represents the proximate result of the instigator's activity. This means that renunciation is possible until the doing of the last act necessary to cause the said person to make such decision; but it does not mean that repentance can occur only after such last act is done but before this decision is made, for Art. 28 (3) prescribes that the result to be prevented is not necessarily the making, but the carrying out, of this decision, ***i.e.*** the commission (which, it seems, includes the completion) of the offence by the incited person (see also AFT 81 IV 285, quoted in para. (2) of comments under Art. 35).

Under sub-art. (3), it is thus the achievement of the ultimate goal, and not the fulfilment of the immediate purpose, which is the test of timely repentance. For example, the instigator's

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ultimate goal is that an offence be committed by another person; consequently, the decision made by such person to commit the offence, though a necessary condition for attaining this goal, is but a link in the execution of a design which is complete when the incited offence is committed. Therefore, active repentance is possible so long as this goal has not been attained. Any other solution, if to be of more than academic interest, would stretch the secondary participant's liability beyond the limits presently provided by for law, since it would imply ***e.g.*** that an instigator is punishable as soon as the immediate result of his activity ensues, whatever he or the incited person may do thereafter.

Another difference between sub-arts. (2) and (3) of Art. 28 lies in the criterion of success. It was said that a principal offender actively repents only when he directly or indirectly prevents the result from being achieved. This requirement docs not appear in subart. (3), under which a secondary participant is merely expected to do "everything incumbent upon him to prevent the commission of the offence"; thps,jm instigator or accomplice is deemcd.ta-ceponmot only when he succeeds in stopping the principal offender from attempting to commit the offcncc, but also when he tries to the best of his ability to stop him and fails in hi«.efforts to prevent the commission of the offence with w'hich he originally associated himself. Two reasons may be suggested to explain this rule. Firstly, unlike the principal offender, the secondary participant docs not always have the power to prevent the commission of the offence. If ***A*** causes ***B*** to decide to kill C, it does not chiefly depend on ***A*** whether this decision will be carried out. It certainly is within ***A's*** power to prevent the immediate result of his acts, namely the success of the instigation; but it is not directly within his power to prevent the attainment of the ultimate goal, namely the execution of the decision, since somebody else, the incited person himself, must play his part so that this goal be attained. Secondly, if it were required that the instigator's or accomplice's repentance be successful, the scope of application of Art. 28 (3) would be rather narrow. Whereas a secondary participant is normally not punishable unless the' principal offender attempts to commit-the offence, if the attempt does not take place in consequence of the instigator or accomplice having actively repented, the latter incurs no liability. In other words, were success necessary under sub-art. (3), this sub-article would apply only in the cases provided for by Arts. 268 and 314 and in such other cases where incitements or acts of assistanc&,constitute independent offences.

Granted that a secondary participant may repent until the achievement of the ultimate result he sought to produce and that his repentance need not be successful, it remains to be seen what exactly he ought to'do so that he may be deemed to have repented. The answer may vary from case to case for, although the instigator or accomplice may invoke the provisions of sub-art. (3) whenever he did his best to prevent the commission of the offencc, his best may not always be good enough.

(i) The instigator's repentance may take several forms, depending on the time at which it occurs. He may firstly, as is often said, "revoke" his incitement, in which case he endeavours to undo what he previously did. Since an incitement consists of causing another person to decide to commit an offence, revocation consists of causing, of one's own motion or free will, this person to decide not to commit this offence. It is not sufficient for the instigator to express the intention to be no longer associated with the potential principal offender and he must make his intention clear through acts that can effectively dissuade the incited person from committing the offence. Active repentance then implies that the instigator, after having led the incited person to make a decision, does his best to negate this decision, which he can do in a majority of cases by withdrawing the incentive originally offered. If ***A,*** who promised ***B*** 5000 dollars for killing C, subsequently informs ***B*** that he withdraws his offer, he will be deemed to have repented even though ***B,*** knowing that the promised reward will not be paid, nonetheless kills ***C.*** Therefore, not only does the mere expression of regrets or remorse not amount to active repentance, for it is not such as to cause the incited person not to act according to the incitement, but the revocation must also be made known to the

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incited person, this being without prejudice to the case where the revocation does not come to the incited person's knowledge for reasons beyond the instigator's control ***(e.g.*** the incitement is revoked by a letter which goes astray and does not reach the incited person before he commits the offence).

Apart from the case of revocation, active repentance may also occur while the incited offence is being committed, or after it has been committed but before it has caused harm. The instigator's efforts are then not directed towards changing the incited person's decision and he does not endeavour to undo what he himself did, but what is being or has been done by the principal offender. Thus, if ***A,*** after inciting ***B*** to kill C, discloses the plan to the police when he knows ***B*** to be looking for C, he may be deemed to have actively repented even though the police interfere too late and are not able to prevent the killing. The same goes when ***A,*** after ***B*** has poisoned C at his instigation, gives Can antidote but ***C*** nevertheless dies.

These, however, arc only guiding principles and the courts may often be in doubt as to whether the commission of the incited offence would not have been prevented, had the instigator done more than he actually did (and this would, of course, imply that he did not do ***everything*** incumbent upon him). Thus, if ***A*** revokes his incitement by a letter which docs not reach ***B*** because the latter has recently changed his post-box number, it may be argued that, since ***A*** did not to the best of his ability satisfy himself that his letter was properly addressed, he did not do enough to benefit by the provisions of sub-art. (3). So too, if ***A,*** in his haste to give C an antidote, gives him fruit salts which he has mistaken for the medicine he intended to give, it may be said that sub-art. (3) is inapplicable because ***A*** should have made sure that the drink he gave ***C*** actually was an antidote. As will readily be noticed, the problem is whether the instigator should take all such steps as are in his estimation capable of preventing the commission or completion of the incited offence, or asare objectively capable of having such an effect. Considering the wording of sub-art. (3), which requires the secondary participant to do all that depends on ***him,*** and not all that may be necessary in the circumstances and, furthermore, bearing in mind the generally subjective inspiration of the Code, it seems that the first interpretation is more in accordance with the spirit of the law. Yet, whichever view is taken, this will not affect the instigator's liability to punishment, but only the decision as to whether or to what extent the punishment should be reduced under Art. 185. Art. 28 (3) does not state that the instigator is not punishable if he did everything incumbent upon him to prevent the commission or completion of the incited offence, for this would imply that he is punishable when he is negligent in trying to break his relationship with the principal offender, which relationship, however, is always an intentional one according to Art. 35; sub-art. (3) merely authorizes the court to mitigate the penalty on the ground of active repentance. Though this may seem insufficiently liberal in view of the fact that the instigator expressed his intention not to be associated any longer with the commission of the incited offence, it cannot be forgotten that this offence would not have been committed, had he not in the first place incited its commission.

(ii) The general rules which apply when an instigator repents also apply to the repentance of an accomplice, and the problems that may arise in this connection need not be discussed at length for they are quite similar to those discussed hereabove. Suffice it to note that the accomplice's repentance may take various forms, depending on whether assistance is given before or during the commission of the offence. Like an instigator, an accomplice may try to undo either what he did himself ***(e.g.*** by taking back the false keys he gave the principal offender) or what is being or has been done by the principal offender ***(e.g.*** by giving an antidote to a person whom the principal offender poisoned with arsenic supplied by the accomplice). •

As regards the accomplice's liability and the effects of his repentance on the penalty, they are the same as in cases of incitement. However, since the part played by the accomplice in the commission of the offence is not necessarily decisive, or not as decisive as that played by the instigator ***(e.g.*** when the offence would probably have been committed in any event because the principal offender could easily have obtained from a different source the

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information given to him by the accomplice), the courts may be more willing to reduce the punishment when an accomplice repents ***(e.g.*** when he tries to dissuade the principal offender from using this information) than when an instigator repents.

Article 29. Offence impossible of completion

When an offender has attempted to commit an offence by means or against an object of such nature that the commission of the offence was absolutely impossible, the court may, without restriction, reduce the punishment (Art. 185).

No punishment shall be imposed when the offender, from superstitition or owing to the simplicity of his mind acted by using means or processes in themselves innocuous which could in no case have a harmful effect.

An impossible offcnce is committed when a person, believing that a.certain state of facts exists (and not a certain legal pr«&criplion, as in the case of imaginary offences coming ua4»r under Art. 77), does, with the Loteotipn of causing a given harm, something which cannot cause harm by reason of the non-existence of that state of facts at the time of his act (as opposed to something which is not unlawful by reason of the non-existence of that legal prescription, in the case of imaginary ofTences). At the turn of the nineteenth century, it was contended that, since an attempt implies a beginning of execution and one cannot begin to execute the impossible, a person who seeks to achieve a result which, unknown to him, cannot be achieved and who embarks, therefore, upon a course of conduct such that one of. the conditions required for the completion of the offence he attempts to commit cannot be fulfilled, is not punishable. According to modern criminal laws, however, it is no longer a condition of liability that the objective sought should be attainable. If regard is had to what a person intends to do, and not only to what could actually be done in the circumstances. the real point in issue is not whether the impossible can be achieved, for it obviously cannot, but whether it can bo attempted in ignorance of the fact that it is impossible — and it obviously can.

1. Ippnioxsihle **ofTences** constitute a special form of attempt. Like ordinary attempts coming under Art. 27, they comprise a positive element (icsBVOcahle-intent to do harm manifested by an act) and a negative one (failure). But, unlike Art. 27 which implies that the doer could have succeeded in causing harm. Art. 29 implies that failure was inevitable or, in other words, that success was impossible; and it was impossible by reason either of the means used in the attempt or of the end to which the attempter put the means he used.

A person may attempt to commit an offence by resorting to means incapable of having any harmful effect. For instance, ***A,*** with the intention of killing ***B,*** discharges at him a gun which he believes to be loaded but which is in fact unloaded; or ***A,*** with a similar intent, mistakenly gives ***B*** sugar instead of arsenic. No result is then achieved because inadequate means are used. On the other hand, a person may attempt to commit an offence by jpsorting ip means cajxaMe of having a harmful effect, though not in the circumstances in which they arc useo. For instance, ***A*** shoots ***B*** who is already dead; or ***A*** performs abortive manoeuvers on a woman who is not pregnant. No result is then achieved because the means used, though adequate, are directed towards accomplishing an unattainable objective.

It is apparent, however, that many cases may occur where the attempter fails but where he might as well succeed. For instance, allhough it is impossible to pick anything from an empty pocket, the fact remains that a theft would be possible if the attempter tried another pocket; although it is impossible to poison someone by giving him an insufficient dose of arsenic, killing by poison would be possible if an adequate dose were given. Cases of this nature show that the problem of impossibility is not as simple as it may seem to be. In particular, doubts may arise as to how impossible offences can effectively be distinguished

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from abortive offences. For, leaving alone cases of renunciation and active repentance, impossibility is implied in every complete attempt considered ***ex post,*** in the sense that the doer would not have failed if the result had been possible in the circumstances. Thus, if ***A*** shoots ***B*** but misses him, his failure may be deemed to be attributable to the fact that it is impossible to kill someone with a gun unless the gun is aimed in the right direction. Yet, the view that liability to punishment is conditional upon the causing of harm being possible can reasonably not apply in this instance. Some test must, therefore, be laid down so that complete attempts do not go unpunished; but, since the element of failure or want of constitutive ingredients is common to all attempts, it can hardly be used in order to characterize impossible offences.

What is characteristic and should be decisive is he reason for the failure. This, however, is more easily said than explained, as is shown t_v the numerous efforts made to reduce the notion of impossibility to a single criterion of general application. If one holds, for instance, that an impossible offence is committed when the doer fails as any other person would fail, one sets out a rule which holds good in certain cases ***(e.g.*** anyone would fail in killing with an empty gun) but should not apply in others ***(e.g.*** attempt to kill with an insufficient dose of poison). If one holds that impossibility arises from an abnormal state of things and that there is an impossible offence when the doer fails due to extraordinary circumstances of which he is not aware, the solution is equally uncertain. For, taking the case of an abortion attempted on a woman who is not with child, one may wonder as to which of her being either pregnant or not pregnant would be an extraordinary circumf ^nce. Furthermore, in a case of attempted poisoning, one might regard as an extraordinary circumstance the fact that, although a sufficient dose was used, the intended victim did not die because he had developed an immunity against the particular poison used. Other tests have been suggested, such as the danger involved in the doer's behaviour. Thus, a person might be deemed to be guilty of a complete attempt when his act, though unsuccessful, created a concrete danger ***(e.g.*** when he shot and missed) and-of an impossible offence in other cases ***(e.g.*** when he shot with an empty gun). A distinction of this kind, which tends to disregard the fact that the ideas of oEjective danger and failure are some what irreconciliable, would also be inconsistent with the subjective inspiration of the law of attempts as embodied in the Ethiopian Code, since the nature or intensity of the danger involved in the act is not an ingredient of attempts. One has also considered using the foreseeability of the failure as a criterion. Accordingly, an impossible offence is committed when it is immediately apparent that the doer will not succeed. Thus, if ***A*** does the first act tending towards the abortion of a woman who is not pregnant, it is forthwith obvious that, whatever he may do subsequently, he cannot terminate a non-existent pregnancy; the same applies if ***A*** gets hold of an unloaded gun with which he proposes to kill ***B.*** On the other hand, if ***A*** starts pouring poison into ***B's*** cup of coffee, that he will fail because the dose is not fatal is only apparent when he stops pouring. However useful it may be in certain cases, this test is not fully satisfactory, particularly when the sequence of events under consideration is very short. Thus, if ***A*** intends to steal a coat hanging in a cloak-room and there is only one coat which happens to be his own which he does not recognize, it is immediately apparent that the commission of a theft is impossible; but if several coats are hanging in the room, it is not obvious that a theft is impossible until he lays his hand on his own coat. In such an instance, one might conclude that there is no impossibility sinbe failure is not inevitable. Yet, inasmuch as a theft implies the abstraction of someone else's property, it is legally impossible to steal one's own coat.

2. Art. 29 does not incorporate any of the above-mentioned tests but draws the same distinction as Art. 23 of the Swiss Penal Code between absolute or legal impossibility, on the one hand, and relative or material impossibility, on the other hand. There exists an absolute impossibility when the means used cannot cause harm whatever the circumstances in which they are used ***(e.g.*** use of sugar in an attempt to poison someone), or a legal impossibility when these means are not among those whereby, under the law, the offence can be com-

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mittod (see. for instance, in Art. 516, the reference to products susceptible of impairing the health); so too, there is an absolute impossibility when the object of the offence does not exist at all ***(e.g.*** embryo, in the case of an attempted abortion; ***contra,*** sec ATF 70 IV 9, JdT 1944 IV 36 and ATF 70 IV 152, JdT 1945 IV 3, subsequently reversed by ATF 74 IV 65, JdT 1948 IV 98 and ATF 76 IV 153, JdT 1950 IV 74), or a legal impossibility when a necessary element of the offence is missing ***(e.g.*** pregnancy, in the same case). On the other hand there is a relative or material impossibility when the means used either can cause harm, if otherwise applied, or come within the legal definition of the offence ***(e.g.*** use of an insufficient quantity of a product capable of impairing the health), or when the object of the offence actually exists, though not where the attempter believes it to be ***(e.g.*** not in the pocket into which he reaches).

As has been noted by all writers who discussed the question of impossibility, the distinction between absolute and relative impossibility is obviously meaningless from a logical point of view, for there are no degrees in impossibility; something which is relatively impossible is still possible. One may find it rather surprising, therejpre^that Art. 29 should refer to offences the commission of which is absolutely impossible, the more so since no reference is made anywhere to offences the commission of which is relatively impossible. In the context of the Ethiopian law of attempts, distinctions of this kind serve no purpose. For, if a person is deemed to be an attempter when he does something such as to show that he is irrevocably determined to cause harm, it should be of no importance whether this harm can follow at all. It may be assumed, however, that the Legislature proposed to dispel any doubt that might arise; since Art. 27 prescribes that there is an attempt when the commission of an ***offence*** is begun, it might, in the absence of Art. 29, have been argued that, when the result cannot be achieved, what is done can obviously not amount to the beginning of execution of an offence. But one may tend to think that this purpose would have been better served by wording Art.
27 differently and omitting Art. 29 altogether. It must, however, be borne in mind that Art. 29, although it retains a distinction for which there is no rational justification and uses terms the meaning of which is still disputed despite the efforts made to clarify it (see in particular the definition of absolute impossibility pertaining to the means used, in ATF 78 IV 145, JdT 1953 IV 105), is not calculated to draw the line between what is punishable and what is not; it does not state that absolutely impossible offences are not liable to punishment, but merely that they are the only impossible offences punishable under Art. 29. The so-called, albeit legally undefined, relatively impossible offences are not punishable under Art. 29, but Art. 27. Although, whatever the test used, it may in some cases be difficult to decide which of either provision should apply, the answer does in no way affect the doer's liability to punishment; whether the result was possible or not may merely affect the sentence. This, incidentally, would be an additional argument militating towards the deletion of Art. 29.

3. Art. 29 mentions "an offender who has attempted to commit an offence" and ofte may wonder as to how general this phrase is. It is not inconceivable that an attempt to incite or assist another person should fail because it could not possibly succeed; thus, someone who is already determined to commit an offence can no longer be induced to commit it; it is impossible to assist a person in the commission of a theft by giving him false information regarding the location of the property to be stolen or information which he already possesses. Since Art. 29, unlike Art. 27 (2), second alinea and Art. 28 (3), makes no special provision with respect to secondary participants, it may be argued that it applies only when principal offenders are involved. Although this question will be fully discussed later (see para. (I) (a) in comments under Art. 35 and para. (3) in comments under Art. 36), there appears to be no reason why the scope of Art. 29 should be thus restricted.

4. As mentioned above, the liability to punishment of a person who commits an impossible offence is founded only upon subjective considerations, namely the fact that he behaves in a manner showing him to be dangerous, although his act is not objectively dangerous. There is little doubt that the menace created by a person who attempts to kill is no less just because

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his gun happens to have been unloaded without his knowledge. In that which concerns his liability to punishment, it is, therefore, irrelevant (as it is in the case of abortive offences) that no harm has been caused, or whether the impossibility pertained to the means used or the object aimed at, or even both. The latter elements may be taken into consideration, but only for the purpose of assessing the punishment.

(a) As a rule, the same sentence may be passed on a person guilty of an impossible offence as that passed if the offence had been possible (with the exception, again, of the death sentence). If the circumstances justify, the punishment may, however, be mitigated in accordance with Art. 185. The reason why Art. 29 does not provide for compulsory mitigation is that this would amount to compromising between the objective doctrine, which demands recognition of the fact that no harm was done, and the subjective one, which disregards the same fact; not only would this compromise undermine the justification for the very existence of Art. 29, but it would also be erroneous in the sense that, under the subjective doctrine, the punishment should be in proportion to the attempter's dangerous disposition and not be automatically reduced. Art. 29, therefore, gives the court wide discretion so as to enable it to take account of all the circumstanccs, material as well as personal, of the case before it.

(b) The court may, however, go beyond free mitigation, since the second alinea of Art. 29 compels it to exempt the accused from punishment if, out of superstition or simplicity of mind (not amounting to total or partial irresponsibility within the meaning of Arts. 48 and 49), he resorted to innocuous means "which could in no case have a harmful effect". In this connection, it must be noted that "one should not hold the doer to be simple-minded merely because he uses inadequate means. For, were it so, exemption from punishment should be ordered in all cases of impossible offenccs. and the law would not deal specifically with the case where the doer acts through lack of intelligence. In the latter case, what is required is a gross inadequacy of the means used, that is, the use of means which to any sensible person would appear to be obviously incapable of bringing about the desired result but which the doer did not recognize to be such by reason of his particular stupidity; in short, the use of means showing that he is more stupid than dangerous" (ATF 70 IV 49, JdT 1944 IV 102).

Although one will not deny that exemption may be entirely justified in certain cases, it would seem that the principle involved in Art. 29, second alinea, no less than its effects, arc questionable. Since the problem of punishment is essentially governed by the dangerous disposition of the doer, it appears somewhat illogical to allow purely objective factors (innocuity of the means used) to affect the decision as to exemption by providing »hat; however harmless the attempter himself, the harmlessness of the means he employed is a ***sine qua non*** condition for exemption. It also appears questionable that exemption should be provided for only when the commission of the offence is impossible owing to the means used. Although it is generally true that a person who believes, for instance, that he can kill his enemy by magic tricks is less dangerous than a person who fires a shot at someone who is already dead, there appears to be no good reason for completely ruling out exemption when the impossibility lies in the object of the offence, so that a man who attempts to steal his own coat may not be let free. Finally, it might have been wiser to provide that exemption is optional (as does Art. 23 of the Swiss Penal Code, for instance).

(c) Whosoever does something in the mistaken belief that a given state of facts exists is punishable as though it had actually existed. In the cases coming under Art. 29, a mistake of fact is committed but, unlike in the cases provided for by Art. 76 where the doer believes that the situation is more favourable to him than it actually is, this mistake operates to his detriment, and not in his favour. For purposes of punishment, the provisions of Art. 29 prevail, therefore, over those of Art. 76. They also prevail over those of Arts. 27 and 28. Although renunciation may occur in cases of impossible offences, the sentence is not to be

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assessed in accordance with Art. 28 (1). As for active repentance, it is theoretically inconceivable since no result can follow and there can be no causal relation between an ***actus contrarius*** and the prevention of a result which will in any event not take place. Yet, an act of the kind may be done in practice, as in the case where ***A,*** after mistakenly giving ***B*** sugar instead of arsenic, gives him an antidote so that the consequences which he thinks will follow do not follow. In such a case, too, the sentence must be assessed in accordance with Art. 29, and not Art. 28 (2).

Article 30. Special case of attempt

When the acts done in an attempt to commit an offence in themselves constitute a separate offence the punishment attaching thereto shall be applied.

This Article does not, strictly speaking, deal with special cases of attempt, but with ordinary and rather obvious cases of concurrence of offences. It merely draws attention to the fact that a person who attempts to commit an offence may be punished not only for his attempt, but also for such other specific offence as the acts done in the attempt may constitute. This rule applies whatever the form of the attempt and whether or not the attempter is liable to punishment or punished at all for the attempt; it also applies irrespective of the capacity in which the attempter acts.

1. A person who attempts to commit an offence within the meaning of Art. 27 may In addition be guilty of an offence other than the one he attempts to commit. Thus, if ***A*** aims at ***B*** with an unlicensed gun but he is caught before he has time to shoot, in addition to an incomplete attempt to commit homicide, there is an offence of unlawful carrying of arms; one of the acts done in the attempt, ***i.e.*** the carrying of a gun without a licence, constitutes a separate offence and the possible mitigation of the penalty provided for by Art. 27 (3) may be ordered only with regard to the attempted homicide. So too, if ***A*** shoots ***B*** with the intention of killing him but only wounds him, in addition to a complete attempt to commit homicide, there is an independent and complete offence of causing bodily harm the penalty for which may not be reduced under Art. 27 (3).

2. In cases of renunciation and active repentance as defined In Art. 28, the accused, though he may be liable to a mitigated punishment or be exempted from punishment as regards the attempted offence, may be punishable for another offence which is constituted by the acts done in the attempt. Thus, if ***A*** enters ***B's*** compound with the intention of poisoning ***B's*** well but, while getting the poison out he hears some noise and runs away, he may be punished by a reduced penalty for the attempted poisoning, but not for the offence of trespass for which he is also guilty. Similarly, if ***A*** poisons ***B*** but thereafter gives him a counter-poison so that ***B*** does not die, ***A*** may be liable to a mitigated punishment for the attempted murder, but not for the injury to ***B's*** health which he may also have caused.

3. The same applies in cases of impossible offences under Art. 29, especially when the attempter uses harmful means with a view to producing a result which cannot be achieved. Thus, if ***A*** kills a woman who is not pregnant in an attempt to abort her, he may be liable to a mitigated punishment for the attempted abortion, but not for the offence of homicide by negligence which he also commits.

Article 31. Discretionary power of the court

In determining the punishment to be imposed or, where appropriate, in reducing it within the limits allowed by law, or, in special cases, in imposing no punishment where an attempt was abandoned or failed, the Court shall take into account all relevant circumstances. It shall, in particular, take into consideration the stage reached In the carrying out of the attempt and the danger it represented, the reasons for which it failed, the motives which prompted the renunciation or the active repentance of the offender, as well as his antecedents and the danger he represents to society.

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Art. 31 does not require lengthy discussion not only because it is self-explanatory, but also because it rather unnecessarily recalls a rule laid down in the preceding Articles ***(m.g.*** the words "if circumstances justify, the court may. . .in Arts. 27 (3) and 28 (1)), namely that the court, whatever the decision it is called upon to make with regard to an attempt (/.«. whether or to what extent the penalty should be reduced, whether the attempter should be exempted from punishment) must take into account all the circumstances surrounding the commission of the attempted offence. Inasmuch as it is expected to individualize its decisions, the court will, therefore, consider the material or objective circumstances of the case (the stage reached in the carrying out of the design, the seriousness of the attempted offence, and the like) as well as the personal or subjective ones (the reasons for the renunciation or active repentance, the simplicity of mind of the offender in cases of impossible offences, the antecedents and the dangerous disposition of the attempter in all cases).

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CHAPTER VI PARTICIPATION IN AN OFFENCE [ARTS. 33-47]

It is a matter of course that an offence may be committed either by one person or by several persons acting in the same or in different capacities. Even when one person alone performs the act or acts which constitute the material element of the offence, the question of participation, which is dealt with hereunder, may arise since this person may have been incited to commit the offence or he may have been assisted in its commission. The following provisions describe the various ways in which one may associate oneself with the commission of an offence, set out the conditions governing the liability to punishment in the various instances of participation and define what punishment may be ordered with regard to each participant. The basic principle is that anyone is punishable who participates in an offence in whatever capacity and whatever the extent of his participation. Yet, as will be seen, the solution to the problem of participation is somewhat influenced by the means used in the commission of the offence, and the rules laid down in Arts. 32—40 which apply in ordinary cases, /.*. in cases other than those of so-called press offences, do not necessarily apply in the case of offences committed through publications (Arts. 41—47).

I. Participation in ordinary offences [Arts. 32—40]

Article 32. Principal art: Offender and co-offenders

(1) ***A person shall be regarded as having committed an offence and punished as such If:***
   (a) ***he actually commits the off-nee either directly or indirectly, for example by means of an animal or a natural force; or***
   (б) ***he without performing the criminal act Itselffully associates himself with the commission of the offence and the intended result; or***
   (c) ***he employs a mentally deficient person for the commission of an offence or knowingly compels another person to commit an offence.***

(2) ***Where the offence committed goes beyond the intention of the offender he shall be tried in accordance with Article 58*** (J).

(3) ***Where several co-offenders are involved they shall be liable to the same punishment as provided by taw. The court shall take into account the provisions governing the effect of personal circumstances (Art. 40) and those governing the award of punishment according to the degree of indiwidual guilt (Art. 86).***

Few laws define what is meant by a principal offender, and he is generally taken to be the person who does the act or acts constituting the offence or who abstains from acting when he is bound to act. However, a cursory glance at foreign law reports or legal literature will demonstrate that the notion of principal participation is not as simple or, indeed, as narrow as that. In Ethiopia, where this notion could not be derived from extra-legal sources, the definition of a principal offender has been inserted in the Code.

1.According to sub-art. (1) of Art. 32, principal participation may take any of the three following forms.

(a) A person is firstly deemed to act in a principal capacity when he does or omits to do an act which is a material ingredient of an offence (sub-art. (1) (o)). For instance, the *<~t of

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taking another person's life is the material element of an offence of homicide; whosoever performs this act is regarded as a principal offender, and he is often referred to as the material offender. Yet, so that his participation be direct, the principal offender is not required to perform himself the act constituting the offence. It is not an ingredient of the offence of homicide that t^>e offender should directly, personally or physically cause death by shooting, stabbing, poisoning or strangling the victim and he may equally well cause death in a indirect manner, "for example by means of an animal or a natural force". Thus, if ***A,*** with the intention of killing ***B,*** sets fire to ***B's*** house when he knows that ***B*** is sleeping at home, and ***B*** dies, it is irrelevant that ***B's*** death is directly caused by the fire, and not by ***A.*** Similarly, if ***A*** trains his dog in shop-lifting, it is irrelevant that the act which constitutes theft (abstraction) is not performed directly by ***A.***

(b) A person is also deemed to act in a principal capacity when he fully associates himself with the commission and intended result of an offence, though he plays no part in the performance of the act constituting the offence. Sub-art. 7T) (6) extends the notion of principal participation to so-called moral offenders who, in popular language, are often "working brains" or "master minds"*. For instance, if ***A*** organizes a gang for the purpose of committing robberies, selects the victims, decides the time and place of the offences, the means to be used in committing them, and the like, but he quietly stays at home while these offences are being committed, he is regarded as a moral offender.

The reasons for such an extension are obvious, since it would hardly be possible to treat ***A*** as he deserves to be treated were the law to make no provision regarding moral offenders. For, leaving alone the question of conspiracy, what is ***A's*** position in relation to the robberies ? He is not a material offender, since he does not participate in the execution of the offences, nor is he an instigator, at least if the members of his gang are quite decided to commit the offences and require no inducement to do so. Admittedly, ***A*** could be regarded as an accessory before the fact by reason of the intellectual assistance he gives the material offenders. However, not to mention that the courts are often reluctant to punish accomplices as severely as principal offenders, although they may do so according to Art. 36 (3), this solution would not be very satisfactory from a psychological point of view, since the mere term "accessory** does not imply as close an association with the material offender as there exists in the above illustration.

The test of principal participation, therefore, lies here in the full association between the moral offender snd both the commission of the offence ("commission'* being a rather misleading word since the moral offender takes no part in the actual carrying out of tbe criminal design) and tbe intended result thereof (a condition which must be read in coinjunction with sub-art. (2) of Art. 32). As has been said when this provision was discussed by the Codification Commission, "to associate oneself mentally with the commission of an offence does not mean that one merely hopes for the doer's success, that one participates only spiritually in the offence, for punishment would then be unjustified. If the moral offender ia punishable, therefore, it is because, although he takes no part in the material ~~per~~pet~~ra~~tion of the offence, he commits the offence in the sense that he fully sides with the material offender and adopts as his own the offence and the desired result." This statement reflects the so-called subjective conception of participation as numberless Swiss judgments have defined it ***(e.g.*** ATF 69 IV 97, JdT 1943 IV 103; ATF 70 IV 102, JdT 1944 IV 124; ATF 77 IV 88, JdT 1952 IV 22; ATF 88 IV 53, JdT 1962 IV 69). Although there must exist a causal relation between the moral offender's participation and the commission of the offence, it is not required that he should in any material way contribute to its commission, be it by mere acts of preparation. Bearing in mind the sources of sub-art. (1) (6), one may be inclined to think that it suffices for the purposes of this sub-article that the moral offender "should associate himself with the decision from which the offence proceeds in such conditions and to such an extent that he obviously fills the capacity of a principal offender" (ATF 80 IV 258, JdT 1955 IV 115) or, in other words, that he should have ***"coopiri par l'intensiti de so volonti***

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***coupable h l'execution matiriellement assurer par autrui"* (ATF 88 IV S3, JdT 1962 IV 69).**

It may sometimes be difficult to decide whether there exists a full association **within the** meaning of sub-art. (1) (***b***) and to distinguish a moral offender froVn an accessory before the fact or even from an instigator (see para. (2) (a) ***infra),*** since the distinction ***"ne repose pa* tant sur la participation d Vexecution de Vinfraction, mais bierf plutdt sur l'intensity de la volonte coupable"*** (ATF 88 IV 21, JdT 1962 IV 34). So far as concerns the liability to, and extent of, punishment, the distinction is, however, of little importance. It may also be difficult to establish whether the required causal relationship mentioned above exists, **especi**ally when several participants are involved in the commission of the offence. But it would, it seems, be in accordance with the spirit of the Code to hold that "the willingness to **perform** acts of execution, if need be, supplements the absence of actual causation" (ATF 88 IV **33,** JdT 1962 IV 69), which means that a conditional intent to act as material offender **would** suffice for the purpose of sub-art. (1) (6).

(c) The expression "principal offender" also includes the so-called indirect offender, ***I.e.*** the participant who acts in the manner described by sub-art. (I) (c). As was noted before, a person who has recourse to an instrument in order to commit an offence is regarded **as a** material offender. However, in the hope of being completely immune from liability, the doer may act in an even more subtle manner. So as to achieve a certain result, he may employ **a** human being (instead of an animal or natural force, as provided for by sub-art. **(1)** (<*)), **such** person being legally irresponsible (and not responsible, as provided for by sub-art. (1) (6)), or he may compel another person to commit the offence. In either case, the difference **with** sub-art. (1) (a) lies in the nature of the instrument or agent used.

(0 A person is regarded as an indirect offender firstly when he uses an **irresponsible** person in the commission of an offence. The terms "mentally deficient person" appearing in sub-art. (1) ***(c)*** are too restrictive since this sub-article should apply whenever **the** offender employs a person incapable of drawing any liability upon himself, indiuting an infant. Thus, if ***A*** tells his five year old child to give ***B*** a glass of milk in which ***A*** put **some** poison, ***A*** should be deemed to act in the capacity of indirect offender. According to the letter of Art. 32, these cases should, however, be regarded as coming under sub-art. (1) ***(a)*** and as covered by the words "for example'*, though they are closer by nature to those coming under sub-art. (1) (c). The same may be said when a person employs another **by** taking advantage of the mistake or ignorance of this other person. Thus, if ***A*** asks that **the** glass of milk be brought to ***B,*** not by a child, but by an adult who does not know that the **milk** is poisoned. ***A*** should also be regarded as an indirect offender, even though he **does** not employ an irresponsible _ or coerced person. He cannot be deemed to **be** a **moral** offender since sub-art. (1) (6), by requiring a full association with the intended result, **would** luggest that there must be a common design between the moral and material offenders, which condition is not. present in this case. Under Art. 32 as it stands today, he should **be** said to have "actually committed the offence indirectly", as provided for by sub-art. (1) (a); yet, it would be more in accordance with current doctrines to treat him as an indirect offender ***<auteur m£diat)*** and it must have been the Legislature's intention that he be so treated. For the French text of Art. 32 (1) (c) does not mention "mentally deficient persons", but ***"un Stre inconscient***", which expression is broad enough to include the cases where the human instrument is irresponsible as well as those where he is **unaware** of the true facts of the case. It may. therefore, be held that Art. 32 (1) ***(c)*** applies when, for example, ***A*** organizes the commission of a robbery by ***B*** against C who, to ***A***'s but not to ***B***'s knowledge has a weak heart and may die out of fright. If ***A*** accepts the possibility of **C**s death and the latter in fact dies as had been contemplated by ***A,*** it seems that ***A,*** who is **a** moral offender in the commission of the robbery carried out in pursuance of ***A* and *B'm*** common design, is alone answerable for the homicide which he commits in the **capacity** of indirect offender. There is no doubt that this was "the meaning intended by the **legisla**ture" lisce the ***Expose des Motifs*** states that the cases coming under sub-art. **(c) include**

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those where "the indirect offender uses a human agent who does not intend to commit an offence or **is** not even aware of the fact that he commits an offence (...), such as a child, a lunatic or a person whom he intoxicated (without the knowledge or against the will of that person) so as to make him commit an offence (...) or a person who, by reason of a mistake, does not realize that he is instrumental in the commission of an offence."* Additional support for the proposed construction will be found in the next Article (see the case of the mistaken witness in comments under Art. 33, second alinea).

(ii) One is also considered to be an indirect offender who compels another person to commit an offence; whether this other person himself is guilty of the offence which he is mu Ha to perpetrate is a question to be settled in accordance with Arts. 67 and 68. But whether he Is or not, this does not affect the indirect offender's liability. Thus, if ***A*** at gun-point orders ***O*** to kill C, ***A*** is punishable for an offenoe of homicide which he commits in the capacity of indirect offender.

(iii) When an offence is committed by means of a human instrument, the fact that liability is incurred by the indirect offender does not mean that the person whom he employs is not punishable at all. Leaving alone the cases where the latter person is irresponsible, he may for imtance be found guilty of having negligently committed an offence in the capacity of material offender. This is so when, had he taken such precautions as could reasonably be expected of him in the circumstances, he would not have committed the mistake of which the indirect offender took advantage. He is also punishable when he acted in a condition of absolute moral coercion (Art. 67) or of resistible physical or moral coercion (Art. 68).

2. The detailed definitions supplied by sub-art. (1) throw light upon the problem of participation by co-offenders, which is alluded to in sub-art. (3), first alinea.

(a) Unlike some laws which draw a clear line between co-offenders and accomplices by ixgarding as co-offenders only the persons who perform the nets constituting the offence, sub-art. (3) of Art. 32 does not provide that co-participation is possible solely as between material offenders ***(e.g.*** when ***A*** and ***B*** together stab ***C*** to death); if read in conjunction with sub-art. (1), it implies that co-offenders are all the persons who participate in an offence in a principal capacity ***(e.g.*** when ***A*** organizes a gang, he, who is a moral offender, and the members of the gang, who are material offenders, arc co-offenders). Admittedly, with such an extensive conception of co-participation, doubts are likely to arise concerning the exact capacity in which a person acts. For instance, if ***A*** and ***B*** together organize the commission of a robbery but ***A*** alone does the acts which constitute robbery while ***B*** merely stands by, one may wonder whether the latter should be regarded as a principal participant at all (since it may not be clear whether he fully associates himself with the offence) and, in the affirmative, whether he acts as material offender (since he did some acts tending towards the commission of the offence) or as a moral offender (since he neither uses violence nor abstracts the victim's property). In disposing of these cases, regard will have to be had, not only to the objective circumstances surrounding the commission of the offence ***(e.g.*** was ***B*** on the lookout, or had it been agreed that he would interfere if things did not go according to plan? Was he physically unable to participate in the offence because he had fallen down and broken a wrist while going with ***A*** in search of a victim ?), but also and mainly to how the offender estimated his own position in relation to the offence, ***i.e.*** whether he adopted it as his own doing. As has been said, "the nature of the participation and the seriousness of the fault of each participant is characterized by the kind of intention which each of them has formed" (Schultz). One will not deny that this test, as is inevitable with a subjective one, is rather uncertain. Yet, for all practical purposes, the uncertainty is immaterial for, should a court wrongly assess the capacity in which the offender acted, this would be of no effect as regards his liability to punishment.

(b) It may be noted that the problem of participation by co-offenders does not arise in relation to such offences as imply a so-called necessary participation, ***i.e.*** offences which

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cannot materially be committed exoept by more than one person (such as duels, Art. 550, or adultery, Art. 618), for there are then distinct offences committed by several persons. Nor does it arise in those cases where, again, several persons are involved but only some of them are liable to punishment (such as usury. Art. 667, or blackmail, Art. 669).

3. The liability to punishment of, and the assessment of the penalty applicable to, cooffenders, are governed by the provisions of sub-art. (2) and sub-art. (3), second alinea.

(a) As a rule, ***i.e.*** subject to the general provisions of the Code regarding criminal guilt (Arts. 40 and 57—59), all the persons who participate principally in an offence are equally liable to punishment, whatever the particular capacity in which each of them may have acted. In this respect, no discriminations are made between material and moral offenders. "Having regard to the subjective basis of the law of participation by co-offenders, each of them answers for what the others have done'* (ATF 81 IV 147, JdT 1956 IV 66). Furthermore, as mentioned already, the fact that an accomplice might be mistaken for a principal participant would, in view of Art. 36 (3), be irrelevant so far as concerns his liability to punishment.

(I) In deciding on liability, regard must be had not only to the offence actually committed, but also to that In which each co-offender intended to participate. For, according to Art. 58 (3) , recalled rather unnecessarily in Art. 32 (2), a person may not be deemed to have intentionally done something which goes beyond what he intended to do. This principle, when applied to participation by co-offenders, means that if ***A*** organizes a gang for committing robberies and instructs the members of the gang merely to frighten the victims, he is a cooffender (moral offender) only in thf offences of robbery; therefore, if on one occasion a member of the gang loses his head and kills the victim, ***A*** may not be regarded as having intentionally and principally participated in the offence of homicide since he quite clearly did not fully associate himself with this offence.

(ii) The above rule is naturally Without prejudice to the cases where, under the law, some co-offenders are not liable to punishment, for instance because they are under age or the condition for prosecution laid down in Art. 629 is not fulfilled.

(.b) Subject to the provisions of Art. 40, co-offenders are all liable to the same punishment. Thus, if ***A*** and ***B*** together commit a robbery organized by C, it is immaterial that C is not physically present when the offence is perpetrated, or that ***A*** alone uses violence so that ***B*** can abstract the victim's property. But, il'the offence is not committed because ***A*** "abandons", although ***A, B*** and C are guilty of attempted robbery, ***A*** is punishable under Art. 28 (1) and ***B*** and C, under Art. 27 (3). Moreover, the fact that an accomplice might be mistaken for a principal participant is of comparatively little importance since, according to Art. 36 (3) , an accomplice may be sentenced to the same penalty as a principal offender. Admittedly, if the court wishes to reduce the punishment for one of the participants in accordance with the last sentence in Art. 36 (3), it may-tiot do so unless it considers him to be an accomplice; it follows that, when the court wrongly appreciates the capacity in which an accomplice acts, it may not subsequently reduce under Art. 36 (3) the punishment applicable to him. This, it may be alleged, shows that the "full association" test is a possible source of confusion which might prejudice an accomplice. The objection, however, is not decisive, as Art. 36 (3) merely states that an accomplice ***may*** be treated less severely than a principal offender either because the extent of his participation is negligible or he appears less dangerous than the principal offender. Well, the latter element also applies as between co-offenders, for they are not all always equally dangerous. The rule that they are liable to the same punishment does not imply that they njust all be sentenced to a mathematically identical penalty, and this is emphasized by the references to Arts. 40 and 86 appearing at the end of Art. 32(3). Therefore, if an accomplice is erroneously regarded as a principal offender, he may none the less be sentenced to a more lenient penalty than his co-offenders. Besides, the kind of mitigation permitted under Art. 36 (3) is the so-called ordinary mitigation, which may be applied not only when the law so provides, as Art. 36 (3) does, but whenever the court considers

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that the punishment should be reduced on any of the grounds mentioned in Art. 79. Therefore, an accomplice who is not eligible for mitigation under Art. 36 (3) because he is wrongly deemed to be a co-offender may in any event, like any other participant, be eligible for mitigation under Art. 79.

Article 33. Participation in cases of special offences

An accused person may be prosecuted as a co-offender when, by his acts, he fully participated with knowledge and intent in the commission of an offence which can be committed only by certain specified persons such as members of the Armed Forces or officials, or only by male persons as in the case of rape.

A special offence within the meaning of Art. 33 is an offence which a person can not commit in the capacity of material offender unless he possesses particular qualifications. For example, it is an ingredient of the offence of desertion that the doer should be a member of the Armed Forces; of the offence of corruption, that he should be a public servant; of the offence of perjury, that he should be a witness; of the offence of rape, that he should bo a male person; of the offence of incest, that he should be related by blood to the other party to the offence; of the offence of adultery, that he should be married. The point raised in Art. 33, which is actually part of a wider problem, namely that dealt with in Art. 40, is whether a person not possessing the required qualifications may commit such a special offence in either of the capacities described in Art. 32 (1) (A) an<t (c), although he cannot commit it in the capacity described in sub-art. (1) ***(a)*** of Art. 32. Thus, is it possible for a civilian to participate as moral or indirect offender in the commission of desertion, for a woman to participate in the commission of a rape or for an unmarried person to participate in the commission of adultery? Taking in particular the case of adultery which, like incest, constitutes a so-called ***dilit personnalissime,*** that is, an offence which by definition cannot be committed through a human agent, the question under Art. 33 is not whether ***A,*** a married man, can be unfaithful to his wife otherwise than by having himself sexual intercourse with another woman, but whether ***A,*** be he married or unmarried, can, for instance, fully associate himself with the adultery committed by ***B,*** who is married to C, although ***A*** himself could not materially commit this particular offence since he is not C's spouse.

Under Art. 33, the answer is in the affirmative. Whosoever contributes ***animo auctoris*** (or even ***animo socii,*** since the same principle applies in cases of participation by an instigator or accomplice) to the commission of an offence is deemed to participate therein, even though this offence is a special offence and he would not be able personally to perform the act constituting it. It suffices, therefore, that the one of the persons involved who possesses the necessary qualifications should do something such that the material element of the special offence is present; whether the other persons involved who do not possess the same qualifications are punishable in any particular case, must be decided in accordance with Art. 40. Thus, one who deceives a witness so as to make him give evidence which, unknown to the witness, is false, is punishable for having committed perjury in the capacity of indirect offender, regardless of the fact that he himself is not a witness and that the witness himself is not punishable since the moral element of the offence of perjury (***Le.*** false evidence should be given knowingly) is missing. In this instance, it suffices that the unlawful act be done by the witness and that the criminal fault (within the meaning of Art. 37) be committed by the indirect offender who knew that the statement made by the witness was false. The principle governing these cases is similar to the one laid down in ATF 73 IV 97 (JdT 1947 IV 174), ***i.e.*** it is necessary, for the purpose of punishing other participants, that the material offender should do sorrtething which is objectively contrary to the law, but it is irrelevant whether this offender is liable to punishment (<***contra***, in cases of instigation, see in particular ATF 71 IV 132, JdT 1945 IV 194 and

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ATF 73 IV 242, JdT 1948 IV 24, neither of which is consistent with the subjective conception of participation).

Article 34. Collective offences

Where an offence is committed by a group of persons the person who is proved to have taken no part in the commission of the offence shall not be punished.

Under Art. 54 of the Constitution, "punishment is personal". This is to say, firstly, that a person may not be punished for an offence in which he does not participate within the meaning of the law and, secondly, that each of the several persons who may have participated in an offence must be punished for his own acts and "according to the degree of individual guilt** (Art. 86). Thus, punishment as well as liability are personal, and there can be no collective liability to punishment, nor may collective punishments be imposed. This principle is recalled in Art. 34 quite unnecessarily, since Arts. 57 ***et seq.*** are sufficient to give effect to the above-mentioned constitutional provision.

Article 35. Incitements

(1) ***Whosoever intentionally induces another person whether by persuasion, promises, money, gifts, threats or otherwise to commit an offence shall be regarded as guilty of having incited The commission of the offence.***

The person who incited the commission of an offence shall be liable to punishment provided the offence was at least attempted.

(2) ***The punishment to be imposed shall be that provided by law for the intended offence. It may be reduced within the limits specified by law If the circumstances of the case justify such a reduction (Art. 184).***

(3) ***When the person who committed the offence went beyond what was intended by the instigator the latter shall be liable to punishment only for the offence he intended or could foresee (Art. 58 (S)).***

The actual offender shall alone be answerable for the more serious offence which he committed.

There are other forms of participation than principal participation. A person may associate himself with the commission of an offence but in such a remote, indirect or limited manner that his acts do not come within any of the definitions supplied by Art. 32 (1); he does not commit the offence materially or through an agent, nor does he fully associate himself with this offence. In like cases, one often refers to secondary participation (which expression is also used in these comments for purposes of convenience, although it is rather inadequate in view of the subjective inspiration of the law of participation), and this may take place either before or during the commission of an offence. A number of laws make no provision for incitements or instigation, and the instigator is regarded as an accessory before the fact. Art. 35, however, deals with instigation separately, for what an instigator does substantially differs from what an accomplice may do before an offence is committed.

1. Any person who intentionally resorts to certain means so as to induce another person to commit an offence is an instigator within the meaning of Art. 35; whether he incites this person to act in a principal or secondary capacity is immaterial.

(a) For the purposes of Art. 35, it is not sufficient—nor is it required at all—that a person should give another the idea to commit an offence, but it. is necessary that he should "induce** or persuade this other person to commit it ***(susciter la volonti de commettre Vinfraction.***

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ATF 69 IV 203, JdT 1944 IV 12). There must, therefore, be **a** causal relation between **what the** instigator does and what the incited person decides to do, which relation **exists when** the incited offeqce would in all probability not have been committed **but** for **the** instigator's intervention>Thus, the characteristic element of instigation lies in the peremptory influence which the instigator exercises on the incited person. If the latter decides to commit an offence as a result of the former's activity, it is immaterial whethef the idea to commit this offence was already in the incited person's mind; there is an incitement even though the incited person had a pre-existing criminal intention which he would, however, not have carried out had he not been persuaded to do so hy the instigator. Thus, if ***A*** promises ***B 5000*** dollars for killing C, there is an incitement even though ***B*** might have previously played with the idea of killing C, who is also his enemy, but would not have killed him if ***A*** had not offered to reward him for it.

The rule that there is no instigation unless one causes another person to take the decision to commit an offence entails the following consequences. JiirsiJy, a person who merely encourages another to commit an offence or strengthens him in a decision which he had already taken is possibly punishable as afl accessory before the fact, hut not as an instigator. Secondly, there is no incitement if a person gives another the oppo.tunity of committing an. offertofc which this other person was determined to commit in any event. Thus, if ***A*** requires ***B,*** who is known for performing abortions, to procure C's abortion, ***A*** will normally not be held to have incited ***B;*** there may be an incitement only if ***B,*** after refusing to provide his services, had then to be persuaded by ***A*** to provide them. Thirdly, doubts may arise regarding the position of a person who gives another an inducement for committing an offence which this other person had already resolved to commit. For instance, after ***A*** has decided to kill ***B,*** he is offered 5000 dollars by C for doing so. There is no problem if.the offer is rejected, and Art. 27 (2), second alinea, is then applicable. But what if the offer is accepted 7 Quite clearly, there is no instigation; since the offence would have been committed even though ***C*** had not made his offer, the causal relation required by sub-art. (1) is missing. Yet, ***C*** did everything incumbent upon him to persuade ***A,*** and if one feels that this cannot be disregarded altogether, the question is whether and according to which provision C may be punished. It may be argued that the offer has been accepted only in the sense that ***A*** was willing to take C's money, but that the situation is for all practical purposes the same as if the offer had been rejected, sipce it did not influence ***A.*** In other words, C attempted but failed for reasons beyond his control to incite ***A,*** and Art. 27 (2) is applicable, with the result that C is-not punishable. To the contrary, it may be said that this does not amount to an attempt to incite because such an attempt implies "that the person whom the doer incites is not already determined to commit the offence. There is an attempt to incite when a person endeavours to create in another the intent to commit an offence, and this is obviously possible only when such intent does not already exist" (ATF 72 IV 27, JdT 1947 IV 3). Bearing this opinion in mind, and in particular the words "obviously possible", it may be argued (hat C attempted to incite ***A*** when this was legally impossible because ***A,*** havjng decided to act, could **no** longer be induced. But impossibility itself might be ruled out, as it was in the same judgment, **on** the ground that "an incitement is impossible due to the object aimed at only when the impossibility pertains to the object of the offence the commission of which one incites, but not when this offence is possible but the person one attempts to incite has already decided to commit it. In the latter case, the impossibility does not pertain to the object of the incited offence, but to the person to whom the incitement is addressed" .Although one should not confuse two cases which are clearly different, namely an impossible incitement and an incitement to commit an impossible offence, one would not, if one held that there is impossibility in this instance, be able to punish C, whose liability to punishment would still be governed by Art. 27 (2), second alinea, since an impossible incitement amounts to an attempt to incite. In order to circumvent this obstacle, one might be tempted to consider that C fortified ***A***'s decision and that Art. 36 applies since he acted as an accessory before the fact. Yet, not only did C obviously intend to do more than that, but he could not have encouraged ***A*** to carry

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out his decision unless he knew of it—and he did not, for he would not have made his offer in the form of an inducement had he been aware of ***A's*** decision. Therefore, whichever view is taken about the case, no provision would enable a court to punish ***C.*** There is little doubt that he actually attempted to incite ***A***; but whether he is deemed to have failed for reasons beyond his control or because failure was inevitable, his liability to punishrr"..* is in any event as provided for by Art. 27 (2), second alinea, which prevents him from being: punished whatever the reasons for his failure and although he should, in strict subjective doctrine, incur liability.

(b) An incitement usually implies a person-to-person relation. It is not required, however, that the instigator should always directly or physically conic into contact with the incited person, and he may equally well persuade this person to commit an offence through a letter, a telephone call or a human agent (instigation in the second degree; see ATF 73 IV 216, JdT 1948 IV 43). Furthermore, the fact that an instigation is ordinarily characterized by an individual relationship does not mean that several persons cannot incite one and the same person. Thus, ***A*** and ***B*** are co-instigators if together they offer ***C*** 5000 dollars for killing ***D*** or if, having agreed so to incite him, the offer is made by ***A*** or ***B*** alone. But, when several persons independently of one another incite the same person. It is a matter of circumstances whether they are all punishable for the incitement. Since there must exist a chain of causation between the instigator's act and the incited person's decision to commit an offence, this act can obviously not be deemed to be the cause of such decision if the decision had actually been taken before the doing of this act. Thus, if ***A,*** not knowing that ***B*** has already promised ***C*** 5000 dollars for killing ***D,*** makes C the same promise, it must be ascertained whether ***C*** was already determined to act upon ***B's*** promise or whether the additional inducement offered by ***A*** was decisive. In the first case, the causal relation is missing and the situation is the same as that described at the end of the preceding paragraph, ***i.e.*** there is a mere attempt to incite, whether under Art. 27 or 29. It would be, not only inconsistent with the true meaning of Art. 35, but also contrary to the provisions of Art. 24, to hold that the incitement is successful and ***A*** is punishable for the sole reason that he made an offer which would normally have been sufficient to induce C to commit an offence, had he not been previously induced to do so by ***B*** (see, however, ATF, 81 IV 147, JdT 1956 IV 66). In the second case, both ***A*** and ***B*** are punishable as instigators, since their respective offers are the concurrent causes of the decision made by ***C.***

(c) Instigation always is an intentional form of participation; the instigator must know that his intervention is capable of persuading another person to commit an offence and he must intend so to persuade him. Whatever his motives for doing so may be, is irrelevant ***(e.g.*** when he acts as ***agent provocateur*** and proposes to prevent the incited person from committing the incited offence). True enough, it is quite possible for somebody inadvertently or unwillingly to give a person the idea to commit an offence or even lead him to decide to carry out such an idea. Thus, if while ***A*** and ***B*** together await payment of a cheque in a bank ***A*** casually points out to ***B*** that the watch system is defective, this may well give ***B*** the idea of robbing the bank and, on reconstructing the chain of events leading to the robbery, one may conclude that the offence would probably not have been committed but for ***A's*** remark; however, this remark does not amount to an incitement. Similarly, if ***A,*** being determined to kill ***B*** but uncertain as to the best way to do it, attends a lecture by Dr. ***C*** about poisons which leave hardly any trace in the human body, and if ***A*** thereafter uses one of the said poisons to kill ***B,*** there is little doubt that the lecture was a decisive factor in the chain of events leading to ***B's*** death; this, however, does not mean that Dr. C should be deemed to have incited ***A.***

(</) As for the means whereby a person may be persuaded to commit an offenoe, Art. 35 (1) , unlike many foreign provisions which draw up a list of inducements, merely supplies some illustrations. Granted that "there must be some definite act of solicitation, the mere expression of a desire that someone should die, for instance, not sufficing", it remains that the nature of the inducement is irrelevant (and this is why some Codes do not describe it at

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B, there is little doubt that the lecture was a decisive factor in the chain of events leading to ***B's*** death; this, however, does not mean that Dr. ***C*** should be deemed to have incited ***A.***

(d) As for the means whereby a person may be persuaded to commit an offence. Art. 35 (1) , unlike many foreign provisions which draw up a list of inducements, merely supplies some illustrations. Granted that "there must be some definite act of solicitation, the mere expression of a desire that someone should die, for instance, not sufficing", it remains that the nature of the inducement is irrelevant (and this is why some Codes do not describe it at

all) so long as it produces the desired result. Thus, an instigator may use persuasion, promises of any kind, money, gifts, threats or, subject to the provisions of Art. 32 (1) (c), any other means, even though not expressly mentioned, such as flattery or challenging, which are possible if not very likely means to incite another. All that matters, therefore, is that the instigator should in any way lead another to decide to commit an offence. He must do no less —and no more; in particular, it is not required that he should in addition instruct the incited person as to when or how or even against whom the incited offence should be committed, and he may well incite him generally to kill "a fascist", "an imperialist" or "a communist", for instance. In some cases, however, the terms of the incitement will have to be known as exactly as possible with a view to establishing whether the act the doing of which was incited is really unlawful (see, for instance, ATF 72 IV 138, JdT 1947 IV 59).

2. The socond alinea of sub-art. (1) was previously referred to in connection with Art. 27 (2) . As has been said, an instigator is normally not punishable unless the incited person commits or attempts to commit the incited offence. "What constitutes the result of the incitement is not only the fact that the instigator creates in another person the intention to act, but also the fact that this other person begins to act. Failing the latter element, the result necessary for the completion of the incitement is not achieved" (ATF 81 IV 285, JdT 1956 IV 12). Thus, apart from the cases where a mere attempt to incite is punishable or the incitement constitutes an independent offence, the causal relation between the instigator's activity and the incited person's decision to commit the offence is of no effect so long as this decision is not carried out. If the said decision is carried out. Art. 35 (1) applies, unless the incited offence is a petty offence, in which case the instigator is not punishable (Art. 696 (2»; if it is not carried out, Art. 27 (2), second alinea, applies. This naturally implies that the instigator's liability to punishment is conditional upon the incited offence being intentionally committed. Thus, if ***A*** incites ***B*** to kill C and ***B*** runs C down in a traffic accident and kills him by negligence. ***A*** is not punishable as an instigator although what he intended to happen has actually happened. It is not required, however, that the incited person himself should be punishable, and this is clearly.implied in Art. 40, second alinea. All that is required is that one should induce a person to do an act amounting objectively to an offence; however, when the incited person is not punishable, and depending on the reasons why he is not punishable and whether the instigator knew of these reasons, he who induced this person to act will no longer be regarded as an instigator, but as an indirect offender ***(e.g. A*** induces ***B*** to have sexual intercourse with Miss C who, to ***A***'s but not to ***B***'s knowledge, is ***B's*** second cousin). "If the material offender was a mere instrument deprived of knowledge or intent (irresponsibility, absolute coercion, mistake excluding intention), he who made him act is not an instigator, but an indirect offender; this is so even when the material offender is punishable for having acted negligently" (Logoz, ***op. cit.,*** p. 99), as in the case where the material offender, but not the person who induced him to act, is mistaken as to the facts although he could have avoided this mistake. But it is Art. 35, and not Art. 32 (1) ***(c),*** which applies when the incited person is not punished only because, ***e.g.*** no complaint is lodged against him (Art. 629; see ATF 82 IV 129, JdT 1956 IV 98). On the other hand, so far as concerns the incited person's liability to punishment, it is also irrelevant whether the instigator himself is punishable. It flows from Art. 40 that the former person is punishable even though the instigator is not punished, for instance because he is irresponsible. Finally, so that a person may be punished under Art. 35, it does not suffice that the incited person should be punished. For it appears from Art. 40 that, if liability depends on the presence of certain special circumstances and the incited person is punishable because the said circumstances are present in him, these circumstances are not "transmissible" to the instigator and the latter is not punishable unless they are present in him also. Thus, if it is an ingredient of an offence that the doer should act with a particular motive, the instigator who for that motivi induces someone to commit this offence is punishable even though the incited person does not act for that motive and is, therefore, not punishable. Conversely, the instigator who without that motive induces someone to commit this offence is not punishable and the incited person who acts for that motive is alone punishable.

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3. It remains to **bo seen** how an instigator is to be punished when, assuming **that all the** conditions analyzed hereinbefore are fulfilled, the incited person commits **or attempts to** commit the incited offence. The rule as laid down in sub-art. (2) is that the instigator is **liable** to the punishment prescribed for the offence the commission of which he incited, ***i.e.*** he **may** be punished as though he had himself committed this offence (to the same effect. **Art.** 35 of the Ethiopian Penal Code of 1930 provided that an instigator as defined in Arts. 37 **and** 38 "shall be considered to be a principal offender as if he acted by himself"). This may **appear** excessive, since the instigator normally plays no part in the material commission of the offence. Yet, not to mention that the offence would probably not have been committed but for **him,** he may be as dangerous as, or even more dangerous than, the principal offender, and **there** is no reason why he should be treated more leniently. On the other hand, he may be guilty in a lesser degree than the material offender, which explains why Art. 35 permits the **punish**ment being reduced under Art. 184 in appropriate cases. This, of course, is without **prejudice** to the provisions of Arts. 67 and 68, which apply when the incited person acted under duress.

4. Sub-art. (3), which relates to the case known as ***excessus mandati,*** rather unnecessarily recalls the provisions of Art. 58 (3), according to which "no person shall be convicted for what* he neither knew of or intended, nor for what goes beyond what he intended either directly or as a possibility, subject to the provisions governing negligence."*

(a) The instigator may induce a person to commit a given offence, such as theft, and the incited person may then act in circumstances the effect of which is that the more serious offence of robbery is committed. In such a case, the instigator is liable to the punishment prescribed for the offence of theft the commission of which he incited, if the incited person abstracted or attempted to abstract property, and the material offender is alone punishable for the robbery. There is also an excess when the incited person commits an offence entirely different from the one he was incited to commit. Thus, if ***A*** incites ***B*** to commit theft in C*s house and ***B,*** having gone to the house, does not abstract anything but rapes C*s daughter, ***A*** is not punishable at all. He did not incite the commission of the rape, and the offence the commission of which he incited nas not even been attempted. However, if the instigator foresaw and accepted the possibility that a more serious or different offence might be committed (indirect intention within the meaning of Art. 58 (1), second alinea, which may be difficult to prove), he is naturally liable to the punishment prescribed for that offence. If, on the other hand, he did not foresee this possibility, or he foresaw it but rejected it, he is not punishable for what finally happened, although he was negligent, since there is no incitement underArt. 35 unless the instigator acts intentionally. Any solution to the contrary would be inconsistent with Art. 24, for it would amount to holding the instigator liable because the incitement was a ***sine qua non*** condition of what finally happened; if the causal relation were to be extended that far, the abandoned notion of absolute causality would be revived.

(б) The instigator may also induce s person to commit a given offence, such as theft with violence, and the incited person may then commit a less serious offence of the same nature, such as theft without violence. In such a case, there is an incitement to commit the theft which was actually committed and an attempt to incite the commission of theft with violence which is not punishable since no violence was used.

5. By way of conclusion, a few words may be said regarding certain problems with which Art. 35 does not deal because they are relevant to the Special Part of the Code; they are, however, related to those discussed above.

(a) Although there is an incitement when a person in any way leads another to the decision to commit an offence, the law provides for some cases, namely cases of public provocations to crime, where Art. 35 is inapplicable regardless of the fact that an offence is committed at someone's instance. If a person publicly provokes others to do wrong, it is not altogether inconceivable that he may act in the circumstances described by Art. 35; however, whether or not he does so is almost impossible to prove; furthermore, assuming it can be proved, it is undesirable for reasons of public order that Art. 35 should apply.

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(i) Inasmuch as an incitement implies a causal relation of an individual nature, it would be necessary for the person who provokes a crowd to "induce" each and every one of its members to commit an offence. Not only can this hardly be established, but, as often as not, there is no inducement at all, because he who provokes suggests rather than he persuades, in that the collectivity he addresses or at least some of its members, are already determined to do wrong, and he merely bends them in a particular direction by indicating how or against whom or what they might express their determination.

(ii) Inasmuch as an instigator is not liable to punishment unless the incited offence is attempted, it would be necessary that the provocation be successful, and it would then have to be shown which of the members of the crowd acted of their own motion and which, as a result of the provocation. Leaving alone the difficulties of evidence, this would entail the risk of serious disturbances, since an offence committed by a crowd is apt to develop on a wider scale, to be accompanied by more excesses and to bring about more harmful consequences than an offence committed by an individual. Furthermore, the chances of abandonment or repentance are almost non-existent.

(Hi) The latter elements, added to the fact that it is often easier to influence a crowd than it is to incite a single person, show that a public provocation is *per se* more dangerous than an incitement and explain why it is undesirable that a person who so provokes should be regarded as an instigator even if it can be established that he acted in the manner provided for by Art. 35. It is, therefore, mainly with a view to preserving law and order and to preventing breaches of the peace that public provocations are declared by law to be independent offences (see. for instance, Arts. 269 and 474). What follows is that a person who provokes others to commit an offence acts in the capacity defined in Art. 32 (1) (a) and not in that defined in Art. 35(1), first alinea. and that his liability to punishment is not assessed in accordance with Art. 35 (IX second alinea. *i.e.* he is punishable although the provocation has had no effect.

(6) It is for reasons quite similar to those given under para, (a) (iii) above that other cases of provocation (which differ from the preceding ones because the provocation is addressed to an individual and not a collectivity) are considered to be independent offences (see. for instance. Arts. 341, 361 and 437). even though all the conditions lai$! down in Art. 35 may be present and their fulfilment can be proved without difficulty. Thus, there is little doubt that a person who induces another not to pay his taxes acts, technically, as an instigator; it is however, undesirable that his liability to punishment should be conditional upon the incited person attempting to evade such payment.

(c) It is for reasons quite different from those given above that a person who induces another to commit suicide (Art. 523) is not regarded as an instigator. An incitement implies that one persuades another to commit an offence; but a person who commits or attempts to commit suicide is not guilty of an offence. Therefore, the instigator cannot be punished in pursuance of Art. 35; yet, it is desirable that he should be punished, which he can be only if be is deemed to act as a principal offender in the commission of an offence contrary to Art. 525. He is not punishable, however, unless the suicide is attempted; this objective condition of liability creates an exception to the provisions of Art. 27 and the question whether one may be punished for an attempt to commit an offence contrary to Art. 525 does not arise.

Article 36. Accomplice

(1) ***An accomplice is a person who knowingly assists a principal offender either before or during the carrying our of the criminal design, whether by information, advice, supply of means or material aid or assistance of any kind whatsoever in the commission of an offence.***

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(2) ***An accomplice in an intentional offence shall always be liable to punishment.***

(3) ***The punishment to be imposed shall*** **rr ***f°~ the offence whether attempted or completed insofar as such offence does not go beyond the accomplice's intention (Art. 58*** (i))- ***The Court may, taking into account the circumstances of the case, reduce the punishment in respect to an accomplice within the limits specified by law (Art. 184).***

Assistance, or complicity, is another form of secondary participation in an offence. Whosoever intentionally gives another person any kind of aid before or while an offence is committed is an accomplice within the meaning of Art. 36.

1. Like instigation, complicity is always intentional. A person is an accomplice only insofar as he is aware that the act he does is an act of assistance and he does it with the intention to assist; under Art. 36, it is irrelevant what his motives may be. If, therefore, assistance is lent by negligence. Art. 36 does not apply. Thus, where ***A*** asks ***B*** to give him some poison under the pretence of using it on the rats of which he say his house is infested, but he uses it to kill somebody, ***B*** may not be regarded as an accomplice.

2. Assistance may be lent, at the earliest, before the first act tending towards the commission of an offence is done (see para. (3) ***in fine*** in comments under Art. 26) and, at the latest, until the desired result is achieved.

(a) Whosoever aids another prior to the commission of an offence is often referred to as an accessory before the fact and he is not to be identified with a **co-offender** (see para. (2) ***(a)*** in comments under Art. 32) nor with an instigator, since he does not cause anyone to take the decision to commit an offerice, but merelv assists someone who has already taken this decision; in the cases coming under Art. 35, the offence would probably noLbc ppmmitted but for the instigator's intervention, while in the cases coming under Art. 36 the offence would probably be committed even if no assistance were given. This, however, does not mean that it is ^materially or legally impossible for one and the **same** person to act as an instigator and then as an -accomplice in the commission of the incited offence. But a person who so acts in a dual capacity is naturally not to be regarded as having participated in the commission of tvw offences; on the other hand, that he so acts is likely to affect tbe sentence, for the court may then rightfully refuse to apply the mitigation provided for by Arts. 35 (2) and 36 (3).

(b) Whosoever aids another during the commission of an offence is often referred to as s principal in the seesaatUlfigree, as opposed to this other person who is known as a principal in the first degree (for the precise implications of these terms, see Archbold, ***op. dr.,*** pp. 1465 ***et seq).*** Whether or not a person may be deemed to have acted as an accomplice during tbe commission of an offence is to be decided having regard to both the definition of such offence and the circumstances in which it was perpetrated. Jt is. **however,** not required that he should help throughout, or be physically present during, the commission of the offence or until the intended result is achieved; on the other hand, it is necessary that he should help before the said result is achieved, for assistance lent after the completion of the offence or even after the doing of the last act necessary to complete it seldom amounts to complicity within the meaning of Art. 36. Thus, if ***A,*** not having agreed beforehand to do so, harbours ***B*** after the latter has shot C, whether or not C is already dead when ***A*** harbours ***>J}*** is immaterial as ***A*** may not be deemed to have assisted ***B*** in the commission OTan offence of homicide.

3. As regards the various activities which constitute assistance. Art. 36 (1), like Art. 35 (1), confines itself to giving some illustrations, for what is relevant is that assistance should be lent, whatever its form. Such assistance may be only of an intellectual or moral nature (advice, information calculated to facilitate the commission of the offence, encouragements, promise to give the offender shelter after the commission of the offence, provided that, in the latter case. Art. 439 applies concurrently if the promise is kept); it may also be material (supplying false keys, being on the look-out, etc.) and may then consist of positive behaviour (supplying false keys) as well as of an abstention (leaving open tbe door of a safe).

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It is debatable as to how effective his help should be so that a person may be deemed to act as an accomplice. On the one hand, a mere intent to assist would not suffice for the purposes of Art. 36. On the other hand, the latter provision does no^ imply that the offence would not be committed if the accomplice did not lend his services. As has been said in relation to the corresponding Swiss provision (Art. 25), "Art. 25 does not imply that the offence would not have been committed if the accomplice had given no assistance; it suffices that, in the circumstances, this assistance should have facilitated the commission of the offence" (ATF 78 IV 6, JdT 1952 IV 136). In cases of intellectual assistance, for example, it is necessary that "the accomplice's behaviour should contribute to the commission of the offence, in that, ***e.g.*** it prevented the doet* from abandoning the execution of his design*' (ATF 70 IV 12, JdT 1944 IV 39). As a rule, it would be sufficient, therefore, that what the accomplice does should be of some help, even though he does not give all the help he may have intended to give. Thus, if ***A*** is on the look-out while ***B*** commits a theft in C"s bouse, Art. 36 applies even though the need to signal for danger does not arise and ***A***'s participation has no bearing on events. However, some cases may occur which involve problems similar to those discussed in relation to instigation (see para. (1) ***(a)*** in comments under Art. 35). Since an accomplice is a secondary participant, he ought to take somejiart in the commission of the offence; yet, it may well be that before or while this offence is perpetrated, he docs something which is or could be of no assistance at all. For example, ***A*** gives ***B*** the combination of C's safe, or false keys to open the same, but ***B*** finds that the combination has been changed or that the keys do not fit, so that he must force the safe open; or he finds that the door of the safe has been left open so that he need use neither the combination nor the keys; or ***A*** agrees to delay C so as to give ***B*** enough time to leave C's house after the commission of the theft, but ***B*** is caught long before C would have got back home even if he had not been held up by ***A*** ; or ***A*** agrees to watch while ***B*** acts but, when taking his post, he passes out and does not regain consciousness until after the offence is committed; or ***A*** waits in a car near C's house so as to drive ***B*** away after the offence, but, on trying to start the engine when about to drive away, he finds that he is out of petrol.

If Art. 36 applier whenever a person does, ***animo socii,*** something which is connected with t^C.principal offender's activity, then the fact that ***A*** faints or cannot drive away is irrelevant; what is relevant is that he went to C's house to be on the look-out or to facilitate ***B's*** escape, and one may hold him to be punishable as an accessory before the fact on the sole ground that, by agreeing to assist, he helped ***B*** in the sense that the latter acted upon this agreement and did not have to make different arrangements; so too, the fact that the false keys which ***A*** gave ***B*** were useless or that ***A,*** on being required by ***B*** to give him the name of a doctor who would perform an abortion, gave him the name of a doctor whom ***B*** had «lready approached, would be immaterial, the only important factor being that he gave the said keys or name. Some support for this interpretation, which is in accordance with the subjective inspiration of the Code, will be found in the above-quoted ATF 78 IV 6, according to which "the question whether there exists a causal relation between the help and the result does not even arise. Art. 25 applies when, in fact, the assistance is related to the result and the accomnlice's intention was to contribute to this .result even though the assistance given mas notordinary course of things, capable of contributing thereto.** On the other hand, if the accomplice is required effectively to contribute to the commission of the offence, even though his assistance is not a ***sine qua non*** condition for achieving the desired result, then ***A*** is not punishable as an accomplice in any of the above cases since he did nothing, before or during the commission of the offence, that could effectively contribute to its commission. It might accordingly be held that ***A*** failed, for reasons beyond his control or because failure was inevitable, to give any actual help although he did everything incumbent upon him to assist the principal offender. In other words, he merely attempted to assist within the meaning of Art. 27 (2). second alinea, and he is not punishable even though, from a subjective point of view, he may be as dangerous as a person who would have effectively assisted the principal offender.

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One may also ask whether Art. 36 is applicable when a person helps a secondary participant. It is quite possible that a person gives some assistance to an instigator, for instance, without playing any further part in the commission of the incited offence. Thus, *A* informs *B* that he incited *C* to kill *D* but that he (*A*) is short of money so that he cannot make the advance payment C has required, whereupon *B* lends *A* the necessary sum. If the homicide is attempted. *A* is punishable as an instigator. As for *B,* he did not incite Cto kill *D* nor did he directly assist *C* in the commission of the offence; it is also improbable that he fully associated himself therewith. Admittedly, he did to some extent contribute to its commission (for *C* might not have acted had he not received the advance payment), but he so contributed to it merely by assisting the instigator. Since Art. 36(1) regards as an accomplice only "a person who knowingly assists a principal offender", it should follow that *B* is not punishable because he aids a secondary participant. In subjective doctrine, however, what should be decisive is the doing^of an act calculated to assist, whoever may be the person to whom assistance is given, and *B* should, therefore, be treated as an accomplice for the sole reason that **// *veut aider autmi, de niani&re indirecte, dans I'accomplissement de Vinfraction'* (Exposi des Motifs)* and expresses this intention in positive behaviour.

4. The liability to punishment of an accomplice is as provided for by sub-art. (2), under which a person who helps in the commission of an intentional offence is always punishable. Thus, as with incitements, so with complicity, if the main offence is not attempted, there is a mere attempt to assist which, according to Art. 27 (2), second alinea. is not punishable unless otherwise provided by law or assistance is an independent offencc. On the other hand, if the principal offender begins to act. it is irrelevant for the purpose of sub-art. (2) whether the desired result is achieved (see sub-art. (3), first sentence), or whether the principal offender himself is liable to punishment (since Art. 36, like Art. 35, must be read in conjunction with Art. 40). Even the nature of the main offence is immaterial, provided that it is not a petty offence, in which case the accomplice is not liable to punishment pursuant to Art. 696 (2).

The condition that the principal offender should act intentionally has been inserted in sub-art. (2) mainly because it is disputed whether a person can assist in the perpetration of

- an unintentional offence and, if so, whether he is punishable under the provisions governing complicity. It is sometimes said that, insofar as assistance implies a_common design, this requirement cannot be fulfilled when the main offence is committed negligently; it is also pointed out that an accomplice should know that he contributes to the commission of an offence, which he can hardly know if this offcnce is not intentionally committed. Whatever the rationale for it, Art. 36 (2) prescribes that a person who should be found to have assisted in the commission of an unintentional offence may not be regarded as an accomplice within the meaning of sub-art. (1). However, it may be noted that, in many of the cases where a person is associated with an offence committed by negligence, it is not for the reasofls stated in sub-art. (2) that he is not punishable as an accomplice. Thus, if *A* gives *B* a gun for killing C but *B* by negligence causes Cs death in a traffic accident, it is because *A* does not assist in the commission of the offence (sub-art. 1), and not because this offcnce is not intentional (sub-art. 2), that he may not be treated as an accomplicc. So too, if *A* is on the look-out while *B* robs C and A throws *C* to the ground so that *C* breaks his skull and dies, *A,* who is an accomplice in the robbery, is not an accomplice in the homicide, not because this offence iscommitted by negligence (sub-art. 2), but because it goes beyond what he intended (sub-art. 3); in fact. *A,* having agreed to assist in the commission of a robbery, would not be an accomplice in the homicide even if *B* had intentionally caused *C's* death. Similarly, if *A* helps *B* to set fire to C's house and *A* (but not *B*), knowing that *C* is in the house, accepts the possibility that C may die in the fire and such death actually occurs, *B* is guilty of having caused C's death by negligence whereas *A,* who is an accomplice in the offence of setting fire, is not an accomplice in the homicide, not because the latter offence was committed by negligence (sub-art. 2), but because he did not assist in its commission (sub-art. 1); he actually did much more than that; he intentionally and indirectly caused C's death by taking advantage of *B's* inexcusable failure to foresee the consequences of the act of setting fire and he is, therefore,

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punishable as a principal offender under Art. 32 (1) (c). Strictly speaking, none of the above cases comes under sub-art. (2), and the latter provision is applicable in different situations. Thus, if *A* drives a car at an excessive speed and *B,* his passenger, encourages him not to reduce his speed, and *A* finally runs someone down, *B* is not punishable as an accomplice in the offence of homicide by negligence, for his encouragements were not intended to assist *A* in the commission of this offence. It may, however, be held that *A* and *B* are cooffenders, as each of them acted in the circumstances described by Art. 32 (1) (a).

5. As for the assessment of the sentence to be passed on an accomplice, the same rules apply as in cases of incitement, and it will be found that sub-art. (3) of Art. 36 is substantially the same as sub-arts. (2) and (3) of Art. 35. The accomplice is, in principle, liable to the same punishment as the principal offender (whereas he was "considered to be a principal offender as if he acted by himself" under Arts. 35 and 41 of the Ethiopian Penal Code of 1930, the reasons for this assimilation being as set out in para. (1) in comments under Art. 40), provided that such punishment may for good cause be reduced in accordance with Art. 184, and provided further that the accomplice is not punishable if the offence finally committed is not one inr which he intended to participate as an accomplice. The explanations given in relation to instigation (see paras. (3) and (4) in comments under Art. 35) apply here by analogy.

6w There are a number of cases where assistance, like instigation, is declared by law to be an independent offence. It was said that a person does not act as an accomplice unless he assists in the commission of an offence. Yet, a person who, *e.g.* helps a prisoner to escape (Art. 456) assists a person who does not necessarily commit an offence (see the ingredients of an offence contrary to Art. 455); the same applies in the cases coming under Art. 525 (assistance in the commission of suicide). Since it is desirable that the person who gives this assistance should be punished but Art. 36 is inapplicable, the only way to punish him- is to regard him as having committed in a principal capacity an offence under Art. 456 or 525.

Article 37. Criminal conspiracy

(1) *Where two or more persons enter into an agreement to achieve an unlawful design or to commit an offence the provisions regarding participation and aggravation of punishment due to the above-mentioned circumstances are applicable (Art. 81* (</)).

(2) *The foregoing provision shall, however, not affect the provisions contained In the Special Part of this Code relating to conspiracies 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 (Art. 269, 286, 313 and 472).*

Under some systems of law, it is an offence merely to enter into an agreement with others for the purpose of doing an unlawful act, and the parties to the agreement are punishable on the sole ground that they combined to carry out a criminal design even though nothing was done in furtherance thereof. "So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect the very plot is an act itself, and the act of each of the parties (.. .) is punishable if for a criminal object or the use of criminal means" (Archbold, *op. cit.,* p. 1442). Art. 37 dealing with criminal conspiracy, *i.e.* an agreement between not less than two persons made with a view to committing an offence, follows a somewhat similar, though less extensive solution. This is not a novelty in Ethiopian criminal law since the 1930 Penal Code already provided that "if men from 2 to 5 in number or more than this are discovered plotting together in order to commit any evil crime which is forbidden by law, because they are associates in a criminal act, each one of them shall be imprisoned from 6 months to 2 years and shall pay a fine from 50 to 200 dollars" (Art. 182; see also Art. 183).

1. When several persons together make arrangements to commit an offence, their agreement is generally taken as an advancement of the intention of each of them, "which then passes from a *secret* intention to the *overt* act of mutual consultation and agreement. Thus

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an engagement by two or more is conspiracy, even if the conspirators do nothing in pursuance of the engagement" (Archbold. ***ibid.).*** However, since the conspirators are not required to do anything aiming by way of direct consequence at the commission of the offence, there is little doubt that a conspiracy only represents an intermediary stage between the internal phase preceding the commission of an offence and the beginning of execution of this offence. In other words, a conspiracy basically consists of a collective preparation for an offence and it is not surprising, therefore, that the rules laid down in Art. 37 should bear so much resemblance to those contained in Art. 26 dealing with individual preparation.

Two or more persons who agree to commit an offence and do nothing more than make arrangements for carrying out their common design must be treated as though they had made these arrangements individually. In principle, ***i.e.*** subject to the provisions of sub-art.

(2) , they are not punishable for having combined to do something unlawful; contrary to what might be inferred from sub-art. (1), "the provisions regarding participation and aggravation of punishment" do not govern the making, but the enforcement of this agreement and apply only when the parties thereto carry out or begin to carry out the common design. They are then punishable solely for the offence they committed or attempted to commit (the nature of their participation therein being assessed in accordance with Arts. 32 ***et seq.)*** and not also, in addition, for having acted in pursuance of a criminal agreement; each of them is answerable for what he did or intended to be done. Art. 58 (3) being applicable in cases of excess. Thus, as a rule, a conspiracy does not amount to an independent offence, and the Code disregards the fact that collective preparation is objectively more dangerous than individual preparation because the risk that an offence will be committed is greater (for the conspirators may encourage each other or feel bolder than if they were on their own), the chance of abandonment is less if the offence is attempted (for each of the conspirators will not want to lose face in front of the others or he may fear reprisals from the others), and the probability that the venture may be successful is higher (for collective arrangements are apt to be better made than individual arrangements). The Code does not, however, disregard the fact that a conspirator may be more dangerous than a person who individually prepares an offence; his consulting with others may imply a taking of risks (disclosure of purpose) showing his determination to achieve what he has in mind or may indicate that he is amazingly at ease in the world of crime. This subjective danger is taken into account, not by punishing him for the only reason that he is r* conspirator, but by providing that, should the offence he prepared with others be attempted or committed, he will be punished more severely than if he had acted alone. It is indeed a general aggravating circumstance under Art. 81 (1) («/) to act ''in pursuance of a criminal agreement". However, the effect of this circumstance on the penalty (Art. 188) is much more limited than if conspiracy were an independent offence and the sentence were increased on the ground of concurrence of offences (Art. 189).

2. As certain cases of preparation within the meaning of Art. 26 are declared to be independent offences, so certain cases of conspiracy within the meaning of Art. 37 (1) are punishable in themselves, although the common design is not executed. Apart from the cases, similar to those provided for in Art. 26 (***a***) but not mentioned in Art. 37 (2), where the acts **of** preparation done by the conspirators amount to an offence other than conspiracy, there are four cases where conspiracy (to use the wording of Art. 26 ***(b),*** since the rationale of Art. 37 (2) is the same) is "expressly constituted a special offence by law by reason of its gravity **or** the general danger it entails". Some of these cases are the same as those coming **under Art. 26** ***(b)*** though the latter provision, unlike Art. 37 (2), does not specify them, **namely** conspiracies to commit an offence against the State (Art. 269), international law **(Art. 286)** or a mutiny (Art. 313).

However, Art. 37 (2) does not aim at protecting only the State, universal order or military discipline; by mentioning Art. 472, which penalizes those who conspire to commit an offence carrying not less than five years rigorous imprisonment, it permits tbe law to be applied before any serious offence, including one directed against private interests, is even attempted. Thus, two or more persons who combine to commit an offence of the seriousness defined in

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Art. 472 are punishable under the latter provision if this offence is not attempted; but, if the said offence is attempted. Art. 472 applies concurrently and the conspirators must, as a rule (i.e. subject to the exceptions mentioned in the next alinea), be charged with both an offence contrary to Art. 472 and the other offence attempted or committed in furtherance of the conspiracy, the sentence being then increased as provided for in Art. 189. Although the wording of sub-art. (2) ("the foregoing provision shall not affect . . . etc.**) is rather ambiguous, it seems that, so far as concerns the offence attempted or committed by the conspirators, the only ordinary provisions which do not apply are those of Art. 81 (1) (</); the ordinary provisions regarding participation remain applicable, and "it must not be held that *quiconque, dans le dessein de provoquer des infractions, aura for mi ou utilis4 une organisation, une bande, un complot, un groupe ou toute autre association, sera puni pour toutes les infractions qui auront r4suit4 du plan criminel de ces associations, com me si c' 4 tali lui-meme qui les avail commises* (Yugoslav Penal Code, Art. 23), for this would be inconsistent with the principle that guilt is individual" *(ELxpos4 des Motifs)*.

Some attention must be given to the fact that the problem of concurrence between an offencr of conspiracy and another offence attempted or committed in carrying out the common design calls for the same answer as the one given in relation to individual preparation (see para. (2), second alinea. in comments under Art. 26). In other words, (hoscjvjio commit an offenoe in furtherance of a conspiracy are guilty of related offenccs as defined in Art. 62 (to which Art. 472 (3) refers) and may be punished for this offence as well as for the conspiracy, unless the conspiracy is an ingredient or an aggravating circumstance of the said offence. Therefore, two or more persons who commit espionage in furtherance of a conspiracy may not be charged concurrently under Arts. 265 and 269 because Art- 270 ***(b)*** prescribes that the punishment for the offence of espionage must be increased if this offence is "the consequence of a conspiracy brought to fruition." Similarly, two or more persons who commit homicide or robbery in furtherance of a conspiracy may not be charged with concurrent offences, because conspiracy is an aggravating circumstance in cases of homicide (and Art. 522 alone is applicable) as well as of robbery (and Art. 637 alone is applicable). This is to say that, in accordance with Art. 81 (2), the same circumstance may not be taken into account twice for the purpose of increasing the penalty. In other cases, related offences are deemed to have been committed. However, insofar as the commission of an offence contrary to Art. 281, for instance, almost necessarily presupposes the commission of an offence contrary to Art. 286. it is debatable as to whether both provisions apply concurrently.

3. By way of conclusion, some remarks may be made to show that neither Art. 37 (2) nor the Articles to which it refers are very satisfactory, and that difficulties will probably be encountered in applying them.

(a) It appears that some of the provisions of the Special Part which treat conspiracy as an independent offence are too narrow. For example, it is an offence under Art. 286 to combine with others for the purpose of committing an offence contrary to Arts. 281—285, which all provide for the passing of the death sentence in serious cases. Therefore, two or more persons who agree to commit an offence contrary to Art. 287, 288 or 290, which also provide for the death penalty, are not punishable with five years rigorous imprisonment pursuant to Art. 286, but with three years simple imprisonment pursuant to Art. 472. The same holds good with respect to serious military offences other than mutiny.

(b) There are cases other than those mentioned in sub-art. (2) where preparation is punishable (e.g. Arts:'254 and 607). For instance, a person who prepares a rebellion (Art. 252) is punishable under Art. 254. and the question may arise whether several persons who prepare a rebellion are punishable as co-offenders under Art. 254 or as conspirators under Art. 472 or under both Articles. On the one hand, it may be pointed out that, although Art. 60 (1) prescribes that one and the same act "against the same protected right (. . .) cannot be charged under two or more concurrent provisions of the same nature". Art. 254 provides for an offence against the State and Art. 472. for an offence against law and order and the conspirators, therefore, do not violate the same protected right; there is nothing in Art. 60

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(1) to prohibit the same preparatory act from being charged under Arts. 254 and 472. The latter provisions have one element in common, namely preparation, but Art. 472 adds something to Art. 254, namely the common design dement; were Art. 254 applicable alone, the offenders would be punished for having prepared an offence, but not for having done so in common; the combination of these two elements means that the case is one of notional concurrence as defined in Art. 82 (1) (a) and permits, therefore, the two pertinent provisions to be applied together. On tfie other hand, there may appear to be no reason why, whenever individual preparation is an offence under a given provision of the Special Part, this provision should not also apply in cases of collective preparation or conspiracy. If preparation is punishable as an independent offence, the number of participants involved is immaterial, save for the purpose of increasing the penalty in accordance with Art. 81 (1) (</)• In other words, Art. 254 is a special provision which prevails over the general provisions of Art. 472; the latter Article applies only subsidiarily, failing a more specific provision. To revert to the illustration given in the preceding paragraph, if Art. 472 applies in cases of a conspiracy to commit an offence contrary to Art. 287, 288 or 290, it is because Art. 286 is inapplicable. Similarly, if Art. 472 does not apply in cases of a conspiracy to commit an offence contrary to Art. 252, it is because Art. 254 is applicable.

It is debatable as to which of either interpretation is correct. Some support for the second one may be found in the fact that, so far as conspiracy is concerned, Aris. 269, 286 and 313 are rather unnecessary; whereas offences such as espionage, genocide or mutiny are punishable with more than five years rigorous imprisonment, those who combine to commit any of the said offences could in any event be punished in pursuance of Art. 472. The latter provision is, therefore, subsidiary in the sense that it may not be applied concurrently with Art. 269, 286 or 313, and it may appear that it should not either apply together with any other provision treating preparation as an independent offence. Yet, one cannot fail to note that Art. 472 does not apply together with Art. 269, 286 or 313 precisely because there is no concurrence at all (or rather there is a so-called imperfect concurrence), since an offence contrary to Art. 472 is a necessary ingredient of an offence contrary to Art. 269, 286 or 313, but not of an offence contrary to Art. 254 or 607.

(c) The enforcement of Art. 472 may give rise to difficulties when the common design has not been carried out, not only because the nature of this design cannot always be deduced from the acts done by the conspirators and it may, therefore, be doubtful whether the conspiracy was to commit an offence punishable with more than five years rigorous imprisonment, but also because Art. 472 requires that the conspiracy should "materialize", which is so imprecise a condition that it is uncertain from what moment the conspirators are liable to punishment. In other words, the problem is whether "the very plot is an act itself", in which case the conspirators are punishable for the sole reason that they consulted with each other, or whether something more than overt acts of consultation should be done, in which case the parties to the conspiracy should, in the terms of Art. 26, do acts, other than acts of consultation, "designed to prepare or make possible an offence by procuring the means or creating the conditions for its commission".

Although Art.-472 does not seem to require more than the doing of preparatory acts, for it would defeat its own ends should it require the conspirators to have attempted the commission of an offence, it is by no means easy to decide how much or, for that matter, how little should be done so that the said Article will be applicable. On first analysis, it may appear that Art. 472 merely perpetuates the system provided for in Art. 182 of the 1930 Code, since it regards as a conspirator a person who combines with others, not in preparing, but "for the purpose of preparing serious offences". This would tend to mean that a conspiracy already includes an agreement to prepare an offence or, in other words, that "every agreement between two or more persons to commit an offence is conspiracy" (Archbold, ***op. cit.,*** p. 1443). If this interpretation were correct, the agreement would suffice for the purpose of Art. 472 and it would be irrelevant whether serious offences have been prepared or not. The doing

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of acts other than acts of consultation would, therefore, not be an ingredient, but only evidence of the offence of conspiracy.

Yet, there is reason to believe that the view expressed above is unsound. If the existence of a common design were sufficient ground for punishing conspirators, there would be no justification at all for the requirement that the conspiracy should "materialize.** Furthemore. the agreement could seldom be proved unless it had been accompanied by something more substantial—and the conspiracy would then have materialized within the true meaning of Art. 472; the stricter the courts would be as regards evidence of the common design to do an unlawful act, the more unlikely it would be that anyone should ever be found guilty of conspiracy on the sole ground that he shared such a design with others. Therefore, it seems that the agreement suffices for the existence of a conspiracy, but not for the punishment of the conspirators, because it is a ***sine qua non*** condition of liability that they should do more than consult each other or discuss together. Although opinions may vary as to what they ought to do beyond mutual consultation, they must do it and, so long as it is not done, there is not even an attempt to commit an offence contrary to Art. 472. There is no room for an attempt, because there is no intermediary stage between what might be regarded as the preparation of an offence of conspiracy (consultation) and its completion (doing of something more than consultation, upon which the liability to punishment depends).

These explanations show how much easier it is to specify what does not amount to a conspiracy than to define this offence in a positive manner, for an answer to the question whether two or more persons have done something material in carrying out a common design cannot be given except from case to case. This implies that there may be little uniformity in the repression of conspiracies and that persons who will have advanced their design to the same extent may be treated unequally. Thus, if ***A*** and ***B*** agree to kill ***C*** and already have a gun for doing so. they are not guilty of conspiracy since they have merely agreed to do something unlawful; but; if ***D*** and ***E***agree to kill Fand do not have a gun for doing so, they may be found guilty of conspiracy if they buy a gun, though they have not advanced their common design more than ***A*** and ***B.*** In many cases, therefore, the liability to punishment may ultimately rest on the mere assumption that the doing of an act other than an act of consultation, such as the buying of a gun, indicates a greater firmness of purpose.

(d) It is controversial whether the conditions governing the application of Art. 472 also govern that of Arts. 269, 286 and 313. ***i.e.*** whether the making of an agreement, which does not suffice for the purpose of the former provision, would suffice for the purpose of the latter provisions. The answer may appear to be in the affirmative; since Arts. 269 and 286 do not define what they mean by a conspiracy, it may be concluded that the pertinent definition must be derived from Art. 472. Yet, Art. 313, on the other hand, regards as a conspirator a person who "conspires or joins with others for the purpose of preparing a mutiny**, but it does not make it a condition of liability that something more "material" should be done than joining with others, and it might consequently be argued that, in cases of mutiny, the agreement itself is conspiracy. In support of this argument, it may be pointed out that, if special provisions regarding conspiracy were made even though Art. 472 would have been sufficient, it may be either because the penalty laid down in Art. 472 appeared inadequate in cases of conspiracies to commit offences against the State, universal order and military discipline, or because it was intended that, having regard to the interests at stake, one should in those cases be less strict as regards the "mater'ilization" of the common design. In other words, it may have been felt that these special cases were so important that the law should apply even earlier than it does in the cases coming under Art. 472.

Article 38. Failure to report

(1) ***Failure to report the preparation, attempt or commission of an offence or the person who committed the offence, shall not be liable to punishment as an act of an accomplice or an accessory after the fact except in the cases expressly provided by law (Art. 267 and 344).***

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(2) *In all other cases the provisions regarding the failure to report to the authorities in the eases specified under Art. 438 shall apply.*

(3) *The above-mentioned obligations are to be construed in a restricted manner.*

Failure to report (or non-denunciation, or misprision) does not involve any particularly difficult legal point. Yet, as a preliminary, it may be asked whether the Code should deal with the problem at all, which many laws omit to do. It is often alleged that it is contrary to individual freedom to impose upon the citizens the obligation to report the commission or the perpetrator of an offence, and it is also pointed to the abuses that have occurred in the countries where private individuals were turned by law into informers. Although the liberalism of this conception deserves respect, it seems that its advocates, in giving the first place to individual liberties, are somewhat oblivious of the fact that the main function of the criminal law is to ensure order and peace for the public good (Art. 1). The citizens must contribute to the preservation of public order, and this explains why many Penal Codes of today, including the Ethiopian Penal Code, consider that civic duties H,1 *y m «•* the authori
ties those who disturb public order and tranquillity. This is not to say that the drafters of Art. 38. utilitarian or realistic as it may be, were not aware of the somewhat immoral character of compulsory denunciation; but they felt that individual freedom must in some cases be subordinated to the interests of society at large and that, although it is primarily a matter of personal conscience and choice to report offences or offenders, this freedom of choice cannot be maintained at the expense of public interests. "One must, however, avoid extending too far the obligation to inform the authorities, for which there is no justification except in cases of extreme seriousness" (records of the Codification Commission). Accordingly, Art. 38 prescribes that there is no duty to report, unless otherwise provided by reason of the nature and importance of the interests at stake.

1. A person who knows of and fails to report the preparation or commission of, or the person who committed, an offence, acts as a secondary participant, at least in the popular, if not in the legal sense of the term (since he does not necessarily intend in any way to associate himself with this offence). This participation may be in the form of assistance before the commission of the offence; by failing to disclose the preparation of an offence, he enables the principal offender to carry out his design, thereby assisting him in an indirect manner. This participation may also be in the form of assistance after the offcna; one who does not report the offence or offender allows him to escape or to destroy the traces of the offence and the police are consequently prevented from taking action immediately, with the result that the apprehension or subsequent punishment of the offender may be more difficult, if not altogether impossible.

For the reasons given above, either form of indirect participation, which consists of a mere abstention, is. as a rule, not punishable. If a person considers it to be his duty to report the preparation or commission of ah offence or the name or description of an offender, nothing prohibits him from doing so; but the Code does not bind the citizens to assist the police prior to being summoned to do so.

2. However, this principle does not apply without ~~restrictio~~ns. There are cases where an offence which is being prepared would, if committed, produce consequences so serious that its commission must be prevented at any cost, *i.e.* the prospective offender must as soon as possible be disabled from proceeding any further on the path of crime. Similarly, an offence which has been attempted or committed may be of such nature and gravity that the whole public is concerned with the punuhmept of the offender; if he is not denounced by whoever is aware of his participation in the offence, the law will or may not take its course. This is why Art. 38, which is more restrictive than corresponding provisions in foreign laws *(e.g.* Art. 62 French Penal Code), provides for compulsory denunciation in some grave cases.

(a) Sub-art. (1) mentions two provisions of the Special Part, namely Art. 267 dealing with indirect assistance given to a person who prepare* an offence against the State, and Art. 344

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penalising the failure to report the preparation of offences against the Armed Forces. Thus, the preparation of a civil war, treason, mutiny, etc. must be reported so that it can be stopped forthwith and the offence will not be attempted.

(6) Failure to report is not only punishable in the two above-mentioned situations and sub-art. (2) makes reference to Art. 438, which deals with the failure to inform the authorities in certain expressly specified cases, which are all serious cases since it is desirable that compulsory denunciation should remain of an exceptional nature. Accordingly, Art. 438 (1) ***(a)*** states that non-denunciation is also punishable if one knows and fails to report the author or the commission of an offence punishable by death or rigorous imprisonment for life, or (sub-art. (1) ***(b))*** one is under the legal or professional obligation to report certain offences, even though they are not of the gravity defined in Art. 438 (1) (a).

3. Why does Art. 38 introduce a distinction between the cases which come under Arts. 287 and 344 and those which fall under Art. 438 7 Since the offence always consists of a failure to inform the authorities, one would imagine that Art. 438 would cover every case. Yet, the distinction is justified for the following reasons.

(a) Under Arts. 267 and 344. there is a duty to report the mere preparation of an offence against the State or the Armed Forces, whereas under Art. 438 there is a duty to report, not the preparation, but the commission or perpetrator of an offence punishable with death or rigorous imprisonment for life.

(б) If Art. 38 referred solely to Art. 438, the latter, even if it mentioned preparation, would not cover all the cases in which Arts. 267 and 344 apply. For example, in certain cases of treason, the highest penalty is rigorous imprisonment up to fifteen years. Failure to report in such cases is punishable under Art. 267, but it would not be punishable under Art. 438, which is not applicable unless the offence carries the death penalty or rigorous imprisonment for life. What matters in cases of treason is not the nature or term of the penalty, but the nature of the interests in jeopardy.

(c) A person who does not denounce the preparation or the commission of an offence when he is obliged to do so by Art. 267 or 344 is regarded as an accessory before or after the fact; complicity then amounts to an independent offence against the State or the Armed Forces. But the situation is quite different under Art. 438, and a person who does not comply with the obligation to inform the authorities in the cases provided for in Art. 438, although he is deemed to have acted in a principal capacity, is not punished for the indirect assistance he may have given the principal offender by failing to report him; in other words, he is punishable for an offcnce against the administration of justice, and not for having participated in the commission of the offence which he failed to report. This difference is reflected in the punishments. According to Arts. 267 and 344, the offender is liable to rigorous imprisonment which may be up to five years (Art. 267) or ten years (Art. 344), while the highest penalty that may be imposed under Art. 438 is simple imprisonment not exceeding three months.

(d) Finally, Arts. 267 and 344 prohibit the accused from invoking certain excuses or special extenuating circumstances which, in ordinary cases, permit mitigating the penalty. For instance. Art. 80 may be invoked by the accused if he is charged with an offence contrary to Art. 438. but not with an offence under Art. 267 or 344.

4. Sub-art. (3) intends to mean that the cases provided for in Arts. 267, 344 and 438 are the only ones where failure to report is punishable, and that denunciation is not compulsory in any other case. Therefore, a person who fails to report an offence which does not come under ArV 267 or 344, or an offence which is not punishable with death or rigorous imprisonment for life, or which he has no legal' or professional duty to report in acco - dance with Art. 438, incurs no liability (see, however, Art._473 (1) (A)); but sub-art. (3) may also mean that the courts must interpret in favour of the accused the terms “to the best of his ability” (Art. 267 (11). “makes no attempt” (Art. 344 (1)\ and “without good cause” (Art. 438 (1)).

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Article 39. Accessory alter Hie (act

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Whosoever after an offence has been committed assists an offender either by hiding him or helping him to escape prosecution or punishment or by receiving the proceeds of his offence shall be punished in accordance with the provisions of the Special Part of this Code dealing with such acts (Art. 439, 454 and 647).

Instigation and assistance are the two forms in which a person may participate in a secondary capacity in the commission of an offence. Art. 39 deals with the problem of accessory after the Tact, *i.e.* the legal situation which comes into being when assistance is given after an offence has been committed.

Since acting as an accessory after the fact consists of aiding a person who has committed an offence, a special provision on the subject may seem superfluous. Should this case not be regarded as one of assistance after the commission of the offence, and should the person who so assists not be treated as an accomplice? So he was. indeed, until not so long ago, and many laws considered any person to be an accomplice who assisted the principal offender after the offence had been committed, either by hiding him or helping him in any other way to escape from punishment, or by receiving or aiding him to negotiate the proceeds of the offence. However, a different solution has been adopted in the Ethiopian Code for tbe following reasons:

(a) Tf one treats as an accomplice a person who assists the principal offender after the commission of the offence, it means that one regards him as a secondary participant: Yet, since this person plays his part only after the offence was committed, he cannot, properly speaking, act as a participant, for it is logically and chronologically impossible "to take part in something which has already been-done" *(Expost des Motifs)*.

(b) Furthermore, the traditional identification of personal assistance after the fact (hiding the offender, for example) with material assistance (receiving the proceeds of the offence) is artificial; these acts of assistance are substantially different, for they infringe on different legally protected interests.

Under Art. 39, an accessory after the fact must be distinguished from an accomplice and his liability to punishment must be determined, not according to what has been done by the principal offender, but according to what he doesTfimself after the commission of the offence. To say that a person who hides an offender assists him, is right in popular language; however, bearing in mind the legal definition of assistance, one who hides an offender docs not participate in the offence which was committed, but actually commits h'mself another offence, since he hinders the administration of justice. This is legally relevant and, if liability is incurred, it is, therefore, not by reason of the assistance, but because such assistance amounts to an independent offence.'Similarly, a person who receives the proceeds of an offence or helps the principal offender in TregUTtrrnftg them does not, thereby, participate in the offence committed by the principal offender, but he himself commits a separate offence against property. Besides, especially in cases of receiving, even the popular notion of assistance is inaccurate, for a person who receives stolen goods usually expects to resell them and to derive therefrom a personal profit; he acts in his own interest and seldom intends to assist the thief, whom he may not even know.

There arc only three cases where a person is punishable for having committed an independent offence by acting as an accessory after the fact, namely the cases coming under Art, 439 (harbouring and aiding an offender in order to save him from prosecution), Art.454 (hiding a convicted person in order to save him from the enforcement of the sentence) and Art. 647 (receiving or negotiating property which has been obtained by an offence committed by another).

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Article 40. Noo-trensmls&IMUty of **personal circumstances**

In case ofparticipation whether as principal or accomplice in an offence each of the participants shall be punished for his own act, according to the extent of his participation, his degree of guilt and the dagger which his act and his person represent to society.

Special circumstances or personal incidents or relationships which have the effect of excluding punishment or Justify its reduction or increase are not transmissible to another person. They operate to the benefit or the detriment solely of the person to whom they attach.

This Article recalls and further illustrates a principle discussed in connection with Arts. 32, 33, 35 and 36, namely that a person who participates in whatever capacity in the commission of an offence is punishable "for his own act".

1. It was mentioned before that Art. 35 of the Ethiopian Penal Code of 1930 considered and treated as a principal offender anyone, including an instigator or accomplice, who had participated in the commission of an offence. Although this solution was traditional in Ethiopia, it has not been fully incorporated in the new Code and Art. 40 is intended to show that, when several persons are involved in the commission of an offence, whatever the capacity in which they act, the liability to, as well as the extent of, punishment are not necessarily the same for all such persons, but may vary depending on the material and personal circumstances in which the offence was committed and on whether these circumstances are "transmissible" or not. In order ftilly to understand this problem, reference ought to be made to French criminal law, from which the above-mentioned Art. 35 was probably derived. Arc 39 of the French Penal Code prescribes that an accomplice is liable to the same punishment as tbe principal offender, a prescription from which the courts of France have drawn tbt conclusion that *"le complice est riput* avoir commis le fait dilictueux imputable d l'auteur principal, rrais ce fait consider* en la personne de ce dernier, caract*ris* par des qua litis qui lui •ont propres"* (Donnedieu de Vabres, *op. clt,,* p. 207). In other words, "the accomplice has no personal guilt; he borrows the guilt of the principal offender*' *(ibid.,* p. 208). The effect of this "borrowing** is that, if the principal offender acts in circumstances which influence the nature of, or punishment for, the offence committed, these circumstances affect not only the principal offender, but also the other participants. "Thisxollective effect occurs regardless of the fact that the accomplice's intention, or even his knowledge, did not apply to the circumstance in question (. . .). That there should be an agreement on the nature of the offence is a condition for punishing the accomplice, but this condition does not extend to the circumstances modifying the liability to punishment. Every criminal enterprise implies a certain risk and it would be unfair that the accomplice should not suffer the consequences thereof" *(ibid.)*. This holds good whatever the capacity in which the secondary participant acts. Thus, if ***A*** incites ***B*** to commit theft in C's house on an afternoon when be knows C to be out of town, but ***B*** commits this theft at night instead of in tbe afternoon, the fact that the offence is perpetrated at night, which is an aggravating circumstance, affects the punishment applicable to ***A*** as well as to ***B,*** for it is a risk inherent in the criminal enterprise.

2. Tbe above solution, which was implied in the Penal Code of 1930, could obviously not be followed without restrictions in the new Code, for it is irreconcilable with the rule ***nulla*** *poena sine culpa,* and more particularly with Art. 58 (3) according to which a person may not be found guilty of what he did not do or intend to do or to be done. Although a co-offender or secondary participant is not liable to punishment unless the material offender does something which is objectively contrary to the law, it does not follow that the said co-offender or secondary participant is guilty and punishable to the same extent as the material offender; be is so punishable if he is equally guilty. Since guilt is individual, each participant is to be punished "for his own act'* and "according to his degree of guilt** (Art. 40, first alinea). As was noted by the drafter in the *Expos* des Motifs,* this implies that the participants do not necessarily suffer all the consequences of the risks inherent in the venture.

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"In **a** system under which, contrary to what occurs with the erroneous theory of the borrowing of guilt, anyone, whatever the part he plays in the commission of the offence, is punishable for his own act and according to his individual guilt (...), it follows by way of natural and necessary consequence that special circumstanccs, qualifications or relations of a personal nature which have the effect of excluding, reducing or increasing the penalty are not transmissible." The second alinea of Art. 40 accordingly prescribes that these special circumstances "operate to the benefit or detriment solely of the person to whom they attach".

(a) Every offence comprises a number of ingredients the presence or absence of which affects the liability to, or nature or extent of, punishment. These ingredients consist of circumstances characterizing the doer or accompanying the commission of the offence and these circumstances, usually divided into materia) and personal circumstances, have been defined as follows: "Material circumstances are those circumstances which the law-maker takes into account because, as they influence the nature of the harm or danger of harm to certain interests protected by law, they modify the objective seriousness of the act and consequently the guilt of any participani who is aware of these circumstances. Personal circumstances are those circumstanccs which the law-maker takes into account because they affect the guilt of the participants to whom they attach without modifying the objective seriousness of the act nor, therefore, the guilt of the participants to whom they do not attach, even though they may be aware of these circumstances" (P. Piotet, *Le champ d'application de I'art. 26 CP,* in JdT 1961 IV, p. 121). In other words, *"les circonstances riel les se distinguent des circonstances personnel les en ceci qu'eltes ne caractirisent pas I'individuality propre de l'% auteur, mais qu'elles modifient la graviti objective de I'acte"* (ATF 81 IV 285, JdT 1956 IV 12).

(б) Art. 40 mentions only personal circumstances, and this implies that the material or factual circumstances as a result of which "the very nature of the offence and its intrinsic gravity change" *(Exposi des Motifs*) are "transmissible", *i.e.* affect all the persons who take part in the commission of this offence. However, this ", ansmission" does not occur automatically; in opposition to the system previously in force, and in accordance with the general principle laid down in Art. 58 (3), material circumstances affect only such participants as are aware of their existence. "Logic and equity require that these material or factual circumstances, which influence the unlawfulness of the act and not merely (like personal circumstances) the individual guilt of the doer, should have effect only with regard to the participant who knew of them, contrary to what the traditional French system provides for. If he did not know of them, he cannot have desired to act in these circumstances and it is unfair that he should be affected by them on the ground that his having agreed to act with others suffices to make him answerable for anything that is done in furtherance of this agreement because he is deemed to have agreed to run all the risks and to bear all the consequences of the venture" *(ibid.)*. Thus, the offence of theft (Art. 630) is aggravated (Art. 635) when it relates to sacred or religious objects. If, therefore, ***A*** and ***B*** together abstract certain objects which only ***A*** knows to be religious objects, ***A*** is punishable for aggravated theft and ***B*** for simple theft. The material circumstance pertaining to the nature of the property stolen is not transmissible to ***B*** because it was not known to him, and he does not "borrow" ***A'%*** guilt.

(c) When the penalty applicable to the doer may or must be increased, reduced or excluded for any reason (peculiar to him) laid down in the General or Special Part of the Code, the said reason constitutes a personal circumstance within the meaning of Art. 40, second alinea, and operates "to the benefit or the detriment" solely of the doer concerned. The penalty applicable to those who participate together with the latter in the commission of the offence may not be increased, reduced or excluded for the same reason, even though they are aware of its existence. For example, if ***A*** and ***B*** commit an offence together but it is established that ***A*** is not fully responsible for his acts, the court must, in accordance with Art. 49, reduce the punishment applicable to ***A,*** while ***B*** is fully liable to punishment; it is immaterial whether ***B*** knew of ***A's*** limited responsibility and there is no reason why the former should not be treated as a fully responsible offender simply because he acted together with a semi-responsible person. So too, if ***A*** and ***B*** commit an offence together and it is

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proved that ***A*** is a recidivist, ***A*** is liable to an aggravated punishment (Arts. 82 (1) (***b***) and 193) and ***B,*** to the ordinary punishment, even though he may have known ***A*** to be a recidivist (ATF 70 IV 125, JdT 1944 IV 104). The same principle holds good when, ***e.g.*** one of the participants is not prosecuted because he enjoys diplomatic immunity, or no complaint is lodged against him, or he is exempted from punishment on the ground of renunciation (Art. 28(1), last sentence) or for reasons mentioned in the Special Part (Arts. 380(1), 483, etc.).

(</) The expression "special circumstances" should not be taken to mean that only the personal circumstances provided for in the Special Part of the Code come within the scope of Art. 40, or that the latter provision is intended to exclude general personal circumstances common to all offences, such as responsibility or criminal fault. This interpretation would be inconsistent with the rule ***nulla poena sine culpa*** on which Art. 40 is based, since it would lead to the conclusion that when, for instance, the principal offender acts under a mistake of fact, the mistake operates to the benefit of the accomplice or, conversely, that when the accomplice, but not the principal offender, acts under a mistake of fact, the accomplice is punishable despite the mistake he commits. As has been said before, it is not required that the principal offender should be punishable, but that he should do something which is objectively contrary to the law. If, in any given circumstances, he is not punishable because he was mistaken as to the facts of the case, it does not follow that the participants who did not commit the same mistake are not punishable either.

(e) The Code provides for a number of "special circumstances or personal incidents or relationships" which in some cases justify the increase or reduction of the penalty and in other cases are constitutive elements of an ofTence. Thus, the penalty for an offence contrary to Art. 663 is increased when the offender acts for gain; in such a case, the motive is a personal circumstance affecting the penalty applicable to the doer, but not the penalty applicable to another participant; this other participant is not liable to the aggravated punishment unless he persbnally acts for gain also. On the other hand, the motive of gain is an ingredient of the offence contrary to Art. 604; as such, it affects "the unlawfulness of the act" and not merely "the individual guilt of the doer". It should follow that when a person, for gain, maintains a disorderly house, his accomplice is punishable even if he personally does not act for gain, provided that he knows the principal offender to be acting for gain. One and the same circumstance may, therefore, be transmissible or not depending on whether it is aggravating or constitutive. Yet, "one fails to see why greed should be of one kind when it is an element of an ordinary offence and of another kind when It is an element of an aggravated offence" (ATF 81 IV 285, JdT 1956 IV 12 and ATF 87 IV 49, JdT 1961 IV 122). To eliminate this inconsistency (which may be found in other cases, as in the instances where it is either an aggravating circumstance or an ingredient of the offence to make a practice of certain unlawful activities), it would, it seems, be consistent with the principle behind Art. 40 always to treat this circumstance in the same manner and to include it in Art. 40 whether it is aggravating or constitutive.

(f) Similar problems arise in relation to so-c[a]Iled ***"ddlits propres purs",*** that is, offences "which can be committed only by certain specified persons" (Art. 33) and ***"delits propres mixtes",*** that is, offences which carry an aggravated punishment when they are committed by certain specified persons. In the first case, there is no doubt that those who participate together with such a specified person in the commission of such an offence are liable to the same punishment as the said person if they are aware of his particular status and regardless of the fact that they themselves do not have this status. "For instance, only public servants can misuse official powers. In such a case, it is clear that anyone who intentionally acts as an instigator or accomplice is punishable in accordance with the general principles of the Code and may not invoke the rule (which is meant to apply in different situations) that per-

onal circumstances are not transmissible" ***(Expos* des Motifs).*** Thus, if ***A,*** knowing that ***B***

a public servant, incites him to commit an offence contrary to Art. 426, Art. 33 demands that ***A*** should be punished under Art. 426 even though he is not a public servant. In the

cond case, however, it would appear that those who participate together with a person

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having a particular status in the commission of an offence which is punishable more severely if committed by such a person are not liable to the same punishment as that person, since his particular status influences only the penalty, but not the objective seriousness of the offence. For instance, an offence contrary to Art. 387 (forgery of public documents) is punishable with ten years rigorous imprisonment (sub-art. (1)); but the punishment is rigorous imprisonment from three to fifteen years when the offence is committed by a public servant (sub-art. (2)). If ***A*** incites ***B,*** a public servant, to forge a public document, it would seem that ***A*** should be punished under sub-art. (1) and ***B*** under sub-art. (2) of Art. 387. The status of public servant would, therefore, operate to the detriment of all the participants in certain cases and not in others. Yet, "when a person who is not a public servant incites a public servant to commit a special offence *(dtlit **propre***), the guilt of the instigator is unchanged, whether the status of public servant is an ingredient or an aggravating circumstance of the offence; there is no reason why this status should not have the same effect in both cases" (ATF 81 IV 285, JdT 1956 IV 12). It is accordingly suggested that the status of public servant should always be deemed to be a material, and not a personal circumstance. For "in cases of offences against official duties, it is not the personal quality of being a public servant M^uch in itself leads to an increase of the penalty; it is rather the fact that these offences are committed through a misuse of the official powers which the State entrusts to its servants. (.. .)• A forgery committed by a public servant is objectively more serious and effectual than a forgery committed by a person not being a public servant" (*ibid.**).*** If this status is deemed to affect the seriousness of the offence, and not the degree of individual guilt, it must operate to the detriment of all the partvijjants who know of it. The reasons behind Art. 40 would, it teems, entitle the courts of Ethiop » to apply this line of reasoning to the position as under the Ethiopian Code.

IL Participation in offences relating to publications [Arts. 41—47]

Few Codes contain rules regarding the liability to punishment of those who participate n an offence committed through a publication, and the whole problem of so-called press offences is usually dealt with in special laws. Yet, one is generally agreed that participation in these offences is not subject to the same principles as participation in other offences. As was mentioned during the debates of the Codification Commission, special rules are required *"d **cause** de **l'anonymat it des ndcessitts et particularity de la mar it re, l'infraction ayant** un **car act ire en quelque sorte commun ou collectif".*** A press offence normally has wider repercussions than another offence and as such calls for swifter repression; a number of difficulties may, however, be encountered in relation to prosecution and punishment because so many persons may be involved in the commission of the offence that its true author may not be discovered forthwith or at all, the more so since he is entitled to remain anonymous (Art. 43
(l) (a))and coercive steps may not be taken in order to discover him (Art. 44, first alinea). It is mainly for practical reasons, therefore, that special rules are desirable, which in Ethiopia will not be found in subsidiary legislation, but in the Code, for it was felt advisable that the Code, as it contains the ordinary principles governing participation (Arts. 32 ***et seq.),*** should also provide for the exceptions thereto (Arts. 41—47).

Although the need for different rules in press matters is very generally recognized, there is little agreement as to their nature. To quote again the records of the Codification Commission, "two main systems have so far been followed in this field: either the French system of the scapegoat ***(ridacteur responsable)*** or the Belgian system of successive liability (***responsa- biliti en cascade).*"** It may be noted that the French system referred to in this passage is the one introduced in 1881, which was modified in 1952 by a law replacing the liability of the scapegoat ***{i.e.*** a person whose only function in the newspaper is or may to be to incur liability even though he may have taken no part in the offence) by a system similar to that provided for in the Belgian law of 1831 which sets out a list of persons successively liable ***(i.e.*** each of them is punishable if the one who precedes him in the list is not punishable). These systems, as also the former German system of so-called ***peines de negligence,*** "seldom

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permit punishing the real culprit and are, therefore, inconsistent with the principles of **modern** criminal law. There exists a third and better system which combines and adapts the French and Belgian ones, and this is the system of the Swiss Penal Code, which has been adopted in the Ethiopian Penal Code. In the first place, it is always the author, therefore the real culprit, who is to be punished, if he is known and amenable to justice. Failing the author, the responsible editor will be punished, if the publication is a periodical one; in the case of a non-periodical publication or of an offence committed by other means of diffusion, the system of successive liability will apply, with the result that the person guilty of the offence of publication or diffusion will be punished" (records of the Codification Commission).

Thus, the Codification Commission adopted the Swiss system in the belief that it enables tbe courts to punish the real culprit and that .ie rules laid down in Art. 27 of the Swiss Penal Code are "special" so far as concerns participation, but not criminal guilt. This is to say that the Commission assumed that none of the persons declared successively liable for a frees offence would be punishable unless he were found guilty of "the offence of publication Or diffusion'*. It appears, however, that this belief is erroneous and that the Swiss system, no more than the Belgian or French one, prohibits a person (other than tbe author himself) from being punished even though he is not guilty. As Logoz *(op. clt.,* p. 113) notes with respect to the said Art. 27 of the Swiss Code: "When the real author of the unlawful writing cannot be prosecuted, the law regards as being successively punishable, in an order which it specifies, various other persons who have taken part i the preparation, publication or even sometimes the diffusion of this writing. Each of these potential culprits is punishable *by virtue of* ***the*** *law* if the one who precedes him on the legal list cannot be prosecuted. (. ..). In a Penal Code based on the principle *'nulla poena sine culpa',* provisions such as those of Art. 27 may seem questionable. One must, however, confess that these rules are required in practice by the exigencies of repression in this particular field."

This quotation suffices to show that Art. 27 of the Swiss Penal Code actually departs from the fundamental principle *nulla poena sine culpa* since, when the author himself is not punishable^ those who follow him on the "legal list*' are punishable for the sole reason that they are ^n this list. It-is important to bear this point in mind because Arts. 41—47 of the Ethiopian Code, though inspired by Art. 27 of the Swiss Code, basically differ from tbe latter provision in that the special rules on participation which they contain apply subject to the ordinary rules on criminal guilt (see Art. 43 (2)).

Article 41. Principle

(1) *In the case of offences relating to publications and wl*h a view to ensuring freedom of expression while preventing abuse, the exceptions to the ordinary principles regarding participation in an offence provided hereinafter shall apply.*

(2) *Offences relating to publications are those which are committed by means of printed material, posters or pictures, cinematography, wireless, television or tele-diffusion, or any other means.*

*They may be committed against the honour of other persons, public or private *afety or any other legal object protected by criminal law and are committed only where publication is completed.*

1. An offence relating to publications differs from an ordinary offence, not by reason of its nature, for there are really no press offences as such, but by reason of the modalities of its perpetration, and no offence may be deemed to relate to publications unless two conditions are present.

(a) A certain technical process or device should be used in the commission of the offence (see ATF 74 IV 129, JdT 1948 IV 136). Art. 41 (2), first alinea, gives some illustrations as to the means that may be utilized, though it does not set out a complete list of these means, for scientific achievements might soon render such a list out of date. Thus, generally speaking.

offences relating to publications are those which are committed through “printed material, posters or pictures, cinematography, wireless, television or tele-diffusion or any other means** (impliedly: of a similar nature). In other words, if any means of “recording, reproduction, emission, communication or projection, whether graphical, visual or aural** (Art. 575) are used for the purpose of committing an offenoe, this offence must be held to relate to publications within the meaning of Art. 41 (2). It follows that there is no offence committed by a publication when, for instance, a libelous manuscript is circulated.

(b) So that Arts. 41—47 be applicable, it is not sufficient that the offence should *be committed through publications as defined above, and regard must in addition be had to the nature of this offence. Admittedly, this requirement is not clearly implied in Art. 41. Quite the contrary, sub-art. (2), second alinea, is very general and gives one the impression that the kind of offence committed is immaterial since it states that the said offence may be contrary to “any legal object protected by criminal law**, including honour and public or private safety. Yet, it seems that the only purpose of this wide prescription is to indicate that, although special rules were first enacted so that prompt action could be taken upon injuries to the honour committed through publications, for these offences are the most common ones, Arts. 41—47 do not apply only to libelous publications, but to other unlawful publications also. The question then is, which publications? Indeed, the commission of many offences may be attempted through a publication, and there is hardly any offence the commission of which cannot be at least incited through a publication. Are Arts. 41—47 applicable in all these cases? The answer is definitely in the negative, for the following reason.

Art. 41 (2), second alinea, prescribes that an offence relating to publications is committed "only where publication is completed*’. On the face of it, this clause means that the subject- matter of the offence should be published and that the offence is not committed unless, *e.g.* a newspaper is put out or a film is shown. However, there is little doubt that the said clause is intended to mean much more than that, though its wording is defective. In order to find out its true meaning, reference must be made to the provision which inspired it, namely Art. 27 (1) of the Swiss Code, which mentions an offence “*consommte par la publication*'*. In other words, that the *publication* should be completed does not suffice, and it is required that the *offence* itself should be completed by the publication. Some support for this interpretation will be found in the records of the Codification Commission, during whose debates an allusion was made to *"le dilit consommi par la publication",* as well as in Art. 42
(1) , which refers to “the text (.. .) the publication of which constitutes the offence**. Moreover, the drafter himself wrote : “It is impossible to enumerate in the law all the offences relating to publications. A general test will be found in the Swiss Code, according to which an offence of this kind should be, not only committed, but also completed by the publication. This test, which has been inserted in the Ethiopian Code, too, will make it clear that the ipedal provisions (of Title II, Chapter IV) apply only when an offence actually is completed, and not merely incited or attempted, by the fact of publication*’ *(Expost des Motifs).*

It is apparent that this interpretation considerably limits the scope of application of Arts. 41—47, since there are not so many offences which meet the requirement implied in Art. 41
(2) , second alines. In each and every case, regard must be had to the ingredients of the oflcnce committed to see whether anything more than publication should be done to complete the offence. Thus (the illustrations which follow are taken from Logoz, *op. cit.,* pp. 114115), when a newspaper publishes an article the contents of which show that a person is trying to. obtain money by false pretences or to blackmail someone. Arts. 41-47 are inapplicable, for an offence contrary to Art. 656 or 669 is not completed by the mere fact of publication; in the first case, it is required that a person should “act in a manner p re judicial to his rights in property” and, in the second case, that he should “purchase silence to the detriment of his estate’’. But Arts. 41—47 will apply to offences such as disclosure of secret (Arts. 404, 405, 407, 409 and 444), public provocation to a crime (Art. 474), spreading of false rumours (Art 480), defamation and calumny (Art. 580), attack on snotber*s credit

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(Art. 671) or unfair competition (Art. 673). As for incitements and acts of assistance, it is debatable as to whether they can be completed by a publication, but there is a tendency to consider that, since an instigator is not punishable unless the incited offence is attempted, and since it is not this offence which is completed by the publication, an incitement or act of assistance may not amount to an offence relating to publications unless it is regarded by law as an independent offence. This case is not to be identified with that where a person acts as an instigator or accomplice in the commission of an offence relating to publications.

2. When an offence relating to publications is committed, an exception is made to the ordinary provisions governing participation. As was mentioned before, it seems that the law-maker did not intend to depart from basic principles other than those laid down in Arts. 32 *et seq.,* and this is made quite clear in sub-art. (1) of Art. 41. The purpose of the said exception is to ensure "freedom of expression while preventing abuse". It is, indeed, a traditional ingredient of the freedom of the press, which in Ethiopia is guaranteed by Art. 41 of the Constitution, that the author may remain anonymous. This privilege, however, must not result in impunity (which would constitute an "abuse"), and it is, therefore, necessary to specify the persons who will incur liability if the author cannot be punished. This means that Arts. 41—47 are expected to be more efficient than Arts. 32 *et seq.,* not as regards deterrence, but only as regards prosecution and punishment.

Article 42. Principal liability

(1) *The author of the text, notice, poster, picture or other publication, the publication or diffusion of which constitutes the offence, or anyone who adopts them as his own and forwards them for publication or diffusion with a criminal intent, shall be guilty of an offence.*

(2) *In such a case the rules governing participation whether as a principal or accomplice shall apply.*

The characteristic element of the special rules regarding participation in offences relating to publications is the distinction between principal liability (Art. 42) and subsidiary liability (Art. 43). In opposition to ordinary cases of participation, where principal and secondary participants may be involved together, the provisions of Arts. 42 and 43 apply alternatively in that “press matters", as they are called in the heading of Art. 43, do not raise concurrently questions of principal and subsidiary liability. There is no subsidiary liability except where no principal liability is incurred, which means that Art. 43 is not applicable whenever an offence is committed through a newspaper and the like, but when, and only when, the author is not amenable to justice or the publication was made without his knowledge or against his will (Art. 43 (1)). Thus, under Art. 42 (I), the rule is that "the author of the text, notice, poster, picture or other publication" is principally liable and should be prosecuted and punished, since he is “the real culprit**. In such a case, not only he, but anyone who has adopted the said text or other publication as his own and has forwarded it for publication or diffusion, while he was aware of its unlawful nature, or who has assisted the author in the commission of the offence, is punishable in pursuance of the ordinary provisions governing participation “whether as a principal or accomplice”.

Art. 42 (1) is much wider than Art. 27 (1) of the Swiss Code, which prescribes that the author, and he alone, is principally liable for the offcnce (“*I’auteur de l'icrit en sera seul responsable*”). Yet, the word *"auteur"* as used in the said Art. 27 (1) has been interpreted extensively by the Swiss Federal Court and the *Exposi des Motifs* indicates that the draftsman had this interpretation in mind when he inserted in Art. 42 (I) the clause “or anyone who adopts them as his own”. To throw light upon the meaning of this clause, it is pertinent, therefore, to quote the Swiss judgments in question. The Court ruled that “in usual language, the author of an article published in a newspaper is the person who conceives it and gives it the form in which it is intended to be published, whether by writing it himself or by dictating it. It follows that one must regard as an author, within the meaning of Art. 27 (1) of the

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Penal Code, a person who causes an article to be written by a third party and then gives it to the press as though it expressed his own ideas, or a person who in any other way gives himself out as being the author of the article and assumes liability for it. Only an extensive definition of the author takes account of the peculiar situation which led to formulating, with respect to liability for press matters, special rules creating an exception to the ordinary provisions of the law. A person who in his own name gives the press a writing reflecting his own opinion or otherwise pretends to be the author of the article may not subsequently avoid his criminal liability and place it on the writer by denying having written this article and thus compelling the injured party as well as the writer in question to prove, which may be almost impossible to do, that in spite of his denial it is actually he who wrote the article" (ATF 73 IV 218, JdT 1948 IV 5, subsequently confirmed by ATF 82 IV 71, JdT 1957 IV 31).

In the above situation, if the author *(i.e.* the person who acted in any of the capacities described in Art. 32 (1)), has been assisted in the commission of the offence, the accomplice will be liable to punishment pursuant to Art. 36 and. although Art. 42 (2) does not say so, it seems that if the author has been incited to commit the ofTence, the instigator is punishable under Art. 35. However, bearing in mind the purpose of the rules regarding participation in press matters, it seems that a certain amount of care must be exercised in giving effect to the extensive conception of liability implied in Art. 42. This provision is worded in such a manner that it might be argued that the editor, for instance, is punishable in any event (i.e. even though the author is punished) if he adopted the publication as his own or acted as an instigator or accomplice in the commission of the offence. Thus, he might be regarded as principally liable by virtue of Art. 42, though according to Art. 43 (1) he is only subsidiarily liable.

To resolve this apparent contradiction, some attention must be given to Arts. 43 and 46. Under Art. 43, the chain of liability is as follows: (1) the author; and (2) the manager or responsible editor, and, in cases of non-periodical publications, (1) the author; (2) the publisher; (3) the printer; and (4) the vendors or distributors, provided that the person mentioned in (2) is not answerable except in default of the person mentioned in (I), nor the person mentioned in (3) except in default of the person mentioned in (2), and so on. Furthermore, Art. 46 prescribes that, if one of the persons mentioned in the list is punished, those who follow him are not punishable. This would lead one to conclude that, when principal liability is incurred under Art. 42, the application of the ordinary provisions regarding participation is possible only in so far as the participants thus involved are not persons subsidiarily liable under Art. 43 or 45. Thus, the person who ***e.g.*** corrects the proofs of a libelous article may be punished as an accomplice if the conditions laid down in Art. 36 are fulfilled and he is not the manager, responsible editor, publisher, etc. It seems that a different interpretation would not only render purposeless the distinction between principal and subsidiary liability, but also be inconsistent with Art. 46; it would, indeed, create a joint instead of a successive liability with the result that the author, manager, editor, etc., would all be punishable together. In support of this view, a judgment of the Swiss Federal Court may be quoted, which reads as follows: ''As a general rule, the editor, the person in charge of advertisements and the printer incur only a subsidiary liability, when the author cannot be found; all other persons engaged either in the printing or in any other branch of the editing process may not be prosecuted. These special rules create an exception to the ordinary provisions of the Code (. ..). But this exception does not have wider implications (. . .). In particular, the general provisions of the Code regarding participation are applicable when an unlawful act is done outside the realm of printing or editing. Therefore, one who incites or assists the author is punishable also. There is no reason why incitement and assistance should not be punished in press matters if the instigator or accomplice is not answerable under the special provision regarding liability in press matters. (. ..). A person who does not concern himself with the preparation and publication of a writing may be punished as an instigator or accomplice" (ATF 73 IV 65, JdT 1948 IV 2). This would tend to show that a person may

be punished for having acted as an instigator or accomplice only on the condition that he is not among the persons declared by law to be subsidiarily liable for the offence. A similar view is expressed in another judgment given by the same Court: "According to the general rules regarding participation, the editor who knowingly allows an offensive article to be published in his newspaper should be punished therefor together with the author. Since, however, the law entitles him to hide behind the author, the corollary to this privilege is that he must alone incur liability for the publication if he refuses to name the author and thereby prevents his discovery" (ATF 76 IV 65, JdT 1950 IV 68); to the the same effect, see Art. 43 (1) ***(a)).*** This makes it quite clear that the editor, even though he has participated in the offence, may not be prosecuted and punished as a co-offender, instigator or accomplice if the author himself is punishable (see also Logoz, *op. cit,* p.115, para. 4).

Article 43. Subsidiary liability In press matters

(1) *If the person who committed the offence cannot be found, or if the publication was made without the author's knowledge or against his will or if he is not amenable to Ethiopian Courts, the following persons shall be regarded as guilty and liable to punishment by the fact of the publication or diffusion:*

(a) *in the case o f a printed periodical publication (newspaper or magazine), the manager or the responsible editor of the printed publication unless he prefers to name the author who shall then be directly answerable for the offence within the meaning of the foregoing provision;*

(б) *in the case of a non-periodical or occasional printed publication, the publisher, or, failing such, the printer or, finally, failing such, the vendors or distributors of the publication.*

(2) *In any case, the offender^guilt shall be viewed in accordance with the relevant provisions of this Code.*

As has been mentioned before. Art. 43 creates a chain of liability and specifies the persons who will be held subsidiarily liable if no principal liability is incurred by the author himself pursuant to the provisions of Art. 42.

1. Prior to going through this list, a few words need be said regarding the conditions on which Art. 43 is applicable.

(a) None of the persons mentioned in sub-art. (1) may be punished unless "the person who committed the offence" *(i.e.* the author as defined in Art. 42) cannot be found or, if found, is not guilty of the offence in that he did not participate therein because the publication was made without his knowledge or against his will, or, whether or not the publication was made with his knowledge and consent, he ii not amenable to Ethiopian courts, for ~~in~~stan~~c~~e because he enjoys diplomatic immunity. If the author is not punished for any other **rea**son, *(.e.g.* because he is irresponsible) Art. 43 is, it seems, inapplicable.

(b) Since the said persons are liable subsidiarily, and not jointly with the author, it follows that efforts must first be made to discover the author or secure his appearance before an Ethiopian court (which, incidentally, may be impossible if he is not on Ethiopian territory, since press offences are normally not regarded as extraditable offences). Thus, when the offence is punishable on complaint *(e.g.* defamation or unfair competition), the injured party may not at his option institute proceedings against the author or editor; if he knows the author, he must make his complaint against him. As has been said, "so that the editor may be punished', it does not suffice that the author is not known. The court must be satisfied that the conditions governing subsidiary liability are fulfilled.** (Incidentally, this does not mean that the injured party may not lodge a complaint against the editor except after having ascertained that the author himself is not amenable to justice; see ATF 80 IV 145, JdT 19S5 IV 34).

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"Admittedly, if the injured party alleges that the author could not be discovered, the court should not require strict proof of this allegation. (. . .). However, the injured party who does not know the author may forthwith ask the editor to name him. If the editor refuses to do so, the injured party need not require an official investigation and await its outcome; for there is then nothing to prohibit the editor from being punished. It is immaterial whether the editor *expressly* states that he will not name the author and that he will assume liability, or whether he merely avoids the question. In either case, the result is the same: the author remains unknown. The editor is liable in lieu of the author whenever he does not comply with a request to name the latter. To this principle, there is, however, one exception: the editor who does not name the author incurs no liability if there are reasons to believe that the inured party already knows who the author is. But it is not sufficient that the injured party should merely suspect someone. There must exist serious presumptions having the force of evidence" (ATF 76 IV 65, JdT 1950 IV 68; see also ATF 70 IV 145, JdT 1945 IV 98). There is little doubt that this reasoning holds good even though the offence is not punishable on complaint. For, inasmuch as "the prosecution of press offences would be hindered in a manner both inacceptable and contrary to the spirit of the law if the injured party were obliged to initiate investigation proceedings" (ATF 76 IV 1, JdT 1950 IV 104), there seems to be no good reason for requiring the public prosecutor to do his utmost to discover the author when the offence is not punishable on complaint, the more so since his efforts may be vain, having regard to the provisions of Art. 44, first alinea.

2. When the conditions for applying Art. 43 are fulfilled and the offence is a "press offence" (as distinguished from an offence committed through "other means of diffusion*' within the meaning of Art. 45), the chain of liability varies according to the nature of the publication (as regards civil liability, see Art. 2135 Civil Code).

(a) With regard to periodical publications, such as daily, weekly or monthly newspapers or magazines, the person who will be liable for the offence is "the manager or responsible editor**. Although two designations are used, the draftsman probably had only one person in mind, the *"ridacteur signant* ***cOmme*** *responsable"* (Art. 27 (3), first alinea, of the Swiss Code). Were it not so, sub-para. (***d***) would in all likelihood have read like sub-para. ***(b)***$_{9}$ that is, "the manager or, failing such, the responsible editor'". Therefore, it seems that, if behind a given publication there are both a manager and a responsible editor, only one of them may be proserated, ***i.e.*** the p* rson nominally designated as the editor by the publication itself, which designation appears on Ethiopian periodical publications. In any event, the term "responsible" is a qualifying one, and the person who is in fact charged with issuing the publication, rather than the manager, if a different person, should be prosecuted when no person is nominally designated as the editor (see, however, para, (c) ***infra***).

The editor may, however, relieve himself of his subsidiary liability by disclosing the name of the author, which tends to show that, as was mentioned in relation to Art. 42, they cannot # be liable together even though the editor may have adopted the publication as his own. Thus, the editor may not be compelled to reveal who has written the libelous article, for instance; he may reveal it if he chooses to do so. In the above-quoted ATF 76 IV 1, the ***raison (Pitre*** of this rule has been explained as follows: "When the question arose as to what rules to insert in the Code on liability in press matters, a compromise had to be found between the need to protect the injured party, on the one hand, and the principle of the freedom of the press and its right to anonymity, on the other hand. In order to fulfil its mission, the ~~press~~ may have to call on contributors whose name it is at liberty not to disclose. This right to remain anonymous has been guaranteed to the press because the press ***itself*** agreed, in return, to designate a responsible editor. According to this system, it is for the editor to decide whether he will name the author or incur liability in his stead." But the editor will not be immune from liability simply because he discloses the author's name, and it is necessary that the author, who becomes "directly answerable" in consequence of this disclosure, should actually answer for the offence. Thus, the editor remains liable if he gives the name of the

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author but the latter is not amenable to Ethiopian courts or it is proved that the publication was made without his knowledge or against his will, since the Conditions governing subsidiary liability are present. Furthermore, if proceedings are instituted against the editor after he has refused to name the author, it seems that the editor remains liable and the proceedings are continued against him even though the author is subsequently discovered, whether because the editor names him or in any other way. "The editor is at complete liberty either to name the author or to incur liability in his stead, and it would be contrary to this system to provide that the editor may not be prosecuted except after an investigation has been held with a view to discovering the author; but it would equally be contrary to the spirit of the law, were the author subsequently discovered, to quash and discontinue, even in the case of offences punishable on complaint, proceedings already instituted against the editor and which might be nearly completed or in which judgment would already have been given. It must rather be held that the editor who, by withholding information, compels the injured party to invoke the editor's subsidiary liability, may not thereafter avoid this liability" (ATF 82 IV 1, JdT 1956 IV 130). It is debatable as to whether the same principle applies when, ***e.g.*** the author, whose name the editor disclosed but who was not prosecuted because he was not in Ethiopia, is found in Ethiopia after proceedings have been instituted against the editor.

(b) With regard to non-periodical or occasional publications, such as books, leaflets or pamphlets, the first person to be subsidiarily liable is the publisher, the second one is the printer and the third one, tlv* seller or distributor. It goes without saying that it is compulsory to follow this order.

It may be noted that, unlike sub-para, ***(a),*** sub-para. (***b***) does not provide that the publisher, printer or seller is liable "unless he prefers to name the author". Only the regular press has a right to anonymity, as is shown by Art. 44, first alinea, which prohibits "ordinary means of investigation or lawful coercion" from being used in order to discover the author of a writing appearing in a periodical publication. This means that the publisher, printer or seller is not legally entitled to substitute himself for the author. Unlike the editor of a periodical publication, he does not become liable as soon as he refuses to name the author, and the latter should as far as possible answer personally for the offence, which he will in a majority of cases, for he can usually be discovered without difficulty since the prohibition from using ordinary means of investigation or lawful coercion does not extend to occasional publications.

(c) In opposition to Art. 27 (4) of the Swiss Code, Art. 43 (1) makes no specific provision regarding advertisements, although they are often handled by a particular section of the editorial staff. Therefore, it seems irrelevant for the purposes of Art. 43 in which part of a newspaper or magazine a text or notice appears; the persons mentioned in sub-art. (1) are subsidiarily liable for unlawful advertisements regardless of the fact that a different person is in charge of publicity, and the latter person may not be held to be liable under Art. 43, though he may, in appropriate cases, be liable in pursuance of Art. 42. Vet, the ***Exposi des Motifs*** suggests a different solution. In his comments on occasional publications, the drafter writes : "There is no need for special rules concerning advertisements, since the principle of successive liability will apply; but, if a person is in charge of advertisements, he will be the first one to incur liability, failing the author, and the publisher or printer will be liable only in his default." There is no reason why this solution should not apply with regard to advertisements appearing in periodical publications also. As a matter of fact, it can more easily be implied in para, (a) than in para, (b) of Art. 43 (1) as only para, (a) mentions " the responsible editor." This may well be taken to mean that, when an unlawful advertisement is published in a newspaper and the author is not discovered, the manager is liable only when there is no editor responsible for advertisements or this editor himself cannot be found.

It may also be noted that, although Arts. 43 and ***44*** are silent on this point, the drafter's intention was that the provisions enabling the editor to invoke the secrecy of writings and to

substitute himself for the author should apply only with respect to ** *la partie ridactionnelle et substantielle de I'imprimd, les articles, et non pas aussi la partie publicitaire et les annonces, ou il n'y a pas de raison de prtvoir la mime protection*" *(Exposi des Motifs)*. In Ethiopian lavy like in Swiss law, ordinary means of investigation or lawful coercion may, therefore, be resorted to with a view to identifying the author of an unlawful advertisement and the prohibition laid down in Art. 44, first alinea, does not operate even though this advertisement appears in a newspaper or other periodical publication.

3. Sub-art. (2) of Art. 43 prescribes that the offender's guilt must in all cases "be viewed in accordance with the relevant provisions of the Code", which means that none of the persons subsidiarily liable under sub-art. (1) who is capable of acting in a guilty manner may be convicted of a press offence unless he is found guilty thereof. On this point, Art. 43 completely separates itself from the Belgian system, under which the said persons are liable *de par la loi*", and it seems that sub-art. (2), though ensuring compliance with the constitutional rule that punishment is personal, may defeat the whole purpose of sub-art. (1). Admittedly, sub-art. (1) states that the editor is "liable to punishment by the fact of publication or diffusion ", thus suggesting that " failing the author, the editor is punishable for his own act, that is, he is deemed to have committed *''un ddlit de publication*' and is punished on that ground, and not for the deed of the author " *(Exposi des Motifs*). The reason, therefore, why the editor is liable under Art. 43 even though he should be found not guilty of libel, for instance, is because he allowed its publication. However, this nuance does not seem to be of much assistance since, so far as concerns this "*dilit de publication"*, the editor's guilt will in any event have to be "viewed in accordance with the relevant provisions of the Code." Furthermore, if the true meaning of Art. 43 (2) is that the editor is liable and punishable for his own act and not for the deed of the author, one does not quite understand why this liability is only subsidiary nor how he can relieve himself thereof by naming* the author.

(a) By prohibiting the court from making exceptions to the general principles governing criminal guilt, sub-art. (2) considerably enlarges the scope of the terms "failing such" which appear in sub-art. (1), since it enables any person subsidiarily liable to invoke all the defences, including those available to the author himself, such as to show that he is not guilty. Thus, the rule that the printer of a book is liable "failing the publisher" should be taken to mean that he is' so liable, not only when the publisher is not known or amenable to an Ethiopian court, but also when it is established that the publication was made without the.publisher's knowledge or against his will. However, it appears that, if lack of intent or knowledge should be an absolute defence, many cases would occur where nobody would be liable at all. Assuming, for instance, that something is published in a newspaper without the editor's knowledge and the editor does not know the author, the editor should answer for the offence according to sub-art. (1) (***a***), but sub-art. (2) would preclude his conviction, and the offence would remain unpunished since no other person is subsidiarily liable in cases of periodical publications. It might even be argued that, if something is published against the editor's will and he refuses to name the author though he knows him, the editor is not guilty of the press offence since the publication was made without his consent.

(б) Furthermore, although it refers quite generally to the ordinary provisions regarding guilt, sub-art. (2) in fact requires that the person declared to be subsidiarily liable should have acted with full knowledge and intent. For, if one examines the offences that may be completed through the press, one will find that most of them are punishable only if they are intentionally perpetrated. Except in some instances, which are likely to be rare in practice (such as breaches of secrecy), negligence is not penalized. Therefore, were it proved that a libelous article was published as a result of the editor having failed to check the contents of the newspaper before it-was published, the editor who should refuse to name the author would not be punishable (Art. 59 (2)), because Art. 580 does not provide for the punishment of defamation by negligence (as regards civil liability, see in particular Art. 2049 Civil Code).

(c) Bearing in mind the purpose of Arts. 41--47, it seems difficult to reconcile special provisions on participation with the ordinary provisions of the Code dealing with criminal

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guilt. This is not to say that it is altogether irrelevant whether a person subsidiarily liable acted intentionally or negligently; this may be of importance in particular with a view to implicating other participants in accordance with Art. 42 (2). However, one may be inclined to think that lack of knowledge should in no case constitute a good defence, and to agree, therefore, with the following ruling of the Swiss Federal Court: "The responsible editor incurs the liability provided for by Art. 27 (3), para. 1, of the Code when he allows an unlawful article to be published without scrutinizing it; he may not avoid his liability by invoking the confidence he had in his correspondent or by alleging that he did not read the article" (ATF 82 IV 71, JdT 1957 IV 31). As for the a'legation that a publication was made against the will of the person subsidiarily liable, it might be held to be a valid defence in all cases other than those where the editor of a periodical publication refuses to disclose the name of the author. Yet, tbe present tenor of Art. 43 does not support any of these views.

Article 44. Guarantee of the secrecy of writings

In the case of offences committed by means of a newspaper or a periodical publication, if the manager or responsible editor refuses to name the author and invokes the secrecy of writings, the ordinary means of investigation or lawful coercion may not be resorted to in order to discover the author of the writing.

An exception is made, however, in the case of attacks against the safety of the State, the Emperor, its constitutional bodies or its military forces as defined in Book III, Title I of the Special Part of this Code or in special laws relating thereto {Art. 248—272).

In connection with Art. 43 (1) (a), reference was made to the principle of ‘‘secrecy of writings** laid down in Art. 44, which latter provision calls for the same comments as Art. 27
(3) , second alinea, of the Swiss Code: “The law thereby recognizes the right of the periodical press to remain anonymous, and the secrecy of writings which is a corollary to this right. These privileges are claimed by the press in the name of the freedom of the press. Periodicals, especially daily political papers, have, it is said, to fulfil a mission of free information and even, as a rule, of free criticism for the public good. But this task cannot be carried out unless anonymity and the secrecy of writings are respected. The press, however, is willing to pay, so to say, for this privilege. It pays for it by placing at the disposal of the authorities someone —the responsible editor—who will be liable in lieu of the author of the unlawful article if the author’s name is not disclosed” (Logoz, *op. cit.,* p. 116; see also ATF 76 IV 1, JdT 1950 IV 104, quoted hereinbefore). In other words, if the press is to be free at all, it must be entitled ♦a anonymity so that pressure is not brought to bear upon, nor retaliatory action taken against, newspapermen. Accordingly, the persons responsible for the publication of a periodical have the right not to name their collaborators and any attempt to pierce this veil of anonymity is unlawful, for it amounts to encroaching upon the freedom of the press. Hence the prohibition in Art. 44, first alinea, according to which “the ordinary means of investigation and lawful coercion may not be resorted to in order to discover the author of the writing.”

1. The secrecy of writings, which may not be invoked except in relation to writings (other than advertisements) published in a periodical publication, raises two questions: what are these means of investigation and coercion the use of which is prohibited, and in whose favour does the prohibition operate?

(a) As regards the first question, it seems that Art. 44 is not sufficiently specific, this being probably'attributable to the fact that it was drafted at a time when the Criminal Procedure Code was not yet in force. It is doubtful, therefore, what exactly may or may not be done in investigating a press offence. However, the wording of Art. 44, first alinea, would appear to support the following conclusions. Ordinary means of investigation or coercion are excluded only in so far as they are used for the purpose of discovering the author of the writing. Thus,

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the office of a newspaper or the premises where a publication was printed may not be searched (Art. 32 Criminal Procedure Code) in order to find out who has written the unlawfti! text; the editor, if he refuses to name the author, may not be prosecuted for an offence contrary to Art. 439 or 442. as the case may be. But, if the author is known, whether because he was named by the editor or otherwise, then the prohibition ceases to operate and ordinary means of investigation or coercion may be used to build the case against the author.

From a practical point of view, if the author is not known, the first step in.the investigation should probably be to ask the editor whether he is willing to name the author; bearing in mind that the Criminal Procedure Code does not distinguish between "ordinary** and other means of investigation, and having regard also to provisions such as Arts. 415 and 416 of the Penal Code which might apply when the prohibition laid do\Vn in Art. 44 is infringed, the police authorities seem to have no alternative. If the editor discloses the author's name, the investigation will continue in the usual fashion against the author who will, subject to the provisions of Art. 43, be directly answerable for the offence; if the editor does not name the author, the investigation will be closed as against the latter and continue as against the former, who may not at any stage be compelled to name the author and who remains liable even though the author is subsequently discovered.

(6) Art. 44 is not sufficiently precise either as regards the second question. However, since the prohibition is as general as it could possibly be, it seems that ordinary means of investigation and coercion may not be used against anyone, whether or not in any way associated with the publication, so long as they tend towards discovering the author.

Thus, not only the editor, but the manager or owner of the .publication, or the printer or his employees (ATF 76 IV 1, JdT 1950 IV 104), may not be compelled to name the author. Similarly, assuming that a libelous article is published in "The Morning Sun** under the signature "Vigilant**, and this pseudonym occasionally appears under articles published in "The Evening Star'*, a 'search may not be made in the offices of the latter paper in order to discover the author of the unlawful text published in the former paper* So too, if the investigating police officer suspects a given person to be "Vigilant", he may not search such person's house with a view to substantiating his suspicions.

2. The secrecy of writings is not absolute, and even newspapermen do not claim that it should be. In some cases, it is desirable that the true author of the unlawful text should be discovered, which makes it necessary to replace the prohibition from using ordinary means of investigation and coercion by the prohibition from invoking the secrecy of writings- Thus, in the cases mentioned in Art. 44, second alinea, not only may a person be punished if he refuses to name the author, but this refusal will not prevent the investigation from proceeding in the ordinary way so as to pierce the veil of anonymity. These cases, which are all serious ones, are those where offences contrary to Arts. 248—272 are committed. However, the reference appears too general, for few of these offences can be completed by the mere fact of publication; it will often be found that only Art. 269 (provocation to commit offences against the State) is applicable.

Two reasons may be suggested to explain this exception to the principle of anonymity. On the one hand, in the most frequent cases of press offences (injuries to the honour), the offender, though liable under the law to imprisonment, is usually sentenced to a fine; them* fore, one can accept without too much repugnance the rule, admittedly inconsistent with the provisions governing criminal guilt, that the editor, even if he is not, technically, guilty of the offence, should pay the fine in lieu of the author when he refuses to name him. But the position is quite different with regard to offences against the State, for it is unlikely that a fine will then be ordered, and it would be inadmissible that the editor should be sentenced to a long term of imprisonment in lieu of the author if he is not guilty of the offence. On the other hand, and more pertinently, it is essential in the case of offences contrary to Arts. 248—272 that the commission of further offences be prevented, and this objective will seldom

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be achieved if one is satisfied with punishing a scapegoat. In other words, having regard to the interests at stake, all the participants should be discovered, which implies that the investigation must be freely conducted and the use of ordinary means of coercion permitted. However, to the extent that the latter consideration is decisive, one may be surprised to see that the secrecy of writings may be invoked in cases such as offences contrary to Arts. 341, 345, and 480 which are also cases where the principle of freedom of the press should be sacrificed to the interests of the State.

Article 45. Subsidiary liability in respect of other forms of diffusion

When the offence is committed by means of a film, poster, theatrical performance, wireless, television, or other means of diffusion, the author of the text or of the picture, then the producer or publisher and then the person who procured the, diffusion in any manner shall be liable to punishment.

This Article, like Art. 43, deals with a problem of subsidiary liability and calls, therefore, for the same remarks as the latter provision.

1. Art. 45 specifies the persons subsidiarily liable in the case of offences committed, not through periodical or occasional publications, but through "other means of diffusion", including films* posters (which, contrary to what Art. 42 (1) might induce one to believe, are not to be taken as printed or press matters within the meaning of Art. 43), plays, radio and television broadcasts and other means of a similar nature which might be developed in the future.

The conditions governing the application of Art. 43 also govern that of Art. 45, and the rule is that the author is directly answerable as provided for by Art. 42. It is only when he cannot be found or is not amenable to Ethiopian courts or the diffusion was made without his knowledge or against his will that the persons mentioned in Art. 45 may be held subsidiarily liable. The said persons are not the same as those listed in Art. 43, for the circumstances in which a radio broadcast is made, for instance, are or may be different from those in which a printed matter is published; the order to be followed in prosecuting these persons is: (1) the producer (of a film or play, for instance) or the puolisher (of a radio news bulletin, for instance); and (2) "the person who procured the diffusion in any manner" (the printer of a poster, the director of a play, and the like). It seems that a choice must be made between the producer and the publisher, if different persons, and that they may not be held liable together, the same as the manager and editor of a newspaper are not jointly liable. It also seems that tlu, person liable failing the producer or publisher is described in too general terms.

2. It will be noted that ordinary means of investigation and lawful coercion may be used in relation to offences committed through "other means of diffusion" and one may find it somewhat surprising that the secrecy of writings, which may be invoked by the "written press", may not be invoked by the "spoken press."

Unlike Arts. 46 and 47 which conclude the Chapter on offences relating to publications, thus indicating that they apply whatever the means used in committing these offences, Art.
44 is inserted between Articles dealing with press matters and other means of diffusion, respectively, thus creating the impression that it applies only in press matters. Its very wording confirms*this impression, since mention is made of "offences committed by means of a newspaper or a periodical publication", of "the author of the writing" and of "the manager or responsible editor**, i.e. a person liable under Art. 43. There is no reason, however, why freedom and secrecy should be guaranteed only to the written press and it would, it seems, be in accordance with Art. 41 of the Constitution to construe broadly the expression "periodical publication" in Art. 44, instead of restricting it to printed matters, and to hold that the spoken press is entitled to anonymity on the same conditions as the written press.

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3. Another point which Art. 45 does not make clear is whether the rule laid down In Art. 43 (2) holds good with regard to offences committed by other means of diffusion also. The ***Expost des Motifs*** shows that it was intended that the offender's guilt should always**[k]be viewed in accordance with the relevant provisions of the Code** and there appears to be no good reason why this rule, questionable as it may be, should not be of general application, regardless of the fact that it is not restated in Art. 45 . Any solution to the coxUraiy would lead to making unjustifiable discriminations among persons subsidiarily liable for offences relating to publications.

Article 46. KTfhwhm of double Mabfllty

The punishment of one of the parties responsible in the order fixed by law shall exclude liability to punith/nent of the other parties for the same act.

It is a widely accepted principle that, when a pe~~rson~~ liable under die law for a **press** or similar offence is punished, any other person declared to be subsidiarily liable may not be punished. *7/ ***est de rigle que la condamnation de Pun des resptmsable* ~~p&ts~~Mis serf de brevet d'exemption it ceux qui viennent ensuite***" (Logoz, ***op. cit.,*** p. 113). This principle & enshrined in Art. 46, which stresses the special Character of participation in press offences by providing that not more than "one of the parties responsible in the order fixed by law" may be punished for an offence of the nature defined in Art. 41 (2).

This means that, if the author is punished (or also if he is acquitted, for instance on the ground that the allegedly unlawful publication is not libelous), none of the persons subsidiarily liable under Art. 43 or 45 may be punished; if the publisher of an occasional publication is punished, the printer may not be punished; if the producer of a film is punished, the person who procured the diffusion of the film may not be punished, and so forth. Thus, as was mentioned in relation to Art. 42 (2), the ordinary rules regarding' participation apply only to the extent that the participant is not a person subsidiarily liable. In other words, when the author is punished, the persons listed in Art. 43 and 45 incur no liability even though they may have participated in the offence; similarly, when a person subsidiarily liable is punished, those who follow him on the list of potential culprits are not punishable regardless of the fact that they may have taken part in the offence. As for the case where a libelous article published in.one newspaper is reproduced in another paper, see ATF 79 IV 51 (JdT 1953 IV 119).

Article 47. Immunity in respect of certain publications

The author, publisher or diffuser of a true record or representation,- which is correct in form, of public debates or acts of a legislative, administrative or judicial authority the diffusion of which is not expressly prohibited by law or by a specific decision shall not be liable to punishment.

As a rule, it is no defence to a charge of defamation or calumny to contend that one merely repeated, "even though not believing them, allegations emanating from another" (Art. 581 (1)). By wky of exception, Art. 47, which is another provision designed to guarantee the freedom of the press, prescribes that a person who writes, publishes or circulates a publication reproducing words spoken or written, opinions expressed or criticisms made by another is not punishable (whether, it would seem, for an injury to the honour or any other offence) if he does so in the execution of his duty to inform the public. This immunity, however, is subject to the fulfilment of the following conditions (see also Art. 65).

1. Tbe record must be true and correct in form, which means not only that it must quote the very words spoken, but that it must be made in good faith, for one may, by making abridgements, distort the idea of a person, even though his words are quoted. Furthermore, the person making the report must put it in such a form that he does not himself commit an

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oflaace by«*hat be adds to the facts which he reports. Thus, if *A,* an accused in criminal pro* ceedings, tells the judgS: "You are & fool**, And *B*, a journalist, writes in a newspaper that the aoeueed told the judge that he was a fool, *B* is not punishable for contempt of court; bat if *B* writes :*V4, the accused, quite rightly told the judge: "You are a fool," *B* is liable to

2» The record must relate to public debates or acts of a legislative, administrative or jtodfefal authority. In other csssi, immunity, if not enjoyed under Art. 47, may be ef^joyed in putsuance of Alt. 579 (see in partkJular ATF 71 IV 225, JdT 1946 IV 147).

1 The uuddng of the record must not have been prohibited by law or by a specific decision. This appears to have no relevance to the question of immunity as defined in Art. 47, riaoe a pawn who a report which is prohibited is punishable for a specific ofllhnce under Art. 429 or 445, as the case may be, irrespective of the contents of such report. What Art. 47 fawpifatt is that a newspaperman who makes a true and eorrect record may eqt be punished, for an insult, although he reports one, but that, if he adds comments of his own which are insulting or makes a record in a case when the making of a record is pn> hMtpd, ha is not for what he reports, but either for what he himeelf states or for the mses fret of having made a report.

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CHAPTER VII CRIMINAL RESPONSIBILITY |ARTS.48-56|

After dealing generally with the criminal offence, the Code defines the so-called moral element of offences, that is, the subjective conditions in the absence of which anyone who takes part in the doing of an unlawful act is not answerable therefore. Since, according to Art.23 (3), a criminal offence is not punishable unless the accused is found guilty, the law has to specify which personal or internal requirements must be satisfied in addition to those examined in the preceding articles so that a given offence may be imputed to a given person.

These requirements are of two kinds and arc laid down in Arts. 48-56, which define criminal responsibility, and Arts. 58 and 59, which define criminal guilt. Both requirements are essential, and they must be present together, for no person may be convicted of an offence unless, at the time of commission, he was not irresponsible for his acts and he acted either intentionally or negligently. Thus, the fulfillment of the requirement as to responsibility is a condition precedent to the fulfillment of the requirement as to guilt; before a court can decide whether the accused acted intentionally or negligently, it must satisfy itself that he was not incapable of so acting, i.e. his state of mind at the time of the offence was not such at to prevent him from understanding what he was doing or from foreseeing the consequences of his acts. In other word, the question whether the accuse is guilty arises only when there is no doubt (Art. 51; see also Art. 130(1) (g) Criminal procedure Code) that he is not irresponsible, for he may not be found guilty but insane (contra, see "The Trial of Lunatics Act, 1883", section 2 (1), in Halsbury's statutes of England, Vol. 5 p. 903).

The rules, which permit deciding whether the accused committed an offence when he was capable of understanding the nature of his acts and of regulating his behavior according to such understanding, will be found in Arts.48-56. However, these ruled are not uniform, for there are between adult and young offenders considerable mental differences, which the Code takes into consideration.

I. Rules applicable to adults (Arts. 48-511 Article 48. Criminal responsibility and irresponsibility

(!) The offender who is responsible for his acts is alone liable to punishment under the provisions of criminal law

A person is not responsible for his acts under the law when, owning to age. illness, abnormal delay in his development or deterioration of his mental facilities, he was incapable at the time of is act. of understanding the nature or consequences of his act, or of regulating his conduct according to such understanding

(2) The court may order in respect of an irresponsible person such suitable measures of treatment or protections as are provided by law (Art 133-135).

Although nobody would today question that insane persons cannot commit punish able offence, the problem of criminal responsibility is among the most controversial ones in penal law because there have been and still are disputes as to who is a responsible person For year, if not centuries, lawyers and physicians have endeavourer to circumscribe the notion of responsibility, which involves a variety of extra-legal elements, but with so little success that the lawyers, for their part, found themselves in a complete deadlock at the beginning of this century. There existed a profound difference of opinions between the spiritualists, who thought in terms of free will and moral responsibility, and the positivists, who though in terms of determinism through factors such as heredity, education, geographical conditions, and the like. Although it was subsequently agreed to leave philo-

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sophical concepts out of the discussion, it soon appeared that the notion in issue, even though analyzed in a purely concrete or practical perspective, could not be reduced to an entirely compete and satisfactory definition. It was found impossible to lay down the criteria of responsibility and the more that could be done was to list certain signs or symptoms, which, if present in a person, should prohibit his being regarded as responsible for his acts. In other words, responsibility could not be defined in a positive, but only in a negative manner, and this is why most Codes, including the Ethiopian Code, do not describe responsible, but irresponsible persons The Code implies that an offender is presumed to be responsible to long as he does not show any of the signs of partial or total irresponsibility enumerated by law, and only an offender who does not show any of these signs is fully liable to punishment.

I. There are three principal methods of defending criminal irresponsibility

(a) The biological method consists in specifying a number of physical or defects deemed to rendei the person concerned irresponsible. This, to some extent, is the system of the French penal Code according to which *"il n'y a ni crime ni delit lorsque leprevenue etait en elat dr demei.ee au temps de I "action"*.

(b) The psychological method consists in prescribing that a person incurs no liability who, at the time of the offence, was incapable of understanding the nature of his acts or of controlling himself. This is the German system, which existed, for instance, in the Swiss penal Code of 1853 and the German penal Code of 1871, and which was to a large extent inspired by the well-known answers of the Judges to the House of Lords given in Consequence of Macnaughton's case (1843).

(c) The third method combines the preceding ones and is followed in many modem Codes, including' the Ethiopian Code. It id the so-called bio-psychological method, according to which a persons is regarded as irresponsible if, at the tie of the offence, he was deprived of his mental faculties in consequence of certain biological defects. This system is not only more precise than the French one in that which concerns the pathological causes of irresponsibility, but it also prohibits irresponsibility from being admitted when. e.g. the offender was incapable of controlling himself for a reason other than a mental disease Thus, although anger, hatred or lust may render a person "mad" or "insane" in the popular sense of these terms, becausc he is so blinded that he no longer knows what he does, this person is not irresponsible in the legal sense of the term unless there exists a biological reason for his being incapable of acting otherwise than as he does.

2. An irresponsible offender therefore is a person who commits an offence when he is in such a physical or mental condition (biological cause) that he is totally deprived of his mental faculties (psychological effect). Not only must these two requirements be present together, but they must be linked by causal relation.

(a) To define the various biological cause of irresponsibility is not chiefly a legal problem As was said in the codification commission, *"on ne peut exiger d an juriste qu 'il fixe, dans la lot. des normes. pathologiques ou psychiques exhaustives En cette matiere, le role determinant appartient dux experts, te au juge qui sera appele a prendre / expertise en consideration Mats il aut fixer certains reperes pour te Juge* ", Accordingly, sub-art. (I) Mentions:

(i) The age of the offender, i.e. here old age (since minors coe under different provisions, namely Arts. 52 et seq). for senility may affect a person's mental faculties,

(il) Illness, which term should be broadly construed, for it is not intended to apply only to any form of mental disease as a result of which a person is deprived of his mental faculties, but also to any physical disease having a similar effect,

(iii)An abnormal delay in the offender's development, which includes cases such as idiotism, cretinism, the consequences of deafness, dumbness, sleeping sickness, and the like,

(iv)The deep alternation or deterioration of the offender's faculties due to poison, intoxication by alcohol or drugs, hypnosis or somnambulism (see however Art.50).

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(b) It is of no importance whether these biological causes are of a temporary or permanent nature, but they must be present On the other hand, as a person interdicted by a civil court under Arts. 35 let seq. of the civil Code is not as of right criminally irresponsible, so an accused person who shows any of the signs listed in sub-art (I) is not automatically relieved of his liability to punishment; he is so relieved only when the said causes had psychological consequences at the time of the act. in that they prevented him from understanding the nature or consequences of his act or from behaving according to such understanding. Thus, two psychological consequences may follow

(i) Firstly, the intelligence of the person concerned may be affccted. Because he suffers from a certain disease, the offender is deprived of that minimum of intelligence, which should be present u a responsible person so as to enable him to know what he is doing. It may be noted that the expression "the nature of his act" is rather imprecije. The Draft, in imitation of An. 10 of the Swiss penal Code, referred to *"le caractere illicit*"* of the act. but the word *"illicite"* was struck out at the request of the Codification Commission for fear of crating confusion with the problem of mistake of law (see Para (1) (b) in comments under Art.58). Although the said expression may now be taken to mean that the offender did not know the difference between right and wrong (in the popular sense of the terms), or between "ce *quiest permis et defendu"* (Expose des Motifs), it should not include not include the moral quality of that act and cover, therefore, cases of so called moral insanity, i.e cases where the offender's mental faculties are intact but his moral sense is affected in that "*les notions de bien et demal sont percues par /' esprit mats ne sont pas senties par le Coeur"* (see. however, para (I) (c) (ii) in comments under Art 49)

(ii) Secondly, the volition of the person concerned may be affected Because he suffers from a certain disease, the offender id deprived of that minimum of power of will which should be present in a responsible person so as to enable him to make a reasonable decision or to act in accordance therewith. This is so when the offender is incapable cither of making any decision at all (hypnosis, somnambulism) or of refraining from acting as he does, even though he knows that he docs something wrong (internal coercion depriving him of the power to choose between right and wrong, as may occur in cases of kleptomania, pyromama or indecent exposure). Although the notion 6f irresistible impulse is not admined in many countries, there is no doubt that the expression "regulating his conduct" includes the case where the offender "is deprived by disease of the power of controlling his conduct" (Stephen).

(c) So that a pcrson'Vy be regarded as criminally irresponsible, it is not required that both his intelligence and volition should have been abolished; sub-art (I), second alinea, indicates that, if the question of insanity anses. It suffices to show that the offender was totally deprived of either faculty, and that this deprivation existed at the time of the act. The problem under Art. 48 is not whether the accused is fit to stand trial, but whethc.- he was capable of acting in a guilty manner and is answerable for the offence. If this question is answered in the negative, the accused must be found not guilty. The same holds good if the answer is doubtful- as it may be when the accused suffers from a permanent disease but appears to have acted in a lucid interval; compare this with art. 373 (2) of the civil code- and the doubt may not be resolved by applying Art. 49. for the laner Article presupposes that the offender is responsible for his acts

3. The legal effects of criminal irresponsibility are of two kinds On the one hand, and irresponsible person incurs no liability since, according to sub-art. (1), first alinea, "the offender who is responsible for his acts is alone liable to punishment" On this point. Art 48 considerable differs from Art. 22 of the 1930 Code, which provided that "if a man be mentally deficient the punishment shall be light" (though it is not certain whether Art. 22 or Art. 19 was the pertinent provision in cases of complete irresponsibility). On the other hand, since and irresponsible person may be in need of medical care or be a menace for others, sub-an (2) Compels the court to make orders under Arts 133-135 (the word "may" in Art 48 (2) ought to read "shall", as it does in the amhanc and French texts; see also Arts 134 (I) and (2) and 135(I)),

Whenever these orders are necessary for the treatment of the offender of the protection of the public, or both. Arts. 134 and 135, which lay down “Measures", and not penalties, aim at preventing the commission of further offences by eliminating the cause of the offence (medical treatment) and/or by restraining the offender so long as he is dangerous (confinement), and these measures apply unitil their purpose is fulfilled (Art. 136), or even though it appears that their purpose cannot be fulfilled because the offender is incurable(ATF 73 IV 145,JdT 1948 IV 34)

Article 49. Limited responsibility

(!) He who owing to a derangement of his mind or understanding, and arrested mental development or an abnormal or deficient condition was not, at the time of his act, fully capable of understanding the nature and consequences thereof or regulating his conduct according to such understanding shall not be liable in full to the punishment specified for the offence committed

The court shall without restriction reduce the punishment (Art. 185)

(2) In addition to a penalty the court may order such appropriate measures of treatment correction or protection as are provided by law (An 133-J 35)

As was mentioned before, Art 49 apply only when there is no doubt that the accused is not fully irresponsible within the meaning or Art. 48. A person who is not totally deprived of either his intelligence or volition is capable of acting in a guilty manner; yet, the fact that he is not completely irresponsible does not imply that he is completely responsible. Between insanity and sanrtv, which in any event are conditions whose frontiers are imprecise, there exist intermediary stages where an offender’s faculties are affected *t"y* such an extent that, although he is certainly able to understand what he does and too act accordingly, it is equality certain that his intelligence or will power is not that of a “normal" person and that his degree of guilt is consequently lesser than that of such a person. He is responsible, but his responsibility is reduced: he may neither be relived of liability, since, he is not fully irresponsible, nor should he be liable to a full punishment, since he is not fully responsible. It is to this kind of offender that Art. 49 apply. “Although many psychiatrists have recently suggested, in particular at the fifth international congress on penal law (Rome, 1953), that legal prescriptions: garding semi-responsible offenders should be dispensed with on the ground that these persons are a problem for the medical, and not the penal science. Art. 49 have been inserted in the code because one is not yet prepared to accept the idea that a person who is responsible, even to a limited extent, should not be liable to punishment" (Expose des Motifs). This being so, and bearing in mind the difficulties experienced in France, for example, where no provision is madtf for such cases, partial irresponsibility had to be dealt with in the law, as it already was in the 1930 code (Art. 19).

I. The characteristic ingredients of limited responsibility are similar to those of irresponsibility, and in most cases only expert evidence will enable the court to decide whether and to what extent the accused is responsible. Under Art. 49 like Art 48, it is required that the offender should have been at the time of the offence in a biologically abnormal condition affecting his mental faculties.

(a) Among the biological causes of limited responsibility described in an. 49 (I), first alinea, one will find certain states, which, from a medical point of view, may be considered to be less serious than those, mentioned in Art. 48(1), namely a derangement of the mind or understanding (e.g. hystena), an arrested mental development (E.g. imbecility) and an abnormal or deficient condition (e.g alcoholic intoxication not having the effects specified in art. 48). Yet, althoMgh the existence of a pathological defect should be provide, it seems that the importance of this element should no be overestimated, for the difference between a sane (even though not fully) and an insane person does not lie so much in the disease or deficiency from which he suffers than in the effects of this condition.

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(b) In contradistinction to irresponsible persons, who are for some biological reason totally deprived for their mental faculties, semi responsible offenders are persons who are for *ome biological persons only partially deprived of their understanding or volition. It appears, there for, that the psychological element, and not the biological one, is decisive, and it is doubtful whether the rigid classification of biological defects laid down in Arts. 48 and 49 is advisable or at ail justified from a medical point of view. Although the law prescribes the contrary, it seems that irresponsibility mrffexist t even though the disease OT deficiency is of the kind mentioned in Art. 49, and limited responsibility, even though the disease or deficiency is of the kind mentioned in Art. 48. When a question arises as to the offender's mental stability and it is established that hi* mental development is not that of an ordinary man, what should mater is whether or not this abnormal condition had the effect that he was totally deprived of his faculties at the time of the fact If the answer is in the negative, Art. 48 should be inapplicable* but the said Article should apply if the answer is in the affirmative, for it would seem rather irrelevant that, from a biological point of view, the offender may be regarded as suffering from "an arrested mental development" Art. 49), and not from "an abnormal delay in his development" (Art. 48). So too, if the offender i« abnormally delayed in his mental development (Art. 48), he should nonetheless be treated as a semi-responsible person within the meaning of Art 49 if this delay has the effect of depriving him only partially of his mental faculties.

(c) As with Art. 48, so with Art. 49, it is necessary that the biological and psychological elements should have existed together at the time of the offence, and it is sufficient that the offender's capac.'y of understanding or will power should have been diminished. In the latter respect, it appears pertinent to quote the following judgments given in relation to Art 11 of the Swiss penal Code, which is similar to Art. 49:

(i) A person is not partially responsible for the sole reason that he is of low intelligence or poor education. "A mediocre intellect does not amount to feeble-mindedness with in the meaning of criminal law (...). A person may have an insufficient education or be little gifted for abstractions or be unable to define complex notions and yet be capable of realizing that he does something unlawful" (ATF 77 IV 210, JdT 1952 IV 34);

(ii) a person is not partially responsible for the sole reason that he is of a weak character or morally perverted. "The court must reduce the penalty only with regard to an offender who suffers from a mental disease or whose mental developments is incomplete, but not with regard to a weak person who is aware of the unlawful nature of his act and who commits an offence out of dishonesty" (ibid). And also: "Only a person who must make an extraordinary effort of the will to control his instincts and whose ability to regulate his conduct is accordingly diminished may be deemed to b partially responsible" (ATF 75 IV 145, JdT 1949 IV 115).

2. Like those of irresponsibility, the legal effects of limited responsibility are of two kinds. On the one hand, the accused is liable to punishment since he was not irresponsible at the time of the act and he is capable of understanding the meaning and purpose of punishment; however, the penalty must be reduced because the offender's responsibilities, and consequently his degree of guilt, are reduced. Although his solution may be found in man Codes, even the lawyers, to say nothing o' the psychiatrists, criticize it on the ground that it is impossible properly to evaluate the extent to which a person's faculties may be diminished and, furthermore, the practice of mitigating the punishment results in passing short-term sentences which are useless in all respects. On the other hand, punishment is only one answer to the problem created by semi- responsible offenders Since persons who are not fully responsible for their acts may, like irresponsible persons, be in need of medical treatment or threaten public safety, the court must, wherever the necessity is present, make an order under Art. 134 or 135, as the case may be. It is pertinent to note that Art. 137 (2) and (3), in imitation of Art. 17 (2) of the Swiss penal Code, prescribes that the enforcement of he sentence passed on a semi- responsible person may be dispensed with on specific conditions. This provision indicates quite clearly in what direction the law on persons who are not fully responsible may develop in the future.

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Article SO. Intention*! or culpable Irresponsibility

(1) The provisions excluding or reducing liability to punishment shall not apply to the person who in order to commit an offence intentionally put himself in to a conditions of irresponsibility or of limited responsibility by means of alcohol or drugs or by any other means The general provisions of this Code are applicable in such a case

(2) If an offender by his own fault has put himself into a condition of irresponsibility or of limited responsibility while he was aware, or could and should have been aware, that he was exposing himself, in such a condition, lo the nsk of committing an offence, he shall be tried and punished under the ordinary provisions governing negligence if the offence committed id punishable on such a charge (Art. 59).

(3) In the case of an offence which was neither contemplated nor intended and was committed in a state of complete irresponsibility into which the offender put himself by his own fault, article 485 of the special part of this code relating to offences against public safety shall apply.

This Article, which is chiefly intended for persons who contrivance the law while under the influence of alcohol or drugs, is based on the rule that intoxication is no defiance if caused by the offender's voluntary act; accordingly, it describes three cases of irresponsibility and two cases of limited responsibility where Arts. 48and 49 are inapplicable because the actor’s abnormal condition at the tune of the offence has been brought about by his own fault. There may appear to be little difference between the cases coming under Art. 48.or 49 and those coming uqder Art 50 as chronic alcoholic, for instance, who is dealt with under Art. 48 or 49. is, in a sense, responsible for his abnormal condition, on the other hand, alcoholism, even though falling short of “insanity", is nonetheless often a sign of subjacent disorders (not, however, that Art. 48 or 49 supersedes Art. 50 if it is proved that the actor is not fully responsible owing, not to the intoxication, but to these disorders). What distinguishes Art. 50 from Art. 48 or 49 actually is not the bio-psychological condition of the actor, but the circumstance surrounding the creation of thii condition, i.e. whether it is due to the actor's fault. This fault, which, as will be seen, operates as an absolute prohibition from invoking the provisions of Art 48 in cases of irresponsibility, docs not necessarily preclude the application of Art 48 since a person who renders himself partially irresponsible by his own act remains nevertheless capable of forming a guilty mind at the time of the act.

1. The firs situation envisaged by Art 50 is that where an offender intqatinally places himself in a state of irresponsibility, whether complete or partial, with a view to committing an offence If a person decides to kill his neighbor but feels incapable of carrying out his decision in cold blood, whether he fears the doing or the consequences of the act, he may drink so as to dampen his inhibitions until he reaches a condition in which his fear is obliterated This may occur in relation to offences of commission (if A drinks in order to kill B) or omission (if A, a soldier on leave, drinks so as to disable himself from going back to his unit).

How theje cases ought to be dealt with has been a much-debated question, for two elements must be considered. On the one hand, the accused was not fully responsible at the time of the act, speaking objectively, his condition at that time was that of a mentally deficient person and he should be treated in the same mann»r as such a person regardless of the fact that he deliberately created this abnormal condition for the purpose of committing an offence On the other hand, intent existed before the offence was committed, smce the accused was capable of forming a specific intention prior to intoxicating himself Subjectively speaking, his condition ai the time of the act is, therefore, immaterial (at Icasiin cases of total irresponsibility), and only the reason for this condition is relevant; not only did he voluntarily place himself in an abnormal condition, but he did so in order to carryout a decision which he had freely made (actio libera ui causa), the second conception, widely prevalent, will be found in sub-art (1) also, which prevents and accused benefiting fro the provisions of Art. 48 or 49 on the sole ground

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that he commined an offence while in an abnormal condition created by himself, in such cases, the ordinary rules governing liability to punishment apply, i.e. the offender may be convicted and sentenced as though he had been fully responsible at the time of the act, unless, of course, there exists some reason other than, e.g. drunkenness for deeming him not to have been fully responsible. Some laws, such as the Italian Code (Arts. 92, sec. Al. and 93) even go to the extent of considering that these case call for an aggravated punishment.

It must be clear, however, that Art 50 (1) is not intended to penalize mere drunkenness; this is to say that, if a person intoxicates himself with a view to doing something which ultimately he is not physically capable of attempting to do, his having placed himself in an abnormal condition amounts, at most, to a preparatory act. It should also be clear that, since “the general provisions" of the Code, including those regarding criminal guilt, apply in the cases coming under sub-ait
(I) , die court must ensure that the offence actually committed is that which the accused directly (Art. 58 (1), first alinea) or indirectly (Art.58 (1), second almea) intended to commit when he intoxicated himself. This, however, does not mean that Art. 48 or 49 necessarily apply if there is a discrepancy between what was intended and what occurred. Thus, if A gets drunk with a view to revealing a tread secret to B and, before meeting B, he is involved in a fight and inflicts bodily injury upon C, doubts may arise as to whether A is at all or fully liable to punishment for bodily injury, which doubts must be resolved in accordance with sub-art. (2) or (3), as the case may be, of Art 50.

2. The second case provided for in Art To is that of a person who commits an offence in a state of partial or complete irresponsibility in which he placed himself, not for the purpose of committing an offence, but when he knew or should and could have known that he was apt to do wrong while in an abnormal condition. Thus, sub-art. (2) does not deal, like sub-art (1), with intentional, but with “culpable" irresponsibility or limited responsibility. The difference between both sub-articles does not lie, however, in the circumstances in which the accused was deprived of his mental faculties (advertently or inadvertently), but in his state of mind at the time when, for instance, he began drinking. Under sub-art. (1), he drinks either in order to do wrong or when he knows and accepts the possibility of doing wrong (e.g. he knows he must drive and, being aware that he might run a pedestrian down if he drinks too much, tells himself that it is late at night so that nobody will see him if he runs a pedestrian down). Under sub-art. (2), he drinks though he either foresees, but rejects, the possibility of doing wrong (e.g. he decides that he will dnvcs slowly but, when he takes the wheel, he is so drunk that he can no longer control his speed) or he is not, but should and could be aware that he may do wrong (e.g. he should not overlook' the fact that he has to drive, and he should know that alcohol affects a driver's reflexes, see ATF 88 IV4, JdTI962 IV39). Under sub-art. (1) intent should, therefore, have existed pnor to the loss of understanding or volition, while it suffices for the purpose of sub-art(2) that negligence should have existed at that time (sec ATF 85 IV I, Jdt I959IV7).

It may be noted that sub-arts. (1) and (2) may apply concurrently. Thus, if A gets completely drunk in order to kill B, (which he ultimately does), but, while driving to B’s house, he runs C Down and kills him, he is guilty of intentional homicide on the person of B and of negligent homicide on the person of C; it seems that A should not be convicted of intentional homicide, but only of negligent homicide, if the pedestrian he happens to run down is B himself. As for the cases where the accused in a state of complete irresponsibility commits an offence other than that which he originally intended to commit, the question is whether he knew or should and could have known beforehand that he was capable of committing a different offence. If it is shown that he did not directly or indirectly intend to commit different offence and that he could not for see that he might commit it, Art. 50(3) is applicable. On the other hand, if it is shown that he foresaw and rejected, or that he should have foreseen, the possibility of committing a different offence, he will be deemed to have committed this offence negligently and punished accordingly, unless negligence is not penalized in the particular case (Art. 59 (2), first alinea). Thus, if

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that he committed an offence while in an abnormal condition created by himself. In such cases, the ordinary rules governing liability to punishment apply, i.e. the offender may be convicted and sentenced as though he had been fully responsible at die time of the act, unless, of course, there exists some reason other than, e.g. drunkenness for deeming him not to have been fully responsible. Some laws, such as the Italian Code (Arts. 92, see. Al. and 93) even go to the extent of considering that these case call for an aggravated punishment.

It must be clear, however, that Art. 50 (I) is not intended to penalize mere drunkenness; this is to say that, if a person intoxicates himself with a view to doing something which ultimately he is not physically capable of attempting to do, his having placed himself in an abnormal condition amounts, at most, to a preparatory act. It should also be clear that, since "the general provisions" of the Code, including those regarding criminal guilt, apply in the cases coming under sub-art
(I) , the court must ensure that the offence actually committed is that which the accused directly (Art. 58 (I), first alinea) or indirectly (Art.58 (1), second alinea) intended to commit when he intoxicated himself. This, however, does not mean that Art. 48 or 49 necessarily apply if there is a discrepancy between what was intended and what occurred. Thus, if A gets drunk with a view to revealing a tread secret to B and, before meeting B, he is involved in a fight and inflicts bodily injury upon C, doubts may arise as to whether A is at all or fully liable to punishment for bodily injury, which doubts must be resolved in accordance with sub-art. (2) or (3), as the case may be, of Art. 50.

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A (et* completely drunk in order to Idll B but, when in B'a house, rapes B's daughter, even though it is established that A knew that alcohol stimulated his sexual urge, he ma not be convicted of rape, for the latter offence is always an intentional one.

Also worth nothing is the fact thatthe offender's state of mind at the time when he begins depriving himself of his intelligence or will power is not necessarily decisive or, in other words, that his state of mind at he time of the act is not necessarily irrelevant. This, however, is true only as regards a person who commits an offence in a state of limited responsibility, i.e. when he ia still capable of acting in a guilty manner. Thus, if A puts himself in a condition of limited responsibility for the purpose of killing B but rapes B's daughter, he is guilty of intentional rape and punishable accordingly, for he was not "completely incapable at the time of the offence of understanding the nature of his act;" (Expose des Motife) however. Art. 49 applies if, at the time when he got drunk, he did not directly or indirectly intend to rape B's daughter.

3. The third situation with which Ait. SO deals is that of an accused who, having placed himeeir in a condition of complete e irresponsibility (but not of limited responsibility since, as was just said, he is capable of acting in a guilty manner if he is not totally deprived of his mental faculties) Commits or attempts to commit (see ATF 83 IV 161, JdT 1957 IV 145) an offence which he did not intend to commit; nor could and should he have foreseen the possibility of committing it. For instance, A spends a quiet evening at home, reading a book occasionally puts his book down and pours himself a glass of brandy; finally, he gets completely drunk and rapes his female servant.

In such instances. Art 48 is inapplicable, since the accused found himself in a state of complete irresponsibility by his own fault; yet, he is not liable to punishment under sub-art. (I) or
(2) of Art 50 whereas neither criminal intention nor criminal negligence existed before he intoxicated himself According to Art. 57 (1), he should, therefore, go free because he is not guilty of the offence committed. However, if the safety of the citizens is not to depend on drunkards; whims, the need to ensure the tranquility of the public would justify that the offender should be punished and should not be permitted to exculpate himself on the ground that he did not mean to do any harm prior to getting drunk

Under sub-art. (3), this conflict is solved in the following manner The offender is deemed to be guilty, not of the offence actually committed, such as homicide, but of a special offence against public peace (Art. 485); he is not punished merely because he killed or because he drank, but because he acted contrary to the law after rendering himself irresponsible. Art. 485, which applies only subsidiarily, is based on the assumption that anyone who intoxicates himself is always a latent menace for others and that he is punishable as soon as he creates a concrete danger, i.e. he commits an offence. Admittedly, it is not easy to reconcile this provision (inspired by Art. 263 of the Swiss penal Cod) with the general rules governing criminal guilt, and this is why Art. 485 does not apply whenever a drunkard commits and offence, but only when the offence he commits would, if perpetrated by a responsible person, be punishable with not less than one year imprisonment, in which case he is liable to a fine or simple imprisonment not exceeding one year, whatever the punishment prescribed for the offence actually committed (homicide, scnous bodily injury, rape, etc.). The seriousness of the fatter offence governs only the assessment of the sentence within the limits laid down in Art. 485.

By way of conclusion, a few remarks may be made concerning some difficulties, which may be encountered in applying Art. 485.

(a) The provisions of Art. 485 are not sufficiently clear as regards the criterion of one year, and it is doubtftil whether the said article requires that the offence commined should be

punishable with imprisonment for one year or more, or whether it also applies when this offence carries on year imprisonment as a maximum penalty. The scope of Art.485 will vary depending on which of either interpretation prevails. Neither the expose des motifs nor the records of the codification commission clarify this point, nor is Art 263 of the Swiss code o assistance, as it lays down a different criterion, that is, the doer should commit "un acte reprime comme crime ou delit."

(b) There are certain offences, which are not punishable with ofi'year imprisonment unless *j* he offender acts in aggravating circumstances. Thus, defamation is punishable with six months simple imprisonment (Art. 580 (I), fourth alinea), unless it concerns a public servant acting in the discharge of his duties, in which case simple imprisonment may be ordered for on'year (Art. 586 (I) (b)). Assuming that the latter punishment suffices for the purposes of Art. 485. if a person who placed himself in a condition of complete irresponsibility should commit defamation against a public servant in the execution of his duties, the question would arise whether the ordinary or aggravated punishment should be taken into consideration, for Art.485 would apply only if the case were deemed to be an aggravated one. It may be argued that, since the application of Art.485 is conditional upon the fulfillment of a purely material or objective criterion (extent of punishment), what is relevant is whether this requirement is present in the particular case It may also be argued that, since the increased punishment, which would permit punishing the offender under Art. 485 may not be ordered unless he knew of the victim's special position, to apply Art. 485 would imply that the accused was aware of the fact that he acted in aggravating circumstances, which implication is inconsistent with the doctrine behind the said Article.

(c) It is also debatable whether intoxication operates always to the detriment of an accused who acted as provided for by Art.485. In other words, the question is whether he may invoke the excuses, which he would be entitled to invoke had he been responsible at the time of the act. For instance, would an irresponsible person who committed and offence in circumstances amounting, objectively, to self-defiance, benefit from the provisions of Art.74? On the one hand, it is necessary for the purpose of the latter Article that the person concerned should have known that he was in a state of self-defense (e.g. Art. 74 does not apply if a person shoots another in ignorance of the fact that such other persons it aiming a gun at him), which knowledge is missing in cases of irresponsibility. On the other hand, it would appear that an irresponsible person should not be punished for an act, which would not have been punishable, if a responsible person had performed it.

(d) When a person, acting in the circumstances described by Art 485. commits an offence punishable on complaint, (e g Art 407 or 539), proceeding are instituted without a complaint being necessary, since the offender is charged with an offence contrary, not to Art. 407 or 539,but to Art 485, which does not require (hat a complaint should be made.

Article 51. Doubtful cases, expert examination

(!) When there is a doubt as to the responsibility of the accused person, whether full or partial, the court shall obtain expert evidence and may order an enquiry to be made as to character, antecedents and circumstances of the accused person

Such evidence shall be obtained when the accused person shows sign of a deranged mind or epilepsy, is deaf and dumb or is suffering from chronic intoxication due to alcohol or drugs

(2) The expert or experts shall be appointed by the court under the ordinary rules of procedure The court shall define their terms of reference and the matters to be elucidated.

The expert evidence shall describe the present condition of the accused person and its effect upon his faculties of judgment and free determination It shall, in addition, afford guidance to the court as to the expediency and the nature of medical treatment or safety measures

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(i) *On the basis of the expert evidence the court shall make such decision as il thinks fit. In reaching its decision it shall be bound solely by defintte scientific findings and not by the appreciation of the expert as to the legal inferences to be drawn the reform.*

It was mentioned before that, although the code does not specifically say so, every accused is presumed to be responsible for his acts. Therefore, as a general rule, it need not be proved that he was capable, at the time of the offence, of understanding what he was doing and of behaving accordingly. However, this presumption is destroyed if a doubt arises regarding the offender's mental stability, and there art two cases where the question of responsibility must be investigated. Either the conn has reasons to suspect that the offender is not fully responsible (sub-art. (1), first alinea), or the court is presumed by law to have such suspicions because the accused is in such a condition that there exists what might be termed a presumption of irresponsibility (sub-art. (1), second alinea). In either case, the court is bound to obtain medical evidence; it may, in addition, require such other evidence as is to help clearly the point in issue.

1. A medical examination must ve ordered whenever the court is in doubt as to an accused person's responsibility. Although Art. 51(1) does not specify how serious the doubt should be, it is probable that there should be objective reasons for the doubt (e.g. the accused was interdicted by a civil court, see ATF 72 IV 59, JdT 1946 IV 174; the accused produces a medical opinion to the effect that he is suffering from a given mental disease, etc.). In other words, if its doubt arises from factual elements and not mere conjectures, the court is obliged to obtain medical evidence and it should do so of its own motion even though the accused is not affected as provided for in the second alinea of sub-art. (I) or does not raise a defense of insanity. On the other hand, where the court is not in doubt but the accused makes an right seek medical evidence; it must do so only if the evidence in support of the objection makes it appear doubtful that the accused is responsible. Finally, whether or not the doubt originates from an objection made by the accused, it must be clear that the court may not proceed with the trial until this doubt is resolved. As has been said, "the judge must, not silence his doubts when he has objective reasons for being in doubt" (ATF 69 IV 51, Jdt 1943 IV 66). And also: "If there are circumstances such as to raise a serious doubt concerning the accused person's responsibility, the judge must not dismiss his hesitations" (ATF /3 IV 212.JDT 1948 IV 130). It may be noted that the provisions of the Criminal procedure code with respect to insanity appear to be incomplete. In particular, it is debatable as to whether a medical examination may be ordered at any time before the trial (e.g. by the public prosecutor dunng the police investigation, or by a woreda court before it commits an accused for trail).

2. The second situation in which a medial examination must be ordered is that where the accused shows any symptom of a derangement of the mind or epilepsy, or he is deaf and dumb or suffers from chronic intoxication due to alcohol or drugs. In these instances, it is immaterial whether or not the court is in doubt as to the offender's mental stability. In practice, it will sometimes be immediately apparent that expert evidence must be obtained (deafness and dumbness). Often, however, the doubt will arise only when an objection is raised under Art. 130(2) (g) df the criminal procedure code, unless the accused person's behavior or statements at the trial indicate that his mind is deranged.

3. It was held (ATF 84 IV 137 JdT 1959 IV 4), that under Art 13 of the Swiss penal code, which is similar to Art. 51 of the Ethiopian code, medical evidence must be obtained also when the court, though satisfied that the accused is not fully responsible, is in doubt as to which of the curative or protective "measures" laid down by law should be ordered, since in this case, too, "les doubtes concement I'etat biologique et psychologique de l'accuse". However logical this view may be, there is little support in Art. 51 for such an extensive interpretation Yet, the latter might be defended on the ground that it is required to give full effect to the principle of individualization enshrined in Art. 86

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4. When medical evidence must be obtained, the court will adjourn the hearing in accordance with Art. 94(2) (j) of the criminal procedure code and appoint on or more experts to investigate the offender's mental stability. It might appear from Ait. 51 (2) that the court may not merely rely on examinations that might have been Meade before the trial, which prohibition would be unrealistic since psychiatrists are scarce at present; for, if the offender caused himself to be examined by a psychiatrist with a view to pleading insanity at the trial and he makes such a plea, the court would seldom have any alternative but to appoint as it seems that the court may decide on the basis of a previous medical examination unless this examination does not resolve the doubt or the court has reason to believe that the findings previously obtained do no longer accurately apply to the case it is trying (ATF 88 IV 49, JdT 1962 IV 66).

The manner of appointing the expert or experts is not specified in the penal or criminal procedure code and will be provided for in the Evidence law, which is to come. Art. SI (2) confines itself to standing generally hat the doctor's duties are:

(a) To describe the condition of the accused, i.e. to investigate whether any of the biological causes of irresponsibility or limited responsibility mentioned in Arts. 48 and 49 is present and what are its effects. Contrary to what is said in the second alinea of Art.Sl (2), the examination should not be restricted to the present condition of the accused, for the real point in issue is not whether he is fit to stand trial. What the court expects the psychiatrist to state is whether, at the time of the offence, the offender's faculties of "judgment and free determination" were affected by some biological defect (which must be defined) and, if so, whether the deprivation was complete or partial; and

(b) To advise the court as to the curative or protective measures that it might be necessary or desirable to order should the accused be found not fully responsible for his acts?

5. Besides ordering a medical examination, the court may order what might be called a social inquiry into "the character, antecedents and circumstances of the accused person" Before psychiatrists were available in Ethiopia, this type of inquiry was commonly resorted to with a view to establishing whether the accused was responsible; the court would call relatives and neighbors to testify as to his behavior in daily life before the offence, and it would be satisfied that he was mentally deficient in situations rather similar to those which now amount to notorious insanity within the meaning of Art.342 of the Civil code Under Art.51, however, an inquiry of the kind (which may be conducted, e g by social workers to be appointed and instructed by the court in die same manner as expert'witnesses), may only be ordered in addition to, and not in substitution for, a medical examination because, although it may provide useful information in cases of chronic alcoholic intoxication or epilepsy, for instance, it is not capable of clarifying the more involved cases of mental diseases that may occur

To the extent that Art. 51 permits investigating the offender's antecedents, including previous convictions, it makes an exception to Art. 138 (1) of the criminal procedure code, which prohibits antecedents from being disclosed before conviction. This exception, however, is in the interest of the accused; since the purpose of the disclosure (which may in any event be made by the accused himself) is not to influence the court's decision as to guilt, but as to responsibility For a court trying an offence such as arson or public indecency will inevitably question the accused person's responsibility if it knows that he was previously convicted on several occasions for a similar offence.

6- Sub-art.(3) deals with the controversial question of the part respectively played by the expert and the court in deciding upon the offender's responsibility and prescribes that:

(a) the court may not substitute itself for the expert and adjudicate medical questions which it is not qualified to decide; it is, bound by "definite scientific findings",

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in sense that ,if the expen states that the accused is a chronic alcoholic or a pyromaniac, it may not ignore this statement in making its decision;

(b) the expert may not substitute himself for the court and adjudicate legal questions which he is not qualified to decide; it is, the before, for the court to draw the " legal inferences" from the expert's findings, so that if the expert states that the accused is not fully responsible and should accordingly be sentenced to, say, a punishment reduced by one half, the court is not bound by this statement.

It may appear that the provisions of sub-art. (3) are somewhat too rigid as regards the weight which "definite scientific findings" carry, as thought the court's doubts will automatically be solved by an expert opinion. During the debates of the codification commission, this rule was justified on the ground that "if the judge were allowed to disregard scientific findings which he is not qualified to appreciate, he would at once be entitled to convict an irresponsible offender merely because the latter committed, in the judges opinion, an atrocious crime demanding punishment". Yet, if scientific findings bind the court, then they must logically do so in all cases,
i. e. whether the accused is found responsible or not. This would imply that, as the court may not set aside Art.48 or 49 if the expert's findings lead to the conclusion is that the accused is not Ailly responsible, it may not apply Art.48 or 49 if the conclusion is that the accused is ftilly responsible. In other words, the court must convict the offender even thought it is still in doubt as to his responsibility. This does not only contradict the fundamental principle in dubio pro reo, but it also leads to a result as shocking as the one "definite" in psychiatry, one may be inclined to prefer the solution prevailing in Switzerland, for instance, where it is held that "*le rapport de I'expen ne lie jamais le juge. C'est a celui-ciqu 'appartient la decision demiere, conforment au principe generalment admis de la libre appreciation des preuves par le juge en procedure penale. Le juge a le devoir de se faire une opinion personnelle, rnente s "ll consulte des expens " (Logos, op. cit.. p. 48)*. This principle is enshrined in a number of significant decisions, which stress that *"le juge n 'est pas tenude suivre, sans I 'examiner de pres, une expertise qu 'il a requise"* (ATF 81 IV, JdT I9SS IV130). Thus, a court may regard the accused as being not fully responsible despite expert opinion to the contrary, "// *est loisible au juge de constater. meme sans expert is' psychiatnque ou en s 'ecartant d 'une telie expertise, les circonstance de fait qu 'il considere comme revelant une diminution de la responsabilite"* (ibid.; see also ATF 73 IV 212, JdT 1948 IV 130 and ATF 75 IV 145, JdT 1949 IV 115).

II. Rules applicable to young offenders (Arts. 52-56]

There are cases other than those coming under the preceding Articles where the offender may not be treated as though he were fully responsible, namely the cases where he is a minor. Arts.48 and 49 are then, as a rule, inapplicable (see, however, Para (2) in comments under Art. 53), and it may not be held that a young offender is not punishable or is liable to a mitigated punishment on the ground that, by reason of his age, he was incapable at the time of the act of understanding what he was doing or of regulating his conduct according to this understanding The problems arising in relation to young offenders are not the same as those which arise in relation to adults, because there exists between the two classes of offenders a difference which does not lie so much in the degree as in the nature of their intelligence or volition. A minor, even though he may be more intelligent than an adult, is nevertheless not a "miniature man" and the may not be treated as such for this *Weltanschauung,* his apprehension of the world, is not that of a grown-up person. Furthermore, as has been said, in the filed of juvenile delinquency 'Tenfant coupable est surtout un enfant victim". This implies that a court dealing with a young offender should not concern itself so much with what he deserves as with what he needs, and that it should consider the offence merely as a indication that he requires medical treatment, education or corriwtion (Arts. 162-166). In this perspective.

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It is dear that the question whether the young offender was aware that be was doing wrong cannot have, under tbe code. The importance it has in England or France, for instance, for it does not govern his liability to a punishment or a so-called “measure'', but only the kind of step that ought to be ordered in the circumstance The idea of retribution is almost altogether absent from the provisions applicable to young offenders, as is indicated by the fact that the seriousness of he offence committed is normally not taken into account in deciding the offender's fate The question is not to punish a juvenile "according to the degree of individual guilt" (Art 86), but “to ensure the best possible treatment" (Art.54), and penalties (Art 171-173), if to be ordered, may not be imposed unless they will better than “measures" serve the objectives which the code aims st accomplishing

This does not mean that the provisions applicable to juveniles are not of a penal nature. Quite the contrary, young offenders other than infants are subject to criminal law; yet, as they constitute a special category of wrong- doers (as u emphasized by the fact that, in many countries, the law concerning them is enacted separately and not embodied in the penal code, and that they are tried by specialized courts under special rules of procedure; to the same effect, see Arts.22 (2) and 171-180 criminal procedure code), they come under special rules. However, they arc treated differently fro adults for only so long as they are "different". Accordingly, the code deals with infancy (which ends at the age of nine years), adolescence (which extends from nine to fifteen yean, this being the limit of penal majority), and an intermediary period extending between penal and civil majority, i.e. between fifteen and eighteen years of age.

Article 52. lafaacy: Exoneration fro-eriminal provisions

The provisions of this code shall not apply to infants not having attained the age of nine years. Such infants far not deemed to be responsible for their acts under the law.

Where an offence is committed by an infant, appropriate steps may be taken by the famly, school or guardianship authority.

Infants are completely exonerated from criminal provisions. Legally speaking, infancy is the period extending from birth to what might be called the beginning of penal minority, i.e. the age from which a child becomes a "young offender” within the meaning of the law. Since under Art.52 the lower limit of penal minority is nine years, the code never applies to children who commit an offence before having completed their ninth year. Some attention must be given to the fact that the Amhanc and French versions of Art52 refer to infants not having "completed” the age of nine years, which has been wrongly translated in to English.

I. It is by no means easy to decide when human beings should become subject to cnmuial law, and the age-limit, which marks the end of infancy, actually vanes from place to place (six yean in Switzerland; seven years under the Ethiopian penal code of 1930; eight yean in England, thirteen yean in France, etc.). Although it it always somewhat arbitrary to fix any limits at ail, the choice should not be made at random, but in view of the following.

(a) The conditions, if any, which iffluence a child’s biological or physical maturity may be taken into account. As for mental maturity, which is of greater importance, it should be estimated having regard to factors such as the standard of living of the country concerned, the average degree of execution, and the tike, which bear upon the minds of infants as much as purely personal circumstances (individual intelligence, family surroundings, etc.).

(b) More pertinent is the cat that, the longer a child is deemed to be an infant the longer the court are prohibited from meaning, with regard to juvenile delinquents, such orders of a curative, educational Or corrective nature as may be necessary for their own good Inasmuch as the commuBon of an offence by a minor indicates that something is wrong with him, it is desirable that dus wrong should be remedied as quickly as possible. Yet *° long as he is an infant the remedy must be administered principally by his parents, that is, by persons who

may be primarily responsible for the wrong or who are not willing or able to take steps as efficient as those which a court might order.

2. Because these considerations in mind, the codification commission felt that nine years would be adequate as the limit of infancy in Ethiopia Therefore, whatever office may be committed by a child who is not yet in his tenth year, he is not criminality liable and may not be subjected to a penalty under the law. He is presumed by law to be doli incapax, and the presumption cannot be rebutted by showing that be understood what he was doing and that he would also understand the purpose of a penalty. As has been said, the exemption is justified not so much by reason of lack of intelligence as by lack of will power. Furthermore, punishment, which in any event might do more harm than good owing to its psychological consequences, is not a proper objective for one who deals with infants. The main task is to investigate why the infant did wrong and to bring about a change in the circumstances, which led him to commit the offence.

This is not to say, however, that children may do as they please, but merely that they are not the concern of the criminal law. They are under the exclusive jurisdiction of heir parents or persons in loco parentis (see also Arts. 2124 and 212S civil code). If they do wrong, corrective steps may be ordered at home or at school, but not in court. Yet, the law does not altogether ignore the interests of infants, and provisions such as Arts. 231-234 of the civil code and Arts. 548, 625 and 626 of the penal code are designed t ensure that infants do not become delinquents in consequence of their parents failing in their duties.

Article 53. Special provisions applicable to young persons

(1) Where an offence is committed by a young person between the age of nine and fifteen the penalties and measures to be imposed by the court shall be those provided in book II, chapter IV of this code (Art 161-173).
Young persons shall rote be subjected to the ordinary penalties applicable to adults nor shall they be kept in custody with adult offenders.
(2) No order may be made under Art. 162-173 of this code unless the offender is convicted.

Complete immunity from criminal liability is enjoyed only by infants and ceases to operate when they attain their tenth year. Thereafter and until they reach penal majority (i.e. when they attain their sixteenth year), young offenders, known in the code as “Young persons", are no longer exonerated from criminal provisions, though they may not be treated in the same manner as adults. According to Art. 53, a young person who commits an offence in not deemed to be irresponsible for his acts, and it is not necessary to supply evidence of “mischievous discretion” in order to establish whether he should answer for the offence. It may be noted that the English version of Art.53 does not make it sufficiently clear that a young person is a minor who has not yet completed his fifteenth year (see Amhanc and French texts; see also Art. 56 (1».

1. The reasons why a young person is criminally liable are of two kinds. In the first place, it is between the ages stated in Art. 53 (1) that a minor begins to understand the mature of his acts, to be able to form a decision and to keep to it. During this period, therefore, his intelligence and volition develop and become gradually closer to those of an adult. On the other hand, and more pertinently, the commission of an offence shows that the time has come to take action becausc'ho action has been taken at home or at school or it has failed. Further delay might well be fatal in that, should the minor’s inclination towards doing wrong be allowed to grow and strengthen, it might become impossible to divert him from a life of crime. It is while the offender is still young and ductile that efforts to bend him in the right direction can be expected to succeed. Moreover, since he is no longer and infant, he can be separated from his parents without being too much affected thereby, if this is necessary in his own interest because the blame for what has happened should be placed on them (whether they are wrongdoers

themselves, or disunited, or drunkards, or too harsh, or too weak or for any other reason) rather than on himself

On attaining their tenth year, therefore, minors are no longer a problem to their parents exclusively, they become the responsibility of society at large. The community is entitled to ensure that its younger members are not let to corrupt and rot, and this explains not only why the law must have its course, but ajso why the pertinent legal provisions are not those that apply to adults. For at this stage, society is little concerned with attaining objectives of retribution and deterrence Its immediate duty and its long-term goal are to turn juveniles into useful citizens. Thus, the primary aims of any action taken with respect to young persons are and must be education and correction, and this is stressed in the code by Art. 170, which prohibits a minor who is a fist offender from being sentenced to a punishment, because penalties should be used in the last resort.

As will readily be seen, it is a difference of purpose more than of degree of responsibility, which justifies that offenders be treated differently according to their age. If, as is prescribed by Art. 53(1), first alinea, young offenders must be dealt with only in accordance with Arts. 161-173 and if, as is prescribed by the said sub-article, second alirea, they may not be subjected to the ordinary penalties applicable to adults, it is not because these penalties are undeserved, but because they are not as well suited to the requirements of a young person as those special measures and punishments that may be ordered under Arts. 161-173. Even when penalities must be ordered with regard to a young offender, which is inevitable in certain cases, they differ from "ordinary penalties", if not by their nature, at least as regards their enforcement. A Penalty such as imprisonment (Art. 173), though similar in its principle to simple or rigorous imprisonment (Art. 105 and 107), may not be executed in the same manner as either of the latter punishments. Not only must young prisoners be kept separate from adult prisoners so as to prevent further contamination (Arts. 53(1), second alinea, and 109 (2)), but also the emphasis must always be on education and corrective training.

2. According to Art. 53 (2), Arts. 161-173 are not applicable to a young person unless he must be found guilty (see Art. 177 criminal procedure code), i.e. he must have committed the offence either intentionally (Art. 58) or negligently (Art 59), This condition may seem perfectly natural, be it only for the reason that it is necessary to find out, for the purpose of deciding what offence has been committed, whether the young person acted intentionally (and. if so whether he had a specific intent, such as the intent to obtain an unlawful enrichment) or negligently. Yet, it may appear, on the other hand, that he said condition is somewhat inconsistent with the rational and purposes of the special provisions regarding young persons. Logically speaking the question whether the offender is guilty cannot be answered unless it is first established that he was capable of acting in a guilty manner, i.e. whether he was responsible or not. It follows that, if the offender is feeble-minded, blind, epileptic, etc. (Art 162), he may neither be convicted, since he is irresponsible, nor subjected to the curative measure provided for in Art 162, since he is not convicted. An order may not either be made under Art. 135, since the latter provision applies to adults, but not to minors (Art.53 (I); see also ATF 76 IV 273, JdT 1952 IV 34). Furthermore, it seems that the question of guilt is of greater importance when the issue is to punish than when it is to order medical treatment or an educational or corrective measure. This is why, bearing also in mind that Ethiopian legislation makes at present insufficient provision regarding children in need of care and protection, one may be inclined to think that "il suffit en pnncipe que Tenant ait commisun acte constituant objectivement une infraction" (Logoz, op. cit, p.337). The terms of the law, however, are clear, and it does not appear possible to depart from them At most it could be said that, if it is shown that a young person did not act in circumstances providing him with a complete defense, the question whether he was responsible and acted intentionally or negligently should be carefully examined when il appears that he should be sentenced to a penalty (Arts. 171173).

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Article 54. Assessment of sentence

In assessing the sentence the court shall take into account the age, character, degree of I *mental and moral development of the young offender, as well as the educational value of the measures to be applied.*

The court may vary its order to ensure the best possible treatment (Art. 168).
This provision departs from two principles, which are fundamental in criminal law and procedure, and thus stresses the special nature of the rule applicable to young persons.

1. When an offence is committed by an adult, he is liable to the penalty prescribed by law with respect to this offence. Every crime carries with it a certain punishment the kind and extent of which vary depending on the kind and seriousness of the crime. However, since Art.53 (1) prohibits "ordinary penalties" from being applied to minors, it follows that no offence committed by a minor is ever liable to a specific penalty or "measure", save in exceptional cases (Art 173). For instance, when an adult commits a simple theft, the court must in principle opt between simple imprisonment not exceeding three years or, if the case is serious, rigorous imprisonment not exceeding five years (Art.630). But, when a simple theft is committed by a young person, the court's discretion is much greater for, although it may not sentence him either to simple or to rigorous imprisonment, it may order any of he measures or, in cases of a relapse, penalties, laid down in Arts. 161-173.

This flexibility is necessary and justified having regard to the purposes of the order to be made. Since education and correction must come first, the law cannot bind the court to make specific orders in specific cases lest these purposes might not be achieved. This explains, for instance, why the court is not obliged to order a penalty if, although the minor is not a fint offender, it considers that the infliction of a penalty would ruin the last chance to correct him. What the court must order, therefore, is the measure of penalty which will best serve the said purposes, taking into account the offender's age, character and mental and moral developme~~nt~~ (Art.54. first alinea).* Thus, if a young person appears to have been the victim of his family circumstances and to be easily amenable to reformation in changed circumstances, the court may, whatever the seriousness of he offence committed, confine itself to ordering that he should be separated from his family and entrusted to the care of reliable persons (Art. 163); if he has acted out of light-mindedness but he is old enough to understand the meaning and implications of an admonishment, the court may repri~~ma~~nd him (Art. 164); if he appears to be in need of supervision because he spends his leisure time in the company of friends who have a bad influence on him, the court may order school or home arrest (Art 165); in other cases, it may deem it more appropriate to send him to a corrective institution (Art 166). This is to say that the minor's needs, as disclosed by the inquiry that may be ordered under Art. 55, are of greater importance than the mature or gravity of his act. What he has done should be considered as a symptom of a maladjustment and not, in isolation, at its face value. As such, it should guide the court in deciding how this maladjustment can best be remedied, in the same manner as a physician diagnoses a disease and prescribes the treatment accordingly. As a matter of fact, there is probably no other field in the entire criminal law where the functions and duties of a judge offer so much resemblance to those of a doctor and where the cooperation of judges, physician and psychiatrists is more necessary.

2. Equally exceptional and significant is the rule laid down in the second alinea of Art54, according to which the court is not bound by its orders and may at any time vary them if this is required in the interest of the young person concerned.

It is a generally admitted procedural principle that a final judgment ma not be revised in the course of its enforcement This principle, however, does not apply when a court has sentenced a minor to' a measure (but not to a penalty; see Art 168) and the court may then substitute a new measure (but presumably not a penalty, though the law does not expressly say so) for the measure originally ordered (see, however Art. 182(2) regarding offenders

over fifteen but under eighteen years of age). The reasons for this exception is obvious if one bears in mind the comparison made above between judges of juvenile courts and doctors. There is a certain amount of expen mentation involved in the dealing with young persons and it always is somewhat unpredictable whether attempts made to promote their reformation will succeed. Therefore, the court's duties do not end after it has begun judgment, as a doctor's duties do not end after he has prescribed a drug. In both cased, he who has ordered the treatment should ensure that it has its desired effect. As a physician does not blindly continue the treatment originally prescribed but often tries a new drug in the cause thereof when he sees that the patients condition does not improve as expected, so the court may order a new measure if it appears that the one which is being enforced does not serve the purpose for which it was ordered. Since measures are imposed with a view to educating and correcting young persons, they may be varied as soon as it is shown to the court, either by the management of the intuition to which a minor has been entrusted (Art. 168) or by the minor himself or his legal representative (Art. 180 Criminal procedure code), that the measure originally ordered is inappropriate as regards its duration (Art. 167) or its nature (Art 168). For instance, when a court has ordered supervised execution (Art 163) and it is apparent that supervision at all is exercised over the young person, the court ma either entrusted him to a person or institution other than the one designated in the original order (Art. 163 (3)), or order school or home arrest (Art 164) or decide that he must be sent to a corrective institution (Art. 166). Similarly, if it appears that a minor does not benefit fro his stay in a corrective institution and that supervised education would be better suited to his requirements, the court may later its judgment accordingly. These variations may be ordered for so long as measures are legally enforceable (Art 167); but, although the law makes no specific provision to this effect, it seems that they should not be ordered except after the court has again ascertained the minor's needs as it did before making die order the revision of which is sought.

Article 55. **Expert evidence and enquiry**

(!) For the purpose of assessing sentence the court may require information about the conduct, education, position and-circumstances of the young offender. It may examine his parents as well as the representatives of the school and guardianship authorities.

The court may require the production of any files, particulars, medical and social reports in their possession concerning the young person and his family.

(2)The court before passing sentence may order the young offender to be kept under observation in a medical or educational center, a home or any other suitable institution.

The court may require the production expert evidence regarding the physical and mental condition of the young person. The court shall put such questions as may be necessary to any expert for the purpose of informing itself as to the physical and mental state of the young person and Inquire what treatment and measures of an educational, corrective or protective kind would be most suitable.

(3)In reaching its decision the court shall be bound solely by definite scientific findings and not by the appreciation of the expert as to the legal inferences to be drawn.

Art.54 requires the court to make its decisions having regard to the age, character and development of the young person before it as well as to the educational value of he order to be made. This implies that the court must make a diagnosis, which it cannot make unless it is fully informed of the circumstances of he case, and a prognosis, which it cannot make unless it is fully informed of the requirements of he case. Whenever the court does not possess the pertinent information, it must order an enquiry under Art.55 with a view to elucidating the factors, which led the minor to commit an offence ancj how they can be eliminated. This is to say that the purpose of the enquiry is not merely to establish the

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personal, social and medical antecedents of the young person concerned, but also to enlighten the court as to the kind of action that would be appropriate e in the circumstances. *"L ' expertise n 'a absolument pas pour but d "etablir le discemement du deliquant mtneur. Elle vise uniquement a gutder le juge dans le choix des measures a prendre. Les Principes poses (comme c "etatt deja le cas a I'article 31) n 'ont pas de caradere imperatif. Ils se proposent de rappeler au Juge que. pour des delinquents jevnes et encore amendables. les measures d 'education sont plus appropriees el preferables aux measures de correction"* (Records of the codification commission).

1. An enquiry may firstly be ordered into "the conduct, education, position and circumstances of the young offender" (sub-art.(1), first alinea). The court will not have a true picture of the case unless it understands why the minor has done wrong; to this end, it may seek «ny information it deems relevant, *"la nature de ! 'acte. la facon don t it a ete com mis. n 'ont iei d 'importance qu 'a litre de symptoms. C 'est pourquol il est indispensable que la decision foit precedee d 'une enquete approfondie sur 1 'enfant il—ui-meme et son entourage. Cette partte de t' enquete implique la recherche des causes de I'acte commis. (■■■)• L 'autorite chargee le fond, prendre des infomations precises sur la conduile, I 'education et la situation de l'enfant", for. "pour etre efficacies, les measures ou les measures ou les chatiments (...) doivent etre, dans chaque cas. adaptes a la personnalite- au sens large du terme - du jeune del inquant " (Logos, op cit.,p340).* This information, which may show that the minor is not naturally bad or dangerous but was driven to crime by surrounding circumstances, ma be otbtained in irrany manner which the court thinks fit to direct. It may in particular summon and examine any person capable of answering whatever question the court may wish to ask concerning the young person (Art. 177 (2) criminal procedure code), such as his parents or persons in loco parentis, teachers, social workers, and the like, and require the production of any written information regarding him What matters is that the court should be aware of all the circ~~u~~mst~~a~~nces of the case; the ways in which it obtains information are irrelevant, so long as the information is reliable.

2. The court may also order a medical examination with a view not only to assessing the offender's mental and moral development (which, according to Art.53, governs the kind of decision to be made) but also to interpreting, if need be, the information obtained through an enquiry conducted under sub-art. (1). Hexe again, the questions of diagnosis and prognosis are closely connected, and the court should as a rule satisfy itself that the step it proposes to take is not undesirable for medical reasons. Sub-art.(2) is quite general as regards the manner in which the court may reach this conclusion. In a majority of cases, however, it will be found nec~~e~~ssary to keep the minor under observation until all the points in issue have been clarified

3. Art.55 (3), which is similar to Art.51 (3), prescribes that the court is bound by "definite scientific findings", although it is ultimately responsible for drawing the legal inferences there form. As much as this solution may be criticized when adults are involved and the issue is whether they are responsible or not, as much it ma appear that Art-55 (3) does not go far enough in compelling the court to take into account the experts' conclusions regarding only the condition of the young person. Bearing in mind that the court may at any time vary its orders, one may tend to think that there is no reason why the law should not also bind the court to make such decision as physicians or psychiatrists consider to be appropriate, the more so since not so many judges are familiar with the problems of juvenile delinquency. Under Art. 5 5 (3) , there is nothing to prevent a court from sending the offender to a corrective institution even though experts strongly advise against it on the ground that this may hamper his reformation. In practice, however, most judges decide according to the recommendations made by the experts.

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Article 96. Offenders over tbe age of fifteen

(1) If at the time of the offence the offender was over fifteen but under eighteen years of age he shall be tried under the ordinary provisions of this Code.

(2) The court may, in assessing sentence, take tnto account the circumstances of the case, in particular the age of the offender, his incorrigible or dangerous disposition and the likelihood of his reform, either by applying the general provisions regarding ordinary mitigation of penalties (Art. 184) or by applying one of the special penalties specified for young persons (Art. 170-173).

Art. 56 creates a transitory period which extends between penal and civil majority. Although a special provision concerning this age group is not necessary in theory, since the offender has attained penal majority, there is nothing to prevent prescribing that a person belonging to this group may enjoy privileged treatment, since he is not yet an adult under the Civil Code. The privilege, however, is not absolute, and Art. 56 is special in that which concerns, not the responsibility or guilt of, but the nature or extent of the penalty applicable to, an offender who is more than fifteen years of age but has not attained his nineteenth year. (The English text again differs from the Amharic and French; see also Art. 198 Civil Code).

1. As stated in sub-art. (1), the ordinary provisions of the Code apply to a minor who has completed his fifteenth but not his eighteenth year, and he is not to be dealt with in accordance with Art. 53 relating to young persons. His criminal responsibility and guilt are determined as though he were an adult, but the punishment that may be ordered is not ~~n~~ecessarily that which would be ordered if he were an adult. In this respect, the court may choose among tbe following courses.

(a) The court may order any of the penalties applicable to adults (exoept the death penalty; see Art. 118, first alinea) and mitigate it as provided for in Art. 184. This mitigation is, however, not compulsory. The court may grant a reduction if it thinks fit, having regard to the circumstances of the case and in particular to the age of the offender and the d~~anger~~ he represents to society. But there is nothing to prohibit the court from treating him like an adult when it considers it more appropriate taking into aocount his "incorrigible or ~~d~~an~~ger~~ous disposition". It is questionable whether there exist persons such as incorrigible minors.

(б) An ordinary punishment, even though mitigated, may in some cases appear excessive. Therefore, instead of applying such a punishment, the court may choose to order one of the special penalties applicable to young persons. In particular, it may be advisable to order a fine rather than a short term of imprisonment.

(e) There is no obligation for the court to substitute a penalty for another penalty. If a mitigated punishment or a punishment under Arts. 171—173 appears inadequate or undesirable, the court may, on the conditions laid down in Art. 182, replace either kind of penalty by any of the special ••measures" applicable to young persons.

2. The court may not proceed as provided for in Art. 56 except where the minor waa between fifteen and eighteen years of age at the time of the offence. If he is tried wben over the age of fifteen for an offence committed before be reached penal majority, he must be dealt with in accordance with Art. 53 since he was a young person on the day of the act,the same as he must be dealt with" under Art. 56 if he is tried when over the age of eighteen for an offence committed before he reached civil majority, since he was not an adult on the day of the act. From a procedural point of view, it is doubtftil whether the provisions of Arts. 171 *et seq,* of the Criminal Procedure Code apply irrespective of the age of the accused at the time of the trial. It seems, however, that they should apply even though he is no longer a minor when he is tried for an offenoe committed while he was a minor.

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CHAPTER Vm

CRIMINAL GUILT [ARTS. 57-63]

According to Art. 23, any offence comprises legal, material and moral ingredients which must all be present so that it may be deemed to have been completed. The provisions of the Code regarding criminal guilt define this moral " pedient, *I.e.* the state of mino ra which the doer of an unlawful act must have been at the ame of the act so that he may be punished therefor. What this state of mind should have been is easy to understand if one recollects that a person who is deprived of his understanding or volition is incapable of forming a “guilty mind”. Yet, even where a person is not incapacitated as provided for in Art. 48, it doea not necessarily follow that he had a guilty mind for, although there exists a legal presumption that every accused is responsible for his acts, there is no presumption that every responsible offender is guilty. The presumption is that he is not guilty until the contrary is proved (Art. 53 Constitution). It must always be established, therefore, that the state of mind of the accused at the time of the offence was of the nature defined in Art. 58 or 59.

Inasmuch as this jtalr of mind is an express or ^npliod ingredient of every offence, it naturally varies from case to case; the moral element ofTiorrucide is not that of forgery, rape or theft It is, however, a general requirement that the wrong-doer should have had a guilty mind and have acted intentionally (Art. 58) or negligently (Art. 59). How this requirement applies in cases of concurrent offences where doubts may arise as to whether the accused is guilty of one or more offences, is s question to be settled in accordance with the provisions of Arts. 60-63. .

Paragraph 1. General provisions [Arts. 57—59]

Article 57. Principle.; fXmlnal f«nf* «nd accident

(1) * *No one can be punishedfor an offence unless he has been found guilty thereof under the law.*

A person Is guilty If, being responsible for his acts, he commits an offence either Intentionally or by negligence.

(2) *No one can be convicted under criminal law for an act penalised by the law If it was performed or occurred without there being any guilt on his part, and was caused by force majeure, or occurred by accident.*

Nothing In this Article shall be a bar to civil proceedings,

1. The moral element of an offence consists of a "criminal fault” in the absence of which no liability to punishment is incurred (*nulla poena sine culpa).* It is this element which makes the difference between criminal offences, *I.e.* acts objectively contrary to the law, and punishable offences, *i.e.* unlawful acts done by a person with a "guilty mind”. Thus a person does- not commit a criminal fault for the sole reason that “he infringes any specific and explicit provision of a law” (Art. 2035 Civil Code), and something more than a breach of the law is required for purposes of punishment. For, as is implied in the well-known maxim *actus non facit reum, nisi mens sit rea,* there are no guilty acts, but only guilty persons. This principle is expressed in sub-art. (1) of Art. 57,' according to which “no one can be punished for an offence unless (...) he commits ar offence either intentionally.Q* by negligence". In other words, a guilty mind, under the Code, is a st^te of mind of the kind define** in Arts. 58 and 59.

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As has been said hereinbefore, it is a general and absolute condition of liability that the offender should have had a guilty mind. There is, however, no more uniformity in the moral than in the material ingredients of offences ahd, since the same act may be an ingredient of several different offence*, it must be established from case to case exactly what the aceused had in mind before one can decide the offence of which he is guilty. The fact that the moral AViqarot of a given offence is absent *(e.g.* intent to obtain an unlawful enrichment, in cases of theft) entails that the aecused is not punishable for that offence; but it d&cs not neeessarily entail that he is not punishable at all, and he may well be found guilty of a different offence *(e.g.* unlawful use of the property of another, for which no intent to enrich oneself is required).

2. The rule that an offender may not be punished unless he is found guilty is developed and illustrated, perhaps unnecessarily, in Art. 57 (2), first alinea, which states that a person does not commit a criminal fault and is consequently not guilty of an offence who infringes the law in circumstances amounting to an accident or *force majeure.* Thus if *A* drives a car in accordance with traffic regulations snd a child who is being run after by a dog suddenly crosses the road, is hit by the car and dies, although the legal and material elements of an offence of homicide are present, *A* is not punishable because he acted neither intentionally nor negligently. So too, if *A* entrusts public documents to *B* which *B* locks up in his safe, and *S*'s house, including the safe, burns to the ground, although the legal and material elements of an offence of destruction of documents are present, *B* is not punishable for be committed no criminal fault.

3. Some attention must be given to the fact that the concepts of criminal and civil liability do not coincide. A person civilly liable is not automatically criminally liable, and a person relieved of criminal liability is not automatically relieved of civil liability; he may, for instance, be ordered to pay damages although he is acquitted (see Arts. 2066 et seq. and 2149 Civil Code). The second alinea of Art. 57 (2) is designed to stress the difference betweeн a criminal and a civil fault and accordingly prescribes that civil proceedings may be taken against a person even where be is not guilty of an offence.

Article 58. Criminal intention

(1) *A person JnfeatiaaaUy commits an offence when he performs an unlawful and juaitbable act withJun *ne* tcijge* [nnti] *inmt.* \

Criminal intention exists also when the offender, beiijg aware that his act map cause *illegal and punishable consequences*[K] *commits the net regardless that such consequences 'may follow.*

(2) *An intentional offence is punishable save in cases of justification or excuse expressly provided by law (Art.* 64-78).

(3) *No person shall be convicted for whqt frf neither knetw-ef er intended, nor for what fees beyond what he intended* [k] *rif" "'~'y or as apossibility, tubfectio the provisions governing negligence.*

Criminal intention, which constitutes the upper degree of criminal guilt, comprises two elements and although, as will be seen later, it may be direct or indirect, the said elements must be present together so that either form of criminal intention may be deemed to be realized.

1. According to sub-art. (I), first alinea, a person intentionally commits an offence who ipfriwg— the law with full knowledge and intent. Thus, criminal intention firstly implies awareness.

(e) Where an act is penalized by law regardless of its consequences, tbe person who performs this act may not be deemed to perform it intentionally unless he is **aware** of the circumstances which have the effect of rendering it criminal. So too, if under the **law certain**

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consequences must be achieved so that an offence is complete, a person may not be regarded as having intentionally committed this offence unless he knew that such consequences would follow. As has been said, *"la conscience doit embrasser avant tout la representation de l'activiti propre de l'auteur (action ou omission), telle qu'elle est caractirlsiepar la tot; elle doit egalement embrasser la representation du resultat (et par consequent aussi celle du rapport de causaliti adequate necessaire entre l'activite dcployte et ce resultat) si, comme il arrive frequemmcnt, un certain resultat—lesion ou mlse en danger—est un des elements Itgaux de l'infraction."* (Logoz, *op. cit.,* p. 63). In every case, therefore, the object of the doer's intent must'be ascertained having regard to the ingredients of the offence as laid down in the Special Part of the Code. Thus a person does not intentionally commit a breach of official secrecy if he does not know that the information he discloses is secret ;.a. person does not intentionally commit homicide if he is not aware of the fact that his target is a human being; a person does not intentionally commit theft if he believes that the property he abstracts is his own.

(b) A controversial issue, which few Codes settle specifically, is whether awareness should attach only to the factual circumstanoes which make an act unlawful, *i.e.* to the material ingredients of an offence, oc, whether the doer should also know Lhal the said act is contrary to the law In connection with Art. 18, al. 2^of the Swiss Penal Code^which reads: *"Cetui-ld commet intent ionne lie me nt un crime ou un diiit, qui le commet avec conscience et volonte",* the Swiss Federal Court held that **in the very terms of this provision, which does not mention unlawful intent, it is not an essential element of intention that the doer should be aware of the unlawful or even of the reprehensible nature of his act. Art. 20 of the Penal Code" (the corresponding provision in the Ethiopian Code is Art. 78) "takes into "^'int thn where this awareness is mining- the court may freely reduce the punishment or impose no punishment if an offence has been committed by a person who had sufficient reasons to tiblieve that he was entitled to act as he did (. . .). If Art. 20 covers all the cases where the doer is not aware c * the unlawful nature of his act, there is no reason whv this awareness should be held to be an ingredient of intentiofi, for this would always lead to acquittal, while under the pertinent provision it is for the court to decide whether the punishment should be reduced or dispensed with (. . .). It must be noted, however, that the latter solution is in conformity with the principle *'nulla poena sine culpa'* on which the Penal Code is based and should therefore, as a general rule, prevail (en *regie generate elle merit• done O'avoir la preference*)" (ATF 70 IV 97, JdT 1944 IV 98).

This opinion is not beyond criticism (see in particular F. Fitting, *Intention dolosive et erreur de droit*, in JdT 1953 IV 2—10) because it is on the face of it contradictory. The Court states that* when the doer is unaware of the unlawful nature of hi« Art should "preferably" be exempted from punishment, for exemption is consisteijt_with_lhe rule *nulla poena sine culpa.* Yet, it would seem that if there is any room at all for applying this rule, nqj only should there be no question as to which solution should prevail, but the doer should properly be found not guilty. It is of questionable logic to invoke the said rule, which means that the doer may not be punished if he is not at fault, in order to justify exemption from punishment, which implies that the doer does not deserve to be punished though liability has been incurred. In Fitting's opinion, the contradiction is inevitable if one fails Jo distinguish two states of mind which may be auite different, namely *"le sentiment de mal agir"* (awamness of the reprehensible nature of the act) and *"la conscience de commettre un acte punissable ou defendu"* (awareness of the unlawful nature of the act).The two do not necessarily go together; if one confuses them, one is, as the said Court was, driven to the conclusion that "*Verreur sur la* ***liceite*** *de l'acte n'est pas une erreur de droit",* which is a contradiction in terms. It is impossible, therefore, to reduce *"la question de la conscience de mal agir A celle de la conscience de VilUceite, ou vice versa, et de resoudre ces deux questions ensemble par la seule disposition sur Verreur de droit* (. . .). An analysis of the various cases that may arise will show that guilt exists when either element is present, *i.e.* when the doer is aware either oi the reprehensible or of the unlawful nature of his act (...); depending on the nature of the case, he should be found guilty, or his degree of guilt should be deemed lesser, or

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he should be found not guilty" (Fitting, *loc. eit*pp. 7—9). Thus, the doer is fully guilty if he is aware of the unlawful as well as of the reprehensible nature of his act; be is not guilt? if he is unaware of both; if he is aware only of the unlawfulness of the act, the punishment may be reduced on grounds such as those mentioned in Art. 79 (I) (ft) of the Ethiopian Code; finally, if he is aware only of the reprehensible nature of the act, then he must be deemed to have committed a mistake of law within the meaning of Art. 78 of the Ethiopian Code.

These conflicting opinions have been quoted rather extensively because they are particularly relevant to the concept of criminal fault as enshrined in the Ethiopian Code; for Art. 58 (1), especially in its Amharic and French versions, is quite specific with respect to the circumstances of which the doer should be aware. The French text reads: ***Commet inten- tionnellement une infraction celui qui agit avec la conscience et la volonti d'accomplir un acte illicite et punissable en vue d'en obtenir le risultat*Although this rule may not be sufficiently clearly worded, it may be calculated to convey the idea upon which Fitting's opinion is based. In this respect, it is pertinent to note that, when the Codification Commission amended Art. 48 (1), second alinea, in the fashion hereinbefore described ("understanding the nature or consequences of his act" instead of "the *unlawful* nature") , the drafter stated that, since such was the Commission's wish, he would not object to the amendment *"bien que cet 414ment* (awareness of the unlawful nature of the act) *soit pricis4ment une condition de /* infraction pinale".* However, if this is the intention behind Art. S8 (1) it does not appear to have been carried out to its ultimate consequences, for it seems that "in exceptional cases of absolute and justifiable ignorance *and good faith*" (Art. 78 (2)), the doer should be found not guilty, instead of merely qualifying for exemption from punishment.

(c) Art. 58 (1) gives no indication as to how awareness is established, for this is not strictly a penal problem,. Yet, some Penal Codes contain rules on tbe subject, which rule* might guide the courts of Ethiopia in deciding whether the accused was aware of the factual circumstances surrounding the doing of the unlawful act. For instance, the Sudanese Penal Code states (Art. 41) that ''a person is presumed, unless the contrary is proved, to have knowledge of any material fact if such fact is a matter of common knowledge." Thus, it is a matter of common knowledge that arsenic can kill, that "tej" is intoxicating, that venereal diseases are contagious, etc.

2. In addition to awareness, criminal intention also **implies** "intent" and. although the latter term **is** rather ill-chosen, what Art. 58 (1) requires is that the doer should have had tbe **dtspice to** act as be **did** or **to** produce the consequences which his act brought about. Something **tnorc** than awareness must, therefore, be j>rove4, fox even when it is certain that the doer knew that his act was likely to result in harm, it does not automatically follow that he deliberately or voluntarily inflicted this harm.

(a) Whether or not a person acted with intent is a question which in some cases can be answered without too much difficulty, in particular where the achievement of a given result is not an ingredient of the offence charged. For Instance, if *A* knowingly uses abusive language towards *B.* the presumption is that he intentionally insulted since he knew the language he used to be abusive, his only purpose fh '□slug il rrrQsi Rave been to injure *B*'s honour. In like cases, intent is necessarily inferred from awareness, and this presumption can be rebutted by establishing that knowledge did not exist and showing, *e.g.* that the accused did not understand the meaning of the words he used. This is so even when some objective ambiguity remains regarding the exact nature of the offence committed. Thus if *A* knowingly abstracts *B*'s hat, although it is not clear from *A's* act whether his purpose was to borrow the hat or to keep it, the court may presume that lie intentionally committed an offence against property since he was aware of the fact that the hat was 2Ts.

(ft) When the achievement of a given result is an ingredient of the offence committed, this offence may not be deemed to have been intentionally committed unless it is shown.

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not only that intent accompanied the doing of the act producing this result, *i. e.* the act was voluntary, but also that the result was foreseen and dsaired. Furthermore, when a voluntary act has brought about several unlawful consequences, the question arises whether all of them were foreseen and desired.

0) A result is intentionally achieved when the doer acts with a view to producing it. In the terms of Logoz *(op. clt.,* p. 65), "the result is certainly desired when the offender acts in order to bring it about, as in the case where *A* shoots *B* for the purpose of killing him. In such a case, intent is presentiaits clcaxcst form, even though the doer was not certain that the result would follow, or he considered it merely possible, or even improbable that the result would follow (for instance because he is a bad shot).*' Although there is little doubt that the offence of homicide is then intentionally committed, the question is: what circumstances warrant the assumption that the doer acted with a view to achieving the result he achieved and that this result was desired ? It may be presumed that, where the doer was aware of the natural and probable consequences of his act, he brought them about intentionally if his act could reasonably have had no other purpose than to bring about the said consequences. Thn^if.-^ p«m pr>i«r>$_n$ jp p <-yp *nf* ygffe*, knowing that it is poison and that the coffee will be drunk by *B,* it is virtually certain that he does so in furtherance of a desire that *B* should die; if *B* dies from drinking the coffee, there is, therefore, g violent presumption that *A* intentionally brought about *B*'s death. This presumption cannot, however, be extended too far (see AFT 69 IV 75 quoted *infra.).* Thus if *A* deliberately accelerates while driving in a crowded street, although he intentionally infringes speed limit regulations and he foresees the possibility of hitting someone, It should not, if he does hit someone, be presumed that he desired to hit him.

(ii) A result is also deemed to have been intentionally achieved when, though not desired, it was to the doer's certain knowledge inevitable in the circumstances. When an act brings about several .unlawful consequences, the consequences which are foreseen and, albeit not desired, are ancillary to the desired consequences, are deemed to be desired also. Thus (Logoz, *ibid.)* if *A,* with a vifew to hitting *B,* throws a stone through the window of *B's* bedroom, the two consequences he brings about (bodily injury and damage to property) must bp regarded as having been intentionally produced.

(e) The above cases are often referred to as cases where the doer has a direct intention because he acts with *"full* knowledge and intent''. In some cases, however, the doer is deemed to have had an indirect intention because only his intent was full, but not his knowledge that the result would follbw. These cases are dealt with in the second alinea of sub-art. (1), which provides for a form of criminal intention commonly described by the expression *dolus eventualis.* For instance, *A* sets fire to *B's* house. He fully knows that he is going to damage *B's* property, and this actually is the immediate result he desires to achieve. Yet, if when he sets fire, he knows *B* to be at home and foresees that the act of setting fire may bring about an additional result (an injury to *B's* person, or *B's* death) which, however, is not inevitable in the circumstances, the question is whether *A,* because he was aware of the possibility that *B* might die, should be found guilty of intentional or negligent homicide if *B* dies in the fire. In other words, should he be presumed to have desired *B's* death or ha* he merely been negligent in failing to ensure that the act of setting fire would not entail consequences other than damage to property ?

The answer entirely depends on the doer's state of mind at the time of the act. As is apparent, *dolus eventualis* stands half way between direct intention and conscious or advertent negligence (as defined in Art. 59 (1)), and under some laws it falls into the nrst category while it falls irito the second one under other laws. Thus it is held in Switzerland that the legal definition of intention also includes *dolus eventualis* (Logoz, *op. cit.,* p. 67; see also ATF 69 IV 75, JdT 1943 IV 73; ATF 73 IV 100, JdT 1948 IV 18; ATF 75 IV 4, JdT 1949 IV 6; ATF 79 IV 24, JdT 1954 IV 47; ATF 80 IV 117, JdT 1955 IV 54). On the other hand, as regards the position under French law, it has been said that *"quant aux consequences pinales.*

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on se demande s'il faut, dans le silence de la loi, assimiler le dol iventuel d I'intention ou d I' imprudence. La rigle 'poenalia sunt restringenda' fait trancher la question dans le second sens" (Donnodieu de Vabres, *op. cit.,* p. 36).

This difference is understandable, since indirect intention has one element, namely awareness, in common both with direct intention and with advertent negligence. In any of these three situations, the doer foresees the possible consequences of his act and he does not refrain from acting in spTTc oT this. However, if *dolus eventualis* in Ethiopian law is dealt with under Art. 38 and not Art. 59, it is because what separates it from direct intention is less important than what separates it from conscious negligence. In cases of direct irtfenj£K>n, the doer acts with a view to achieving the result, however improbable, or_knowing.Miat it will inevitably follow, while in cases of *dolus eventualis* he holds the result to be merely possible. In both cases, however, tlje result is desired, whether it will or might occur. It is not, therefore, to the object or strength of this desire that the difference between direct and indirect intention* pertains, but to the manner in which the doer sees or imagines things, and it cannot be sajd that an indirect intention is not full or complete (ATF 86 IV 10, JdT 1960 IV 66). A person who knowthgly runs a risk ana fully accepts to bear the consequences, should the risk eventuate, desires .nese consequences in the same fashion as if he had known that they would* follow. True enough, a .person who is consciously negligent knowingly runs a risk also. Yet, if one investigates the reason why the prospect of the consequences did not prevent the doer from acting, one will find that,.in cases of *dolus eventualis*, he acted because he accented the possibility of bringing about the consequences which he knew might follow, while in cases *Of* conscious negligence he acted because -ejected this .possibility; he did not desire the consequences because he believed that they would not take place (ATF 86 IV 12, JdT 1960 IV 74). Thus, in both cases, the doer is faced with an alternative and in both cases, too, he makes the wrong choice. The state of mind behind this choice is, however, utterly different. In cases of *dolus eventualis,* the doer is determined to achieve his primary goal at any cost, regardless of the fact that other consequences may follow, while he probably would, in cases of conscious negligence, refrain from acting or act in a different manner if he properly weighed the possibility of bringing about consequences other than those, if any, which he desires to bring about. This difference, which lies in the "acceptance" of the consequences element, is made clearer in the French (and Amharic) text than in the English version of Art. 58 (I), second alinea, for the said acceptance is specifically mentioned in the French text which reads: *"L'intention dilictuelle est rialisie aussi lorsque I'auteur, sachant ou se rendant compte que son acte peut entrainer des consequences illicites et punissables, Vaccompli! nianmoins en acceptant celles-ci pour I'iventualiti ou elles se produiraient"* (see also Art. 63 (I) (a), which states: "if the result was intended, or foreseen and accepted by the offender'*).

Thus, to come back to the above illustration, if *A,* when setting fire to *B's* house though knowing the latter to be at home, thinks that *B* will have enough time to escape, he must, if *B* is actually unable to get out of the house and dies in the fire, be found guilty of negligent homicide, but if *A* thinks to himself that he could not care less whether or not *B* will be able to get out, he must, if *B* dies, be found guilty of intentional homicide in accordance with Art. 58 (1), second alinea, because "being aware that his act may cause illegal and punishable consequences",he does this act "regardless that such consequences may follow", *i.e.* accepting the risk that *B* might die. In support of a solution of this kind, one may note that, from a moral point of view, the fault committed by *A* is graver in the second case, where he acts out of selfishness, than in the first one, where he acts out of light-mindedness (Logoz, *op. cit.,* pp. 66—67) so that, although the result is the same in both cases, the dangerous disposition of the actor is more apparent in the second than in the first case. It is understandable, therefore, that a Code "chiefly concerned, not with the act and the result as such, but with the wrong-doer'*, should regard *dolus eventualis* as a form of intention rather than of negligence.

Natural as the distinction drawn in Art. 58 (1) may be, it entails difficulties with regard to evidence since it lies in the doer's state of mind and the "acceptance" or rejection of the consequences of the act may be almost impossible to prove, the more so since it is con

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troversial whether it would be sufficient for the purpose of sub-art. (1), second alinea, that the doer should "accommodate himself inwardly to the fact that the risk may eventuate" by adopting a sort of fatalist attitude (as it was held in ATF 81 IV 197, JdT 1957 IV 21), or whether the "acceptance" element is to be construed more restrictively, meaning that the doer must positively *"vouloir le risultat tventuel"* (as it was held in ATF 86 IV 10, JdT 1960 IV 66). Take, however, the following case. *A* is driving a car and *B,* his passenger, points to him that he drives too fast and might hit someone. To which *A* replies: "You needn't worry. I'm a good driver and nothing is going to happen." A moment later, *B* again insists that *A* should slow down. *A* then answers: "I've told you before I'm a good driver. Anyway, it's two o'clock in the morning, the police are asleep and nobody will see us if something should happen." Thereupon, *A* runs down a pedestrian who dies. There is little doubt that a change occurred in /4's state of mind between the two statements he made. Had the accident taken place after he had made his first statement, it would have been virtually certain that he had rejected the possibility of hitting someone, but, after he made his second statement, it is virtually certain that he had accepted the possibility of causing a result against which *B* had warned him twice and that he is. therefore, guilty of intcntioaaLbomscide, for it is improbable that he again changed his mind after making this second statement. Yet doubtful cases may, of course, present themselves, since indirect intention does not necessarily flow from awareness. "It is i matter of evidence whether the doer had an indirect intention; however, the existence of this intention is not proved when the only sign that he had such an intention is the fact that he was aware of the possibility of bringing about the result. This would, indeed, amount to reducing the subjective element of the offence to knowledge alone. Knowledge does not permit one to infer the corresponding intent unless the probability that the result would occur was so high that the act cannot be interpreted otherwise than as an acceptance of this result. Yet even in such a case, indications to the contrary may rebut this presumption; for a person does not have an indirect intention when, from carelessness, he believes that a result which he had at first considered to be probable will not follow" (ATF 69 IV 75, JdT 1943 IV 73; see also ATF 84 IV 127, JdT 1958 IV 114). If the doubt cannot be resolved, the court must rule out *dolus eventualis* and find the accused guilty of having acted negligently, if the conditions laid down in Art. 59 are fulfilled.

3. Since intention constitutes the upper degree of criminal guilt, it normally follows, as is stated in sub-art. (2), that a person who intentionally commits an offence is always liable to punishment, for all the conditions governing liability to punishment are then fulfilled. This, however, is without prejudice to the cases of "justification or excuse expressly provided by law", namely the cases dealt with in Arts. 64—78 where the doer acts in circumstances such that he is not guilty of an offence or that his guilt is diminished.

4. Sub-art. (3) derives from the principles contained in sub-art. (1) two consequences which are rather obvious and have been referred to already.

(g) Firstly, a person may not be deemed to have intentionally committed an offence when he caused a harm which he did not know would occur or did not desire. This is another way of saying that there is no criminal intention unless awareness and intent are present together. If the first ingredient of intention is missing, the second one is necessarily missing, too, since tbe unforeseen cannot be desired. On the other hand, if the first ingredient of intention is present, the second one is not necessarily present also, for what has been foreseen may not have been desired. Yet, although the doer may not have intended to cause the harm in issue, it does not follow that he will not answer for it. If he is not guilty of an intentional offence, it remains to be seen whether he has been criminally negligent within the meaning of Art. 59, that is, whether he could and should have known that his act was capable of causing harm or. if he knew it, whether he should have given this possibility more attention than he did.

(b) The above rule, which applies when the doer did not intend to cause harm, naturally applies also in cases of so-called praeterintentional offences, *i.e.* when the doer intends to cause harm and actually causes more harm than he had intended either directly or

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indirectly. Thus, in the illustration given hereinbefore where *A* sets fire to *B's* house, if he did not know that *B* was at home and *B* dies in the fire, this death is in excess of. or "goes beyond", what *A* directly intended. On the other hand, if *A* knew that *B* was at home and accepted the possibility of his death, but he did not know that *B* had his friend *C* staying with him, and *B* and C die in the fire, the death of C goes beyond what *A* had intended "as s possibility", namely the death of *B*. It will be recalled that this solution is to be followed whatever the capacity in which the offender acts (see Arts. 32 (2), 35 (3) and 36 (3)). Yet, although the harm in issue has not been intentionally caused sihce it is beyond what was desired (whether the excess pertains to the nature or extent of the harm), the doer may be punished for having caused this harm by negligence if he could and should have foreseen the possibility of an excess or, having foreseen it, should have given it more attention than he did. In such a case, the punishment will be assessed in accordance with Art. 63. This Article also applies if *A* negligently caused the death of *B* and C; in such a case, however, *A* is punishable for damage to property and only one offence of negligent homicide, even though two persons died (see para. (1) (c) in comments under Art. 60).

Article 59. Criminal negligence

(1) *A person Is guilty of a criminal negligent act where*f. *by a criminal lack of foresight or imprydence t he acts without consideration or in disregard of the possible consequences of his act.* *-

A person is guilty of criminal negligence when he fails to take such precautions as might reasonably be expected in the circumstances of the case and having regard to his ag9-, experience, education, occupation and rank.

(2) *Offences committed by negligence are liable to punishment only if the law so expressly provides by reason of their nature, gravity or the danger they constitute to society.*

The court shall assess sentence according to the degree of guilt and the dangerous character of the offender, and according to his realisation of the possible consequences of his act or his failure to appreciate such consequences as he ought to have done.

Where criminal intention must be excluded on the ground that the conditions laid down in Art. 58 are not fulfilled, the question arises as to whether negligence, which constitutes the lower degree of criminal guilt, is present.

1. Although "what amounts to negligence depends on the facts of each particular case and the term negligence is, therefore, not susceptible of any precise definition which will be of universal application", negligence in any given circumstances implies a failure to exercise care or sufficient care as a result of which harm is done which was not desired but could and should have been expected to occur in the ordinary course of things. As is indicated by sub-art. (1), first alinea, this failure is always attributable to "lack of foresight or imprudence". ThCLEcason why the doer failed to exercise care varies, however, according to what he failed to foresee.

(a) A person may fail to exercise care because he doea not realize that care is required at all. This amounts to what is known as unconscious or Inadvertent negligence, which is characterized by the fact that the doer_fails to foresee that his act may cause harm. If he foresaw it, he'would not act as he does. Thus, if *A* aims at *B* with a gun he believes to be unloaded but which in fact is loaded and he pulls the trigger and *B* dies, *A* acts "without consideration of. the possible consequences of his act" or, as the French text more clearly puts it, *"sans se rendre compte des consequences de son acte".*

(б) A person may also fail to exercise care or sufficient care because, although he foresees that his set may cause harm, he believes that this harm will not occur or that the care ha exercises will suffice to prevent the risk be knowingly takes from eventuating. This constitutes conscious or advertent negligence which differs from *dolus eventualis* on the

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ground that the doer rejects the possibility of causing harm. Thus if *A* drives a car at an Excessive speed and foresees the possibility of hitting someone but believes that this will not materialize because he is a good driver, he will, if he runs a pedestrian down, be deemed to have acted "in disregard of the possible consequences of his act" or, as the French text puts it, "*sans tenir compte des consequences de son acte"*. In such a case, the doer commits a mistake which he could haveavgjjled.

(c) An inquirv into the presence of inadvertent m-giigrtf* is to be made when it is clear that the doer did not foresee the possible consequences of his act. Yet, although it is irrelevant to tbe doer's liability to punishment whether he was consciously or unconsciously negligent, it may be noted that:

(i) conscious negligence should not automatically be ruled out for the sole reason that the doer did not foresee the exact consequences he brought about (ATF 73 IV 227, JdT 1948 IV S3); if *A* drives a car at an excessive speed and foresees but rejects the possibility of hitting a pedestrian, he may, it seems, be deemed to have beea consciously negligent if, instead of running s pedestrian down, he comes into collision with another car;

(ii) conscious and unconscious negligence do not necessarily exclude each other for, when an act brings about several unlawful consequences, some of them may have been foreseen and not the others, in which case there may be a concurrence of offences committed by negligence. For example, while burning refuse in his garden, *A* notices that the wind blows in the wrong direction and foresees but rejects the possibility of *B*'s trees catching fire. If not only the trees but also *B*'s house then catch fire and *B* dies in the fire, *A* must be deemed to have acted with conscious negligence in that which concerns damage to property and with unconscious negligence in that which concerns loss of life.

2. Not any failure to exercise care or sufficient care in consequence of a failure to foresee or properly weigh the consequences of a given act gives rise to criminal liability. Negligence in the legal, if not the popular, sense of the term is nQlpunishable unless it is "criminal", and. U is not criminal unless the doer was bound to exercise care In the particular case- As was stated when Art. 59 was discussed by the Codification Commission, *"la culpability par negligence tient uniquement au difaut de precautions que /'auteur avail le devoir de prendre."* Although the law often lays down prescriptions calculated to lessen the risk inherent in certain undertakings (carriage of persons, manufacture of dangerous goods, surgical operations, sporting activities, and the like), the duty to exercise care does not necessarily flow from the law. It is much more general and consists in conforming one's conduct to that of a reasonable man, *i.e.* a man bearing in mind the lessons of common experience. Since there may, however, be a gap between common and individual experience, the standard of care is not uniform and inflexible. This is why sub-art. (1), second alinea, states (though not in the English version) that a person is criminally negligent, not whenever, he fails to exercise the care which a reasonable man would exercise, but when he l_iU to exercise the care that can reasonably oe required "of him" in the circumstances (see the French text: *que t*on pouvait raisonnablemcnt exiger de luf)*. This shows that the existence of criminal negligence, whatever its form, is subject to the fulfilment not only of objective, but also of subjective conditions.

(a) A person is objectively negligent when in any given circumstances he fails to do what a reasonable man should or would have done. Unconscious negligence is criminal, therefore, if the doer should have foreseen the possible consequences of his act because a reasonable man would have foreseen them in identical circumstances. For instance, common experience dictates never to aim at a person with a gun because there is always a chance that it may be loaded; one who shoots another with a gun he believes to be empty is, therefore, objectively negligent for he does something which a prudent man would not do. So too, conscious negligence is criminal if the doer should have refrained from acting because a reasonable man, having foreseen the possible consequences of his act, would in identical circumstances have refrained from acting. For instance, common experience dictates never to aim at a target without having first ensured that nobody stands around who is likely to be hit; one who

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shoots a human being standing near a target in the belief that he will not hit him is, therefore, objectively negligent because he does something which a prudent man would not do.

Thus, it is in every case necessary to estimate what a reasonable man would have done in the circumstances and whether the accused behaved like a reasonable man. What degree of care should have been exercised in any particular case, therefore, is firstly a matter of circumstanccs . Thus (see also Logoz, ***op. cit.,*** pp. 68—69), a greater risk is involved, and consequently a greater amount of care is required, with explosives than with matches, with a gun than with a stick or with a poisonous drug than with a harmless substance. The amount of care obviously varies also depending on whether one drives on a wet or on a dry road, in heavy traffic or in a desert, and the like. Equally ielevant, from an objective point of view, is whether the result could have been avoided by obeying signs or complying with instructions or regulations, though a mere failure to respect the same does not necessarily amount to negligence, since the doer may have been careful none the less. Conversely, the doer may be negligent even though he does not violate any legal prescription (ATF 78 IV 73, JdT 1952 IV 160), since itj&~noi a condition ***pi*** liability that ***the*** act, bringing about the result should be contrary to the law.

(6) A person is not criminally negligent, however, for the sole reason that he departs from an ideal line of conduct and the true comparison is not between his behaviour and that of a mythical nmrl«»nt or reasonable man, but between his behaviour and that of a prudent man possessing the same characteristics as himself. The issue, therefore, is whether the accused failed to exercise the care which a reasonable man in his position should have exercised, and there is no criminal negligence unless he was subjectively at fault, but this does not mean that the objective conditions of negligence are purposeless. Quite the contrary, what a reasonable man's conduct would have been must be ascertained in every case, though it does not follow that the accused was at fault because his own conduct was different; he is at fault only if there are no reasons of a personal or subjective nature to justify his failure to act like a prudent man. (See, however, ATF 88 IV 4 as commented upon by Heim in JdT 1962 IV 42 ***et seq.,*** which suggests that "circumstances such as a reasonable speed or prudent behaviour do not suffice to rebut the presumption of carelessness which flows from the fact of driving while under the influence of alcohol")- Similarly, it does not follow that the accuaod was not at fault simply because he behaved like a reasonable man, for there may be reasons of an individual nature why he should have exercised greater care than that which would been required ***in abstracto*** of a reasonable man. "Tbc doer should have failed to exercise, not only the care required in the circumstances, but the care which a person in his position should have exercised.. Having regard to his intelligence, education, experience of life and social position, one must be able to demand of him that he should exercise that amount of care" (ATF 69 IV 228, JdT 1944 IV 44; see also ATF 83 IV 9, JdT 1957 IV 34). For instance, a greater amount of care is required of a doctor than of a nurse, of a professional driver than of an ordinary driver, of a master mason than of an apprentice, etc. As Logoz points out ***(pp. cit.,*** p. 69), the circumstances must be such that one is justified not merely in saying that a result is attributable to negligence, but in telling-tbe-accused: ***You*** ~~havr~~. been negligent. Failing such, Art. 59 is inapplicable, even though the hypothetical prudent man would not have acted as the accused did.

3. In opposition to intentional offences, which arc punishable save in cases of jus~~tifie~~ation or excuse, offences committed by negligence are not punishable unless the law makes specific provision to this effect (see. however. Art. 697). It is often said that, since negligence basically consists of making a wrong decision, to punish negligence amounts to pu~~nish~~ing a person for his mistakes, although he may have no criminal mind. Yet, inasmuch as ~~ne~~negligence implies **a** fault, there is, it seems, sufficient moral justification for punishment and the infliction of a penalty is not contrary to the rule ***nulla poena sine culpa.*** From **a** practical poftit of view, however, the usefulness of punishfnent is questionable, at least in cases of unconscious negligence where the act which brought about the consequences was not contrary to the **law;** for there is little hope that **a** person who is congenitally inadvertent and who has

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been punished for having acted negligently in any given circumstances will subsequently have move foresight in different circumstances. These are the main reasons why, under the law, tbe punishment of negligence is exceptional and is restricted to cases where it is justified, in the terms of sub-art. (2), by reason of the nature (as in the case of petty offences) or gravity of the offence committed.

Whether or not negligence is penalized in a particular case is a question to be answered having regard to the Special Part of the Code or other instrument creating the offence. Apart from those instances where negligence is hardly conceivable (insult, rape, robbery, etc.), there are several offences which are not so serious as to warrant the imposition of a penalty on a person who would act negligently. For instance, according to Art. 573, a person who deliberately opens a letter not addressed to himself, which he has no authority to open, is liable to punishment. However, Art. 573 does not penalize negligence, so that a person who inadvertently opens a letter not addressed to himself is not punishable. The principle that negligence is not punishable in the absence of legal provisions to the contrary (subject,as said above, to the provisions of Art. 697) applies even though the word "intentionally"or words to the same effect do not appear in the definition of any given offence. For instance. Art. 487 punishes "whosoever violates the resting place of a dead person". The fact that the said Article does not specifically punish "whosoever intentionally violates the resting place of a dead person'* docs not justify the conclusion that any such violation is punishable regardless of whether the doer acts intentionally or negligently. Quite the contrary. Art. 59 (2) justifies the conclusion that any such violation is not punishable if it was done negligently, as in tbe case where the doer did not know but could and should have known that the place in question was the resting place of a dead person.

4. Negligence is penalized irrespective of its form. In other words, whether the doer acted with conscious or unconscious negligence does not affect his liability to punishment but only the sentence to be passed in the particular case, as does the seriousness of the "fault" committed. For, under sub-art. (2), second alinea, the punishment is to be assessed having regard to the degree of guilt and dangerous character of the offender and according to whether or not he foresaw the possible consequences of his act.

(a) The degree of guilt includes the degree of fault. Since there is authority in the records of tbe Codification Commission for believing that Art. 59 may be interpreted like Art. 18, al. 3, of the Swiss Penal Code, it may be held that the question whether there has been "gross" negligence (recklessness, as distinguished from lack of care, is without relevance to the liability to punishment. It does not seem, therefore, that "a very high degree of negligence is required to be proved before the offence is established" (Archbold, ***op. cit.*** p. 913). It rather appears that ***"la notion de negligence grave n'a d'importance qu'en ce qui conceme la mesure de la peine"*** (ATF 69 IV 228, JdT 1944 IV 44), whatever the seriousness of the harm done.

(b) In order to decide as to the dangerous character of the accused, regard will havfijo be- had not only to his antecedents, but also to whether or not he foresaw the consequences of his act. It should not be held, however, that a person whc acts with conscious negligence is always more dangerous than a person who acts inadvertently for this would result in punishing an'offender who took the trouble of thinking before he acted, but who mistakenly believed that he had exercised sufficient care to prevent the result from occurring, more severely than an offender who did not think at all and exercised no care whatsoever because he did not even realize that care was required.

(c) It is also in relation to the assessment of the sentence, and not to the liability to punishment, that the question of cgnirihulQD' negUgcncc will be taken into consideration. If the accused was at fault but the damage was not entirely due to his fault, this may affect his civil, but not his criminal liability fnr when two persons act negligently, each of them is answerable for the result, however large his contribution to its occurrence may be. A fault committed by the victim of the offence, for instance, does not relieve the accused of his general duty to

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behave so as not to inflict harm upon other persons (ATF 80 IV 49, JdT 1954 IV 104). Criminal liability is to be excluded only when it is proved that the doer was not at bolt **and** that the damage was due entirely to the fault of another person.

Paragraph 2. **Guilt in cases of concurrence [Arts.** 60-63]

Few codes contain rules of the kind laid down in Arts. 60-63, though these or s~~imilar~~ **rules** are abundantly analyzed in the legal literature and commonly applied by the courts. **This is** so particularly in Switzerland and, since many judgments of the Swiss Federal Court **appear** to have had a direct bearing on Arts. 60—63, it will be necessary to make reference to **these** judgments in order to ascertain the true meaning of these Articles.

As will be seen again later (para. (1) in comments under Art. 82), concurrence comes into being either when several unlawful acts are done in contravention of one or more articles of the Jaw (concurrence of ***offences***, or ***material*** concurrence) or when one unlawful act is done in contravention of several articles of the law (concurrence of ***provisions,*** or ***notional*** concurrence). The question with which Arts. 60-63 deal is whether and to what extent the fact that several acts or faults are committed affects the doer's decree of guilt and, by way of consequence (Art. 82 (1) (a)), the punishment to which he is liable.

Art. 60. Unity of guilt and penalty

(1) ***The same criminal act or a combination of criminal acts against the same protected right flowing from a single criminal intention or act of negligence cannot be charged under two or more concurrent provisions of the same nature.***

(2) ***Successive or repeated acts against the same protected right flowing from the same initial criminal intention or act of negligence and aiming at achieving the same purpose constitute one offence; the offender shall be charged with the said offence and not with each of the successive acts which constitute it.***

(3) ***In cases of offences resulting from injury to property, the putting into circulation of counterfeit coins, or the use of forged documents, the subsequent acts performed by the offender himself after the commission of the main offence for the purpose of carrying out his initial criminal scheme shall not constitute a fresh offence liable to punishment and are merged by the unity of intention and purpose.***

1. The first situation to be provided for by this Article is the one usually refe~~r~~red to as imperfect concurrence of offences, which actually is not a case of concurrence at all.

Many offences consist of behaviour which is also an ingredient of other offences or imply a combination of acts some of which are also material elements of other offences. When one of the former offences is committed, it may seem, therefore, that one of the latter offences is committed also. In other words, this behaviour or combination may seem to fall under several provisions of the law; yet this concurrence is only imperfect or apparent bec~~a~~use there actually is only one legal provision that applies to this behaviour or combination. For instance, the offence of rape consists of coercion and sexual outrage; robbery implies the use of violence with a view to, or in the act of, committing a theft; bodily injury is a necessary element of offences such as homicide and abortion (see. however, para, (c) ***infra).*** What Art. 60 (1) means is this: when an act is done in contravention of several legal provisions but only one of these .provisions fully covers this act, then that provision is applicable to the exclusion of all the others under which the act apparently also fall*. Thus a person who, with the intention of killing someone, inflicts upon him an injury so serious that the victim dies some days later is punishable exclusively for a complete offence of homicide and not, in addition, for attempted homicide nor, indeed, for bodily injury (ATF 79 IV 60, JdT 1953 IV 130). Similarly, when several acu are done which, if considered in isolation, would be

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punishable under different legal provisions but which, if considered in relation to one another, amount to a tingle offence of which all these acts are ingredients, then these acts an not punishable under these different legal provisions but only under the provision defining the latter offenoe. A person who commits robbery, therefore, is punishable only under Art 636 and not also under Art. SSZ, 554 and/or 630; a person who commits rape is punishable exclusively under Ait. 589 and not under Art 554 and 591 or any other provision penalizing sexual outrages unless, of coune, he rapes a relative (Art. 621). So too, if in a case of complete attempt to commit homicide the victim is merely wounded and then abandoned, the doer is punishable only for tbe attempt and not for tbe abandonment since "whether or not the actor abandons the victim after the act, tbe intention to kill necessarily implies refusal to assist. The tentence pasted on the accused by reason of an intention to kill expressed in an act also applies, therefore, to the abandonment of the victim" (ATF 87 IV 7, JdT 1961 IV 127).

This rule, which bolds good whenever an act or combination of acts apparently contrary to several legal provisions actually constitutes an offence under only one of these provisions because "it dearly flows from the law that the ingredient! of one of the offences comprise all the ingredient! of the other offence" *(Ibid.)* applies subject to the following conditions.

(a) The offender must have done only once the act or combined acts constituting the offenoe. If such act or acts are repeated, there is, as a rule, material concurrence within the meaning of AH. 82 (I) (a), first tentence, unless this repetition is an ingredient of the offence committed *(t.g.* Art. 471, dangerous vagrancy; Art 518, unlawful exercise of the medical profession; Art 604, habitual exploitation of the immorality of others) or "flows from the same initial criminal intention or act of negligence", in which case a to-called successive offence within the meaning of Art 60 (2) a deemed to have been committed. Different am tbe cases where the court is satisfied that the actor, because he repeat* such act or sets, makes a profession of thr offence *(Le.* he derives a profit from it and is ready to commit H whenever a favourable opportunity presents itself; tee para. (3) *(b)* in comment* under Art tl) and the article of tbe law in violation of which this offenoe is committed expressly states that the penalty must be increased when the actor makes a profession of the offence *(e.g.* Art. 635 (3) (a), habitual theft; Art. 648 (ft), habitual receiving; Ait. 658 (a), habitual fraudulent misrepresentation; Art 670 (a), habitual usury, extortion or blackmail). In these cases, a so-called collective offence is deemed to have been committed (note that the expression "collective offence" is used here in its technical tense and not in the general sense of offence committed by s group of persons, a collectivity, which it hat in the heading of Art. 34); although the repetition in theory constitutes material concurrence and should consequently be dealt with in accordance with Arts. 61 snd 189, the doer is punishable only for the aggravated offence of which this repetition is an ingredient and not separately for all the acts which be repeatedly committed.

(b) The act or combination must be committed "against the tame protected right". This rule is axiomatic insofar as it means that one and the tame act can not amount at once to theft and robbery, for instance. Yet it obviously means also that when an act or combination of acts infringes upon several different legally protected interests *(e.g.* liberty snd sexual integrity, in cases of rape; liberty and property, in cases of robbery) and is such, therefore, that it would appear to fall under two or more concurrent provisions of s different nature, only one of these provisions is spplicable if it covert all the aspects of the act or plurality of acts in issue *(*g-* Ait 589 in cases of sexual outrage by violence and Art 636 in cases of abstraction of property by violence). Where no such provision exists in the Special Part of the Code, (hen there is no longer imperfect concurrence; several legal provisions are applicable because the act or combination is not an ingredient of only one of them. This occurs in cases of notional concurrence. Thus if *A,* a married man, rapes his sister in a public place, be is punishsble for four offences, namely rape, incest, adultery and public indecency. Ait 589 (rape) covers the sexual outrage, but not the relationship between the actor and the victim (incest. Art 621) nor tbe marital status of the actor (adultery. Art 618) nor tbe fact that tbe

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offenoe wu committed in view of the public (public indecency. An. 608). Similarly, Art 621 coven the sexual outrage and (he blood relationship between the doer and tbe victim, but not the use of violence, which is an ingredient of (he offence of rape, nor the public indecency. The scope of Arts. 608 and 618 is even more restricted. In cases of this nature \rt 60 (1) is inapplicable.

(c) The act or combination of acts should flow "from a single criminal intention or act of negligence". The wording here is obviously defective; on the face of it, the phrase "Tbe same criminal *act* (...) flowing from a single criminal intention or *act* of negligence, etc" is meaningless. As is shown by tbe French text, which reads "C/it *mfme fait* (...) *rtalltaxi une intention ou une negligence coupable unique",* what is contemplated is that tbe actor should commit only one criminal fault within the meaning of Art 57.

It may appear that this is always so. In cases of rape, for instance, tbe doer forms only one intention regardless of the fact that the offence actually consists of a combination of acts; be does not have separate intentions regarding these acts but a global intention attaching to the use of violence as well as to the sexual intercourse. Yet tbi&is not necessarily so in all instances of imperfect concurrence, for cases may occur where an offence inciuacrrmty the objective, but not the subjective elements, of other offences of the same nature. Thus if *A* strikes *B* with the intention, of causing him bodily harm but *B* dies in consequence of the blow, although bodily hacm is implied in homicide, *A* should be punished for having attempted to cause hann to *B* and for *B's* death if the death was or could and shouiffTUtve been foreseen (Art. 59). *A* having intended to cause *B* some harm but not to kill him, the result which he brought about by his negligence is different from the one which he intended to produce (Art. 58 (3)). Two different criminal faults have, therefore, been committed, with the effect that, instead of there being imperfect concurrence under Art. 60 (1), there is a combination of offences (*i.e.* notional concurrence) under Art. 63. When an act is directed against one protected right (bodily integrity) but. by reason of an additional fault committed by the doer, entails consequences infringing upon another protected right (life), Art. 60 (1) is inapplicable regardless of the fact that a violation of the latter right necessarily includes a violation of the former. This holds good, *a fortiori,* when such an interdependence does not necessarily exist. For example, the offence of abortion necessarily implies some, but not any, bodily injury; if *A,* therefore, aborts Miss *B* in such an unskilful manner that she is permanently disabled from bearing children, there is, again, a combination of offences within the meaning of Art 63 (*contra,* Art. 119 of the Swiss Penal Code and Logoz, *Par tie Sptciale,* I, p. 34).

It is debatable as to whether Art. 60 (1) applies when one act brings about several unlawful consequences which are all contrary to "the same protected right". For example, if *A* throws a spear at *B* which, after piercing through S's body and killing *B,* also enters C's body and kills him. one may wonder whether the case is one of imperfect, material or notional concurrence. The same may be asked if *A,* having failed to fasten his load of bricks properly, drives a truck and two bricks fall off the truck, killing *B* and C. It is usually held that a single offence should be deemed to have been committed in tike situations as only one act is done (/.*. there is no material concurrence) which is contrary to only one legal provision *(i.e.* there is no notional concurrence), though it contravenes it several times. "Notional concurrence should be excludctLwhco-a person by one and the same insulting, statement offends several persons or throws a bomb which kills or injures several persons. Such an act is not contrary to several different legal provisions" (Logoz, *op. cit.,* p. 292). Yet the rule that there is imperfect concurrence when one act entails two or more results infringing upon the sang, legally protected interest can be criticized an_thc following grounds. "(1) It seems obvious that one who causes the same harm to several persons should be punished more severely than if be causes harm to only one person. The social disorder as well as the fault are graver and justify an increase in tbe sentence. (2) It appears contradictory to prescribe, on the one hand, that the commission of several offences is an aggravating circumstance irrespective of tbe number of acts done and, on the other hand, that several violations of the same legal

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provision are p* ".iihable more or leu severely depending on whether one or aeveral acu are done. (3) It is il'. jfical that one who, by one intentional act, causes the same harm to several persons should » treated more leniently than if he had intended to cause this harm to one of them and [r.l] ser harm to the other. Thus it is unacceptable that *A,* if he kills *B,* the lover of his wife C, i* .tl iterely wounds his wife, should be liable to a higher punishment than if he had killed *t-* and C by the same act. (4) It is a matter of pure chance whether the penalty may be increase^ (note: in the above illustrations, there would be concurrence if the spear or brick happened to injure C without killing him). (5) It may be quite difficult to decide whether there is unity or plurality of acts and it would be unjust and arbitrary to allow or prohibit aggravation according to whether the doer's behaviour, contrary to a single legal provision, consists of one or more acts" (P. Piotet, *Rtflexions sur le coitcours tT infract ions, notamment sur les art.* 68 *CP et* 65 *al.* 4 *LA,* JdT 1954 IV, pp. 2 *et seq.* \ see also J. Huber, *Concours Idial et concours imparfait,* JdT 1958 IV, pp. 79 *et seq.).*

These observation* apply to Art 60 (1). If one act is done whereby the same protected right is infringed upon several times, these infringements do not amount to notional con- cuir^ncejioku-two criminal faults are committed. Thus if *A,* when throwing the spear at *B,* is aware of, but disregards, the possibility of killing C also, he is punishable for having intentionally caused the death of *B* and negligently that of Cjuid he will, paradoxically, be liable to a higher punishment than he would have been, had he intended to kill *B* and C; for if such had been his intention, he would through a single fault have violated the same protected right *(Le.* life, and not *B't* life as distinguished from C's life). Even if it should be held that he committed two faults in that he intended to kill two persons, the fact would remain that only one act was done (he threw the spear only once, and material concurrence must, therefore, be ruled out) and only one legal provision is applicable (one of the articles concerning intentional homicide, and notional concurrence must, therefore, be ruled out). On the other hand, if he committed two faults of a different nature in that he intended to kill one person and not The other, it* follows that, although only one act is committed which affects only one protected right (life), two legal provisions are applicable (any of the articles concerning intentional homicide *and Art* 526 concerning homicide by negligence), so that the case is no longer one of imperfect concurrence /note, however, that Art. 522 (1) (a) is so broadly worded as to permit considering the case where one intentionally kills two persons by the same act as a case of homicide in the first degree, for the circumstances then show that the doer is particularly dangerous).

To remedy this inconsistency, it has been suggested in Switzerland (P. Piotet, *ibid.)* that the provisions regarding concurrence might also apply when a single act brings about several consequences violating Uie same legal provision since the condition that the doer should, by one act, "have rendered himself liable to several penalties involving loss of liberty" (Art. 68 (1) of the Swiss Code) is fulfilled whether these penalties are incurred under several different legal provisions or under only one provision which has been contravened several times. Yet the corresponding Article of the Ethiopian Code (Art. 82(1) (a), second sentence) would clearly prohibit such a construction. Nor is Art. 61 of much assistance; as is shown by the reference to Art. 189 which it contains, it deaW with cases of material concurrence and implies that there should be a repetition of acts, which repetition does not exist in the illustrations discussed above. Unleu one is prepared to say that the word ''successively'' appearing in Art. 82 (1) *(a),* first sentence, covers not only the cases where several acts are done in violation of one or more provisions, but also those where one act entails several consequences punishable under a single provision, there is no means of dealing with the lAttcxjases in accordance with the rules concerning concurrence.

(d) When the three requirements laid down in Art. 60 (I) are satisfied, the actor "cannot be charged under two or more concurrent provisions of the same nature" (note that the French text reads "ne *peut tomber sous le coup de"* which has been rendered into Amharic, correctly, by "cannot be punished for"). The principle *nulla poena sine culpa* demands that there should be "unity of penalty" where there is "unity, of guilt". Thus one and the same

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act *(e.g.* abstraction sf property) may neither be charged nor punished under Arts. 630 (theft) and 636 (robbery). Thia, however, is without prejudice to ihe cases where it ia doubtful whether the accused used violence in abstracting property, as he may then be charged with, though not punished for. robbery and theft although the former offence includes the latter and Arts. 630 and 636 are concurrent provisions of the same nature. Should alternative offences be thus charged in accordance with Art. 113 of the Criminal Procedure Code, the effect of Art. 60 (1) would be that the accused must be punished exclusively under Art 63^ if it is proved that he used violence, and exclusively unuer Art. 630 if this is not proveo. He may not, for the same act of abstraction, be punished at once under these two Articles.

2. Another instance where there is unity of guilt and penalty is that which is provided for by sub-art. (2) of Art. 60, according to which a person who commits a so-called successive offence is guilty of, and punishable for, only one offence and not each of the act* which he repeatedly does. Prior to explaining this rule and in order to prevent any misconstruction of the French terms appearing hereinafter, a question of terminology must be settled. What Art. 60 (2) means by "successive or repeated acts" is what is known in the Swiss literature as *"dilit successif"* (or *ripitf)* and, in the French literature, as *"dilit continui".* For what is known as *"dilit successif"* in France is called *"dilit continu"* (or *prolongO* in Switzerland, *i.e.* in the terms of the Ethiopian code, an offence consisting of a criminal activity "pursued over a period of time" or a so-called "continuing offcnce" (Art. 228 (2), second alinea, last sentence), such as desertion or unlawful detention (see, for instance, ATF 80 IV 6, JdT 1952 IV 92).

"Le dilit successif se difinit comme la ripitition d'actes delictueux identiques ou analogues aui lesent le mime genre d'intirits proteges par le droit et procedent d'utie dicision unique" (ATF 72 IV 179, JdT 1947 IV 143 and ATF 78 IV 152, JdT 1952 IV 143).

(*a*) According to this definition, the wording of which is very close to that of Art. 60 (2), a successive offence firstly impljts a repetition of unlawful acts of a similar nature, each of which js punishable in itself either as an attempted or as a complete offence, violating "the same protected right". For instance, a cashier who misappropriates five dollars a day over a period of one year commits a successive offcnce of breach of trust since the acts which he repeatedly does are of the same kind (appropriation) and directed against the same legally protected interest (property). Yet if, in the course of committing this offence, ne steals one of his colleagues[T] umbrella, he commits a separate offence; although the latter offence id*like breach of trust, an offence against property, it does not. like breach of trust, consist of an act of appropriation, but of one of abstraction.

When this condition is fulfilled, and subject to what is said in para. (*b) infra,* it is immaterial whether the acts which constitute the successive offence cause harm to the same oi different persons, as in the case of a merchant who repeatedly sells adulterated goods. It is immaterial, also, whether these acts are always performed in identical circumstances so long as they are of the same nature and infringe upon the same protected right. Thus if *A* repeatedly has sexual intercourse over a period of three years with his daughter *B* who is aged fourteen on the day of the first act, he cdmmits a successive offcnce of incest regardless of the fact that an aggravating circumstance was present on that day and disappeared when *B* completed her fifteenth year of age (see ATF 83 IV 158, JdT 1957 IV 143). So too, if *A,* a married man, repeatedly has extra-co iugal sexual relations with Miss *B.* firstly in her house and subsequently in his own house where ne asks her to stay, he commits a successive offence of adultery regardless of the fact that an aggravating circumstance which was not present on the day of the first act supervenes at the moment when he asks Miss *B* to settle down in his house.

(б) A successive offence secondly implies "the same initial criminal intention or act of negligence". Art. 60 (2), therefore, answers in the affirmative the controversial question whether a successive offence can be committed by negligence *(e.g.* the words *"une dicision unique"* in the above-quoted ATF 72 IV 179 would appear to exclude negligence; see also Logoz, *op. cit.,* p. 270).

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(i) In a number of cases, there is little doubt that apt* are rep«»t«lly rinn* to furtherance of a single criminal intention, as in the case where *A,* who decides to steal three cubic meters of wood from *B,* finds that the cart he has taken with him for the purpose of removing the wood holds only QOC cutuc meter and he accordingly makes three trips to take all the wood awmy. Yet all cases are not so obvious, for the unity of .intention is not noccssarily to be inferred from fhe similarity of the acts done nor from the unity of the purpose which the doer has in view (see Art. 61, according to which the unity of intention may be lacking even when the actor has the same end in view). Thus, to come back to the above illustration of the cashier, supposing that in the course of committing his successive offence of breach of trust he also appropriates one hundred dollars which *B* had asked him to give C, it would seem that this should be treated as an independent offence of breach of trust even though the act is also one of appropriation and also constitutes an offence against property. Similarly, if *A,* a married man, while or after having repeated extra-conjugal sexual relations with Miss *B,* starts a new affair with Miss C, it seems that this should be treated as an independent offence of adultery even though the acts are of the same nature as those which constitute the first successive offence of adultery and also violate the same interests (the institution of marriage). In like cases, one would be justified in assuming that the new act or scries of acts is done "with renewed criminal intention" (Art. 61) and is not covered, therefore, by "the initial criminal intention".

(ii) Repeated acts of tue same nature infringing upon the same protected right may also be done by negligence. Thus, if a shepherd is in the habit of washing his flock in a river, overlooking the fact that the water is rendered unfit for consumption for the people downstream who drink it, he negligently commits a successive offence of contamination of water contrary to Art. 506 (3). There are. however, numerous instances of negligence where the provisions of sub-art. (2) do not apply. For example. *A* drives his car recklessly and runs *B* down; he stops and, finding that *B* is only slightly injured, drives away and within five minutes runs *C* down. In such a case, *A* may not be deemed to have committed a successive offence; what bad happened with *B* should have made him more careful and there is no doubt that his running *C* down originates from a new act of negligence (Art. 61). Furthermore, sub-art. (2) of Art. 60 would not apply either in the case of the truck-drivcr who drops bricks, described in relation to sub-art. (I). It is true that, in that case, the death of *B* and *C* is attributable to "the same initial act of negligence". Yet it seems that such a case can only be deemed to amount to a successive offence if one gives the terms used in sub-art. (2) more attention than they actually deserve; it is apparent that the wording of this sub-article is as defective as that of sub-art. (1). The French text reads; *"Des actes successifs ou ripitis* (...) *procidant d'une seule et mime* (...) *negligence coupable", i.e.* in effect "repeated acts flowing from the same initial lack of foresight" and not "from the same (...) act of negligence", which suggests that one act would suffice. Therefore, there should be a repetition of acts, which is the case in the above illustration of contamination of water, but not in the illustration of the truck driver.

(c) The cases coming under Art. 60 (2), in which the retain acts which usually, though not necessarily, contravene a single article of the law, are easily distinguishable from those where there is notional concurrence and the offender does one act which necessarily contravenes several legal provisions, as the difference lies in a purely objective factor (one or more acts). On the other hand, a purely subjective test (one or more faults) is applicable with a view to distinguishing a successive offence from a case where there exists a material concurrence of offenccs against the same protected right and the distinction, therefore, is much more uncertain. Neither the similarity of the acts done nor the identity of the purposes which the actor seeks to achieve are, as such, decisive, for if they were. Art. 60 (2) should always prevail over Art. 82 (1) (a) when the doer infringes upon the same legal interests; this similarity and identity are only elements from which to infer what is really decisive, *i.e.* whether or not a tingle criminal fault has been committed. Yet, even granted that there is, as a rule, concurrence and not a successive offence "when identical acts are repeatedly done which are

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not related in such a way that they may be regarded at amounting to one offenoe" (Logoz, *op. cU.,* p. 270), the inference may not be obvious (note the word* "successive" in Art. 60 (1) and "successively" in Art. 82 (1) (a), first sentence). It is doubtful whether Art. 60(2) or 82 (1)
(a) should apply when *A,* within one hour of robbing *B,* commits a new robbery against C or after robbing *B,* takes, and drives away in, C's car; or when *A* draws a gun at *B* and C and robe them both at once (the latter case does not, it seems, amount to imperfect concurrence as two acts of abstraction are done; there would be material concurrence, or possibly a successive offence, if no violence were used and the fact that one act of violence is done with a view to committing two thefts does not imply that the case comes under Art. 60 (1); for the "combination" of violence and theft is then achieved twice, that is, vis a vis *B* and C). When it is not certain whether an act is done "with renewed criminal intention or negligence" within the meaning of Art. 61, the doubt must benefit the accused and he must, therefore, be found guilty of a successive offence and not of concurrent offences.

(<0 When a successive offence is committed, *i.e.* there is a single criminal fault behind the acts repeatedly done, the doer is to be punished for only one offence, whether attempted or complete, and not separately for each of the unlawful acts the repetition of which constitutes this one offence. Thus a cashier who embezzles ten dollars on fifty occasions will be punished for one breach of trust amounting to five hundred dollars, and not fifty breaches of trust amounting each to ten dollars; a person who attempts on five occasions to steal a painting from someone will be deemed to have attempted only one theft and punished for only oob attempted theft. This rule entails two important consequences.

(i) Limitation does not run while a successive offence is being committed any more than it docs while a continuing offence is being committed. The period of limitation will begin to run only on the day when tbe last (and not the first) unlawful act is done (Art. 228 (2), second alinea, first sentence).

(ii) The judgment given and sentence passed with respect to a successive offcnce apply to all the acts constituting this offence. Therefore, if some acts remain unknown at the time of the judgment which, had they been known, would have been deemed to form a part of that offence, they may not be tried and punished as though they amounted to an independent offence if they are discovered after that time. For instance, where a merchant is sentenced in accordance with Art. 60 (2) for having sold adulterated goods to *A, B* and C, he may not be tried and sentenced again if it is subsequently discovered that he had, at the time of the sale* in question, sold adulterated goods to *D* also; this case, therefore, does not amount to retrospective concurrence of offences. It may occur, however, that one or more of the acts repeatedly done have to be singled out for purposes of trial because they haw been done together with other acts which are not liable to prosecution. For instance. *A,* who la in the habit of picking his father's pockets, one day picks ten dollars from a coat he believes to be his father's but which belongs to *B,* a friend of his father's. This constitutes a successive offence of theft consisting of acts some of which may not be prosecuted except on complaint, namely those committed against the father (Art. 629 (1) (a)), and one of which may be prosecuted even though no complaint is made, namely that committed against *B.* The fact that the father makes no complaint is no bar to the latter theft being tried; but it will then be tried as a separate offence and not as a part of a successive offence and no regard may be had, for purposes of punishment, to the thefts with respect to which no complaint was made.

(e) It is questionable whether the word "charged" is properly used in Art. 60 (2). The French text states that the actor *"ripond (de eelie infraction)",* that he is answerable foe one offence, which does not imply that he should be prosecuted for only one offence. Indeed, although there may sometimes be little doubt that a case comes under Art 60 (2) and not Art. 82 (I) (a), such as the above-mentioned case where the offender steals three cubic meters of wood, the question as to which of these Articles should apply depends, aa has been Hid, on whether one or more criminal faults have been committed and it seems that only tbe court, and not the prosecutor, can answer that question. If the prosecutor were to charge tbe sreueed

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with one offence, he would, in effect, decide a question of guilt, which he is not qualified to do. So far as concerns the charge, Art. 113 (1) of the Criminal Procedure Code appears to be general enough to enable the prosecutor to charge the accused with concurrent offences and, in the alternative, with a successive offence. Even if the accused were charged only with concurrent offences, the court would still be allowed to find him guilty of a successive offence; whether the reverse is true, is debauble since the punishment, though not the offence, is then not "of leaser gravity" (Art. 113 (2) of the Criminal Procedure Code).

3. Sub-art. (3) of Art. 60 deals with the problem of so-called non-punishable acts of execution preceding or following an offence. In the course of carrying out a given design, a person may do several unlawful acts some of which, however, appear to be ancillary to the others in the sense that they must be performed if the design is to be brought to fruition at aliyThus a person who counterfeits currency does something which is purposeless unless and until the currency is put into circulation; assuming that he utters as genuine currency which he counterfeited, the question is whether he should be punished for both the counterfeiting and the uttering or for only one of these offences. If he is punishable for only one offence, another question is which of either unlawful act should be treated as an act of execution. Under subart. (3), the answers are as follows/when a person, with a single end in view, commits several offences closely connected with one another, a guilty mind is deemed to have existed with respect to the "main offence" an^ not with respect to the acts done *thereafter* in furtherance of the “initial criminal scheme”, In the above illustration, therefore, the doer is punishable for the counterfeiting, which is the main offence; the uttering is to be regarded as an act of execuUon “merged by the unity of intention and purpose".

In which cases does this rule apply ? The French text of sub-art. (3), which differs from the English one, mentions offences *“qui supposent chez I'auteur un dessein di ter mini, eomme I'enrichissement indu* (which words do not appear in the English text) *en cas d'atteinte au patrimoine, la mise en circulation en cas de faux-monnayqge ou I'usage en cas de faux”.* The Special Part of the Code qualifies this rule and accordingly provides that a person who utters counterfeit currency is punishable only if he is not “the author of the principal offenoe” *(i.e.* the counterfeiting) and has taken no part in it (Art. 369); that a person who uses a forged instrument is punishable only if he is not “a party to the forgery" (Art. 386); that a person who puts falsified goods into circulation is punishable only if be is “a third party”, *i.e.* he has taken no part in the falsification (Art 400); that a person who sells stolen goods is punishable for receiving only if the goods have been stolen “by another” (Art. 647). These specific provisions are calculated to dispel the doubts that are bound to arise when the problem is not specifically dealt with by the law itself (see in particular ATF 69 IV 42, JdT 1943 IV 45, subsequently reversed by ATF 77 IV 88, JdT 1952 IV 22).

^ Are there instances other than those provided for by Arts. 369,386,400 and 647 where the Special Part gives effect to the rule laid down in Art. 60 (3) and declares an ancillary offence to be not punishable? The answer is in the negative, although other cases may occur where this rule should apply./Thus, when a person falsifies, *e.g.* postage stamps (Art. 374) or weights and measures (Art 375) which he then uses as genuine, the position is basically the same as in cases of forgery and use of forged instruments. Since Arts. 374 and 375 do not, however, state that the user is punishable only if he took no part in the forgery, it may appear that these cases, as well as those coming under Arts. 371-373 (falsification and use of falsified seals and marks) are not governed by the principle that governs forgery of instruments. This conclusion would be wrong.-Mhe Code does not prescribe that Art. 60 (3) applies only when the Special Part makes express provision to this effect; the operational range of this Article is wider, therefore, than it would at first sight seem to be, and ancillary offences may be deemed to be committed in cases other than those specifically mentioned therein. The abovequoted French text of sub-art. (3) clearly shows that the latter cases are cited by way of illustration since it contains the word *“comme”* (such as) which also appears in the Amh&ric text. That offences contrary to Arts. **371-375** should not be excluded from Art. 60 **(3)** is further evidenced by the fact that, where the English text mentions "the use of forged instru-

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merits", the French text merely speaks of *"usqge en etude faux*" (use in cases of falsification) and not *"en eas de faux dans les litres"* (in cases of forgery of instruments). It is true that the word *"faux"* is usually taken to be synonymous with forgery of instruments; yet there appears to be no reason why it should not be widely interpreted here, the more so since this is to the benefit of the accused, even though it is more commonly used in a restricted sense.

Avhen a court, after considering the Special Part or Art. 60 (3) or, indeed. Art. 62, is satisfied that an unlawful act done after tbe commission of a given offence is an act of execution, this act may not be punished as though it were an independent offence and the sentence passed for "the main offence" may not be increased on the ground of concurrence of offences.' Although, in a case of forgery and use of a forged instrument, the doer should be charged with both offences so as to enable the court to decide whether Art. 60 (3) is applicable, he may not be punished for the latter offence if it is established that he did not commit it with a new criminal intention (Art. 61). What Art 60 (3) implies, therefore, is not mere!} that the punishment ordered for the main offence also serves as a punishment for the ancillary offence (ATF 71 IV 205, JdT 1946IV 81), but that the latter offence is not committed with a guilty mind /

Bv way ot conclusion, it may be noted that difficulties are bound to arise in deciding how far the concert of ancillary offcncc; should be extended ap.-* v.'rrc -o draw the line between

- . ►•>r,uP2 under Arf fiO (3) and those wlwsre related offences have been reoHnioesi, *ix.* v.iere ac offence is committed with a view to facilitating or concealing the voni'-i :r n >.T another offcnce. This problem will be r'iscusscd in connection with Art. 62; there is no nuestion, however, that the more general provirion of the two is Art. 62, and that the rule laid down In Art. 60 (3) is an exception to the former .Article.

Article 61. Renewal of guilt entailing a fresh penalty

When an offender having commined an offence as specified In Art. 60 *commits with renewed criminal intention or negligence another offence of the same kind whether against the same person or the same protected right and with the same end in view, such offence constitutes a fresh offence and the court shall apply the provisions of Article* 189.

The provisions of this Article must be read in conjunction w*th those of the preceding Article. According to Art. 60, a single offence is deemed to have been committed and there is "unity of penalty" on the condition that there is "unity of guilt". When this condition is not fulfilled, it follows that there is a plurality of offences and, consequently, of penalties. This may occur in any of the three situations described by Art. 60, though not in the abscncc of a repetition of acts.

1. There is no room for a "renewal of guilt" in the case; coirins under Art. 60 (I) unless more thin one act or comoinauon of acts infringing upon the same interest js committed Thus if *A* intends to have sexual intercourse with Miss *B* but he only has a conditional intent in break her resistance by violence, a new criminal intention within the metmn* of Art 61 is cot formed when he actually resorts to force A repetition of act*, or omissions is equallv neotssary *in* of negligence. For example, if the truck, driver who did not fasten his load ol bitbks is aware ot the tact that a tvlck ins fallen en and killed v-meone, he w»U. u anolucr bri£K tilt- off a:id xiK. a second person, be oumshaMc.fer concurrent offences of negligent homicide (unless *do!u\ eventuate* c?rn he proved*)* neattne the death of the ^econd vtctim u. attributable to a i.tilurr m ensure that bricks would Dot fall off the truck. When such a repetition *c- \z. UfOVMOm cotvrmnv,* msterul coocwrcnt* are applicable, in the absence of liu- repetition, ttuf form of dmcurieuuc must oc ruled out but, ha* been Wid before (para.. (!) (c) in comments under Art 60), notional concurrent* mav be praacni when !"*o efferent faults atc co^nitiad at o<^e, in which case there, obviously docs not exist a "renewal" of guilt.

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2. A new criminal fault may be committed in the course of the performance of a successive offence. While a person repeatedly doe* the same unlawful acts, certain events may occur or the circumstances in which he acts may change so that the chain of act* ~~the~~ ~~rep~~etition of which constitutes the successive offence is broken. If the same acts are done again after this change, the i̲n̲iM|‹nn ■* they are still done in furtherance of "the same initial criminal intention or act of negligence" or wbriber tN*v should be treated as a separate offence regardicNJiLlta-fact that they may be done "against the same person or the same protected right and with the same end in view". There is no definite answer to this q~~umtinn~~ For instance. *A* is in the habit of taking the petty ™h he finds in the pockets of his employer *B*\ the latter one day catches him in the*act and warm him that this must stop. *A* refrains from stealing for some weeks, whereafter hc_ resumes picking *B's* pockets. Can one assume that the initial intention applied only to the acts done until *A* was warned and that a new intention existed behind the acts done thereafter? Would it make any difference if *A* had stopped stealing for some days instead of some weeks? What would be the position if, after having been warned, *A* had suited stealing B's cigarettes instead oCDCtly xaf h, or stealing petty cash from the pockets of *K%* wife? None of these factors is, in itself, decisive. For example, although tbe "succession" contemplated by Art. 60 (2) may be broken by mere lapse of time without the occurrence of any extraneous event such as a warning, at least when the acu repeatedly done are done intentionally, there is no means of telling with any degree of certainty when this is so, just as there is no means of telling, *e.g.* after what time an act of retaliation should no longer be considered as having been done in response to a provocation. Thus if *A* shoots *B* with the intention of killing him but be misses him, it is clearly impossible to say that, should the attempt be repeated, *A* will be punished for one attempt only if tbe second attempt occurs within fifteen days or twenty or thirty days from the first one; supposing that *A* btokfi-hiaJcg. after tbe first attempt and rcpcatcdlhc attempt on being fit again. Art. 61 does not necessarily apply only for the reason that six weeks or two months elapsed between the two attempts. Therefore, it is above all a matter of circumstances whether the initial sUte of mind lived on intact. When the court is satisfied that there was a renewal of guilt, the case is one of material concurrence (there may even be a material concurrence of successive offences) and the provisions of Arts. 82 (1) (a) and 189 apply as regards the assess- merit of the sentence unless the court considers that the offence must be treated aa a collective offence (see para. (3) *(b)* in comments under Art. 82). When the court is not so satisfied or ia in doubt as to whether a new fault was committed. Art 61 is inapplicable and the accused is punishable for only one offence.

3. The rule laid down in Art. 61 also applies in cases of ancillary offences where, again, tbe circumstances surrounding the performance of acts of execution may change to such an extent that these acts can no longer be deemed to be "merged by the unity of intention and purpose". For instance, *A* puU into circulation bank notes which he himself forged. However, fearing lest he might be caught, be subsequently asks *B* to circulate tbe notes, which *B* docs until he is arrested. If *A* then personally puts his forged notes on the market again, the question arises whether be does so "with renewed criminal intention". Although tbe acts are the same as those which *A* had originally done and are directed against tbe same protected right and although there still is "unity of purpose", there does not necessarily exist "unity of guilt". Had it not been for the episode with *B,* the uttering would clearly not have been punishable as a separate offence. In the circumsUnces, however, there is a strong presumption that the new uttering was done with a new intention and that *A* should, therefore, be punished for concurrent offences of forgery and uttering forged currency; the presumption would not be so strong if *A,* after spontaneously refraining from circulating the notes, had done new acts of uttering without similar acts having in the meantime been done by *B* on *A't* behalf.

Article 62. Guilt la cases of related offences

When an offender commits an offence with the intention of causing or facilitating the commission of another punishable offence the provisions regarding aggravation of penalty in case of com-

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currence shall apply (An. 190) *unless srch offence is declared by law to be an aggravated offence.*

This article, which has been alluded to in connection with Art. 60 (3), deals with so-called related offences which are not always easily distinguishable from ancillary offences.

' 1. Related offences are deemed to be committed when an unlawful act is done for the purpose of causing or facilitating the commission of another offence which is at least attempted or (Art. 190) of concealing the commission of another offence. Like ancillary offences, related offences imply, therefore, two or more kinds of unlawful acts; these acts, however, amount to two or more separate offences and are not regarded as constituting a main offence preceded or followed by acts of executiotf.A'ct since related offences, like ancillary offences, are committed in furtherance of a single initial criminal scheme with a view to achieving a single purpose, it may be rather difficult to decide whether any given case comes under Art. 60 (3) or 62. As has b< n said before, if *A* forges bank notes which he then puts into circulation, the uttering is regarded as an act of execution. This would suggest that, if *A* forges a document which he then uses in order to obtain money by false pretences, the offence of misrepresentation is "merged by the unity of intentionand purpose" since *A,* when obtaining this money, was merely "carrying out his initial criminal scheme"; he intended to make use of the instrument already at the time of the forgery and did not commit misrepresentation with a new intention. Therefore, it would appear that, whatever acts are done after the forgery, they are acts of execution and *A* should be punished only for forgery. Yet this is not so at all and Art. £60 expressly states that, where an offence of misrepresentation "is committed by means of a forgery, the relevant provisions shall apply concurrently" (see also Arts. 396, 442 (3) and 678). ,

t^This raises the problem of why and where the line is drawn or, in other words, of fixing the point beyond which the theory of acts of execution no longer applies. In this respect, the Swiss Federal Court, after noting tha^'the fault as well as the result are not the same when the doer merely steals as when he steals after breaking in or when, after the theft, he destroys, the property stolen", held that "one must admit that several legal provisions may apply to a series of different offences which constitute a whole, unless the law clearly indicates lha tone of these offences is an ancillary one which is not punishable'y(ATF 71 IV 205. JdT 1946 IV 81; see also ATF 77 IV 14, JdT 1951 IV 128; ATF 77 IV 88, JdT 1952 IV 22; ATF 80 IV 252. JdT 1955IV 109)OThe reason behind this solution is that "two independent unlawful acts do not amount to a single offence simply because the doer decided at one and the same time to perform these acts (even though) they are objectively and subjectively related (...). A person who, by one act of will, decides to commit several offenccs is not to be punished more leniently on the ground that he made only one decision (...). It is immaterial whether these offences are of the same or a different nature, or that the commission of one of them excludes the commission of the other" (ATF 79 IV 60, JdT 1953 IV 130).

Although the records of the Codification Commission give no indications regarding Arts. 60-63 of the Ethiopian Code, these judgments are probably the source of Art. 62. If so, it follows that this Article must be regarded as a general provision permitting one to apply various articles of the law to various acts done with a view to achieving a single purpose unless in any given case the law expressly provides to the contrary on the ground that there is unity of guilt within the meaning of Art. 60 (3). In other words, the decision as to whether ancillary or related offences have been committed must be made in accordance with whatever specific provisions the Special Part may contain on the subject. Thus a provision such as the above-quoted Art. 660 is on the face of it designed to exclude the application of Art. 60 (3). Yet doubtful cases may arise. For instance, it is not clear whether the "relevant provisions" mentioned in the said Art. 660 are only those which concern forgery or also those which concern the use of a forged instrument. The doubt, therefore, is as to whether Art 60 (3) is entirely inapplicable or applicable up to a certain point. Although this question was involved in the above-mentioned ATF 71IV 205, tbe Court did not settle it. The said judgment makes it clear that the offence of misrepresentation is not merged by the unity of intention and

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purpoie, but it does not specify whether the use of a forged instrument is in such a case to be regarded as an act of execution of the forgery or as an offence committed for the purpose of facilitating the obtaining of money by false pretences, *i.e.* wether the doer is punishable for two or three offences There is nothing in Art. 62 to indicate that an offence can never be of the kind described in Art. 60 (3) if it is related to another offence; the implication is rather that, when such a relation exists, the fact that some subsequent acts performed by the offender himself are merged by the unity of intention and purpose does not entail as a matter of right that any subsequent act so performed never constitutes a fresh offence. The other "punishable offence" mentioned in Art. 62 is, therefore, any offence other than one which is expressly declared by Art. 60 (3) to be an ancillary one. Thus, in the above illustration, it appears that only two offences should be deemed to have been committed, namely forgery (including the use of the forged instrument) and misrepresentation; whether or not the forged instrument is used to commit a new offence, the use itself is in any event, subject to the provisions of Art. 61, ancillary to the forgery.

2. So that related offences may be deemed to have been committed, it is obviously necessary that two or more unlawful acts should have been done. The actor should have at least attempted to commit either the offenoe the commission of which he intended to facilitate by a previous offence or the one designed to conceal the perpetration of a previous offence. For instance, he must have attempted to obtain money by false pretences when using a forged instrument or to set on fire the house in which lay the body of the person he shot. In some cases, it will be entirely a matter of circumstances whether related offences have been committed or not. Thus if *A* pays for a drink he has had in a bar with coins forged by himself, this payment, which in any event has the effect that counterfeit currency is put into circulation, at the same time constitutes an offence of misrepresentation or, if the waiter refuses to accept these coins, an attempt to commit this offence; but if *A* uses these coins only to tip the waiter, the uttering of counterfeit currency does not amount to an offence of misrepresentation and tbe case comes under Art. 60 (3), and not Art. 62.

3. Where related offences have been committed, the sentence wi*l be assessed in accordance with Art. 190, unless otherwise provided for by the Special Part of the Code. In other words, related offences are treated like concurrent offences save in those cases where the law states that a combination of unlawful acts constitutes a single, though more serious, offence; the solution here is exactly the same as in cases ot repetition of similar acts, where the provisions concerning concurrence apply unless the repetition constitutes a collective offence liable to an increased punishment according to the Special Part. This Part, therefore, must be examined for the purpose of deciding, not only whether ancillary or related offences have been committed, but also whether in a case falling under Art 62 a specially aggravated punishment applies *(e.g.* Art. 635 (3) (c) or 637 (2)) or not *(e.g.* Art. 660).

(a) The Special Part contains few express provisions to the effect that related offences amount to a single aggravated offence. In the abscnce of such provisions, concurrent offences are committed which are punishable in the manner provided for by Art. 190. Thus *A* is guilty of concurrent related offences if he steals private papers from *B* which he subsequently uses to blackmail *B.* In some instances *(e.g.* Arts. 396, 446, 660, 678), this principle is specifically recalled, perhaps not quite unnecessarily since this reminder occurs in border-line cases where one may be in doubt as to whether related offences have in effect been committed or not.

{*b*) The Special Part sometimes creates an aggravated offence out of two or more unlawful acts which would otherwise be treated as concurrent offences. For instance, there is aggravated homicide when one kills a person "to further or to conceal another crime" (Art. 522 (1) (e)); there is aggravated theft when one abstracts property after "climbing over or breaking in" (Art. 635 (3) (c)); there is aggravated robbery when an offence of robbery is accompanied by "grave bodily injury" (Art. 637 (I) (c». Provisions of this kind involve the following questions:

(i) It is debatable as to what charge should be framed in cases of anempt. If *A* is caught in *B't* garden after climbing over the fence.'should he be charged with a complete offence of

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trespass (Art. S71) or with an attempt to commit aggravated theft (Art. 63S (3) (c»? The answer will vary according to the circumstances. If *A* was on his way to a secret rendezvous with *B's* daughter, the climbing over the fence does not amount to a beginning of execution of a theft and the charge, therefore, is trespass. If, on the other hand, *A* could reasonably have no purpose in being in *A'%* garden other than to abstract some property, then the offence of trespass is, so to speak, "absorbed" by the further offence he intended to commit and he should consequently be charged only with an attempt to commit aggravated theft.

(il) Art. 62 is so worded as to suggest hat, when under the law related offences amount to a single aggravated offence, there can be no concurrence at all or. rather, there is imperfect concurrence within the meaning of Art. 60 (I), between the various unlawful acts constituting this offence. This is so, indeed, in cases of theft, for instance, in the sense that trespass plus theft always equals aggravated theft. It seems, however, that on this point the provisions of Art. 62 should not be taken to be of general application. For instance, although homicide plus any other related offence always equals aggravated homicide, it does not appear from Art. 322 (1) (c) that the offence of aggravated homicide "absorbs" this related offence. Quite the contrary, it would appear that Art. 190 should then apply because there is concurrence between aggravated homicide and this related offence. Thus if *A* kills *B's* "zabania" to enter *B's* house and he then steals a painting from that house, he is undoubtedly guilty of aggravated homicide; but. it is submitted, he is in addition guilty of aggravated theft even though Art. 62 would tend to intimate that the punishment ordered with respect to the former offence also serves as a punishment for the latter offence.

Article 63. Guilt In case of a combination of offence*

(1) *When a given offence implying an Injury to persons or property, or the use of arms, instruments or dangerou* means, fire or explosives'?poison or toxic substances, entails an injury whereby the elements of a second offence are materialiied, whether it be bodily injury, injury to health, death of a human being or the destruction of a third person's property, the court shall apply the following principles for determining the guilt and the penalty:*

(a) if the result was Intended, or foreseen and accepted by the offender (Art. 58 (I)), *he shall be charged with both the principal offence and the resulting offence and aggravation shall apply in accordance with the relevant provisions (Art.* 189 *and* 192), *due regard being had to the combination of the elements constituting the two intentional offences;*

(b) if the injurious result could and ought to have been foreseen in the circumstances of the case (Art. 59 (/)) *there shall be concurrence between the principal Intentional act and the resulting offence due to negligenct, and the court shall increase the penalty accordingly.*

(2) *Aggravation shall apply in particular where the criminal result was achieved by means endangering public security, such as arson, explosion, use of explosives or where communications or public health are in danger as well as in the case of exposure of persons, maltreatment, duels, abortion, rape or sexual outrq ts.*

Art 63, which is the last provision dealing generally with the guilty mind of one who commits two or more offences, relates to the case where so-called combined offences have been committed, *i.e.* where a person does something such that be brings about several consequences amounting to several different offences which, however, are neither ancillary nor related to one another since they do not, as is required by Arts. 60 (3) and 62, consist of several different unlawful acts. The "combination" contemplated by Art. 63 is one of results (the act X, done by a person committing two criminal faults, produces consequences contrary to Articles Y and Z; there is no concurrence if the consequences are contrary to only one of these articles) and differs from the one mentioned in Art. 60 (1), which is one of acts

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(the act X plus the act Y, done by a person committing a single fault, constitute the offence Z). In other words, the case provided for by Art. 63 is one of notional concurrence and not, as might be inferred from the reference to Art. 189 which fttontains, one of material concurrence (the purpose of this reference is merely to remind one that, when the sentence is assessed under Art. 192 regarding notional concurrence, the penalty is calculated in accordance with Art. 189; since Art. 192 expressly says so anyway, this reminder is at once unnecessary and misleading; also misleading are the words "the principal intentional act" in sub-art. (1) (6), which suggest that more than one act should be done).

The reason why this case of notional concurrence is described separately is that, although "the act (...) contravenes several criminal provisions" (Art. 82 (1) (a)), it does not contravene them "simultaneously''; the difference between these cases and those mentioned in Art. 82

(I) (a), second sentence, lies, therefore, in the different working of causes and effects and the question is whether the doer, if be is found guilty of the act and its immediate result, such as the setting fire to. and consequent destruction of, a house, is necessarily answerable for the secondary consequences, such as the death of the occupant of the house. The answer supplied by Art. 63 is in complete conformity with, because it logically flows from. Arts. 24,58 and 59. For this reason, Art. 63 may appear to be rather superfluous.

1. The first case that may present itself is that where the initial as well as the resulting offence are intentionally committed. For instance, *A* deliberately sets fire to *B's* house when he knows *B* to be at home, and he does so either with a view to causing *B's* death (direct intention) or after foreseeing and accepting the possibility that *B* may die (*dolus eventualis).* If *B* dies, *A* is in either instance guilty of two concurrent intentional offences, namely damage to property and homiddc, provided, of course, that there is a causal relation between the two. The sentence will then be assessed in accordance with Art. 192. It may be noted that;

(a) the expression "principal offence" used to describe the act is misleading, for it may suggest that the initial offence should be a complete one. This, however, is not so at all and the provisions of Art. 63 (1) (a) also apply when the act amounts to an attempt, as in the case where *A* attempts to abort a woman who is not with child and the woman dies;

(*b)* the doer is not deemed to have committed related offences even though he, *e.g.* burns a bouse for the sole purpose of taking the life of its inhabitants. Admittedly, the burning is done "with the intention of causing or facilitating the commission of another punishable offence" (Art. 62). Yet this purpose is achieved, not through the doing of a new act, but through the natural consequences of a single act and Art. 62 is, therefore, inapplicable. The effect of this distinction as regards the sentence is, however, negligible.

2. The second case for which Art. 63 provides is that where the act is intentionally done but only its immediate consequences are intended. For instance, *A* sets fire to *B's* house with the intention of destroying the house, and he does so believing that *B* is out (unconscious negligence) or thinking that *B,* whom he knows to be in, will have enough time to escape (conscious negligence). If *B* dies, *A* is in either instance guilty of an intentional offence of damage to property committed concurrently with an offence of negligent homicide, for he should have either foreseen the possibility of *B* being at home or ensured that the possibility that *B* might die, which he had foreseen, would not materialize. In these cases, again, there must exist a causal relation between the "principal intentional act and the resulting offcnce due to negligence" (sub-art. (I) (6)). There is no concurrence when either the consequences were unforeseeable or the "injurious result" which "could and ought to have been foreseen in the circumstances of the case" is an ingredient of an offence which is punishable only if intentionally committed. Thus if *A,* at the wheel of a car, deliberately fails to comply with a "stop" sign and runs down a pregnant woman who loses her child, he may not be punished for having caused abortion by negligence, though he is liable to a punishment to be calculated in accordance with Arts. 63 and 192 for having intentionally committed a traffic offence and negligently caused bodily harm.

3. A third type of combination is conceivable, namely a combination of offences committed by negligcnce. Although this case is not specifically provided for by Art. 63, it calls

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for tbe same solution as the above cases. Thus if *A* by negligence causes an explosion (Ait. 492) in consequence of which property is damaged and/or life is lost, the sentence to be passed with respect to all these offences will be calculated in accordance with the niks coo* corning notional concurrence since the initial lack of foresight brings about consequences “contravening several criminal provisions".

4. Sub-art. (2) of Art. 63 must be read in conjunction with Ait 192 which states that in of notional concurrence, “the court may aggravate the penalty according to tbe provisions of Art. 189 where the offender's deliberate and calculated disregard for tbe law justifies aggravation**, provided that “it shall be bound to do so** in the cases coming under Art 63 (2) and provided further that “in other cases (it) may only impose the maximum penalty prescribed by the most severe of the relevant provision*.”

This rule, tbe implications of which are in any event insufficiently dear, calls for tbe following observations. Firstly, it is on the face of it inconsistent with Art 63 which provides for compulsory aggravation in every case and not only in the cases mentioned in sub-art (2). Secondly, Ait. 192 would tend to suggest that there is in the latter cases a conclusive presumption that the offender acted with "deliberate and calculated disregard for the law'*, which is not necessarily so, at least when the injurious result was brought about by negligence. Thirdly, if the purpose of the reference to Art 63 (2) appearing in Ait 192 is to indicate that tbe actor must be treated with particular severity when the result is caused by an offence consisting of the use of dangerous means or follows upon the commission of exposure, maltreatment, duel (which in any event is mentioned by mistake; see Ait 350 (2)), abortion or sexual outrage, then this purpose must be achieved, not by ordering tbe maximum penalty prescribed by law with respect to the more serious offence committed (sinoe this type of aggravation applies “in other cases’* than those coming under Ait. 63 (2)), but by increasing this maximum in accordance with Ait 189(1) (6). If this construction is required to effectuate the intention behind Arts. 63 (2) and 192, the wording of the latter Article is flexible
enough to permit it. The effect, however, is that the court is given little discretion with respect to the assessment of the sentence and may consequently find itself bound to order a punishment higher than is adequate in the circumstances. A different interpretation may, therefore, be suggested, which docs not conflict with tbe language of Art 192 and is mors in conformity with the principle governing the calculation of sentences (Ait 86). In cases of notional concurrence as defined in Art. 82 (1) (a), the court “shall impose the penalty deserved for the more serious offence” (Ait 189 (1) *(b))* but may not exceed the maximum of this penalty (Art. 192) unless the degree of guilt is high, as in the esse where a married man who rapes his daughter is fully aware of the fact that he commits three offences. In cases of notional concurrence as defined in Ait 63, the court “shall impose the penalty deserved for the most serious offence and shall increase its length" on tbe ground of concurrence (Art 189 (1) *(b)),* but it may not, except in the cases mentioned in Ait 63 (2), exceed the maximum of this penalty (Ait 192) and “impose s penalty exceeding by half the basic penalty” (Ait 189 (I)
(b) , second sentence). With a solution of this kind.the courts remain at liberty to pass whatever sentence they think fit in tbe circumstances and to deal with all cases of notional concurrence in the same manner regardless of whether the concurrent offences are “comb~~oe~~d** (Ait 63) or “simultaneous” (Art 82 (1) (4), second sentenoe).

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CHAPTER DC

LAWFUL, JUSTIFIABLE AND EXCUSABLE ACTS [ARTS. 64-78]

According to Art. 38 (2), a person who intentionally commits an offence is always punishable except where he acts in circumstances providing him with a justification or an excuse, that is, in any of the circumstances defined in Arts. 64-78. The question whether an act is lawful, justifiable or excusable docs not arise, therefore, unless this act is an ingredient of an offence. Furthermore, the tutid question is always to be decided with reference to the law for there are no justifications or excu.«-v wb»tr"er their *raison d'etre,* other"than those provided for by law, whichever this tow mav be.

Tlte dotinmon ana imss<nca:.or. of .-••.u., justifiable and excusable acts sometimes vary. In Francc, for example, the ooiy disimt-.on ts between justifications and excuies. The first ones comprise acts requirH or authvririd by law, legitimate defence and, though this is disputed, nerr**tuy sets ard aca <foae vjili the consent of the injured party, for which the French Code *don* .-tot «4prr«iij prr ■■ hilt lite second ones, which are said to be either *absoiutoire*s or • *h .c ACU effect* on the penalty, are similar to the circumstances which the fcttuopui k!o regards as general or special extenuating circumstances. Thus again, under Swiss law, acts ordered or authorized by law, acts done in a state of legitimate defence and necessary acts all Call into the general category of lawful acts. So too, coercion, with which the Ethiopian Code deals in relation to criminal guilt, is not provided fu. *a* th- Swiss Cede and H in France, dealt with together with insanity in relation to criminal responsibility. Some laws. uuuii« kxw n! the fact that there is tor a!! radical purposes little difference between lawful and justifiable acts since the doer is nui fiwuishsi becai'v> the law itself deprives the act. in the one case, of its unlawful character and. is the other, of its punishable chai*c;cr, do rvM even attempt any classification and deal with both types of acts under headings such as "general exceptions", "excuses" or "affirmative defeaces". It ts in thif general sense, also, that the term "justification" will be used hereinafter

The Ethiopian Cede does not follow any of the above-mentioned models but provides for three classes of acts with respect to which the ordinary rules concerning criminal guilt do not apply or fully apply, namely lawful acts (acts done in circumstances which legitimate them), justifiable acts (acts done in circumstances excluding intentional guilt) and excusable Acts (acts done in circumstances reducing the degree of guilt). Whether this classification (which «i*o «ppiic» in uises w peuy I'Sentx.-:; see Arts 699and 700) is fully satisfactory, is a matter of opinion. !t na>* opr-sii, however, 'hat lawful acts should ot be dealt with in the Chapter of the Code conuri^ij- mmiral sni^t as they do not involve any question of guilt (to the same effect, *se the Swiss renal Cod* in which the marginal note "criminal guilt" cover* only three provisions, narney Art ' . mtemjoa and negligence; .Art 19, mistake of fact, and Art 20, mixtakc of iaw,. Sc .oo, tft cTrach »J one is authorized by law to repel unlawful attacks, it may seem that acts done is legitlma:. defence should rank among lawful acts and not among justifiable acta.

Article A cts required or actluriied by law

Acts reqvi-i-u or authorised by Jo* *dt unot constitute an offence and are not punishable, in particular*

(a) *art tn reroect of public, State or military duties done within the limits permitted by law;*

(b) *acts reasonably done in exercising the right of correction or discipline;*

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(c) *acts done in the exercise of private right recognized by law, where the condition! and limits of ike ixerche of such rights are not exceeded.*

A '»wful act i* an act which a person u legally obliged *ui* «uwsc^ to do. *Sx~ae* of the -~*'i'rvcc* of this duty or r.sht. **'- **<J. *l«c!i weald otherwise [illegible] .tn-i for which tins dow is sot punishabk tiiiu it *tzrr*. *** *₁. <«“»..»« *-irciixs* iwmvm or not (An. 699 (1)). On the other band, the mere fact that a criminal act » omarvd ujr iaw not to be punishable does naturally not mean that this act is lawful when the reason why it is not punishable is not that tbe act is ordered or permuted by law *(c.g* Arts. 28(1} *in ft. '*. 19, second alinea. 380 (I), 584 (2)).

1. «Ji>ucj Art 54, bWfi act; romprije in particular acts ccnnpr*~[4]»«»- n*ibL>c, Sc*[f]* * military duties, acts dens in the exercise of a right of correction or ducipliiie and act', of private justice ’[r]bese act? are pot lawful, however, unless there is a isjsi oblige tk» or permission to act and the act is done, by the person who is so obliged *r~* tr H the terms of this legal obiigadon or permission. The reason behind A< i*4 tl-af tbe i»», whatever its nature, Cannot witnout contradicting itself bind or auuituixc e i-juui, to **e-* and then punish him J he uctl in accordance with the law.

(a) Act*r* relating to public, State or military duties are acts wiuch a parson is k#J)y compelled or authorized u> do in the general interest.

(0 The Code does not define "acts in respect of public duties”. It should bo *doors,* however, that the justification which the said duties provide is available to anyone who does, in accord* ance with the law, something that is for tbe public good. Contrary to what might be inferred from the words “public duties" (see in particular the French version which mention: *"aaes relevant de fonctions publUjues"),* it is not required that the doer should possess an official status or be vested with any kind of official powers nor, for that matter, that he should act in the discharge of a duty, sincc a person with such a status may aval! iinadf of tfcr rrr*re specific justification that oc acu "in raped ui iuue uuuet'. iu. <ui> who, or) the conditions laid down in the Criminal Procedure Code, arrests, or naitkipates in the arrest of, an offender does an act pertaining to public duties, and St ir in*nv ral whether te i-.a purru”it to the permission granted by An. 50 of tb* «aid Co's in u> du. ohue-mm .OQfcinsd in Art 57 of the said Code; bo may, in neithei c*&c, bs y...i ~-~I L,. on ctTute under Arti 557 of the Penal Code sincc, although he interfere; -vith tiu- 1 ɹ*~:> the interference is not “contrary to the law” as is required by the latter Ankle. On thl*. point, therefore, tbe Criminal Procedure Code makes an excepuor io the Code Th of exception will be found in nu.--.bc.-les: cases, such as tnose of informers or witness*. A persor who exerdsea his right or carries out his duty to report an offence with e view to criminal proceedings being instituted (An. 11 of the Criminal Procedure Code) may not be punished even though he “imputes to another an act, a fact or conduct such as to injure his honour or reputation" (An. 580 (1) of the Penal Code). The same bolds good with regard to a person who acts in the execution of his civk duty to give evidence (Arts. 30 (2) and 136 of tbe Criminal Procedure Code). So too, although it is an offence to kill a human being, one who kills another person in an effort to suppress a rebellion does a lawful act since be carries out his duty to defend tbe Emperor and the Empire against all enemies in accordance with Art. 64 of the Constitution.

(ti) Tbe same may be said of acts connected with State duties, *i.e.* acts done by public Krvants in the execution of their duties as public servants, as well as of acu connected with military duties, *Le,* acts done by members of tbe Armed Forces in their capacity as soldiers in the broad sense of the term. Thus no offence is committed when, in accordance with the Criminal Procedure Code, a policeman searches a house, a prosecutor charges an offender, a judge refuses to release an accused on bail, an executioner carries out a sentence of fsath or when, in accordance with tbe laws of war, a soldier kills an *taxr* , *r* - ubmarine si. js a ship or an aircraft drops bomba.

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(b) Also lawful are tbe acts done in exercising a right of correction or discipline vested by law in the doer. Any person legally entitled to take certain corrective or disciplinary stepi commits no offence when he takes these steps. Thus, Art. 2039 (c) of the Civil Code statei that a person is not at fault and is not civilly liable who inflicts reasonable corporal punishment "on his child, ward, pupil or servant". Accordingly, Art. 548 (2) of the Penal Code dealing with maltreatment of minors expressly reserves the right of correction or discipline. However, these two provisions raise a controversial question, namely what is the scope of tbe justification. Although the said Article 2039 *(e)* is quite general as regards the right to discipline one's child, the reservation contained in Art. 548 (2) of the Penal Code applies only with respect to chastisement inflicted upon children under fifteen years of age. The question, therefore, is whether a father who should discipline his son aged seventeen would be justified under tbe Penal Code since he is justified under the Civil Code. It may appear that, when a justification is available under tbe Penal Code and some other law but it is defined in a more restrictive manner in tbe former than in tbe latter law, then, for purposes of criminal liability, regard should be had to tbe definition supplied by the Penal Code. On the other hand, when the Penal Code clearly intends that the doer should be justified but it does not define tbe justification, as in the case of servants, then the doer may not be punished if a justification is available under some other law, regardless of the fact that the Penal Code itself does not define it Yet this construction would either entail that one may incur no civil liability even though one is criminally liable (and this would contradict Art 2035 (1) of tbe Civil Code, which states that a person is at fault whenever be contravenes tbe provisions of any law), or restrict the scope of the justification laid down in Art. 2039(c) of tbe Civil Coda (note that «imil»r difficulties arise in connection with the problem of consent; see para. 3 (*b*) second alinea, in comments under Art 66 *infra).* Therefore, one may be inclined to think that, since the basis of tbe justification actually lies in Art. 2039 (c) of the Civil Code rather than in Art. 64 of tbe Penal Code, this justification operates regardless of the age of the minor and of the provisions of Art 548 (2) of the Penal Code. In support of this interpretation, it will be noted that the right of correction is inseparable from the duty to educate, which duty is incumbent upon the parents or persons in *loco parentis* so long as tbe child docs not'attain his majority or is not emancipated (Arts. 199,204 and 328 of tbe Civil Code, and Ait. 626 of tbe Penal Code, in which tbe term "children" has the same meaning as in Art. 219 of tbe Swiss Penal Code, that is. minors; note, furthermore, that the said Art. 626 mentions, in its sub-art. (2), "abuse of the right to administer chastisement", which suggests that this right can be exercised throughout the minority of the child, contrary to that may be inferred from Art 548 (2)). Therefore, a father who should be prosecuted under Art. 544 for having disciplined his son aged seventeen (note that in view of the son's age. Art. 548 is inapplicable) would be entitled to justify himself by invoking Art. 2039 (c) of the Civil Code.

(c) Tbe last type of lawful acts expressly provided for by Art 64 is that of ads done in exercising private rights recognized by law, which acts are sometimes called acts of private justice. For instance, the bolder or possessor of a thing is justified by Art. 1148 of tbe Civil Code in repelling by force any usurpation of or interference with that thing and, when the thing has been taken away from him by violence or secretly, in taking it bock forthwith either by expelling the usurper or seizing the thing from the hands of the usurper caught in the act or running away (that is, in a situation which does not necessarily amount to legitimate defence). So too, the owner of a land is justified under Art. 1212 (2) of the Civil Code in cutting as from the boundaries of his land all the roots rising on this land. Thus again, the owner or possessor of a land may, according to Art 2076 (2) of the Civil Code, kill an animal belonging to another which causes damage to his property, in order to prevent substantial damage disproportionate to the animal's value. In all these cases, the doer is not guilty of an offence of bodily injury or damage to property, for instance, since the taw expressly authorizes him to act as he does.

(4) It is worth noting that the list of lawful acts set out in Art 64 is not meant to be exhaustive; tbe words "in particular", which are constantly used in tbe Code as synonymous

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with "for instance" or "*uch as" (#./. Arts. 31, 56 (2),'63 (2), 68, second alinea, TO (2), 73 (I), 78 (1), second alinea), clearly show that these acts are mentioned only by way of illustration. This, however, does not mean that a person will be deemed not to have committed a criminal offence whenever tbe court considers that he acted in circumstances such as to justify him; it merely means that any justification, even though of a kind other than those described in Art. 64, will be taken into account for purposes of criminal liability, provided, of coune, that this justification is laid down by law. Such would not be the case when, for instance, a husband disciplines his wife, since Art 2039 (c) of the Civil Code deals exhaustively with the right of correction; but the words "in particular" would permit one to regard as lawful an act done, in a situation not amounting to necessity (Art 71) or legitimate defence (Art. 74), for the purpose of restraining a dangerous lunatic from doing harm (Art 2039 (</) of the Civil Code), even though this act doeViot, strictly speaking, fall within any of the categories of lawful acts defined in Art. 64. The same may be said of acts done in the course of sporting activities (Art 2068 of the Civil Code) of which the Penal Code makes no mention (though Art. 65 may apply in the case of acts done by professional sportsmen). It is the permission of the law, rather than that of the person to whom harm is done, which renders the act lawful. Admittedly, a person who takes part in a rugby game, for example, is prepared and agrees to suffer some harm. Yet the reason why this harm does not constitute an offence is not so much that the said person of his own free will takes part in the game with full knowledge of the fact that he may suffer harm, as the fact that the game is expressly or even impliedly authorized by law (see also para. 3 *(b),* second alinea, in comments under Art 66).

2. A person is justified under Art 64 only insofar as the unlawfulness of the harm he causes is obliterated by the lawfulness of the act causing harm. The mere fact that a person is obliged or authorized by law to do something does not render lawful anything that he may do in carrying out this duty or in exercising this right. In other words, an act is unlawful not only when no justification is available at all, but also when, there being a duty or a right to act tbe act is not done in terms of tbe legal obligation or permission. Yet although Art 64 is then inapplicable, the act may be justified or excused under different legal provisions, such as Arts. 70, 71 and 73.

(a) A legal obligation or permission to do an act connected with public duties is a complete justification when the doer complies with the legal requirements governing the doing of this act. Thus a private person commits an offence not only when he arrests without a warrant a person who commits a flagrant offence punishable with simple imprisonment not exceeding one month (since under Art. 50 of the Criminal Procedure Code such an arrest is not permissible unless tbe offcnce is punishable with simple imprisonment for at least three months), but also when, after making an arrest in accordance with the said Article 50, he strikes tbe arrested person although the latter does not resist the arrest (since under Art. 56 (4) of the same Code no force may be used in making an arrest unless the arrested person forcibly resists tbe arrest or attempts to evade the arrest). In the first case, the arrest itself is unlawful while in the second case the arrest is lawful, but not the manner in which it is effected; he who makes the arrest, therefore, is punishable in the first case for illegal restraint (Art 557) and in the second case for bodily injury or assault, as the ease may be (Arts. 538 *et ieq.).* Similarly, the right or duty to report offences does not relieve the informer of his general obligation not to give false information (Art. 440 or 441, as the case may be), nor does the duty to give evidence relieve the witness of his obligation not to make knowingly a false statement (Art 447; see also ATF 80 IV 56, JdT 1954 IV 111).

(b) Tbe same applies to acts pertaining to State or military duties. The scope of tbe justification must be ascertained having regard to the provisions of the law compelling or authorizing a public servant or a soldier to act. In these eases, two questions arise, namely whether the doer, and not some other public servant or soldier, was obliged or authorized to act (and it must be remembered in this respect that the receiving of a superior order does not by its own force create a duty to act; see Art 70 *infra),* and whether be acted "within the

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limits permitted by law", *I.e.* in accordance with the legal requirements governing the doing of the act. For instance, a police officer, though legally entitled to make a search, is not legally qualified to issue a search warrant (Art. 33 (1) Criminal Procedure Code) nor is he entitled, in the abaence of directions to the contrary, to execute after six o'clock at night a warrant lawfully issued (Art 33 (3) of the said Code) nor may he seize articles not mentioned in the warrant (Art.lT(2) oHbc said Code). Leaving alone the question of abuse of powers (Art 414 Penal Code), a sdarch carried out, under a warrant legally issued, in contravention *d* Art 33 of the Criminal Procedure Code constitutes an offence under Art 415 of the Penal Code. Similarly, * judge commits an offence under Art. 416 of the Penal Code if he refuse*, in violation of Art. 31 of tbe Constitution, to release on bail a person charged with an offence the sole penalty /or which is fine. So too, a policeman who, in the course of an investigation, use* methods prohibited by Art. 31 of the Criminal Procedure Code commits an offence in violation of Art 417 of tbe Penal Code and may not justify himself by invoking his duty to investigate (as for statements contained in a police investigation report, for instance, see Ait. 379 (2) of the Penal Code; see also ATF 76IV 23. JdT 1930IV 30). Thus again, a soldier, who is justified in taking an enemy prisoner or in killing an enemy, does not do a lawful act if he shoots a prisoner (Art. 284 Penal Code) or mutilates the enemy he killed (Art. 287 Peru I Code).

(c) Regarding the right of correction or discipline, the Penal as well as the Civil Code prescribe that it must be exercised in a reasonable manner. Whether this condition is fulfilled it to be decided from case to case, taking into account elements such as the seriousness of the fault sought to be corrected, the means used in applying the punishment and the harm thereby caused. It may be noted that, so far as concerns minors, a test is laid down in Art 267 (2) of the Civil Code, according to which the guardian "may inflict light bodily punishment on tbe minor, for the purpose of ensuring his education". Although it is certain that the guardian is justified neither under the Civil nor under the Penal Code if bodily punishment is applied for any purpose other than that of ensuring the minor's education, since the right to beat a child is a corollary to the duty to educate him, it is debatable as to whether he may be justified under the Penal Code when the punishment is not light, even though he is not justified under the Civil Code. It seems that the guardian's criminal liability is not necessarily involved when he inflicts severe punishment in violation of the said Art 267 (2). even if he is removed on that ground (ATF 85 IV 123, JdT 1959 IV 98). The provisions of Art. 548 (2) of the Penal Code would tend to mean that the right of correction is exercised in a reasonable manner so long as tbe doer does not maltreat the minor "in such a way as to affect or endanger *gravely* his physical or mental development". In questionable cases, expert evidence will have to be obtained. In any event, there is no doubt that no justification is available when the punishment it manifestly excessive.

(d) Acts done "in the exercise of private rights recognized by law" are lawful, also, only when they are done in terms of the legal permission (there is then no question of a duty to act), for these rights are not unlimited. Thus even though ownership "is the widest right that may be had on a corporeal thing" (Art. 1204 (1) Civil Code), its exercise is subject "to such restrictions as are prescribed by law" (Art. 1205 (1) *Ibid.).* These restrictions may be found in the Penal Code (see, for instance, Arts. 488, 506 and 659) as well as in the Civil Code (see tbe general provisions of Art. 1225). To come back to the illustrations given in para. (I) (r) *npra.* Art. 1148 (3) of the Civil Code prohibits the possessor resisting usurpation from doing any act of violence "which is not justified in tbe circumstances" *(e.g.* striking the usurper after seizing tbe thing from his hands). Similarly, the justification provided for by Art. 2076 (2) of tbe same Code does not operate when the owner kills an animal other than the one causing damage (ATF 78 IV 83, JdT 1953 IV 34) or when the killing is not necessary, within the meaning of Art. 71 of tbe Penal Code, because the damage sought to be prevented could (and this is not to be decided by purely objective standards; ATF 77IV 194. JdT 1952IV 136) have been prevented by different and less harmful means (sec Art. 1219 of tbe Civil Code).

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(*) The same holds good with respect to any other act the doing of which is expressly or impliedly authorized by law, and it is immaterial whether the restriction ties in the law itself or in mere usage. Thus an act causing harm done in the course of sporting activities is unlawful when there is “gross infringement of the rules of the sport” (Art. 2068 of the Civil Code). This restriction would apply even though the justification were deemed to rest in consent and not in a legal permission as consent is given on the express or tacit condition that no such infringement will occur.

Article 65. Professional duty

An act done in the exercise of a professional duty is not liable to punishment when it is in accordance with the accepted practice of the profession and the doer does not commit any grave professional fault.

Nothing in this Article shall affect civil liability.

Although they serve a different purpose, acts done in the exercise of a professional duty come, like the acts provided for by Art. 64 (a), within the general category of acts authorized by law (and not necessarily ordered by law, as might be inferred from the words “professional duty”). Legally speaking, an act done, *e.g.* by a surgeon in his professional capacity is of the same nature and has the same effect as an act done, *e.g.* by a public servant in his official capacity. In both cases, the law (and not tbe professional regulations.far lhac regulations merelv i adieu te how the profession is to be exercised but do not as a rule provide for the justification itself) gives a right to act and the rationale of Art. 65 is, therefore, the same as that of Art. 64. The law, which authorizes the exercise of certain professions or the making of certain contracts under which specific activities are to be carried out by certain persons, would contradict itself should it regard as unlawful acts properly done by these persons in the exercise of these professions or the performance of these contracts.

Art. 65 does not define what is meant by “profession** as it is not for a penal code to supply such a definition. Yet since this term is not defined in a general manner in any existing law, it may be taken to include “any vocation or calling in which the person professes to exercise learning, skill or art" (Halsbury, *op. cit.,* 12, p. 186) or “any activity which a person habitually carries out for the purpose of obtaining the resources necessary to his livelihood" (French decree of January 16, 1947). It teems irrelevant for the purposes, of Art. 65 whether ihis activity is exercised hv virtue of the law nr a contract Furthermore, it seems that remuneration, whatever its form, should not be regarded as a conclusive test in deciding whether a person carries out a profession within the meaning of Art. 65 *(e.g.* a nun employed as a nurse in a hospital exercises a professional duty when she gives an injection even though she is not remunerated).

1. As a preliminary, it may be noted that the law sometimes imposes upon certain professional persons the duty to perform certain acts. When such an act is done, it is naturally lawful, but then the justification is not the fact that the doer carries out a professional duty ; it is rather the fact that the act is ordered by law. It actually is an act “in respect of public duties” within the.meaning of Art 64 (a). For instance, a doctor who terminates a pregnancy on medical grounds must give notice thereof to the authorities *(Art* 535 (1) Penal Code) and may not, therefore, be punished for breach of professional secrecy when he gives the required information; the same applies when a doctor carries out his duty to send the authorities statistics regarding venereal diseases (Legal Notice No. 151 of 1950) or a professional person is obliged to ■give information which an ordinary person is not obliged to give (Art. 438 (1)

(b) Penal Code). So too, when a doctor is competed by law to carry out examinations or inoculations (see for instance the Vaccination Rules, Legal Notice No. 149 of 1950, and the Malaria Eradication Order No. 22 of 1959), he may not thereafter be punished for battery or bodily injury. In all these cases, however, the act is lawful only on the condition that it is done “within the limits permitted by law". Thus, the justification is not available when a doctor sending statistics regarding venereal diseases discloses the names of tbe persons

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■uffcring from such diseases. Furthermore, when a lawful act brings about harmful consequences, these consequences are not necessarily lawful for the only reason that tbe initial act is ordered by law. If a person dies of blood poisoning after being inoculated against small pox and it is shown that the death is due to the fact that the doctor used an unclean syringe to make tbe inoculation, although tbe inoculation itself is lawful, the doctor is not justified for the death under Art. 64 or 65 since he committed a grave professional fault

2. Tbe justification provided for by Art 65 applies when, in the carrying out of a profession the exercise of which is expressly or even impliedly permitted by law, an act is done which would be criminal according to the Penal Code or the Code of petty offences (Art. 699 (1)) were it not done by a professional person so authorized to act. Thus an advocate filing a petition for divorce on the ground of adultery dons not commit defamation; a surgeon performing an operation does not commit an offenc jf bodily injury; a mechanic dismantling a car entrusted to him for repair may not be punished for damage to property. What justifies the doer in these cases is the permission of the law rather than that of the person to whom harm is done. Although a person who submits to a surgical operation agrees to the injury, the reason why the injury is not unlawful is not so much.that this person gives his consent to the operation as the fact that the operation is authorized by law. In a number of cases, however, this authorization may not be invoked in the absence of consent and. as has often been noted, the questions of the right to act and of the manner in which this right should be exercised are so closely connected as to be really inseparable. A provision like Art. 534 of the Penal Code, dealing with termination of pregnancy *r* i medical grounds, offers a good illustration in this respect On the one hand, a doctor is punishable for abortion when, with the consent of the pregnant woman, be terminates the pregnancy for reasons other than those why such termination is permitted by law; consent alone, therefore, is no justification. On the other hand, the doctor is also punishable for abortion when, without this consent, he terminates the pregnancy on the grounds laid down by law; the permission of the law therefore, is not sufficient and consent is a prerequisite for availing oneself of the legal authorization to act.

3. As certain acts may be justified under Art. 65 as well as Art. 66, so other acts may be justified under Art. 65 as well as Art 64, since both provisions basically deal with acts authorized by law. For instance, a schoolteacher inflicting reasonable corporal punishment on a pupil does an act which is lawful according to Art. 64 (*b)* and Art. 65. In some cases, however, one may wonder whether an act which is not lawful according to Art. 64 may be deemed to be lawful according to Art. 65. Thus Art. 1302 (1) of the Civil Code states that the manager of a syndicate of joint owners "shall be responsible for the maintenance, security, cleanliness and repair of the parts jointly owned of the building". If, therefore, the manager gives a slap in the face of a child who is soiling the staircase, it might be held thdt the manager, though be has no right of correction under Art. 64 *(b),* is justified under Art 65 on tbe ground that he acts in the discharge of his duty to keep the staircase clean (see, for instance, ATF 89IV 71. JdT 1963 IV 39). So too. a schoolteacher who publicly reprimands a child for using obscene language does not commit defamation. Although his act may not be justified under Art. 64 *(b),* it is in any event justified under Art. 65 since the doer who has tbe professional duty to educate his pupils is accordingly entitled by law, be it impliedly, to prevent moral contamination (to the same effect, see ATF 72 IV 176, JdT 1947 IV 51).

4. The permission to practise a profession does not render lawful anything that may be done in the exercise *tf* this profession and Art. 65, by stating that the justification applies only when the doer acts in accordance with the accepted practice of the profession and does not commit any grave professional fault lays down restrictions which have the same purpose as those laid down in Art. 64. These restrictions would apply even though it should in appropriate cases be held that the justification lies in the consent of the injured party rather than in the legal permission, for he who gives his consent gives it on the express or implied condition that tbe rules of the profession will be complied with (Art. 2031 of the Civil Code).

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(o) The question whether an act is lawful under Art 65 does not arise unless the doer is personally entitled by law to perform the act allegedly done in the discharge of a professional duty. Thus, if an eye-doctor should cause the death of a person in attempting to remove tbe appendix of this person, be could obviously not be deemed to have acted in tbe exercise of his profession and would therefore not be justified under Art. 65. Depending on the circumstances of the case, he might, however, invoke the defence of necessity (Art. 71).

(A) The act must conform to the accepted practice of the profession (see also the words "normal curative practice" in Art 519 and the words "in good faith in tbe discharge of their duties" in Art 579). In order to decide whether this condition is fulfilled, reference will have to be made to professional regulations, if any, or to the custom of the particular profession, which may be ascertained through expert evidence. For instance, it is not normal surgical practice to use a kitchen knife in removing someone's appendix though in a particular cas* this, again, may be necessary within the meaning of Art 71.

(c) The doer who acts in accordance with the practice of the profession must not commit any grave professional fault. Thus, a surgeon commits such a fault when, after skilfully removing a person's appendix, he leaves his instruments in the patient's body; if this omission causes the patient's death, the surgeon is guilty of homicide by negligence even though he did a lawful act when operating on the patient. Whether a professional fault has been committed in any given case, and whether it is a grave one, is to be decided in the same manner as the question whether the act is in accordance with the accepted practice of the profession.

(</) The above conditions must be fulfilled together so that Art. 65 may apply, and this may sometimes give rise to difficulties. Thus, assuming that an entirely new surgical technique should be invented and a surgeon using this technique should cause the death of a patient, it might be contended that the surgeon may not justify himself for the death under Art 65 since tbe act was not done in accordance with the accepted practice of the profession. Yet it seems that the question whether, he is criminally liable in such a case should be answered in the negative, provided that the said technique has unquestionable scientific merits and provided also that no grave professional fault has been committed.

(«) As has been mentioned before, a distinction may have to be made in oertain cue* between the lawfulness of an act done in tbe exercise of a profession and the lawfulness of the consequences which this act brings about Thus a doctor claiming to terminate a pregnancy on medical grounds commits a grave professional fault and is punishable for abortion if bo doe* not comply with the requirements laid down in Art. 534 of the Penal Code. This, however, doe* not mean that he will also be punished for homicide if he causes the death of tbe woman when so terminating her pregnancy. He is liable for her death only if in terminating the pregnancy be does not act in accordance with the accepted practice of the profession and commits a grave profesaional fault. On the other hand, his liability for the'death of the pregnant woman exists even though he terminates the pregnancy for the reasons sec out in the said Art 534. If be commits a grave professional fault, he may not justify himself on the ground that his intervention was permitted by law.

S. Art 65 makes it dear that the problems of criminal and civil liability for acts done in the exercise of a profession should not be confused, as a person who is justified under Art 65 is not as a matter of right immune of civil liability. It must be remembered that the doer's criminal liability is not involved according to Art. 65 unless he commits **grave* professional fault which condition will seldom be found in the Civil Code. For instance, Art 2031 (2) dealing generally with professional faults states that a person practising a profession or a specific activity "shall be liable where, due regard being had to scientific facts or the accepted rules of the practice of his profession, he is guilty of imprudence or negligence constituting definite ignorance of his duties". So too. Art 2647 (1) which defines the liability of physicians prescribe* that "a physician shall not be liable to the person towards whom be is bound under the contract unless he commits a fault having regard to the rules of his profession". The degree of fault, therefore, is not necessarily tbe same under the Civil Code as under tbe Penal Code.

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Article 66. Consent of tbe injured person

The consent of an injured party to the commission of a criminal offence against himself or a right he possesses does not relieve the offender of criminal liability.

It has always been a controversial question whether one who commits a criminal offcnce may justify himself on the ground that the person against whom this offence is committed agrees to its perpetration. This question is resolved by Art. 66 the history of which is worth recalling because it does to some extent explain the rather unsatisfactory contents of this provision.

1. The tenor of Art. 66 is quite different from that of Art. 59 of the Draft Code, which stated that "he who endangers or infringes upon a right with the consent of the person who may validly dispose of this right commits no offence.jThis consent, however, does not justify tbe doer when his act is forbidden and punished by a specific legal provision whether or not the person aggrieved by this act consented to its commission'y In the Codification Commission, an objection was raised to the said Art. 59 on the ground that "in the classical cnminn[1] law, consent is no defence", and it was accordingly suggested that the principle set ou! **fr.** this Article should be turned into an exception and vice versa. The drafu.. thai "the legally protected interests of which one may valiuly dispose are by fai il** vutf..... All personal and patrimonial rights, for i"«tnrcr. fall Into »his category. > net- • ; *tr.si** when one agrees to be stuien. i» iliere Nviily **injury** when one allo« irp-.-.r-'- This must be the general rule. asm* expressed also in ivu. ancient mn *;ra if«.n >*njrria* By way of exception nowever. the doer will he punaheri under c*pr~s ;.ovisicr.i r. public order or general interests are at stake." The suggested change was nevertheless made at a later stage in the codification work, but in suui a manner that thn principle cow !zid down in Art. 66 is inflexible, and wrcngly sc.

This discussion, MUell as the difference in the text of Arts. 59 a-.d 66, cull for rt*>* following introductory remarks.

(c) Apparently, some misunderstanding occurred during the said discuvion, presumably because the word "consent" was not used in the same sense by tbe sneakers. When the drafter cited th*f» as an instance where the injured party's consent is relevant, lie was usu;; un» term in such a general sense that he left unanswered the point really in issue, namely which are the exceptional cases in which consent operates as a *justification.* For with thef' as with any offence implying absence of consent, the giving of consent negates the possibility of the offence being committed. It is evident that a necessary clement of the offence of rape is missing if the woman agrees to the intercourse, or of the offcnco of trespass if one is invited to come into someone's house. In these cases, the act it not criminal owing to tbe absence of one of the material ingredients of the offence and the question of justification, therefore, does not arise, since it is only when an act is contrary to the law that it may be asked whether tbe doer ii justified.

(6) The problem which the said Art. 59 *VTA** de^gr^ [Jf]> • *• ’’’••‘’"t different and consists of knowing whether eor>«~'‘ •* n defence when an offence such as homiei^ or abortion Is committed which implies neiiber conscni jr want ot consent Pc iit question of justification, which does not arise when a pen.cn agms to the ecmmi r . *r.* jiicr.«x implying want of consent, does not arise either in the cas-j of rffi'" — imp!y-rig conse.il, *«wh as duel or usury. In these cases, the act is unlawful (kanite the fart the*. .: ;i <1- w •* th the consent of the person thereby intirvd. Consent. JlKwUwft u not a iusiiAcauon w.jt jtsereH an ingredient of a special offence, different from that wtnch the said set would constitute were it done in the absence of consent (duel, under An. 550 (I), as dtttir-iuuhcu fro... exposure, under Art. 545, and, notwithstanding the provisions of Art. 63 (2). duel followed by death, under Art. 550 (2), as distinguished from homicide; usury, under Art. 667. as distinguished from extortion, under Art. 668). Finally, the question of justification does not arise in relation to offences to the commission of which no person would be qualified to consent.

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such u counterfeiting of currency or breaches of the peace or. generally, any offence affecting the interests of the community.

2. In contradistinction with Art. 59, which prescribed that consent was a defence unless otherwise expressly provided for by law. Art. 66 now states that one who commits a criminal oflenccmaju in no *ease.* iustifv himself on the around that he acts with the agreement of the person aggrieved by the offence. This principle is so absolute as to make it altogether unnecessary to discuss the problem of consent in Ethiopian criminal law. Since, however, it is to be hoped that the said principle will in the future be replaced by a less rigid one and. furthermore, the meaning or purpose of some provisions in the Special Part, which were influenortl by this principle, is now doubtful because these provisions have not been revised when the principle has been reversed, it appears to be of more than acadcmic interest, before analyzing the implications of Art. 66, to examine what the position would have been if Art. 59 had not been amended. For the purpose of the following comments, made with reference to the original Art. 59, it will be assumed, therefore, that the rule stiil u that consent is a defence except where tbe law provides to the contrary.

(a) Few provisions in the Code exclude the operation of the defence of consent. Two Articles (Am. 298 (2) and 605 (a)) make it clear that the doer is not justified by consent and one Article (Art. 530 (2)) indicates that, although consent is not an ingredient of the offence of abortion, want of consent operates as an aggravating circumstance when a pregnant woman is aborted against her will. These indications are, of course, insufficient. Why, for instance, should it be specifically slated that consent is no defence only in relation to traffic in women (Art. 605 («)) and not also in relation to enslavement (Art. 565), which does not imply want of consent ? Furthermore, a provision like Art. 298 (2) is misleading for il creates the impression that consent is a defence when bodily injury is done for. any purpose other than that of rendering the injured party unfit for military service. Yet this conclusion does not necessarily hold good and Art. 542 (I) (c) shows that there are cases in which consent, though it is not irrelevant, will not operate as a justification, but as an extenuating circumstance.

(б) Bearing in mind that, in the absence of express provisions to the contrary, the doer is justified by consent, it may seem that there are too many cases in which the justification will be available. This, however, is not so. Quite clearly. Art. 59 cannot have been intended to mean that one who kills another person is justified by that person's consent. The question, therefore, is how to identify the cases in which the principle set out in Art. 59 does not apply. In this respect, the following tests may be considered.

/ (i) It is sometimes ^ig^ested that consent is a defence only in cases of encroachments upon so-called "relatively protected rights'*, that is. legally protected interests the violation of which is punishable only on the complaint of the injured party, as distinguished from "absolutely protected rights", infringements upon which are punishable in the absence of such a complaint vThis test makes it unnecessary to ascertain the nature of the interests affected by the offence and the justification of consent must be ruled out whenever this offence is liable to official proceedings (homicide or abortion, for example). Yet doubtful cases may occur. Thus common wilful injury *(i.e.* an injury not as serious as those defined in Art 538) is punishable on complaint according to Art. 539 (1) unless it is caused by means of "an instrument capable of inflicting bodily injuries", in which case no complaint is required according to Art. 539 (2). If, therefore, *A* asks *B* to remove a thorn from his foot and *B* consequently makes an incision in *A's* foot with a knife, it must logically follow that *A's* consent does not justify *B* who, since he used a weapon, is punishable even though *A* makes no complaint against him. According to the above-mentioned Art. 542 (1) (e)f consent should be considered only in mitigation of the punishment; Avith this test, the fact that no complaint is required implies that the injury "is forbidden by law" although it is inflicted at the request of the injured party. Difficulties may also arise in relation to an offence such as adultery (Art 618) which is punishable on complaint even though it does not affect only private

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right*, but generally the institution of marriage. The test of "relative legal protection" would lead to the conclusion that an adulterer is justified if his spouse consents to the adultery. Yet Art. 618 (1) does not state that no offence is then committed, but merely that, if a spouse who consents to the offence of adultery makes a complaint against the adulterer, "no proceedings shall follow" (which presumably means that tbe public prosecutor must dose the investigation file in accordance with Art. 39 (1) (c) of the Criminal Procedure Code). Incidentally, it may be noted that the person with respect to whom the injured party does not exercise his right of complaint (which right be retains although he agrees to the commission of the offence, unless the law expressly provides to the contrary) may not be deemed to have done a justifiable act for the sole reason that no complaint is filed. In the absence of a complaint, the question whether consent was given and whether it operates as a defence, does not even arise. Although, therefore, failure to complain and consent may entail the same practical consequences, the latter cannot be inferred from the former nor is the legal position the same in both cases; only consent, but not want of complaint, may deprive an act of its punishable character.

(ii) The above test is a corollary to the rule that the question of consent does not arise save in connection with offenoes against the injured party or a right he possesses *(contre m droll dont il peut validement disposer,* in the French text of Art. 59—and of Art. 66 also) or, in tbe terms of Art. 217, "offences of a predominantly private nature". Although this test permits drawing a rather clear line between the cases where consent may be invoked as a defence and those where it is irrelevant, it alters rather than explains the scope of Art. 59, which does not imply that a person may validly dispose only of those rights the infringement on which is punishable on complaint Therefore, the question as to when consent justifies the doer should be decided having regard to the nature of tbe legally protected interests affected by the offence rather than to the purely formal criterion of complaint

In a number of cases, the answer to this question flows from the Special Part of the Code itself even though it makes no specific provision regarding consent. Thus, it may be argued that, since a person who maims himself, for instance, is not punishable, he has the right to dispose of his own body and to agree to the doing of harm to himself; consequently, a person who aborts a pregnant woman with her consent should be deemed to commit no offence. Yet, independently of what is implied in the above mentioned Art 530 (2), as a pregnant woman who procures her own abortion commits an offence under Art. 529 (I), *a fortiori* a person who assists her in the abortion or aborts her, even with her consent, is not justified and must be punished—as he actually is (Art 529 (2) or 530, as tbe case may be). For abortion is not an offence only against the physical integrity of the mother but also, ss the Code puts it, "against life unborn". So too, the principle of freedom of the sexual life applies subject to the restrictions laid down by law. Therefore, consent is no defence in cases of incest, for tbe legally protected interest is not "sexual liberty and chastity" (see Section I in Chapter 1 of Title IV of the Code), but "tbe family" (Chapter 2 in tbe same Title). Similarly, it might be contended that a person may validly dispose of his own life, since one who attempts to kill himself commits no offence. However, inasmuch as a person who merely assists another in committing suicide is punishable under Art.525, *a fortiori* be who kills another at his request *(e.g.* euthanasia), is not justified—and he will ordinarily be punished for extenuated homicide under Art 524 (*b*) since the Code, unlike the Swiss Penal Code (Art 114), makes no provision for killing on request So too, even though names are purely personal attributes, when a person authorizes another to make use of his name but this use is expressly prohibited by law *(e.g.* to commit forgery under Art 383 *(b)* or, sinoe according to Art. 699 (3) the question of consent also arises with regard to petty offences, to conceal his true identity in violation of Art. 766 (1)). such authorization is no defence because the legally protected interest is not the name of the person who gives the said authorization.

(ill)) Consent, therefore, is never a defence unless it is given to tbe commission of an offence against purely private rights. Yet since the person who commits such an offence is not automatically justified by consent, it must be decided in relation to which encroachments

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upon these rights the defence of content is available. It is often suggested that this question should be resolved having regard to the reason behind the encroachment. This so-called “purpose of the harm" test, which means that consent justifies the doer whose act is morally irreproachable, implies that consent may be a justification even though tbe offence is not punishable on complaint and, conversely, that it may not be invoked when the purpose of the harm is morally reprehensible, even though the offence is punishable on complaint. Thus in the above case where *B* removes a thorn from *A's* foot, *B* is justified by *A's* consent despite the fact that no complaint is required to prosecute him. This consent, which does not render lawful anything that may br done by *B* and, in particular, does not relieve him of his general duty to exercise care, would, it seems, be relevant even though be should cause *A* grave bodily injury within the meaning of Art. 338. On the other hand, if *A,* at the request of *B* who is a masochist, causes *B* common injury within the meaning of Art. 539, he is not justified by *B's* consent. Admittedly, in the absence of aggravating circumstances, *A* may not be punished except on a complaint made by *B;* yet, as noted before, the fact that *B* should fail to complain would not mean that *A's* act is a justifiable one.

This test is in complete conformity with the spirit of tbe Code. What it really implies is that tbe doer, like any person seeking justification under Art. 64,65 or 74, for instance, must act with the intention of performing a justifiable act. Failing this intention, he proves himself to be dangerous and is not justified by consent even though tbe moral quality of his act is not objectively questionable (the same as a father who apparently exercises his right of correction is not justified when be beats his child for any purpose other than that of educating him). In fact, it may be said that this test to a large extent explains the provisions of tbe Code on adultery: for if consent is no defence under Art. 618 (1) and if the spouse who agrees to the adultery is penalized in that be is precluded from prosecuting, it is not only because, adultery being an offence against the institution of marriage, tbe interests affected are not purely personal, but also and mainly because consent is given to tbe doing of an act which is morally reprehensible.

How this test should apply in arty given case can best be decided by analyzing a specific provision of the Special Part of the Code, such as Art. 542 which defines certain circumstances to be considered in mitigation of thfc punishment for bodily injury. Sub-art. (1) (c) of this Article states that, when injury is done to the person or health of another “at his request and where the injury is forbidden by law or offends public decency", consent is not a defence but a mere extenuating circumstance. It is irrelevant, for the purpose of this Article, whether the injury is “grave” (Art. 538) or “common” (Art 539) and whether the offence is punishable on complaint.

One fails to understand exactly what is meant by the rule that the defence of consent is not available when harm is done in contravention of the law. If the implication is that an injury which would normally be justifiable pursuant to Art. 59 is not so justifiable when it is declared by law to be punishable notwithstanding the provisions of tbe said Article, then one of tbe obvious cases in which this rule should apply is that of bodily harm done at tbe request of a person for the purpose of rendering him totally or partly unfit for military service (Art. 298
(2)). In the said case, however, consent is not considered in mitigation and there is no reason why tbe sentence to be passed in accordance with Art. 298 (2) should be reduced on the grounds stated in Art 542 (1) (c). The former Article clearly is a special provision departing from the ordinary provisions on bodily injury and may not be applied concurrently with these provisions. Tbe said rule does not seem to serve any purpose either if it is meant to apply in cases where consent governs the lawfulness of an act done under Art. 65. What it implies is that, if such an act is prohibited by law, the doer is not justified by consent. Thus if surgeons are prohibited by law from sterilizing human beings, a surgcoh who sterilizes someone at tbe latter's request may not invoke consent as a defence. Yet it seems that the question of consent is absolutely irrelevant in this instance ; whether or not the surgeon operates at the patient’s request, the reason why he is not justified is that be acts when there exists no legal permission to act. Furthermore, there appears to be no more reason for mitigating the punishment to be

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passed on tbe surgeon, who in any event disregards his professional duties (and this normally is an aggravating circumstance; see *Art* 339 (2) (*b*)) than there would be for mitigating the sentence to be passed on a doctor who, with the consent or a pregnant woman, terminates a pregnancy on grounds other than those laid down in Art. 534.

By way of exception to Art. 59, consent also operates as an extenuating circumstance, and not as a defence, when it is given to the doing of harm which, though not forbidden by law. offends public decency. Although one may wonder why the question of consent should arise at all when an act is lawful, what this means, presumably, is that an injury which according to Art. 59 should be deemed a justifiable one is nevertheless punishable, though by p. mitigated penalty, when it is contrary to decency. One instance in which this exception would apply is the above case where *A* beats *B,* a masochist, at the latter's request. The fart that *A* is then not justified by *B's* consent but is, by reason thereof, liable to a lesser punishment, quite clearly shows that the "purpose of the harm" test is incorporated in Art. 542 (I) (c). This test may also be of assistance in deciding whether an act done with the consent of the injured party is lawful according to Art. 65 when it is uhcertain whether it is done in terms of the legal permission or when there exists neither a specific legal permission to act nor a specific legal prohibition against acting. Thus assuming that a surgeon sterilizing someone should claim to act in the discharge of a professional duty even though no law states whether sterilization is authorized or forbidden, it would follow that no offencc should be deemed to be committed if the operation were done, for instance, at the request of a woman who already has many children and cannot afford to bring up any more or of an habitual sexual offender who knows Chat he will relapse unless he is operated on. On the other hand, an offence should be deemed to be committed (but the punishment might then be mitigated in accordance with Art S42 (l)(c)) if the operation were done, for instance, at tbe request of a prostitute who does not want to let pregnancy interfere with her work or of a woman who fears that bearing children will spoil her looks. As a general rule, therefore, consent might be deemed to be relevant for the purposes of Art. 65 when it is given to the doing of an act which is not morally reprehensible or is morally indifferent *(e.g.* tattooing, plastic surgery requested only out of vanity).

3. These are some of the comments that might have been made if the principle laid down in the former Art. 59, which principle may also be found in a provision like Art. 51 of the Sudanese Penal Code, had not been reversed. Admittedly, the consequences of this principle were perhaps not defined with sufficient precision in the Special Part of the Code and the amendment made in Art. 59 may, for this reason alone, commend itself. But then, to avoid the same criticism, the effects of the principle having been reversed should have been clearly specified in the Code also. In other words, provision should have been made to show, not (as was partly done in the Draft Code) when the doer would not be justified by the consent of the injured party but, on the contrary, when he would be so justified; for whatever the principle governing the problem of consent, there are exceptions to it. Since the exceptions to Art. 66 are not to be found in the Code, it may be said that the existing rule on consent is even less satisfactory than the one for which it has been substituted. As the drafter of 'the Code himself pointed out when he was informed of the amendment, of which he neither knew nor approved, Art. 66 is so absolute that it is bound to lead to absurd consequences. It is worth noting, however, that the French text of this Article is more flexible than the Amharic and English ones since it states that *en prindpe,* as a rule, consent is no defence.

(a) According to Art. 66, in no case may consent be invoked as a justification. The reason behind this principle is that the rights protected by the criminal law cannot be waived by agreement for. although tbe immediate purpose of the protection is to prevent infringements upon these rights, its ultimate goal is to maintain public tranquillity. Even when purely personal rights are encroached upon, as in the case of most of the offences punishable on complaint, a penalty is imposed because the encroachment calls social order in question; it is not imposed in the name and on behalf of the individual against whom the offence is committed.

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This, however, it only a general rule, for public order it not affected in each and every case where private rights are infringed upon. If, therefore, an act docs not jeopardize tbe interests of society and, furthermore, it is done with tbe agreement of the person against whom it is directed, the imposition of a penalty can hardly be justified on any ground. This was tbe rationale of the former Art 59 and tbe flexible solution it contained. Arguments of equal pertinence can unfortunately not be offered to support tbe inflexible solution now enshrined in Art 66. Thus, if *A* asks *B* to cut his hair because he cannot afford going to the barber, there appears to be no good reason why *B* should be deemed to do an unlawful act and be punished therefor. Yet even though this act does not give rise to dvil liability since it does not amount to battery under Art. 2038 (1) of the Civil Code, it must, according to the letter of Art 66, be considered to be an assault This, as also the fact that consent should as a rule justify the doer when the performance of an act under Art. 65 is conditional upon the giving of consent, would suffice to show that the former Art. 59 should not have been changed in such a radical manner.

(b) One of the clearest effects of this change is to render unnecessary sub-art. (2) of Art 298 as well as the reference to consent appearing in Art. 60S (a). It also distorts the purposes of Art. 542 (1) (c) in the sense that the case cannot arise any longer where an act, which should in principle be a justifiable one because it is not “forbidden by law" and is done at tbe request of the injured party, is nevertheless punishable because it offends public decency. Any bodily harm being now forbidden by law in consequence of the provisions of Art. 66, the role of the “purpose of the harm test” embodied in Art. 542 (I) (e) is quite different from what it was intended to be. The test no longer serves to distinguish unlawful acts from justifiable acts, but acts liable to a full punishment from acts liable to a mitigated punishment. Thus in the above illustration where *A* removes a thorn from *B's* foot. B's consent will not operate as a justification (as it would originally have since tbe injury does not offend decency), but as a mere extenuating circumstance. By way of exception to Art. 66. consent according to Art 542 (1) (c) may. therefore, be taken into consideration, though not in deciding whether the actor is liable to punishment, but only in assessing sentence. It might be argued that this exception, since it applies in cases of bodily injury, must *a fortiori* apply in the less serious cases of assault (Art. 544). Yet tbe scope of the exception is rather well defined by tbe law, which does not provide for any mitigation, on the ground of consent, of the punishment to be ordered for assault. Furthermore, this line of reasoning would lead to the conclusion that consent is, *a fortiori,* material in the case of petty offences, which conclusion would be inconsistent with the provisions of Art. 699 (3).

With a view, however, to avoiding flagrant internal contradictions in the Penal Code, it should at least be held that consent is relevant, whether it is given by the person to whom harm is done or by his legal representative, when it governs the lawfulness of an act done under Art. 65. Were it not so, it would logically follow, *e.g.* that surgical operations authorized by law on the condition that the patient agrees to the operation should henceforth be treated as criminal offences since the patient may, in no case, agree that an injury be done to himself (which would also be inconsistent with the provisions of Art. 18 (2) of the Civil Code). On this point therefore, the suggestions made hereinbefore regarding the possible application of the “purpose of the harm test" in doubtful cases may still be of tome assistance. Although it may seem futile (o discuss whether this test, or for the matter of that any other test, may be resorted to in order to identify other cases in which Art 66 might be departed from, since there is now an absolute prohibition from justifying oneself by invoking tbe consent of the person aggrieved by the offence whether the interests thereby affectod are purely personal or not. one cannot fail to observe that, so far as civil liability is concerned, this prohibition entails rather awkward consequences. For either it enlarges the scope of Art 2035 of the Civil Code (infringement of a law) and then the scope of Art. 2039 of the same Code (justification) is proportionately considerably reduced, or it is without bearing at all on these provisions despite the dear wording of the said Art. 2035, and then many acts amounting to criminal offences pursuant to Art. 66 give rise to no dvil liability because they arc justifiable according

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to the Civil Code. In order to resolve this contradiction as well as to avoid injustice, not to say absurdities, it may be suggested that tbe justification laid down in the Civil Code renders tbe act lawful within the meaning of Art. 64. In other words, when an act done at someone's request involves no civil liability by reason of such request having been duly made, then tbe doer's criminal liability is not involved either as this act ranks among those which Art. 64 (which, as has been said, is not limitative) regards as being authorized by law.

4. In view of the above, it may appear rather pointless to note that consent, to be relevant, must be free from defects and precede or at the latest accompany the doing of the act. However, as these conditions must be fulfilled not only with regard to the acts to which the former Art 59 was intended to apply, but also in cases where consent must be given before an act may be done under Art 65 or negates the offence, or where want of consent is an aggravating circumstance, it is not altogether unnecessary to recall that consent given under duress or by mistake, or by a minor or an insane person, or after the commission of the offence or to the doing of an act other than the one actually done, is without juridical effects. Some Codes contain specific provisions on this point *(e.g.*. Art 90 of the Malaysian Penal Code). Thus, the increased punishment provided for by An. 530 (2) applies when a pregnant woman, in a condition of complete drunkenness, agrees to her abortion; an offencc contrary to Art 591 is committed when a woman agrees to have sexual intercourse because the offender persuaded her that it will render her immune to cancer; an offence contrary to Art. 630 or 644, as the case may be, is committed when a lunatic agrees to someone taking away his property. In certain cases, it may be suggested (as it is by Logoz, *Partie Sptdale,* I, p. 155) that the giving of a valid consent merely negates the possibility of an offence being completed Thus, it may appear that there is an attempt (possibly under Art. 29) to commit.an offence contrary to Art. 656 when a person who makes false statements with a view to being given money receives money from a person who is not misled by these statements and gives such money merely to get rid of tbe former person. Also worth noting is the fact that consent cannot necessarily be inferred from lack of resistance (ATF 75 IV 113, JdT 1949 IV 107) and that it may be revoked; thus, an offence contrary to Art 571 (1) (c) is committed when a person, after being invited to come to someone's bouse, refuses to leave when ordered to do so since consent was given on the implied condition that the said person would not refuse to leave.

Article 67. Absolute coercion

Whosoever commits an offence under an absolute physical coercion which he could not possibly resist is not liable to punishment. The person who exercised the coercion shall answer for the offence (Art. 32 (1) (c)).

When the coercion was of a moral kind the courfmay without restriction reduce the penalty (Art. 185) *or may impose no punishment.*

In relation to Art. 32, it has been mentioned that tbe concept of principal participation includes tbe act of an indirect offender, that is, of a person who commits an offence through a human instrument, either by taking advantage of tbe incapacity, ignorance or mistake of tbe agent or by compelling him to act or refrain from acting. Art. 67 deals with tbe same problem, though from a different angle, for the question here is not to ascertain tbe respective capacity in which the indirect offender and the agent are involved in the commission of the offence, but which of them is guilty of the offence. This, as will be seen, depends on tbe kind and degree of compulsion. The 1930 Penal Code, on the other hand, resolved at once the problems of participation and guilt by stating that “if twt> or more persons commit a crime together, each of them shall be considered to be a principal offender as if be acted by himself and he shall be punished with the punishment laid down for this crime (Art. 35). The meaning of tbe words ‘those who commit a crime together’ is as follows (Art 36). They are those who instigate and encourage and intimidate by threats and violence, saying: We will ruin you if you do not commit this crime” (Art 38). As no other reference to tbe problem of coercion

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appeared in Am. 12-24 setting out “tbe law by which punishments are reduced" and "con* cerning (be infliction of light punishment" nor in Arts. 145-151 containing “the law concern* ing crimes which do not entail punishment”, it appears that, under tbe said Code at least, coercion, whatever its nature, was not a defence nor was it considered in mitigation. On this point, Art. 67 separates itself from earlier legislation, though not as radically as might be expected.

During the debates of the Codification Commission, the drafter of tbe Code noted that “the modern penal law, as it does not consider only tbe consequences of an act, cannot regard as being criminally liable a person who acts against his will under an absolute cocccion". For criminal guilt is not perfect in cases of absolute coercion, whatever its nature; tbe required combination of awareness and volition can not be achieved owing to tbe absence of, or defect in. tbe latter element. Tbe human agent who is compelled to act in violation of the law knows that he does wrong but the compulsion firmly ^ ^ fnr<1"m *tf* ■rtHT In this sense, he is “incapable at the time of his act of regulating his conduct according to (his) under* standing”; from a psychological point of view, he is, therefore, in the same position as an irresponsible person and this, incidentally, explains why Art. 64 of the French Penal Code deals at the same time with insanity and coercion. In the Ethiopian Penal Code, however, coercion must be treated separately since the biological or pathological defect which should exist so that Art. 43 may apply is missing. The Codification Commission shared these views but introduced a distinction, which did not exist in the first Draft of the Code according to which the effects of absolute coercion did not vary depending on the kind of the coercion, betwe~~en~~ physical and moral coercion. Hence the rule that absolute physical coercion **it** a justification (Art. 67, first alinea) while absolute moral coercion is only an excuse (Ait. *SI,* second alinea).

1. An offender is not justified under Art. 67 unless two requirements are satisfied. The coercion must be physical; it must be absolute.

(a) As has just been pointed out, the Draft Code regulated the juridical effects of coercion considering only whether and to what extent a general cause (coercion, compulsion, duress) negated or vitiated tbe “intent" element of criminal guilt. There was no reason, therefore, why it should have defined physical or moral coercion since the nature of the coercion was irrelevant and the sole test for deciding whether an act was justifiable or excusable, was whether the offender bad been deprived of his moral liberty or freedom of choice completely (absolute coercion) or partly (resistible coercion). Such a definition should, however, have been inserted in Art. 67 when tbe Codification Commission suggested that the nature of tbe cocrdon ought to be taken into account; for, failing a clear definition, doubts may arise as to what either form of coercion consists of.

(i) Donnedieu de Vabres *(op. cit.,* p. 105) defines physical coercion as “violence exercised by someone in consequence of which a human agent is materially obliged to commit an offence.” This definition implies that tbe defence of coercion is available when violence or force is used, whether for the purpose of compelling or preventing an act, which renders the agent physically incapable of acting otherwise than as he does. Thus *A* is not guilty of homicide if, when he is about to shoot a gazelle. *B* forcibly makes him aim and discharge his gun st C. So too. if Miss *A,* after stopping her car to come to tbe assistance of a pedestrian whom she has run down, is forcibly evicted from the driver's seat *by B.htf* passenger, who drives sway with her, thus preventing her from helping tbe pedestrian, Miss *A* is not guilty of an offcnce under Art. 547. In both cases, physical coercion has been exercised and the person who was compelled to act or not to act is not guilty of an offenoe if the second condition laid down in Art. 67 is fulfilled, *I.e.* if the comoulsion is absolute.

(ii) It is debauble as to whether physical coercion includes cases other than those where the agent is actually disabled from acting by the person exercising the coercion. For instanoe, if *A,* at gun-point, orders *B* to kill C, is *B* physically or morally coerced ? If moral coercion ia said to be present whenever *“en I'absence de tout facteur physique une presskm s'est extreme*

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sur la vokmti del'agent et I'a emptchie de se manifester normalement" (Donnedku dc Vabres) or when "the agent's will is subdued by Tear of imminent evil" (Garraud), it follows that there is physical coercion only when pressure is brought to bear, not upon the mind, but upon the body of the agent himself or, in other words, when the immediate effect of the coercion is to deprive the agent of his freedom of movement. In tbe absence of indications to the contrary, there appears to be no reason why Art. 67 should not be taken to mean that a person is physically coerced only when he docs not have even tbe physical possibility of acting in accordance with the law and that he is morally coerced when his moral liberty, *i.e.* his frwicr.: *A*wv.mX, „ Li=; ■ tfcmfaji he ts physically able to act in accordance with the law.

(iii) The rricremxs in A $_{w}$>, nr». aiioea, to "the person who exercised tbe coercion" and toArt. 32(1) *(c)* ck^rly if.- - t»t Art. 67 or, in tbe case of petty offences. Art. 699(1), applies in cases ol physical coeruuu only insofar as the agent is compelled by a human being. If the coercion springs from another source, different provisions apply. This is so particularly in the cases referred to in the French literature as cases of "internal physical coercion". Thus a person found on the train in Nazareth with an Addis Ababa-Debre Zeit ticket may not be deemed to have committed an offence in violation of Art. 814 *(a)* if he can show that he did not alight in Debre Zeit as be should have because he was asleep at that time. Thus again, a signalman at a level-crossing who fails to carry out his duty is not guilty of an offence under Ait. 300 *(l)(d)* if it is established that, on his way to the crossing, he broke his leg and passed out. Similarly, a person expelled from Ethiopia who is put on a plane in Addis Ababa does not commit an offence in violation of Art. 433 when the plane returns to Addis Ababa by reason of engine trouble. In all these cases, no liability is incurred ^tcause, in the terms of Art. 57 (2), tbe act is caused by force majeure or occurs by accident. So too, a person who takes refuge in someone's garden because he is being run after by a mad dog commits no offence since he does a necessary act within tbe meaning of Art. 71.

(6) Physical coercion is no defence unless it is absolute, that is, :rreaistibiejsac Art 68). Although the term "absolute' would create the impression fnat *here must not exist, even ui *abstracto,* any possibility ol resistance, ihe text of Art. 67 indicates that the defence is available when the agent personally could not possibly act otherwise than as he did. However, although the question whether resistance is possible must be decided *m conereto* and by subjective standards, doubts may arise regarding the exact implications of the word "possibly".

(i) As s preliminary, it should be noted that coercion as a defence must he carefully distinguished from the specific offence of coercion as defined in Alt. 554, for a higher degree of compulsion is required to establish tbe defence than to prove the offencc As has bee" said in relation to the corresponding offence in the SwissPcfial Code (Art 181), "violence need not amount to absolute coercion and be of a kind against which no resistance is possible *(vis absolute).* All that is is required is the use of such amount of violence as is sufficient to bend the victim's will *(vis compulsiva).* The law can not demand heroism from tbe citizens" (Logoz, *Partie Spi dale.* I, p. 270). Therefore when an offence of coercion is committed in violation of Art. 534, the coerced person is not justified under Art 67 as a matter of right if he does an unlawful act under coercion.

(ii) Although Art. 67, unlike Art 59(1) or Art 72, does not contain tbe word "reasonably" or words to the same effect and this may lead to the conclusion that the degree of compulsion is irrelevant even though the coerced person yields only because he is exceedingly timorous, there appears to be no reason why tl>e question whether the agent "could not possibly resist" should be resolved through a test other than that governing for instance, the question whether tbe offender could and should have foreseen tbe consei^uenoes of his act and has been negligent; for if it is certain that the law cannot demand heroism, it is equally certain tint it -ill not justify mere fear. Art. 67, to be sure, does not require a coercion such that nobody, including the *constantissimus vir* of the Roman law, could not have resisted it; on the other hand, a coercion such as to subdue only a coward would not suffice for the purposes of this Article; between the conduct of a hero and that of a coward, there is the

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conduct of a reasonable man and this, it seems, should be taken into account. Although, therefore, regard must according to Art. 67 be had to the personal position of the agent, the defence of coercion will not operate unless a reasonable man possessing the same individual characteristics and placed in the same situation as the agent could not possibly have resisted. Whether this is so depends, of course, on the circumstances of the particular case and makes it necessary to compare elements such as tbe respective hex. age, strength or health of the parties (see also Art. 68). Thus, assuming that the roles are reversed in the above hit-and-run case and that Miss *A* pushes *B* off the driver's scat after he has run a pedestrian down, takes the wheel and drives away. *B* may not as a rule invoke the defence of coercion for a reasonable man would have tried to make Miss *A* stop tbe car. Yet Art. 67 will apply if, for instance. Miss *A* is a young and athletic girl while *B* is a frail old man or he has a heart condition that prohibits him from making any kind of physical effort, The temperament of the agent, however, is not in itself a sufficient reason for applying Art. 67. A person who is naturally fearful is not to be regarded as incapable of resisting merely because he is fearful; on the other hand, if he is fearful because he is obviously much weaker than the person exercising the coercion, then the defence is available for what makes it impossible for him to act otherwise than as he docs is not his fear, but his weakness.

(c) When these two conditions are fulfilled, the agent incurs no liability; only the person who, through the use of irresistible force, compels him to act or prevents him from acting is guilty of the offence materially perpetrated by the agent. No further requirements need be satisfied according to Art. 67 and it is irrelevant, therefore, whether the agent by his own fault placed himself in a situation where he had to act under duress (*contra*, see, for instance, Art. S3 of the Sudanese Penal Code or Art. 94 of the Malaysian Penal Code, as well as the French jurisprudence; sec also Art. 72 concerning excess of necessity). Thus, if *A* and £ agree to commit an offcnce and, when the.common design is about to be carried out, *A* wishes to withdraw but *B* compels him to act, *A* may invoke the defence of coercion regardless of the fact that a previous fault is attributable to him since he would not have been in the situation in which coercion was exercised liad he not conspired with *A*.

It is immaterial, also, what offence is committed by the agent since he has no guilty mind. Some Laws, such as the above-quoted Sudanese and Malaysian provisions, restrict the scope of the defence to offences other than murder and crimes against the State which are punishable by death. Yet even these restrictions do not apply in cases of absolute physical coercion, and rightly so. As the agent is pot punishable because he is being used as an instrument *(non agit, sed agitur*), there is no reason why the seriousness of the offence which he is made to commit should be taken into consideration at all; the only cases in which this factor is relevant are those where the doer is not totally deprived of his freedom of choice.

2. When the above condition pertaining to the nature of the coercion is not fulfilled but a person commits an offence because pressure which he cannot resist is brought to bear upon his will, he is not relieved of criminal liability; moral coercion, according to Art. 67, only excuses him but does not exculpate him. Tbe same applies in tbe case of petty ofTences (Art. 699 (I)).

(a) Inasmuch as a person who acts under absolute moral coercion, like one who acta in a state of necessity, is led by extraordinary circumstances to behave otherwise than as he would if these circumstances did not exist, it may appear that cases of coercion might be resolved by applying Art. 71 or, conversely, that necessary acts might be dealt with in accordance with Arts. 67 and .68. Admittedly, the two situations have certain elements in common and mar.y French judgments actually invoke coercion to explain immunity from punishment in cases of necessity, since the French Code makes no general provision for necessary acts. In both cases, the doer is in a position such that, unless he could have opted in favour of another course of conduct, no good reason can be given why he should be punished. Yet coercion and necessity are not equivalent, though opinions vary as to what differentiates them. The difference, it is sometimes said, is purely factual and lies in the source of the

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pressure which in cases of coercion emanates from a human being while in cases of necessity it is brought about by a natural event. But this is only partly true and would not hold good, for instance, under a Code which would deem necessary acts to be lawful (Art 34 of the Swiss Penal Code). If *A* cannot defend himself against *B* without placing C, an innocent third party, in serious and imminent danger, *B's* act is necessary and. if held to be lawful, does not create a state of legitimate defence so far as C is concerned, as the danger facing C does not spring from an unlawful attack. If, therefore, C cannot avoid this danger otherwise than by committing an offence, he, too, does a necessary act although the danger in which he finds himself is not brought about by a natural event but by human behaviour. According to some authors, the decisive difference is of a psychological nature. Thus Donnedieu de Vabres *(op. eit.,* p. 103) notes in relation to irresistible moral coercion that "whereas the doer of a necessary act makes a choice and exerts his intelligence and will power, the coerced person has no such possibility since his win is being bent in a single direction". Other writers, how* ever, maintain that the chance of avoiding a danger created by man is greater than that of avoiding a danger created by nature and there exists, therefore, an element of inevitability in cases of necessity which does not exist in cases of coercion, with tbe effect that a greater freedom of choice exists in tbe latter than in the former cases. This, it seems, is a matter of circumstances for there may be cases of necessity where the danger is not so pressing that there is no time for making a rational choice and using one's discrimination. FinaUy, tome authors point out that an act done under coercion differs from a necessary act by reason of its legal nature and effects. In this sense, Logoz *(op. cil.,* p. 138) writes that "an act done under physical or moral coercion involves a question of guilt which does not arise in cases of necessity any more than it does in cases of legitimate defence since a necessary act, like an act of defence, is in any event not contrary to the law." In other words, a person who does a necessary act commits no offence while a person who is compelled to act in violation of the law commits an offenoe but is either justified or excused.

In one way or another, these opinions take two distinctive features into consideration. Firstly, a coerced person is being used as an instrument, and this does not occur in cases of necessity. Tbe reason why, in the above illustration, *C*is deemed to act in a state of necessity and not under duress is that *A* does not put him in danger with a view to compelling him to commit an offence. Secondly, a necessary act, unlike an act done under coercion, may be socially useful (if the interests protected are of greater value than the interests affected) or is socially indifferent (if these interests are of equal value). It may also be noted that were coercion and necessity held to be equivalent, one would have difficulties in explaining why a necessary act done for the benefit of another person should not be punished since no coercion it then exercised on the doer.

(b) Moral coercion it exercised when an act is done which does not render the agent's movements involuntary, but deprives him of his freedom of choice. It is usually in the form of threats intended to break his wiU and make him yield to the demands of the person exercising the coercion and it is immaterial, for the purpose of deciding whether there is duress, whether the agent himself or some other person is being threatened, as are also the contents of the threat. These elements are taken into consideration only with a view to establishing the degree of coercion exercised in any given case. It must be dear, however, that the excuse of moral coercion is not available in the absence of threats, in particular when the agent is moved only by a so-called reverential fear. Such a fear, which does not abolish his moral liberty but merely makes it more difficult for him to act in accordance with the law, may be considered in mitigation of the punishment, not as an excuse, but as an extenuating circumstance (Art. 79 (1) (c)). Nor is the excuse available in the cases referred to in the literature as cases of internal moral coercion, *i.e.* cases of irresistible impulses falling short of complete or partial irresponsibility.

(c) As is implied in the heading of Art. 67 and also in Art. 68 which deals generally with resistible coercion regardless of its nature, moral coercion it an excuse only when it it absolute, and there is no reason why this condition should not have here the meaning it has

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in cam of physical coercion. The compulsion must be such that it is impossible for the agent to resist it and it is of no importance, therefore, whether resistance is objectively possible or whether tbe threat would be carried out, so long as a reasonable person placed in the same situation as the agent could not be expcctcd not to yield. Whether this condition is fulfilled depends on the factual circumstances of the case as well as on the persona! p. juon of the doer. Although Art. 67 does not require that the agent should be in serious and imminent danger (see Art. 71) nor that the threats should cause apprehension that instant death will be the consequence of his refusing to be used as an instrument (see, for instance, Art. S3 of the Sudanese Penal Code), it is evident that the nature and intensity of the coercion cannot be estimated in disregard of factors of this kind. As a rule, one may legitimately doubt whether thv agent's will can be completely subdued by threats, not to life or bodily integrity, but to reputation or property, for instance. Thus absolute moral coercion should be ruled out when *A* threatens to disclose that *B* is an adulterer or to set fire to *B's* house unless *B* kills *C.* This is not to say that *B* is not being coerced, but merely that he is not absolutely coerced; if he submits to *A'i* demand, the punishment witl, therefore, be assessed in accordance with Art. 68 and not Art. 67. Thus although Art. 67, unlike Arts. 71 and 74, does not contain a proportionality requirement, it seems permitted to imply in it that coercion is not absolute when the harm feared by the agent is completely out of proportion to the harm done by him; although Art. 67, unlike Art. 72, makes no specific reference to the case where harm should have been suffered rather than caused, it may be taken to mean that the agent is not fully deprived of his moral liberty unless the evils in balance are somewhat comparable, for one who kills lest he be exposed as an adulterer is not subjected to a pressure which reasonably be cannot possibly resist. His freedom of choice is impaired but not suppressed and he is liable to punishment by virtue of the rule *coactus voluil, sed voluit.* A clear case in which this rule applies is that of incitement, since threats are expressly mentioned in Art. 35 as one of tbe means whereby one may instigate someone to commit an offence. Purely objective tests, however, should not be used in estimating the intensity of the threat according to the respective seriousness of the harm feared and the harm done. For instance, absolute coercion is not to be ruled out as a matter of right when *A* kills C because he has reasons to believe that *B* will otherwise rape his daughter as he threatens to do.

(d) In opposition to what was provided for in the first draft of the Code, absolute moral cocK₂ten.il not a justification according to Art. 67, but only an excuse, and it is difficult fully to agro with this rather unusual solution. For it is a very generally admitted principle that irresistible coercion, whatever its nature, is a complete defence, and even the fact that under some laws the defence is not available in certain cases docs not weaken this principle. To some extent, Art. 67 assimilates the effects of absolute physical coercion to those of irresponsibility, on the one hand, and the effects of absolute moral coercion to those of limited responsibility, on the other hand. Yet as the question whether a person whose will power is affected by a biological defect is responsible depends on whether he is fully or partly incapable of controlling his conduct, so the question whether a person whose will power is affected by constraint is justified or excused should, it seems, depend, as it did in the Draft Code, on whether and to what extent he is deprived of his freedom of choice, and not on the cause of the deprivation.

Art. 67 thus implies that the rule *coactus voluil. sed voluit* applies not only in cases of resistible coercion, but also in cases of absolute moral coercion; in the latter cases, the doer is deemed always to have a guilty mind regardless of the fact that he may actually be unable to form a criminal intention. This contradiction, which already existed in the 1930 Penal Code, can hardly be justified on any ground. Even if the rationale of Art. 67, second alinea, is that an act done under duress, unlike a necessary act, is never socially useful or indifferent since the agent satisfies an unlawful demand, *• must apply irrespective of the nature of the duress and not only in cases of moral coercion. Be this how it may, the fact remains that a person who is irresistibly compelled by moral pressure to commit an offence is liable to punishment together with the person who exercised tbe coercion. The latter person Is not alone liable, as he is in cases of physical coercion. So far as the problem of participation is

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concerned, this means that Art. 32 (1) (c) does not apply when there is absolute moral coercion; tbe respective capacity in which the acton are involved in the offcnce is not that of indirect offender and agent, but that of instigator and incited person, or that of co-offenders.

The acton, however, are not liable to the same punishment since the court may mitigate the penalty or impose no penalty with respect to the person who acted under duress. This logically flows from the principle that moral coercion is only an excuse. It is, however, regrettable that a mistake in the translation of the French text into Amharic and English should prohibit the excuse from operating as it was intended to operate. For mitigation is compulsory according to the French text of the Code *(le juge atUnuera librement la peine)* while it is optional according to the official venions of An. 67, second alinea. This being so, there is, of course, not much point in dealing with absolute moral coercion under Art. 67 since, apart from the question of exemption from punishment, it entails the same consequences as resistible coercion under Art. 68. For these reasons, one may be tempted to interpret the notion of physical coercion more extensively than it has been hereinbefore so that it should include not only the cases in which tbe agent's freedom of movement is suppressed by the use of actual force, but also those in which he personally is directly threatened in such a manner *(e.g.* when he is made to act at gun-point) that be can hardly be deemed to be physically capable of acting otherwise than as he does.

Article 68. Resistible coercion

If the coercion was not irresistible and the person concerned was in a position tp resist It or avoid committing the act he shall, as a general rule, be punishable.

The court may, however, without restriction reduce the penalty (Art. 185), taking into account the circumstances of the ease, in particular the degree and nature of the coercion, as well as personal circumstances and the relationship of strength, age or dependency existing between the person who was subjected to coercion and the person who exercised it.

The indications given in relation to the preceding Article make it unnecessary to dwell at length on the problem of resistible coercion, which arises when an offence is committed under duress of a lesser degree than that which is requited for the purposes of Art. 67.

Resistible coercion, with which Art. 68 deals without distinguishing whether it is of a physical or moral nature, is a coercion of an intensity such that the coerced person could reasonably be expected "to resist it or avoid committing the act** (whatever the alternative implies). Thus if *A* and *B,* in an attempt to escape from prison, tie up C, a prison warder, who is able to untie himself and to ring an alarm bell white *A* and *B* are in the act of escaping but who does not do so lest they cause him further harm, C is guilty of an offence contrary to An. 418 since he actually permits *A* and *B* to escape. Although be has been physically coerced, a man in his position and with his responsibilities could reasonably have been expected to raise an alarm after he had regained his freedom of movement; he is not justified, therefore, by absolute physical coercion, nor should he be excused, it seems, by absolute moral coercion for at the time when he permitted the escape he was not in * position such that he could not possibly avoid committing the offence. So too, if *A* at gun-point orders *B* to accompany him to C's house for tbe purpose of forcing open the door of *C't* safe and if on tbe way to C't house *A* drops his gun and starts looking for it in the dark. *B* can reasonably be expected to flee rather than to wait patiently until *A* recovers his gun. It is true that, if *B* does not run away but accompanies *A* and if at gun-point he opens the door of the safe as demanded by *A,* he is at tbe time of the offcnce subjected to absolute coercion. Yet one cannot disregard the fact that, before that time, *B* had an opportunity to flee and thus to avoid committing the offence; the coercion was not irresistible throughout. The same applies when, for instance, the coerced person, by reason of his strength, age or sex and having regard to the strength, age or sex of the person exercising the coercion, is physically capable of resisting the coercion. Finally, as has been mentioned in connection with Art. 67, it seems

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that coercion should not either be deemed to be absolute when the harm caused is manifestly out of proportion to the harm feared.

When coercion, whether physical or moral, is not irresisible, intent as an element of criminal guilt is present and the coerced person is answerable for his act. Hence the provisions of Art. 68, first alinea, according to which the doer is as a general rule punishable (see also Art. 699 (I), second alinea). However, the fact that he nevertheless acts under duress is not irrelevant; it is as relevant as the fact that a person who exceeds the limits of necessity (Art 72) or legitimate defence (Art 75) is nevertheless, basically, in a state of necessity or defence. Hence the provisions of Art. 68. second alinea, according to which the punishment may be reduced if the factual and personal circumstances of the case warrant mitigation. These circumstances do not call for any comment other than the following; account should be taken not only of the relationship of dependency existing between the person subjected to the coercion and the person who exercised it, but also, where appropriate, of the relationship of affection existing between the threatened person and the one who has committed an offence to remove this threat.

The above-quoted maxim *coactus voluil. sed voluit* is behind the provisions of Art. 68 and its application is, of course, entirely justified here, which it is not in cases of absolute moral coercion. To the extent, however, that resistible coercion creates a psychological condition comparable with a state of limited responsibility, one would expect it to have on the penalty the same effects as this state, anH mitigation to be compulsory. This actually is what the French text of Art 68 rightfully provides For, in opposition again to the Amharic and English texts. Although there is no doubt that the French text, in prescribing compulsory reduction of the punishment in cases of absolute moral coercion as well as of resistible coercion, is as wrong as the official text is in prescribing optional mitigation in both cases, it must be remembered that this mistake in the master-text results from the distinction made in Art. 67 by the Codification Commission between physical and moral coercion. The very fact that Art. 68, which was not amended by the Commission, does not contain a similar distinction and doe* not make the extent of the reduction depend on the kind of coercion exercised, shows that there is some inconsistency in the existing rules regarding duress. It is to be hoped, therefore, that Art 67 will be amended again and the original rules revived, according to which no liability is incurred in cases of absolute coercion while the punishment must be reduced in cases of resistible coercion.

Article 69. Responsibility of person giving an order

In the case of an offence under this Code commuted on the express order of a person of higher rank whether administrative or military to a subordinate, the person who gave the order is responsible for the act performed by his subordinate and is liable to punishment so far as the subordinate's act did not exceed the order given (Art. 58 (3)).

The problem of superior or hierarchical orders arises when a person commits an offence on the order of someone to whom he owes obedience. Thus it involves, firstly, the rather simple question whether tbe person who gives the order is guilty of the offence (Art 69) and, secondly, the much more controversial question whether the person who carries out tbe order is guilty of the offence (Art. 70). The main issue, therefore, is one of liability and not of participation and, as is apparent, the points it raises bear some resemblance to those discussed in connection with acts ordered or authorized by law, on the one hand, and with coercion, on the other hand. This problem is not a new one in the Ethiopian criminal law. It arises, however, only in relation to orders given by administrative or military superiors and not as it did under Arts. 146-149 of the 1930 Penal Code, with regard to orders given by any "master". When an offence is committed on the order of a person other than a hierarchical administrative or military superior, the doer who executes the order is never excused, though be may avail himself of the extenuating circumstance mentioned in Art 79 (1) (c).

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Tbe State exercises its privileges, carries out its duties and generally transacts its business through its agents and this delegation of powers implies, within government departments and agencies, a hierarchical set up and a chain of command. Each agent, at his own level, has the right and the duty to make and/or enforce decisions, and this is an essential feature of any collectivity, including the administration and the Armed Forces. "Pursuant to the nature of the administration's organization, every superior exercises hierarchical powers over his subordinates, and this entails that he may not only vary their decisions, but also give them general or individual orders" (G. Vedel, *Droit administratif,* P.U.F., Paris 1959, II, p. 500). So far as concerns the superior, the corollary to this right to give orders is the duty to assume liability for what is done by his subordinates on his order. Hence the rule that an administrative or military superior who orders something unlawful to be done may not thereafter avoid his liability on the ground that he did not materially participate in the doing of the act which he ordered *fo* be done, whatever the seriousness of this act may be (Art. 699 (2».

The right to give orders is subject to two restrictions. Firstly, orders may be given only with regard to so-called "service matters", that is, matters concerning the business transacted by the organization to which the superior and subordinate belong. Secondly, only such acts may be ordered as must be done so that the said business be properly transacted. If a superior, therefore, gives an order with full knowledge of the fact that these conditions are not fulfilled, his liability is involved and he may not invoke the defence mentioned in Art. 64 (a) since either the act ordered is not "in respect of public. State or,military duties'* or the right to give orders is not exercised "within the limits permitted by law". Moreover his liability is involved irrespective of his rank, for it is not required that the superior should be a high ranking official or military commander, but merely that he should be of higher rank than tbe person executing the order, *i.e.* that he should have the right to give orders and that his subordinate shouJd have the corresponding duty to obey. He who gives the order must, therefore, be a person in authority: if he is not. Art. 414 applies in any event, whatever tbe contents of the order and whether or not.it is carried out. Yet his being in a position to give orders docs not entitle him to demand from his subordinates that they should act in violation of the law. and some provisions in the Special Part of the Code, such as Arts. 281-285, 287 (</). 288, 291, 292, 325 (c) and 426 (1), make this perfectly clear.

It is obvious, however, that the superior who orders an act to be done which is unlawful is liable only insofar as the subordinate acts in terms of the order. The position here is the same as in cases of incitements, for instance, and this is to say that, if the subordinate exceeds or departs from the order, the superior is not answerable for the excess or departure unless he directly or indirectly intended it to occur. Thus a police officer who orders a search to be carried out without a warrant commits an offence in violation of Art. 415. But it is evident that the constable who, in the course of the search, misappropriates an object which he was not ordered to seize or rapes the daughter of the house is alone liable for the misappropriation or rape. For, as is implied in the reference to Art. 58 (3) appearing rather unnecessarily in Art. 69, what is done by the subordinate "goes beyond what (the superior) intended either directly or os a possibility".

Artkle 70. Responsibility of tbe subordinate

(1) *The subordinate who has carried out an order to commit an offence under this Code thail be liable to punishment if he was aware of the Illegal nature of the order or knew that the order was given without authority or knew the criminal nature of the act ordered, such as In cases of homicide, arson or any other grave offence against persons or property, essential public interests or international law.*

The court may, without restriction, reduce the penalty (Art. 185) *when the person who performed the act ordered was moved by a sense of duty dictated by discipline or obedience; the court shall lake Into account the compelling nature of the duty.*

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(2) *The court may Impose no punishment where, having regard to all the circumstances and In particular to the stringent exigencies of State or military discipline, the person concerned could not discuss the order received and act otherwise than he did.*

(3) *In the event of an order being Intentionally exceeded the person who exceeded the order Is alone responsible for the excess.*

As a person who acts under coercion it not automatically relieved of liability by the mere fact that the person who exercises the coercion is liable, so the fact that a person in authority is liable for what is done on his order by his subordinates does not mean that the subordinates themselves incur no liability when, with full k nr; w lodge and intent, they carry out an unlawful order. But whether or on what conditions they are liable is a controversial question which may be answered in three different ways depending on how far the duty to execute orders is ■aid to extend.

If the duty to obey is deemed to be absolute, the subordinate is under the obligation to execute whatever order he may receive. According to this system, known as the system of Mind or passive obedience, respect for the order identifies itself with respect for the law and the subordinate who carries out an unlawful order is justified by the fact that he is legally bound to act because, so far as he is concerned, the order is law. Tbe said system, consistently and wrongly invoked during the trials of war criminals held at the end of World War II. is inspired by a concern for the maintenance of discipline, particularly within the Armed Forces since it was held for centuries that *"la discipline fait la force principale des armies",* and provides the subordinate with a defence similar to that contained in Art. 64 (a). What it implies, of course, is that the subordinate is a mere instrument in the hands of his superiors; ha may not. therefore, discuss the orders he receives any more than a robot does. Yet as he is a human being and not an automaton, be may find himself in a dilemma. The conflict that may confront him is not between incompatible legal obligations since the duty to act in accordance with the law includes the duty to execute the order, but between his duty to obey and the dictates of his conscience. If he deems his moral obligations more important than his legal duty and allows them to prevail, thus resolving the conflict by disobeying (he order, he is neither justified nor excused. What is criminal is not obedience, but disobedience.

However true it may be that the efficient working of an organization, department or agency depends on how swiftly and scrupulously the decisions of the policy-makers are enforced and however pressing, therefore, the need may be to ensure that orders are carried out, it la evident that a person is not incapable of forming a guilty mind for the sole reason 'that be owes obedience to someone. A subordinate who knowingly executes an unlawful order makes a choice for which he is answerable. Hence the doctrine of so-called "intelligent bayonets (or infantry)" according to which the subordinate must control the lawfulness of the orders be receives and is liable to punishment if he intentionally violates the law on being ordered (o do so. The duty to obey, therefore, is only relative and "ceases to bind the subordinate when the doing of an act is ordered which is contrary to the law** (Vedel, *op. clt.,* p. 500). The question whether he must opt between respect for the law and respect for the order does not arise, at least in theory, since an unlawful order is not to be respected; he must act in accordance with the law and is consequently entitled to refuse to execute the order. Nor is the subordinate tom by conflicting legal and moral requirements since the dicutes of the law coincide with those of his conscience. Whatever iu menu, (his solution is not fully satisfactory. Firstly, it does not eliminate the posaibility of a dilemma posing itself. Since obedienoe is ss often as not prompted by fear of reprisal, the alternative is cither to disobey the order, thtjs obeying the law (and the subordinate may believe‘that this will entail immediate and serious consequences) or to obey the Qidet, thus rfisoheving the law (and he may believe that this will entail no consequences at all or, on some future and uncertain day, less serious consequences). Whereas a subordinate who knowingly carries out an unlawful order in many cases chooses what he thinks to be the leu of two evils, be is. psychologically speaking, in a position comparable with that of a person acting under duress and should therefore be excused. Secondly, as the subordinate is not always able forthwith to estimate the lawfulness of

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ihc order, the doctrine may jeopardize the proper operation of tbe administration or the Armed Forces for ‘*with a view to, or under the guise of, guaranteeing the pre-eminence of the rule of law, one can actually disrupt the whole public service" (P. Duez and G. Debeyre. *Traiti de droit administratif,* Dalloz, Paris, 1952, p. 672). This danger is all the more to be feared since “the duty to obey hierarchical superiors is distinct from the duty to obey the law because the law does not and cannot regulate everything; in a case where the superior exercises his discretion, he docs not speak in the name of the law as there is, by hypothesis, no law in such a case” *(ibid.,* p. 670). How then will the subordinate know whether he is under the legal obligation to execute the order?

The above indications show how difficult it is to reconcile legal and practical requirements. Society at large is concerned with the efficient working of public services, for which obedience is a prerequisite, as much as with respect for the law. which prohibits blind obedience and demands that the subordinate should retain his freedom of decision. This is why the criminal law of today does not fully incorporate cither of the systems described hereinbefore but takes a middle-of-the-road position in an attempt to combine obedicnce with independence. It accordingly provides that the subordinate is liable when he knowingly carries out an order which is manifestly unlawful as regards its form and/or contents.

1. Art. 70 (I) does not require the subordinate to check the lawfulness of each and every order hcjreccivcs. bulit apparently prohibits him. under pain of incurring liability, from executing an order which he knows to be flagrantl> contrary to the law. Admittedly, the test of “manifest illegality" does not appear in the English text of this Article. It might, however, be implied in the French version (and in the Amharic one also) which, though it is insufficiently dear, states that the subordinate is guilty of an offence when he is aware of the unlawful nature of the act ordered, particularly; in cases of homicide, arson *"ou <Tune autre infraction manifestemcnt grave contre l'intigriti des personnes ...* etc.” (*contra*, Art. 699 (2) according to which the subordinate who is oidcrcd to commit an act amounting to a petty offence is not **pnn.ihahlc** if he drra not r.ucecd the order; this, however, is not necessarily decisive precisely because it concerns petty offences and the degree of obedience may be inversely proportionate to the seriousness of the harm which the subordinate is ordered to do). It is arguable, of course, whether “the manifest seriousness of the offence" means the same thing as “the manifest illegality of the order" and the records of the Codification Commission unfortunately do not clarify this point. On the one hand, it seems that the Commission intended to follow the rules prevailing in countries such as France and Great-Britain, where it is generally held that there is no duty to obey an order only when it is obviously unlawful. On theother hand, the drafter stated that *”ilfaut poser en principe la responsabiliti de l'executant* (...) *en admettant une attenuation iris large, voir mime I'exemption, si I'exicu- tant itait dans un itat juridiquement assimilable it la contrainte absolue ou 6 Vital de nicessiti.”* Yet if Art. 70 were designed to mean that the subordinate is guilty whenever he n a warn $n^{f\ lh*l}$ unlawfulness of the order, the gcriousnsss of th$ offence which he js nnifxrd in mmgiit should, il seems, be irrelevant and there would be no need to mention *"une autre infraction manifestement grave.”*

The Commission undoubtedly wished to convey the idea that, as the right to give orders is not unlimited according to Art. 69, so the duty to obey is not unlimited according to Art. 70. Depending, however, on where the limit is set, the legal consequences are quite different. If the subordinate is relieved of his duty to obey as soon as the superior does not exercise “within the limits permitted by law" his right to give orders, the subordinate must always ensure'that the order he receives is lawful and he is legally bound not to carry out an unlawful order; if he carries out such an order, he may, at best, be excused. In favour of this restrictive interpretation of Art. 70, it may be said that “the subordinate must in particular refuse to execute an order tending towards the commission of a criminal offence. For the penal law is of a specially imperative character and nobody may be ordered to violate it” (Duez and Debeyre, *op. cit.,* p. 673, who, however, express this view with regard only to civil servants, but not to military persons who “must obey even an unlawful order unless ft is

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manifestly contrary to constitutional law or dearly constitutes a serious offence"). If, on the other hand, the subordinate is relieved of the said duty only when the order is manifestly unlawful, then he is legally prohibited from not carrying out, and is justified if he executes, an order which is not obviously contrary to the law. True enough, considering the discretion given by Art. 70 to the court, it may be of little practical importance which of cither interpretation is chosen. Although the rationale of Art. 70 cannot be known with precision as it was framed, on.models which to some extent contradict one another (the drafter's statement reflecting the Swiss, position—see Art. 18 of the Swiss military penal code and Logoz, *op. cit.,* p. 128 — which is not quite the same as the French or British one), it seems at any rate more in accordance with the letter of this Article to hold that it incorporates the test of the obvious unlawfulness of the order since, as mentioned above, the reference it contains to the manifest gravity of tbe offence does not make much sense unless it is intended to supply a standard whereby the manifest unlawfulness of the order should be measured. If this is so, then no liability is incurred under Art. 70 except where "obedience, and not disobedience, would be manifestly criminal" (Vedel). In support of this proposition, it may be noted that many writers emphasize the practical usefulness of the said test which operates as an essential safeguard both for the administration and the subordinate since it prevents not only public services from being disorganized or paralyzed by constant queries and refusals to obey, but also subordinates from being arbitrarily accused of disobedience, insubordination or mutiny.

Be this how it may. it is obviously rather difficult to tell with any degree of certainty when, under Art. 70 (I), a subordinate ceases to be bound by his duty to obey. It seems, therefore, that this doubt must be resolved by examining the provisions appearing in other parts of Ethiopian legislation regarding the problem of superior orders. Mention may be made, firstly, of Art. 2036 (2) of the Civil Code which states that a person who carries out an order is at fault "where he was aware of the illicit nature of the order, in particular by reason of the lack of competence of the person giving the order, and the criminal nature of the act ordered". This provision, however, which does not embody the test in question, is not os a matter of right pertinent to the interpretation of Art. 70. Not only is there no evidence to show that the authors of the Civil and Penal Codes drafted the respective provisions in concert. but many Articles of the said Codes, such as those concerning necessity, demonstrate that dvil and criminal liability do not always coincide and are not always incurred on identical conditions. As nothing permits one to say that the subordinate who knowingly carries out an unlawful order is guilty of a criminal offence by the mere fact that he is dvilly liable in such a case, the provisions that are truly relevant to Art. 70 are not those of the Civil Code but, evidently, those of administrative and military law.

Concerning the public servants' duty to obey, a decisive answer will be found in the Civil Service Regulations (Legal Notice No. 269 of 1962), which prescribe: “The Public Servant shall obey the orders of his superiors. A Public Servant shall refuse to obey an order which is obviously not in accordance with the law, and shall report such incident to the Head of the Ministry, Chartered Government Agency or other Public Authority. In all other cases, the superior is responsible for the legality of his orders" (regulation 71 (2)). This rule speaks for itself. It docs not, however, apply to military persons who, for the purposes of the said Legal Notice, are not included in the expression “public servant” (see regulation 3 ft) (a)). Regarding the duty to obey orders given by military superiors, mention must, therefore, be made of the special provisions governing military discipline, namely Art. 34 of the Imperial Army Prodamation No. 68 of 1944 which reads as follows: “When an officer or soldier receives a lawful order from his superior officer, he must obey immediately without demur or hesitation. If after obeying the order he feels that he has a grievance, he may complain thereof to his company commander. If after seeing his company commander, he still feels aggrieved he may request to see his Commanding Officer. If after sedng his Commanding Officer, he still feels aggrieved he may complain thereof to the General Officer Commanding the Army. If he is not content with the ruling of the General Officer Commanding the Army or in his absence hii representative, he may request that his grievance be laid before Us, as Commander-in-

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Chief of the Imperial Regular Army." Although this provision doe* not lUte that the order should be lawful as regards both its form and its contents, it would appear to mean that a military person's duty to obey ceases when the order is contrary to tbe law, whether or not its unlawfulness is obvious (see also Art. 9 according to which it is an offence to disobey "any lawful order" given by a superior). Yet two arguments may be suggested which militate towards a different interpretation. Firstly, the fact that a military person may feel aggrieved by, and complain about, his having had to execute an order despite the apparent lawfulness of tbe order tends to imply that the duty to obey actually extends beyond the limits laid down in Art. 34. It is not unreasonable to imagine that one of tbe main reasons why this person complains is because he feels morally, if not legally, at fault; although in principle he incun no liability when he carries out a lawful order, he may be aggrieved in the sense that he feels be should not have obeyed the allegedly lawful order and may accordingly wish it to be officially stated that he committed no offence by not refusing to obey. Art 34 might therefore be held to mean that an order which is regular as to form must be blindly obeyed regardless of its contents, subject to the subordinate's right to complain after he has ~~execut~~ed the order. Secondly, if this Article should be taken at its face value, it would follow that a military person is guilty of an offencc whenever be carries out an unlawful order while a public servant is guilty only when the order is obviously contrary to the law. In other words, tbe duty to refuse to execute unlawful orders would be more general, and a lesser degree of obedience would be required, in military than in administrative life, which would be rather paradoxical considering that the exigencies of discipline are more pressing in tbe former than in the latter case. It seems that, if public servants must execute order* which are not manifestly unlawful, the same obligation should, *a fortiori,* be incumbent upon military ~~p~~erso~~ns~~.

The scope of the duty to obey administrative superiors is as dear, therefore, as the soope of the duty to obey military superiors is uncertain. Reading the above-quoted An. 34 in conjunction with An. 70 of the Penal Code, any of the following condusions may be arrived at depending on the respective meaning of these provisions. Assuming that liability is incurred under An. 70 whenever the order and act ordered are unlawful, An. 70 is in harmony with An. 34 if An. 34 means that obedience is criminal when the order is in any way unlawful, but it amends Arts. 34 and creates a situation less favourable to the subordinate if An. 34 means that disobedience is criminal when the order is regular in form. Assuming, on tbe other hand, that liability is incurred under Art 70 only when the order is manifestly unlawful. An. 70 amends An. 34 for the benefit of the subordinate if An 34 means that obqdience is criminal when the order is in any way unlawful and to his detriment if An. 34 means that disobedience is criminal when the order is regular in form.

2. According to Art 70 (1), the subordinate is guilty of the offence which be is ordered to commit when he is aware of the fact that both the order and the act ordered are contrary to the Law. On this point, the Amharic and French texts differ from the tingiish one and lay down two requirements which must be satisfied together *C's'M s'est rendu compte du caractirt illidte de I'ordre, notamment d dtfaut de competence de son auteur, et du caractire criminel de*
racte...").

(a) It is obvious, and it is in any event implied in the words "without authority", that the question resolved by An 70 does not arise unless there exists under administrauve or military law a relationship of subordination between the person giving the order and the person receiving it If tbe latter person does not owe obedience to the former, he can naturally not be deemed to be his subordinate even though he may be of lower rank than tbe person giving the order. Thus Art 70 implies that the two parties involved in the commission of the offence as a rule belong to the same institution, department, agency or service. Far example, a Woreda judge is not the subordinate of an Awradja governor any more than a public prosecutor is the subordinate of, say, the Minister of Housing or a police constable tbe subordinate of a naval officer; the said governor. Minister or officer has no hierarchical powers over the said judge, prosecutor or constable and, although he may be legally entitled to make the order he makes in any particular case, he is not authorized by law to demand obedience from

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the person to whom this order is given. In such a case, therefore, obedience involves the liability of the person who carries out the order.

(6) Apart from these cases, a subordinate who obeys a superior is guilty of an offence when he knows that the order Ts contrary to the law ("*illicit**", in the French text, which means contrary to public order, morals or the law) and that the act which he is required to perform or not to perform is unlawful also. These conditions are alternative according to the English text of Art. 70 (1) and also to the French text of Art. 2036 (2) of the Civil Code, which implies that it is immaterial, as.. is according to the Civil Service Regulations quoted above, exactly where the illegality lies. According to the official version of Art. 70 (1), however, the said conditions are cumulative, which implies that the subordinate's liability is not involved when he ignores, or is mistaken as to, the unlawfulness of either the order or the act ordered.

To the extent that the lawfulness of the order governs the lawfulness of the act ordered, it may appear that either of these two conditions would be sufficient for the purposes of Art. 70 Cl). In a great many cases, when one of them is fulfilled, the other one is necessarily fulfilled also. As the contents of an order are unlawful, if not always criminal, by the mere fact that the order itself is unlawful, it seems that few instances will be met where the subordinate is unaware of the unlawfulness of the act though he is aware of the illegality of the order. This is all the more true since the phrase "without authority" may be taken to include all the cases where the order is illegal on whatever ground, whether "in particular by reason of the lack of competence of the person giving the order" (French text of Art. 70(1); see also Art. 2036 (2) of the Civil Code) or generally because this person does not exercise his hierarchical powers "within the limits permitted by law" as is required by Art. 64 (a), which limits define the jurisdiction of tbe superior as well os the form and contents of the order. Therefore a subordinate who knows that his superior is for any reason prohibited by law from giving the order is necessarily aware of tbe unlawful nature of the act ordered as nothing can lawfully be done in pursuance of an unlawful order. For instance, if it is a pre-requisite for exercising hierarchical powers that the person giving the order should be sworn into office, any order be gives before taking the prescribed oath is illegal and the subordinate who carries out the order with full knowledge of its illegality knows that the act ordered is illegal as a matter of right, regardless of the fact that this act would be lawful had the person giving the order taken the oath. Similarly, if an investigating police officer orders a constable to search a house and the constable obeys knowing that no search warrant has been issued and the case is not one in which a search may be effcctcd without a warrant, he knows that hit superior is not entitled to make such an order and that the search is unlawful by the mere fact that the order is illegal. In other words, the subordinate who is aware of the fact that his superior exceeds his powers or assumes official powers which he does not possess is, for this reason alone, usually aware of the fact that the act ordered is unlawful. He may, however, justify himself on the ground that he believed the making of this order to be neccssary within the meaning of Alt. 71.

Knowledge of the illegality of the order and act ordered does not suffice for the purposes of Art. 70 (I). The subordinate who carries out an illegal order should know that this illegality renders the act ordered "criminal". If he thinks that the act ordered is contrary to the administrative or dvil law, but not to the penal law, his criminal liability is not involved. If, on the other hand, he knows that the act constitutes "homidde, arson or any other grave offence against persons or property, essential public interests or international law", he is punishable if he also knows that the order is illegal. Again it may appear that, when the subordinate is aware of the fact that the act ordered amounts to a serious criminal offence, he is necessarily aware of the fact that the order itself is illegal since no person in authority is entitled to exerdse his hierarchical powers in violation of the law. In other words, the mere fact that the act is criminal normally implies that the order is unlawful and that the superior exceeds or misuses his powers. This is so in particular when the order does not relate to "service matters" *(e.g.* an order to commit rape or adultery). Difficulties may arise, however, when the act ordered may or may not be lawful depending on whether the superioi exercises

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his power* in accordance with the law, at the carrying out of an order to kill or bum property may come within the normal duties of the subordinate, particularly those of a miliary person in time of war, or may be justified on the ground of military necessity (Art. 73). Yet even in these cases it is doubtful whether the subordinate who is aware of the unlawfulness of the act may nevertheless be unaware of the illegality of the order, as his knowledge of the criminal nature of the act presumably springs from his knowledge of tbe fact that the superior is not justified under Art. 64 (a), 71 or 73 in giving the order. For instance,if Captain *A* orders Private *B* to kill C, a prisoner of war, and *B* knows that this constitutes "a grave offence against international law", how can he believe that his captain can lawfully order him to commit such an offcnce? How, on the other hand, would he know that the act is not an offence unless he knew that the order itself is not illegal, as in the case where C would suffer from cholera and ordering that he should be put to death would be the only way to prevent contamination? So too, a policeman who is ordered to search a house after 6 p.m. cannot know that the act ordered is unlawful unless he know that the search warrant contains no specific provision to the effect that this house may be searched at any time. If he is aware of the want of this provision, he is aware of the illegality of the order as only tbe legality of the order can justify the search.

(c) As is apparent, ignorance of either of the reasons why the subordinate is in any given case relieved of his duty to obey operates as a complete justification according to Art. 70 (1). Since definite knowledge of the illegality of tbe order and unlawfulness of the act is required, mere suspicions or negligence not sufficing, the subordinate is liable only when obedience is not the result of a mistake of fact or law. Thus a constable who, on the order of his superior, carries out a search warrant issued by a local judge (atbia dania) is not liable to punishment if be does not know that a local judge is not authorized by law to issue such a waiYant and his superior does not in any way allow him to know that the search is unlawful. Even though he is at fault since he is supposed to know the law, be is deemed not to be guilty because there is a general presumption, which according to the Civil Service Regulations operates as long as the order is not obviously unlawful, that his superior makes the order in accordance with tbe law; the tame applies if his superior, when ordering him to effect the search, shows him a warrant which it apparently valid but has in fact been executed already. Besides, the subordinate, particularly when his professional or technical qualifications or experience are lower than those of the superior, either is not in a position to judge the lawfulness of the superior's action or assumes that the superior, because he is in authority, knows what he is doing.

The question whether, in tbe tame illustration, the constable is punishable does not arise, therefore, unless he knows that the warrant it invalid. But then whether he it aware of the fact that the order it illegal or the search unlawful should be irrelevant, as he has a guilty mind whenever he knows that obedience is for any reason criminal. This is actually implied in the English text of Art. 70 (I). Admittedly, this Article may create tbe impretsion that, even if the constable knows the warrant to be invalid, he is justified in obeying because the order does not tend towards the commission of a grave offence. Yet it seems that, when the subordinate knowt that there are no circumstances which legitimate the giving or the carrying out of the order, the seriousness of the offence which be is ordered to commit should not be taken into consideration. If this were not so, it might as well be said that the subordinate who it ordered to commit adultery and executes the order with full knowledge of the fact that it does not relate to a service matter it not punishable because adultery is not a serious offence. This is why, as mentioned before, one may be inclined to think that the purpose of the reference to the seriousness of the offence appearing in Art. 70 (1) is rather different. What this Article may have been intended to mean, though it docs not clearly say so, is the following. A subordinate who carries out an order it guilty of an offence when he knowt that obedience it criminal, that it, when the circumstances are such as to rebut the general presumption that the superior gives a lawful order which the subordinate is bound to obey. This presumption is rebutted when, in the terms of the Civil Service Regulations, the order is "obviously not in accordance with the law" because, to the subordinate's certain knowledge, it it either made without authority (/.*. it it illegal as to form) or it it to the effect that some

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thing ibould be done which manifestly does not come within tbe normal duties of the subordinate *(i.e.* it is illegal as to contents). If this were tbe intention behind Art. 70 (1), it would follow that an order which is not in proper form is not to be executed, whatever its content! *(e.g.* tbe subordinate knows that the "superior" has not been sworn into office, or that the order should be made in writing or be counter-signed by someone; to this effect, see Art. 2064 of tbe Civil Code). On tbe other hand, an order which is on the face of it in regular form must be executed unless its contents are obviously unlawful, as in the case where there can be no possible justification for the doing of the act, whatever its seriousness *(e.g.* order to commit adultery) or the subordinate knows that the act ordered, by reason of its nature or seriousness, does not come within his official duties in the circumstances *of* the particular case *(e.g.* order to burn down a house given to a soldier in time of war, when the soldier knows that the order is made because the house is that of the lover of the superior's wife). Obedienoe is criminal, therefore, when the order is obviously made without authority or does obviously not relate to a service matter. Hence tbe conclusion that *"*I'infiriew n'a pas, en gintral, d se faire juge de la Itgaiiti des ordres de ses supJrieurs lorsque l'ilUgaliU ft'ext pas flagrante"* (M. Waline, *Traiti ilimentaire de droit administratif,* Sirey, Paris 1952, p. 343).

3. As a subordinate who knowingly carries out an unlawful order is or may be to a varying degree deprived of his freedom of choice, it is not surprising that Art. 70 should make with respect to the assessment of tbe sentence provisions inspired by the rule *coactus voluit, sed voluit,* similar to those which apply in cases of coercion. Thus tbe court may ("shall" according to tbe French text) freely mitigate the punishment or may impose no punishment depending on whether the subordinate could have acted otherwise than as be did, that is, could have refused to obey. In doing so, the court is required to bear in mind the subordinate's sense of duty, the compelling nature of the duty and the stringent exigencies of State or military discipline. Elements such as the subordinate's status (civil or military), the respective position of tbe superior and subordinate (particularly in the Armed Forces) and tbe circumstances in which the order was made *(e^.* in time of peace or war) are all the more important since, for instance, a judge enjoys a higher degree of independence than an ordinary public servant; there is more time for discussing an order, and the consequences of a refusal to obey are likely to be less serious, in the civil service than in the Armed Forces or. in the Armed Forces, in time of peace than on tbe field of battle. Furthermore, as obedience is usually dictated, particularly in tbe Armed Forces, by fear of reprisal more than by a sense of duty, tbe court will also consider that a soldier might possibly discuss an order he receives from a lieutenant or captain, but that he cannot reasonably be expected to disobey an order he receives from a general. As a rule, therefore, mitigation will be ordered when tbe subordinate acted in circumstanccs amounting to resistible coercion and exemption, when tbe circumstances amounted to absolute moral coercion. It is evident, however, that this mitigation or exemption applies only as regards the punishment of the offence which the subordinate was ordered to commit. Sub-art. (3) of Art. 70 contains a rule which is parallel to the one laid down in the last sentence of Art. 69, namely that tbe subordinate is alone liable, and fully liable, for whatever offence he might commit as a result of his exceeding or departing from the order. Thus if *A* carries out an unlawful order to burn down a house but, before carrying out tbe order, he rapes a woman who lives in the house, he is not under duress when committing the rape. He may, therefore, be punished by a reduced penalty or be exempted from punishment only so far as conoerns the burning of the bouse, but not the rape which he was not ordered to commit.

Article 71. Necessity

[a]

An act which is performed to protect from an imminent and serious danger a legal right belonging to the person who performed the act or a third party is not liable to punishment if the danger could mot have been otherwise averted and the doer used means proportionate to the requirements of the cate.

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A necessary act is an act performed in a situation so critical that the doing of harm is the only alternative to the suffering of harm. The actor's rights or those of another are in imminent danger and a choice must be made between safeguarding them or sacrificing them. As is apparent, the cases coming under Art. 71 have much in common with those provided for by Arts. 67 and 74 respectively. Yet the conflict which arises under Art. 71 is between interests which are all legitimate and the manner in which it is solved implies the triumph of neither right nor wrong. It is mainly on these grounds that necessary acts are usually distinguished from acts done under coercion (see para. 2 (a) in comments under Art. 67 *supra)* as well as from acts of defence (see introductory observations to Art. 74 *infra).* With few exceptions, notably Art. 34 of the Swiss Penal Code, necessary acts, unlike acts done in legitimate defence, are not deemed to be lawful; the actor does not have the right to protect his interests at the ixpense of those of another and is not authorized by law to cause harm so long as he is not threatened with, or subjected to, an unlawful attack. These acts are justifiable, not because the doer is deprived of his freedom of choice and is being used as an instrument, but rather for reasons of social interest. "La *sociiti ne frappe pas I'auteur du dilit nicessaire, parce qu'etle n'a aucune raison de le punir. L'amendement n'a pas d itre recherche, puisque I'acte ne manifeste aucune perversity. V intimidation est igalement inutile puisque, selon toute apparenee, les faits qui ont ament I'infraction ne se reproduiront pas. Meme dans le cas contraire, la menace d'une peine serait inopirante a I'igard d'un homme qui a de pressantes raisons d'agir* (...). *En aucun cas (le dilit nicessaire) n'a iti socialement nuisible. L'acte 'nicessiti' est en dehors du droit pinal"* (Donnedieu de Vabres, *op. cit.,* p. 88).

This is also what is implied in the well-known maxim *necessitas non ft abet legem* which has always inspired the continental rules on necessity. However, the fact that a necessary act is "juridically neutral" does not mean that the law need not define it, for it is neutral only on certain conditions. Hence the provisions of Arts. 71 and 72, rather similar to those of Art 34 of the Swiss Penal Code, which circumscribe the scope of the defence of necessity. This, defence is not available unless two basic requirements are satisfied. Firstly, there must truly exist a state of necessity, that is, a situation fn which7Tchoice has tobe made between conflicting legitimate interests; this situation arises when the rights of the actor or another person are in serious and imminent danger. Secondly, the conflict may not be resolved by any means; tbe doer is justified only when hi^act.is the sole way to avoid this danger and he does not cause more harm than he or another person woifld have suffered but for the doing of this act. Thus Art. 71 contains two kinds of conditions governing respectively the coming into being of a state of necessity and the lega I consequences of an act done in such a state. This distinction may appear to serve no practical purpose as a person who, for instance, commits an offence in a situation involving serious and imminent danger while he could avoid this danger by other means or should allow it to materialize, is not strictly speaking in a state of necessity for there is actually no need to make the choice he makes. It is true that, whichever of the above conditions is missing, the justification of necessity may not be invoked. Yet Art. 71, if read in conjunction with Art. 72, indicates that a state of necessity may exist regardless of the fact that the doer makes the wrong choice, provided that he is not justified under Art. 71 unless be makes the right choice. In view of these provisions, it is doubtful whether the opinion that *"pour qu'exisie Vitat de nicessiti, Il faut en prlncipe que iintirit d sauvegarder soil plus pricieux ou, au moins, aussi pricieux que I'intirit d sacrifier au salut du premier"* (Logoz, *op. cit.,* p. 141) is fully relevant to the problem of necessity under Ethiopian law. Art. 72, which deals with "excess of necessity" and thus implies that the actor is basically in a state of necessity, *i.e.* in serious and imminent danger, shows that the interests in conflict must be of a comparable value, not "so that a state of necessity should exist", but so that the actor should be justified under Art. 71 instead of being merely excused under Art. 72. Although, therefore, the conditions laid down in Art. 71 are inseparable, they serve rather different purposes. If a person in serious and imminent danger were deemed not to be in a state of necessity for the sole reason that he acts while he should actually refrain from acting, he should be fully punishable; tbe peculiar circumstances in which he acts might, at best, be taken into account with a view to mitigating tbe penalty in accordance with Art. 79 (1) (e).

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But Art. 72, which implies (hat these circumstances constitute an excuse warranting mitigation under Art. 183. and not a mere extenuating factor warranting mitigation under Art. 184, would then, it seems, lose its *raison d'itre,* which is to show that the manner in which a person behaves in a situation involving 9erious and imminent danger is pertinent to the question, not whether he is legally in a state of necessity, but whether be is justified or excused.

1. Art 71 is inapplicable unless a person commits an offence with a view to protecting his own rights or those of another person from a serious and imminent danger.

(a) The danger must be serious (or, according to the French text, "*notable*", which is a rather vague term) and it is debatable as to whether this condition, which few codes contain, is in the logic of the system and advisable from a practical point of view. In the first place, the very word "danger" implies that the harm with which the actor or the person for whose benefit he acts is threatened must amount to more than a simple inconvenience. Furthermore, not only is it hardly possible to define a serious danger with any degree of precision, but experience shows that necessary acts are done daily to avert dangers which are not serious at all. Inasmuch as "what is relevant is not the intrinsic, but the respective value of the interests in conflict" (Donnedieu de Vabres, *op. cit.,* p. 89, who classifies the said condition among *"certaihes conditions qui sont exigies d tort"),* it appears that the seriousness of the danger should not be a *sine qua non* condition for the legal existence of a state of necessity (any more than it is a condition for the existence of a stale of defence under Art. 74) and should be taken into account only for the purpose of deciding whether the conflict has been resolved in such a manner that the doer is justified, *i.e.* whether the harm he caused is not more serious than

- the harm he would have suffered. In other words, in cases of necessity as well as of legitimate defence, the gravity of the peril is by its very nature inseparable from the "proportionality? requirement and there seems to be no sufficient reason why it should not play under Art 71 (particularly in view of Art. 72 which states that there is necessity, though an excess of necessity, when the threatened right should have been abandoned) the same part as it plays under Art 74. that is, it should govtm the question whether the act is justifiable (Art 71) or excusable (Art. 72) as it governs the question whether an act of defence isjawful (Art 74) or excusable I Art 75). What Art. 71 in its present tenor implies, therefore, is that *A,* whose hat has been blown away by the wind in the middle of the Debre Zeit lake, may not invoke the defence of necessity if he "borrows" someone's boat with a view to recovering his hat The question whether he is justified or excused simply cannot arise in such a case.

$ lb) As with legitimate defence, so with necessity, the danger must be imminent. If the actor causes harm when his interests or those of another person are not yet or no longer in jeopardy, he is not in a state of necessity. The,need to make a choice must be actual, pressing, urgent. "A danger which is already over is not to be considered, nor is a future danger which is not about to materialize" (Logoz, *op. cit.,* p. 139). Thus if *A* and *B.* after a shipwreck, find themselves dinging to a piece of wood which is not large enough to hold the two of them, *A* does a necessary act if he pushes *B* off the plank. Each of them is obviously in serious and imminent peril of his life and he who takes the initiative of getting rid of his companion will be justified. This, of course, is not the case when *A* and *B* are in a life-boat with enough food for three days and *A* throws *B* overboard so as to have enough food for himself for six days, since *A* is then exposed to a risk which not only is not imminent but might even not eventuate at all.

(e) It is irrelevant from where the danger springs. This, however, is without prejudice to the provisions of Arts. 67 and 74. The former Article applies when the actor is in serious and imminent danger as a result of coercion being exercised by another person with a view to making him commit an offence, while the latter Article applies when he is in danger by reason of an unlawful attack being performed or about to be performed by a human being or his agent (though, as will oc seen later, Arts. 71 and 74 do not exclude each other since the doer may be at once in a state of necessity and of legitimate defence). It is irrelevant, also, as it is in cases of legitimate defence, what kind of "legal right" is threatened. As Art. 34 of the Swiss Penal Code puts it the defence of necessity is available when the doer seeks to protect "in

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particular his life, bodily integrity, freedom, honour or property". The nature and importance of the interest in jeopardy is considered only with a view to deciding whether or not the actor inflicted more harm than would have been caused if the necessary act had not been done. It is irrelevant, finally, as it is, again, in cases of legitimate defence, whether this legal right belongs to tbe actor himself or a third party. Thus Art. 71 applies if *A* "borrows" *B's* boat in order to come to C's assistance who is about to drown himself.

(d) The question whether the doer is in asituation involving serious and imminent danger [illegible] be resolved by purely objective standards. Although a person who commits an offence because he erroneously believSTfijnUch a situation exists may be found not guilty or punished by a reduced penalty, necessity is not the reason why he is not liable to punishment or to full punishment. This, however, does not mean that subjectiyity is altogether absent from Art. 71, but merely that it plays under this Article the same part as it plays under Art. 74, *i.e.* the actor's state of mind is taken into account, not for the purpose of establishing whether he actually is in a state of necessity, but in evaluating his reaction in an actual state of serious and imminent danger. It is therefore, Art. 76 or 78, as the case may be, that applies when a person does an act which he thinks to be necessary as a result of a mistake of fact or law. A person who, due to "an erroneous appreciation of the true facts of the situation" (Art 76 (1)), believes that he or another is faced with a serious and imminent danger, is in a state known as imaginary necessity, whatever the facts as to which be is mistaken. Such a mistake is particularly likely when one seeks to protect the interests of a third party. Thus, to come back to the above illustration, Art. 71 is inapplicable if *A* believes that C is about to drown himself while C actually only pretends that he is drowning. On the other hand. Art. 78 applies if the actor correctly appreciates the true facts of the situation but is mistaken as to the legal conditions governing the doing of a necessary act *(e.g.* he believes that an imminent danger suffices for the purpose of Art. 71 and does not know that it should also be serious). It may be noted that, although Art. 71 is inapplicable when such a mistake occurs, the court must nevertheless decide on the legal consequences of this mistake having regard to the fact whether the act would, in the absence of a mistake, be justified under Art. 71 since the doer must be "tried according to (his) appreciation" of the situation (Art. 76). Thus even though there is imaginary necessity in tbe case where C pretends to be drowning, *A's* act would evidently be necessary and proportionate were *C* in actual peril of his life.

(e) It must be clear, however, that a person is not justified on the ground of necessity merely because he is objectivdy in a situation involving serious and imminent danger; whatever he does in such a situation is not justifiable unless he does it with a view to avoiding this danger. In other words, the actor must be aware of the fact that he is in danger. Thus if *A* for whatever reason enters *B's* garden without authority, not realizing that htf is run after and about to be bitten by a mad dog, *A's* act, which would be necessary if he knew that be is in danger, is neither justifiable under Art. 71 nor excusable under Art. 72 as he is not trying to avert the danger created by the dog.

2. Regarding the manner in which the conflict must be resolved so that the doer may invoke the justification of necessity. Art. 71 lays down the following requirements.

(a) The situation must be such that the danger cannot be avoided except by infringing upon someone else's rights. This condition, usually referred to as the *"subsidiariti"* or "necessity" condition, is dosely connected with the question of choice which is characteristic of necessity, and means that the actor is justified in resolving the conflict facing him by committing an offence only when the commission of an offence is truly necessary, that is, there exists no possibility of resolving this conflict by acting in accordance with the law. *"11 y a conflit d'inUrets qui sont tous legitimes. La faculti de risoudre ce conflit par un acte en lui-meme dilictueux* (...) *est done strictement subsidiaire: elle n'est donnte qu'd difaut de toute autre Issue possible. Par exemple, si I'inliressi peut s'en tirer par la fuite, U doit user de ce moyen"* (Logoz. *op. cit.,* p. 139). Unlike a person acting in legitimate defence, a person wbo is in a state of necessity does not have a proper right to cause harm; be is not justified, there-

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fore, unless the doing of harm is absolutely necessary in the circumstanccs. If be can protect his interests or those of another person without breaking the law or can reasonably be expected not to protect them, he may not invoke Art. 71, though be may be excused under Art 72. Whether an act is necessary in any given case calls into question the quality of tbe choice made by the doer; as such, it should, it seems, be decided by the same test as the question whether the next condition (proportionality) is fulfilled, that is, "a subjective one or, at least, a relatively subjective one" (Logoz, *op. cit.,* p. 141). Thus if a fire starts in *A'** house and he breaks into his neighbour's house in search of an extinguisher when there is actually time to call on the fire-brigade, although his choice is objectively wrong and the commission of the offence of trespass, therefore, is not strictiy necessary, he should not be denied the benefit of Art. 71 if it appears that a reasonable man in his position would have made the same choice. In other words, to the extent that the "necessity" and "proportionality" requirements involve the same questions, they ought to be decided by the same standards. This, however, is without prejudice to the cases where the actor is mistaken as to the necessity of his act, for instance because he is unaware of the fact that the danger can actually be averted otherwise than by causing harm *(e.g.* if unknown to *A* there is an extinguisher in his own house, the case comes under Art. 76, and not Art. 71).

(b) As has just been mentioned, the "necessity" test is intimately related to the second condition governing the doing of the act according to Art. 71, namely the so-called "proportionality" condition. The latter implies that, when causing harm is the only way to avert danger, the actor is justified only if be does not cause more harm than he would have suffered had he refrained from acting. Yet this may well be read into the preceding requirement which, if widely interpreted, means that what is necessary in the circumstances is the commission, not generally of an offence, but of the very offence committed. As a matter of fact, this interdependence between tbe said requirements was stressed during the debates of the Codification Commission. Answering the objection that "Art. 64 (now 71) lacks a precise criterion of proportion", the drafter noted that "this criterion exists, as is shown by tbe conditions laid down in Art. 64: it must be impossible to avoid the danger otherwise than by committing an offence ("necessity" test, *condition de subsidiarity)* and the threatened right must not be such that its abandonment may reasonably be expected in the circumstances. This wide definition, which will be found in many modern Codes, including the Swiss Penal Code, indicates that a certain equilibrium must be achieved and that one is not justified in doing anything with a view to protecting one's interests (proportionality test). Tbe latter test is also inserted in Art. 64 (now 72) which contemplates tbe case in which the doer exceeds what is necessary".

Tbe proportionality test, which applies in cases of legitimate defence also, means that a person in serious and imminent danger may not avoid this danger at any cost. More specifically, it means that tbe threatened right must, as a rule, be at least as important as tbe right infringed upon by the actor. "But how will the court estimate the respective value of tbe interests in conflict ? A purely objective estimation is not fully satisfactory as there may be a discrepancy between the objective value of the right and its subjective value in the eyes of its holder" (Logoz, *ibid.).* Hence the rule that, in comparing the interests at stake, regard should be had to objective as well as subjective elements or, as Art. 72 puts it, that an act is not proportionate "if the abandonment of the threatened right could reasonably have been required in tbe circumstances of the case or if the encroachment upon tbe third party's rights exceeded what was (reasonably) necessary". For instance. *A* does an act which is both necessary and proportionate if he injures or kills someone in order to get out of a theatre- house in which a fire starts. These conditions, however, are not fulfilled if, in the same circumstances, he injures or kills someone while trying to recover his cigarette-case which be lost in the panic. Whether one considers that he should have abandoned his cigarette-case or that, even though he could not reasonably be expected to abandon it because it is of considerable material and sentimental value, he did not protect it by adequate means, the fact remains that a cigarette-case, however valuable, is not worth tbe life of a human being, and

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(hit ia sufficient ground foe denying *A* the benefit of the justification provided for by Art. 71. The same applies if, in identical circumstance*. *A,* a fireman on duty in tbe theatre-bo use, injures or kills someone in an effort to get out, as his personal position and duties then prohibit him from invoking tbe justification (see para. (3) *infra);* but if he thus causes harm in an effort to break tbe doors open so that tbe spectators may get out, Art. 71 is applicable. It will be noted, in conclusion, that the cases where the justification is not available due to the .Sarwant of the proportionality requirement are without prejudice to those where the actor is, for instance, mistaken as to the respective value of the interests in conflict, which mistake may well occur when he acts for tbe benefit of a third party.

3. A case for which Art. 71 does not expressly provide is that where a person in serious and imminent danger is bound, in particular by a legal prescription, to expose himself to such a danger. For instance, two mountaindimbera who find themselves in a situation su^h that neither of them will survive, unless tbe rope that ties him to his companionis cut, are in s' state of necessity. But what if one of them is a professional guide, that is, a person under the obligation to safeguanTthe life of the other 7 The same situation may arise, *e.g.* with respect to a soldier uain^one of his comrades, as a shield on the field of battle or to the captain of a ship saving his own life at the expense of his passengers' lives. One may wonder whether such a person, by reason oflus special pdlffloiror duties, is at ill capable under the law of being in a state of necessity. If the answer is in the affirmative, the application of Arts. 71 and 72 may be envisaged, while it must be excluded if the answer is in the negative as there can be no “excess of necessity" unless what is "exceeded” actually is "necessity”.

To the extent that a state of necessity consists of a serious and imminent danger usually brought about by an extraordinary and unforeseeable event, it might appear that the actor ia not in such a state when, so far as he is concerned, the occurrence of danger is the rule and not the exception. Not only should he never be justified, but he should not either be excused on the ground that "the abandonment of the threatened right could reasonably have been required in the circumstances” since this right must be abandoned. Thus the court should not even examine whether the doer made a proper choice in time of danger as he had actually made his choice when he engaged in the activity the carrying out of which implies exposure to, and acceptance of, danger. Yet it seems that tbe existence or non-existence of a legal, professional or contractual obligation to accept danger is not an essential prerequisite for the coming into being of a state of necessity but is pertinent only to the question whether an act done in a situation involving serious and imminent danger is necessary and proportionate, having regard to the context in which it is done. In the above illustration of tbe mountain- climbers, a state of necessity exists even though one of them is a professional guide. If neither of them ia a guide, and, possibly, if both of them are guides, either of them is justified under Art. 71 if he cuts the rope. If only one of them is a professional guide, he is not so justified, but this docs not mean that he may not be excused under Art. 72 for, although his duty is to avoid the danger threatening his client and not the danger threatening himself, which he can do only by sacrificing his own life, he is nevertheless in a stale of necessity. What is in question here ia not whether a conflict between legitimate interests arises at all, but bow the actor resolves it, *U.* whether the "necessity" and "proportionality" requirements in tbe absence of which the justification of necessity is not available, are fulfilled. The guide's life does not cease to be a “legal right” within the meaning of Art. 71 by the mere fact that he should aacrifice it; this fact entails that his own life is of smaller value than tbe life of his dient and that he makes the wrong choice if he allows his instinct of self-preservation to prevail over hia obligations towards his client. The court must, therefore, take two elements into consideration; firstly, the act is done in a situation involving serious and imminent danger and cannot be judged by the same standards as a similar act done in a different situation; secondly, the conflict can and should be resolved otherwise than as it is, and the act cannot be judged by the same standards as a similar act done in identical circumstances by a person not having the same obligations as the actor. The latter is neither relieved of liability nor ia be fully punishable.

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If a person who is by reason of his peculiar position bound to accept danger were by definition incapable of performing necessary acts, it would follow that a guide finding himself in serious and imminent danger with a party of four inexperienced climbers would neither be justified nor excused were he to sacrifice tbe life of one of his clients with a view to saving the .rest of tbe party; he should rather sacrifice his own life regardless of the fact that the other climbers would in all likelihood die unless be should stay with them and lead them down the mountain. Yet if such a case obviously calls for a solution other than the case where a guide and only one client are involved, h is not because a state of necessity exists in one case and not in the other one, but because the interests in conflict are not the same in both cases. In the latter case, what the guide saves at the expense of the life of one human being is not one life, but four lives. The fact that he is among the survivors is immaterial if the danger threatening his clients cannot be averted otherwise than by his sacrificing one of them and remaining with the others. The conditions on which an act done in serious and imminent danger is justified are fulfilled, therefore, in the second case, but not in the first one.

4. When the above requirements are present, the actor is not guilty of an offence and he is, accordingly, not punishable. A necessary act, though not lawful, is justifiable. This entails, in particular, that a person resisting the performance of such an act is in a state of legitimate defence within the meaning of Art. 74 since this act amounts objectively to an unlawful assault (*contra*, despite some disagreement in the literature, see discussion in Logoz, *op. cit.,* pp. 143-145, the Swiss Code, according to which a necessary act is lawful, so that a person resisting the doing of such an act is himself in a state of necessity). Yet a person does not cease to be in a state of necessity for the sole reason that be encounters such a resistance, this, it seems, should affect only the quality of his choice. Thus in the case where *A* breaks into *B's* bouse in search of an extinguisher, *A* has, if *B* offers no resistance, the choice between suffering damage to his own property or causing damage to *B's* property; if, on the other hand, *B* resists the trespass and defends his property as he is entitled to do under An. 74, *A* has the choice between letting his house burn or causing harm to the person of *B,* unless the latter seeks to defend his property by inadequate means, in which case *A* is in a state of legitimate defence and not of necessity since *B's* act is then unlawful.

5. TV- fact that the doer of a necessary act is not punishable does not mean (as might be inferred from the questionable provisions of Art 72, second alinea) that he is not civilly liable for the harm done. He is liable to pay compensation even though his criminal liability is not involved because necessity, according to Art. 2066 of the Civil Code, is a situation in which civil liability is incurred "in the absence of a fault"; the only case where the actor is not civilly liable is tbe one in which "the damage is due to the victim's fault".

Article 72. Excess of necessity

If the abandonment of the threatened right could reasonably have been required In the circumstances of the case or if the encroachment upon the third party's rights exceeded what was necessary or If the doer, by his own fault, placed himself in the situation involving danger or necessity In which he found himself, the court, may, without restriction, reduce the penalty (Art. 185).

Nothing in this Article shall affect civil liability for the damage caused.

This Article, which must naturally be read in conjunction with the preceding one, seta out the three reasons why a person is not justified under Art. 71 even though be causes harm to avoid a serious and imminent danger. Two of these reasons pertain to the actor's behaviour at the time of the danger and to the choice he makes, while the third one pertains to his behaviour before the occurrence of danger and to the events which bring this danger about. Thus the doer is not justified if his act is not n oessary, or it is not proportionate or, although tbe act is necessary and proportionate, tbe doer himself is responsible for the creation of the situation in which the act is performed. In any of these cases, the doer is guilty and punishable.

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not, however, for a (pecial offence such at abuse of right, since in any event he has no right to do a necessary act, but for the offence of which the harm caused is an ingredient Yet be is not as a matter of right liable to a full punishment; whereas the problem of excess of necessity docs not pose itself unless the situation is basically one of serious and imminent danger, the actor who is not justified for any of the reasons stated above may nevertheless be excused precisely because such danger existed.

1. The doer is liable to a punishment to be assessed in accordance with Art. 72 firstly when "the abandonment of the threatened right could reasonably have been required in the circumstances of the case". This condition is not as clear, especially with respect to acts done for the benefit of third parties, as the one laid down in Art. 34 of the Swiss Penal Code, according to which the justification is not available *"si, dans les circonstances ou Vacte a iti commis, le sacrifice du blen menact pouvaii etre raisonnablement exigt de Vauteur de Vacte"* (sub-art. (1)) nor *"si Vauteur pouvait se rendre compte que le sacrifice du bien menact pouvai' ttre raisonnablement exigt de celui auquel le bien appartenait"* (sub-art. (2)).

Inasmuch as an act is not justifiable according to Art. 71 except where it is necessary as well as proportionate, the first situation contemplated by Art. 72 is not easily distinguishable from the one in which the doer "exceeded what was necessary". By making this distinction, which the Swiss Code, for instance, does not contain, Art. 72 may be designed to convey the idea that, although the question whether an act is proportionate does not arise unless it is necessary, the "proportionality" condition may be missing regardless of the fact that the "necessity" requirement is satisfied. Yet if the actor is not justified when the abandonment of tbe interest in jeopardy could reasonably have been required of the doer in the circumstances, is it not because the harm done is out of proportion to the harm feared, *i.e.* "protection" causes more damage than "abandonment" 7 (to the same effect, see Logoz, *op. cit.,* p. 141, who deals with abandonment in relation to proportionality). So far as concerns the liability to, and extent of, punishment, it seems of comparatively little importance whether the act is deemed to be unnecessary because it is disproportionate or vice versa. Thus in the case, quoted under Art. 71, where a professional guide who is in serious and imminent danger with another climber cuts the rope and sacrifices his client's life, his act may be said to be either not necessary (as fce danger can be averted otherwise, namely by the guide sacrificing his own life) or not proportionate (as the client's life is more valuable than the guide's life, which is precisely the reason why the guide should sacrifice his own life). Be this how it may, it appears to have been intended that the phrases "if the danger could not have been otherwise averted", in Art. 71, and "if the abandonment of the threatened right could reasonably have been required", in Art. 72, should be related to one another. Consequently, the doer makes the wrong choice and is not justified when he decides in favour of protecting a legal right which a reasonable man would have abandoned, thus avoiding the danger confronting him (the reasonable man) otherwise than by committing an offence. As has been mentioned before, the quality of the choice made by the actor is not to be dccided by objective standards only. Thus a father whose feeble-minded son is in serious and imminent danger together with a Nobel prize winner may invoke Art. 71 if be sacrifices the life of the latter to save the former's life.

Z. Tbe actor is not justified either when he exceeds what is necessary to avoid a serious and imminent danger. This clause, which is parallel to tbe clause "if the doer used means proportionate to the requirements of the case" appearing in Art. 71, implies that the doer makes the wrong choice when he protects by certain harmful means a legal right which he could not reasonably be required to abandon but which he could have protected by less harmful means. As noted above, this prescription is purposeless unless it is taken to mean hat, when a danger cannot be averted otherwise than by committing an offence, there is an excess of necessity if the doer commits an offence more serious than the offence the commis* sion of which would suflke to avert this danger. The term "exceeded" shows that the doing r[r] harm must, in such a case, be unquestionably necessary, which it is not in tbe preceding case. In other words, it is not the doing of any harm generally which is then unnecessary, but

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tbe doing of the particular harm done in the circumstances and the actor, who would be justified in causing harm within reasonable limits, is merely excused if he exceeds these limits. Thus if a fire starts in *A't* house, he is justified in breaking into his neighbour*! house in search of an extinguisher but not in killing his neighbour if the latter attempts to resist the trespass. It may be repeated, however, that this is tantamount to saying that a reasonable man could be expected to let his house burn rather than to kill someone in an effort to save it. Further* more, it may be noted that there is nothing to prevent the court from investigating whether "the excess committed was due to excusable fear, surprise or excitement'' (Art. 75 (2)), although the actor's state of mind will then be taken into account in deciding, not whether he should be exempted from punishment (for, subject to the provisions of Art. 73 (2), exemption is permissible only in cases of excess of legitimate defence), but whether and to what extent the punishment should be freely mitigated in accordance with Art. 185 (see, however, para. (5) *infra).*

3. Although the doing of a necessary act often implies that strength has the last word, the restrictions set out in Art. 71 as well as in Art. 72 clearly aim at preventing the law of the jungle from being tbe only standard of behaviour in situations involving serious and imminent danger. Considering, however, the very peculiar circumstances in which a necessary act is done, it is obviously rather difficult to lay down rules of conduct at once sufficiently precise, general and realistic to be applicable in all cases. This is why the Ethiopian Code, like most codes, does not contain further requirements or particulars concerning the manner in which the actor should make his choke. He cannot be expected, for instance, minutely to estimate the respective value of tbe interests in conflict, not only because he often acts on the spur of tbe moment and has no time for a careful and cold-blooded estimation, but also because such an estimation is truly impossible when several "legal rights", even of the same objective value, are in jeopardy. Thus if after a shipwreck five persons find themselves in a life-boat without any food and it becomes necessary that one of them should die so that the others may survive, who is able to say exactly whicb of them should be put to death ? The old or the sick one, because his life-expectation is shorter? The fat one, who will provide more food? The stupid one, the bachelor or the widower, whose death will be less felt by society ? Should one decline to make any choice at all and draw lots so that fate should decide? But is it really reasonable to entrust tbe decision with Fortuna, who is blind? What if tbe unlucky one is a tailor, the only one of the survivors able to calculate the position of the boat and to sail it to the nearest land, taking advantage of the wind and oceanic currents, so that, if be dies, his companions are in all probability doomed ? The truth of the matter is (hat no human being and, therefore, no law can say how such a conflict should be resolved; all that can be said is that the actor's decision, however he made it, should not be questioned when it is not manifestly unreasonable as regards the necessity and proportionality of his act

4. Tbe last case in which tbe doer is not justified under Art. 71 is that where by his own fault he finds himself in a situation such that he cannot get out of it otherwise than by committing an offence. Unlike Art. 34 of tbe Swiss Code, Art. 72 makes it dear that the justification is available even though the person for whose benefit the doer acts is at fault, so long as the doer himself is not at fault. Thus if *A* sets his car.on fire with a view to defrauding his insurer b(it the fire spreads to his house and he cannot put it out except by breaking into *B's* house and taking *B"*i extinguisher, *A* is not justified by necessity even though the danger could not be otherwise averted and the act is proportionate. Tbe fact that the same solution applies if *A* by mere imprudence flam a fire in his bouse shows that this condition, which may also be found in the Swiss Code and French jurisprudence and is similar to the one which some laws lay down with respect to coercion (see para. 1 *(c)* in comments under Art. 67), is not beyond criticism (see in particular Logoz, *op. cit.,* p. 140; Donnedieu de Vabres, *op. cit.,* p. 90 and Vouin, *op. cit.,* p. 184). Firstly, the scope of the defence becomes exaggeratedly narrow, unless a very short chain of causation is required, as comparativdy few are the cases in which no fault is attributable to the doer. Secondly, the generally subjective inspiration of the Code would seem to demand that tbe nature of (he

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fault committed tbould be taken into consideration for *"en bonne doctrine, il n'est pas facile d'enviiager une solution uniforme pour tous les cas*" (Logoz, *ibid.).* Thus if two inexperienced mountain-climbers should embark upon an ascension which is obviously much too difficult for them, they might be deemed to be at fault because they could and should foresee that *il* involves danger; if they should meet with serious and imminent danger and one of them should cut the rope, he might, therefore, be regarded as not being justified under Art. 71. But how should he be treated? The nature of the fault might be taken to affect either the nature of the offence committed or only the extent of the mitigation which may be ordered under Art. 72 and the doer might accordingly be found guilty either of intentional homicide (to the same effect, see Donnedieu de Vabres, *ibid.)* or of negligent homicide (to the same effect, see Vouin, *ibid.).* Although Art. 72 does no' make the same distinctions as Art. SO. it may be suggested that these cases should be ret. .rived by applying the principle governing intentional and culpable irresponsibility, *i.e.* by considering the doer's state of mind, not as of the time of the doing of the act causing harm, but as of the time of the doing of the act which is the relevant cause of the situation in which harm must be done. Awareness of tbe danger, therefore, would not suffice to exclude the justification of necessity. A person creating danger with a view to causing harm under the guise of doing a necessary act, or accepting the possibility of doing barm when he knows that, if the danger which he foresees eventuates, the commission of an offence will be the only means to avert it, should be found guilty of an intentional offence. He might, on tbe other hand, be fouid guilty of an offence committed by negligence (if negligence is penalized, which it is not i most cases of damage to property) when he could and should have foreseen, not merely that his act might bring about a situation involving serious and imminent danger, but that harm would have to be done should this situation occur, or when he rejected the latter possibility after having foreseen it *

5. When the justification of necessity is not available for any of the reasons set out in Art. 72, the act done in serious and imminent danger may nevertheless be excused in view of the circumstances in which it was performed and the court may accordingly mitigate the penalty in the manner provided for by Aft. 185 (under the French text of Art. 72, mitigation is compulsory, as it is under Art. 34 of the Swiss Code also). It is worth examining whether this rule can be reconciled with Art. S24 (a) —(see also Art. 542 (1) (a))—which states that there is extenuated homicide when a person intentionally kills a human being "in resisting the violation, by force or trickery, of the privacy of his house or outbuildings, there being no true state of necessity or legitimate self-defence (Art. 71 and 74)." In this rather unusual provision, which says either too much or too little, the phrase "there being no true state of necessity" is, to say the least, ambiguous. If it is taken to mean that Art. 524 applies when there is excess of necessity, Art. 524 is inconsistent with Art. 72 as regards both the definition and consequences of an excess of necessity. For there is a true state of necessity even when an excess occurs (otherwise what is exceeded is not necessity at all and one would then fail to understand why the killer should be deemed to have committed extenuated homicide), and this entails that the doer should be charged with homicide in the second degree (Art 523), tbe court being then at liberty to mitigate the penalty in accordance with Arts. 72 and 185. If the said phrase is taken to mean that Art. 524 applies when there is imaginary necessity. Art. 524 cootradicts Art. 76 for although there is then no true state of necessity, if a charge is to be brought at all it must be brought under Art 526 concerning homicide by negligence. If the said phrase implies that there is extenuated homicide when one kills a person who, without being in a true state of necessity, commits trespass, it is equally meaningless since tbe kilkr is in a stale of legitimate defence whether or not the trespass is necessary.

Assuming however, for purposes of argument, that the phrase in question means that there is extenuated homicide when a person kills another in resisting the violation of the privacy of his domicile because there is then a manifest disproportion between the harm feared and the harm done, it is difficult to understand not only why Art. 524 applies solely in cases of trespass and not generally in all cases of excess of necessity, but also how such a case can actually arise. As the victim is in any event doing an act amounting objectively to an offence

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fault committed should be taken into consideration for "«i *bonne doctrine, il n'est pas facile d'enrlsager une solution uniforme pour tous les cas"* (Logoz, *ibid*1). Thus if two inexperienced mountain-climbers should embark upon an ascension which is obviously much too difficult for them, they might be deemed to be at fault because they could and should foresee that it involves danger; if they should meet with serious and imminent danger and one of them should cut the rope, he might, therefore, be regarded as not being justified under Art 71. But how should he be treated ? The nature of the fault might be taken to affect either the nature of the offence committed or only the extent of the mitigation which may be ordered under Art. 72 and the doer might accordingly be found guilty either of intentional homicide (to the same effect, see Donnedieu de Vabres, *Ibid.)* or of negligent homicide (to the same effect, see Vouin, *ibid.).* Although Art. 72 does no make the same distinctions as Art. 50. it may be suggested that these cases should be ret .ivcd by applying the principle governing intentional and culpable irresponsibility. *I.e.* by considering the doer's state of mind, not as of the time of the doing of the act causing harm, but as of the time of the doing of the act which is the relevant cause of the situation in which harm must be done. Awareness of the danger, therefore, would not suffice to exclude the justification of necessity. A person creating danger with a view to causing harm under the guise of doing a necessary act, or accepting the possibility of doing harm when he knows that, if the danger which he foresees eventuates, the commission of an offence will be the only means to avert it, should be found guilty of an intentional offence. He might, on the other hand, be found guilty of an offcnce committed by negligence (if negligence is penalized, which it is not i most cases of damage to property) when he could and should have foreseen, not merely that his act might bring about a situation involving serious and imminent danger, but that harm would have to be done should this situation occur, or when he rejected the latter possibility after having foreseen iL *

S. When the justification of necessity is not available for any of the reasons set out in Art. 72, the act done in serious and imminent danger may nevertheless be excused in view of the circumstances in which it was performed and the court may accordingly mitigate the penalty in tbe manner provided for by Aft. 185 (under the French text of Art. 72, mitigation is compulsory, as it is under Art. 34 of the Swiss Code also). It is worth examining whether this rule can be reconciled with Art. 524 (a)—(see also Art. 542 (1) (a))—which states that there is extenuated homicide when a person intentionally kills a human being "in resisting the violation, by force or trickery, of the privacy of his house or outbuildings, there being no true state of necessity or legitimate self-defence (Art. 71 and 74)." In this rather unusual provision, which says either too much or too little, the phrase "there being no true state of necessity'* is, to say the least, ambiguous. If it is taken to mean that Art. 524 applies when there is excess of necessity. Art. 524 is inconsistent with An. 72 as regards both the definition and consequences of an excess of necessity. For there is a true state of necessity even when an excess occurs (otherwise what is exceeded is not necessity at all and one would then fail to understand why the killer should be deemed to have committed extenuated homicide), and this entails that the doer should be charged with homicide in the second degree (An. 523), tbe court being then at libeny to mitigate the penalty in accordance with Arts. 72 and 185. If the said phrase is taken to mean that An 524 applies when there is imaginary necessity. Art. 524 cootradicts An. 76 for although there is then no true state of necessity, if a charge is to be brought at all it must be brought under Art. 526 concerning homicidc by negligence. If the said phrase implies that there is extenuated homicide when one kills a person who, without being in a true state of necessity, commits trespass, it is equally meaningless since the killer is in a state of legitimate defence whether or not the trespass is necessary.

Assuming however, for purposes of argument, that the phrase in question means that there is extenuated homicide when a person kills another in resisting the violation of the privacy of his domicile because there is then a manifest disproportion between the harm feared and the harm done, it is difficult to understand not only why An. 524 applies solely in cases of trespass and not generally in all cases of excess of necessity, but also how such a case can actually arise. As the victim is in any event doing an act amounting objectively to an offence

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of tret put, it see mi that (be only excess tha(can occur in (uch a cate ia an exceaa *ot* legitimate defence and not one of neceasity (aee, however, para. 2 in commend under Art 73,

The position would, of course, be different if neceatary acts were deemed to be lawful a* a person endangered by a neceatary act would then be entitled to avert (he danger by hi—If doing a neceatary act, but not an act of defence. Thus if *A* should break into ZTt bouae in search of an extinguisher to put out a fire in his own house, *B* would have no right (under Art. 74) to resist the trespass, since the trespass would be lawful, but he would be justified in resisting it on the ground of neceasity and, if he should kill *A,* the question would arise as to which provision applies. (Note (ha((his question would not arise should *A* break *IF* a reaiat-ance by killing him since *A* would then not be resitting the violation of the privacy *ot* his domicile). According to Art 72, *B* should be charged with homicide in the second degree (Art. 523) and the court might reduce (he punishment under Art. 185. Yet as the case would be expressly provided for by Art 524, the latter provision should prevail over Art 323. *B* would, therefore, be charged with extenuated homicide but the court would (hen to prohibited from reducing in accordance with Art. 185 tbe sentence to be passed pursuant to Art. 524; the reason why the penalty might be mitigated were *B* charged under Art 523 ia taken into account in the definition of the offence of extenuated homicide, and it is a fundamental principle that a sentence may neither be increased nor reduced twice on tbe same ground (see Arts 79 (2) and Art. 81 (2)). This, however, ia a purely hypothetical case. Since *A'l* art in effect constitutes an unlawful assault, *B* is in a state of legitimate defence. The tame appliea if *A,* invited (o *B's* house, auempts to force hit way into C't house which be mistakes for £*s, and C kills him. So far at concerns necessity, it aeema, therefore, that Art. 524 (a) may be disregarded altogether. Inasmuch as it implies in its present tenor (hat the deceased was objectively at fauH, it deals wi(h a situation which has nothing in common with neceasity, whether true or not. This is to say that if Art. 524 *(a)* conflicts with a provision of the General Part of the Code, it ia with Art 75, and not with Art. 72. A different conclusion would to reached only if Art 524 *(a)* stated that a person who intentionally kills another in any *ot* tto circumstances described by Art. 72 is, notwithstanding the provisions of Art. 72, guilty *at* extenuated homicide and not of excusable homicide. Even though a provision of (his kind would be questionable, it would at least be dear aa Art. 72 would then apply whenever tto exceaa causes harm other than the death of a human being.

Thus there is every reason to believe that the provisions of Art 72 are of general application and that (he court may, in any case of excess, mitigate the penalty in such manner aa it thinka fit having regard to all the circumstances of the case and in particular to the extern to which the act ia excessive. Granted, furthermore, tha(the cases in which the doer is at fault should be resolved considering his state of mind at the time when he did the first relevant act in consequence of which a serious and imminent danger occurred, the ex(cnt of (he mitigation will vary depending on the nature and seriousness of the fault he committed. In no case, however, is the court allowed to exempt him from punishment when there hat been exceaa of necetaity. At regards dvil liability, Art. 2066 of the Civil Code appliea irrespective of tto fact whether there has been excess or not.

Article 73. Military state of neeeaalty

(1) *AH act done by an officer of a superior rank in active service to maintain discipline or seam the requisite obedience in the case of a military danger and in particular tn the case of* **a***mutiny or in the face of the enemy shall not be punishable if the act was the only memu, In the circumstances, of obtaining obedience.*

(2) *Where the officer exceeded what was required in the circumstances the court shall, without restriction, reduce the penalty (Art.* 185) *or, if the circumstances were of a particularly impelling nature, may impose no punishment.*

The explanations given hereinbefore concerning the rationale of Ant. 71 and 72 **woaid**

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lead to the conclusion that, ao far at liability to punishment is concerned, it should be irrelevant whether a situation involving serious and imminent danger arises in the course of ordinary or military life. Art. 73 may, therefore, appear purposeless to the extent that it deals with a problem sufficiently covered by Arts. 71 and 72. Furthermore, provisions like Art 73 are usually found in countries where tbe penal law applicable to military persons is not embodied in the same instrument as the penal law applicable to civilians. In Switzerland, for instance, where there exists a distinct military Penal Code, it is understandable that the General Part of this Military Code should contain rules regarding necessity (Art. 26). This, however, is not true of the Ethiopian Code; as it incorporates military offences (Arts, 296331), there is no decisive reason why its General Pan should distinguish between ordinary and military necessity and why the question whether an act done by a military person is necessary should not be resolved in accordance with Arts. 71 and 72. Finally, a separate provision on military necessity may create the impression, which would be wrong, that a military person is fully punishable when any of the conditions laid down in Art. 73 is not fulfilled.

Thus it may seem that Art 73, apart from being misleading, does not add much to Arts. 71 and 72 and should for these two reasons have been omitted. Although it is perfectly true that this Article serves little purpose in the context of the Ethiopian Code, the reason why it is superfluous is not because it repeats Arts. 71 and 72, but because it repeats Art. 64. For the truth of the matter is that Art. 73, as is apparent from its contents which are rather different from those of Arts. 71 and 72, does not deal with necessity at all. It has been mistakenly, it would appear, borrowed from the Swiss Military Penal Code. As mentioned above, the said Code contains a provision on necessity, namely Art. 26 dealing successively with necessary acu done in one's own interest (sub-art. (1), concerning *Notstaitd* in the strict sense of the term), necessary acts done for the benefit of another person (sub-art. (2), concerning *NotstandihOlfe)* and acts done with a view to maintaining discipline (sub-art. (3), concerning *Notstand der Disiiplin).* The rules set out in the first two of these sub-articles are identical to thoae set out in the ordinary law (Art 34 of the Swiss Penal Code) and similar to those contained in Arts. 71 and 72 of the Ethiopian Code; the obvious inference is that there actually exist* nothing such as a military state of necessity. It is by mistake, therefore, that the said Art. 26 deals with maintenance of discipline under the title of necessity and it is regrettable that this mistake should be repeated in Art. 73 of tbe Ethiopian Code. The latter reproduces *verbatim* Art 26 (3) of the Swiss Military Penal Code, a sub-article which a Swiss authority has termed an “unfortunate” and “completely useless” provision (F. H. Comtesse. *Das Sckwcixerische MiUtar-Strafgesets,* Schultess *A* Co., Zurich, 1946, p. 78), for every superior is bound by administrative law and military regulations to maintain discipline, so that the question whether an act done in execution of this duty is unlawful, is excluded by hypothesis. What legitimates the act is the law itself, and not necessity. The same may be said of Art. 73. Since an officer commits an offence if he fails to take essential security measures to safeguard the life of persons under his command or property for which he is responsible (Art. 322) or to take action to prevent or remedy the spreading of fear, disorder or confusion (Art. 324), the question whether he is justified on the ground of necessity in taking such measures or action simply cannot arise. The point is that his act is ordered by law; it is an act “in respect of military duties” within the meaning of Art. 64 (a). Whether this act is done “within the limits permitted by law” must, therefore, be decided having regard, not to the provision* of the Penal Code concerning necessity, but to those of the law creating the duty to maintain discipline. Thus necessity does not come into the picture at all so long as the said duty is carried out in accordance with administrative law or military regulations. It is only when the officer does not act in terms of the legal command or permission that it may be asked whether this behaviour is justifiable or excusable under provisions other than Art. 64. for instance under those governing necessity, and, excepting the discretion given the court by Art 73 (2) to exempt him from punishment, there is. it seems, no reason why this question should not be resolved by applying the ordinary provisions of the Code concerning necessity.

It is, therefore, not only superfluous, but truly wrong ("*unrichtig",* Comtesse, *op. cit.,* p. 70) to create a relationship between acts ordered by law and necessary acts and to justify on the

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ground of necessity acts which are by definition lawful. If an act done, within the limits permitted by law, to maintain discipline or secure obedience were of the same nature as a necessary act, it should logically follow that legitimate defence is possible against it Thus a soldier involved in a mutiny would be able to invoke Art. 74 were he to cause harm to an officer attempting to suppress the mutiny—and this would be clearly absurd. Furthermore, if there were any point at all in Art 73 (1), then surely further provisions of the same kind should have been made regarding all other cases where there exists a legal permission or duty to act *(e.g.* policeman using force to make an arrest). The only part of Art 73 lhat may seem useful is sub-art. (2). Yet this sub-article, again, deals with a problem which is not peculiar to military life, for it is a general question whether and on what ground a person compelled or authorized by law to act may be excused when he does not act within the limits permitted by law *(e. g.* policeman using, in making an arrest, means which are not "proportionate to the circumstances" within the meaning of Art. 56 (4) of the Criminal Procedure Code). Such a person, however, may not be excused under Art. 73 (2) but, at best, under Art. 72. It seems that the purpose which Art. 73 aims at achieving could have been better served by inserting in Art. 72 a provision to the effect that the court must mitigate the punishment or may exempt the actor from punisment when, in "circumstances of a particularly impelling nature", he exceeds what he is obliged or authorized to do (which provision would thus have played the same part as Art. 75), and by omitting Art. 73 altogether.

In view of these general observations, there would be little point in commenting at length on Art. 73. According to sub-art. (1), a military state of necessity comes into being when military discipline is endangered by disobedience; an act amounting objectively to an ofTence is necessary, therefore, when it is the only means to restore discipline. Art. 73 (I) docs not require that discipline should be in serious and imminent danger nor does it make it dear whether it is relevant from where the danger should spring, namely whether an act is necessary when disobedience takes place in a time of danger *(e.g.* in the face of the enemy) or disobedience itself is the source of the danger *(e.g.* in the case of a mutiny). For all practical purposes, this would, however, appear to be irrelevant even if the cases were to be dealt with within the framework of Art 73 (I), and not of Art. 64 (a). On the other hand. Art 73 (I) deem* necessary only an act done with a view to maintaining discipline or securing obedience. Thus an officer causing harm when acting in his duty to protect property (Art. 322) is not justified under Art 73. Yet his act is lawful since he discharges a legal obligation and this is further evidence of the fact that the principle behind Art. 73 (1) is questionable as there is no reason why acts done to avert danger to disdpline should not fall undfer the same provision, namely Art. 64 *(a),* as acts done to avert danger to property. Finally, the justification is not available to any member of the Armed Forces but only to "an officer of a superior rank in active service". This requirement, which implies that maintenance of discipline is the responsibility of superior officers, again illustrates what is defective in Art. 73 (1), for from where does this responsibility flow, if not from the law itself?

When any of the above conditions is missing, the doer should be deemed either not to have been at all in a state of military necessity or to have exceeded the requirements of military necessity. Yet, as has been said before, the real issue is whether he acted within the limits permitted by military law. which may be wider than those laid down in Art. 73. In particular, it is improbable that an act which would be justifiable according to Art 73 (1) should not be lawful within the meaning of Art. 64 *(a).* It is doubtful, also, whether the question of abandonment, with which Art 73 (2) does not specifically deal but which may be unplied in the word "exceeded", can arise at all under military law when discipline and obedience are at stake. Thus certain acts may be lawful even though they are different from those contemplated by Art. 73 and/or are done by persons other than those mentioned in this Article. If, therefore, an act tending towards the maintenance of disdpline is done by a military person other than a superior officer, or any military person does an act calculated

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to ■vert any dancer other than a danger to discipline, it does not follow u a matter *at* right that thia penon ia guilty of an offence. He is guilty only if his act is not lawful according to military law, but he may then invoke other defences, such as superior orden or necessity, which are, therefore, purely subsidiary. If the conditions set out in Art. 73 (1) regarding the status of the doer and tbe purpose of tbe act are fulfilled, the question is whether the excess is excusable under Art 73 (2) and, if they are not fulfilled, whether it is excusable under Art 72. This, incidentally, implies that two military persons having done the same act in identical circumstances may in the last analysis be treated quite differently depending on their rank, as it is only when the doer is a superior officer that the court must midgate the penalty or may impose no punishment For example, if a step taken to suppress a mutiny is so drastic that it is not lawful according to military regulations, is is, presumably, not justifiable either, but the doer may nevertheless be excused; if this step has been taken by a non-commissioned officer, the penalty may be reduced (Art 72) while it must be reduced or may be dispensed with (Art 73 (2)) if the said step has been taken by a commanding officer. It is rather difficult to justify this discrimination, as the circumstanoee are "of a particularly impelling nature" whoever the actor may be. These circumstances, which explain why the effects of the excuse extend further in military than in ordinary life, would precisely seem to demand that all things being otherwise equal, the excuse should operate regardless of rank when military persons are involved.

Article 74, Setf-deftnce

Ait met dome under the necessity of self-defence or the defence of another person against an bmdnent and unlawful assault or a threat of an assault directed against a legally protected belonging shall not be punishable if the assault or threat could not have been otherwise averted and if the defence was proportionate to the needs af-ihe. case, in particular to the danger and gravity of the assault and the importance of the belonging to be defended.

The law of self-defence, which Cicero in *Pro Mllone* termed a *nata lex,* is as ancient as mankind. Except for a period during which acts of defence were held to reveal a lack of charity and were accordingly punishable, men have from time immemorial been deemed entitled to protect themselves from unlawful attacks. Natural law, however, is not the only reason why the justification is now a part of the *scrip ta lex.* If the right of defence is recognized by the penal law, it is also because society at large benefits by its exercise. Inasmuch as a penon who unlawfully attacks another is in tbe wrong, he who repels the attack contributes to ensuring that wrong should not prevail; by restoring the order which the attack has ~~distur~~bed, be performs a function which ia all the more useful to the community since his act max at the same time deter prospective aggressors. "*Le droit de l'attaqui de se difendre peut avoir un effet gtniral d'intimidation et privenir ainsi des at toques illicit es, ce qui est dans l'intMt du droit"* (ATF 79 IV 148. JdT 1954 IV 34). Furthermore, tbe doer is justified in residing the attack not only morally and socially, but also legally; the defence is lawful since, in tbe terms of Hegel, it negates the negation of the law implied in the attack. These reasons, which are behind most legal provisions on self-defence, also explain the difference bet~~w~~een Arts. 71 and-94. Although, as was mentioned before and as is emphasized by the words "the necessity of self-defence" and "the needs of tbe case" appearing in Art. 74, necessity and self-defence have much in common since in both cases a situation of distress arises which cannot be solved otherwise than by tbfi_doing of harm, there exists a fundamental difference between the two whirh lit* nnt «n much in the fact that an act under Art 71 is basically one of aggression while an act under Art 74 is one of defence, as in the fact that the doer of a necessary act, unlike a person who defends himself, is not resisting an unlawful assault. Under Art 71, but not under Art 74, the conflict which occurs ts between legitimate interest* and this entails that in tbe first case it is strength, while in the second case it is the law, which has the last word. Moreover, the manner in which thia conflict is solved does not always benefit _the community, firstly because a necessary act may be socially indifferent which an

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act of defence is not, and, secondly, because a necessary act, even when it is socially useful, disturbs rather than restores order and ia *may* event does not serve as a deterrent. From whichever angle one looks at it, the position, therefore, is not tbe same in both cases. Hence the fact that, in the penal law, the requirements of self-defence are not identical to those of necessity. Hence also the difference, in the penal and civil laws (see Arts. 2039 (ft), 2066 and 2067 of the Civil Code) between the consequences of a necessary act and those of an act of defence.

The right to repulse attacks which are contrary to the law is not unrestricted. Its exercise is governed by conditions which, under the new Code, are at once more general and more precise than they were under the Fetha Negast and Art. 143 of the 1930 Penal Code. These conditions pertain to the attack as well as to the defence and are, as such, parallel to the conditions laid down in Art. 71 regarding the coming into being of a state of necessity and the doing of a necessary act.

1. As its very name indicates, self-defence (or, more correctly, legitimate defence) O defence; as such, it necessarily implies an assault or at least a threat of an assault, which latter term is used in Arts. 74 and 73 as synonymous with "stuck" and does not mean that legitimate defence is possible only to resist the commission of an offence of assault as defined tn Art. 544.

(a) The aggressor mast be attacking or abbut to attack. As with necessity, so with legitimate defence, the justification is available only insofar as there exists a state of actual danger, whether the assault is in the course of being executed or is imminent. It follows that there is no right of defence when either the assault has already taken place (unless the danger subsists and the assault may be repeated) or the doer xck&-LQ.prevent a future danger from eventuating. 'Tic must always be in response to an assault or threat of an assault. If. therefore, the defence is premature or follows the assault, it is not legitimate within the meaning q{ (he law" (Records of the Codification Commission; see also ATF 75 IV 49, JdT 1949 IVT5TJ. Failing this restriction, one would be given a free hand to cause harm merely out of fear or vengeance. Thus if *A* says to *B* "Your money or your life". *B* does a lawful act if he strikes *A* with a view to protecting his property; but his act is no longer one of defence if, after *A* has taken his wallet, *B* runs after him and strikes him in order to, recover it. This, however, does not mean that his act is necessarily unlawful; it may be lawful within the meaning of Art. 64 (c). So too, if *A* publicly states that he has been cheated by *B* to whom he will "teach a lesson one of these days", *B* may not invoke Art. 74 if, after the threat has been reported to him. he goes to *A's* house and kills him in his sleep for at tbe time of the killing *B* i&.not threatened with an imminent attack.

While it is rather easy to identify an attack, it is more difficult to define what amounts to a threat of an attack, particularly since Art. 74 lacks precision. In this respect, the following observations may be made.

(i) Art. 74 provides that the right of defence may be exercised only "against an imminent and unlawful assault or a threat of an assault". This would firstly imply that no such right exists when the assault is in the course of being performed, which is clearly absurd. It would also imply, among other things (for depending on how the sentence is read and the adjectives are related to tbe nouns, various meanings are possible which are all unsatisfactory) that a mere threat of an assault is sufficient ground for exercising this right even though the threat, whether or not imminent and unlawful, is not about to be carried out—and this would excessively enlarge the space of time within which the right of preventive defence may be exercised. Logically, Art. 74 must, therefore, be held to mean that a person may exercise the said right "against an unlawful assault or a threat of an imminent and unlawful assault". This is probably what the French text of this Article contemplates when it refers to *"une attaque ou une menace d'at toque imminente et contraire au droit"*. The word *"imminente"* should, it seems, be read in conjunction with tbe second *"attoque"* regardless of the fact that the words "*contraire au droit*" must, for their part, be read in conjunction with the first and

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the second *"at toque"*. On this point, the wording of Art. 74 is not as dear as that of Art. 33 of the Swiss Penal Code which confers the right of defence upon one who it *"attaqui sans droit ou menaci .tans droit d'une attaque immincnte"*.

(ii) The word "threat" is not to be taken in its technical sense, as though it were a necessary condition for exercising one's right of defence against an imminent assault that the aggressor should, for instance, commit an offence contrary to Art. 552, 5S3 or SS4. The said word, which is used in Art. 74 merely to convey the idea that the defender should be in actual dancer, could as a matter of fact have been omitted altogether and this idea could have been rendered in a less misleading manner, had Art. 74 stated that a right of defence exists against "an unlawful assault or an imminent and unlawful assault". Be this how it may, the question whether an assault is imminent is to be decided from case to case.

(iii) Although there is no legitimate defence against a threat of an assault, other than a threat of an imminent assault, it is usually agreed that, when a person takes steps designed to repulse future attacks *(e.g.* by setting snares in his garden) and these steps take effect when such an attack is executed, the said person is deemed to have repulsed the attack in a state of legitimate defence if the other conditions governing the right of defence are fulfilled. Such a defence, therefore, is not premature.

(b) The attack, whether actual or imminent, must be unlawful. For the purposes of Art. 74, it suffices that the act done or intended to be done by the aggressor should be objectivdy contrary to the law, whatever this law may be, and it is not required that it should amount to a criminal offence nor, when it amounts to such an offence, that it should be punishable. Tbe reason behind this solution is that the defender cannot be expected to know or has no time to find out whether tbe aggressor is, subjectively, at fault.

(i) There is no legitimate defence against lawful acts, particularly acts of tbe kind described in Art. ^4. Thus if *A* arrests *B* who commits a flagrant offence, *B* is not entitled to resist the arrest. If *A* inflicts corporal chastisement upon his son *B,* tbe latter is not justified under Art.
74 iq striking his father back. Nor is there any legitimate defence against legitimate defence (while there is a right of defence against necessary acts). For instance, if *A* strikes *B* in order/ to protect his property which *B* seeks to take away, *B* may not invoke Art. 74 if be strikes *A* back as *A's* act is one of legitimate defence which does not constitute an unlawful assault It naturally follows that there is a right of defence when an act, which is basically a lawful one, is done in contravention of the legal provision governing its performance. Thus, in tbe first illustration above, *B* may not only resist the arrest if his flagrant offence is a petty offence (since tbe requirement laid down in Art. SO of the Criminal Procedure Code is then not fulfilled), but he may also defend himself against any unwarranted act of violence accompanying an arrest Lawfully made (Art. 56 (4) of the Criminal Procedure Code); in the second illustration, *B,* tbe son, is entitled to defend himself if the right of correction is not exercised in a reasonable manner, as is required by Art. 64 (A); in the third illustration, £ is in a state of self-defence if *A* exceeds his own right of defence *(e.g.* after knocking *B* down and thus repelling the attack. *A* proceeds to beat *B).*

(ii) It is immaterial from whom the assault emanates. There is a right of defence against unlawful acts generally, even done, *e.g.* by insane persons *(contra,* the French literature, according to which the defender is then in a state of necessity), drunkards or children (sec, for instance.Art. 57 of the Sudanese Penal Code). A right of defence exists even against animals used as instruments in the cases provided for by Art. 32 (I) (a); in other cases of attacks by animals, the provisions of Art. 64 (c) or 71. as the case may be, arc applicable for when an animal is not utilized by a human being, the attack may not be deemed to be contrary to tbe law. A controversial issue, especially in France (see also Ait. 60 of the Sudanese Penal Code or Art. 99, first and second parts, of the Penal Code of Malaysia) is whether a right of defence exists when an unlawful assault is done by a public servant. Thus if *A,* a police officer, seeks to carry out a search under a warrant in ***B's*** house after 6 p.m. in violation of Art. 33 (5) of the Criminal Procedure Code, is ***B*** entitled to prevent him from doing so. even by the use of

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violence, should *A* endeavour to force his way into tbe house ? The French courts, for instance, have held that the citizen* should blindly submit to the acts of official authorities, while it is suggested in the French literature that this duty ceases when tbe act sought to be done is ■manifestly illegal. On the other hand, according to the above-mentioned Codes, there is no right of defence against an act done in good f Jth by a public servant under colour of his office unless the act reasonably causes apprehension of death or greviou* hurt. Neither solution holds good in Ethiopian law. In the above illustration, *A* is attempting to commit an offence contrary to Art 415 of the Penal Code and one would fail to understand why *B* should be prohibited from invoking Art. 74 if, by adequate mean*, he should prevent *A* from carrying out a search sought to be done "without due regard for the conditions and forms prescribed by law" (Art 415). So far as concerns the defender, the question whether the aggressor ia in good faith (which, in any event the defender will seldom know) does not affect his right to resist the performance of an act which is objectively contrary to the law.

(iii) As has been said hereinbefore, it is not required that the assault should constitute a criminal offence. Thus a penon may, by adequate means, prevent another penon from publicly exhibiting his photograph without his consent (Art. 27 of the Civil Code) because such an exhibition constitutes an offence within the meaning of Art 2035 of the Civil Code, te. the doer ia at fault although it is not an offence under the Penal Code. In practice, however, it will be found that the right of defence is almost invariably exercised to repulse attacks, whether they be in the form of an act or an abstention and whatever tbe aggressor * state of mind, amounting to a criminal offence. In this respect it may be noted that there is no legitimate defence against preparatory acts *(.contra,* Logoz, *op. cit.,* **p.** 133, who does not explain or illustrate his proposition) since they are not unlawful even though they may in *abstracto* constitute a threat of an assault. This, however, is without prejudice to the case* where preparation itself is criminal and a right of defence accordingly exists if the condition pertaining to the imminence of the assault is fulfilled; thus if *A* and *B* conspire to kill *C,* the conspiracy constitutes a threat of an unlawful assault, but not necessarily of an imminent assault Legitimate defence is, of course, possible against attempt*, and even against complete offences which may imminently be reiterated. Thus although it would seem that whatever reaction a penon may have after being insulted constitutes an act of retaliation and not of defence, it appean possible to defend oneself against such an offence not only by interrupting in some appropriate fashion an insulting statement, but also by stopping in the same manner the inaulter from repeating the insult then and there.

(iv) While under Art 71 it is a condition for the coming into Heing of a state of neoeasity that the actor should be in serious danger, under Art 74 the seriousness of tbe assault ia irrelevant for the purpose of establishing whether a state of legitimate defence exists. Aj has been mentioned in relation to Art. 71, the degree of danger created by an unlawful assault is taken into account only with a view to deciding whether tbe defence is proportionate to the attack. So too, the nature and purpose of the attack and the kind of "legally protected belonging" against which it is directed, are immaterial. Unlike certain laws which restrict the exercise of tbe right of defence to some attacks against the person or property (see, for instance, Arts. 61 and 62 of the Sudanese Penal Code; Art 328 of tbe French Penal Code, the scope of which has, however, been enlarged by the courts), Art. 74 provides that legitimate defence exists against attacks endangering any right, *i.e.* in Jhering's terms any interest protected by law ("un *bien juridiquement protigi"* in the French text of Art. 74), such as life, bodily integrity, honour, sexual liberty or property. This Article is more general as regards the interest* at stake and their holder than Art 145 of the 1930 Code, which stated 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, hi* money and family". It is irrelevant whether this interest is that of the defender or of another penon
(see para. 2 (a) *infra)* and also whether it is of a private or public nature. In some cases, the doer who acu primarily in his own interest at tbe same time indirectly protect* public interests *(e.g.* if *A* prevents *B* from poisoning his *(A't)* well, *A* prevent* the co~~mmis~~sion of an

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offenoe under Ait. 506, which is an offenoe against public health). However, when purely public interests are at stake, there is often a duty and not a mere right to defend them (see. for instance. Art. 64 of the Constitution and Arts. 267, 344 and 438 of the Penal Code).

(c) All the above conditions must be fulfilled so that a situation comcs into being where an act of defence may legitimately be done. Whether the defender is in that situation is a question to be decided by objective standards and the observations made in this connection under Art 71 remain valid here. "Hie subjective conception upon which the whole Code ia based does not entail that a person is in the said situation merely because he believes that he ia unlawfully attacked or faced with an imminent and unlawful attack. So that Art. 74 may be invoked, it is a *sine qua non* condition that the doer should, in fact and not only in his opinion, be so attacked or threatened. When this requirement is missing, the doer acts in a situation known as imaginary legitimate defence and the question whether his act is lawful ■imply cannot arise. This point was nude dear during the debates of the Codification Commission when, answering the contention that "Art. 68 (now 75) docs not take sufficiently into account the subjective nature of legitimate defence, as is shown by the fact that it makes no mention of imaginary defence", the drafter of the Code pointed out that "in the Article in question, subjectivity plays a great part since tbe court may go as far as exempting from punishment a person who. out of fear, surprise or excitement, exceeded what was necessary to repel the attack. These conditions are purely subjective. But the problem of imaginary defence has nothing to do in this Article, for what does it amount to 7 Either the defender misapprehends the situation of fact and erroneously believes that he is threatened, in which, cate Art 69 (now 76) applies since a mistake of fact is committed. Or the doer honestly believes that he is entitled to aa in a situation which he correctly appreciates, in which case Art 71 (now 78) applies since a mistake of law is committed. The said problem, therefore, is to be resolved exdusively in accordance with these two provisions regarding mistake."

2. It is only when a situation of the kind described above exists that the doing of an act of defence is lawful. However, not any act may be done to repulse any attack and the exercise of the right of defence is subject to the following conditions, which are to some extent similar to those governing the doing of a necessary act under Art 71.

(a) The holder of the right is anyone. Art. 74 states that an act of defence may be done under the necessity of defending either oneself or another person, which, incidentally, explains why the expression "legitimate defence" is more adequate than "self-defence". It is not required, therefore, that the act of defence should always be done by the person who is, or is about to be, unlawfully attacked. Such an act may be done, not only to protect one's own interests, but also those of a third party (as he may be unaware that his interests are in danger or for some reason incapable of repulsing the attack himself), whatever these interests may be (*contra*, see Art. 2039 (ft) of the Civil Code, according to which one ia not justified in defending the property of another person). It may be noted that, when the right of defence is exercised for the benefit of another person, mistakes are likdy to occur, which are not mistakes as to the imminence of the assault, but as to its unlawfulness *(eg. A* prevents *B* from driving away in C's car. not knowing that the car was lent by C to *B;* or *A* erroneously believes that *B* is raping Miss C when in fact the intercourse is not against her will). Cases of this nature amount to imaginary legitimate defence and, as mentioned above, are to be dealt with in accordance with the provisions regarding mistake. The court must then examine, as in cases of imaginary necessity, whether the accused would have been entitled to invoke Art. 74 had be committed no mistake.

(ft) Art. 74 states that an act of defence "shall not be punishable if the assault or threat could not have been otherwise averted". (Note that, in the case of a threat, what is sought to be averted is not the threat itself, but its carrying out). This requirement, similar to the "necessity" requirement in Art. 71, raises the controversial question whether an act of defence, like a necessary act, may be done only in the last resort, that is, only when the right in jeopardy cannot be protected otherwise *(e.g.* by running away or calling tbe police) than

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by causing barm. For instance, *A* secs *B* who is attempting to remove a heavy statue from his (*A's)* garden. *A* lives next to a police station and, if be telephoned to the station, be could obtain the assistance of the police before the statue is removed. Should *A* call the police or is he entitled personally to defend his property ?

The records of the Codification Commission do not clarify the point whether Ait. 74 means that one is entitled to take the law into one's hands in any case of an unlawful attack or only when the law cannot be enforced otherwise than by repelling tbe attack or repelling it personally (see, for instance. Art. 59 of the Sudanese Penal Code which state* that "there is no right of private dcfence in cases in which there is time to have recourse to the protection of the public authorities"). On the one hand, one cannot fail to point, not only to the emphatic reference in Art. 74 to "the necessity of self-defence", but also to tbe striking similarity in the wording of Arts. 71 and 74. Both Articles require that the danger could not have been otherwise averted and there appears to be no decisive reason why this condition, which under Art. 71 means that the doing of the act must be truly necessary, should mean something ehe under Art. 74. Bearing in mind the sources of these two Articles (Arts. 33 and 34 of the Swiss Penal Code), it is pertinent to recall that, precisely because this similarity does not exist between the said Swiss provisions, it was held that "had it been the legislator's intention to allow defence against unlawful attacks only on the condition that tbe danger could not be otherwise averted, he would have expressly so provided for in Art. 33" (ATF 79 IV 148, JdT 1954 IV 34). Since tbe Ethiopian legislator has "expressly so provided for" in Ait. 74, one may tend to think that it is because he had in mind something which the Swiss legislator did not have, namely that the right of defence may be exercised only subsidiarily. On tbe other hand, it is worth noting that the similarity between Arts. 71 and 74 does not extend to the definition of excess of necessity and defence respectively contained in Arts. 72 and 75. According to Art. 72, the doer is punishable "if the abandonment of the threatened right could reasonably have been required in the circumstances". This condition does not appear in Ait. 75 and this implies that, when a right $ threatened by an unlawful attack, its abandonment cannot be required. Hence if the alternative to flight is abandonment, there is no duty to retreat.

This conclusion permits suggesting the following explanations for tbe case where the choice is not between flight and defence, but between personally defending the threatened right and calling the police to defend H. Admittedly, so far as concerns the assaulted penon, tbe position is the same whether he runs away or calls the police since in either case be does not, properly speaking, exercisc. his righLof defence (see the above-quoted ATF 79IV 148). Yet so far as concerns the fate of the interest against which the unlawful assault is directed, tbe position appears to be rather different. In the first case, he who renounces to defend thia interest by running away sacrifices it (unless he defends it while running away; see ATF 86 IV 1, JdT 1960 IV 144), whereas in the second case he does not sacrifice it by calling tbe police but entrusts its defence to the police. The issue, therefore, is not whether he should sacrifice his right rather than protect it, but whether he should directly protect it by his own act rather than protect it indirectly by haviog. recourse to tbe authorities. Since the said interest is not to be sacrificed, it seems that, if the alternative to direct protection is abandonment, the act done by the defender personally is necessary and, by way of consequence, lawful (unless it is excessive), while if the alternative to direct protection is indirect protection, , then tbe act done by tbe defender personally is not necessary and is, by way of consequence unlawful, though excusable. What is in question here, therefore, is not the right of defence as such, which nght exists by the mere fact that an unlawful assault is taking place, but tbe manner in which it is exercised, *i.e.* the adequacy of tbe means used to repel the attack. Thua Svith Art. 74 as with Art. 71, the "necessity" test actually is inseparable from the "proportionality " test (see para, *(c) infra.).* What the law requires in any event is *"laproportionaitti des mo yens de difense, non celle de la difense comme telle"* (ATF 79 IV 148). In other words, what must be necessary is not generally the doing of an act of defence, but the doing of tbe particular act done in any particular case. Consequently, if tbe assaulted penon decades in

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favour of personal action when indirect protection could have been obtained by calling the police, he decides in favour of means of defence which cause more harm than would have been caused if the police had been called. In this sense, he goes "beyond the acts necessary for averting the danger" (Art. 75 (1)) and. since he misuses his right of defence, his act is no longer lawful, but excusable. Therefore, "the defence, as a rule, is not legitimate if the threatened right (..) could have been effectively protected by calling the police" (Logoz, *op.* dr., p. 135). Whether it could have been so protected is a question to be decided by objective as well as subjective standards. It is not sufficient that the possibility of having recourse to the authorities should have existed; it is also necessary that the defender should have been aware of it » *(i.e.* he was not mistaken as to the necessity and proportionality of his defence) and could reasonably have been expected to take advantage of it Furthermore, one may tend to think that the "necessity" test should be applied rather liberally when, though the danger could have been averted by calling the police, the defender who personally took action used means proportionate to repel the assault and did not, therefore, cause more harm than that which he police might have caused; for one must remember that, if he did not call the police. Iiis act is no longer lawful and this leads to the somewhat shocking but unavoidable tondusion that legitimate defence is possible to resist this act This, however, is without f irejudice to tbe cases where this act is lawful under legal provisions other than Art. 74. Thus *S A,* though he has enough time to call the police, is able to prevent his statue being removed merely by arresting *B,* the fact that he should have called the police is irrelevant in the particular case ; even though one should hold that Art 74 does not legitimate tbe arrest. *A* is in any event authorized to make this arrest by Arts. 64 (a) of the Penal Code and 50 of the Criminal Procedure Code.

(c) An act of defence is lawful only when it is "proportionate to the needs of the case". This condition calls for the same observations as have been made with respect to tbe proportionality requirement included in Art. 71. In deciding whether this condition is fulfilled, having regard particularly to "the danger and the gravity of the assault and tbe importance of the belonging to be defended", the court must, therefore apply "subjective or, at least, relatively subjective standards". As with necessity, so with legitimate defence, a comparison must be made between the harm caused by the act of defence and that which the defender could reasonably fear. In this respect, it may be noted that when an attack endangers several interests, the question whether the defence is proportionate should be resolved by taking into account the more valuable of these interests. For instance, if *A* says to *B* "Your money or your life" and *B* kills *A,* he may invoke Art. 74; as he cannot defend his property without pladng his life in danger, it is actually his life which is ultimatdy at stake. Whether or not *A* would carry out his threat is immaterial so long as *B* has reasonable grounds, in the circumstances, to believe that he is in peril of his life. The same holds good when the purpose of tbe attack changes while the attack is being performed, be it for a reason attributable to tbe defender himself *(e.g.* because he shows his determination to repel tbe attack; see ATF 79 IV 148, JdT 1954 IV 34). Thus if *A,* when in the act of removing a statue from *B's* garden, sees *B* coming towards him'and pulls out a gun, *B,* who had originally come to defend his property, is then in peril of his life; if he kills *A,* his act, which would have been disproportionate had *A* not pulled out a gun, is lawful since, at the time of tbe defence, it is no longer hit property but his life which is at stake. The proportionality condition implies, therefore, that regard must be had not only to tbe respective importance of the interests involved, but also to elements such as the weapons, if any, used in the attack and the defence, and the respective sex, age, strength or state of health of the aggressor and the defender.

Without prejudice to the cases where the defender is mistaken as to the proportionality of the defence *(e.g. A* believes that *B* threatens him with a real gun while *B* is actually holding a pop-gun; Miss *A* believes that *B* is about to rape her while he only intends to kiss her), the defence is legitimate when the court is satisfied that in view of all the material and personal circumstances of the case, the defender exercised his right in a reasonable manner. This may be to even when he caused more harm than he had reasons to fear, *i.e.* when there is an

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objective disproportion between the value of tbe right protected *(e.g.* sexual integrity) and the consequences of the act of defence *(e.g.* death of a human being). In the last analysis. H is a matter of circumstances whether the defence ia proportionate and thia explains why it ia impossible to lay down precise criteria enabling one to distinguish without hesitation tbe cases in which the proportionality requirement is satisfied from those in which it ia not Hence the proposition that tbe defence is legitimate when the court, placing itself "in the shoes of the accused", arrives at the conclusion that it is not manifestly excessive, as it would be if one should kill someone in defending one's property (Logoz, *op.* ***cit.,*** p. 13S).

3. An act done in repelling an unlawful assault by proportionate means is lawful and is, therefore, quite similar in nature to those "acts done in the exercise of private rights recognized by law" which are mentioned in Art. 64 *(c)*. Although Art. 74, unlike Art. 33 of the Swiss Penal Code which clearly states that a person who is unlawfully attacked *"a le droit de repousser l'at toque',* does not expressly say that the doing of acts of defence is authorized by law, it has always been taken for granted by the Codification Commission that a person is legally entitled to repulse unlawful attacks, as it constantly discussed "the right of legitimate defence" (see also the French text of Art. 699 (1) which mentions the excess *"du droit de nicessitf'*—which is wrong, as a necessary act is not lawful—*"ou de ligitime difense*read also Arts. 2039 (*b*) and 2067 (2) of the Civil Code in comunction with Art. 2035 of the same Code).

It logically follows that Art. 74, which legitimates the intentional doing of harm, *a fortiori* legitimates the doing of barm by negligence. One would often arrive at absurd conclusions should one hold that a person who repels an unlawful assault by adequate means is not justified unless he intentionally causes the harm actually done, and it must rather be held that nothing in this Article "permits one to say that the defender is not liable only when he intentionally brings about the result ensuing from the act of defence" (ATF 79 IV 148, JdT 1954IV 34). In other words, pie doer is under the obligation to use adequate means but under no obligation to exercise care in using them or to avoid causing a harm which he is authorized by law to cause. Art. 74 applies, therefore, when a person in peril of his life pulls out a gun with the intention of intimidating his aggressor by shooting in the air but actually hits and kills him. This holds good, however, only insofar as harm is done to the **aggraaaor** himself. For a person is liable when be injures an innocent third party in repelling an unlawful assault (Logoz, *op. cit.,* p. 135). Yet it will then have to be examined whether or not he was in a state of necessity vis-a-vis this third person. Although legitimate defence constitutes a special case of necessity. Aits. 71 and 74 do not exclude each other. If they did, tbe defender would only be entitled under Art. 74 to cause harm to tbe aggressor in exercising his right of defence and he would not be justified under Art. 71 should he encroach upon a third person's interests in exercising this right; so far as concerns the means whereby be may avert the danger, be would, therefore, be in a less favourable position than a person acting in a state of necessity. "In practice, there may exist no possibility of defending oneaelf, for instance because tbe aggressor is much stronger than the defender. The latter may then be in a state of necessity, that is, be may be incapable of averting the danger created by the aggressor otherwise than by causing harm to a third party. There appears to be no reason why a person subjected to an attack which he cannot successfully resist should be deemed not to be in a state of necessity vis-a-vis persons other than the aggressor" (ATF 75 IV 49, JdT 1949IV 48; a different solution will be found, *e.g.* in Art. 63 of the Sudanese Penal Code, which stales that *"if in* the exercise of tbe right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk").

So that Art. 74 may be invoked, it is required, not only that a state of legitimate defence should objectively exist, but also that the defender should act with the knowledge and desire to perform a lawful act. An act which is objectively one of defence is not lawful, therefore, when the doer either does not know that he is in a state of legitimate defence or provokes tbe

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aggression with the intention (direct or indirect, negligence not sufficing) of causing harm to the aggressor under the guise of exercising his right of defence. When these objective and subjective conditions are fulfilled, tbe defender is not punishable as he docs an act authorized by law. This authorization, however, applies only to the act of defence and does not relieve the defender of his duty, *e.g.* to come to the assistance of the aggressor in appropriate cases (Art. 547 (2)) or to report the aggressor's death to the authorities (Art. 795 (6)). Any failure to comply with this duty is not excusable under Art. 75 as it does not constitute an excess of legitimate defence.

Article 75. Excess in self-defence

(1) t B *'hen a person in repelling an unlawful assault exceeded the limits of self-defence by using disproportionate means or going beyond the acts necessary for averting the danger, the court shall, without restriction, reduce the penalty (Art.* 185).

(2) *The court may impose no punishment when the excess committed was due to excusable fear, surprise or excitement caused by the assault.*

(3) *In the case of acts exceeding strict self-defence he who repelled the assault shall remain civilly liable for the injury caused by his excess.*

Art. 75 is in a sense parallel to Art. 72. Like the latter provision, which states that a person who is, basically, in a state of necessity, is not justifiable but excusable when he exceeds the requirements of necessity, the former Article prescribes that an act done in a situation which is basically one of legitimate defeat is norlawful.ibut excusable, when the defender exceeds the requirements o! legitimate defence. In both cases, there is a failure to comply with the legal conditions governing the performance of the act. Arts. 72 and 75 differ, however, as regards both the definition and effects of the excess.

1. The defender is deemed to exceed the limits of legitimate defence when, in repelling an unlawful assault, he uses disproportionate means (want of proportionality requirement) or docs more than should reasonably be done to avert the danger (want of necessity requirement). Yet insofar as these requirements are inseparable, this distinction is not strictly necessary (see. for instance. Art. 33, second alinea, of the Swiss Penal Code, which refers generally to the case where *"celui qui repousse une attaque a excidi les bomes de la ligitime defense").*

(a) Regarding the first case of excess, what should be taken into account, it seems, is not the proportionality of the means used, but that of the defence itself. What Art. 75 (1) actually implies, therefore, is that an act oLsi? fence is not lawful when the defender causes more harm than .that w hich he had reasons to fear, *l.e.* when the defence is, in the terms of Logoz, "manifestly excessive". As has been mentioned in connection with Art. 74, this, however, docs not mean that there is an excess when "the abandonment of the threatened right could reasonably have been required in tbe circumstances", nor does it mean that tbe defence is disproportionate for the sole reason that tbe harm done is objectively graver than that which the aggressor sought to cause. Thus if *A* shoots *B* so as to prevent him from abstracting some property of minor value, the defence is manifestly disproportionate neither because *A* should tolerate the theft nor because he uses a weapon while *B* is unarmed, but because even though he i(entitled to defend his property, he is not entitled to defend it in such a radical manner.

(b) The second case in which an act of defence is unlawful is that where the defender goes beyond what is necessary to repel the unlawful assault. Although there may appear to be no difference between this situation and tbe preceding one, what is meant is that the doer is not justified whether the excess accompanies or follows th* attack. In the first case, the defender is punishable because the defence itself is disproportionate while in the second case he is punishable because he continues to do harm even though this is not necessary since the assault

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has already been repelled in an adequate manner. Strictly speaking, therefore, he jto^longer defends himself as he is no longer in danger. Thus, if *A* strikes *B* after repelling *B"»* assault by knocking him out, the beating is unlawful. It may be mentioned, incidentally, that cases of this nature may involve difficult questions as to evidence for if *B* suffers injury it will be necessary to examine whether it has been inflicted while *A* was defending himself or thereafter; so too, if *B* suffers several injuries, the question will be whether all or some of them have been inflicted while *A* was properly exercising his right of defence.

(c) As has been mentioned before, it is immaterial for the purposes of Art. 74 whether tbe defender "by his own fault placed himself in the situation involving danger". Unlike Art. 72, Art. 7S (1) does not provide that the actor is merely excusable when a previous fault is attributable to him. This, however, is naturally without prejudice to the case where he deliberately places himself in such a situation with a view to taking advantage thereof and committing an offence. In such a case, be will not even be excused under Art. 75, just as tbe doer of a necessary act would not be excused under Art. 72. On tbe other hand, if this fault consists of a mere imprudence or negligence, he will be justified under Art. 74 while the doer of a necessary act would only be excused under Art. 72.

2. Tbe defender who exceeds tbe limits of legitimate defence is liable to punishment. He ia criminally (and also civilly, as Art. 75 (3) recalls rather unnecessarily) liable for the harm done. Yet the fact that he acts in a situation which is basically one of defence operates as an excuse and he is, therefore, liable to a punishment which the court has under Art. 75 (1) the duty to mitigate in accordance with Art. 185 (note, however, that mitigation is optional according to tbe Amharic text of this Article as it is, also, in cases of excess of necessity according to the Amharic text of Art 72).

The difficulties that may be encountered in applying this provision in view of Arts. 524 (a) and 542 (1) (a) have been pointed out before (see para. 5 in comments under Art 72). As has been said, Art 524 (a) simply cannot apply in cases of excess of necessity and is apparently meant to deal with cases of excess of legitimate defence in which the harm done is flagrantly disproportionate to the harm feared. Yet one fails to understand not only why other cases where the defence is manifestly excessive should not come within this Article *(e.g. A* kills *B* who is attempting to steal his dog), but also why the actor should then be deemed not to be in "a true state of legitimate self-defence" as the question of excess docs not arise unless he actually is in such a state. Thus Art. 524 *(a)* means that one who kills another in resisting tbe commission of an offence of trespass is guilty of extenuated homicide and not. as Art 75 would lead one to conclude, of excusable homicide. This entails that the doer may not be charged under Art. 523 (homicide in the second degree), tbe punishment being then assessed in accordance with Art 75; he must be charged under Art. 524 (a), tbe concurrent application of Art 75 being then excluded, so that he may not be exempted from punishment if the conditions laid down in Art 75 (2) are fulfilled. It may naturally be argued that nothing prevents tbe court from applying Art 75 even though the accused is charged with extenuated homicide. Two reasons, however, seem to militate against this interpretation.

Firstly Art. 524 *(a)* would clearly be purposeless if it were not taken to be a special provision in comparison with the general principles governing the assessment of the sentence in cases of excess of legitimate defence and did not prevail over Art. 75. For what is in issue in these cases is the minimum of the penalty to be ordered, if any, *i.e.* to what extent the punishment may be reduced or whether there are any reasons why no punishment should be ordered. This being so, it is of little importance what is the maximum of the penalty which must (or may) be mitigated or may be dispensed with. *I.e.* whether it is twenty yean (Art. 523) or five years (Art. 524). If it is held that Art. 75 applies in addition to Art. 524 *(a),* the court will, as regards the sentence, reach the same result as it would were the accused charged under Art. 523, the more so since the kind of mitigation provided for by Art. 75 is the so-called free mitigation under Art. 185, as distinguished from the so-called ordinary mitigation under Art. 184. Logically, therefore, there is no point in Art. 524 (a) unless it is designed to restrict

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the court's powers concerning mitigation of, or exemption from, punishment. In other words, tbe only justification for the existence of the said Article is that it makes an exception to tbe provisions of Art. 75. If the latter Article applies concurrently with the former, the exception ceases to operate and Art. 524 (a) might as well be omitted altogether.

Secondly, as noted in connection with Art. 72, the concurrent application of Arts. 75 and 524 *(a)* would mean that the same fact is taken into account twice, firstly as an ingredient of the offencc of extenuated homicide and secondly as a ground for reducing or dispensing with the punishment prescribed for this offence. Yet such a course is expressly prohibited by law (Art. 79 (2» and what is true of extenuating circumstances should *a fortiori* be true of excuses. It would, it seems, be as wrong to assess in accordance with Art 75 the sentence to be passed for extenuated homidice as it would be, for instance, to apply the provisions concerning moral coercion together with those of Art 80 or to hold that a mother convicted of infanticide should be liable to a penalty reduced under Art. 49 by reason of the fact that the delivery or its after-effects rendered her partially incapable of understanding the nature of her act, while it is precisely because she is conclusively presumed to be partially responsible due to the said fact that she is convicted of infanticide, and not of homicide.

All things considered, there is no doubt that Art. 524 (a), and ^or that matter Art. 542 (I)
(a) , is quite unsatisfactory. On the one hand, it docs not strictly speaking, apply in cases of excess of legitimate defence any more than it does in cases of excess of necessity. If there is no true state of legitimate defence, the actor is either fully punishable for intentional homicide, whether in the first or second degree, or punishable for homicide by negligcnce since he acts ia a state of imaginary defence. On the other hand, assuming that it governs cases of excess of legitimate defence, it applies either subject to the provisions of Art 75, in which case it is purposeless, or to tbe exclusion of these provisions, with the absurd consequence that the doer may be treated more leniently when tbe defence is more disproportionate than it is in the case where one kills another in resisting trespass. However, if Art. 524 (a) is not to be disregarded altogether, it must be deemed to apply in the latter case. As for the controversial question whether Art. 75 may be invoked in addition, it might, it seems, be resolved in favour of tbe accused and answered in the affirmative regardless of the fact that this interpretation renders Art 524 *(a)* practically useless.

According to Art. 75 (2), the court may go beyond free mitigation; it may exempt the actor from punishment when it is satisfied that the excess is due to the fear, surprise or excitement caused by the assault. “In evaluating the excess, the judge must if possible put himself in the place of the defender and imagine his state of mind at the time of the attack. If this psychological investigation shows that the excessive act was not done with a guilty mind, the accused must be acquitted’* (Logoz, *op. cit.,* p. 136; note that exemption is then compulsory under the Swiss Code, which it is not according to Art. 75 (2)). Although the passage of the Codification Commission's records quoted under Art. 74 shows that this solution is inspired by purely subjective considerations, some attention must be given to the fact that exemption may not be ordered on the sole ground that the defender was afraid, surprised, or excited, as this is the state of mind of almost every person acting in legitimate defence. Tbe said solution is subjective, therefore, in the sense that tbe doer's state of mind may justify immunity from punishment; it is not entirely subjective, however, because it is not sufficient that this state of mind should have existed at the time of the attack and have been brought about by the attack and it is required, in addition, that it should be excusable—which word serves the same purpose here as the term “justifiable" in Art. 79 (I) (*d*). Whether this condition is fulfilled must, again, be decided in the light of all tbe circumstancse of the case and not only of tbe defender’s personal characteristics. Thus the fact that the defender has a particularly fearful temperament docs not suffice to create a condition of excusable fear unless the assault itself justifies that he should let his temperament loose, nor is he in a state of excusable excitement when, after repelling tbe assault, he strikes his aggressor out of cruelty or sadism. As act of defence is seldom done in cold blood as there is seldom time for reflecting upon the proper means whereby to repulse the attack. Hence tbe proposition that the defence is lawful

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as long as it ii not manifestly excessive; hence also the fact that excesses are likely to occur; hence, finally, the rule that the consequences of an excessive act vary depending on whether the circumstances make it understandable that the defender should have completely lost his head. When the requirements laid down in Art. 75 (2) are satisfied and no punishment ia imposed, the state of excusable fear, surprise or excitement in which the defender found himself in consequence of the assault operates, therefore, in the same manner as a justification (ATF 73 IV 261, JdT 1948 IV 90), though not for all practical purposes. Even when he is exempted from punishment and the exccss is excusable, the mere fact that there is an excess implies that he did not exercise his right of defence "in a reasonable manner" as is required by Art. 2039 (6) of the Civil Code. Civffly, he is, therefore, at fault.

Article 76. Mistake of tact

(1) *Whosoever commits an offence under an erroneous appreciation of the true facts of the situation shall be tried according to such appreciation.*

Where there is no criminal intention the doer shall not be punishable. Where he could have avoided the mistake by taking such precautions as were commanded by his personal position and the circumstances of the case (Art. 59), *he shall be punishable for negligence in cases where such negligence is penalized by law.*

(2) *Mistake as to a fad which constitutes a specified offence shall not exclude,the punishment of the doer for another offence constituted by the act he performed.*

(3) *The offence is committed where there is a mistake as to the identity of the victim or the objective of the offence.*

The references made hereinbefore to the cases of imaginary necessity and imaginary legitimate defence throw some light upon Art. 76 which deals with the cases where one who ignores or misapprehends all or part of tbe factual elements of tbe situation in which be acts, does an act in the belief That be actually docs a different act or an act which will entail ■different consequences. As is immediately apparent, a mistake of this kind bears upon tbe doer's guilt and Art. 76, therefore, is not strictly necessary in that it adds little to the rule that, without prejudice to the eases where there is negligence, a person may not be ''convicted for what he neither knew of or intended, nor for what goes beyond what he intended either directly or as a possibility" (Art. 58 (3)), as the "awareness" component of intentional guilt is then vitiated by the mistake. This is also what Art. 76 (I) implies when it states that a person who cot units vt offc ice in consequence of an erroneous appreciation of tbe true facu of tbe situation must tx tried as though the situation which he believes to exist did actually exist. Unlike Art* 29>conceming impossible offences where a mistake of fact operate* fc> tbe detriment of tbe doer because he believes in the existence of a situation which, did it exist, would be less favourable to him than the true situat on. Art. 7$ provides for cases where this mistakf operates to his benefit because he believes in the existence of a situation which, did it exist, would be more favourable to him than the true situation (to the same effect, see Logoz, *op. cit.,* p. 76). This difference is made clear in Art 19 of the Swiss Penal Code which states that tbe offender must be tried according to his own appreciation of the facts *"si elle lui est favorable*" (see. for instance, ATF 75 IV 65, JdT 1949 IV 87).

1. A fact within the meaning of Art. 76 is any event, circumstance or quality of a material or personal nature the existence or non-existence of which affects tbe court's decision on guilt and/or sentence. It may consist of a phenomenon perceptible by the senses *(e.g.* the doer mistakes arsenic for sugar) or of a state of mind *(e.g.* tbe doer believes that someone intends to kill him) and it is immaterial for the purposes of this Article whether the fact as to which the doer is mistaken concerns him personally *(e g.* he mames believing himself to be a widower) or not *(e.g.* be has sexual intercourse with a woman whom he believes to be unmarried) and also whether its existence or non-existence is conditional upon the poMf ion

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of a certain legal sums or the existence of a certain legal relationship *(e.g.* quality of being a public servant, or the owner of some property, or the relative of some person; see also ATF 82 IV 198, JdT 1937 IV 68). A legal provision, however, is not a fact and Art. 76 is inapplicable, therefore, when the doer is mistaken as to the legal consequences of an act which be does in a situation tbe factual elements of which are known to him and correctly appreciated by him *(e.g.* he has sexual intercourse with a woman whom he knows to be married but believes that she only commits an offence, or with a girl whom he knows is aged seventeen but be believes that this is permitted by the law).

(a) Art. 76 may be invoked firstly when the doer is mistaken as to a fact which is a material ingro^cni_oLan offence. Thus if *A* shoots something which he Lakes to be a gazelle but actually is *B,* he certainly has a desire to kill, though not the desire to kill a human being, as is required so that an offencc of homicide be committed, since he does not know that his target ia a human being; he may not, therefore, be found guilty of intentional homicide. Similarly, if flier shooung *B* with the intention of killing him, buries him in the belief that he is dead, but *B* is still alive and actually dies of suffocation, *A* is notguilty of intentional homicide as the act done to cause *B*'s death (the shooting) misses its purpose and the act causing fl'sHeath (the burial) is not done with a view to terminating the life of a human being, as is necessary so that an offence of homicide may be deemed to be intentionally committed. According to the general rules on causation and guilt, *A* must be charged with attempted homicide and homicide by negligence. So too, if *A* has sexual intercourse with Miss *B,* whom he believes to be nineteen years of age but actually is sixteen, he may not be deemed intentionally to commit an offence in violation of Art. 595 since he is mistaken as to an essential element of this offence, namely the girl's age. The same holds good when *A* mistakes *B's* coat for his own and takes it believing it to be his own.

(b) As mentioned before, Art. 76 may also be invoked when the doer is mistaken as to a fact which, did it *&* ist, would* legitimate or justify his act *(e.g.* mistakes in doing an act of tbe nature defined in Art. 64; imaginary necessity; imaginary legitimate defence).

(c) Finally. Art. 76 applies when the actor is unaware of tbe fact that he acts in aggravating drcumstanoes or believes to be acting in extenuating circumstances^ Thus if *A* insults *B,* not knowing that the latter is a public servant on duty, he is not liable to the aggravated punishment provided for by Art. 586 (1) as be does not know of the fact in consequence of which the penalty is increased, namely the special status of the victim Similarly, if *A* aborts Miss *B* in tbe belief that she is pregnant as a result of having been raped, he may invoke the extenuating circumstance laid down in Art. 533 even though Miss *B* fabricated the rape story to induce him to abort her.

2. It logically follows from the general rule enunciated above that a mistake of fact is not alvays relevant. In other words, as is implied it) Art. 76 (3), a mistake as to a fact which has no bearing upon the doer's guilt or the extent of the punishment, such as a mistake concerning the identity of the victim or the object of the offence, is not to be taken into account. Mistakes of this kind are sometimes referred to as non-fundamental mistakes, in opposition to fundamental or essential mistakes which are the only ones with which Art. 76 is concerned. Thus if *A* waits near *B's* house with the intention of shooting him when he comes home and, seeing someone approaching the house, he shoots him in the belief that it is *B* while it actually is C, be is guilty of intentional homicide for the identity of the human being one kills is not an ingredient of the offence of homicide. So too. if *A* steals a painting which, unknown to him, is a mere copy of the one which he intends to steal, he is nevertheless guilty of intentional theft. A mistake concerning the means whereby the result is achieved is irrelevant, also, if this result is the one which the offender intended to achieve when doing the act which brought it about. This is not the case in the above illustration of the shooting and burial but occurs when a result is due to concuutnt causes (Art. 24 (2)). one of which is the doer's act. and this act was sufficient to produce this result.

The principle laid down in Art 76 (3) holds good, however, only insofar as the identity of the victim or tbe object of the offence is without influence on the actor's guilt or on the nature

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or extent of the sentence to be passod. Thus *A* is not guilty of incest when he has sexual intercourse with Miss *B* who, unknown to him, is his second cousin whom he never saw before in his life (see also tbe above case of insults to a public servant); nor is he guilty of intentional theft when he takes *S*'s coat, believing it to be his own, or of aggravated theft contrary to Art. 63S (1) (a) when he steals an object which, unknown to him, is a religious one. Different from these cases are the cases of deviations *(aberratio Ictus*) in ufhirh a rrenlt different fyoWThe intended onti' achieved by reason of tbe doer's unskillfulness. foiiosUnep. and not because he is mistaken as to tbe true facts of the situation. Thus if *A* discharges his gun at *B* with tbe intention of killing him but he misses him and actually hits C who die^, the case must be resolved, not by applying frrt. 76 as no mistake is committed, but by applying the ordinary provisions concerning causation and guilt and *A* must accordingly be charged with attempted homicide on the person of *B* and negligent homicide on the person of *C* (Logoz, *op. cit.,* p. 76).

3. As a mistake of fart affirm- tK» $_0$f mind, it entails, when proved, legal con
sequences which may considerably vary according to the elements to which it relates; whether or how the actor is punishable depends on the kind of situation in which he believed that he was acting.

(a) If the mistake relates to a constitutive ingredient of a given offence, the doer may not be deemed to have intentionally committed this offence, whatever tbe kind of ingredient as to which he is mistaken. It is immaterial, for instance, whether he believes his act to be ordered, authorized or justified by law (as when he arrests someone whom he mistakes for a wanted criminal or seeks to protect himself from what he believes to be a serious and imminent danger or an unlawful assault) or lawful on other grounds (as when he thinks that the property he takes is his own). In all these cases, his "knowledge" and consequently his "intent" is not of the kind required by the provision to which his act is objectively contrary; according to Art. 58 (3), he must therefore be tried as though the situation had actually been what he took it to be.

(b) If the mistake relates to a circumstance affecting the penalty by way of aggravation or extenuation, the doer may not be deemed to have intentionally committed the aggravated offence or must be deemed to have committed the extenuated offence, as the case may be (see illustrations under para. 1 (c) *supra).*

(c) A mistake of fact relieves the doer, not necessarily of any criminal liability, but only of Aie liability which he would have incurred in the absence of a mistake. <f. therefore, his act is punishable under legal provisions different from those to which it i* objectively contrary, these provisions apply. In other words, a mistake as to an ingredient or extenuating or aggravating circumstance of any given offence leaves intact the doer's liability for any other offenoe the elements or punishment of which is not affected by the mistake (sec, for instance, ATF **84**IV 102, JdT 1958IV 153; ATF 85IV 76. JdT 1959IV 105; ATF 85 IV 189, JdT 1960 IV 36).

(i) When a mistake relating to an ingredient of a given offence is such that intentional guilt must be excluded, the doer may nonetheless be punished for having committed this offence by negligence if he could have avoided the mistake by exercising the care which could reasonably be expected of him in the circumstances (Art. 76 (1), second alinea). This is to say that he is not liable only on the condition that the mistake was unavoidable; whether it was so must be decided in accordance with Art. 59. Thus a doctor who causes the death of a patient by giving him, by mistake, a poison instead of a drug or injecting him a drug without first checking whether hfcis allergic to that drug is n<Jt guilty of intentional homicide; yet a person in his position should obviously be particularly careful not to commit a mistake of this kind. As he could and should have ensured that he actually was administering a medicine or that the patient was not allergic to the drug, he is punishable for homicide by negligence unless he is able to show that, so far as he was concerned, the mistake was unavoidable *(».g.* the laboratory affixed the wrong label onto the bottle of medicine). For purposes of

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criminal liability, it is clear, however, that an inquiry into the presence of negligence may be dispensed with whenever the law does not expressly provide for the punishment of negligence (Art. 59 (2), first alinea). Thus if *A* is mistaken as to the age of the girl with whom he has sexual intercourse, there is no point in considering whether he could have avoided the mistake as negligence is not penalized by Art. 594 or 595 (*contra*, Art. 191 (3) of the Swiss Penal Code and *e.g.* ATF 84 IV 102). So too, if *A* steals an object which, unknown to him, is of a religious nature, it is not necessary to examine whether he could and should have known of the true nature of this objcct sincc there is no such offence as aggravated theft by negligence.

(ii) The doer is in any event guilty of any "other offence constituted by the act be performed" (Art 76 (2)). Intentional guilt, even if to be excluded in relation to a given offence, may be present in relation to a different offence, as is the case, for instance, when concurrent offences are committed. Thus if *A,* in sight of the public, has sexual intercourse with a girl about whose age he is mistaken, he is punishable for an offence of public indecency intentionally committed even though he is not punishable for the sexual outrage; if *A* shoots *B* in the belief that he is actually shooting *B's* dog, he may, whatever the court's decision regarding the homicide, be punished for an impossible offenoe of damage to property (Art. 653); if *A* deliberately fails to come to tbe assistance of *B* whom he has wounded in a state of imaginary legitimate defence brought about by an unavoidable mistake or uses, in defending himself in such a state, an unlicensed gun. he is punishable for having acted in violation of Art. 547 (2) or 764, as the case may be, even though he is not punishable for having caused bodily injury. The same holds good in cases of avoidable mistakes also *(e.g.* concurrence between bodily iiyury caused by negligence and failure to assist). Finally, the same holds good, when a mistake is committed regarding a circumstance bearing upon the punishment to be ordered with respect to a given offence *(e.g. A,* who is mistaken as to the religious nature of tbe object stolen, is not punishable for aggravated theft, but for simple theft; *A,* who is mistaken as to tbe cause of the pregnancy of the woman whom he aborts, remains punishable for abortion, though by a mitigated penalty). By making specific provision for these cases, which few codes do, Art. 76 really deals with the obvious as the solution logically flows from the general principles concerning criminal guilt.

Article 77. Imaginary offence

A person is not punishable for an act or omission not penalised by law (Art. 2 (2)) *even though he acted in the mistaken belief that he was committing a criminal offence.*

Nothing in this Article shall prevent the court from applying the measures provided by Articles 139 *and* 144 *of this Code.*

1. An imaginary offence consists of an act which qjicaon does in tbe belief that it is prohibited by law while it actually is not. It is characterized by a mistake as to the unlawfulness of tbe act and not. like an impossible offence, by a mistake as to !b£ asiequacy of tbe means used or objocLftiroed at in an effort to produce a criminal result. In other words, what ia missing altogether is the legal element of an offcnce, and not merely ia material ingredient, as m tbe case of an impossible offence By stating that an imaginary offence is not punishable. Art. 77 draws, therefore, an obvious inference from the principle of legality as aet out in Art. 2 (1), second alinea (and not Art. 2 (2), as the text of Art. 77 wrongly states). Thus a person who writes a sorcery book believing that it is an offence under the new Code as it was under Art 401 of the 1930 Code is not liable to any punishment since it actually no longer ia an offenoe. Whether there ia any need for a restatement of this kind, is a matter of opinion. Even if one considers Art. 77 to be a useful provision on the ground that it dispels any doubt that might arise when a person acts with a desire to contravene a non-existent legal prohibition or to disregard a non-existent legal obligation, it may appear questionable to deal with imaginary offences in a Paragraph of tbe Code concerning justifiable acta and excuses

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since tbe problem of justification or excuse does not pose itself when an act is not objectively contrary to the law. Yet the reason why Art. 77 follows the provision regarding mistake of fact and precedes the one regarding mistake of law is presumably becausc, as indicated above, the said Article also provides for a mistake whiih, however, is neither one of fact nor one of law. Rather, it may be called a negative mistake of law; in the cases contemplated by Art. 77, the actor does something lawful in the belief that it is unlawful, while in the cases coming under Art. 78 he does something unlawful in the belief that it **is** lawful.

2. Although the doer of an imaginary offence is not liable to punishment, action may (if his behaviour comes at all to the knowledge of the authorities) be taken against him in accordance with Art. 77, second alinea. which illustrates the subjective inspiration of the Code. From an objective point of view, it is true that an imaginary offence neither creates danger nor guises harm since it consists of an act which society has deemed unnecessary to penalize. If, however, one considers the doer's state of mind, it is equally true that his behaviour often reflects a dangerous disposition as he acts despite the fact that he thinks his act to be unlawful. This is why the Code allows tbe court to make with respect to such a person certain orders which are not of a punitive nature, as this would be contrary to the principle of legality, but of a preventive and protective one. Thus the court may require him to enter into a recognizance to be of good behaviour (ArL 139) or order the confiscation of whatever dangerous articles he may have been using (Art. 144). It is doubtful, however, whether, on this point also. Art. 77 serves any purpose at all for Art. 145 permits making an order in accordance with Art 139 and/or Art. 144 even though a person is not prosccutcd for any offence.

Article 78. Mistake of law and ignorance of law

(1) *Ignorance of the law u no defence.*

The court shall, without restriction, reduce the punishment (Art **18**S) *applicable to a person who In rood faith believed he had a right to act and had definite and adequate reasons for holding this erroneous belief.*

The court shall determine the penalty taking into account the circumstances of the case and, in particular, the circumstances that led to the error.

(2) *In exceptional cases of absolute andjustifiable ignorance and goodfaith and where criminal intent is not apparent, the court may impose no punishment.*

(3) *The person who committed the breach of the taw shall remain civilly liable for the injury caused.*

The problem of mistake of law and ignorance of the law, to which an allusion was made hereinbefore (see para. 1 (*b*) in comments under Art. 58) il and always has been a controversial one. The issue is whether a person who doe* an act objectively contrary to the law may justify himself on the ground tharhe has no guiltv mind since, owing to his being unaware of the existence of the IcaaLptcvision which he violates or mistaken as to its true meaning, he believe: act Jo fe lawful.

1. **By** way of introduction, it may be noted that there arc two main schools of thought regarding tbe effects of ignorance and mistake of law.

(a) It is a traditional and still widely prevalent conception that an offender is not justified by his unawareness or misconstruction of a legal provision (*ignorant ia juris nemlnen excusat).* Whether or not he actually knows the law is immaterial for he is in any event conclusively presumed to know it *(nemo legem ignorare censetur).* This presumption, which frees the court from the impossible task of ascertaining whether the actor knows his deed to be contrary to the law, is laid down in the general interest, regardless of the fact that the consequence may be

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hardship upon individuals, so that social peace and order be not constantly disrupted with impunity. “Every person must be taken to be cognisant of the law, otherwise there is no knowing to what extent the excuse of ignorance might be carried.” For purposes of criminal liability, therefore, it is irrelevant whether the doer is aware of the unlawfulness of his act;Jje is at£ault by the mere fact that he mistakenly believes his behaviour to be in accordance with the law and he must bear all the consequences of his failing in his duty to know the law *(error juris nocei).* His mistake may, at best, be considered in mitigation of the penalty.

(b) As is apparent, this utilitarian conception is based on a pure fiction. “The complexities of modem life and consequent increase in the volume of laws”, to quote the Preface of tbe Code, make it utterly impossible for anyone to know the laws, be they the laws of his own country, let alone to understand them. This is recognized even in France, where the said conception applies (see Art. 4 of the decree of November 5, 1870, according to which the courts may *“accueillir I'exception <f ignorance alltguie par les conirevenants, si la contravention a lieu dans le dilai de trois jours francs it partir de la promulgation".* Comparable rules, wider as regards their definition, if not their legal effects, could be found in tbe 1930 Ethiopian Penal Code. Thus Art 17 stated that "the stranger who has come from a foreign country, who has not heard the law and ordinances of the Government (for a period of six months), shall have five tenths remitted” and Art. 20 prescribed that “the countryman who converses in the language of his own country and does not know the Amharic language in which the edicts and law of the Government are made shall have eight tenths remitted; this present law however is only valid for a period of three years beginning from the date of its enactment; after three years the punishment shall be decided according to law.”). Furthermore, it is evident, also, that the classical conception is inconsistent with the principle *nulla poena sine culpa* upon which so many modem Codes, including the Ethiopian Code, are based. This is why there is nowadays a tendency towards resolving the question of ignorance and mistake of law by the general rules concerning criminal guilt If regard is had to the doer's state of mind rather than to tbe circumstances which bring it about, it follows that a person who is unable to distinguish right from wrong in consequence of his ignorance or misunderstanding of the law may not be deemed intentionally to commit an offence, for this implies that he knowingly decides in favour of wrong against right Thus a mistake of law, like a mistake of fact, a fleets the “knowledge” component of intentional guilt; when it entails that “there is no criminal intention" (Art. 76 (1), second alinea), it should produce the same juridical effects as a mistake of fact'ln either case, therefore, the issue is whether tbe actor is subjectively at fault, and this depends on whether the mistake is avoidable. If the answer is in the negative, tbe doer is blameless and must be found not guilty; if, on the other hand, the answer is in the affirmative and the doer could have ascertained the existence and/or meaning of the legal provision which he violated by exercising the care that could reasonably be expected of him in the circumstanccs, he is at fault, because he has been negligent. Thus awareness of the unlawfulness of the act, which does not necessarily accompany awareness of the morally reprehensible character of the act, is an ingredient of intentional guilt in the absence of which only negligence may be attributable to the offender. In this conception, therefore, “a mistake of law in any event negates intentional guilt and may exclude negligence also” (Logoz. *op. cit.,* p. 77). Nothing goes to show that this solution would create with regard to evidence greater difficulties than those which may be encountered in relation to many legal provisions, such as those concerning the difference between indirect intention and conscious negligence. Furthermore, it is in any event for the accused to prove ignorance or mistake of the law, which is not always more difficult to prove than any other defence.

2. Whatever may be inferred from Art. 58 (1), particularly in its French version. Art. 78 makes it clear that neither of the conceptions summarized above has been fully incorporated in Ethiopian law. Art 78, like Art. 20 of the Swiss Penal Code, “stands half-way between these two conceptions. It departs from the rule that a mistake of law should not bear upon the court’s judgment. But it does not go as far as prohibiting the court from punishing for an intentional offence a person who believed that he had a right to act” (Logoz, *op. cit.,* pp.

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77-78). In Ethiopian law like in Swiss law *(e.g.* ATF 75 IV 150, JdT 1950 IV 26: ATF 82 IV 15, JdT 1956 IV 86), awareness of the unlawfulness of the act is not an element of intentional guilt and ignorance or mistake of law is not a justification, but an excuse which the court must (may, according to the Amharic text, similar on this point to Art. 20 of the Swiss Code) take into consideration.

This solution, which is perhaps not in full harmony with the principles set out in Arts. 23 (3) and 57 (1), reflects and combines the opinions expressed during the lengthy debate which the Codification Commission held on the subject, namely that it would be as unrealistic to lay down a conclusive presumption that all the citizens know the law while the law so far has been almost entirely unwritten as it would in all respects be detrimental to the interests of a nation in full development always to let go free persons who do not take "due notice of the offences and penalties prescribed by law" (Art. 1). Hence tbe compromise solution supplied by Art. 78 which, moreover, is in conformity with the traditional Ethiopian criminal law concerning ignorance and mistake of law. For, as indicated above, the Code of 1930 dealt with this problem in the Chapter regarding "the law by which punishments are reduced" and provided for different remissions depending on the personal position of the accused pleading ignorance (Arts. 13-20).

3. Art. 78 applies, not when a person acts "under an erroneous appreciation of the facts of the case but when, being aware of the true facts of the case, he draws an erroneous inference therefrom" (ATF 72IV 150, JdT 1947IV 43). So far as concerns the availability of a possible justification, it is irrelevant whether the offender arrives at a wrong conclusion because he does not know the law or he misunderstands it since ignorance of the law is, in neither case, a complete defence. The "circumstances that led to the error" are pertinent solely to the question whether and to what extent the actor may be excused under Art. 78.

(a) Although Art. 78 does not specifically say so, it is evident that the doer fails in his duty to know tbe law only insofar as he acts in contravention of a law which he could and should have known, /*jg.* of a law duly published. In this respect, two provisions ought to be bo me in mind, namely Art. 2 (a) of the Establishment of the Negarit Gazeta Proclamation No. 1 of 1942, which states that "there is hereby established the Official Gazette which shall be called Negarit Gazeta in which shall be published all Proclamations, Decrees, Laws, Rules, Regulations, Orders, Notices and subsidiary legislation", and Art. 22 of the Administration of Justice Proclamation No. 2 of 1942, which states that "when any law has been enacted by Us, it shall be published in the Official Gazette of Ethiopia in the Amharic and English languages." It is worth noting, however, that a law as defined in the said Proclamation No. I may be law within the meaning of Art. 78 even though it is not published in the Negarit Gazeta as required by the said Proclamation No. 2 *(e.g.* Art. 6 of the Maritime Order No. 12 of 1953 reads: "The regulations issued in pursuance of this Order and of Our Maritime Laws shall become effective eight days after posting, in either Amharic or English, in three conspicuous places in each of Our **pom.").**

(b) Art. 78 may not be invoked unless, at the time of the aa, the doer in good faith believes that he is legally entitled to act as he does. If a doubt, however slight, crosses his mind concerning his right to act, he is not in good faith and it is then immaterial whether he knows the exact provision to which his act is contrary or believes that he will not be punished or is mistaken as to the kind or extent of punishment to which he is liable (Logoz, *op. cit.,* p. 79). "An offender who is, be it vaguely, aware of the fact that he does something unlawful may not plead ignorance of the law" (ATF 72 IV 150, JdT 1947 IV 43; see also ATF 74 IV 199, JdT 1949 IV 80). Yet an honest mistake does not suffice for the purposes of Art. 78 except where it is excusable, that is, where the doer has "definite and adequate reasons for holding this erroneous belief" *("des raisons pricises et suffisantes"*, in the French text). The purpose of these terms "is not to indicate that the court will not believe the accused unless he is able to give a clear and evident reason why he thought that he was doing a lawful act. (...). A reason is sufficient when the doer is not to blame for his mistake because it is the result of

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circumstances which would equally have led a conscientious person into error" (ATF 75 IV 150, JdT 1950 IV 26). Whether this condition is fulfilled must be decided from case to case, having regard particularly to the nature of the offence committed. For it is obvious, and it was noted during the discussions of the Codification Commission, that “the problem of ignorance and mistake of law will as a rule pose itself, not in the case of natural offences (such as homicide or theft), but in the case of ccrtain special offences such as economic offences'*. This, however, is not to say that an honest and excusable mistake may not be committed in relation to other offences, such as sexual offences, concerning which there have been radical changes in Ethiopian legislation. For instance, Art. 395 of the 1930 Penal Code prescribed that “a man who is found having illicit sexual intercourse without tbe consent of her parents with a girl who has not yet reached puberty whether with or without her consent shall pay a fine from 100 to 300 dollars and shall be imprisoned from 6 months to 2 years, or he shall be punished by either of these two punishments." Under the new Code, it is exclusively a question of age, and not of physical maturity and parental consent, whether such an act should be punished. A man having sexual intercourse with a girl having reached physical maturity, with her consent and that of her parents, might well, therefore, be unaware of the unlawful and morally reprehensible nature of his act and be excused under Art. 78, depending on his personal position, regardless of the fact that his offence should be deemed contrary to “natural law". For although “a person is not relieved of his duty to investigate whether a given act is lawful for the sole reason that he relies upon a widely prevalent opinion" (ATF 75 IV 169, JdT 1950IV 21), the cases in which this opinion has its source in a law previously in force should, it seems, be distinguished from those where it has no such foundation, particularly when the accused had no reason to believe that this law had been'replaced. The same may be said of the replacement of the law concerning bigamy (compare Art. 390 of the Code of 1930 with Art. 616 of the new Code, and read Art. 617 of the latter Code in conjunction with Arts. 585 and 611 of the Civil Code). The question of ignorance or mistake may also arise with respect to offences committed by foreigners. Although a foreigner is subject to the provisions of the Ethiopian Penal Code and must consequently examine whether his act *(e.g.* adultery) is penalized in Ethiopia even when it is not penalized in his own country (see, for instance, ATF 86 IV 212, JdT 1961 IV 82), he may nonetheless commit an excusable mistake aa to tbe meaning of the provision which he has examined, for example because he relies on tbe English text of this provision and such text does not accord with the authoritative Amharic text. If be then commits an offenoe without being at all aware of the fact that his act is unlawful, there is no reason why be should not be excused under Art. 78 (ne, for instance. ATF 69 IV 178, JdT 1943 IV 116, and ATF 70IV 97, JdT 1944 IV 98).

(c) So that Art. 78 may apply, il is essential, therefore, that the accused should not have been in error through his own fault. Wben this condition is fulfilled, the court may mitigate tbe penalty or impose no punishment whatsoever and it must, in doing so. take into account "tbe circumstances that led to the error” *(e.g.* whether the Negarit Gazeta circulates at tbe place where tbe offcnce was committed, whether the accused merely did not know of the law or tried to ascertain its meaning, whether be is educated and, generally, those circumstances which it could have taken into account according to the Code of 1930).

Art. 78 lay* down a solution which is at once similar to, and different from, the one which is contained in Art. 76. On tbe one hand, exemption is permissible “in exceptional cases of absolute and justifiable ignorance and good faith and where criminal intent is not apparent"; although, aa has been mentioned in relation to Art. 58, it seems that the accused should then be found not guilty, Art. 78 (2) entails the same practical consequences as Art. 76 (1), second alinea, which states that “where there is no criminal intention tbe doer shall not be punishable". On tbe other band, since tbe application of Art. 78 must be ruled out wben the mistake was avoidable. Art 78, unlike Art 76, does not prescribe that the accused will be punished far an offence committed by negligence, if negligence is penalized, “where be could have avoided tbe mistake by taking such precautions as were commanded by his personal position and tbe circumstances of tbe case.” In such a case, he is punishable for an intentional offence

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(note, incidentally, that it is doubtful whether a mistake of law may occur in the case of an offence committed by negligence; see ATF 78 IV 170, JdT 1953 IV 79) and he may not be excused under Art. 78. Tbe same applies, for instance, when the doer is aware of the unlawful nature of his act but not of a provision to the effect that this act is liable to an increased penalty *(e.g.* he knows that adultery is an offence, but not that it is punishable more severely according to Art. 618 (3) if the adulterer "installs a concubine in the conjugal home").

(d) Whatever decision may be made under Art. 78, it is without bearing upon tbe actor's civil liability; according to Art. 2035 of the Civil Code, he is answerable for the damage caused by his act even though he is exempted from punishment.

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CHAPTER X

EXTENUATING AND AGGRAVATING CIRCUMSTANCES [ARTS. 79-84]

Extenuating and aggravating circumstances are elements of a material and/or personal nature which do not affect the offender's liability to punishment but may or must be taken into consideration at the time when sentence is passed. They pertain to tbe position of the actor as well as to the conditions surrounding the commission of the offenoe. Depending on their character and effects, they are either general (Arts. 79 and 81) or special (Arts. 80 and 82) and are laid down by law so as to enable tbe court to give effect to the fundamental principles of individualization set out in Arts. 85 and 86.

Article 79. General extenuating circumstances

(1) *The court may reduce the penalty, within the limits allowed by law (Art.* 184), *in the folio wi^ cases:*

(a) when the offender who previously of good character acted without thought or by reason of lack of intelligence, ignorance or simplicity of mind;

(b) when the offender was prompted by an honourable and disinterested motive or by a hfgh religious, moral or civil conviction; "

(c) when he acted in a stale of great material or moral distress or under the apprehension of a grave threat or a justifiedfear, or under the influence of a person to whom he owes obedience or upon whom he depends;

(d) when he was led into great temptation by the conduct of the victim or was carried away by wrath, pain or revolt caused by a serious provocation or an unjust Insult or was at the time of the act in a justifiable state of violent emotion or mental distress;

(e) when he manifested a sincere repentance for his acts after the offence, in particular by affording succour to the victim, recognising his fgult or delivering himself up to the authorities, or by repairing, as far as possible, the injury caused by his offence.

(2) *When the law, in a special provision of the Special Part, has taken one of these circumstances into consideration as a constituent element or as a factor of extenuation of a privileged offence, the court may not at the same lime allow for the same circumstance to reduce the penalty applicable thereto.*

In opposition to some codes, such as the French one, which provide that tbe court may mitigate the penalty when it thinks fit on grounds which are not defined by law and need not be specified in the judgment (so-called system of judicial or indeterminate circumstances). Art. 79 of the Ethiopian Code, in imitation of Art. 64 of the Swiss Code, supplies a detailed list of the reasons why the court may reduce the punishment (so-called system of legal circumstances). Subject to the provisions of Arts. 80 and 83 and to such other express indications as may be found in the General *(e.g.* Art. 29) or Special *(e.g.* Art. 380) Part of the Code concerning the mitigation of the penalty to be ordered with respect to certain offences, this list is exhaustive. The said circumstances, some of which are similar to, though they do not affect the offender's liability or degree of guilt in the same manner as, the justifications and excuses laid down in the foregoing Articles, may, depending on the test used in classifying them, be divided into material (or external, or objective), personal (or internal, or subjective) and mixed circumstances, or into circumstances which precede, accompany or follow the commiaaion of tbe offence. Most of them, however, “pertain to the subjective element of tbe

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offenoe" (Logoz, *op. cit.,* p. 278) and are centred on tbe question whether tbe am;and has a dangerous disposition.

1. Tbe penalty may be reduced firstly when the offender acted out of light mindedness, lack of intelligence, stupidity or ignorance.

(a) Mitigation on tbe grounds stated in Art. 79 (I) (a) is permissible wben provisions such as those concerning limited responsibility, mistake of fact or ignorance of the law are inapplicable and (Art. 79 (2)) the accused is not liable to a punishment reduced on similar grounds pursuant to any of the specific articles of tbe law which he violated. However, it is not clear whether these circumstances may be invoked in cases where tbe court is given precise indications regarding the assessment of the sentence *(e.g.* Arts. 31 and 59 (2), second alinea), as compliance with these indications may entail a prohibition from reducing the penalty in accordance with Art. 79 (I) (a). Thus when tbe court finds that the accused acted with unconscious or inadvertent negligence, there seems to be no decisive reason why thoughtlessness should operate in mitigation. As has been mentioned in connection with Art. 59, the fault committed by one who does not think at all may actually be more serious than that committed by one who makes the wrong choice after carefully weighing the chances of causing harm. It appears, therefore, that Art. 79 (1) (a) should not apply in such a case any more than it does in the cases where the court, in following the said indications, is expressly or impliedly bound to take into consideration any of the circumstances laid down in this Article.

(б) The principle behind Art 79 (1) (a) is not that a thoughtless, stupid or ignorant man is not dangerous. Hence this additional requirement: the accused should previously have been of good character *("ayant toujouri eu jusque Id une bonne conduit*",* in tbe French text),

i. e. he should not on earlier occasions have shown himself to be dangerous. This condition is expressed in such a narrow manner, especially in Amharic and French (“*toujours")* as to imply that the accused should have no previous convictions at all. Yet it rather seems that an accused who acted out of lack of intelligence should not be deprived of the benefit of Art. 79

(1) *(a)* even though he is not a first offender, provided that his antecedents are not such as to convince the court that he is dangerous.

2. The punishment may also be mitigated when the accused was prompted by high motives. This circumstance does not apply unless these motives are high by ordinary moral standards, and not necessarily by those of the accused (Logoz, *op. cit.,* p. 278). Thus if *A,* out of pity, kills *B's* dog which has been run over by a car. he may be punished under Art. 653 but tbe penalty should be reduced because his motive was “honourable and disinterested”; if *A* strikes *B* who “scoffs at an authorized religious ceremony" (Art. 486 (a)), he may be punished for assault by a mitigated punishment sincc he acts out of a “high religious conviction" (serious provocation might also be invoked); a person who, in a bookstore, destroys books which may be considered obsccnc or indecent may be deemed to be prompted by a “high moral conviction”. The disposition of a person who violates the law with motives of this kind is not truly dangerous or anti-social. The same may be said of offences inspired by high civic or political ideals (see G. Levasscur. Justice and State Security, Journal of the International Commission of Jurists, Winter 1964, Vol. V, No. 2, pp. 234-246; see also the very questionable stand taken by tbe Swiss Federal Court in ATF 70IV 181, JdT 1945IV 57; note, finally, that one of the reasons why political offcnccs are not extraditable offences is because, in the terms of Professor Levasseur, those who Commit them “are not base criminals, enemies of society, but intelligent men, progressive men, who seek the happiness of their fellow citizens"). In other words, just as it is a general aggravating circumstance to act with a base motive (Art. 81 (1) *(a)),* it is an extenuating circumstance to act with a high motive.

3. The punishment may be reduced if the accused was in a state of distress or fear or was moved by a sense of respect or obedience.

(a) Distress, whether material or moral, operates in mitigation when it falls short of necessity. This may be the case, for example, when a poor man, after exhausting all poasi-

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bilitics of finding honest work for himself and/or his wife, induces his wife to prostitute herself and lives on her earnings (Ait. 604; to this effect, see ATF 79IV 120, JdT 1934 IV 41); when a released convict who cannot find employment because he cannot produce a certificate of work or similar recommendation forges such a certificate (Art. 393); when, as is expressly mentioned in Art. S33, a woman who is pregnant as a result of having been raped aborts herself. Although this circumstance implies a kind of necessity, it may be invoked even when the accused is to blame for the creation of the state of distress in which he found himself *(e.g.* he lost his job because he committed a professional fault), for few are the cases in which Buch a stale is brought about exclusively by external factori (ATF 83 IV 187, JdT 1958IV 6).

(b) The circumstance pertaining to the apprehension of a grave threat or the existence of a state of justified fear is taken from the Swiss Code where it serves some purpose as the said Code makes no specific provision regarding coercion (Logoz, *op. cit.,* p. 278, thus mentions moral coercion as a case in which this circumstance may apply). In the context of the Ethiopian Code, however, it docs not seem to add much to Arts. 67 and 68, which prevail over Ait. 79. Besides, it could have been omitted also on the ground that it implies in any event a state of great distress.

(c) The fact of having acted out of a so-called reverential fear may be considered in mitigation whenever Art. 67, 68 or 70 is inapplicable. During the debates of the Codification Commission, the question was asked whether the scope of Art 70 should not be broadened in view of the traditional importance of master and servant relationships in Ethiopia. The drafter replied that a relationship created under private law, unlike one created under public law, does not give rise to a true hierarchical subordination; the duty to obey, therefore, is not as compelling in the former as in the latter case, nor are tbe consequences of a'refusal to obey similar in both cases. Hence the rule that a state of dependency or subordination of a private nature may operate only as an extenuating circumstancrfc^- Arts. 635 (2) HB3'2525 of the Civil Code). *

4. A convicted person may also be punished by a mitigated penalty if he has been led into temptation by the conduct of the victim or has acted under provocation or in a state of violent emotion.

(a) The first circumstance, which basically consists, like the second one, of serious provocation but differs from provocation *ttricto sensu* because the doer is not “carried away by wrath, pain or revolt”, is present when “the victim provokes the offender in such a serious manner that the blame for the offence does not rest exclusively upon the actor but is shared by his victim" (ATF 75 IV 4, JdT 1949 IV 6). Vet "it is not sufficient that the victim should in whatever way behave himself in a reprehensible manner towards the offender (...). On the other hand, the court may take into consideration any conduct (barring instigation) whereby the victim leads the offender into temptation. Such conduct, for example in the case of sexual offences, may warrant mitigation. So too. the consent of the victim may be taken into account if it does not constitute a justification" (Logoz, *op. cil.,* p. 279). It is necessary that the temptation should be grave, *I.e.* of such a nature and degree as to partially subdue the offender's will and make it understandable why he failed in his duty to resist provocation. Regard must be had, therefore, to the personal position of the offender and the victim, including their respective age, for, particularly in the cases of sexual outrages (in which this circumstance is usually invoked), “one will as a rule hesitate to admit that the behaviour of a minor towards an adult warrants mitigation on the ground of serious temptation. Mitigation is certainly not justified when a minor is to blame solely for having complacently yielded to tbe demands of an adult” (ATF 73 IV 157, JdT 1947 IV 177 and ATF 78IV 81, JdT 1953IV 31; see, however, Art 597 (2) which, in any event, is questionable). It is necessary, also, that the offender himself should have been provoked, and provoked by tbe victim himself. This condition is not fulfilled when, there being no provocation on the victim's part or there being provocation not intended for tbe offender, the latter is moved only by his own immorality or sexual instinct or is tempted in tbe sense that a favourable opportunity to commit tbe offence

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presents itself, nor is the condition fulfilled when the offender is tempted by the behaviour of third parties *(e.g.* when the parents of a minor girl do not object to tbe offender having sexual intercourse with her), even though they are legally or morally bound to watch over the victim (ATF 75 IV 4. JdT 1949 IV 6).

(b) A provocation *stricto sensu* or an insult may be considered in mitigation on the following conditions.

(0 The provocation must be serious or the insult must be unjust, without the actor being, however, m either instance in a state of legitimate defence. As is stated in Art. 38 of the Sudanese Penal Code, this circumstance does not include "provocation sought or voluntarily provoked by the offender as an excuse for committing the offence, provocation given by anything done in obedience to the law or by a public servant in the lawful exercise of the powers of such public servant, or provocation given by anything done in tbe lawful exercise of the right of private defence". A typical case in which this circumstance may apply is that of adultery, where tbe injured spouse kills the unfaithful spouse and/or the co-respondent taken in the act (which case actually falls under Art. 524, so that there ■« nn rnnm for further mitigrtjgn-of.the punishment on the ground of provocation). In such a case, the murderer is not justified under Art. 74 for although his rights as a spouse arc disregarded and the unfaithful spouse fails in his duty of fidelity (Art. 643 of the Civil Code), he is not threatened with an unlawful assault nor, of course, is the unfaithful spouse, since the "legally protected belonging" affected by the offence is the institution of marriage.

(ii) It is not necessary that the actor should personally be provoked or that the unjust insult should be addressed to himself *(e.g. A* publicly gives his wife or child a severe, coarse and unwarranted reprimand and *B,* an indignant witness, slaps him; tbe assault is committed under provocation even though *B* is not personally insulted).

(iii) The actor must have been carried away *("entralnf* , in the French text) by wrath, pain or revolt caused by, and only by,4his provocation or insult. The words "carried away" imply as a rule *"une certain? idie d'immidiateti dans Iti riaction"* (Logoz, *op. cit.,* p. 280). Answering the suggestion made by a member of the Codification Commission to the effect that the notion of "cooling time" should be inserted in the law so as to permit distinguishing acts done under provocation from acts done in cold blood out of revenge, the drafter said that "the time element is not necessarily decisive. What matters is whether there truly exists an excusable state of mind of the kind described by the law. It would in any event be extremely difficult to fix a reasonable time regarding the reaction and it is a question of circumstances whether the chain of causation between the provocation and the reaction has been interrupted by lapse of time. Besides, the expression 'earned away' is significant enough; il is evident that one is not so carried away for yean." One should not, therefore, automatically rule out the possibility of wrath, pain or revolt extending over or reviving after a rather long period of time, as in tbe case where the injured spouse looks for his wife's lover and discovers him only some weeks after the adultery or be finds himself for the first time, some weeks after the adultery, in the presence of his wife's lover.

(hr) In cases of provocation or insult as in cases of legitimate defence, the reaction must be directed against the person whose conduct arouses the actor's wrath, pain or revolt.

(c) In view of these two circumstances and also of sub-art. (1) *(c)* which permits mitigation when the offender acted "in a state of great moral distress", there may appear to be little point in providing for tbe reduction of the punishment in tbe cases where "he was at the time of the offence in a justifiable state of violent emotion or mental distress" falling short of total or partial irresponsibility. Yet certain situations may occur which do not fit any of the preceding requirements and this circumstance may, therefore, apply as an alternative to tbe foregoing ones. On the other hand, it is likely that most of the cases in which it might be invoked will actually amount to "privileged offences" according to the Special Part of the Code (Arts. 524 *(b)* and 542 (1) (A)). Thus if a woman, desperate at discovering that her child

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ia deaf and dumb, Jumps with him in the Awash river and (he it saved but tbe child diea. she commits homicide in a justifiable state of mental distress. She is not, however, to be charged with homicide in the second degree (Art 523), the court being then at liberty to reduce tbe punishment according to Art 79 (1) *(d),* but with extenuated homicide (Art. 524 (*b*)), and further mitigation on the ground of mental distress is then prohibited by Art. 79 (2). So that thia circumstance may apply, it does not suffice that tbe emotion should be violent; it must be justifiable, too. Thus if *A* after kissing Miss *B* feels such a violent sexual emotion that be rapes her, tbe pertinent circumstance may not be invoked for his emotion is not, legally, justifiable. As a general rule, tbe same holds good of any violent emotion stirred up by tbe prospect of committing an offence or by tbe very commission of an offence.

5. Finally, tbe manner in which the offender behaves after the offence may be a ground for mitigating tbe penalty. Any conduct showing that he is sincerely repentant and truly regrets what he has done may be taken into consideration, provided, however, that this repentance manifests itself by acu. On this point, the English text is not as clear as the French one which requires that the offender should have "*manifest* un repentir sincere par ses actej apris r infraction",* that ia, *by* his acu and not *for* his acu, as the English translation wrongly states. Mere contrition and platonic regrets, therefore, will not suffice; what is expected is not "a purely passive attitude, but behaviour indicating the offender's desire to repair the harm be has done" (ATF 73 IV 159, JdT 1947 IV 162). Although active or positive behaviour u required, sincere repentance within the meaning of Art. 79 (1) (e) is not equivalent to "active repentance" as defined in Art 28 (2) since the offender does not prevent or contribute to prevent tbe consequences of his act from eventuating. This, however, doea not mean that there is room for sincere repentance only after the offence is completed; it may well follow upon an attempt to commit an offence but does not amount to active rcpentanoe so long as tbe offender's conduct is not tbe reason for the failure *(e.g. A,* after shooting and missing *B,* informs tbe police of his attempt).

By way of illustration, Art 79 (1) (e) mentions four cases in which the punishment may be reduced on the ground of sincere repentance.

(a) Tbe offender came to the victim's assistance. Insofar as this may occur when the actor has caused the victim physical harm, one fails to see exactly why be should be rewarded for having complied with his legal obligation to help the penon he has wounded (Art 547 (2) (d); tee, however, ATF 87 IV 7 quoted in relation to Art. 60 (1)).

(fr) The offender admitted having committed the offence. This circumstance ia taken from Art 23 of the 1930 Penal Code which stated that "if, knowing that he has committed an offence, (the offender) confesses of his own free will beforehand that he has committed an offence, (the punishment) shall be light" The said circumsUnce is not present when the accused, knowing from the findings of the police that he has no chance of getting away with the offence, confines himself to pleading guilty at tbe trial.

(c) Tbe offender deliven himself up to the authorities. This case was also provided for by tbe 1930 Code, Art. 24 of which prescribed that "if a man after committing a crime surrender of his own free will before the crime is discovered and is tbe first to speak about tbe matter, (the punishment) shall be light" Although this circumstance may well be present together with the preceding one, the law does not require that the offender should surrender himself and make a confession; either circumstance may, therefore, be invoked even though the other one is not realized.

(<0 Tbe offender repain to the best of his ability the damage caused by tbe offence. Contrary to what might be inferred from Art 79 (1) (e), this reparation need not always be in the form of monetary compensation and may be of any kind whatsoever. There is sincere repentance when *A* gives back to *B* the property be has stolen from him; when, in the absence of a court order, he pays *B'%* hospital expenses after causing him physical harm; when be apologizes to *B* after insulting him, etc. What is decisive in these cases, like in the preceding ones, is whether tbs offender's behaviour is actually indicative of repentance and not whether be has repaired

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all the damage he caused, tines in any event he is expected to repair it only "as far as possible". As this circumstance may operate in mitigation only if the actor's conduct after tbe offence shows that his disposition is not as dangerous as might be inferred from tbe mere fact that be contravened the law, tbe court should not confine itself to examining whether be has done, by way of reparation, as much as could reasonably be required of him and it should also consider the reasons why he has done it and the spontaneous ness of his repentance. Thus it seems that sincere repentance should be ruled out when a thief returns stolen goods only in the hope that this will induce the owner to withdraw the complaint he may have made to the police.

6. When any of the above circumstances is present, the court may mitigate the penalty in the manner provided for by Art. 184 on the condition that the circumstance under consideration is not, according to the Special Part of the Code, an ingredient or extenuating factor of the offence with respect to which the question of mitigation arises, for Art. 79 (2) prohibits the court from taking the same fact into account firstly as a special circumstance and secondly as a general circumstance. In other words, the punishment may not be reduced twice on the same ground *(e.g.* simplicity of mind, in Art. 29. second alinea, and Art- 79 (I) (a); high motives, in Art. 79 (1) *(b)* and Art. 563 (1) or 581 (2) *(b);* material or moral distress in Art. 79 (1) *(e)* and Art. 533 or 806 (1); provocation, in Art. 79 (1) *(d)* and Art. 524 (6), 542 (1) *(b)* or 584 (1); sincere repentance, in Art. 79 (1) *(e)* and Art 380 (1), 585 or 599). What Art. 79 (2) means, therefore, is that the punishment to be ordered with respect to a person convicted, say, for having killed another "following gross provocation" (Art. 524 *(b))* may be reduced on any of the grounds laid down in Art. 79 (I) other than provocation, as this circumstance is an essential element of the offence of extenuated homicide which is. therefore, a "privileged offence". This holds good also with respect to some of the general circumstances set out in Art 79(1). Thus a penalty may not be mitigated twice on the grounds of "grave moral distress" (Art. 79 (1) (c)) and "mental distress" (Art 79 (1) *(d)).*

Subject to this restriction, the court may reduce the penalty for the reasons set out in Art 79 (1) whenever it is satisfied that such a mitigation, known as "ordinary mitigation" (Art 184) is justified. It may be noted that mitigation is only optional when a general extenuating rircumstance is present, while aggravation is compulsory when a general aggravating circumstance is present (Art. 81). This discrepancy, which would seem questionable since circumstances bearing upon the degree of guilt of the accused and pertaining to his dangerous disposition should operate in the same manner whether they lead to an increase or a reduction of the punishment, is more apparent than real. If Art. 79 is read in conjunction with Art 184, there is no doubt that the punishment *must* be reduced, though not whenever a general extenuating circumstance is present *(e.g.* whenever a thief returns the goods he has stolen), but only wben the court considers that this circumstance is so eloquent that it cannot be ignored in passing sentence; for Art. 184 states that if the court deems mitigation justified *(e.g.* wben a thief returns stolen goods out of remorse, and not out of fear), "it *shall* pronounce.. .etc." These two provisions would, therefore, appear to call for the same interpretation as the corresponding provisions of the Swiss Code (Arts. 64 and 65), namely that *"when* the judge considers that the penalty should be mitigated on any of the grounds mentioned in Art. 64, be *must* order a reduced punishment in accordance with the scale of punishments laid down in Art. 65; the text of the latter provision makes this point perfectly clear. But Art. 64 gives the judge wide discretion as to *whether* the penalty should be mitigated. Tbe law does not say that the judge must, but that he *may* reduce the punishment for any of the reasons described by law (...). This discretion is necessary so that, despite the fulfilment of any of the conditions stated in Art. 64. the judge should not be compelled to take this condition into consideration when mitigation is undeserved in view of all the circumstances of the case" (ATF 71 IV 79, JdT 1945 IV 168). The provisions of Art. 84 concerning the assessment of the sentence in cases of cumulation of extenuating and aggravating circumstances actually confirm this interpretation.

The extent of the reduction "within the limits allowed by law" is to be decided from case to case and it may vary depending in particular on whether one or more, or which extenuating

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all tbe damage he caused, since in any event he is expected to repair it only “as far as possible”. As this circumstance may operate in mitigation only if tbe actor's conduct after the offence shows that his disposition is not as dangerous as might be inferred from the mere fact that he contravened the law, the court should not confine itself to examining whether he has done, by way of reparation, as much as could reasonably be required of him and it should also consider the reasons why he has done it and the spontaneousness of his repentance. Thus it seems that sincere repentance should be ruled out when a thief returns stolen goods only in the hope that this will induce the owner to withdraw the complaint he may have made to the police.

6. Wben any of tbe above circumstances is present, the court may mitigate the penalty in the maimer provided for by Art. 184 on the condition that the circumstance under consideration is not, according to the Special Part of the Code, an ingredient or extenuating factor of the offence with respect to which the question of mitigation arises, for Art. 79 (2) prohibits the court from taking the same fact into account firstly as a special circumstance and secondly as a general circumstance. In other words, the punishment may not be reduced twice on tbe same ground *(e.g.* simplicity of mind, in Art. 29, second alinea, and Art. 79 (I)

(a) ; high motives, in Art 79 (1) *(b)* and Art. 563 (1) or 581 (2) (5); material or moral distress in Art. 79 (1) (c) and Art 533 or 806 (1); provocation, in Art. 79 (1) *(d)* and Art. 524 *(b),* 542 (I) (*b*) or 584 (1); sincere repentance, in Art. 79 (1) *(e)* and Art. 380 (1), 585 or 599). What Art. 79 (2) means, therefore, is that the punishment to be ordered with respect to a person convicted, say, for having killed another “following gross provocation" (Art. 524 (*b*)) may be reduced on any of the grounds laid down in Art 79 (1) other than provocation, as this circumstance is an essential clement of the offence of extenuated homicide which is, therefore, a “privileged offence”. This holds good also with respect to some of the general circumstances set out in Art. 79(1). Thus a penalty may not be mitigated twice on the grounds of “grave moral distress’* (Art 79 (1) (c)) and "mental distress" (Art. 79 (1) (</)).

Subject to this restriction, the court may reduce the penalty for the reasons set out in Art 79 (1) whenever it is satisfied that such a mitigation, known as "ordinary mitigation" (Art 184) is justified. It may be noted that mitigation is only optional when a general extenuating urcumstance is present, while aggravation is compulsory when a general aggravating circumstance is present (Art. 81). This discrepancy, which would seem questionable since circumstances bearing upon the degree of guilt of the accused and pertaining to his dangerous disposition should operate in the same manner whether they lead to an increase or a reduction of the punishment is more apparent than real. If Art. 79 is read in conjunction with Art. 184, there is no doubt that the punishment *must* be reduced, though not whenever a general extenuating circumstance is present *(e.g.* whenever a thief returns the goods he has stolen), but only when the court considers that this circumstance is so eloquent that it cannot be ignored in passing sentence; for Art 184 states that if the court deems mitigation justified *(e g* when a thief returns stolen goods out of remorse, and not out of fear), “it *shall* pronounce.. .etc.” These two provisions would, therefore, appear to call for the same interpretation as the corresponding provisions of the Swiss Code (Arts. 64 and 65), namely that *"when* the judge considers that the penalty should be mitigated on any of the grounds mentioned in Art. 64, he *must* order a reduced punishment in accordance with the scale of punishments laid down in Art. 65; the text of the latter provision makes this point perfectiy clear. But Art. 64 gives the judge wide discretion as to *whether* the penalty should be mitigated. The law does not say that the judge must, but that he *may* reduce the punishment for any of the reasons described by law (...). This discretion is necessary so that, despite the fulfilment of any of the conditions stated in Art. 64, the judge should not be compelled to take this condition into consideration when mitigation is undeserved in view of all the circumstances of the case" (ATF 71 IV 79, JdT 1945 IV 168). The provisions of Art. 84 concerning the assessment of tbe sentence in cases of cumulation of extenuating and aggravating circumstances actually confirm this interpretation.

The extent of the reduction “within the limits allowed by law" is to be decir’ed from case to case and it may vary depending in particular on whether one or more, or which extenuating

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circumstance* are present It must be clear, however, that the punishment to be mitigated is the one which the court would have ordered in the absence of extenuating circumstances (to this effect, see the above-quoted ATF 71 IV 79). The court, therefore, is expected to make a double estimation. Firstly it should decide which penalty it would have ordered had the accused not acted in extenuating circumstanccs; secondly it must reduce this penalty having regard to the extenuating circumstance which is present in the particular case. This means, *inter alia,* that when an offence is liable to a severe punishment and, in the alternative, with a more lenient one. the punishment to be mitigated is not as a matter of right the more lenient one. For example. Art. 592 states that a person who, by taking advantage of his position, has sexual intercourse with a person detained under his supervision "is punishable, according to the seriousness of the case, with rigorous imprisonment not exceeding five years or with simple imprisonment for not less than one month." The fact that the offender "was led into grave temptation by the conduct of the victim" does not in itself entail that rigorous imprisonment must be ruled out and that the penalty to be mitigated is the one of simple imprisonment for at least one month as this would amount to a double reduction. Mitigation on the ground of serious temptation should not, il seems, apply to the punishment of simple imprisonment unless the court would not have ordered rigorous imprisonment even though the accused had not been tempted by the victim. From a practical point of view, the difference is considerable if one bears in mind the provisions of Art. 184. If the punishment to be mitigated is rigorous imprisonment not exceeding five years, the court must substitute therefor simple imprisonment for not less than six months (Art 184 *(d));* but if the punishment to be mitigated is simple imprisonment for not less than one month, the accused may be sentenced to ten days simple imprisonment (Art. 184 (*)).

The question may be asked whether the fact that a general extenuating circumstance is present necessarily implies that the court is prohibited from calculating the punishment otherwise than in accordance with Art. 184. Thus, to come back to the above illustration, may the court make the following reasoning: "But for the fact that the accused has been provoked by the victim, we would have sentenced him to three years rigorous imprispnment. In view of this fact, however, we sentence him to one year rigorous imprisonment" ? Or is the court bound to substitute simple imprisonment for rigorous imprisonment ? This question, which is of particular importance when the court is expected to change the nature of the punishment, may, it seems, be answered in either of the following ways. On the one hand. Art 184 may be deemed to confine itself to showing the court how low it may go when it reduces the punishment and docs not prevent it from reducing it to a lesser extent than is prescribed by the said Article. Supposing that the penalty to be mitigated is simple imprisonment, the court should, according to Art. 184 (/). replace it by "compulsory labour or a fine". Yet "it cannot have been the legislator's intention that the judge should be faced with tbe alternative cither to punish the accused with (simple imprisonment) or to order (compulsory labour or a fine). There may be cases where circumstanccs which would warrant (ordinary) mitigation would lead to the result that the one penalty would be too severe and the other one, too lenient In these cases, the judge has the right to refuse (ordinary) mitigation and to take these circumstanccs into account while assessing sentence within the limits prescribed by law for the offence under consideration. The judge, therefore, is not obliged to allow these circumstances to operate (in the manner provided for by Art. 184) whenever the conditions laid down in (Art. 79) are fulfilled, but only when, in addition, the infliction of the more lenient penalty to be ordered in the alternative pursuant to (Art. 184) appears to be justified" (ATF 71 IV 79, JdT 1945 IV 168). On the other hand, in the absence of any indication in the records of the Codification Commission, it may be argued that Art. 184 is imperative and gives the court no discretion at all; in the above case, the court would, therefore, be bound to replace rigorous imprisonment by simple imprisonment. This substitution, however, should not be effected at the expenses of logic. Since the court would then be compelled to replace gorous imprisonment by "simple imprisonment for six months to five years" (Art, 184 (</)), it should obviously not order simple imprisonment for a period longer than the period of rigorous imprisonment which it would have considered adequate (»>. one year) had it not

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been bound by Art 184 to change the kind of the punishment. This is all the more true since, so far as concerns the enforcement of sentences, there is little difference at present between simple and rigorous imprisonment.

Article 80. Special circumstance*; Family relationship or relationship of affection

(1) *The court may, without restriction, reduce the punishment (Art.* 185) *when the offender acted in a manner contrary to the law and In particular failed In his duty to report to the authority or afford it assistance, made a false statement or deposition or supplied false information or assisted an offender in escaping prosecution or the enforcement of a penalty, for the purpose of not exposing himself, one of his near relatives by blood or marriage or a person with whom he is connected by specially close ties of affection to a criminal penalty, dishonour or grave injury.*

The court shall examine and determine the existence and adequate nature of the relationships Invoked.

(2) *If the act with which the accused person is charged was not very grave and If the ties in question were so close and the circumstances so impelling that they placed him In a moral dilemma of a particularly harrowing nature the court may exempt him from punishment other than reprimand or warning (Art. 121).*

(3) *Nothing in this Article shall affect the provisions of Articles 267 (4), 344* (*3) and 647 (4).*

In addition to general extenuating circumstances, the law provides for a special extenuating circumstance which appeared in the 1930 Penal Code already. The circumstance described in Art. 80 is special as regards its nature, since it may not be invoked by anyone in any case, as well as its effects, since it warrants more than ordinary mitigation.

1. According to Art. 80 (1), the'court may reduce the punishment when a person commits an offence with a view to saving himself, a relative by blood or marriage or a close friend from prosecution, punishment, dishonour or grave injury. By way of illustration, the said Article mentions a number of cases in which such a reduction is permissible.

(a) A person fails to report a relative or friend to the authorities. Thus *A* may invoke Art. 80 if, knowing that his brother *B* has committed homicide in the first degree, he does not inform the police thereof as he ought to according to Art. 438 (1) (a).

(b) A person fails to assist the authorities in apprehending a relative or friend. Thus *A* may invoke An. 80 (see Art. 701 (1)) if, on being ordered by a policeman to participate in the arrest of his brother *B,* he refuses to do so in contravention of Art. 761.

(c) A person makes a false statement or deposition or gives the authorities false information concerning an offence committed by a relative or friend. Thus *A* may invoke Art 80 if, on being asked by an investigating police officer whether his brother *B,* who is suspected of homicide, was in Addis Ababa on a certain day, falsely states that his brother was in Jimma on that day (Art. 440 *(b))* or testifies in court that his brother was in Jimma (Art 447).

(d) A person helps a relative or friend to escape prosecution. Thus *A* may invoke Art. 80 if, after his brother *B* confesses to him to having killed C and tells him that he forgot his hat with his name on it, in Cs house, he goes to *C't* house and takes the hat before it is found by the police (Art. 439).

(e) A person helps a relative or friend to escape the enforcement of a sentence. Thus *A* may invoke Art. 80 if. while his brother *B* is taken to prison by a policeman after being sentenced to one year imprisonment, he attacks the policeman and sets his brother free (Art. 454).

2. As is apparent, all the above cases are cases where the actor commits an offence “against the administration of justice" (Book IV, Title IV and Book VIII, Title 1, Chapter 3, Section II of the Code) and it may be asked whether there are other cases in which the circumstance

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provided for by Art. 80 may apply. For instance, *A* confesses to his brother *B* to having raped Miss C, who recognized him. May the court reduce the punishment in accordance with Art. 80 if *B* then kills Miss *C*so that his brother *A* cannot be identified? It seems that this question should be answered in the negative. It might be argued that the cases in which the said circumstance may not be invoked are mentioned in a limiting manner in An. 80 (3). This, however, is not quite true since Art. 80 (3) does not deal generally with the question as to what kind of offences may be committed in assisting a delinquent relative or friend; except for the case of receiving, it deals with the offence committed by this relative or friend and merely prescribes that when the latter has perpetrated a crime against the Stale, mutiny or desertion, he who assists him thereafter will not benefit by the provisions of Art. 80. What should be taken into consideration for tbe purpose of identifying the cases in which family relationships or relationships of affection may t considered in mitigation is the fact that the Codification Commission presumably intended merely to preserve an extenuating circumstance which was traditional in the Ethiopian criminal law, but not to widen its scope. Even under the 1930 Code, the pertinent circumstance applied solely with rcspect to certain offences committed "by disobedience to a judge and by hindering the work of the courts of justice'* (Arts. 245 and 246) and "by releasing prisoners who are imprisoned as a punishment" (Arts. 251 and 252), and these restrictions will be found in other laws, too *(e.g.* Arts. 305 and 308 (2) of the Swiss Penal Code and ATF 81 IV 39; JdT 1955 IV 123). In view of this and also of the illustrations supplied by Art. 80 (1), it may be suggested, therefore, that the said Article may be invoked only insofar as the person who assists a re! .ve or friend who has committed an offence himself commits, in doing so, an offence against the administration of justice.

3. Art. 80 may not be invoked unless the following conditions are fulfilled also.

(a) The person who commits an offence against the administration of justice with a view to helping an offender must be connected with him:

(0 by blood or marriage. UAlike Arts. 246 and 252 of the 1930 Code, Art. 80 (1) does not state how far this relationship extends. There is no reason, however, why a blood relationship should not be taken to mean a relationship of the kind defined in Arts. 550 and 551 of the Civil Code and a relationship by marriage, one of the kind defined in Arts. 552-554 of the Civil Code; or

(ii) by dose ties of affection. This condition, which did not appear in the Code of 1930, is not capable of being defined in a general manner. As is mentioned in the second alinea of Art. 80 (1), it is for the court to determine what kind of relationship exists in any particular case, and whether it is "adequate". The latter term should, it seems, be read exclusively in conjunction with ties of affection, for a blood or marriage relationship will probably always be held to be adequate, *i.e.* so close as to explain and partly excuse the actor's behaviour.

(b) The person who helps the offender may do so either in his own interest or in that of the offender. In either case, however, this interest must consist of avoiding "a criminal penalty, dishonour or grave injury" and not, for instance, the institution of a civil suit Thus if *A* makes a false statement to protect his brother *B.* a suspected murderer. Art. 80 applies even though *A* does not want to save his brother as much as he wants to protcct his own reputation and avoid the dishonour of being known as the brother of a murderer. Furthermore, although Art. 80 (1) does not specifically say so, it seems that the pertinent circumstance should not operate when a person seeks to avoid a penalty, dishonour or injury to which he would be exposed as a result of his having himself committed an offence other than that with rcspect to which the question of mitigation arises. In other words, what this person must be trying to avoid are the consequences of an offence committed by the relative or friend whom he helps. Thus if *A,* while serving sentence for theft, escapes from prison after knocking out a warder, he is punishable under Art. 455 and may obviously not invoke Art. 80 on the ground that he escaped "for the purpose of not exposing himself to a criminal penalty". In such a case, no family relationship or relationship of affection exists. Yet doubtful cases may occur. For instance, if *A,* after assisting his brother *B* in the commission of a theft, is suspected by the

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police and accuses C of having committed the offence, tbe purpose *of* this false accusation (Art 441 (a)) is to save *A* as well as *B* from being prosecuted. Although it is oertain that Ait 80 might have been invoked if *A* had not been personally involved in the tbeft, it is debatable as to whether *A* may invoke it in view of the part he himself played in the commission of the offence the consequences of which be seeks to avoid.

(c) Whatever the kind of assistance given by a person to a delinquent relative or friend, it is dear that this person may not avail himself of the provisions of Art 80 unless this assistance is given after such relative or friend has committed an offence. Thus Art. 80 obviously does not apply when *A* helps his brother *B* in the perpetration of a theft because he thinks that *B* is so stupid that he will inevitably be caught unless he (*A)* assists him.

4. When tbe above requirements are satisfied, the court may reduce the punishment without restriction (Art. 80 (1)) or confine itself to reprimanding or warning the accused (Art
80 (2)). Unlike the general circumstances laid down in Art. 79, which warrant only a so-called ordinary mitigation (Art 184) and never exemption from punishment, the special circumstance laid down in Art. 80 gives rise to a so-called free mitigation (Art. 185, which gives the court in all respects greater discretion than Art 184) or may, on certain conditions, justify the imposition of the “secondary punishment" provided for by Art. 121.The rationale of this liberal solution is that the state of mind of a person acting in the manner described by Art.
80 is somewhat similar to that of a person acting in a state of necessity or under duress (to the same effect, see Logoz. *Partie Sptciale,* II. p. 736 and ATF 87 IV 21, JdT 1961 IV 145).

Subject to the provisions of Art. 80 (3) and to the comments made under para. 2 *supra,* the court may, therefore, freely reduce the penalty and, for instance, substitute ten days simple imprisonment for any term of rigorous imprisonment whenever it considers that mitigation is justified. But the court may do even more than that and replace any principal punishment *(i.e.* imprisonment of whatever kind, compulsory labour or fine) by an admonishment and a warning (Art. 121). The court may not altogether dispense with any punishment whatsoever and must apply Art. 121 if it considers that a principal penalty would be undeserved. Furthermore, the court may not apply Art. 121 unless the bond existing between the accused and the offender he helped is so close that the former was in a situation similar to absolute moral coercion *and* the offcnce committed by the former in helping the latter is not very serious. One who assists a delinquent relative or friend may invoke Art. 80 whatever the nature or seriousness of the offence (other than an offence against the State, mutiny or desertion) committed by such relative or friend; and he may invoke Art 80 whatever the seriousness of the offence against the administration of justice which he himself commits in to assisting his relative or friend, but he is not eligible for exemption from any punishment other than a reprimand unless he does not gravely hinder the administration of justice. A “not very grave act" within tbe meaning of Art. 80 (2) would be, for instance, an offence in violation of Art. 438, 440 or 761.

Article 81. General aggravating circumstances

(1) *The court shall increase the penalty as provided by law (Art.* 188) *in the following cases:*

(a) when the offender acted with treachery, with perfidy, with a base motive such as envy, hatred, greed, with a deliberate intent to injure or do wrong, or with special perversity or cruelty;

(b) when he abused his powers, or functions, or the confidence or authority vested in him;

(c) when he Is particularly dangerous on account of his antecedents, the habitual or professional nature of his offence or the means, time, place and circumstances of its perpetration, in particular if he acted by night or under cover of disturbances or catastrophes or by using weapons, dangerous instruments or violence;

(d) when he acted in pursuance of a criminal agreement, together with others or as a member of a gang organized to commit offences and, more particularly, as chief, organizer or ringleader;

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(e) when he intentionally assaulted a victim deserving special protection by reason of his age, state of health, position or function, in particular a defenceless, feeble-minded or invalid person, a prisoner, a relative, a superior or inferior, a minister of religion, a representative of a duly constituted authority, or a public servant in the discharge of his duties.

(2) *When the law, in a special provision of the Special Part, has taken one of the same circumstances into consideration as a constituent element or as a factor of aggravation of an offence, the court may not take this aggravation Into account again.*

Art. 81 is parallel to Ail. 79 in that it lays down a number of circumstances which bear upon the degree of guilt of the accused and indicate that he has a particularly dangerous disposition. General aggravating circumstances may, like general extenuating circumstances, be divided into material and personal circumstances; some of them have both qualities at once (mixed circumstances). They may also be divided into circumstances preceding or accompanying, but not following, the commission of the offence. Subject to the provisions of Arts. 82 and 83 and to such Articles in the Special Part as provide for aggravated offences, penalties may not be increased on grounds other than those laid down in Art 81.

1. The accused is liable to an aggravated punishment when his dangerous disposition can be inferred from his motives *(e.g.* envy, hatred or greed; note that greed, to the extent that it affects pecuniary penalties (Art. 90 (1)), is mentioned here by mistake), his state of mind at the time of tbe act (deliberate intent to injure or do wrong, an illustration of which may be found in Art 586 (1) (c)) or the conditions in which he acts (with treachery, perfidy, special perversity or cruelty; note the view expressed in ATF 80IV 234, JdT 1955 VT 44, according to which perversity, which may be symptomatic of a derangement of the mind, may be considered in aggravation even though the accused is not fully responsible for his acu; see also Ait 195 of the Swiss Code (cruelty in cases of sexual outrages) and the corresponding provision in the Ethiopian Code (Art. 598), which seems to go too far in providing for aggravation on the ground of sadism).

What these aggravating factors actually consist of and whether they are present, is a matter to be decided from case to case. It should be clear, however, that they do not bear upon the punishment whenever they are present, but only when they denote the offender's dangerous disposition. Therefore, the commenu made in connection with general extenuating circumstances apply *mutatis mutandis* with respect to general aggravating circumstances. If this were not so, the penalty to be ordered for an intentional offence should always be aggravated on the ground that the accused acted with a deliberate intent to do wrong; the fact that a person was shot in the back should always warrant aggravation on the ground that the murderer acted with treachery or perfidy; the fact of maiming someone would always be a sign of cruelty, etc. Yet in all these cases, the court should not confine itself to ascertaining whether any of the circumstances described by Art. 81 (1) (a) is present; it must also explain why it considers that the pertinent circumstance should affect the punishment (ATF 70IV 51, JdT 1944IV 71), which explanation must go to show that the accused is dangerous.

Admittedly, the only aggravating circumstance in relation to which this additional requirement is expressly laid down is the one mentioned in sub-art. (1) *(c)* of Art. 81 ("when he is particularly dangerous on account of his antecedents... etc."). This might lead to the conclusion that, in all other cases, the mere fact of acting in general aggravating circumstanccs raises an irrebuuble presumption that the offender is dangerous. However, many reasons militate against this interpretation. Firstly, such an automatic aggravation of the punishment would contradict the fundamental principle of individualization of sentences (Art. 86). Secondly, it would create contradictions within Art. 81. Treachery or perfidy, for instance, may be regarded either as personal circumstances inherent in the actor (in which case, according to sub-art. (I) (a), they need not reveal the latter's dangerous disposition) or as material circumstances surrounding the perpetration of the offence (in which case, according to sub-art. (I) *(c),* they must denote that the offender is particularly dangerous); thus the

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question whether the "dangerous disposition" requirement should be satisfied would in tbe last analysts depend on how certain circumstances are classified, and this is inadmissible. Thirdly, the said interpretation would also create contradictions between Art. 81 and several provisions of the Special Part or the Code. For example. Art. 522 (1) *(a)* dealing with homicide in the first degree clearly indicates that the general aggravating circumstances mentioned in Art. 81 are taken into account only when they are "such as to betoken that (the offender) is exceptionally cruel or dangerous". There appears to be no reason why this condition should be restricted to cases of homicide; quite the contrary, it should be of general application and fulfilled whenever the offender acts in the manner described by Art. 81 even though neither this Article nor the provision of the Special Part to be applied in any given case expressly so provide.

This is to say that the only purpose of Art. 81 is to draw the court's attention to certain factors which are. *in abstracts,* symptoms of a dangerous disposition. But it does not follow that the court must aggravate the penalty as soon as such a symptom exists; what follows is that the court must in every case attempt to draw concrete inferences from these symptoms and, as is stated in the above-quoted ATF 70IV 51, examine whether the accused before it has, in effect, a dangerous disposition. Therefore, the fact that he acted in aggravating circumstances does not of its ownforce justify aggravation. Some support for this view will be found in the records of the Codification Commission concerning premeditation in cases of homicide (note that premeditation or malice aforethought, though not specifically mentioned in Art. 81, may very well be read into sub-art. (1) *(a)* thereof since it is merely illustrative). Regarding the effects of premeditation on the punishment of homicide, the drafter made a statement identical with the one appearing b ATF 70IV 5 (JdT 1944 IV 73). that is. “what is characteristic of homicide in the first degree is the particularly perverse mentality of the actor or the danger which he creates, as reflected by his act. Premeditation is not to be taken into consideration unless it evidences this mentality or danger. On the other hand, it is not an essential ingredient of the offence.of homicide in the first degree as the said mentality or danger may be inferred from other circumstances". One would, it seems, be fully justified in applying this line of reasoning to all the aggravating circumstances laid down in Art. 81.

2. The actor's personal position may also be considered in aggravation when there clearly exists a relation between his position and the offence he commits. The reasons behind sub-art. (1) (6) are objective as well as subjective. Firstly, one is entitled to be very demanding with respect to persons who, by reason of their particular status, are in a position of trust *(e.g.* bankers, tutors, managers, advocates, etc.) or in one which enables them to deal with public affairs, to give orders or to require obedience *(e.g.* civil servants, commanding officers, judges, etc.). As often as not, society at large is concerned with the manner in which these persons exercise their powers or carry out their duties; therefore, the consequences of any offence which the said persons may commit in the performance of their functions are as a rule objectively graver. Secondly, a person who commits an offence by taking advantage of "his powers or functions or the confidence or authority vested in him" acts in disregard not only of the harm he causes, but also of the powers or confidence placed in him by the Government, the public or any particular person. Hence the general presumption (requiring concrete corroboration) that his mentality is more dangerous than that of a person who might have caused the same objective harm without betraying anyone's trust.

3. The accused is liable to an increased punishment when be is particularly dangerous by reason of his antecedents, the habitual nature of his offcnce or the conditions in which he perpetrated it.

(a) The circumstance pertaining to the actor's antecedents applies when the requirements governing recidivism as defined in Art. 82 (I) *(b)* are not fulfilled either because "limitation of recidivism" has occurred *(i.e.* the new offence is not committed within the period of time laid down in the said Article) or because the new offenoe is committed by negligence *(i.e.* the relapse is not intentional, as is provided for by the same Article). It does not suffice, however, that the accused should have one or more previous convictions and the pertinent drcum-

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stance does not operate unless the court, after considering his past and present behaviour, it of the opinion that he creates a serious danger to the community. Thus a person convicted of adultery in 1965 should not be sentenced to an aggravated penalty on the sole ground that he was convicted of assault in 1959.

(b) Even though it does not necessarily imply that the accused has antecedents or is a recidivist, the fact that the offence is committed habitually raises a very strong presumption that he has a particularly perverse mentality and will continue to break the law unless drastic action is taken against him. This circumstance is meant to apply with respect to a person who "makes a business of crime in a way that he acquires or tries to acquire a gain whenever a favourable opportunity presents itself" (Art. 90 (1)), or, in the terms of the Swiss Federal Court, a person "who commits an offence on several occasions with a view to deriving a profit therefrom and who is willing to repeat it at the expense of an indeterminate number of persons" (ATF 70IV 134, JdT 1945 IV 14; ATF 71IV 82, JdT 1945IV 205; ATF 71 IV 113, JdT 1946 IV 134; ATF 72 IV 107, JdT 1947 IV 7; ATF 74 IV 139, JdT 1948 IV 173; ATF 78 IV 152, JdT 1952 IV 143; ATF 79 IV 9. JdT 1953 IV 109). In these cases. Art. 81 (1) (c) will govern the calculation of punishments other than pecuniary punishments and Art. 90
(1) , or Art. 81 (I) (a), the calculation of fines. Yet it is not an essential condition for applying this circumstance that the accuscd should have acted for gain. More than his motives, it is his permanent contempt for the law and his readiness to commit new offences that make him a danger to society and justify aggravation. However, as will be seen later (para. (3) in com* ments under Art. 82), the srope of this circumstance is not as wide as it might appear to be.

(c) The conditions in which the offence is perpetrated are also a ground for increasing the penalty when they betray the actor's dangerous disposition. What this circumstance implies "is not that the offence, but that the offender, should be particularly dangerous" (ATF 77 IV 156, JdT 1952 IV 52). This may be so for example when he acts at night, takes advantage of disturbances or disasters of any kind *(e.g.* riots, flood or fire) or uses weapons, dangerous instruments or violence. It may be suggested, however, that this circumstance should not be taken into account when, although it is not an ingredient of the offence committed *(e.g.* use of arms in cases of duels or of violence in cases of rape or robbery), it accompanies the commission of this offencc almost inevitably or in a majority of instances *(e.g.* use of arms or dangerous instruments in cases of homicide). In other words, the circumstances surrounding the perpetration of the offence raise the presumption that the actor is dangerous only when they are of a somewhat unusual or extraordinary nature *(e.g.* use of arms in cases of rape; see, however, the above-quoted ATF 77 IV 156, according to which the fact that certain circumstances are frequently present when a given offence is committed does not preclude the court from considering them in aggravation).

4. The accuscd is also liable to an increased penalty when he acts in consequence of a conspiracy, in a group or as a member of a group formed to commit offences.

(a) By providing for aggravation when one acts "in pursuance of a criminal agreement", Art. 81 (1) *(d)* merely gives effect to the principle set out in Art. 37 which states that a conspiracy is considered in aggravation whenever it is not an independent offencc according to tbe Special Part of the Code. Suffice it to note here that it is nof required for the purposes of Art. 81 (1) *(d)* that the conspirators should have acted together since it is in any event an aggravating circumstance to act "as a member of a gang organized to commit offenccs". As has been mentioned in connection with Art. 37, the rationale for this solution is that a person "who is a member of a gang creates a special danger, for his association with his companions strengthens him and permits one to assume that he is more likely to relapse into crime" (ATF 72 IV 110. JdT 1947 IV 9).

(b) Whether or not there has been a conspiracy, the accused is presumed to be particularly dangerous wheti he acts "together with others". This form of collective action may be purely spontaneous and does not necessarily imply the existence of a prior agreement. The only difficulty which this provision involves consists of knowing whether the accused should have

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acted with at least two persons (“together with *others")* or whether his acting together with only one more person would be sufficient. On this point, it is worth noting that the French text is rather different *("torsqu'il a agi en bande")* and that the term *"bande"* (gang, group) has been construed as follows: “So that there should be a gang, it is not required that more than two persons should have taken part in the commission of the offence. The reason why the law lays down an aggravated punishment with respect to an offence committed by a gang is because collective action strengthens the actors physically and psychologically and, therefore, renders them more dangerous. The possibility of making majority decisions is not a necessary ingredient of collective action. Thus the fact that such decisions cannot be made when two persons arc involved, because there is then either unanimity or conflict, docs not entail that a gang cannot consist of only two persons" (ATF 78 IV 227, JdT 1953 IV 89). This interpretation might, it seems, apply to Art. 81 (1) *(d)* also. Indeed, the word "gang" as used in the phrase “as a member of a gang organized ... etc.” in any event means a group of conspirators, *Le.* an association of two or more persons (Art.37), and there is no reason why this word should have different meanings depending on whether the offender acts with a group or merely as a member or agent of a group.

(c) When a person acts in the circumstances defined in sub-art. (I) *(d),* there is a very strong presumption that he is dangerous if his capacity is that of a “chief, organizer or ringleader". It is not required, however, that he should be involved in the acme perpetration of the offence, for, as has been noted in relation to Art. 32 (1) *(b),* a moral offender may well create a greater menace to society than a material offender. Whether he merely pulls the strings behind the stage or is physically present when the offcnce is committed and leads or encour-ages the other participants is, therefore, irrelevant for the purposes of Art. 81 (1) *(d).*

5. The last general aggravating circumstance laid down in Art 81 pertains 1o the peculiar position of the victim of the offence. The accused is presumed to be dangerous when he intentionally causes harm to a person “deserving a special protection”. The word “intentionally" implies that this circumstance is'inapplicable not only when the offence is committed by negligence, but also in cases of mistake where the doer is unaware of the fact that his victim is, for instance, defenceless, feeble-minded or invalid, or a prisoner, relative, superior, inferior, clergyman or civil servant. Insofar as this circumstance is to some extent parallel to the one laid down in sub-art. (1) *(b)* of Art. 81. there should exist a connection between the nature of the offence and the position of the victim, *i.e.* the actor should take advantage of the particular position of the person against whom the offence is committed. Yet most of the cases in which this connection exists are expressly defined in the Special Part of the Code, so that, in view of Art 81 (2), the pertinent circumstance is of limited practical usefulness. Furthermore, when it is not an ingredient or spccial aggravating circumstance of the offence committed, it should be applied with some discrimination. For instance, an innkeeper who serves alcohol to a member of Parliament “already manifestly suffering from excessive consumption thereof" (Art. 514) is not as a matter of right liable to an increased punishment; a syphilitic husband who knowingly but with an indirect intention contaminates his wife (Art. 538 (c)) is not as a matter of right liable to an increased punishment, nor is a person who intentionally destroys his uncle's property (Art 653).

6. When any of the above circumstances is present and the court is satisfied that il denotes the offender’s dangerous disposition, the penalty must be increased in accordance with Art. 188 (ordinary aggravation, as distinguished from special aggravation under Arts. 189-193, justified by special aggravating circumstances, namely concurrence and recidivism as defined in Art. 82). This, however, is subject to the same restrictions as those which govern the effects of general extenuating circumstances.

(a) As is stated in Art. 81 (2), the court is not allowed to increase the penalty twice for tbe same reason. Therefore, when a person commits an offence of which one of the circumstances laid down in Art 81 (1) is an ingredient, or an offence carrying an increased penalty owing to the presence of one of the said circumstances, the penalty to be ordered for the said

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offence or tbe said increased penalty, as the case may be, may not be increased again on the ground that the pertinent special circumstance is also a general aggravating circumstance (*e.g.* Arts. 81 (1) *(a)* and 322; greed, in Art 81 (1) (a) and Arts. 397 (2), 509 (3). 519, second alinea; perversity or cruelty in Art 81 (1) (a) and Arts. 598 (c), 637 (2); abuse of powers, confidence or authority, in Art. 81 (1) *(b)* and Arts. 304, 393 (2), 415, 470, 642 *(b);* habitual or professional criminal activity, in Art 81 (1) (c) and Arts. 471, 475 (I) *(b),* second alinea, 517 (I), 531 (1), 606,609 (2) (a), 635 (3) (a) ,670 (a); acting at night or undercover of disturbances, in Art. 81 (1) *(c)* and Arts. 282 (A), 285, 635 (3) (c); use of arms or dangerous instruments, in Art 81 (1) (c) and Arts. 484 (3), 539 (2) (a), 549 (2); conspiracy or collective action, in Art. 81 (1) *(d)* and Arts. 452 (2). 484 (3). 567, 572 (ft), 589 (2) (c), 635 (3) (A); capacity of chief or ringleader in Art. 81 (1) *(d)* and Arts. 458 (2), 476 (a), 477, 478 (2); special position of the victim, in Art. 81 (1) (*) and Arts. 601 (2) *(a*)—defenceless person; 591 (1)—feebleminded person; 539 (2) (*b*)—invalid; 417—prisoner; 606 (2) *(b)* or 621—relative; 305— inferior; 310—superior; 256(2)—member of authority; 433—civil servant).

(b) A general aggravating circumstance may not be applied concurrently with another general aggravating circumstance of the same nature *(.e.g.* the fact of causing harm to a person deserving special protection, such as a minor, an inferior or a prisoner, necessarily implies in many cases an abuse of powers, functions, confidence or authority). Identical aggravating factors, like identical extenuating factors, may not be cumulated whether they appear in the same or in different parts of the Code.

Subject to these restrictions, the court must assess sentence having regard to all the aggravating circumstances which show that the accused is dangerous. The punishment will vary, therefore, depending on which and how many of these circumstances are present in any given case (see also, in Art. 188, the words “the nature and the multiplicity of grounds of aggravation”). Yet, although Art 81 (1), first line, states that the said circumstances lead to increasing the penalty, it must be clear that the court may not exceed the limits of the punishment prescribed by law for the offence committed (while it may exceed them when special aggravating circumstances are present). For instance, grave wilful injury (An. 538) is punishable with rigorous imprisonment for not more than ten years or simple imprisonment for not less than one year. The fact that this offence is committed out of hatred (Art. 81(1) *(a))* or against a defenceless person (Art. 81 (1) (<)) does not entail that the court may order rigorous imprisonment for more than ten years. Art. 188 dealing with ordinary aggravation clearly shows that the penalty is then to be determined “within the limits specified in the relevant provision of the Special Part” and that the higher limit so specified *(i.e.* ten years, in the case of grave wilful injury) “is binding upon it” whatever the nature or number of general aggravating circumstances present in the particular case. In other words, these circumstances are aggravating, and the penalty is increased, in the sense that the accused is to be punished more severely than he would have been, had he not acted in the said circumstances. Here again, as in the cases coming under Art. 79, the court is cxpcctcd to make a double estimation. It should firstly decide which punishment it would have ordered in the absence of aggravating circumstances and then increase this hypothetical punishment in view of the fact that the offender is dangerous. Thus, in the case of an offence of grave wilful injury committed against a defenceless person, the court should make the following reasoning: “As the injury is not of extreme seriousness and the accused is a first offender, we would have ordered two years simple imprisonment but for the fact that the victim was defenceless. Considering, however, that the accused has shown himself to be dangerous by deliberately taking advantage of the peculiar position of the victim, we shall aggravate this punishment." This aggravation may be effected either without changing the nature of the penalty *(i*. by increasing the hypothetical punishment of two years simple imprisonment up to the legal maximum which, according to Art. 105 (1), third alinea, is three years in cases of simple imprisonment) or by substituting, for simple imprisonment, rigorous imprisonment for any term not exceeding ten years. As is apparent, there will hardly be any room for "ordinary aggravation” when the above-mentioned hypothetical punishment would in any event be up to the limit specified in the relevant

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provision of the Special Part, for instance because the accused has caused considerable damage (which is not a general aggravating circumstance). Thus in a case where the accused would have maimed both arms and both legs of the victim, it would for all practical purposes be irrelevant whether the victim was defenceless or, for that matter, whether the accused acted in any other general aggravating circumstance, since a punishment of ten years rigorous imprisonment would anyhow not be undeserved, having regard solely to to the seriousness of the physical harm suffered by the victim.

7. By way of conclusion, it may be noted that the provisions of Art. 81 arc not totally unprecedented in Ethiopia, as the 1930 Code took into consideration for purposes of aggravation circumstances such as envy (Art. 46), treachery or revengefulness (Art. 47), the personal position of the actor (Arts. 52-142) and of the victim *(e.g.* Art. 273). Yet Art. 81 is novel in that it attempts a systematic classification and precise definition of all the factors that should affect the punishment, which factors, furthermore, have a much more general scope than they ever had before. Even though the introduction of such a system of general aggravating circumstances may commend itself in many respects. Art. 81 calls for criticism and might, it seems, be on some future day revised on the following lines.

(a) Art. 81 misses its purpose to the extent that it does not bring about a simplification of the Sp'-ial Part of the Code. In this Part, one would expect to find only aggravaung circumstanccs of such a peculiar nature that they can hardly find their place in Art. 81 and be deemed to be general circumstances *(e.g.* making pregnant the victim of a sexual outrage. Art. 598 *(b)*; stealing religious objects, Art. 635 (I) (a); driving to suicide (he victim of an offence of blackmail, Art. 670 (e)). Too often, however, aggravation according to the Special Part is justified for the very reasons mentioned in Art. 81. This implies that “ordinary aggravation" pursuant to Arts. 81 and 188 has been considered insufficient in numberless instances and one may wonder, therefore, whether it should not have been provided that general aggravating circumstances would bear upon the scntcncc much more drastically than they do under these Articles. In other words, the effects of general aggravating circumstances should, it seems, have been described in a more general manner. This could have been done either by bringing Art. 188 closer to Art. 189 or, which would probably have been more logical, by drafting a provision parallel to Art. 184 which defines the effects of general extenuating circumstanccs. As it indicates how the penalty is calculated when certain factors are present which lessen the offender's degree of guilt and make him appear not to be dangerous, so the law might have indicated how the sentence is assessed when certain circumstances are present which show that he is particularly dangerous, and a carefully worked out formula might have been included in the law to cover these cases *(e.g.* rigorous imprisonment for five yean instead of simple imprisonment for three yean; rigorous imprisonment for ten years instead of rigorous imprisonment for five yean, etc.).

(б) Tbe existing system of aggravation is defective, also, because the manner in which a general aggravating circumstance affects the punishment according to Arts 81 and 188 often is completely out of proportion to the manner in which it affects it according to the Special Part of the Code. Thus theft (Art. 630) and fraudulent misrepresentation (Art. 656) are both punisha ble with rigorous imprisonment not exceeding five yean. Now, conspiracy, for example, is a general aggravating circumstance in cases of offences contrary to Art. 656, but a special aggravating circumstance in cases of offences contrary to Art. 630. Therefore, two persons who conspire to commit fraudulent misrepresentation may not be punished by more than five years rigorous imprisonment, while two persons who conspire to commit theft are liable to ten yean rigorous imprisonment (Art. 635 (3) (*b*)). Discrepancies of this kind may even be found within the Special Part *(e.g.* compare Art. 510 (I) concerning traffic in narcotics with Art. 511 (1) concerning traffic in adulterated foodstuff, and sec how the fact of making a profession of the offence affects the penalty in the first case—Art. 510 (3)—and in the second one—Art 513 ; see also how the fact of causing damage to the Government affects the penalty in cases of mismanagement—Art. 664 (*b)* as distinguished from Art. 663—and in cases of

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fraudulent bankruptcy—Art. 682 (1) (ft), third alinea, as distinguished from Art. 682 (l)(ft), second alinea). With a formula of tbe son suggested above, it seems that these inconsistencies or discrepancies should disappear; all the offences which, if not committed in general aggravating circumstances, are liable to the same penalty would hence, if committed in these circumstances, carry the same maximum penalty. In other words, the effects of general aggravating circumstances would not only extend further than they do at present, but they would also be more uniform.

Article 82. Special circumstances: Concurrence and recidivism

(1) *The penalty shall be aggravated under the relevant provisions (Arts.* 189-193):

(a) In cases of material concurrence, when the offender successively committed several offences, whatever their nature; it may also be increased, according to the degree of guilt, in cases of notional concurrence, when the act simultaneously contravenes several criminal provisions;

(b) when a second or further intentional offence against the provisions of this Code warranting extradition under Ethiopian law has been committed within five years of a sentence being served in whole or in part or having been remitted by pardon or amnesty.

(2) *Where in a case of recidivism the offender has at the same time been convicted of concurrent offences the court shall first assess sentence for the concurrent offences and then increase it having regard to recidivism.*

The special aggravating circumstances laid down in this Article differ, in that which concerns their nature as well as their effects on the punishment, from the general aggravating circumstances defined in Art. 81. Yet these differences are more apparent than real, for in the last analysis the reason why concurrence and recidivism justify an increase in the penalty is that, like general aggravating circumstances, they reveal the offender's dangerous disposition; and the reason why this increase is greater according to Art. 82 than it is under Art. 81, is that the accused is deemed to be more dangerous when he acts in special, than when he acts in general, aggravating circumstances. There exists, however, a fundamental difference between these two Articles. As has been said before, a general aggravating circumstance does not of its own force justify the passing of a more severe sentence and the court must ask itself whether the accused is really dangerous; it may, therefore, disregard the fact that such a circumstance is present when it is satisfied that the accused is not dangerous despite the said fact. In cases of concurrence or recidivism, on the other hand, there is a conclusive presump* tion that the accused is dangerous; the court may not disregard the fact that be committed several unlawful acts, contravened several legal provisions or relapsed into crime and it is in any event bound to increase the penalty. The intensity of the menace which the actor creates to society is taken into consideration for the purpose of deciding, not whether aggravation is justified, but to what extent the punishment should be increased (see, however, para. 2 (ft)
(iii) *infra).*

1* The first special aggravating circumstance for which Art. 82 provides is concurrence of offences (sub-art. (1) (a)), which is a situation to which several allusions have been made hereinbefore (see particularly comments under Arts. 60-63 *supra).* Concurrence may be either "material" *(concours* or *cumul riel)* or "notional" *(concours* or *cumul ideal),*

(a) Without prejudice to the cases where it is an ingredient of an offence that certain acts should be repeated *(e.g.* Arts. 471, 518 and 604) and subject, also, to the cases where a repetition of acts amounts to a successive offence within the meaning of An. 60 (2), there is material- concurrence of offences when a person successively (that is, repeatedly) commits unlawful acts, whether of the same or of a different nature. Thus if *A* steals *B's* car and runs down C, the case is one of material concurrence (theft and homicide) within the meaning of Art. 82 (1) (a), first sentence; the same holds good if *A* steals *B's* car, C't bicycle and *D's*

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puree. There is not material concurrence, however, when a conviction is had in the course of the performance of these acts; if *A* steals C's bicycle after being sentenced for stealing *B't* car, the penalty will bejncreajgd^not oj> ihs ground of concurrence, but on that of recidivism (Art 82 (1) (£)) or antecedents (Art. 81 (1) (c)). The latter cases should not be confused with those in which there exists ''retrospective concurrence" (Art 191), *i.e.* where, after a person has been sentenced for an offence *(e.g.* stealing *B's* car), it is found that he should at the same time have been sentenced for another offencc *(e.g.* stealing Cs bicycle) but he was not so sentenced because this other offence had not been discovered at the time of the first trial. In cases of retrospective concurrence, therefore, the concurrent offences are not separated from one another by a conviction. For all practical purposes, these cases are identical with those where there exists ''simultaneous concurrence", *i.e.* where all the concurrent offences **ire** known and tried together. It may be noted, incidentally, that concurrent offences should, as a rule, be tried together (Art. 116 (1) of the Criminal Procedure Code); however, if separate trials are ordered under sub-art (2) of this Art 116 so that the accuscd should not be embarrassed in his defence, the sentence ultimately arrived at should be assessed as it is in cases of retrospective concurrence, that is, "so that the offender is not punished more severely than if all the offences had been tried together". Unfortunately, the Criminal Procedure Code gives no indications as to how this should be done and many important questions are left unanswered *(e.g.* in which order should the offences be tried? If they are triable by different courts, which of them will finally pass sentence ? If they arc triable by the same court, should they be tried by different judges ? If the accused is also a recidivist, which court will take this circumstance into account?). So long as the procedure to be followed is not clearly indicated *(e.g.* when the accused is found guilty of two or more of the offences separately tried, only one sentence is passed, and it is passed by the court having tried the more serious of the offences for which the accuscd is convicted), one may wonder whether a court will ever order separate trials in view of tbe considerable practical difficulties that would follow upon the making of such an order.

(b) There is notional concurrence of offenccs when a person, though he performs only one act violates several different provisions of the law. For example, if *A,* a married man, rapes his sister in view of the public, the case is one of notional concurrence (rape, incest, adultery, public indecency; see also the situations described in Art 63) within the meaning of Art. 82 (1) (a), second sentence. Thus, only one act is done (while material concurrence implies the doing of several acts) which necessarily contravenes various legal provisions (while, subject to what was said concerning successive offences, the several acts done in cases of material concurrence may all contravene the same legal provision). It may be noted that retrospective notional concurrence is hardly conceivable.

(c) Regarding the effects of concurrence, it has been mentioned before, particularly in connction with Art. 9, that the Code provides neither for the "cumulation" of the penalties nor for the "absorption" of the lesser penalty by the higher one. These systems, which could both be found in Art. 42 of the 1930 Penal Code, do not take sufficiently into account the individual offender and his fault or degree of guilt and lead to passing sentences which do not truly reflect his dangerous disposition. Cumulation, furthermore, may be completely unrealistic as the accused may be sentenced to say, one hundred years imprisonment, or it may result in the imposition of so lengthy a punishment that the taking of rehabilitative steps is in a sense useless. This is why the Code provides, as a rule, for aggravation in accordance with Arts. 189-192 (sec, however. Arts. 189 (1) (c) and 725).

(i) In cases of material concurrence, the penalty will be calculated as provided for by Art. 189**,** unless the repetition amounts to a collective offence (see para. (3) *(b) infra)* or two or more of the concurrent offences are "related" within the meaning of Art 62, in which case the penalty will be calculated as provided for by Art. 190 (see, however, para. (3) in comments under Art. 62; note, also, that the upper limit of aggravation is unchanged whether the sentence is assessed in accordance with Art. 189 or 190**).** The same method of calculation applies in cases of retrospective concurrence (Art. 191**).**

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Illustrations (under Art. 189 (I) (a) *and (b))*

A is convicted of homicidc in the first degree (which according to Art. 522 is punishable with rigorous imprisonment for life, or death) and blackmail (which according to Art. 669 is punishable with rigorous imprisonment not exceeding five years and fine). If the court con* siders that, for the homicide alone, *A* should be sentenced to death, "this penalty shall override anv other penalties entailing loss of liberty" (Art. 189 (1) (a)). Therefore, he may not Eesentenced to, say, three years rigorous imprisonment for blackmail, to be served prior to his being executed; but he may be fined for blackmail in addition to being sentenced to death for homicide.

A is convicted of robbery (Art. 636, punishable with fifteen years rigorous imprisonment) and ordinary rape (Art. 589(1), punishable with ten years rigorous imprisonment). The court "shall impose the penalty deserved for the more serious offence *(I.e.* robbery) and shall increase its length taking into account the provisions of the law *(ir.* the concurrent legal provisions, when there is notional concurrence; these words arc unnecessary in view of Art. 192) or the concurrent ofTences; it may, if it thinks fit, impose a penalty exceeding by half the basic penalty without, however, being able to go beyond the general maximum fixed by law for the kind of penalty applied" (Art. 189 (1) (*b*)).

This formula, similar to, though not as clear as, the one contained in Art. 68 (1). first alinea, of the Swiss Code *("le juge le condamncra & lu peine de l'infraction la plus grave et en augmen- tera la durte d'apris les circonstances, mais pas au deld de la moitii en sus du maximum de la peineprivue pour cette infraction*") means, in effect, this: in calculating the sentence, the court considers only the penalty prescribed by law for robbery, which is the more serious offenoe, and, on that basts, assesses a hypothetical sentence *(i.e.* the sentence which it would pass in the absence of concurrence) of, say. twelve years rigorous imprisonment, which it then increases on the ground of concurrence. In doing so, it may either confine itself to ordering the maximum penalty prescribed for robbery (»'-*• fifteen years) or exceed this basic penalty (although the latter words are ambiguous, there is no doubt, in view of the sources of this Article, that the basic penalty is not the one which would be ordered if the aforesaid hypothetical sentence were passed, *i.e.* twelve years, but the one laid down by law with respect to the more serious offence, *i.e.* fifteen years in cases of robbery or, when alternative penalties are prescribed for the more serious offenoe, then the higher of these penalties). This increase, however, is subject to two restrictions. On the one hand, the basic penalty may be exceeded only by one half (*I>*. here seven and a half years); on the other hand, the penalty finally arrived at may not exceed the general maximum fixed by law with respect to the kind of penalty ordered *(Le.* according to Art 107 (1), third alinea, twenty-five years in cases of rigorous imprisonment). In this instance, therefore, the court may not order rigorous imprisonment for more than twenty-two and a half years. However, if *A* were convicted of aggravated robbery under Art 637 (I), which is punishable with twenty years rigorous imprisonment, an increase by one half would obviously be impossible as the court would in any event be prohibited from exceeding the general legal maximum of twenty-five years.

As is apparent, an increase under Art. 189 is excluded when tbe penalty prescribed by law for tbe more serious offence is already up to the general legal maximum *(e.g.* tbe maximum for simple imprisonment is three years according to Art. 105 (1), third alinea; thus a person convicted of ten offences the more serious of which carries three years simple imprisonment may, in no case, be sentenced to simple imprisonment for more than three years). It must be clear, however, than even when there is room for increasing tbe penalty in accordance with Art. 189 (1) *(b),* such an increase is not compulsory nor, for that matter, is it always justified. In cases of material concurrence, the court is merely required to pass a more severe sentence than it would have passed had this aggravating circumstance not been present This can often be done without exceeding the "basic penalty" and, like aggravation under Art 188, may be achieved "within the limits specified in the relevant provision of the Special Part". Another possibility is to change tbe nature of the basic penalty when alternative punishments are

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prescribed by law with rcspect to the more serious offence. Thus under An. 630 theft is punish* able “with simple imprisonment (not exceeding throe years) or, according to the gravity of the case, with rigorous imprisonment not exceeding five years". When a theft is committed concurrently with one or more offenccs carrying lesser punishments, tbe court is not expected always to order seven and a half years rigorous imprisonment; if it considers that simple imprisonment for two years would have been an adequate penalty in the absence of concurrence, it may well, in view of the latter circumstance, decide to replace this hypothetical punishment by, say, three years rigorous imprisonment.

Illustrations (under Art. 189 (/) (c)-{e))

A is convicted of falsifying weights (which according to Art. 375 (1) is punishable with rigorous imprisonment not exceeding five years) and storing adulterated goods (punishable with fine, according to Art. 401). The court "may impose both penalties" but may not “exceed the general maximum prescribed by law for each kind of penalty" (Art. 189 (1) (c)). Thia rule is not clear at all. On the face of il, it means that *A* might be sentenced to twenty-five years rigorous imprisonment and fine, which is clearly absurd. There is no reason why the court should in such a case be allowed to increase the period of imprisonment more than it would be able to do had the falsification been committed concurrently with another offence punishable with imprisonment. Reasonably, therefore, an increase under sub-art. (1) *(e)* of Art 189 must be taken to be subject to the same restriction as an increase under sub-art. (1) *(b\ i.e.* one half of the basic penalty, so that *A* might actually be sentenced to rigorous imprisonment not exceeding seven and a half years and fine. Concerning the latter penalty, it is doubtful whether it may also be increased only by one half *(e.g.* 1500 dollars instead of 1000) or whether the only restriction is that it should not exceed “the general maximum prescribed by law", *i.e.* 5000 dollars, or 10,000 dollars in cases of greed (see the next illustration).

A is convicted of making seditious statements (an offence which according to Art. 481 is punishable with six months simple imprisonment or a fine not exceeding 500 dollars) and blasphemy (which according to Art 486 is punishable with two years simple imprisonment or a fine not exceeding 1000 dollars). Whether or not *A* is also sentenced to imprisonment, the court, if it decides to fine him, “shall impose a single fine the amount of which shall not exceed the aggregate amount of the separate fines" (Art. 189 (1) (</)). *i.e.* 1500 dollars. In so cumulating the fines, the court may not, however, exceed “the general maximum amount provided by law". *I.e.* 5000 dollars, according to Art 88. first alinea. Thus if two fines of 3000 dollars each are to be cumulated, cumulation is possible only up to to 5000 dollars, “save in cases where the offender acted for gain”, in which cases a fine up to 10,000 dollars may be ordered (Art. 90 (1)). Tbe latter clause is unnecessary; as a fine not exceeding 10,000 dollars may be imposed whenever any one offence is committed for gain, it is obviously on the ground of greed, and not of concurrence, that tbe fine may then be increased. It must be clear, however, that “the general maximum amount provided by law” in cases of greed may not be exceeded when concurrent offences are committed for gain; in these cases, the fines may be cumulated only up to 10,000 dollars.

A is convicted of endangering tbe independence of the State (Art. 259, which is an offence with respect to which confiscation of property as defined in Art. 97 may be ordered pursuant to Art. 272) and espionage (Art. 265, which, if committed for gain, may according to Art. 271 (1) be punished with a fine not exceeding 20,000 dollars). If the court orders the confiscation of *A'l* property, “it may not (...) impose a fine either as principal or as a secondary penalty” (Art. 189 (1) *(e*); note that a fine is never a secondary penalty; what is meant here, presumably, is this: when one of the concurrent offenccs is punishable with a fine, with imprisonment and fine or with imprisonment or fine, a fine may in no case be ordered in addition to confiscation).

(if) In cases of notional concurrence, the penalty will be calculated as provided for by Art 192, which actually refers one to Art. 189. According to Ait 82 (1) (a), the main difference

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between tbe effects of material concurrence and those of notional concurrence lies in the fact that tbe court must aggravate the penalty in tbe first case while, in the second one, it may do •o "according to the degree of guilt".

During tbe debates of the Codification Commission, it was alleged that notional concurrence should not be an aggravating circumstance because "the offender does only one material act, though he happens to contravene several legal provisions. Concurrence, therefore, is purely formal and h is often by chance that it is present; thus, it does not seem fair that the penalty should be increased on the sole ground that a murderer uses an unlicensed gun". The drafter answered that he had "hesitated before providing for aggravation on this ground (...). Regard must be had, however, to the actor's intention. For example, a married man who rapes his daughter knows full well that he is not committing only one offence. It is in cases of this nature that aggravation would be justified." After some discussion, it was agreed that "aggravation will be optional in cases of notional concurrence and will not be ordered unless it is justified in view of the actor's degree of guilt". Unfortunately, the latter principle has not been implemented throughout the Code. As has been mentioned before, there are inconsistencies between Arts. 63, 82 and 192, and aggravation is compulsory in a great number of instances of notional concurrence. Furthermore, the provisions of Art. 192 are in any event unclear as they do not confine themselves to referring the judge to Art. 189 but contain additional rules regarding aggravation (see para. (4) in comments under Art. 63 *supra).*

2. Recidivism is the second special reason laid down in Art. 82 for which the penalty must be increased. Generally speaking, a recidivist is a person who relapses into crime and who is conclusively presumed to be more dangerous than a first offender because he has not, in tbe terms of the Preface to the Code, "become prudent" despite his earlier contacts with the law. Hence the principle that he must be treated more severely than an offender who has no previous convictions. Yet this severity, although it may be justified on the ground of social defeoce, is, in a sense, an admission of impotence. Having failed to prevent a relapse, one imposes drastic penalties (Art. 193) or measures (Art. 128) which primarily serve purposes of deterrence and disablement; one tends to overlook the fact that this failure is at least as disquieting as the relapse and to tackle the effects rather than the causes of recidivism. For the truth of tbe matter is that recidivism is not only a threat, but also a challenge, and one which concerns society at large, and not only the law-giver. the judge and the penologist. It calls into question the whole social system, and not only the wisdom of tbe law and the efficiency of law-enforcement agencies. This being so, aggravation clearly is only a palliative; it cannot solve the problem, the more so since there must be a limit to aggravation lest recidivists be used as scape-goats. The true remedy, therefore, lies elsewhere, namely in prevention. What need be acted upon are criminogenous factors. Giving education, employment, decent housing conditions, fighting alcoholism, bringing about a change in the community's attitude towards former convicts must accompany the efforts made to improve the laws, penitentiary treatment and post-penitentiary care and are more decisive weapons in the struggle against crime than a purely punitive and, as it were, Pontius Pilate-like action against recidivists.

Tbe Code makes with respect to recidivism rules which, apart from being simple in comparison with those which exist or have existed elsewhere (see Donnedieu de Vabres, *op. cit.,* pp. 216-228), are designed to ensure that aggravation will not be ordered unless it is truly deserved. Therefore, not any relapse into crimc amounts to recidivism; so that this circumstance may he taken into consideration, two kinds of conditions must be fulfilled which pertain to the actor's past record as well as to the new offence which he commits.

(a) A sentence must have been previously passed and enforced (in whole or in part) or remitted.

(i) The nature of the offence or offences previously committed and of the penalty or penalties ordered with respect thereto, whether by an Ethiopian or by a foreign court (Art. 22), is indifferent according to Art. 82 (1) (6), except wben the court intends to order iniem-

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ment (Art 128) instead of increasing the penalty under Art 193. On thia point, Art 82 (1) *(b)* a less restrictive than *e.g.* Art. 67 (1) of tbe Swiss Code which requires a previous senteooe involving deprivation of liberty. Thus the principle behind Art 82 (1) (A) is that anyone should become prudent who has once been subjected to punishment regardless of whether he was affected in his freedom, his property, etc. This is perhaps going too far; one is ti<*‘ ^cssarily dangerous who commits an offence after being sentenced to compulsory labour (Art 102 or 103) or merely reprimanded (Art 121) for a previous offence.

(ii) It is not sufficient that the accused should have heen sentenced on an earlier occasion, and the sentence must have been served in whole or in part. This requirement, which is missing in some foreign codes, implies that one of the typical features of recidivism is the fact that the accused, though previously deprived of his liberty, for instance, bns not been impressed thereby; having experienced penitentiary life, the prospect of being sent back to prison does not deter him from committing a new offence. Subject to the cases of remission by pardon or amnesty, so long as the previous sentence has been at least partly enforced, it is immaterial exactly what portion thereof has been served *(e.g.* conditional release was granted and tbe new offence was committed during the probation period). This rule may sometimes entail awkward and apparently unjust consequences. Thus if *A,* on hearing himself sentenced to one year imprisonment for theft, knocks out a policeman and runs out of the court-room, he may not be punished as a recidivist when he is tried for assaulting the policeman since, at the time of the assault, the enforcement of the sentence passed for the theft had not begun; on the other hand, if upon being sentenced for the theft he is taken to prison but escapes after knocking out a warder, he will be punished as a recidivist when he is tried for having assaulted the warder even though the assault and escape may have taken place within five minutes of his entering the prison. There is one case, however, where this difference will not be found. If *A* was on remand at the time when he was tried for the theft, he may be punished as a recidivist for the assault committed in the court-room; since the period of remand must be reckoned as a part of the sentence (Arts. SI of the Constitution and 114 of the Penal Code), the enforcement of the sentence had actually begun before the assault took place (to the same cffect, see Logoz, *op. cit.,* p. 287.)

(iii) Aggravation on the ground of recidivism will also apply even though tbe previous sentence was not served, but then only if the reason why it was not served is that tbe convicted person was granted a pardon or amnesty. The rationale of this solution is that, by committing a new offence in disregard of the good previously done to him by the remission of the earlier sentence, he shows himself to be as dangerous as if he had committed it in disregard of the harm previously done to him by the enforcement of the said sentence; in both cases, his former contacts with the law have taught him nothing. Different from these cases are those where the previous sentence was not served because suspension was ordered under Art. 195 or 196. A person convicted of a previous offence who is placed on probation and is of good behaviour throughout the probation period is not to be treated as a recidivist if he relapses into crime upon the expiration of this period, as the previous sentence has not been enforced at all. The same should actually hold good when a new offence is committed during the probation period. Yet Art. 204 (3) states that, in such a case, “the penalty pronounced in respect (of the new offence) shall be added to the previous penalty in conformity with the general principles governing recidivism (Art. 193)." It is not certain whether this prescription, which is dearly not "in conformity with the general principles governing reddivism”, is an inconsistency due to an oversight or a deliberate exception to the provisions of Art. 82 (1) (6), which exception could be explained in the same manner as the rule which this Article makes for the ease of pardoD and amnesty. From a logical point of view, however, it is difficult to understand how the probation period can be regarded as being a part of the enforcement of the sentence (for this is the implication of Art. 204 (3)), since either no sentence was passed at all (Art. 195) or its enforcement was expressly suspended (Art. 196). Nor is it easy to understand why this fiction should then operate, not generally, but only when a new offence is committed during the said period.

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(b) The new offence must be intentionally committed within five yean of the previous sentence being served or remitted, and it must be an extraditable offence according to the laws of Ethiopia.

(0 Mo«t codes fix a maximum period of time, known as the period of limitation of recidivism, upon the expiration of which a person who commits an offence will not be treated as a recidivist regardless of the fact that he has previous convictions. Under Art 82 (1) <*b*), this period is five yean and is invariable, that is, its duration does not change depending on the nature and/or seriousness of the earlier and/or new offence. (Regarding the position under English law, see *e.g.* Archbold, *op. cit.,* pp. I486 *et seq.* \ note also that in French law, for instance, “criminal recidivism is perpetual", *I*,* a person previously convicted of a felony will be punished as a recidivist if he commits a new felony irrespective of the number of years separating the two felonies). The provisions of Art. 82 (1) (*b*), however, are without prejudice to those of Art. 726 (I), according to which the period of limitation of recidivism is one year in cases of petty offences; a person with previous convictions who commits a petty offence is a recidivist only when this offence is committed within one year of the total or partial enforcement or the remission of a previous sentence, for whatever offence passed. (Similar yet more restrictive provisions will be found in certain countries for the case of offences committed by habitual drunkards; see. for instance. Archbold, *op. cit.,* pp. 1498 *et seq.* and Sudanese Penal Code, Ait, 447).

Aggravation on the ground of recidivism being b'ised on the assumption that a person who relapses into crime has a dangerous disposition, if not necessarily “an ingrained propensity to evil doing" (Art. 128), the mere fact that a former convict does not come again into conflict with the law during a rather long period of time goes to rebut this presumption and usually implies that be is not really dangerous, for if be were it would probably take him less than five yean to commit a new offence. What the actual length of this period should be is, of course, a matter of opinion, but a period of five years is certainly not unreasonable. Another factor which militates towards providing for the limitation of recidivism is that one must endeavour to promote in every conceivable way the rehabilitation of offenders. This purpose would often be frustrated if the law of recidivism were used, not as an incentive, but exclusively as a sword of Damocles, for many a former convict might be discouraged from reforming himself at the thought of being punished as a recidivist whatever be might do in the future *(e.g.* if he should, after twenty yean, exceed his right of legitimate dcfenoe).

The period of limitation of recidivism, whether under Art. 82 (1) *(b)* or Art. 726 (1), begins to run on the day when the former sentence is fully or partly served *(e.g.* when the prisoner ia finally or conditionally released or escapes from the prison) or when the convicted person receives his pardon or the law of amnesty by which he benefits is put into effect. If a petty offence is committed after more than one year, or a serious offence after more than five yean, of that day, the relapse is no longer a special, but a general aggravating circumstance (Arts.
81 (1) *(c)* and 188 or Arts. 701 (2) and 724, as tbe case may be).

(ii) Equally significant is the condition that tbe new offence must be intentional (whether it it completed or attempted and whatever the capacity in which the offender acts). Oftentimes, to be sure, it may appear that a person who repeatedly commits offences by negligence should be treated with particular severity, especially in the cases where he has been reckleta. All things considered, however, the said condition, which will not be found, *e.g.* in Art 67 of the Swiss Code, seems to be perfectly sound. On the one hand, it is logical in view of tbe rationale of Art. 82 (I) *(b)* since, as a rule, it is only when a penon knowingly and deliberately relapses into crime that one is really entitled to conclude that be has a dangerous disposition. On tbe other hand, this condition, like the preceding one, is designed to encourage former convicts to be of good behaviour. It would, indeed, be no encouragement to see that, howeve* hard one might try to correct oneself, there would always be a chance that one's efforts might be frustrated should one, for instance, happen to break tbe law through inadvertent negligence. Whether the said condition should be fulfilled wben tbe relapse consists of a petty

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actor if tried in Ethiopia pursuant to the general provisions governing the jurisdiction of Ethiopian courts, was committed in a foreign country.

(c) There are two ways in which recidivism will affect the punishment, depending on whether the accused is a persistent offender or not.

(i) As a rule, the court will, when the conditions laid down in Art. 82 (1) (ft) are present, calculate the penalty in the manner provided for by Art. 193, *i.e.* it is "not bound by the provisions of the Special Part of ■this Code. It may exceed the penalty provided for the offence but may not exceed the general maximum provided for the kind of penalty imposed. It may go beyond this maximum having regard to tbe circumstances of the new offence, the degree of guilt and the danger represented by the offender and is bound solely by the general maximum specified for the kind of penalty imposed". This formula, derived from Art. 67 (I) of the Swiss Penal Code *("le juge augmentera la durie de la peine. II ne sera pas lii par le maximum de la peine privue pour l'infraction, mais il ne pourra dipasser le maximum ligal du genre de peine")* seems very involved, this being largely due to the fact that the original French text was poorly translated (the expression "general maximum" appears twice in the English text, which is consequently unclear, but not in the French, which states that *"le juge devra augmenter la peine encourue. sans etre lii par le maximum privu dans la disposition applicable de la Par tie spiclal*. II peut dipasser ce maximum sulvant les circonstances de la ricUUve, la culpabiliti et le degri de darker de Vauteur, et n'est lii que par le maximum giniral du genre de peine qu'il applique.")*

Thus, in cases of recidivism like in cases of concurrence, the court may exceed "tbe basic penalty", *le.* the penalty prescribed by the Special Part of the Code with respect to tbe offence committed; in both cases, too, the court is prohibited from exceeding "tbe general legal maximum" prescribed by the General Part with respect to the kind of penalty ordered, *Le.* twenty-five yeais rigorous imprisonment, three years simple imprisonment or 5000 dollars in cases of fine (unless the accused acted for gain). Tbe essential difference between concurrence and recidivism, so for as concerns the calculation of the penalty, lies in the fact that the court may, in the first case, exceed the basic penalty by not more than one half while in tbe second case it may exceed it as it thinks fit. Yet in the latter case like in the former one, the court is expected to assess a hypothetical punishment (i.e. the one which would be adequate if the accused were not a recidivist; note that the said punishment must be calculated having regard to all other special—see Art. 82 (2)—or general—see Art 84 (2)—aggravating circumstances that may be present in the particular case), and it is this hypothetical punishment which the court is bound to increase on the ground of recidivism. To that extent, the comments made hereinbefore with respect to the calculation of the punishment in cases of concurrence of offences apply here by analogy. For example, within three yean of being released from prison, *A* is convicted of theft under Art. 630, which offenoe is punishable with simple imprisonment not exceeding three yean or, in more serious cases, rigorous imprisonment not exceeding five yean. What Art. 193 means is that the court is at liberty to exceed tbe limit of five yean rigorous imprisonment laid down in Art. 630, that this excess is not restricted to one half, as in cases of concurrence, but that the court is prohibited from exceeding tbe general maximum of twenty-five yean laid down in Art 107 (1), third alinea. In this instance, therefore, the maximum penalty that may be ordered is twenty-five yean rigorous imprisonment (while, if tbe case were one of concurrence between theft and a less serious offence, tbe maximum penalty would be seven and a half yean rigorous imprisonment). The court however, is not bound to exceed the basic penalty and there are various ways in which it may take recidivism into consideration, though there is no room for aggravation when the hypothetical punishment is already up to the general legal maximum; if the court ia of opinion that one year simple imprisonment would be adequate in the absence of recidivism. It may increase this hypothetical punishment up to, say, two or three yean; if tbe adequate hypothetical punishment would be three yean simple imprisonment, it may replace it by, aay, four or five yean rigorous imprisonment, etc. What will bear upon the punishment actually

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imposed are not only “the dmunstances of the new offenoe”, particularly its seriouineaa, but also, and chiefly, “the degree of guilt and the danger represented by the offender”.

(ii) As is expressly stated in Art. 193 (2), the provisions concerning aggravation on the ground of recidivism are without prejudice to those of Art. 128 dealing with “internment". Internment, or preventive detention, is a “measure” the purpose of which "is not to make the accused pay for his offence, but to disable him from committing further offences” (ATF 69 IV 51, JdT 1943 IV 66; note that the corresponding provision of the Swiss Code—Art. 42— permits internment being ordered for an indefinite period of time, so that an internee who misbehaves may be confined for the rest of his life regardless of the seriousness of the offence with respect to which internment was originally ordered, while under Art. 130 (1) of the Ethiopian Code internment may in no case last fo.˙ more than ten years). According to Art. 128 (1), internment is substituted for any other penalty entailing loss of liberty when the accused previously “served several sentences involving loss of liberty”. ”It is a matter of circumstances how many sentences he should have previously served so that he may be deemed to have served several sentences" (ATF 73 IV 223, JdT 1948 IV 7; see also ATF 69 IV 99, JdT 1943 IV 104: "It is unquestionable that three previous sentences do not amount to ‘several sentences' within the meaning of the law", and ATF 75 IV 97, JdT 1949 IV 66: “It is only when the previous sentences are less than four in number that one can say without hesitation that the pertinent legal requirement is not fulfilled", the rationale for this requirement being that “so long as repeated efforts have not been made to correct the offender through the imposition of penalties entailing deprivation of liberty, there still is a chance that he may be amenable to reformation if he is imprisoned"). The nature of the offences with respect to which these previous sentences were passed, or the duration of these sentences, is immaterial (Art. 128; sec also ATF 70 IV :3. JdT 1945 IV 162, and the above-quoted ATF 73IV 223), though it seems that the court is at liberty to disregard some of the previous sentences when it considers that they are of no moment (see the above-quoted ATF 70 IV 53).

It does not suffice, however, that several previous sentences should have been served and it is required, in addition, that the new offence should be intentional and denote “the dangerous disposition of the offender" (Art. 128 (2)), *i.e.* “an ingrained propensity to evfl doing, misbehaviour or incurable laziness" (which conditions are alternative according to Art 128 (1), for the purpose of this Article would often be defeated if they were cumulative; to the same effect, see ATF 77 IV 77, JdT 1951 IV 110), or that the offender should “habitually derive his livelihood from crime" and. finally, that the new offence should be punishable with imprisonment for not more than five years. When these conditions are fulfilled, there is a conclusive presumption that “there is no hope of correcting the accused by subjecting him to a penalty” (see the above-quoted ATF 73 IV 223), and internment must be ordered, though this is not quite certain since sub-art. (1) of Art. 128 states that “internment shall be ordered" while, according to sub-art. (2), it “may be ordered". However, it seems that if the making of such an order were not compulsory, there would be little point in providing that Art. 128 is inapplicable when the new offenoe is punishable with imprisonment exceeding five years (in support of this contention, see Art 42 of the Swiss Code which authorize* the court to order internment irrespective of the seriousness of tbe new offence).

From a practical point of view, it appears that the law-given, by departing in Art 128 from Art 42 of the Swiss Code in that which concerns tbe conditions governing tbe imposition and enforcement of internment, have created a system such that this measure will be inapplicable in a number of cases where it might be useful and that absurd consequences will often follow if Art 128 is given effcct Thus if *A* is, for the fifth time, convicted of abortion (Art 530 (1), which provides for rigorous imprisonment not exceeding five yean; note, inddentally, that this case must be distinguished from the one where *A* would be convicted at once of five offences of abortion, which latter case would amount to a so-called "collective" offence of abortion specifically mentioned in Art 531 (1» and all tbe other requirements laid down in Art. 128 are satisfied, internment must be ordered

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and *A* will consequently be detained for an indefinite period of time which, however, may not exceed ten years; yet if *A,* instead of being interned, were sentenced to a penalty of rigorous
imprisonment increased on the ground of recidivism, he might be detained for as long as twenty-five years. Paradoxically, internment, which must be substituted for imprisonment because its disabling effects are felt longer than those of imprisonment, may often, in actual fact, disable the offender for a shorter period than a punishment would. This being so. Art. 128 will be found to serve some purpose only when the new offence is punishable with simple imprisonment, for it is only then that the accused will be put away for a longer term *(I.e.* ten years at most) than if the penalty were ordered *(i.e.* three years at most). Besides, in view of this inconsistency, it would be tempting to rely on Art. 128 (2) and to hold that in no case is the court'bound to make an order for internment.

3. The last question requiring clarification is whether aggravation under Art. 82 may be ordered in cases where, according to the Special Part of the Code, the accused is liable to an increased punishment on the ground that he U an habitual offender or makes a profession of the offcnce or, generally, because the offence has been repeated. For instance, Art. 520 (1) dealing with refusal to provide professional services, states that the offender "is punishable with fine and, in the event of repetition of the offcnce, with simple imprisonment not exceeding one month"; Art. 551 (I), concerning incitement to dueling, prescribes that the offence is punishable with fine but that, "where the offence is repeated, the court may pass sentence of simple imprisonment not exceeding three months"; Art. 635 (3) (a) states that there is aggravated theft if the offender is "a habitual thief" and Art. 658 (a), that there is aggravated fraudulent misrepresentation "where tbe offender habitually commits tbe offence of fraudulent misrepresentation".

(a) There is little doubt that the above-mentioned Arts. 520 (1) and 551 (1) do not contemplate cases where there exists a material concurrence of offences contrary to the said Articles. They clearly imply that the offence consisting of refusing to provide professional
services or inciting others to figh't a duel is committed on at least two occasions, a conviction for such an offence being had in the meantime. These Articles, therefore, provide for special cases of recidivism in which Art. 82 (1) (ft) is not applicable in addition. Although the only rule expressly prohibiting cumulation of identical aggravating circumstanccs is Art. 81 (2), which concerns solely the cumulation of circumstances repectively laid down in Art. 81 (1) and the Special Part of the Code, this prohibition must logically apply *a fortiori* to the cumulation of identical aggravating circumstanccs respectively laid down in Art. 82 and the Special Part or, for that matter, in Arts. 81 and 82 *(e.g.* antecedents in Art. 81 (1) *(e)* and recidivism in Art. 82 (1) (ft)). Thus, if under the Special Part recidivism already affects the penalty to be ordered pursuant to the article of the law which the accused violated, as in the case of offcnccs contrary to Art 520 (1) or 551 (1), that penalty may not be increased again on the ground of recidivism in accordance with Arts. 82 (1) (ft) and 193.

(ft) The same principle applies regarding the question as to what relation exists between Art. 82 and provisions like tbe above-mentioned Arts. 635 (3) (a) and 658 (a). It was noted before that, when a person is charged at once with a series of offcnccs of the same nature, not amounting to a successive offenoe, and the pertinent provision of the Special Part provides for aggravation on that ground, a so-called "collective offence" is deemed to have been committed and the penalty ordered pursuant to that provision may not be increased on the ground of concurrence. *I.e.* Art. 61 and. consequently. Art. 189 arc inapplicable unless, of course, the collective offence has been committed together with one or more offences of a different nature. Thus if a person is convicted at once of several thefts and the court considers that he makes a profession of theft (see the definition in para. (3) (ft) of comments under Art. 81). he must be punished exclusively under Art. 635 (3) *(a)* and the punishment imposed according to this Article may not be increased pursuant to Arts. 82 (I) (a) and 189; the latter Articles would apply only if the court should consider that the accused is not an habitual thief and convicted him of ordinary theft under Art. 630.

(c) There is no indication in tbe law that provisions such as Arts. 635 (3) (a) and

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658 (a) are meant to apply only in cues of collective offences, /.#. when all the thefts of which the accused makes a profession are tried together. In other words, these provisions may be taken to supersede the general rules governing recidivism as well as those governing concurrence. Thus if a person previously convicted of theft on several occasions is again found guilty of this offcnce, he may be regarded as an habitual thief within the meaning of Art. 635 (3) *(a)* and punished according to this Article (and not interned according to Art. 128, since the punishment exceeds five years) by a penalty which may not be increased on the ground of recidivism; if, on the other hand, the court is of opinion that he does not make a profession of theft, it must convict him of ordinary theft under Art. 630 and aggravate the punishment as provided for by Arts. 82 (1) (6) and 193. There is one reason, however, which militates in favour of applying Art. 635 (3) *(a)* and similar provisions only to collective offences, and this is disablement, since the accused may be detained for a longer term if be is punished according to Arts. 630 and 193 than if he is sentenced under Art. 635 (3) (a) or interned according to Art. 128.

(d) Aa is apparent, there is in any event little room for applying the general aggravating circumstance laid down in Art, 81 (1) (c) concerning the habitual or professional nature of the offence. To the extent that this circumstancc contemplates the case of collective or concurrent offertces, it is superseded by the express provisions of the Special Part or. In the absence of such provisions, by Art. 82 (1) *(a);* if it contemplates the case of relapses, then it is, failing express provisions in the Special Part, superseded by Art 82 (1) (6). It seems that this circumstance would apply, therefore, only when the conditions laid down in the latter Article are not fulfilled; whether the proper ground of aggravation in such a case should be the fact that the accused has antecedents or that he makes a profession of crime, is a matter of opinion.

Article 83. Other circumstances

The court shall give reasons for applying extenuating or aggravating circumstances not expressly provided for in this Code and shall state clearly Its reasons for taking this exceptional course.

Although, as has been mentioned before, the Ethiopian Code follows the system of legal extenuating and aggravating circumstances, and not the one of judicial or indeterminate circumstanccs, Art. 83, with a view to ensuring that any factor may be taken into account which ought to bear upon the sentence, enables the court to reduce or increase the penalty on grounds other than those expressly mentioned in Arts. 79-82. Art 83, therefore, provides for judicial circumstances which, however, are only relatively indeterminate; for a court which is of opinion that a circumstance not laid down in Arts. 79-82 should be considered in mitigation or aggravation may not confine itself to reducing or increasing the punishment accordingly. It must describe the said circumstance and explain why it thinks that it should affect the sentence, *i**. why this circumstance warrants the conclusion that the accused is more or less dangerous (see Art. 522 (1) (d». Considering, however, the broad wording particularly of Arts. 79 and 81, it ia unlikely that the need to invoke Art. 83 will arise often. Aa a matter of fact in the very terms of this Article, mitigation or aggravation for reasons different from those specifically provided for by law is only an “exceptional course".

Art 83 is silent as regards the effects of “other circumstances", and so are the records of the Codification Commission. Yet tbe question must be settled whether these circumstances lead to an "ordinary" or a "special” mitigation or aggravation of the penalty. On the one hand, it might be held that since Art. 83 leaves it to the discretion of the court to decide whether "other circumstances" should be taken into consideration, the manner in which they affect the penalty is also in the court’s discretion. The court, therefore, is not bound by tbe provisions of Arts. 184 and 188. On tbe other hand, it may be argued that had it been tbe legiaiaturc's intention to lay down additional special mitigating or aggravating factors, express provision would certainly have been made to this effect. In support of this view, one may point to tbe fact that Arts. 80 and 82 are restrictive and do not contain clauses aa general as those that can be found in Arts. 79 and 81. Only in tbe latter Articles ia it possible to imply

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circumstances other than those which are specifically mentioned therein. Therefore, the discretionary power of the court applies exclusively to the creation of additional general, and not special, extenuating or aggravating circumstances, and this entails that “other circumstances" within the meaning of Art. 83 bear upon the sentence in exactly the same manner as those provided for by Arts. 79 and 81 respectively, *i.e.* they warrant ordinary mitigation (Art. 184) or aggravation (Art. 188).

This construction may also be defended on the following ground. If Art 83 allowed the court to create special extenuating or aggravating circumstances, how would the penalty be calculated ? Difficulties would arise, not in cases of mitigation since Art 183 provides for free mitigation, but in cases in aggravation. However wide the court’s discretionary power, it should obviously be exercised within certain limits as in all other cases when the court applies special aggravating circumstances. But which limits? Those laid down in Art 189 or in Art. 193? Leaving alone the fact that this uncertainty would create utter confusion, it is simply unthinkable that the court should be allowed to assess sentence as though there were concurrence or recidivism when the aggravating factor which it applies has actually not been deemed to be sufficiently important to call for a specific legal definition. There can be no doubt, therefore, that "other circumstances" bear upon the sentence in the same fashion as general extenuating or aggravating circumstances for, granted that they cannot lead to special aggravation, there is no reason why they should lead to special or free mitigation.

Article 84. Cumulation of extenuating and aggravating circumstances

(1) *If there exists both extenuating and aggravating circumstances the court shall take both into consideration in determining the sentence.*

(2) *In the event of concurrent aggravating and extenuating circumstances the court shall first fix the penalty having regard to the aggravating circumstances and then shall reduce the penalty in light of the extenuating circumstances.*

Extenuating and aggravating circumstances, whether general or special, do not exclude each other. What is prohibited by law is only the cumulation of identical extenuating or aggravating circumstances, but not the cumulation of different circumstances nor that of extenuating and aggravating circumstances other than those which are clearly incompatible *(e.g.* Arts. 79 (1) *(a)* and 81 (1) (c); Art. 79 (1) *(b)* and 81 (1) (a), etc.). If a case occurs in which certain factors should be considered in aggravation and others in mitigation, the court must assess sentence having regard to all of them. Thus if *A,* within five years of being released from prison, commits theft in a state of great material distress, the court must, according to Art. 84 (1), increase the penalty on the ground of recidivism and reduce it on tbe ground of distress. This operation, which is a rather delicate one, is to be effected as provided for by Art. 84 (2), the precise implications of which are as follows. The court will first estimate the penalty that would be adequate were there neither extenuating nor aggravating circumstances present in the case. This hypothetical penalty will then be increased”having regard to the aggravating circumstances", but this increased penalty will itself be hypothetical since it is not the one that will ultimately be ordered, but the one that will be reduced “in light of the extenuating circumstances". The actual penalty, therefore, will be this increased penalty thus reduced.

When several aggravating circumstances are present in any given case, they must all be taken into account. This cumulation may appear unnecessary for objective as well as subjective reasons. On the one hand, it has no bearing upon the upper limit of the punishment, *I.e.* the court is always bound by the limits laid down in Art 188 whatever the number of general aggravating circumstances, and by those laid down in Art. 189 or 193, as the case may be, regardless of the fact that general aggravating circumstances are present together with concurrence or recidivism, or that concurrence and recidivism are present together. On

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the other hand, any aggravating circumstance which the court takes into consideration reveals the actor's dangerous disposition; thus, if he is a recidivist, this is sufficient evidence that he is dangerous and there is little point in considering in addition whether he acted from base motives, exceeded his powers, etc. The same view might be expressed in relation to the eases where the accused is convicted of an offence which, under the Special Part, is an aggravated one and the pertinent provision of this Part contains other aggravating circumstances which are also present. For example, if a thief is deemed to be dangerous because "he acted at night or by climbing over" (Art. 635 (3) (c)), it may seem that the court should disregard the fact that he also acted "as a member of a group" (Art. 635 (3) (ft)) sincc the first circumstance suffices to show that he is dangerous and he is in any event punishable for aggravated theft (to the same effect, see ATF 72 IV 110, JdT 1947 IV 49; see also ATF 73 IV 17, JdT 1947IV 74 and ATF 78 IV 227, JdT 1953IV 89). The same, finally, might be said of the cases where there exists a cumulation of extenuating circumstances. Yet this view would be inconsistent with the letter and spirit of the law. What is decisive and must be taken into account by the court in e Iculating the penalty is the degree of danger which the actor creates, objectively and subjectively, and this depends, in the terms of Art. 188, on "the multiplicity of grounds of aggravation" or, for that matter, of mitigation. It is true that this multiplicity does not affect the limits of punishment as laid down by law; it does and must, however, affect the limits of the punishment actually ordered. Bearing in mind the principle of individualization of semences, it seems evident that the sentence passed with respect to a thief who acts at night as a member of a group should not be the same as that passed on a thief who acts alone at night; nor should the same sentence be passed under *e.g.* Art. 380 or533 irrespective of whether one or several extenuating circumstances are present.

Therefore, the first operation which the court is expected to make is to calculate the penalty so that it should reflect all the grounds of aggravation that are present in the particular case. Although Art. 84 (2) docs not clearly state in what order they ought to be considered, it may be inferred from Art. 82 (2) that the court will, where appropriate, consider firstly concurrence, then recidivism and then general aggravating circumstanccs (at any rate, the latter circumstances can obviously not be considered before concurrence, *i.e.* before it is known upon which of the various penalties they should bear). After this is done, the court will reduce the penalty if there are any reasons for doing so (note that, contrary to what is stated in Art. 84
(2) , mitigation, at least on the grounds mentioned in Arts. 79 and 80, is not compulsory unless the court is satisfied that the accused is less dangerous on these grounds). For example, within five years of being released from prison, *A,* in concert with *B,* shelters his brother C, a criminal wanted for homicide in the first degree, and gives the police false information concerning Cs whereabouts. The court will estimate which punishment would be adequate, lairing into account the fact that there is concurrence (Arts. 438 and 439), recidivism and conspiracy. The more serious offence is harbouring (Art. 439, punishable with three years simple imprisonment). If only this offence had been committed, one year imprisonment might have been adequate; since *A* is a recidivist, two years imprisonment might appear to be adequate; yet since ttyere is conspiracy also, the court might arrive at the conclusion that two and a half years imprisonment would be a punishment that would adequately reflect all these aggravating factors. It is this punishment that must be considered when the question arises whether and to what extent the fact that *A* acted in the special extenuating circumstance described by Art. 80 should be considered in mitigation; if the court is of opinion that this fact should bear upon the sentence, it must reduce this hypothetical punishment of two and a half years in the manner provided for by Arts. 80 and 185. Then, and only then, will the court really have calculated the sentence "according to the degree of individual guilt, taking into account the dangerous disposition of the offender, his antecedents, motive and purpose, his personal circumstances and his standard of education, as well as the gravity of his offence and the circumstances of its commission" ,vArt. 86).