

Micky Short Note Center

CRIMINAL LAW BOOK II

Dear readers you are advised to read each provision in line with the note. Since the content of the original book that directly copied the criminal code provision are completely removed, except on necessary points

UNIT-I

CRIMINAL RESPONSIBILITY

What is defense?

- ✓ They are circumstances that relieve an accused from conviction of guilt and its consequent penalty. These circumstances exempt a criminal from criminal liability or entitle him/her to a reduced punishment.

Explain different forms of defenses?

- ✓ Defenses for criminal liability are incorporated in criminal law in different ways.
 - a. **Special defenses:** could be non-fulfillment of essential conditions of the crimes provided in the special part of the Criminal Code. They are defenses that apply in particular crime.
 - b. **General defenses:** are those expressly provided by law as defense. They are general defenses. They are applicable to all crimes. They are excuses and justifications.
 - **Excuses** are defenses that arise because the defendant is not blameworthy for having acted in a way that would otherwise be criminal. In the cases of the excuses, the focus is on the individual criminal rather than on the crime committed.
 - **Justification defenses.** Defenses that arise when the defendant has acted in a way that the law does not seek to prevent are called justification defenses. Justifications, the focus is on the act rather than on the criminal. Justifications include acts required or authorized by law, legitimate defense, necessity and professional duty.

Who has the Burden of Proof in Cases of Defenses?

- ✓ The general rule is that it is the duty of the prosecution to prove the accused's guilt and if at the end of and on the whole of the case, there is a reasonable doubt created by the evidence, given by either the prosecution or the defense, as to whether the accused had committed the crime or not, the accused is entitled to acquittal on the ground of *benefit of doubt*.
- ✓ It means if an accused pleads defense within the meaning of 'excusable' or 'justifiable' grounds of defense, there is a presumption against him and the burden to rebut that presumption is on him.

General Defenses

1. Criminal Responsibility and Irresponsibility

What is responsibility and irresponsibility?

- ✓ Responsibility is a person's mental fitness to answer in a court for his/her action. Responsibility or irresponsibility is concerned with the criminals' awareness and their capabilities to control their action.
- ✓ Therefore, before ascertaining that the criminals have committed the crime intentionally or by negligence, it is necessary to assure the responsibility or irresponsibility of the criminals.

What are the circumstances for irresponsibility of the offender?

- ✓ Irresponsibility may arise in three cases. *With regards to adults, it may arise from insanity or intoxication, and with regards to infants, it may arise from their immaturity.*

What is the presumption of the law on the criminal liability of the accused?

- Generally, when a person is accused of a crime his/her responsibility is presumed by the Court. The prosecution need not prove it.
- This means that of the important things necessary to make a person liable for punishment within the meaning of Art.49/1 are established the in the following way:
 - a. The proof that the act was done by the accused---It is the burden of the prosecutor.
 - b. The fact that the accused is responsible for his acts---this is presumed by the Court.

When the question of irresponsibility are raised?

However, the question of irresponsibility arises in any of the following two situations:

- a. **When the accused invokes** it, particularly, during the preliminary objections as per Art. 130/2/g of the Criminal Procedure Code, on the first day of the criminal Proceeding.
- b. **When the Court is doubtful about the mental condition of the accused** due to partial or complete deprivation of mental faculties. The Court may entertain such a doubt at any stage of the trial from the conduct of the accused on the trial.

1.1.Absolute Responsibility (art 48)

What are the circumstances whereby the accused is in absolute responsibility? (Art 48)

- ✓ According to Art. 23 (3), *cum* (Art. 48) the fulfillment of the requirement as to responsibility is a condition precedent to the fulfillment of the requirement as to guilt.
- ✓ This is to mean that no person may be convicted of an offence unless, at the time of commission, he was not irresponsible for his acts.

- ✓ In general responsibility could not be defined in a positive, but only in a negative manner, and this is why most codes including the Ethiopian Criminal Code (2005) do not describe responsible but irresponsible persons.

A. Insanity

- ✓ Insanity is a complete defense to a criminal charge. It is based on the assumption that one who is insane has no mind and hence cannot have the necessary mens rea to commit a crime.
- ✓ Insanity, according to medical science, is a disease of the mind, which impairs the mental faculty of man. In law, insanity means a disease of mind, which impairs the cognitive faculty, namely, the reasoning capacity of a man to such an extent as to render him incapable of understanding the nature and consequences of his act.

What is the presumption of the law on insanity?

- ✓ Every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crime, until the contrary be proved to their satisfaction; and that to establish a defense on the ground of insanity.
- ✓ It must be clearly proved that, at the time of committing the act, the party accused was suffering under such a defect of reason, from disease of the mind, as
 - **Not to know the nature and quality of the act he was doing:** did not appreciate what he was doing so that the “act requirement” is not fulfilled
 - **Does not know the wrongfulness of his or her act:** if he could not form the requisite mens rea).

Explain the tests of insanity?

- ✓ The major short lived tests are:
 1. **The irresistible impulse addition to the M’Naghten test:** A defendant may be acquitted if he or she was unable to control the action due to mental illness.
 2. **The Durham Rule, or “product test” (1954):** The defendant must be acquitted if the crime was the product of mental disease or defect.
 3. **The Currens Test (1961):** The defendant must be acquitted if he or she “lacked substantial capacity to conform his conduct to the requirements of the law...as a result of mental disease or defect.”

What are the Essential Conditions to Establish the Defence of Insanity?

- ✓ Art. 48(2) requires the proof of the defense of irresponsibility i.e. the incapacity of the defendant to form a guilty intention basing on the following important things:
 - a. **Nature of the incapacity:** That the accused is incapable of understanding the nature **or** consequences of his act **or** of regulating his conduct according to such understanding,
 - b. **Reason of the incapacity:** That such incapacity is due to age, illness, abnormal delay in his development **or** deterioration of his mental faculties, (one of the causes specified under Art. 49 (1) i.e. a derangement or an abnormal or deficient condition).
 - c. **Time of the incapacity:** That such incapacity exists **at the time of his act** that produced the consequences in question.

Which tests of insanity is adopted by Ethiopian criminal code?

- ✓ The Code resorted to one of the three principal methods of defining criminal responsibility, namely:
 - a. **Biological method**, consists in specifying a number of physical or mental disabilities or defects deemed to render the person concerned irresponsible.
 - b. **Psychological method** consists in prescribing that a person incurs no liability that, at the time of the offense, was incapable of understanding the nature of his acts or of controlling himself.
 - c. **Bio-psychological method**, followed in many modern Codes including the Criminal Code of Ethiopia, a person is regarded as irresponsible ***only if, at the time of the commission of the crime, he was deprived of his mental faculties in consequence of certain biological defects. In other words there must be a causal relation between the biological defect, which the offender suffers, and the psychological failure as a result of which the person become incapable to understanding his acts.***
- ✓ Sub-Article 2 of the provision clearly provides the test of insanity. It provides both the biological and psychological tests, which are enumerated below:
 - a. **Age:** refers to old age, for senility may affect a person's mental faculties;
 - b. **Illness:** refers to any form of mental as well as physical disease as a result of which a person is deprived of his mental faculties.
 - c. **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;

- d. **Deterioration of mental faculties** of the offender due to poison, intoxication by alcohol or drugs, hypnosis or somnambulism;

What is the Legal Effects of Criminal Irresponsibility?

- ✓ The legal effects of criminal irresponsibility are of two kinds.
 - a. **No liability: 48(1):** An irresponsible person incurs no liability
 - b. **Subject to certain treatments or measures:** 48 (3) authorizes the court to make orders under Arts. 129-131, whenever these measures are necessary for the treatment of the offender or the protection of the public or both.

1.2. Limited Responsibility: Art. 49

What is partial responsibility?

- ✓ it is a stage between insanity and sanity, where an offenders faculties are affected to such an extent that, although he is certainly able to understand what he does and to act accordingly, it is equally certain that his intelligence or will-power is not that of a “normal” person and that his degree of guilt is consequently lesser than that of such a person.
- ✓ Such a person may neither be relieved of liability, since he is not fully irresponsible, nor should he be liable to a full punishment, since he is not fully responsible.
- ✓ Thus, Art. 49 applies only where there is no doubt the accused is not fully irresponsible within the meaning of Art. 48.

What are the common Characteristics of Limited Responsibility?

- ✓ Limited responsibility described under Art. 49, stated as a *derangement of the mind or understanding (e.g. hysteria), an arrested mental development (e.g. imbecility) and an abnormal or deficient condition (e.g. alcoholic intoxication)* do not have the effects specified under Art. 48.
- ✓ A person is not partially responsible for the sole reason that he is of low intelligence or poor education. Furthermore, a person is not partially responsible for the sole reason that he is of weak character or morally perverted.

What is the Legal Effects of Limited Responsibility?

- ✓ Like that of irresponsibility, the legal effects of limited responsibility are of two kinds:
 - a. partial penalty for which he responsible
 - b. special treatment and measures for his irresponsibility

2. Intoxication-Intentional or Culpable Irresponsibility: Art. 50

Is intoxication is a defense for criminal liability?

- ✓ Regarding intoxication, whether voluntary or involuntary, most penal codes flatly state that intoxication is not defense which is actually, not true. since involuntary intoxications can be a ground for defense for criminal liability.

What is the difference between art 48, 49 and Art 50?

- ✓ The main difference between Arts. 50 and 48, 49 is not the bio-psychological condition of the offender but it is the condition that creates the irresponsible nature of the offender.
- ✓ Unlike the legally recognized causes under the preceding articles, under this article, it is the doer who puts himself into a condition of irresponsibility or of limited responsibility by means of alcohol or drugs or by any other means.

What are the condition to establish a criminal liability on intoxicated person?

- Preceding intention:** When intent existed before the offence was committed, since the accused was capable of forming a specific intention prior to intoxicating himself. Under this condition, the person not only did he voluntarily place himself in an abnormal condition, but he did so in order to carry out a decision which he had freely made. (art 50(1))
- Negligence:** when 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 being in an abnormal condition (Art.50/2). This therefore is applicable to states of negligence—advertent and inadvertent. The implication here is that the doer will not be held liable if the wrong he has done is not punishable.
- Absolute Irresponsibility (Accident):** In such instances, the accused is not liable to punishment under sub-art.3, as the person has neither criminal intention nor criminal negligence existed before he intoxicated himself. See Art.57 (1). Under sub-art.3, this conflict is solved by holding the doer not of the offence actually he committed but of a special offence against public safety (Art.491).

Bear in your mind

Sub-Art.	State of the Defendant	State Induced By	Crime Committed	Legal Consequence
Art. 50/1	Absolute or Limited	Own fault	Intentionally (In order to...)	Fully liable to punishment

	irresponsibility	(Voluntary Intoxication)		
Art 50/2	Absolute or Limited irresponsibility	Own fault (Negligence)	Negligently	Punishable for negligent commission of the crime
Art. 50/3	Absolute irresponsibility	Own fault	Accidentally (Neither contemplated nor intended)	Punishable under Art. 491 provided the crime is punishable with at least 1 year.
Art. 50/4	Absolute irresponsibility	No fault on his part (i.e. has been coerced)	While incapable of forming any mental element	Shall not be liable to punishment

What are the Conditions where the Court Falls in Doubt about the Responsibility of the Accused?

- a. **When the accused displayed any sign of insanity.** In fact Art.51 (1) does not specify how the ground of the doubt should be serious. Thus, there should be objective reasons for the doubt (e.g. the accused is interdicted by civil court, the accused produce a medical proof to the effect that he is suffering from a given mental disease, etc.).

In other words, if its doubts arises from factual elements and not mere conjecture, 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 (1) or does not raise a defense of insanity.

- b. **Where the accused shows any symptoms of 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. The court is rather presumed to have such suspicions because the accused is in such a condition that there exists what might be termed as a presumption of irresponsibility.

What is the Duties of the Medical Expert?

- ✓ According to Art.51 (2), the duties of the medical expert are of two folds.
 - a. Medical expert shall investigate whether any of the biological causes of irresponsibility or limited responsibility mentioned in Art.48 and 49 is present and what its effects.
 - b. The medical expert 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.

What should be the reference time for the medical expert to show irresponsibility?

- ✓ In this case the essential time reference is the time of the commission of the crime. However the mental condition of the offender at the time of trial is also important to determine whether the offender is capable of standing on trial.
- ✓ The Amharic version of sub-art.2, second *alinea* accurately refer to both the time of the commission of the crime and the time of the trial.

What should be the Relation between the Court and the Medical Expert?

- ✓ Sub-art.(3) of Art.51 on the other hand seems to put a clear boundary between the roles of the court and the medical expert in determining irresponsibility;
 - a. **Role of the court:** The court shall not substitute itself for the expert and adjudicate medical questions, to which he is not qualified to decide. Instead, the provision required the court to be bound to the ‘definite scientific findings’, or not ignore the medical statement in making its decision.
 - b. **Role of the medical expert.** He/she may not substitute himself/herself for the court and adjudicate legal questions, to which he is not qualified to decide. so that if the expert states the accused is not fully responsible and should accordingly sentenced to, say, a punishment reduced by one half, the court is not bound by this statement.

3. Infancy/Immaturity: Art. 52

What is infancy or immaturity?

- ✓ Immaturity refers to inability to appreciate the nature and consequences of an act due to early age. It includes infancy, young criminal and persons in the transitory age.

Who are immature?

- ✓ according to the criminal code of Ethiopia the following are immature person:
 - A. **Infancy:** Infancy is the period extending from birth to what might be called criminal majority. The age limit that marks the end of infancy varies from one country to another. In

our country, infancy ends at the attainment of ninth year (article 52). The infants who have not attained the age of nine years are exonerated from criminal liability.

B. Young Persons: Young persons are persons whose age is between nine and fifteen (article 53(1)). Young persons do not enjoy complete immunity from criminal liability. They are considered responsible for their acts. However, the court may not treat young persons in the same manner as it does adults. The court orders the penalties and measures provided under article 157-168 rather than the punishments provided under the special part of the Criminal Code.

What measures are imposed on young offenders? (Arts 158-162)

✓ The measures provided for young criminals under article 158-162 of the Criminal Code are five in number. They are summarized in the following table.

No.	Problems of young persons	Measures	Articles	Duration of Measures
1	Feeble mindedness, arrested development, mental disease, epilepsy, addiction to drink etc.	Treatment	158	When the purpose is served or when the court ordered or when the criminal attained 18 years (article 164(1))
2	Moral abandonment, corruption, absence of care and protection	Supervised education	159	When the purpose is served or when the court ordered or when the criminal attained 18 years (article 164(1))
3	Spending free hours and holidays with bad friends and places	Keeping the young criminal at home or school	161	The duration is fixed by the court (article 161)
4	Dangerous disposition, commission of grave crime	Admission to corrective institution	162	Between one to five years or when the young criminal attains 18 years (article 164(2))
5	Any other problems	Reprimand and censure	160	No duration

Why young person are subject to liability?

There are two basic reasons that underlie why young persons have to be held criminally liable.

- i. Young persons are assumed to begin to understand the nature of their acts and able to form a decision and keep to it.
- ii. The commission of an offence by them calls action by the society because no action has been taken at home or at school or it has failed. On attaining their tenth year, therefore, minors are no longer a problem to their parents alone; they become the responsibility of the society as well.

C. Transitory Age: The criminal responsibility and guilt of persons between the age of fifteen and eighteen years are determined as though they were an adult, but the punishment that may be ordered is not necessary that which would be ordered if they were adults.

What are the measures taken for the transitory age offenders?

- ✓ The court has three options:
 - a. It may order any of the penalties applicable to adults and mitigate it according to article 179. However, the mitigation is not compulsory. In such case, the court may not sentence the criminal to death penalty.
 - b. The court may order one of the special penalties applicable to young persons.
 - c. The court may order special measures applicable to young criminals based on the conditions laid down under article 177.

N.B. the court should assess the punishment of young offender according to art 55.

UNIT-II

2. AFFIRMATIVE DEFENSES

.What is Affirmative defense?

- ✓ Affirmative defenses, as the name speaks for itself are legal defenses against a criminal charge.

When affirmative defenses are raised?

- ✓ It is logical for the accused to raise them only at the time when he is required to defend the charge. Procedurally, this will happen after the prosecution have adduced evidence and prove a *prima facie* case.
- ✓ This implies that one who being under any of the above circumstances commits a punishable act shall undergo all the preceding stages in the process. Some seriously criticize the scheme for the fact that it unduly makes the accused suffer from the hardship of a criminal process.

They therefore suggest that circumstances, particularly the first and the second to justify the discontinuation of the proceeding at the earliest possible time.

- ✓ In line with the idea some Codes of Criminal Procedure allow the circumstances to be invoked at least as a legitimate ground of preliminary objection.
- ✓ The Criminal Procedure Code of Ethiopia for example expressly stated state of irresponsibility as ground of preliminary objection (art.130/--). In the case of the Code even arguments have been forwarded in favor of the prosecution to rely on Art.42/1(a) to discontinue cases whenever they prove any of the circumstances.

2.1. Lawful, Justifiable and Excusable Acts:

What is the legal status of affirmative defenses in Ethiopian criminal law?

- ✓ According to Art.58 (2), a person who intentionally commits an offence is always punishable except where he acts in circumstances providing him with a justification or an excuse that is in any of the circumstances defined in Arts.68-81.
- ✓ Therefore the question whether an act is: lawful, justifiable or excusable does not arise unless this act is an ingredient of an offence.

What is the difference between justifiable acts and excusable acts?

- ✓ The definition and classification of lawful, justifiable and excusable acts sometimes vary.
 - a. **Justifiable Acts:** comprises of acts required or authorized by law, legitimate defense, necessary acts and acts done with the consent of the injured party,
 - b. **Excusable acts:** which are said to be either *absolutoires* or *attenuantes* according to their effect on the penalty, are similar to the circumstances with the Ethiopian Code regards as general or extenuating circumstances.

What is the position of Ethiopia in classifications?

- ✓ The Ethiopian Code does not follow any of the above-mentioned models but provides for three classes of acts with respect to which the ordinary rules concerning criminal guilt do not apply or fully apply,
 - a. **Lawful acts** (acts done in circumstances which legitimate them),
 - b. **Justifiable acts** (acts done in circumstances excluding intentional guilt) and
 - c. **Excusable acts** (acts done in circumstances reducing the degree of guilt).

2.1.1. Lawful Acts (Art 68)

What are lawful acts?

- ✓ A lawful act is an act, which a person is legally authorized to do. Even in some circumstances the law provides more than authorization and obliges a person to behave in contradiction to the law.
- ✓ *The defense of lawful acts therefore provides a counter-law to the prohibitory law. The prohibitory law says: you must not kill. But the counter-law says: If you are a soldier in a combat, you must kill.*

What are the conditions for the applicability of defense on lawful act?

- ✓ The availability of the defense is conditioned upon the fulfillment of two conditions.
 - a. One cannot claim protection under the defense unless he/she is one who has acquired the status required in the law. For instance, if someone, other than a police officer who restrain the liberty of another.
 - b. The mere fact of having the status envisaged in a law does not entitle the person to act in contradiction to the prohibitory law. *Instead the objective circumstances that necessitate the action in question must be present.*

A. Acts required or Authorized by Law

What are the Acts required or Authorized by Law? Art.68

- ✓ Under Art.68 of the Criminal Code of Ethiopia, lawful acts comprise of *particular (illustrative)* acts connected with: are the following;
 - a. **Acts Relating to Public, State or Military Duties:**
- ✓ 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.

What is acts in respect to public duties?

- ✓ Art.68 is silent as to what constitutes “acts in respect to public duties”. But, if one compares it with ‘State duty’, which is more specific and require the claimant to possess an official status or be vested with some kind of some power,
- ✓ It appears the defense is available to anyone who does, in accordance with the law, something for the public good. For instance, any private person who arrests or participates in the arrest of an offender must be protected under this defense because the act he does pertains to public duties

When the defense of state military duties constitute a defense?

- ✓ It is available when the doers possess an official status, either civil or military, and act in discharge of their duty.
- ✓ Acts of a public servant or a member of the armed forces are therefore do not constitute an offense and are not punishable so long as they are done in accordance the terms of the relevant law.

b. Right of Correction or Discipline

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

c. Exercising Private Rights:

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

B. Professional Duty: Art. 69

What is profession and who are professionals?

- ✓ Although Art.69 applies to only specifically mentioned class of people, ‘professionals’, term is defined nowhere in the Code the.
- ✓ But there are some suggestions for it to include “any vocation or calling in which a person professes to exercise learning, skill or art”. It also refer to “any activity which a person habitually carries out for the purposes of obtaining the resources necessary to his livelihood”.
- ✓ It seems irrelevant for the purposes of Art.69 whether this activity is exercised by virtue of the law or a contract. Only a person entitled to practice a profession is exempted from criminal liability.

What are the Conditions where Professional Duty is not justified?

- ✓ Art.69 applies only when the doer acts in accordance with;
 - a. **The accepted practice of the profession:** reference will have to be made to the professional regulations, if any, or to the custom of the particular profession, which may be ascertained through expert evidence and
 - b. ***Does not commit any grave professional fault.***

C. Consent As a Defense: Art. 70

- ✓ This provision is inserted by the Revised Criminal Code. The previous Penal Code under its Art. 66 categorically stated that consent is no defense for criminal liability.
- ✓ But in fact that was a technically wrong statement since there are crimes such as rape, theft and injuries caused during sports without foul play there an implied consent of the victim while voluntarily participating in the game. Therefore, it is right to say that consent is a qualified immunity to criminal liability.

When consent is qualified defense?

- ✓ Art. 70 says that consent can be a defense for cases which are punishable upon filing of a formal complaint. In such cases if the consent has been give by either the victim himself or his legal representative the person causing the injury is not liable for penalty.

Is it absolute defense or without limitation?

- ✓ Art 70/2 places an important limitation to this defense. A person is free to donate any of the above said things to another **person for personal use** or to a juridical person for appropriate scientific research or experiment, the recipient shall not be punishable within the meaning of Art 70/2.
- ✓ However, if such a transaction is done with **commercial motive both the donor and the person who takes the bodily organ from his body i.e., surgeon are liable to punishment under Art. 573 sub-article (1) and (2) respectively.**

D. Coercion/Duress: Arts. 71 & 72

- ✓ The law shall expect neither extreme heroism from individuals nor encourage cowardice
- ✓ There is well-known maxim *actus me invito (factus) non est mens actus*, i.e. an act which is done by me against my will is not my act and hence I am not responsible for it. This maxim refers to one type affirmative defense commonly known as the defense of ‘duress’ or ‘coercion’.

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

Why coerced persons are protected or go unpunished?

A coerced person is justified first, because;

- a) They are like an insane person or intoxicated person he is totally deprived of his freedom of choice and therefore equally deserves the same treatment as long as the loss of will power is involuntary.
- b) They are justified for he/she sometimes avoid a greater harm; say his/her life in exchange for a lesser harm, say forced damage to a property of another.
- c) Absence of any purpose to punish a coerced person is also another justification lying behind the defense of coercion. Punishment does deter neither the coerced person nor any potential victim of coercion.
- d) The disposition of a coerced person is not that of a criminal who willfully act in disregard of the law. Thus, punishing a coerced person would be absolutely contrary to the basic principle of criminal justice.

Explain the legal status of the Defense of Coercion under Ethiopian Law?

- ✓ There are two types of coercion absolute and resistible coercion.

i. Absolute coercion

What degree of coercion amounts for defense?

- ✓ Regarding the degree of coercion required to justify the wrongful act of a person under compulsion, Art.71 requires that to be 'absolute'.
- ✓ Therefore, coercion is no defense unless it is absolute. Actually the term 'absolute' would create the impression that there must not exist, any possibility of resistance. However, the text of Art.71 indicates that the defense is available when the agent personally could not **possibly** act otherwise than as he has done.
- ✓ The question whether resistance is possible shall be decided taking both objective and subjective factors into account.

What are the possible forms of coercion under art 71?

- ✓ Coercion under Art.71 can be of either physical or moral.
 - **Physical coercion** is “violence exercised by someone in consequence of which a human agent is materially obliged to commit an offence”. This definition implies that the defense of coercion is available when violence or force is used, whether for the purpose of compelling or preventing an act, which renders the agent physically incapable of acting otherwise than as he does.
 - **Moral coercion** on the other hand is exercised when an act is which does not render the agent’s movements involuntary is done, but deprives him of his freedom of choice. It is usually in the form of threats intended to break the will of a person and make him yield to the demands of the person exercising the coercion.

ii. **Resistible Coercion:**

- ✓ Resistible coercion, with which Art.72 deals without distinguishing whether it is of a physical or moral nature, is a coercion of intensity such that the coerced person could reasonably be expected “to resist or avoid committing the act”.
- ✓ In other words, Art.72 is applicable when 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 capable of resisting the coercion. Coercion can be resistible when it is physical as well as moral.
- ✓ When coercion is not irresistible, intent as an element of criminal guilt is present and the coerced person is answerable for his acts.
- ✓ Thus, the doer is as a general rule punishable. However, the fact that he acts under coercion the punishment may be reduced if the actual and personal circumstances of the case warrant mitigation.

E. Superior/Subordinate Relation: Arts. 73 & 74

- ✓ Arts.73/74 are applicable only to specific types of relation, i.e. administrative and military superior subordinate relation.

What is the Responsibility of a Person Giving an Order?

- ✓ In both administrative and military superior subordinate relation, the orders that can be given to a superior are restricted to fit two essential conditions.

- a. Orders may be given only with regard to the so called “service matters”, that is matters concerning the business transacted by the organization to which the superior and subordinate belong.
- b. Only such acts may be ordered as must be done so that the said business is properly transacted. If the act ordered has little or no significance at all to the proper functioning of the transaction in question, the likelihood for unlawfulness is higher.

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

What is the Responsibility of the Subordinate?

- ✓ The Ethiopian criminal law and many other modern criminal laws take an intermediary position by combining obedience with independence.
- ✓ Thus, Art.74 (1) provides that the subordinate cannot escape punishment if he/she carries out an illegal order, which he is aware of it.
- ✓ In general, under Art.74, the subordinate who has carried out an order to commit an offense shall be liable to punishment on the following three conditions:
 - a. When the subordinate is aware of the illegal nature of the order, (superior is not allowed by law to give an order of the type in question.)
 - b. When the subordinate knows that the order is given without authority, (where one obeys an order from someone else to whom he does not owe obedience.) or
 - c. When the subordinate knows the criminal nature of the act ordered,

N.B. For the application of Art.74, the definite knowledge of the illegality of the order and unlawfulness of the act is required, and mere suspicious or negligence is not sufficient. The subordinate is liable only when obedience is not the result of a mistake of fact or the mistake of law.

2.1.2. Necessity and Legitimate Defense: Arts.75-76

What is necessity?

- ✓ A necessary act is an act performed in a so critical situation that the doing of harm is the only alternative to the suffering of harm.
- ✓ The rule for the defense of necessity is similar to that of legitimate defense. In fact in cases of necessity the threat to the actor comes from nature. It is sometimes called an “act of God,” and it may be a fire, a storm, and an earthquake, or a shipwreck that compels the actor to do something that otherwise would be illegal.
- ✓ This is all about a pressure of natural forces that may sometimes confront a person in an emergency with a choice of two evils: to violate the clear meaning of criminal law and produce a harmful result, or to comply with the law and let greater or equal or lesser may harm occur.
- ✓ Necessity is therefore meant a situation where conduct promotes some value higher than the value of the literal compliance with the law.

What is the scope of necessity defense?

- ✓ The second paragraph of Art.75 provides for an exception where necessity is not a defense notwithstanding that all the necessary conditions to raise the defense is met.
- ✓ The law stipulates that persons who have special professional duty to protect life or health may be entitled to mitigation but cannot invoke necessity.
- ✓ Accordingly, if a given boat has some passengers in excess of its carrying capacity and as the result is about to be drowning, except for the crewmembers that are necessary to navigate the boat, others must be sacrificed first.
- ✓ *Thus, in cases of such special circumstances the rule is danger and safety is the exception. The professionals are therefore there to protect others from the danger even at the expense of their lives.*

What are the essential elements and conditions for claiming necessity defense?

The defense of necessity is not available unless some basic requirements, which are enumerated below are not satisfied. It is true that, whichever of the conditions below is missing; the justification of necessity may not be invoked.

- a. **There must be a Danger:** A person is not justified on the ground of necessity merely because he is objectively in a situation involving serious and imminent danger. Instead, a necessary act is an intentional act. That means whatever he does in such a situation is not justifiable unless he does it with a view of avoiding this danger. The expression, ‘to protect’ under Art.75 implies that the act has to be performed with the sole objective of averting

the imminent danger. *The accused must honestly believe, on reasonable grounds, that he was placed in a situation of imminent peril.*

- b. **The Danger must be Imminent:** The danger must be reasonably certain to eventuate. There shall be no time to resort to a third choice that can be used to avoid the danger. Necessity is therefore a defense only if the law is violated when there is no hope to exploit or other way outs.
- c. **The Danger must be Serious:** the justification of the defense is based, among other things, on the proportionality that must exist between the danger averted and the interest made sacrifice. It is therefore immaterial whether the danger at hand is serious or not as long as a danger is averted at a lesser cost, which at the end of the day benefits the society based on cost benefit analysis. But, on the other hand, the very word “danger” implies that the harm with which the actor or the person for whose benefits he acts is threatened must amount to more than a simple inconvenience.
- d. **The Danger Could Not Otherwise Be Averted:** the doer must fall in a situation which the danger cannot be avoided except by infringing upon someone else’s rights. There shall exist no possibility of resolving the conflict between the two interests by acting in accordance with the law.

N.B. Unlike a person acting in legitimate defense, a person who is in a state of necessity does not have proper right to cause harm. Therefore a person in a state of necessity is not justified, unless the doing of harm is absolutely necessary in the circumstances. If he can protect his interest or those of another person without breaking the law or can reasonably be expected not to protect them, he may not invoke Art.75.

- e. **The Harm must be Proportional:**
 - ✓ When causing harm is the only way to avoid danger, the doer is justified only if he does not cause more harm than he would have suffered had he refrained from acting.
- f. **Absence of fault:** Under Art.76 of the code, it is provided that the defense of necessity ceases to exist if the emergency situation is created by the fault of the actor. Therefore, the absence of fault on the side of the doer is another requirement to avail himself of the defense of necessity. For instance, a person driving at an excessive speed cannot raise necessity as a defense if he runs over a pedestrian to save the passengers in the car.

2.1.3. Legitimate Defense: Arts. 78, 79

What is legitimate defense?

- ✓ It is when a person is suddenly faced with an attack to his person or property and immediate aid from the state machinery is not available, that person is entitled to defend himself and resist the attack and to inflict on the attacker any harm that is necessary for the purpose of defense.
- ✓ Legitimate defense is one specific type of necessity, and therefore has much in common. In both cases, a situation of distress arises which cannot be solved otherwise than by the doing of harm.

What are the differences between necessity and legitimate defence?

- ✓ . Some of the differences are as follows:
 - a. necessity is basically one of aggression (violence) while an act under Art 78 is one of defense,
 - b. The doer of a necessary act, unlike a person who defends himself, is not resisting an unlawful assault.
 - c. In the case of necessity the conflict occurs is between two legitimate interests but in the case of legitimate-defense the conflict occurs is not between two legitimate interests. This entails that in the first case it is **strength**, while in the second case it is the **law**, which has the last word.

What are the essential Conditions Required for the legitimate Defense?

- ✓ The right to repulse attacks, which are contrary to the law, is not unrestricted. Its exercise is governed by the following conditions.
 - a. There must be an Imminent Attack or a Threat of Attack:**
- ✓ As its very name indicates, legitimate defense necessarily implies attack or at least a threat of an attack.
- ✓ As with necessity, so with legitimate defense, the justification is available only insofar as there exists a state of **actual** danger, whether the attack is in the course of being executed or is imminent.
- ✓ It follows that there is no right of defense when either the attack has already taken place or the doer seeks to prevent a future danger from eventuating.

When legitimate defense shall commence?

- ✓ The right of legitimate defense commences as soon as a reasonable apprehension of danger to a legitimate interest arises from an attempt threat to commit the offense though the offense

may not have been committed; and it continues as long as such apprehension of danger continues.

- ✓ The person shall not expect until some harm are caused against him.

b. The Attack, Whether Actual or Imminent, Must be Unlawful:

- ✓ For the purpose of Art.78, the act done or intended to be done by the aggressor should be objectively 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.
- ✓ The reason behind this solution is that the defender cannot be expected to know or has no time to find out whether the aggressor is, subjectively, at fault.

For whom legitimate defense is allowed?

- ✓ It is available only to those who in the face of imminent peril act in good faith. The right is not to be allowed to be pleaded or availed of as a pretext for a vindictive, aggressive or retributive purpose.
- ✓ The right is available against an offense and so an aggressor cannot claim the right of legitimate defense. The right cannot be used as a shield to justify an act of aggression. In other words, there is no private defense against private defense.

c. No other Choice (Could Not Have Been Otherwise Averted):

- ✓ Art.78states that an act of defense “shall not be punishable if the attack or imminent attack could not have been otherwise averted”. Therefore, the defense, as a rule, is not legitimate if the threatened right could have been effectively protected by some means.

d. The act of Defense should be Proportionate:

- ✓ The right of private defense in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defense. The force which a person is entitled to use must not be unduly disproportionate to the injury which is to be averted or which is necessarily apprehended and must not exceed its legitimate purpose, and that the exercise must not be vindictive or malicious.
- ✓ The proportionately condition implies that regard must not only be to the respective importance of the interests involved, but also to elements such as the weapons, if any, used in the attack and the defense, and the respective sex, age, strength or state of health of the aggressor and the defender.

What should be the sources of danger?

- ✓ It is immaterial from whom the assault emanates. The right of legitimate defense is also available against an offence committed by a person who might not be criminally liable for his act, either by reason of the doer being a man of unsound mind, or because of want of maturity of understanding, or by the reason of any misconception on the part of that person.

Whose and what Rights Protected?

- ✓ Legitimate defense exists against attacks endangering **any right**, i.e. any interest is protected by law, such as *life, bodily integrity, honour, sexual liberty or property*.
- ✓ It is irrelevant whether the right protected is that of the defender or of another person, and also whether it is of a private or public nature. The holder of the right can be anyone.

When there exist Excess in Self-Defense?

- ✓ Under Art.79, the defender is deemed to exceed the limits of legitimate defense in the following two conditions:
 - a. **Uses disproportionate means. (Want of proportionality requirement):** What Art.79 (1) actually implies, is that an act of defense is not lawful when the defender causes more harm than that which he had reason to fear, i.e. when the defense is, “manifestly excessive”
 - b. **Does more than should reasonably be done to avert the danger (want of necessity requirement):** because he continues to do harm even though this is not necessary since the assault has already been repelled in an adequate manner. Strictly speaking, therefore, he no longer defends himself, as he is no longer in danger.

2.1.4. Mistake of Fact, Mistake of Law and Ignorance of law: Arts.80&81

A. Mistake of fact

What the Meaning of ‘Fact’:

- ✓ A “fact” within the meaning of Art.80 is any event, circumstance or quality of a material of personal nature the existence or non-existence of which affects the court’s decision on guilt and /or sentence.
- ✓ *A fact may consists of a phenomenon perceptible by the sense. (e.g. the doer mistakes arsenic for sugar) or a state of mind (e.g. the doer believes that someone intends to kill him)*

Is the mistake of the person concerns him or the status of the person is relevant?

- ✓ It is immaterial for the purposes of Art.80, whether the fact as to which the doer is mistaken concerns him personally or not. For example, he marries believing himself to be a widower or he has sexual intercourse with a woman whom he believes to be unmarried.
- ✓ It is also immaterial whether the existence or non-existence of the fact is conditional upon the possession of certain legal status 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).

When Mistake of Fact May be Invoked (Applicable)?

- ✓ According to Art. 80 of the criminal code, a person who commits an offence in consequences of erroneous appreciation of the true facts of the situation must be tried as though the situation, which he believes to exist, did actually exist. Art 58 (3) of the criminal code supports this rule.
- ✓ Article 80 therefore may be invoked on the following cases:
 - a. When the doer is mistaken as to a fact, which is a material ingredient of an offence.** If A, after shooting B with the intention of killing him, buries him in the belief that he is dead, but B is still alive and actually dies of suffocation. A is not guilty of intentional homicide as the act done to cause B's death (the shooting) misses its purpose and act causing B's (the burial) is not done with a view to terminate the life of a human being, which is a required element of the offence of intentional homicide.
 - b. When the doer is mistaken as to fact, which did it, exist, would legitimate or justify his act.** Mistakes in doing an act of the nature defined in Art.68: as imaginary necessity; imaginary legitimate defense. This Article excuses a person who has done what by law is an offence, under a misconception of facts, leading him to believe in good faith that he was commanded by law to do it. A, an officer of a Court of justice, being ordered by that court to arrest Y, and after due enquiry, believing Z to be Y, arrests Z. A has committed no offence.
 - c. When the actor is unaware of the fact that he acts in aggravating circumstances:** A insults B, not knowing that the latter is a public servant on duty. In this case, A is not liable to the aggravated punishment as he does not know of the fact in consequences of which the penalty is increased, namely the special status the victim has.

Is mistake of fact committed by negligence or in bad faith is punishable?

- ✓ According to Art.80 of the criminal code, a person who commits an offence in consequences of erroneous appreciation of the true facts of the situation shall be excluded from punishment

but, the doer may nonetheless be punished for having committed this offence because of negligence, he could have avoided the mistake by exercising the care which could reasonably be expected of him in the circumstances (Art.80 (1),

- ✓ Thus a doctor who caused the death of a patient by giving him, by mistake, a poison instead of a drug is not guilty of intentional homicide; yet a person in his position should obviously be particularly careful not to commit a mistake of this kind.

Are Separate and Independent Offences Punishable? Art.80 (2)

- ✓ The doer of an act who is free from any punishment due to the mistake of fact is not free from punishment of another offence which in themselves constitute a separate offence Art.80 (2). Intentional guilt, even if it is to be excluded in relation to a given offence, may be presented in relation to a different offence, as is the case, for instance when concurrent offences are committed. (e.g. sexual intercourse in public with girl, whose age is wrongly appreciated)

When Mistake of the Identity of the Victim or the Objective of the Offence are used as a defense?

- ✓ According to Art.80 (3), a mistake as to a fact, such as a mistake concerning the identity of the victim or the object of the offence is not to be taken into account. Mistake of this kind are sometimes referred to as non-fundamental mistakes, in opposition to fundamental or essential mistakes which are the only ones that which Art.80 is concerned with.
- ✓ *The principle laid down in Art.80 (3) is however, applicable only when the mistake as to the identity of the victim or the object of the offence is without the influence of the actor's guilt.* 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; nor is he guilty of intentional theft when he takes B's coat, believing it to be his own, or of aggravated theft when he steals an object which, unknown to him, is a religious one.
- ✓ However, the following acts are not included; 'A' waits near B's house with intention of shooting him when he comes home. Seeing someone approaching the house, he shoots C thinking that it is B. In this case, A is guilty of intentional homicide and he cannot invoke Art.80. Since the identity of human being one kills is not an ingredient of the offence of homicide.
- ✓ 'A' steals a painting, which is unknown to him, but which is a mere copy of the one, he intends to steal. In this case, A is guilty of intentional theft and cannot invoke Art.80.

B. Mistake of Law and Ignorance of Law:

- ✓ Mistake from the point of view of the law in a criminal case is no defense. Mistake of law ordinarily means mistake as to the existence of any law on a relevant subject as well as mistake as to what the law is.
- ✓ The maxim *ignorantia juris non excusat*, in its application to criminal offences, admits of no exception, not even in the case of a foreigner who can not reasonably be supposed in fact to know the law of the land.
- ✓ The legal presumption that everyone knows the law of the land is often untrue as a matter of fact but the reason for this seems to be nothing but expediency, otherwise there is no knowing of the extent to which the excuse of ignorance of law might be carried.
- ✓ Ignorance of the law has rarely been sufficient to excuse criminal conduct. It is permitted as a defense only in situation in which the law is not widely known and a person cannot be expected to be aware of a particular law.

What are the propositions of Schools of Law Regarding the Rule of Ignorance of Law is No Excuse?

- ✓ The question of whether mistake of law and ignorance of law is excusable has been a controversial issue for a long time. With regards to this question, there are two main schools of thought.
 - a. **The first school supports the general rule: that states “Ignorance of Law is no Excuse.”**
 - ✓ An offender is not justified by his unawareness or misconception of a legal provision. Whether or not he actually knows the law is immaterial for he is in any event conclusively presumed to know it.
 - ✓ This presumption will make the courts free from ascertaining whether the offender knows his act is contrary to the law or not which is almost impossible. *Thus, “Every person must be taken to be cognizant 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 or not.*
 - b. **The second school supports an exception to the general rule and states: “Ignorance of Law May be an Excuse in Certain Circumstances”**

- ✓ According to this school of thought, the maxim “ignorance of law is not an excuse” It is not acceptable on the following grounds:
 - i. The complexities of modern life and the consequent increase in the volume of laws, makes it completely impossible for anyone to know the laws, be it be the laws of his own country, let alone to understand them.
 - iii. It is inconsistent with the principle “nulla poena sine culpa” (no penalty without intentional guilty) upon which so many modern codes, including Ethiopian criminal code, are based.

What is the position of Ethiopia?

- ✓ According to Art.81 (2) and (3) It stands in a half way in such a manner that the Ethiopian penal law may reduce the punishment or a one who is in **good faith** believed that he had a right to act and had definite and adequate reasons for holding this erroneous belief and may not punish a person who out of absolute and justifiable ignorance and good faith and without criminal intent commits a crime.

What are the essential elements to apply art 81?

- a. **When there is Good Faith** Article 81 may not be invoked unless, at the time of the act, the doer in good faith believes that he is legally entitled to act as he does. **An** honest mistake is not sufficient for the purposes of Art.81 except where the doer has “definite and adequate reasons for holding this erroneous belief.
- b. **When the Accused Is Not At Fault/No Criminal Intent:** it is essential that the accused should not have been in error through his own fault. Art.81 (3)

UNIT-III

CRIMINAL PUNISHMENT AND ITS APPLICATION

What are Purposes of Punishment under the Criminal Code of 2004?

- ✓ The principles of Criminal law regarding the purpose of punishment we discussed above are clearly incorporated in the provisions of the Criminal Code of 2004. Art.1. Para 2 of the
- ✓ Art. 87 The Criminal Punishment and Its Application- Principle provided that The penalties and measures provided by this code must be applied in accordance with the spirit of this Code and so as to the achieve the purpose it has in view (Art.1)”
- ✓ Accordingly See the following arts
 - Article. 107 and Article. 108 Rigorous Imprisonment for the rehabilitation

- Art. 190 Conditional Suspension of Penalty: will promote the reform and reinstatement of the criminal

What is the central idea of the principle of individualization of punishment?

- ✓ The same kind of punishment may not bring about the desired effect on all types of criminals alike. In short, it can be said that, universalization of punishment is impossible.
- ✓ Therefore, we have to study the criminal before prescribing the proper form of punishment to him according to his physical, social, educational or cultural make-up to design a punishment that suits him perfectly to achieve the specific objectives of criminal justice. (see art 88)

Explain the different forms of punishment?

- ✓ The Criminal Code carefully designs and prescribes punishments for crimes of various kinds and criminals of various categories. Thus, there are three different sets of punishments under the code.
 - a. Ordinary punishments applicable to Adults –Book II, Title I, Articles 90-156.
 - b. Measures and penalties applicable to young persons-Book II, Title I Articles 57-177
 - c. Penalties and measures applicable to Petty offences-Petty Code, Book VII Title II Articles 746-764.

What are the broad categories of penalties for Adults under Ethiopian criminal code?

- ✓ there are three and includes; Principal penalties, Secondary penalties Special measures applicable to Adults

A. Principal Penalties Principal penalties can be put under the following heads:

- i. **Pecuniary Penalties**-art. 90-102: it includes
 - **Fine** (90-97); is payment in money and forfeited to the state or public treasury. it varies based on the offender, when natural person or the juridical person is involved in the commission of the crime.
 - **‘Sequestration’** is ‘a legal process consisting of temporary deprivation of a person or his property, until the claims on such property are settled or to make him to do or abstain from doing an act within a specified time.’”(see art 99)
 - **Confiscation**: “appropriation of private property to the public treasury by way of penalty.”
 - **Other pecuniary effects**: These are:
 - ✚ Forfeiture of material benefits to the state
 - ✚ Compensation for damages caused to the victim.

✚ To be paid by the criminal Art.101.

✚ To be paid from the proceeds of sale of confiscated property, etc. Art 102.

ii. **Punishments Restricting or Depriving Liberty** – Art. 103-116 it includes;

- **Compulsory Labour**: In cases of minor crimes which are punishable with simple imprisonment for a term not exceeding 6 months
- **Imprisonment**: it also includes;
 - **Simple Imprisonment**: Articles. 106 and 107 the sentence is applicable to less serious crimes which are committed by persons who are not serious dangers to the society. 10 days to 3 years and in concurrent crimes to 5 years.
 - **Rigorous Imprisonment**: the quality of being strict.’ Art.108 expressly speaks about the range of the punishment from 1 year to 25 year.

How the imprisonment shall be administered?

1. **Separation of sex and segregation**: see Art. 110
2. **Obligation to Do Work and Benefits Accruing** There From (Art.111)
3. **Variations in the Conditions of Imprisonment** (Art. 112): These are intended to bring reformatory effect on the prisoner and to enable him to resume a normal law abiding social life on his release. The important variations as possible pursuant to Art.112 are:
 - Imposition of solitary confinement (sub. Art (1))
 - Isolation during periods of work and
 - More favorable treatment for good conduct.
4. **Conditional Release before the Expiry of the Period of Imprisonment**: Art 113
5. **Deduction of Period of ‘Remand’** (Art.115).
6. **Period of Hospitalization to Be Part of the Sentence**:

What are the effects on the sentence of imprisonment in case of mental disorders of prisoners?

- ✓ In case, if a prisoner is deemed by medical experts to be suffering from some mental disorder or irresponsible for his acts, Art.116 (3) provides for the following rules:
 - His sentence shall be suspended
 - The criminal shall be transferred to a proper institution for care and treatment.
 - If the mental disorder or state of irresponsibility of the criminal is of a permanent nature the remaining period of the sentence shall not be carried into effect.

iii. **Death Penalty** – Art. 117-120.

- ✓ Arguments are made both in favor (majority) and against the retention of capital sentence (minority) as a form of punishment.

What are the conditions to apply death penalty?

- ✓ The death penalty may impose on:
 - a. May only be imposed for the most serious crimes, pursuant to a final judgment rendered by a court and providing it is not contrary to the provisions of human rights law e.g. not a crime of genocide.
 - b. Anyone sentenced to death has the right to seek pardon or commutation of the sentence;
 - c. Death sentence is not to be imposed on anyone below the age of 18 or carried out on pregnant women.

What are the grounds of international laws in prohibition of death penalty?

- ✓ At the same time, the use of the death penalty is totally prohibited from use by the various international criminal courts, like the ICTY, ICTR and the ICC. since it violate;
 - a. **Right to Survival:** When talking about children, the right to life can often mean the right to survival. Human rights law already forbids the use of the death penalty for children.
 - b. **Rights of Victims** of extrajudicial, summary or arbitrary executions are entitled to adequate compensation from the state where the violation was committed. Granting compensation is separate from the additional obligation on states to conduct investigations and punish perpetrators.

What is Ethiopia's Obligation to Stand Committed to the International Treaties and Instruments?

- ✓ Within the meaning of the Art 13/2 of the Constitution of FDRE 1995, the fundamental rights and freedoms ensured by the Constitution shall be interpreted in a manner conforming to the principles of The UDHR, ICHR and International Instruments adopted by Ethiopia.
- ✓ Therefore the most precious right to life embodied under Art 15 of the Constitution which obviously permits the deprivation of life as a punishment for serious crimes without doubt is interpreted subject to the most important international instruments that guarantee the right to life.

What are the major grounds for the abolished of death penalty?

- ✓ Amnesty International works for an end to executions and the abolition of the death penalty everywhere. The major grounds for this argument are:

- ✚ An execution, just like torture, *involves a deliberate assault on a prisoner*. Even so-called 'humane' methods such as lethal injection can entail excruciating suffering.
- ✚ *Capital punishment is irrevocable*. All judicial systems make mistakes, and as long as the death penalty persists, innocent people will be executed.
- ✚ *It is also discriminatory and is often used disproportionately against the poor, the powerless and the marginalized*, as well as against people whom repressive governments want to eliminate
- ✚ The death penalty does not deter crime more than other punishments.

What are the general principles relating to death penalty? Arts. 117-120:

1. Sentence of death shall be passed only in cases of grave crimes and on exceptionally dangerous criminals, in the cases where it is specifically laid down by law as a punishment.
2. Death sentence shall be given only in case of completed crimes, and not for the stage of attempt of those specific offences for which death penalty is prescribed.
3. It shall be passed only where there are no extenuating circumstances.
4. It shall not be passed on a criminal who has not attained the age of 18 years at the time commission of the crime.
5. Death sentence shall be carried out only after obtaining confirmation of the same by the Head of the State.
6. It shall be executed only after ascertaining of its non-remission or non-commutation by pardon or amnesty.
7. The means of execution shall be determined by the executive body having authority over the Federal or the Regional Prison Administration concerned.
8. The death sentence shall not be carried out in public by hanging or by any other inhuman means. It shall be executed within the precincts of the prison by a humane means.
9. The body of the executed person shall be given to his family, upon their request. If no one claims for the body, it shall be given a decent burial (Art. 117 (4)).

How should be the treatment of the prisoner awaiting execution?

- ✓ A prisoner awaiting the confirmation and execution of the sentence shall be kept under the same conditions as a prisoner serving sentence of rigorous imprisonment. At the wish of the prisoner awaiting the death penalty and where it is possible he shall be given some work to do within his cell. art 118

What conditions necessitate for suspension and commutation of death sentence?

- ✓ Suspension and commutation of death penalty are possible in the following circumstances:
 - i. In case of fully or partially irresponsible or seriously ill persons or a pregnant woman.
 - ii. The death sentence may be commuted to “Rigorous Imprisonment for Life”, in case of a woman with child and if she gives birth to a live child.
 - iii. The other cases of sentences of death may be commuted or remitted only by way of pardon or amnesty as provided by the Arts. 229 and 230 of the Criminal Code.

B. Secondary Penalties

When secondary punishments are imposed?

- ✓ A court may impose a secondary penalty on a criminal in addition to the primary punishment. Secondary penalties are not equal to primary punishment.
- ✓ Thus, before imposing a secondary penalty the court has to pronounce a primary penalty, which it deems to be appropriate for a crime. However, they may replace the principal penalty under the conditions stated by the provision of article 122(2).
 - ✚ If such is specifically laid down by the law; or
 - ✚ Where there are extenuating circumstances; or
 - ✚ Where the law provides for a free mitigation of the punishment (article 82 & 83); or
 - ✚ Where enforcement of the sentence is postponed.

Is the court obliged to always impose secondary penalties in addition to primary penalties?

- ✚ The court is not obliged. The law gives the discretion whether or not to impose secondary penalties to the court under article 122(2).

What are the types of secondary penalties?

- ✚ There are different types of secondary penalties. These are:
 - a. **Caution** (warning), **Admonishment**: (expression of disapproval of ones actions or behavior), **Reprimand** (strong official disapproval of someone) and **Public apology** (Article. 122 (1))
 - b. **Deprivation of rights (Art.123)** They could be permanent or temporary (6 month to 5 years) deprivation of *Civil rights, Family rights, and The right to exercise a profession*

C. Special Measures Applicable to Adults:

Why we call them special?

- ✓ Measures may be imposed even if they are not specifically indicated in the Special Part of the Code as far as the court finds it to be desirable keeping in view the purposes of the criminal law.

What are the different forms special measures?

- ✓ Our code has three categories of measures. These are dealt with as follows:
 - a. **Measures applicable Irresponsible persons and criminals with limited responsibility:**
These are the measures of confinement and treatment. See articles 130(1), and 131.
 - b. **General Measures for the Purposes of Prevention and Protection:** These types of measures are applied together with principal penalties when the circumstances of the case justify them in the opinion of the court. They are applied even if they are not mentioned in the special part of the code. Such measures are divided into three categories
 - i. **Measures of a Material Nature:** it includes;
 - ✚ Guarantee of Good Conduct (Article 135)
 - ✚ Seizure of Dangerous Article (140)
 - ii. **Measures Entailing Restriction on Activities:**
 - ✚ Suspension and withdrawal of a license (Article 142):
 - ✚ Prohibition and closing of an undertaking (article 143):
 - iii. **Measures Entailing a Restriction on Personal Liberty:**
 - ✚ Prohibition from resorting to certain places (Article 145):
 - ✚ Prohibition to settle down or reside in a place (Article 146)
 - ✚ Obligation to Reside in Special Place or Area Article. 147:
 - ✚ Placing under Supervision (Article 148)
 - ✚ Withdrawal of Official Papers Article. 149:
 - ✚ Expulsion (Article 150)
 - c. **Measures for the Purpose of Information:** These are of three types:
 - ✚ Notification to the Competent Authority Article. 154:
 - ✚ Publication of the Judgment Article. 155:
 - ✚ Entry in the Judgment Register Article. 156:

What are the General Principles of Determination of Punishment? Arts. 87-89:

- ✓ The following principles have to be kept in view by the court at the time of fixing the quantum of punishment and the nature of the measure to be applied:

1. Punishments and measures designed by the Criminal Code are supposed to be applied
 - i. In accordance with the spirit of the Criminal Code, and
 - ii. In order to achieve the purpose of the Criminal Code in terms of Art.1
 - iii. Giving due respect to human dignity. (Arts.18 (1) and Art.21 of the Constitution)
2. The calculation of sentences is expected to be by a meticulous correlation of the General Part and the Special Part of the Criminal Code.
3. The principle of individualization of punishment should be given effect
4. Careful examination of the complete range of punishments from the lightest to the severe most should be made in choosing the right punishment.
5. The Federal Supreme Court issues a 'Manual Relating to Sentencing' in order to ensure the correctness and uniformity of sentencing. The courts are expected to maintain standards well as uniformity by conforming carefully to the said manual.
6. In relation to the determination of sentences in cases of 'Minor Crimes' there are two alternatives provided by Art. 89. These are:
 - i. The court may apply the provisions of Art. 122 relating to reprimands warning , or
 - ii. The provisions of the Law of Petty Offences

What is extenuating circumstances and their types?

- ✓ The punishments to be imposed on a criminal need not necessarily be exactly the one which is prescribed for the specific crime. It can be mitigated (or extenuated or reduced) or aggravated (increased) in the circumstances listed out by the Criminal Code. Arts. 82-86 categorize the circumstances into the following groups:
 - ✚ General Extenuating Circumstances- Art.82
 - ✚ Special Mitigating Circumstances- Art. 83
 - ✚ Other General Extenuating Circumstances- Art. 86

What is the central idea of prohibition of double mitigation? Art.82 (2)

- ✓ Some of the provisions of the Special part incorporate one of these extenuating circumstances as one of the essential element of the crime or as a factor of extenuation of a privileged crime. In such cases, the Court may not allow for the same circumstance to reduce the penalty applicable to that crime.

How the Determination of Sentence under Extenuating Circumstances are taken place?

- ✓ There are three favorable treatments available for the criminal basing on the extenuating circumstances. They are:
 - a. **Ordinary Mitigation Art.179:** In all the cases of general extenuating circumstances mentioned in Art. 82 the sentence is subject to ordinary mitigation. In this type mitigation, the extent of mitigation that should be allowed is clearly mentioned. Therefore, the Court cannot go beyond the prescriptions in reduction of penalty.
 - b. **Free Mitigation Art. 180:** Where special mitigating circumstances exist the sentence may be freely mitigated by the Court without any restriction.
 - c. **Exemption from Punishment Art. 83 (2):** Under this provision the Court may exempt the criminal from punishment and leave him by reprimand or warning as has been provided by Art.122. The special circumstances under which this kind of reduction are:
 - i. Where the act committed is not very grave, and
 - ii. If the ties in question are so close, and
 - iii. The circumstances are so impelling that they placed him in a moral dilemma of a horrifying nature.

What are Aggravating Circumstances?

- ✓ Aggravating circumstances are those circumstances that bear upon the degree of the guilt of the criminal and indicate that the criminal is particularly of his dangerous disposition.
- ✓ Therefore, the Courts can award either maximum punishment provided for the specific crime or sometimes even more punishment than that is prescribed by the specific provision defining the crime charged of.
- ✓ The Criminal Code puts aggravated circumstances also under two heads:
 - ✚ General Aggravating Circumstances Art. 84:
 - ✚ Special Aggravating Circumstances: Art. 85 are:
 - ❖ The cases of concurrence of crimes, and
 - ❖ The cases of recidivism

Is it possible to make double aggravation, unlike mitigation? Art.84 (2)

- ✓ Some of the provisions of the Special part incorporate one of these aggravating circumstances as one of the essential element of the crime or as a factor of aggravation of a serious crime. In such cases, the Court may not take into account the same circumstance to aggravate the penalty applicable to that crime.

How the determination of Sentence under Aggravating Circumstance are taken place?

- ✓ There are two serious consequences available for the criminal basing on the aggravating circumstances. They are:
 - a. **Ordinary Aggravation Art.183:** In all the cases of general aggravating circumstances mentioned in Art. 84 the sentence is subject to ordinary aggravation. In this type aggravation, the extent of aggravation that should be allowed is clearly mentioned. Therefore, the Court cannot go beyond the prescriptions in aggravation of penalty.
 - b. **Aggravation of Penalty in Special Aggravating Circumstances Arts. 184-188:** Where special aggravating circumstances exist the sentence may be aggravated by the Court in accordance with the following provisions:
 - ❖ Aggravation of Penalty in case of Concurrent crimes- Art. 184
 - ❖ Special cases of Concurrence-Art. 185
 - ❖ Aggravation in case of Retrospective Concurrence- Art.186
 - ❖ Aggravation in case of Notional Concurrence- Art. 187
 - ❖ Aggravation in case of Recidivism- Art. 188

What are the Other General Extenuating and Aggravating Circumstances? Art 86

- ✓ *This provision is for giving some discretionary power to the Court to consider the existence of any other aggravating or mitigating circumstance other than those which are expressly enlisted in the above discussed provisions.*

How the court determine in case of different extenuating and aggravating circumstances? : Article 189

- ✓ In case of different extenuating and aggravating circumstances, the Court shall determine the penalty as provided below:
 - a. **In case of concurrent general aggravating and extenuating circumstances:** The Court shall first fix the penalty having regard to the aggravating circumstances (Art. 183) and then shall reduce the penalty in light of the extenuating circumstances (Arts. 179,180).
 - b. **In a case of recidivism:** Where the criminal has at the same time been convicted of concurrent crimes the Court shall first assess sentence for the concurrent crimes and then increase it having regard to recidivism.
 - c. **In case of different types of aggravating and extenuating circumstances:** Where there exist both concurrent general aggravating and extenuating circumstances and recidivism as

specified in sub-article (1) and (2) above, 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.

What are Post Conviction Processes include?

- ✓ The following are the ‘post-conviction procedures’:

A. Suspension of Penalty and Conditional Release: Art. 190

i. Suspension of Penalty

What is suspension of penalty and why?

- ✓ The principle of conditional suspension of penalty is *for the promotion of the reform and reinstatement of the criminal by giving him room to help himself in his own reformation.*
- ✓ There are two kinds of suspension of penalties under the Criminal Code. These are:

a. Suspension of Pronouncement of Penalty, Art. 191

- ✓ The court suspends the sentence and places the offender on probation after conviction.
“Probation is a sentence served in the community without confinement in the prison, under the supervision of a probation officer and conditional upon strict obedience to the rules established by the courts.”

What are Essential Conditions for Suspension of Pronouncement of Penalty? Art. 191

- ✚ The criminal must not have any previous conviction i.e. he must be a first offender,
- ✚ He should not appear to be of dangerous character,
- ✚ The crime he is convicted of should be punishable only with fine, Art. 90 compulsory labour, Art. 103 and 104
- ✚ Simple imprisonment for less than 3 years, Art. 106

b. Suspension of Enforcement of Penalty, Art. 192

- ✓ The court convicts the criminal, passes an appropriate sentence and promptly records such conviction.
- ✓ But, simultaneously, the court also gives an order suspending the enforcement of the penalty for a specified period of probation. For example, if the criminal is sentenced to one year simple imprisonment, it will be recorded but he will not be imprisoned.

ii. Conditional Release: Art. 201

When and why conditional release are granted?

- ✓ This is provided towards the end of the enforcement of the penalty. This provision may be applied in all cases where a penalty or measure resulting in 'loss of liberty' is imposed.
- ✓ Conditional release also is based on the consideration that it serves as a means of reform and social reinstatement. Further, conditional release should be adopted only in cases where it affords a reasonable chance of success.

What are the Essential Conditions for 'Conditional Release'? Art. 202

- ✓ The court may order for the conditional release of the prisoner basing on the recommendation of the Prison Director when the conditions listed under art 202 are fulfilled.

How long should be the period of probation? Art. 204:

- ✓ Normally the period of probation may be a minimum of two years and may extend up to a maximum of five years, subject to any provisions to the contrary.
- ✓ However, in case of criminal sentenced to life imprisonment the minimum is five years and the maximum is seven years.

B. Pardon and Amnesty: Articles. 229 and 230

What is pardon?

- ✓ Pardon may be defined as *“the act or instance of officially nullifying punishment or other legal consequences of crime”. The chief executive of a government usually grants a pardon. The president has the sole power to issue pardons.*

What is amnesty?

- ✓ Amnesty is also a species of pardon but applies to a certain classes of criminals and specific type of crimes only. Thus, it means, *“a pardon extended by the government to a group or class of persons usually for a political offense; the act of a sovereign power officially forgiving certain classes of persons who are subject to trial but have not yet been convicted.*
- ✓ Unlike an ordinary pardon, amnesty is usually addressed to crimes against state sovereignty i.e. to political offences with respect to which forgiveness is deemed more expedient for the public welfare than prosecution and punishment.
- ✓ Amnesty is usually general, addressed to classes or even communities, which also termed as 'general pardon'.

If so what is the Differences between Pardon and Amnesty?

- a. Pardon is remittance of penalty while amnesty is a general pardon especially for political crimes against government.

- b. Pardon is granted by the competent authority where as amnesty is granted by the appropriate competent authority.
- c. In pardon, the remission of sentence may be whole or in part and in amnesty, it is always complete remission.
- d. Pardon may completely remit the penalty or commute the same to a penalty of lesser nature or gravity.
- e. Pardon may apply to all penalties and measures whether principal or secondary. But amnesty may be granted in respect to certain crimes and certain classes of criminals only
- f. The order of pardon may determine the conditions to which it is subjected to and its scope. Amnesty may be either absolute or subject to certain conditions and obligations.
- g. Pardon shall not cancel the sentence. The entry of sentence shall remain in the judgment register of the criminal and continue to produce its other effects. However, amnesty, cancels both the indictment and the sentence and bars or discontinues any prosecution from the moment of its promulgation. If the sentence is already, passed amnesty cancels it as well as all its consequences under the criminal law. The conviction shall be presumed non-existent and the entry shall be deleted from the judgment register of the criminal.

C. Reinstatement: Arts.232-237

What are the fundamental principles of reinstatement??

- ✓ The procedure of reinstatement is subject to the following principles:
- ✓ Subject to the fulfillment of the conditions laid down in Art. 233, a convict may request for his reinstatement provided he falls under any of the following categories:
 - ✚ who has undergone his penalty or
 - ✚ whose penalty is barred by limitation or has been remitted by pardon or
 - ✚ whose penalty has been suspended on probation or
 - ✚ who has been released conditional
 - ✚ Reinstatement must be deserved and shall never be granted as of right.
 - ✚ If the convict who satisfies the requirements prescribed by law is incapable of acting by himself or has died, the request may be made by his legal representative or a next-of-kin.

What are the Conditions for Reinstatement? Article 233

- ✓ Reinstatement shall be granted by the Court subject to the conditions enumerated under art 233.

Discuss on the contemporary Systems of Determination of Penalty:

A. System of Discretionary Penalties:

- ✓ This system was applied in Pre- Revolutionary French law. The penalty is not determined by the law; the judge establishes it taking into account the particular circumstances under which the crime was committed and the personality of the criminal. He may, for instance, take into account the background of the criminal, his general character, the reasons for which the crime was committed, etc.
- ✓ This system would allow the penalty to be fitted to the guilt of the criminal, to the possibilities of his reform or, as we would say today to, the needs of “social rehabilitation”. It has, on the other hand, the disadvantage of tending towards the arbitrary and of weakening of the intimidation value of the penalty.

B. The System of Fixed Penalties:

- ✓ This system is adopted by the legislators of the French Revolutionary period which consists in the legislative determination of the penalty to be applied to the crime without any possible modification designed to fit the personality of the criminal.
- ✓ This system has the advantage of being strongly deterrent and therefore of maintaining the full intimidation value of the penalty. However, it has the disadvantage of being unjust and even ineffectual by not allowing the penalty to be fitted to the crime committed by the criminal and his chances to reform.

C. The Modern System:

- ✓ Modern penal law has endeavored to borrow from both the systems; thus the penalty is in principle established by the legislature but individualized significantly in its application by the judge or the executive, to the specific criminal. This allows for the successive participation of the legislator, the judge and the administrative authorities.

- i. The Role of the Legislator:** The legislator enacts the basic penalties. The scheme guarantees against arbitrary action by judges, at least in the sense that the judges cannot sentence beyond the maximum penalty provided by law.

ii. **The Role of the Judge:** Judge plays a key role in the application of penalties. He is required to exercise his discretion in identifying the following important factors;

- ✚ The circumstances of commission of the crime
- ✚ The personal circumstances of the criminal.

iii. **Role of the Administrator:** The prison authorities are sufficiently empowered by the Criminal Code to make rules and regulations that are required to make the enforcement of punishment meet objectives of punishment as well as the ends of justice.. The administrative individualization of punishment is very evident in the following three measures:

- ✚ Pardon and Amnesty
- ✚ Prison Administration
- ✚ Conditional release

It is yours...