Criminal Law II

Teaching Material

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UNIT-I

CRIMINAL RESPONSIBILITY

Introduction:

General Defences:

Defenses for criminal liability 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.

Defenses for criminal liability are incorporated in criminal law in different ways. Some are clearly provided by the law as defenses while others are not. The latter categories are special defenses. They are defenses that apply in particular crime. Special defenses could be non-fulfillment of essential conditions of the crimes provided in the special part of the Criminal Code. According to article 665 of the Criminal Code, for example, the crime of theft is not complete unless the thing abstracted belongs to somebody else. If the accused abstracted his/her property, he/she can raise this fact as a defense. Special defenses could also be defenses provided for particular crime. For example, Article. 640 of the Criminal Code prohibit obscene publications. Article 642 provides defenses for the crime of obscene publication. As a result, artistic, literary or scientific works or objects are not considered obscene or indecent.

The other categories of defenses are those expressly provided by law as defense. They are general defenses. They are applicable to all crimes. They are excuses and justifications. The Criminal Code of 2005 does not follow this dichotomy. However, we follow this classification in this module for convenient understanding.

Excuses are defenses that arise because the defendant is not blameworthy for having acted in a way that would otherwise be criminal. Excuses are the defects and unusual conditions of the criminal during the commission of the crime. Thus, if persons commit crime unwillingly, without understanding the nature and consequences of their act, with mistaken belief of facts or law, the law excuses them from criminal liability. In the cases of the excuses, the focus is on the individual criminal rather than on the crime committed.

Defenses that arise when the defendant has acted in a way that the law does not seek to prevent are called justification defenses. In short they can be called "justifications". In cases of justifications, there are preliminary conditions that enable the doer of the act to take necessary and proportionate action. Thus, when there is an attack on legally protected rights, the steps taken to reverse the attack is justifiable act. Similarly, if the persons found themselves in imminent and serious danger and their only choice to avoid this situation is by committing a crime, their act is justifiable if they have chosen the lesser harm. In justifications, the focus is on the act rather than on the criminal. The society encourages those acts. Justifications include acts required or authorized by law, legitimate defense, necessity and professional duty.

- **Justification for Defences:**

Law reflects the value of the society. It punishes persons blamed for committing harmful act against the society. Nevertheless, sometimes the society does not blame the perpetrator of an act that has caused harm to it when that act is committed in certain circumstances. The circumstances in which the doer of an harmful act will not be blamed are provided by the criminal law as defense for criminal liability. The basic reason for the existence of the defense is that it is not just to hold persons guilty for a crime for which the society does not blame them as a criminal.

It is the basic principle of criminal law that there is no crime unless all its elements are fulfilled. Article 23(2) of the Criminal Code provides that a crime is

only completed when all its legal, material and moral ingredients are present. The absence of one of these ingredients necessarily implies the absence of crime. If persons commit a crime under the circumstances that provide them with defenses, one of the ingredients of the crime is lacking. As a result, there is no crime committed. For example, homicide is a crime. A person commits homicide when he/she kills a criminal who has been sentenced to death penalty. Yet, there is no crime of homicide as executing death penalty is a lawful act. Thus, justifications are defenses for criminal liability. In justifications, the legal ingredient of the crime is not present. Similarly, the act is short of moral element when irresponsible persons commit it. Consequently, irresponsibility is an excuse. Thus, where either the legal or the moral element is not present, it is not legally acceptable to punish persons for their deeds.

Objectives of the unit

Under the following section of this Unit students will be able to:

- Define criminal responsibility
- Know that an insane person is criminally irresponsible
- Know that a person who is criminally irresponsible for his acts shall not be punished
- Understand the conditions under which an adult may be regarded as irresponsible
- Know the legal effects of criminal irresponsibility.

Burden of Proof in Cases of Defences:

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 defence, as to whether the accused had committed the crime or not, the accused is entitled to acquittal on the ground of *benefit of doubt* (Woolmington v. D.P.P., 1935 A.C. 462). However, "the dangers of exaggerated devotion to the rule of benefit of doubt at the expense of *social defence* and to the soothing sentiment that all

acquittals are always are good regardless of justice to the victim and the community, demand special emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go, but an innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then breakdown and loose credibility with the community. If unmerited acquittals become general, they tend to lead to cynical disregard of the law, and this in turn , leads to public demand for harsher legal presumptions against indicted 'person'and more severe punishment of those who have found guilty."(Per Mr. Justice Krishna Iyer)

But the burden of proving the existence of circumstances bringing the case of the accused within any of the general exception in the criminal Code, or within any special exception or proviso contained in any part of the Code, or in any law defining the crime is upon him, and the court of shall presume the absence of such circumstances. It means if an accused pleads defence within the meaning of 'excusable' or 'justifiable' grounds of defence, there is a presumption against him and the burden to rebut that presumption is on him. This does not mean that the accused must lead evidence. Circumstance which would bring the case of an accused within any of the general defences may be proved from the evidence given for the prosecution or otherwise found on the record. Where an accused pleads a defence but the evidence given in support of such plea fails to satisfy the court affirmatively of the existence of circumstance bringing the case within the general exception pleaded, the accused is still entitled to be acquitted if upon a consideration of the evidence as the whole a reasonable doubt is created in the mind of the court, whether the accused is or is not entitled to the benefit of the said exception. If it is apparent from the evidence on the record, whether produced by the prosecution or by the defence, that a general defence would apply

then the presumption is removed and it is open to the court to consider whether the evidence satisfactorily shows that the accused is entitled to the benefit of the general defence.

The principles enunciated in the provisions relating to defences to criminal liability are in fact rules of evidence carrying either conclusive or rebuttable presumptions. They deal with the circumstances which preclude the existence of *mens rea.* They are, therefore, enumeration of the circumstances that are incompatible with the existence of mens rea. Huda calls these principles "conditions non-imputability", and Kenny calls them "conditions of exemption from criminal liability". If the existence of facts or circumstances bringing the case within any of the exceptions is proved, it negatives the existence of mens rea necessary to constitute the crime and thereby furnishes a ground for exemption from criminal liability.

Section 1: Criminal Responsibility and Irresponsibility

Responsibility is a person's mental fitness to answer in a court for his/her action. Persons are criminally liable only if they are responsible for their acts. Thus, the court should not punish the criminals unless it finds them responsible for their acts. Therefore, to determine the guilt of persons it is necessary to ascertain their responsibility. Responsibility or irresponsibility is concerned with the criminals' awareness and their capabilities to control their action. If the criminal do not know the nature and consequences of their act or if they cannot control their acts despite their awareness, they should not be responsible for the result of their acts. 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. 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.

- **Responsibility is Presumed By the Court:** 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:

1. The proof that the act was done by the accused---It is the burden of the prosecutor.
2. The fact that the accused is responsible for his acts—This is presumed by the Court.

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

- 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.
- 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 trail from the conduct of the accused on the trial.

Once the 'question' arises it becomes necessary to decide the facts in the light of Arts. 48 and 49. Then it becomes the burden of the defence to prove the accused is irresponsibility beyond reasonable doubt. Then the burden of the prosecution is only to raise a reasonable doubt in the mind of the Court that the accused is responsible and deserves punishment.

1.1. Absolute Irresponsibility: Art. 48

According to Art. 23 (3), a criminal offense is not punishable unless the accused is found guilty. Moreover, no person is liable to punishment unless he is found responsible for his acts (Art. 48). Rather the fulfillment of the requirement as to responsibility is a condition precedent to the fulfillment of the requirement as to guilt. 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 other words, before a

court can decide whether the accused acted intentionally or negligently, it must satisfy itself that the accused was not incapable of so acting.

On the other hand, as there is consensus about the fact that insane persons cannot commit punishable crimes; the problem of defining criminal responsibility remained the most controversial one. The question as to who is responsible person is not yet settled for it involves numerous extra-legal elements. Philosophers, lawyers and physicians have done their best to lay down the criteria for responsibility that could have been utilized across all disciplines. Spiritualists and positivists as well have got different opinions as to who responsible is. The former defined responsibility in terms of free will while the latter thought in terms of determination through factors such as heredity, education, geographical conditions, and the like. This made the effort exerted to reach an entirely complete and satisfactory definition of responsibility a futile exercise. Thus, more that could be done was to identify certain signs or symptoms, which, if present in a person, should prohibit his being regarded as responsible for his acts. The basis or sources of many of these signs and symptoms were some celebrated common law cases that involved a defense of insanity. Accordingly different tests or rules were developed along each case that aimed at determining irresponsibility. 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.

1.1.1. 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.

Being deprived of free will, an insane person is placed in an even worse condition than a child, because the latter can at least control his will and regulate his conduct, whereas the former cannot. Moreover, the act of an insane man, being

unintentional and involuntary, no punishment can deter it. At the same time, people are to be protected from being attacked by maniacs and accordingly, a provision has been made in many jurisdictions for the detention and care of insane persons. ***(****Gaur, K D., Criminal Law, Cases and Materials, 4th ed., Butterworths, 2005, New Delhi, pp. 115-127)*

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. It excludes from its purview, the insanity caused due to emotional and volitional factors. It is only insanity of a particular or appropriate kind, which is regarded as insanity at law that will excuse a man from criminal liability. The legal concept of insanity widely differs from that of the medical concept.

The kind and degree of insanity available as a defense to a crime has many times been defined. However, the most notable of all is the 'right and wrong test' formulated in *Mc`Naughten's* case. It was an interesting case, worth remembering. According to the summary of the case Daniel M'Naghten was obsessed by the idea that Sir Robert Peel, by creating the Metropolitan Police in London, wanted to destroy the liberties of Englishmen. He hunted Sir Robert to kill him, but mistakenly shot and killed his secretary. M'Naghten was acquitted of the murder charge by virtue of insanity.

The House of Lords moved by the controversy aroused and clarified the defense of insanity as follows:
Every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crime, until the contrary be proved to their satisfaction; and that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was suffering under such a defect of reason, from disease of the

mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know he was doing what was wrong. (***Freda and others, 1994: 91-93)***

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

On the other hand, the isolated reference to and application of the second part of the test and the resultant miscarriage of justice caused courts to constantly change and reshape their tests of insanity. The following are some of the short-lived insanity tests:

- 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.
- The *Durham Rule*, or *"product test"* (1954): The defendant must be acquitted if the crime was the product of mental disease or defect.
- 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."

Latter in 1982 the American Congress settled the issue, at least as far as federal law is concerned, by providing for an acquittal by reason of insanity if "at the time of the commission of the act the defendant, as a result of sever mental disease or defect, was unable to appreciate the nature and quality or wrongfulness

of his act." But majority of states in the region have adopted the version codified in the American Law Institute's Model Penal Code and known as the ALI test:
A person is not responsible for criminal conduct if at the time of such as a result of mental disease and defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.

This test focuses on the defendant's capacity to form the necessary criminal intent by asking whether the defendant appreciated the wrongfulness of the act. It also emphasizes, as part of the *mens rea*, the defendant's volitional capacity: Could the defendant really intend to commit the wrongful act? Did he have the "(substantial) capacity" "to conform his conduct to the requirements of law"?

The laws, which the Criminal Code of Ethiopia provides regarding defense of insanity, are found in Article 48. As elaborated earlier in this section, our law do not describe responsible, but irresponsible person. It implies that an offender is presumed to be responsible so long as he does not show any of the signs of partial or total irresponsibility enumerated in the law, and only an offender who does not show any of these signs is fully liable to punishment. Thus, responsibility of an offender is not an element that the alleging party must always establish. Instead, responsibility is a legal presumption.

- **Essential Conditions to Establish the Defence of Insanity:**

Art. 48(2) requires the proof of the defence of irresponsibility i.e. the incapacity of the defendant to form a guilty intention basing on the following important things:

1. **Nature of the incapacity:** That the accuses is incapable of understanding the nature ***or*** consequences of his act ***or*** of regulating his conduct according to such understanding,
2. **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).

3. **Time of the incapacity:** That such incapacity exists ***at the time of his act*** that produced the consequences in question.

The Code resorted to one of the three principal methods of defining criminal responsibility, namely: The *biological method*, the *psychological method* and the *bio-psychological method*. The three methods differ on factors that deem to be the source of irresponsibility. The biological method consists in specifying a number of physical or mental disabilities or defects deemed to render the person concerned irresponsible. The psychological method on the other hand consists in prescribing that a person incurs no liability that, at the time of the offense, was incapable of understanding the nature of his acts or of controlling himself. And according to the 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. However the mere presence of the two does not suffice. Aaccording to this system reasons other than mental disease such as anger, hatred or lust, are capable of rendering a person 'mad' or 'insane'. In the popular sense of the terms, they are excluded from being considered as grounds of legal irresponsibility

Sub-Article 2 of the provision clearly provides the test of insanity. It provides both the biological and psychological tests, which are enumerated below:

- ***Age:*** refers to old age, for senility may affect a person's mental faculties;
- ***Illness:*** refers to any form of mental as well as physical disease as a result of which a person is deprived of his mental faculties.

- ***An abnormal delay in the offender's development,*** which includes cases such as idiotism, cretinism, the consequences of deafness, dumbness sleeping sickness, and the like;

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

  The sub-provision further cross-referred to the unlimited biological causes recognized under Article 49 as capable of affecting person's state of mind.

  Regarding the psychological consequences in most legal systems two different mental conditions are recognized to claim exemption from criminal liability.

  These are:

  a) the accused was incapable of knowing the nature of the act, owing to unsoundness of mind, or

  b) the accused was precluded by reason of unsoundness of mind from understanding that what he was doing was either wrong or contrary to law.

  In this regard, our law in the same sub-Article specifies three manifestations.

  They are:

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

  These psychological failures can also be categorized into *lack of intelligence* and *absence of will power*. In the first category, due to some kind of disease the doer

is deprived of minimum of intelligence, which should be present in a responsible person so as to enable him to know what he is doing. In the second category, the doer is deprived minimum of 'power of will', which should be presented in a responsible person so as to enable him to make a reasonable decision or to act in accordance therewith. For a person to be regarded as criminally irresponsible, it is not necessary that both his intelligence and volition should have been abolished. It is sufficient to show that the offender at the time of the act was totally deprived of either his intelligence or volition. Further, it is of no importance whether the biological causes are temporary or permanent nature. Only the presence of one type of disease at the time of the act is relevant.

1.1.2. **Proving Insanity**

In addition to its role in determining responsibility, insanity plays an important role in determining whether the defendant is competent to stand trial or not. In this latter case only relatively less complication may occur in establishing insanity for it is based on the actual state of mind of the defendant existing at the time of trial. A more controversial application of insanity occurs when one attempts to determine whether the defendant was sane or not at the time of the act. This is because insanity may have been completely removed at the time of trial. Therefore, although in both cases medical science has the decisive role to play, looking in to the motive and conduct of the accused before, during and after the incident is more relevant in establishing insanity for the purpose determining irresponsibility. Accordingly, Art. 51 of the Criminal Code authorized the court to order an inquiry to be made as to the character, antecedents and circumstances of the accused person. Therefore the conduct of the doer prior to the incident as well as at the time of the incident and subsequent to the incident does not support the contention that he was insane at the time when the offense was committed; the court may make such decisions as it thinks fit. This implies that 'legal insanity' is not the same thing as 'medical insanity' and a case that falls within the latter category need not necessarily fall within the former.

Besides, the law presumes that every person is sane unless the contrary is proved. Mere absence of motive would not indicate that the accused was insane, or that he did not have the necessary *mens rea* for the commission of the offence. Thus in a case where pre and post facto situations show little or no sign of insanity, the doer bears a heavy burden to prove its existence at the time of the commission of the act.

At last, what the law lays down is not that the accused claiming protection under it should not know an act to be right or wrong, but that the accused should be 'incapable' of knowing whether the act done by him is right or wrong.

The capacity to know a thing is quite different from what a person knows. The former is a matter of potentiality; the latter is the result of it. If a person possesses the former, he cannot be protected in law, whatever might be the result of his potentiality. In other words, what is protected is an inherent or organic incapacity, and not a wrong or erroneous belief which might be the result of a perverted potentiality.

1.1.3. Legal Effects of Criminal Irresponsibility:

The legal effects of criminal irresponsibility are of two kinds. other is that an irresponsible person incurs no liability since, according to sub-art. (1), "the criminal who is responsible for his acts alone liable to punishment. The other is that hand the law required the court to ensure the irresponsible person will not be any more a menace for others. Therefore, sub-art. 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.

Review Questions:

1. Why does Art.48 penalize only those said to be responsible for their acts? What is the function of a test of criminal responsibility?
2. Must the public prosecutor prove sanity as an essential element of every case that he brings to court?
3. What is the disposition of offenders to be criminally irresponsible under Art.48?
4. When is one incapable of "regulating his conduct according to …understanding?

1.2. Limited Responsibility: Art. 49

It is believed that the fact that some who committed particularly notorious crimes invoked insanity and escaped justice has prompted several states to pass legislation providing for an alternative disposition, that of "guilty but mentally ill." This novel idea is meant to cover defendants not mentally ill enough to qualify for an outright acquittal "by reason of insanity," yet not well enough to be found fully accountable and "guilty". Therefore, between insanity and sanity, there exists intermediary stages where an offenders faculties are affected to such an extent that, although he is certainly able to understand what he does and to act accordingly, it is equally certain that his intelligence or will-power is not that of a "normal" person and that his degree of guilt is consequently lesser than that of such a person. 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.

Unlike irresponsible persons, who are for some biological reasons totally deprived of their mental faculties, semi-responsible offenders are persons who are for some biological reason only partially deprived of their understanding or volition. It is therefore, to this kind of offender that Art. 49 applies and it applies only where there is no doubt the accused is not fully irresponsible within the meaning of Art. 48.

1.2.1. Characteristics of Limited Responsibility

It was believed that some biological diseases or defects are less serious to cause absolute irresponsibility. Accordingly it was proposed that the biological causes of limited responsibility described under Art. 49, stated as a *derangement of the mind or understanding (e.g. hysteria), an arrested mental development (e.g. imbecility) and an abnormal or deficient condition (e.g. alcoholic intoxication)* do not have the effects specified under Art. 48.

But according to the contemporary view, the causes and characteristic ingredients of limited responsibility are similar to those of irresponsibility. The question is that whether the abnormality substantially impaired the defendant's mental responsibility for his acts or not. This is a question of degree. In most cases only expert evidence will enable the court to decide whether and to what extent the accused is irresponsible. But some common law jurists such Per Lord Parker argues that the question involves a decision not merely as to whether there was some impairment of the mental responsibility of the accused for his acts but whether such impairment can properly be called 'substantial', medical evidence serves a limited purpose. For jurists, it is a matter upon which juries may quite legitimately differ from doctors.

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 within the meaning of criminal law. A person may have an

insufficient education or be capable of realizing that he does something unlawful. Therefore, like Art. 48, it is required that the offender should have been at the time of the offense in a biological abnormal condition affecting his mental faculties. In fact, it sufficient that the offender's capacity of understanding or will power should have been diminished.

Furthermore, a person is not partially responsible for the sole reason that he is of week 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 development 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".

1.2.2. Legal Effects of Limited Responsibility:

Like that of irresponsibility, the legal effects of limited responsibility are of two kinds:

1. 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 responsibility, and consequently his degree of guilt, is reduced. 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, whenever the necessity is present make an order under Art. 130 or 131, as the case may be.

Thus, unlike other defenses, the legal effects of insanity, whether absolute or limited, shows that the court is duty bound to deal with the causes of the insanity. If the court orders confinement or compulsory treatment, that is for the benefit of the offender himself or the community in which the defendant is living.

Review Questions:

1. What are the differences between Arts. 48 and 49?
2. Why is it necessary to create an intermediary between irresponsibility and responsibility?
3. How does the court determine the extent of mental responsibility of the defendant?

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

The problems intoxication poses to the criminal justice system, and to law enforcement in particular, are by no means negligible. Drug addiction and alcoholism remain two of the foremost-unsolved problems confronting the criminal justice system of many countries. To hold perpetrators responsible for crimes committed under the influence of either may not be a solution, but may have a minimal advantage of making treatment services accessible for them.

Alcoholism may constitute a disease provided it has damaged the brain to an extent as to grossly impair the ability to make rational judgment and emotional responses. On the other hand, though the taking of alcohol inevitably impairs judgment and the ability to control the emotion, its transient effect cannot be accounted as a "disease". Therefore, the question lies as to under which of the two conditions one is exempted of criminal liability. Further, a person is deemed voluntarily intoxicated when he takes an intoxicant including alcohol, drugs or any other thing being aware that it is or may be an intoxicant and he takes it in such quantity as impairs his awareness or understanding. Or a person may be involuntarily intoxicated say, for the purpose of medication or being under coercion. The question that repeats itself here is that under which one of the conditions the doer can claim exemption from criminal liability? Alcoholism,

whenever it constitutes a disease, depending on the extent it affected the ability to make rational judgment and emotional responses; it would justify irresponsibility or only diminished responsibility.

2.1 Voluntary and Involuntary Intoxication:

Regarding intoxication, whether voluntary or involuntary, most penal codes flatly state that intoxication is not defense which is actually, not true. Involuntary intoxication, for example, because of prescription medication or coercion can constitute a defense. Where an offense is committed under intoxication caused due to fraud or coercion, the intoxicated man may not be said to have acted on his own accord, and therefore, is not responsible for the consequences of his acts. The justification for such a provision is based on the contention that the accused had himself not contributed to his drunkenness, which was not likely to be repeated as in case of voluntary drunkenness.

Most courts in America have held that even voluntary intoxication, when sever, may render a person incapable of forming certain specific types of criminal intent, which is an ingredient element of the crime in question. For example, murder in the first degree requires, among other things, premeditation and deliberation. Many courts have also held that if a defendant was so grossly intoxicated that he or she could not premeditate and deliberate, he or she can at best found guilty of murder in the second degree. To that extent, the law on intoxication conforms to the *mens rea* principle. But American law does not absolve intoxicated perpetrators of all criminal liability: gross voluntary intoxication may simply lower the degree of the crime committed. (**Adler, Mueller and Laufer**)
Generally the development of the law on drunkenness has passed through the following three stages:

1. That insanity, whether produced by drunkenness or otherwise, is a defense. The distinction between the defense of insanity in the true sense caused by

excessive drinking, and the defense of drunkenness, which produces a condition such that the drunken man's mind becomes incapable of forming specific intention, has been preserved throughout the case. The insane person cannot be convicted of a crime. There was no law that takes note of the cause of insanity. If actual insanity in fact supervenes as a result of alcoholic excess, it furnishes as complete an answer to a criminal charge as insanity induced by any other cause.

2. That evidence of drunkenness, which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts, proved in order to determine whether or not he had the intent.

3. That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts. (**Gaur**)

The defense of drunkenness and its legal effects in Ethiopia is prescribed under Art. 50 and the discussion are followed here after. The provision is chiefly intended for persons who with some state of mind contravene the law while under voluntary influence of alcohol or drugs or any other means. It is based on the rule that intoxication is no defense if caused by the offenders' voluntary act.

The main deference between Art. 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. Speaking objectively, the doer's condition at the time of the offence was that of a mentally deficient person and may lead to say he should be treated in the same manner as the mentally deficient a person regardless of the fact that he

himself deliberately created this abnormal condition. But speaking subjectively, 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. This is also applicable to circumstances under which a person voluntarily places himself in a state of irresponsibility when he knows and accepts the possibility of doing wrong. Therefore, in the cases coming under this condition, the court must ensure that the case actually committed is that which the accused ***directly*** or ***indirectly*** intended when he intoxicated himself. This is applicable in relation to both offenses of commission (if *A* drinks in order to kill *B*) or omission (if *A,* a soldier on leave drinks so as to disable himself from going back to his unit). Art. 50(1) supports the second conception, which prevents an accused benefiting from the provisions of Arts.48 and 49 on the sole ground that he committed an offence, while in an abnormal condition that was created by himself. Thus, the fault of the doer operates as an absolute prohibition from invoking Arts.48 and 49. Instead, in such cases, the offender may be convicted and sentenced as though he had been fully responsible at the time of the act.

The second condition by which an offender shall not be benefited from the provisions excluding or reducing the punishment is 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). Under this sub-article, a person drinks or consume drugs, though he foresees, but rejects, the possibility of doing wrong or he is not, but should and could be aware that he may do wrong. 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.

The third situation with which Art.50 deals is that of an accused who, having placed himself in a condition of complete irresponsibility commits or attempts to commit an offence with which he did not intend to commit; nor could and should he have foreseen the possibility of committing it. For instance a person may in a particular quite and cold evening staying home alone begin to drink with intent to get himself warm and relaxed but may get completely drunk and commit a punishable act. In such instances, the accused is not liable to punishment under sub-art.3, as the person has neither criminal intention nor criminal negligence existed before he intoxicated himself. According to Art.57 (1), he should, therefore, go free because he is not guilty of the offence committed. However, the need to ensure the peace of the public justifies that the offender should be punished and should not be permitted to excuse himself on the ground that he did not mean to do any harm prior to getting drunk. 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). Art.491 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.

The Defence of Intoxication At A Glance:

Sub-Art.	State of the Defendant	State Induced By	Crime Committed	Legal Consequence
Art. 50/1	Absolute or Limited irresponsibility	Own fault (Voluntary Intoxication)	Intentionally (In order to…)	Fully liable to punishment
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	Punishable under Art. 491 provided

			contemplated nor intended)	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

The following important inferences can be drawn from the above legal provisions:

1. Voluntary drunkenness is not defiance for the commission of a crime, except for minute variations in the liability.
2. Sub- Art. (2) reduces the defendant's liability to negligent commission of the crime which according to Art. 59/2 is punishable only if the law expressly provides for punishment.
3. Su-Art. (3) deals with act neither contemplated nor intended which is committed in a state of absolute irresponsibility and prescribes punishment in accordance with Art. 491 provided that such act is normally punishable with at least one year's imprisonment. Under Art. 491 the defendant is punishable with fine or with simple imprisonment not exceeding one year, according to the degree of danger or gravity of the act committed.
4. Involuntary such as, the thing which intoxicated him was administered to him without his knowledge or against his will shall afford him a valid defence as it does not amount to putting himself into the state of irresponsibility.

Voluntariness here has to be understood clearly. There are two things to be distinguished:

- Voluntariness relating to the act of getting intoxicated,
- Voluntariness in doing the act subsequent to the intoxication.

There can a 'state of incapacity' produced either by drinking voluntarily or involuntarily. Once the state of incapacity is produced it means that the person is

incapable of doing things voluntarily i.e. he is irresponsible either absolutely or partially. However, Art. 50 is concerned with the combination of two factors:

1. He should not have by his own fault out himself in the state of drunkenness,
2. Whish makes him absolutely irresponsible so as to satisfy the essentials of Art. 48 or partially irresponsible so as to fit in to the requirements of Art. 49.

If the defendant gets intoxicated voluntarily:

- he is fully liable under Sub-Art (1) of Art. 50,
- he is liable for negligently doing it under Sub-Art.(2), if he is aware, or could or should have been aware of the likelihood of committing a crime subsequently,
- he is liable for committing disturbances resulting from acts committed in a state of ***culpable irresponsibility*** under Art.491 of the Special Part, if he is completely unaware of the likelihood of committing a crime subsequent to intoxication.

Review Questions:

1. A person who voluntarily intoxicated himself is objectively irresponsible while doing wrong. What is then the justification for excluding such state of condition from the application of Art.48 and 49?
2. What distinguishes each of the sub-sections within Art.50? What consequences result from placing an individual within one or another of these sub-sections?
3. What relationship exists between Art.50 and the preceding Art.48 and 49? Does Art.50 exclude the application of Art.48 and 49 in all cases of voluntary intoxication?
4. Identify the three ways in which intoxication may be used as a defense.

Case Problem:

Three friends Khalid, Addisu and Binyam went to a restaurant to celebrate the birthday of Addisu. They started taking drink after drink and were enjoying their time. During their conversation they picked up an argument over an issue and

Biniyam got really angry with some of the arguments made by Khalid and seriously left the place and went out. Biniyam was fully drunk by that time. After sometime he reappeared there and continued to drink with his friends. Then Khalid teased him over the matter once again. Biniyam this time got enraged and took a beer bottle and hit Khalid hard on his head. Khalid had a profuse bleeding due to the cut wounds by the sharp edges of the bottle and was rushed to the hospital by both Addis and Biniyam. Unfortunately Khalid died after two days of medical treatment.

Can Biniyam raise the argument that he his case should be treated under Art. 50/3?

Note these points:

1. It was a case of voluntary intoxication.
2. The commission of the act was neither contemplated nor intended as is clear from the facts. They were friends and celebrating a birthday.
3. No evidence of previous enmity or even any disturbances between them.
4. Assume that provocation as defence is ruled out as it was not a case of gross provocation.
5. Assuming that Art. 50/3 can be rightly applied to the facts of the case, can this case be appropriately be dealt with under Art. 491?
6. Do you think that any case is punishable with at least one year of imprisonment (***and above)*** can rightly be brought under Art. 491?

2.1.1 Doubtful Cases

Although nowhere in the Code specifically said so, every accused is presumed to be responsible for his acts. Therefore, as a general rule, the alleging party need not prove that the accused was capable, at the time of the offence, of understanding what he was doing and of behaving accordingly. This presumption, however, is destroyed if doubt arises regarding the offender's mental stability. The court may fall in doubt about the responsibility of the accused as there are

objective reasons to doubt or any of the conditions identified by law are found. And the court cannot proceed before clearing the doubt either through medical examination and inquiry into the character, antecedent and circumstances of the accused. On the basis of the finding, the court shall make such decision, as it thinks fit.

- **Conditions where the Court Falls in Doubt about the Responsibility of the Accused:**

  The first condition where the court is allowed to doubt about the responsibility of the accused brought before it is 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. But almost certain that a mere informal conduct displayed in the courtroom is inadequate for the court to fall in doubt about the mental condition of the accused. Instead 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.

  The second situation in which a medical examination must be ordered is that 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.

In either of the above conditions, the court is bound to obtain the medical evidence. It may, in addition, require other evidences to help the court to clarify the point in issue.

- **Duties of the Medical Expert:**

According to Art.51 (2), the duties of the medical expert are of two folds. First, the 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. What the court expects the of medical expert is to state whether the offender's faculty of "judgment and free determination were affected by some biological defects and, if so, whether the deprivation was complete or partial. In this case the essential time reference is the time of the commission of the crime. Only this time is important to determine irresponsibility. 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. Accordingly, most criminal codes authorize the court to order medical experts to examine and state the mental condition of the offender both at the time of the commission of the crime and at the time of 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 trail. The English version, however, refers solely to the time of trial and many agree that this simply an oversight. Secondly, 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.

2.1.2 The Relation between the Court and the Medical Expert:

The part respectively played by the medical expert and the court in deciding upon the criminal's responsibility is one of the most controversial issue. In most common law countries, it appears that the jury is allowed to ignore the findings of the medical expert. In the case *R v. Bryne,* Per Lord Parker argued that the 'mental responsibility of a person for his acts' points to a consideration of the extent to

which the accused person's mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise will power to control his physical acts. For him the question is therefore to what extent the abnormality in a particular circumstance substantially impaired the mental responsibility of a person for his acts. A further argument is that the question of degree of essentially one for the jury. He press go on his argument and says that medical evidence is relevant, but as the question involves a decision not merely as to whether there was some impairment of the mental responsibility of the accused for his acts but whether such impairment can properly called 'substantial', the jury may quite legitimately take different position from doctors. The argument goes on and says after all claiming that, there is no scientific measurement of the degree of difficulty, which an abnormal person finds in controlling his impulses. These problems which in the present state of medical knowledge are scientifically insoluble, the court can only approach in a broad, common sense way.

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. The court therefore may 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', in the sense that, if the expert states that the accused is a chronic alcoholic or a pyromaniac, it may not ignore this statement in making its decision. If the judge is allowed to disregard scientific findings to which he is not qualified to appreciate, some say he would at once be entitled to convict an irresponsible offender merely because the latter committed, in the judge's opinion, an atrocious crime demanding punishment.

The same is true with the 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. It is, therefore, for the court to draw the "legal inferences" from the expert's findings, 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.

Review Questions:

1. "Every accused is presumed to be responsible for his acts". Discuss
2. What do you think should be the roles to be played by the medical expert and the court in determining irresponsibility and limited responsibility?
3. What is the role to be played by medical experts in Ethiopia in those cases where the defense of irresponsibility is raised?
4. What "terms of reference" shall the court set for the expert?

Section. 3. Infancy/Immaturity: Art. 52

Suppose a 3-year-old pushes her baby brother down the stairs, and the baby dies. Could we try the 3-year-old for murder? Does the 3-year-old commit the act of killing? Does she have the requisite intent (mens rea)? In fact a 3-year-old does not even know the meaning of life and death. To prevent silly inquires into whether an infant committed a criminal act with the requisite criminal intent almost every jurisdiction set infancy limit below which children are absolutely exempted from being subject of criminal law. This is based on the principle that an infant is incapable of distinguishing between right and wrong and so no criminal responsibility could be fastened in regard to his deeds. Children of such age are granted absolute immunity on the ground that they are *doli inapax*, that is, incapable of doing a criminal act, because a child under such age group cannot form the necessary intention to commit a crime. This is therefore a legal presumption. In other words it is immaterial whether the nature and quality of the wrong done as it is normally one to be done only by someone with high caliber and experience. And some jurisdictions have adopted a qualified immunity as well to children whose age is above the infancy limit but below certain age limit.

In the case of India, for instance, section 83 provides qualified immunity to a child above seven years of age and below twelve years of age. In other words, if it is shown that the child has not attained the requisite degree of understanding to judge the nature and consequences of his conduct, he is exempted from criminal liability. In the absence of such proof, a child above seven years of age as much liable for his criminal act as an adult is. The maturity of understanding can be inferred from the nature and quality of the act, subsequent conduct of the doer and allied factors.

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

It is also common in many jurisdictions to have different age groups for young offenders with different treatment and punishment prescribed. 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 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 he may not be treated as such for his appreciation of the world, is not that of a grown-up person. This implies that a court dealing with a young offender consider the offence merely as an indication that he requires medical treatment, education or correction. The idea of retribution is almost altogether absent from the provisions applicable to young offenders, as indicated by the fact that the seriousness of the offence committed is not normally taken into account in

deciding the offender's fate. The issue is not to punish a juvenile "according to the degree of individual guilt", but "to ensure the best possible treatment" and penalties.

This however does not mean that the provisions applicable to juvenile are not of a penal nature. Quite to the contrary, young offenders other than infants are subject to criminal law; yet, as they constitute a special category of wrong-doers (as is 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), they come under special rules. (Philip Graven, pp. 144-145)

Accordingly, the Criminal Code of Ethiopia deals with infancy (which ends at the age of nine years), adolescence (which extends from nine to fifteen years, 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.

3.1. Infancy under Ethiopian Law:

According to Art.52 of the Ethiopian Criminal Code, infants are completely exonerated from criminal provisions. The lower limit of penal majority is made nine years under this article. Therefore, the Ethiopian criminal code never applies to children who commit an offence before having completed their ninth year. Whatever offence may be committed by a child who is not yet in his tenth year, he is not criminally liable and may not be subjected to a penalty under the law. He is presumed by law to be *doli incapax*, and showing that he understand what he is doing and that he would also understand the purposes of penalty cannot rebut the presumption. Furthermore, punishment, which in any event might do more harms 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 infants do wrong and to bring about a change in the circumstances, which lead 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. Instead, they are under the exclusive jurisdiction of their parents or persons exercising parental authorities. If they do wrong, corrective steps may be ordered at home or at school, but not in court. And yet, provisions of the Revised Family Code and Arts.576, 659 are designed to ensure that infants do not become delinquents in consequences of their parents failing in their duties.

3.1.2. Classification of Young offenders under the Code:

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.

3.1.2.1. 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.

For example, Hamdi is eight years old. He set fire to a hut in which three persons were asleep. Two persons seriously injured in the fire. The third person died in the fire. Hamdi will not be liable for causing negligent homicide contrary to article 543 of the Criminal Code, nor will he be liable for injuries caused by negligence contrary to article 559 of the Criminal Code.

3.1.2.2. Young Persons:

Young persons are persons whose age is between nine and fifteen (article 53(1)). Young persons don 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.

Young persons are criminally liable for two reasons. First, persons begin to understand the nature of their acts, to be able to form a decision and to keep to it between the age of nine and fifteen. During this period, their intelligence and volition develop and become gradually closer to those of adults. Secondly, the commission of a crime shows that the time has come to take action because no action has been taken at home or school or it has failed. Further, it is easy to correct young persons in early age and their separation from their family does not affect them.

The objective of subjecting young persons to any action is to turn juveniles into useful citizens. Therefore, the primary aims of any action taken with respect to young persons are and must be education and correction. The commission of a crime by the young persons implies that there are problems in bringing them up. These problems may arise from different causes that include the parents' failure to perform their legal duty to bring up their child properly, disunited family, poverty, migration and association of young persons with criminals. Since the causes for criminal behavior of young persons are different, the court should apply different penalties and measures that can correct and educate them.

The court, according to article 54 of the Criminal Code, should require information about the conduct, position and circumstances of the young criminal. The court may obtain this information from persons having close relationship with the young criminal such as parents, representatives of the school,

guardianship authorities and institutions. Besides, the court before passing measures or penalties may order the young criminal to be kept under observation in medical or educational center, a home or any other suitable institution.

The court after it has obtained necessary information assesses the penalties and measures by taking into account the age, character degree of mental and moral development of the young criminal, as will as the educational value of the penalties and measures to be applied. Accordingly, when an adult commits a crime, he/she is liable to the penalties prescribed by law with the respect to this crime. 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, young criminals are liable to only penalties and measures provided for them. Therefore, the court may order appropriate measure against young criminals irrespective of the kind and seriousness of the crime they committed. In ordering the measure, the court should ascertain that the measure ordered could eliminate the problems of young criminals. In this regard, the work of judges of juvenile criminal is similar to that of the medical doctors.

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. This is another point that distinguishes the penalties and measures ordered against young persons from that of the adults. In cases of adult, it is a generally admitted procedural principle that a final judgment may not be revised in the course of its enforcement. This difference is justified, as there is certain amount of experimentation involved in the dealing with young persons. It is unpredictable whether the measure ordered succeeds in reforming the young criminals. Thus, the court's duties do not end after it has begun judgment. It may order a new measure if it appears that the one that is being enforced does not serve the purpose for which it is ordered.

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.

3.1.2.3. 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. As a result, the court has three options. First, 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. Secondary, the court may order one of the special penalties applicable to young persons. Finally, the court may order special measures applicable to young criminals based on the conditions laid down under article 177.

3.2. Special Provisions Applicable to Young Persons:

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.

Where a young person commits an offence the penalties and measures to be imposed by the court shall be those provided in Book II, Chapter IV of the Criminal Code between Arts. 157-168. The reason that the young persons are subjected to these special provisions is not because they do not deserve the ordinary penalties but because they are not as well suited to their requirements as those special measures and penalties. As compared to measures and penalties prescribed for adults, the court has wider option and allowance for flexibility. Besides these provisions that provide young persons, among other things, protection from being subjected to the ordinary penalties is applicable to adults or being kept in custody with adult offenders. By doing so, the provisions squarely

fits with the Constitution of the Federal Democratic Republic of Ethiopia and the UN Convention on the Rights of the Child.

3.3. Reasons for Young Persons Criminal Liability

There are two basic reasons that underlie why young persons have to be held criminally liable. First, young persons are assumed to begin to understand the nature of their acts and able to form a decision and keep to it. During this period and therefore, their intelligence and volition develop and become gradually closer to that of an adult. Second, 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. Thus, the community is entitled to ensure that its younger members are not let to corrupt and perish. Accordingly, the primary aim of any action taken with respect to young persons is and must be education and correction; penalties should be used in the last resort.

3.4 Assessment of Sentence in Case of Young offenders:

Art. 55 provides some guidelines, that the court has to follow in assessing the sentence regarding young offenders. According to Art.55 first aliena, the court in assessing the sentence shall take into account the age, character, and degree of mental and moral development of the young offender as well as the educational value of the measures to be applied. In view of enhancing the capacity of the special measures and penalties prescribed bring the desired result, i.e. reform and rehabilitation; the second *aliena* of the same provision allowed the court to vary its orders at any time to ensure the best possible treatment. This implies that the court must always take into account the best interest of the young person, a standard adopted by the FDRE Constitution and ICRC.

3.5 Measures for the Problem of the Young Criminals

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 attaines 18 years (article 164(2))
5	Any other problems	Reprimand and censure	160	No duration

The court may impose penalties on young criminals. These penalties as provided under article 166-168, are of two kinds. These are fine and imprisonment. The court may not sentence a young criminal to fine or imprisonment unless the measures applied under article 158-162 have been applied and failed.

A court may sentence a young criminal to fine when he/she is capable of paying the fine and of realizing the reason for its imposition. Thus, a court may not

impose fine on young criminal who has no means of income. The fine should be proportionate to the criminal's means and gravity of the crime (article 167). Thus, a court may impose different fine on two young criminals who have committed the same crime with the same circumstances if the magnitude of their income differs. The fine may be imposed in addition to imprisonment.

A court should not order the sale of property of the young criminal or the conversion of fine into labor or compulsory labor. If the failure to pay the fine is deliberate, the court may convert the fine into home or school arrest.

The court may impose imprisonment on young criminals when they committed a crime punishable with rigorous imprisonment of more than ten years or death penalty (article 168(1)). The young criminals serve the sentence either in corrective institution or penitentiary detention institution. If the court sends the young criminals to penitentiary detention institution, they will not be mixed with prisoners who are sentenced to rigorous imprisonment or special confinement. The court sends young criminal when they are incorrigible or likely to be a cause of trouble, insecurity or corruption to others. Thus, the court sends young criminals to penitentiary detention institution when the measures ordered against them could not reform them. The court shall transfer young criminals from corrective institution to penitentiary detention institution when they are dangerous or when they have attained 18 years and the sentence extends beyond the age of majority.

The period of detention shall extend from one year to ten years (article 168(2)). The enforcement of this period of detention takes place under the regime of simple imprisonment (168(3)). That is, the court should not send young criminals to a prison that is appointed for the purpose of rigorous imprisonment. If young criminals appear to have been reformed, they may be released on probation after they have served two-thirds of the sentence of imprisonment. Thus, a young

criminal who is sentenced to six years of imprisonment may be released on probation if he/she serves four years of imprisonment.

Review Questions:

1. Should the infancy limit recognized under Art.52 be revised? If so, how should it be revised?
2. Why does the Code make special provisions for young persons? What is the special purpose intended to be achieved?
3. What special authority does the court has in relation to sentencing?
4. What are the principles to be taken into account in sentencing young persons? Is such sentence to be considered criminal?

Case Problem:

'A', 'B' and 'C' were brothers. Their father 'F' was killed by his enemy 'E'. Since then, the three brothers were planning to finish off their father's murderer. All of them, in fact, had a criminal history. Finally, they executed their plan and killed 'E'. 'C', the youngest among the three accused, was 14 years old when he participated in the homicide along with his elder brothers. Both the elder brothers were sentenced to imprisonment for life, where as the youngest one was sent to a 'Correctional Institution' for a period of 5 years, being considered his young at the time of the commission of the offence.

1. Discuss the principles of Penal Law relating to his confinement in the "Correctional Institution".

2. Explain the objectives of Correctional Institutions. What is the maximum period of time that a child offender may be kept in such an Institution?

3. If you were a judge how do you proceed with enforcement of the punishment given to "C' in the above case?

Unit Summary:

General defenses for criminal liability 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. These defences arise either due to negation of *mens rea* i.e. moral ingredient of crime in case of irresponsible persons. Insane persons, intoxicated persons and infants are exempted from criminal liability due to the fact that they lack the capacity to form the mental element required for attaching any criminal liability.

The defence of insanity includes two different grounds. There are, absolute irresponsibility under Art 48 and limited responsibility under Art 49. In case of absolute irresponsibility the accused is absolutely immune from any criminal liability but shall be subjected to special treatment as provided under Arts 129-132. Where as, in case of limited responsibility the court shall freely mitigate his penalty as per the provisions of Art 180. In addition to that the accused is subject to the treatment specifies under Arts 129-133.

The defence of intoxication has been dealt with in the Criminal Code under Art 50. Involuntary intoxication leading to an absolute irresponsibility is an absolute immunity under Art 50/4. If the absolute irresponsibility is the result of coercion or according to a strategy for which the accused has no fault it amounts to in voluntary intoxication. Voluntary intoxication as a basic rule is no defence for criminal liability. But it might become a qualified defence under the circumstances mentioned in Sub-articles (2) and (3) of Art 50. Where a person is voluntarily intoxicated *in order* to commit a crime, the person becomes completely liable for punishment whether the irresponsibility produced due to intoxication is an absolute one or partial (Art 50/1). However if the voluntary intoxication falls under Sub-Art.(2) the person is liable for negligent commission of the crime as per Art 59.

Infancy under Ethiopian Criminal Code has been dealt with very carefully. The young offenders fall under three categories: infants, young offenders and of intermediary age group. Infants under nine years of age are completely exempt from any criminal liability. Young offenders falling in between nine and 15 years are liable criminally but are not punished on par with adult criminals. The Code designed special types of measures with curative, educational and corrective values. Young persons above the age of 15 but below 18 fall under intermediary age group. They are normally liable to penalties as adults but in cases of abnormal delay in mental development the measures designed for the below 15 may be applied to them.

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2. Articles 50,51,59 and 491 of the Criminal Code of FDRE, 2005-defence of Intoxication
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UNIT-II

AFFIRMATIVE DEFENSES

Introduction

Broadly speaking, crime is an individual behavior that contradicts the will of the public at large. Criminal law is branch of law where the will of people is expressed. It is therefore an individual has no choice but to behave in accordance with the terms of the law in question. Failure to comply with the law causes harm to the society and is therefore always punishable. But there are circumstances though limited and bound with strict legal framework exonerate the doer from criminal liability fully or partially. One such circumstance is for instance where it is necessary to pass some rules of the law over and do acts for the benefit of the same people. This refers to lawful acts. A lawful act is an act, that a person legally obliged or authorized to do. The act is lawful not because law does permit it. Rather it is inherently a punishable one. Under such circumstances certain positive results would not be achieved unless there is to be an act being made in contradiction to the law. Sometimes contradicting the law is not only authorized but also required or ordered. Punishment in such circumstance therefore would be ironic. Besides that it would prevent the society benefit from exceptionally unique positive results of certain outlawed acts. A good example of this is restraining persons liberty to force them answer for a criminal wrong they have done to the society. One another circumstance where despite an act is in contradiction with the law but not punishable is when the society lifts its condemnation up. Under these circumstances the original condemnation by the society of certain acts may have gone astray. Rather under such circumstances the acts may be found justified. Justifiable defenses are therefore acts done in circumstances excluding intentional guilt. Imposing punishment against persons who do acts in contradiction to the law being under special circumstances is thus not only would contradict the very essence of criminal law but is also unjust. Take for instance a person of whose legitimate interest is being threatened taking repulsive measure. There shall be no justice to be served. Instead it would guarantee illegitimacy to prevail. Still another circumstance is where persons in no way are allowed doing

acts that contradict the law but enjoy a special protection of a lesser punishment. This refers to acts done in circumstances reducing the degree of guilt. For instance, if someone erroneously believes that drunk driving is not outlawed and does so is not a serious menace as the one who willingly contradicted the law. Generally assumed that he would live by the law had he known drunk driving is outlawed. Accordingly it would be unjust to punish him/her alike. The same is true with a person provoked to violate the law. Therefore in such all circumstances the doer is not justified but is allowed under the law to enjoy some protection.

- **The Procedural Place They Assume:**

  Affirmative defenses, as the name speaks for itself are legal defenses against a criminal charge. It is therefore 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 fascia* 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. Such possible times could have been for instance when the case is under the retention of the prosecution service. The proponents of the idea question that why the prosecution as a member of the legal profession could not have been authorized to discontinue cases that undoubtedly fall under any of the circumstances discussed above. 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 1949 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 relay on Art.42/1(a) to discontinue cases whenever they prove any of the circumstances. The question

that demand attention here is, however whether it is after all possible to prove the circumstances otherwise within the judiciary.

Objectives:

By the end of this chapter, students will be able to:

- Understand the meaning and essence of affirmative defenses
- Identify the categories of affirmative defenses
- To make distinction between absolute defenses and limited defenses
- Discuss the ideal time in the process where the defenses could have been invoked.

Section.1. Lawful, Justifiable and Excusable Acts:

- **The Ethiopian Criminal Code on the Subject:**

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. Furthermore the said question is always to be decided with reference to the law for there are no justifications or excuses, whatever their *raison d'etre*, other than those provided by law, and whichever this law may be.

The definition and classification of lawful, justifiable and excusable acts sometimes vary. In some jurisdictions, for example, the only distinction is between justifications and excuses (e.g. France). The first one comprises of acts required or authorized by law, legitimate defense, necessary acts and acts done with the consent of the injured party, while the second ones, which are said to be either *absolutoires* or *attenantes* according to their effect on the penalty, are similar to the circumstances with the Ethiopian Code regards as general or

extenuating circumstances. In other jurisdictions, acts ordered or authorized by law, acts done in state of legitimate defense and necessary acts all fall into the general category of lawful acts (e.g. Swiss). Some laws, taking into account the fact that there is for all practical purposes little differences between lawful and justifiable acts since the doer is not punished because the law itself deprives the act, in the one case, of its unlawful character and, in the other, of its punishable character, do not even attempt any classification, and deal with both types of acts under headings such as "general exceptions", "excuses" or "affirmative defenses". (Phillip Graven)

The Ethiopian Code does not follow any of the above-mentioned models but provides for three classes of acts with respect to which the ordinary rules concerning criminal guilt do not apply or fully apply, namely lawful acts (acts done in circumstances which legitimate them), justifiable acts (acts done in circumstances excluding intentional guilt) and excusable acts (acts done in circumstances reducing the degree of guilt).

Whether this classification is fully satisfactory, is a matter of opinion. Graven argued that lawful acts should not be dealt with in the Chapter of the Code concerning criminal guilt, as they do not involve any question of guilt. So too, in as much as one is authorized by law to repel unlawful attacks, it may seem that acts done in legitimate defense should rank among lawful acts and not justifiable acts.

1.1. 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. Because of the existence of the legal right or duty to act, the act, which would otherwise be criminal, is a legitimate one for which the doer is not punishable. The defense of lawful acts therefore provides a

counter-law to the prohibitory law. The prohibitory law says: you must not kill. But the counter-law says: If you are a soldier in a combat, you must kill. This defense however is different from the circumstances where a particular criminal act is declared by law not to be punishable (e.g. Arts.28/1, second *aliena,* 29, second paragraph, etc.) In these latter cases the acts are not punishable for reasons other than ordered or permitted by law.

On the other hand, the availability of the defense is conditioned upon the fulfillment of two conditions. Firstly, one cannot claim protection under the defense unless he/she is one who has acquired the status required in the law. For instance, however the person is someone sentenced to death for the atrocious crime he has committed, only employee of the prison administration and perhaps particularly who has been assigned to do the job can take action against the sentenced to enforce the order of the court. Therefore, if a person other than the one mentioned above takes action and kill the sentenced offender, his act would amount to an ordinary crime of murder. The same is true if someone, other than a police officer who restrain the liberty of another. Secondly, 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. Therefore, despite the fact that the doer is one envisaged in the law, his act would remain a punishable crime so long as it is committed in the absence of objective circumstances the necessitate the act.

Acts Required or Authorized by Law: Art.68

Under Art.68 of the Criminal Code of Ethiopia, lawful acts comprise of particular acts connected with:

A. Public, state or military duties,
B. Acts done in the exercise of a right of correction or discipline, and
C. Acts of private justice.

Here it is worth noting that the list of lawful acts set under this provision is not meant to be exhaustive. Taking the term "in particular" at the opening of the provision into account, we may say that the acts expressly stated are only illustrations. What is important is whether these and any other acts are done by a person who has a legal obligation or permission to act and whether the acts are done according to the terms of this legal obligation or permission. The reason behind the law is that the enforcement of the provisions of the Code itself calls for actions that contradict itself. Criminal sanctions that require imposition of penalty restraining liberty, for instance cannot be materialized without authorizing someone to take action with the effect of restrain on liberty.

A. Acts Relating to Public, State or Military Duties:

The defense is nowhere applied more appropriately than in conjunction with the defense of public duty. Furthermore 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. However, the 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 so long as done on the conditions laid down in the Criminal Procedure Code, Arts.50 and 57. In both cases the person shall not be punished for an offence under Art.585 of the Criminal Code since, although the person interferes with the liberty of another, the interference is not contrary to the law as is required by the latter provisions. A private person, however, would be punished for committing an offense has he arrested without a warrant someone who has committed a flagrant offense punishable with simple imprisonment not exceeding three months for that would be beyond the legally permitted boundary for private person's action (art.50). Similarly, the private

person would be held criminally liable if he strikes the person he has lawfully arrested in the absence of any resistance from the arrestee for that would be beyond the legal boundary set under Art.56 (4) of the Criminal Procedure Code. One also finds the same type of exceptions to the criminal law in numberless cases in the Criminal Procedure Code including the acts of crime informers and witnesses.

The defense of State or military duties on the other hand is available when the doers possess an official status, either civil or military, and act in discharge of their duty. Acts of a public servant or a member of the armed forces are therefore do not constitute an offense and are not punishable so long as they are done in accordance the terms of the relevant law. Thus, a policeman searching a house, a prosecutor charging an offender, a judge ordering the accused to be kept in custody, a prison employee executing death penalty and a soldier killing an enemy are not committing crime and are not liable to any kind of punishment as long as they discharged their respective duties according to the terms of the Criminal Procedure Code and the laws of war.

B. Right of Correction or Discipline:

There are some kinds of measures that can be possibly administered for the purpose of correction or discipline but inevitably result in some harm to the individual subjected to such measures. It is not also uncommon to find legal provisions that vest the power of administering correctional or disciplinary measures on some. Such is the case, for instance, Art.2039(c) of the Civil Code impliedly authorizing the parents, guardians and masters to use reasonable use of force for the purposes of chastisement. Accordingly, Art.576/3 of the Criminal Code dealing with maltreatment of minors expressly limits the right of correction or discipline. Thus, there shall be no criminal liability against those legally authorized for their acts unless they have gone beyond legal limit, namely the reasonableness of the action *vis a vis* the seriousness of the fault sought to be corrected.

C. Exercising Private Rights:

The last type of lawful acts expressly provided under this defense is that of acts done in exercising private rights recognized by law, the acts that are sometimes referred to acts of private justice. Thus, Arts.1148 and 2076(2) are just some provisions of the Civil Code that justify the protective actions of a holder of a thing and a possessor of a land however their action may cause harm to others. In both cases, the doer is not guilty of an offense of bodily injury or damage to property, since the law expressly authorizes him to act as he does.

Review Questions:

1. Explain the general meaning and essence of affirmative defenses
2. Explain and justify the classification of affirmative defenses between lawful, justifiable, excusable
3. What should be the appropriate time in the criminal process to apply affirmative defenses?
4. State the reasons why lawful acts are not punishable.
5. Explain the subjective and objective requirements of the defense of lawful acts.
6. Distinguish the difference between 'State duty' and 'public duty'

Critical Thinking!

Should lawful acts and acts done in a state of legitimate defense fall in the Chapter of the Code that deals with guilt?

Brain Storming!

"The law itself provides a counter-law to the prohibitory law". Discuss.

1.2 Professional Duty: Art. 69

Certain socially beneficial professional duties can only be discharged in contravention to what is prohibited by law. In the absence permission by law to contradict itself any act done in the exercise of such professional duties would thus remain criminal and punishable. Accordingly there could have been no one willing to acquire such professions to the disadvantage of no one else but the public.

Acts done in the exercise of a professional duty come within the general category of acts authorized by law. In fact, the defense serves a specific purpose of ensuring the exclusion of criminal liability for acts done under certain legally tailored conditions while exercising professional duties. Otherwise, legally speaking, an act done, for example by surgeon in his professional capacity is of the same nature and has the same effect as an act done, for example by a public servant in his official capacity. In both cases the law but not the status or the duty of the doer that gives a right to act. In other words, the law, which authorizes the exercise of certain professions under which specific activities are to be carried out by certain persons, would not contradict itself by making the same act unlawful acts, which are properly done by these persons in the exercise of their profession.

1.2.1. Defining ‘Profession’:

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. On the other hand, remuneration seems important to determine whether the profession a recognized one. It seems, for instance, the law does not allow persons infringe the law while acting in seeking of pleasure. However, it seems that remuneration, whatever its form, should not be regarded as a conclusive test in deciding whether a person carries out a profession within the meaning of the provision. Sometimes it is irrelevant whether the person acting is remunerated as long as he is recognized as someone capable of doing things more efficiently and accurately than ordinary persons.

A related question is that whether an act is done lawful under Art.69 whenever it is done by a person not entitled by law to perform the act allegedly done in discharge of a professional duty. Obviously it is not. Only a person entitled to practice a profession is exempted from criminal liability. Thus, if an eye-doctor should cause the death of a person in attempting to remove the appendix of this person, he could obviously not be deemed to have acted in the exercise of his profession, and would therefore not justified under Art.69. Similarly only an advocate filling a petition for divorce on the ground of adultery does not commit defamation; only a surgeon performing an operation does not commit an offence of bodily injury and only a mechanic dismantling a car entrusted to him for repair may not be punished for damage to property. In all the above cases, only a person who acquired the required profession is allowed in the law to perform the acts.

1.2.2. Justification for a Harm Caused by a Person in the Exercise of Professional Duty:

Whenever a person is exempted from criminal liability for the acts he has done in discharge of his professional duty, the justifications is not the fact that the doer carries out a professional duty; it is rather the fact that the act is ordered by law. If it were not due to the law, the doer would remain criminally liable regardless of the fact that the act is necessary in carrying out his profession. For instance, if a doctor terminates a pregnancy on medical ground and report that to the right

authority, as he is required to so by law, he would not be punished for breach of professional secrecy. The law that required reporting lawful termination of pregnancy is therefore the source of justification for the act of the doctor. If it has not been for the law, the doctor's act of reporting would tantamount to breach of professional secrecy and is thus criminally punishable. The same is true when a professional person is obliged to give information, which an ordinary person is not obliged to give.

In all the above cases, however, the act is justified only on the condition that it is done "within the limits permitted by law". Thus, the law not only authorizes some acts to be done in the exercise of some professions but also prescribe the conditions under which the authorization is valid. Any act, though may be required under the profession is therefore not justified unless it is done only within the legal boundary set for such acts in legislations pertaining to each act. In this respect, even the consent of the person to whom harm is done may not be regarded as the source of justification. For instance, 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 law authorizes the operation. In fact, the surgeon must first obtain the consent of the patient to exercise his professional duty. A doctor is therefore punishable for abortion when, without the consent of the woman, he/she terminates a pregnancy. The presence of grounds laid down by law may not necessarily adequate to justify his act under this provision. This shows the existing of close relation existing between the question of the right to act and of the manner in which the right should be exercised.

1.2.3 Conditions where Professional Duty is not Justified:

The permission to practice a profession does not render lawful anything that may be done in the exercise of this profession. Art.69 applies only when the doer acts

in accordance with ***the accepted practice of the profession*** and does not commit ***any grave professional fault***.

In order to determine whether the first condition is fulfilled, reference will have to be made to the professional regulations, if any, or to the custom of the particular profession, which may be ascertained through expert evidence. For instance, it is not normal surgical practice if a surgeon uses a kitchen knife in removing someone's appendix.

The doer who acts in accordance with the practice of the profession on the other hand must not commit any grave professional fault. Thus, a surgeon commits such a fault when, after skillfully removing a person's appendix, he leaves his instruments in the patient's body. If this omission causes the patient's death, the surgeon is guilty of homicide by negligence even though he has done a lawful act when operating on the patient. Whether a professional fault has been committed in a given case, and whether it is grave one or not is to be decided in the same manner as in the first condition.

Review Questions:

1. Is there any distinction between the justifications behind Art.68 and 69? If not, what is the purpose for Art.69 to stand-alone?
2. "A person who is justified under Art.69 is not as a matter of right immune of civil liability". Discuss.
3. State the conditions where professional duty is not justified.
4. What amounts to 'grave professional fault'?

Case Problem 1:

Dr. Daniel while preparing a mixture of a medicine to be given to his patient, took out a certain medicine from a bottle. The label on the bottle was little bit torn out making the name of the medicine not completely visible. The doctor,

nevertheless, proceeded to prepare the medicine without making any extra effort to confirm the name of the medicine. The mixture was administered to eight patients suffering from high fever out of which seven died.

Discuss the liability of the doctor for causing death of those seven patients, referring to the relevant principles and provisions of law.

Case Problem 2:

Iyasu Birhanu is a photographer and he owns a photo studio too. His wife was suffering with cancer. He brought her medicines and kept them in a shelf where some other bottles containing poisonous solutions used for photography business were also kept. In a state of drunkenness, before going to bed, Iyasu gave his ailing wife the poisonous solution as a result of which she died.

Iyasu has been charged for causing the death of his wife. Discuss his liability referring to the relevant provisions of Criminal Code.

Distinguish this case from case number 1.

2.3 Consent As a Defence: Art. 70

This provision is inserted by the Revised Criminal Code. The previous Penal Code under its Arty 66 categorically stated that consent is no defence for criminal liability. But in fact that was a technically wrong statement since there are crimes such as rape, theft etc. for which 'lack of consent' is an essential element of the crime. Consent nullifies these crimes. Not only that, in cases of 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.

Art. 70 says that consent can be a defence 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.

- **Limitation to Consent as a Defence:** Art 70/2 places an important limitation to this defence. Consenting to donate any of his bodily parts while alive or after his death or his body after his death for any commercial purposes is absolutely prohibited. This is a punishable crime under Art 573. A person is free to donate any of the above said things to another person fro 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.

Case Problem:

Aden suffered from incurable disease. There was no hospital that was not visited by Aden. Thus, Aden has no hope of recovery from his illness. Aden lived only to suffer from his incurable illness. Finally, Aden decided to die. He begged his intimate friend, Bishar who is a doctor to kill him, by giving him some medicine that can take away his life painlessly. After slow but strong argument between Aden and Bishar, Aden persuaded Bishar. Bishar killed Aden by administering a poisonous injection. Aden's family came to know about the fact that it was by the interference of his doctor friend that Aden died.

Bishar is charged with murder of Aden. Decide the case.

1. Can 'consent' of the victim be a valid defence in this case? Discuss the principles relating to the defence of consent under Art. 70 of the Criminal Code.
2. What should be the right charge against Bishar?

1.4. Coercion/Duress: Arts. 71 & 72

Generally law, and in particular criminal law is always expected to attempt regulating the behaviors of only an average person. The law shall expect neither extreme heroism from individuals nor encourage cowardice. It shall give due notice of an average person the criminal behaviors together with the consequential penalties. This, however, does not mean giving notice is a guarantee for absolute compliance. It is almost unavoidable for there to be individuals disregarding the notice and committing the crimes defined by law. Some disregard it willfully and others commit it out of their own will. One common circumstance where one disregards the law out of his free will is when he/she is compelled by another to violate the law. In these situations the criminal law lets them go unpunished. This is founded on the 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. ***(GAUR)*** In such circumstances it may be said that the actor acted not of his or her own free will. Thus, the requirement of the required voluntary action (conduct) is not there.

All what has been stated above refers to one type affirmative defense commonly known as the defense of 'duress' or 'coercion'. The defense of coercion is therefore, a defense that the actor engaged in the conduct charged to constitute an offense because he is coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist. The law recognizes that we cannot be expected to yield our lives, our limbs, the safety of our relatives, our houses, or our property when confronted by a criminal threat that forces us to violate a law.

There is, however, a general requirement that the evil that threatens the actor and the evil created by the actor not be out of the proportion. One is for instance generally not justified if he or she causes death in submitting himself/herself for a

threat against his/her property. ***(Adler, Muller and Laufer)*** In addition, 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.

A coerced person is justified first, because like an insane person or intoxicated person he is totally deprived of his freedom of choice and therefore equally deserves the same treatment as long as the loss of will power is involuntary. Also a coerced person is 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. 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. Finally, the disposition of a coerced person is not that of a criminal who willfully act in disregard of the law. Thus, punishing a coerced person would be absolutely contrary to the basic principle of criminal justice. ***(The Defense of Consent, Coercion and Necessity under the Criminal Code of The Federal Democratic Republic of Ethiopia, by Dejene Girma, Jima University Journal of Law, p. 75)***

- **The Defense of Coercion under Ethiopian Law:**

1.4.1. Absolute Coercion:

Broadly speaking, Art. 71 like that of Art.32 deals with a situation where more than one person involves in the commission of crime. However, unlike the latter provision the defense of coercion deals with a question of guilt. It questions, among other things, whether in the case of absolute coercion the required combination of awareness and volition, which are the requirement of guilt, are available. Certainly, a person compelled to act in violation of the law knows that he does wrong. But, the compulsion deprives him of his freedom of choice. In this

sense, he is "incapable at the time of his act of regulating his conduct according to his/her understanding", from a psychological point of view, it is stated, he is in the same position as an irresponsible person. (**Philip Graven**) However, under the Ethiopian Criminal Code, coercion is treated separately from insanity issue discussed under Art.48 because the biological defect, which should exist so that Art.48 may apply, is missing.

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. The coercion therefore need not amount to absolute and be of a kind against which no resistance is possible. But it is equally certain that a coercion such as to subdue only a coward would not suffice for the purpose of this article. Between the conduct of a hero and that of a coward, there is the conduct of a reasonable man which, seems, that it should be taken into account. Although, therefore, regard must according to this article be had to the personal position of the agent, the defense 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 possible have resisted.

1.4.2. Physical vs. Moral Coercion:

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". (Graven, 1965) 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. For instance when ‘A’ is about to shoot at a gazelle but ‘B’ forcefully makes him aim and discharge his gun at ‘C’. In this case ‘A’ is not guilty of homicide as he is physically coerced. The same is true if Miss ‘A’ who was trying to assist a pedestrian whom she run down is forcibly evicted from the drivers seat by her passenger, ‘B’ thus preventing her from helping the pedestrian. She is not guilty of an offense under Art. 575.

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. In case of moral coercion, it is immaterial whether the agent himself or some other person is being threatened, as are also the contents of the threat. In fact these elements are relevant to determine whether the degree of coercion exercised in a given case is absolute.

1.4.3. 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. A case is for example when ‘A’ and ‘B’, in an attempt to escape from prison tie up ‘C’, a warden. But, ‘C’ was able to untie himself and ring an alarm bell while ‘A’ and ‘B’ are in the act of escaping. His failure to take the necessary measure under the circumstance would excuse him but not justify him. Another case of resistible coercion would be when ‘A’ drops his gun and starts looking for it in the dark while compelling ‘B’ at a gun-

point to company him to 'C's' house for the purpose of forcing open the door of 'C's' safe. B's failure to flee in fear of the possibility of repossessing the gun by 'B' would only excuse him under this article.

When coercion is not irresistible, intent as an element of criminal guilt is present and the coerced person is answerable for his acts. Hence, according to this article, first aliena, the doer is as a general rule punishable. However, the fact that he acts under coercion that is relevant to the second *aliena*, the punishment may be reduced if the actual and personal circumstances of the case warrant mitigation.

Review Questions:

1. Explain the scope of consent as a defence.Distinguish the difference between the aims of Art.32 and 71
2. Identify and explain the types of coercion.
3. Discuss the degree of coercion required to justify a coerced wrong.
4. Define resistible coercion and explain its legal effects.
5. Define "defence of coercion" and distinguish it from the 'crime of coercion" (Art. 582).

Case Problem 1:

Aden is a very well known drug dealer. One day he threatened to kill Bushra's wife unless Bushra transported cocaine, a narcotic substance, from Dire Dawa to Jijiga. Bushra heard the story that Aden had killed somebody's son whose father refused to transport narcotic drugs. Therefore, Bushra was terrified and then agreed with Aden to transport the drug from Dire Dawa to Jijiga. On his way to Jijiga, Bushra was caught in Harar.

The public prosecutor charged Bushra under Article 525(1)(b) of the Criminal Code.

1. Is Bushra liable for the crime? Why or why not?
2. What is the liability of Aden?

Case Problem 2:

Bishar worked with Farah in municipality of Jijiga city. Farah saw Bishar accepting bribe from Mursel. Farah had also evidence that he could prove Bishar's corruption in court of law. If Farah exposed these evidenced, Bishar would be definitely convicted under article 408(2) of the Criminal Code. Farah wanted to kill his enemy, Aden. Nevertheless, he feared criminal prosecution. Finally, Farah had an idea to escape criminal prosecution. This idea is to force Bishar to kill Aden. Thus, Farah told Bishar that unless Bishar killed Aden, Farah would disclose the evidences to the police. Bishar feared the criminal prosecution very much. Therefore, he agreed with Farah to kill Aden. Bishar killed Aden to carry out his promise to Farah.

1. What is the nature of coercion offered to Bushar here? Is Bishar liable for the crime of homicide? Why or why not?
2. What is the liability of Farah?
3. Assume that Bishar acted under resistible coercion. Can the court refuse to mitigate the penalty?

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

The problem of superior subordinate relation arises when a person commits an offense on the order of someone to whom he owes obedience. This can happen in numerous occasions. It can happen for example in family administration between parents and children, and in the previous times between landlords and the serf. Arts.73/74 are not applicable with regard to orders given by any "master". In fact 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 but may avail himself of the extenuating circumstances mentioned in Art.82 (1) (c). Arts.73/74 on the other hand are applicable only to specific types of relation, i.e. administrative and military superior subordinate relation. It is

common practice for any State to carry out its duties and transact its business through agents. This implies delegation of power and a hierarchical set up and a chain of command within government departments and agencies. Whenever there is hierarchical relation and chain of command, it is inevitable for there to exist a superior who exercises hierarchical powers over his subordinates and giving them general or specific orders. Thus, such kind of relation involves, a rather simple question with regards to whether the person who gives the order is guilty of the offense in every occasion. A much more controversial question is whether the person who carries out the order is guilty of an offense. The main issue therefore is one of liability and not of participation.

1.5.1. 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 unlimited. Instead they are restricted to fit two essential conditions. Firstly, 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. An order of hospital administrator to evict residents from certain area is therefore susceptible of being regarded as unlawful and punishable. The same is true with an order of a higher rank military officer to release tons of wheat stored for state of emergency. Secondly, 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. Generally, a superior, who gives an order with full knowledge of the fact that the above conditions are not fulfilled, may not invoke the defense mentioned under 68 and escape punishment since the act ordered is neither "in respect of public, state or military duties" nor "within the limits permitted by law".

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. He who gives the order must, therefore, be a person in authority. But his being in a position to give orders does not entitle him to demand from his subordinates that he should act in violation of the law.

Further, the superior who orders an act to be done, which is unlawful, is liable only for those acts. This is to say that, if the subordinate exceeds or departs from the order, the superior is not answerable for the excess or departure unless he directly or indirectly intended it to occur.

1.5.2. Responsibility of the Subordinate:

It is within the interest of the public to see the public service work efficiently. Obedience is therefore one of the essential prerequisite to make the public service efficient. Here the question is whether the subordinate should blindly obey every order form the superior or should retain some freedom of decision that would allow him/her reject at least apparently unlawful orders. 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. Hence the subordinate must control the lawfulness of the orders he receives and is liable to punishment if he intentionally violates the law on being ordered to do so. The duty to obey, therefore, ceases to bind the subordinate when the doing of an act is ordered which is contrary to the law. It appears however; the law does not impose a higher duty on the subordinate to check the legality of every ordered act. He/she is required to refuse execute an order, which is ***manifestly unlawful*** as regards to its form and or contents. 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,
b) When the subordinate knows that the order is given without authority, or
c) When the subordinate knows the criminal nature of the act ordered,

In the first condition it is a subordinate who knows that his superior is not allowed by law to give an order of the type in question. In such circumstances the subordinate is presumed to know that nothing can lawfully be done in pursuance of an unlawful order. A case is, for instance, when an investigating police officer, in disregard of the requirement court warrant, orders a constable to search a house. If the constable obeys the order and conduct the search he together with the investigating police officer shall be held liable. The second condition refers to a situation where one obeys an order from someone else to whom he does not owe obedience. If the subordinate does not owe obedience to the superior, he can naturally not be deemed to be his subordinate even though he may be of lower rank than the person giving the order. For instance, a public prosecutor is not subordinate to the minister of agriculture or health. Neither is a judge in the first instance court subordinate to the chief executive a sub-city. Knowledge of the illegality of the order and the act ordered is not sufficient for the purposes of Art.74 (1). In addition a 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 civil law, but not to the criminal law, his criminal liability is not involved. If, on the other hand, he knows that the act constitutes "homicide, arson or any other grave offences against persons or property, essential public interests or international law" he is punishable.

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

the define knowledge of the subordinate about the illegality of the order and unlawfulness of the act, he may enjoy mitigation or total exemption of punishment. Thus, the court may freely mitigate the punishment or may impose no punishment depending on whether the subordinate could have acted otherwise than as he had done, i.e. could have refused to obey. As a rule therefore, mitigation will be ordered when the subordinate acted in circumstances amounting to resistible coercion and exemption, when the circumstances amounted absolute moral coercion.

Review Questions:

1. Discuss the general purpose of the defense of superior order.
2. Explain the degree of unlawfulness envisaged under Art.74/1 to deny the application of Art.73.
3. Illustrate the exceptional circumstances under which a subordinate has committed an act apparently criminal but excused.

Case Problem 1:

Getachew was the driver of bulldozer of the Municipality of the city of Harar. Adamu was a head of the Department of the Municipality called "City Plan and Destruction of Illegally Constructed Houses". Mursel and Adamu were enemies. In his plan to make Mursel homeless, Adamu ordered Getachew to destruct Mursel's house which was legally constructed. Getachew carried out the order.

1. Who is liable for the destruction of Mursel's house? Why?

2. Would your answer be different if Adamu had been the driver of a car of the municipality of the city? Why or why not?

Case Problem 2:

Aden was a sergeant in the Defense Force. He ordered Bishar, an ordinary soldier to burn down Guled's house. Bishar asked Aden why he had to burn Guled's house. Aden answered that Guled was a spy for certain foreign state. Bishar went

to Guled's hause to burn it down. When he arrived, he entered the house to check whether Guled was in the house. Bishar found a very beautiful girl in Guled's house. He raped her and thereafter he set fire to the house. The raped woman could manage to escape from the fire.

1. Determine the liability of Aden. Determine the liability of Bishar.

2. Who is entitled to mitigation or exemption of punishment? Aden or Bishar? For which crime and why?

Section: 2. Necessity and Legitimate Defence:

- **General State of Necessity: Arts.75-76**

  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. Under such circumstances the actor's right or those of another are in imminent danger and a choice must be made between safeguarding them and sacrificing them. 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. As a matter of social policy, if the law is violated to avoid greater harm, the violator will not be punished unless the emergency situation is created by his own fault. In the absence of fault on his side his act is considered to be necessary to the society and hence justified. So a necessary act is a non-condemnable act though contrary to the law because condemnation is based on the cost-benefit analysis of the society. The society accepts and even encourages acts bringing about societal benefits such as necessary acts. *(Dejene Girma, 2007*

The Defense of Consent, Coercion and Necessity under the Criminal Code of the FDRE, Journal of Law, Vol.I, No. 1, 2007, Jima University). Necessity is therefore meant a situation where conduct promotes some value higher than the value of the literal compliance with the law. As stated by Pollard:

In every law there are some things, which when they happen, a man may break the words of the law, and yet not break the law itself and such things are exempted out of the penalty of the law, and the law privileges them although they are done against the letter of it; breaking the words of the law is not breaking the law, so long as the intent of the law is not broken. It is a common proverb; *'quod necessitas non habet legem*'-necessity knows no law. [*Reniger V. Fogosia (1550); Morre v. Hussey (1609)*, **in GAUR**]

Whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm is a question of fact. The following illustrations provide ideal circumstances under which the actor causes harm without any criminal intention, and merely with the knowledge that it is likely to ensue and be done in good faith to avoid or prevent other harm to person or property.

Illustrations:

(A) ***A***, the captain of a steam vessel, suddenly and without any fault or negligence on his part, finds himself in such a position that, before he can stop his vessel, he must inevitably run down a boat ***B***, with twenty or thirty passengers on board, unless he changes the course of his vessel, and that, by changing his course, he must incur risk of running down a boat ***C*** with only two passengers on board, which he may possibly clear. Here, if ***A*** alerts his course without any intention to run down the boat ***C*** and in good faith for the purpose of avoiding the danger to the passengers in the boat ***B***, he is not guilty of an offence, though he may run down the boat ***C*** by doing an act which he knew was likely to cause that effect, if

it be found as a matter of fact that the danger which the intended to avoid was such as to excuse him in incurring the risk of running down the boat ***C.***

(B) ***A***, in a great fire, pulls down houses in order to prevent the conflagration from spreading. He does this with the intention in good faith of saving human life and property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, A is not guilty of the offence.

It is thus on the principle of expediency that the law has recognized necessity as an excuse in criminal cases. In other words, what necessity forces is justifie. Nevertheless, necessary acts, unlike acts done in legitimate defense, are not deemed to be lawful. In case of necessity the actor does not have the right to protect his interests at the expense of those of another and is not authorized by law to cause harm so long as he is not threatened with or subjected to, an unlawful attack. This entails, in particular, that a person resisting the performance of such an act is in a state of legitimate defense within the meaning of Art.78 since this act amounts objectively to an unlawful assault.

The doctrine so enunciated (necessity) on the other hand must be carefully circumscribed. Else, necessity would open the door to many on excuses. It was for this reason that it was not admitted in the famous *Dudley and Stephens* case that the defendants who with intent to save their own life fed upon the extremely weakened passenger were held guilty of murder. Similarly, if a man who is starving enters a house and takes food in order to keep himself alive, the law does not admit the defense of necessity. It holds him guilty of larceny. The reason is because, if hunger were once allowed to be an excuse for stealing, it would open a way thorough, which all kinds of disorder and lawlessness would pass. So here, if homelessness were once admitted as a defense to trespass, no one's house could be safe. Necessity would open a door, which no man could shut. The plea would be an excuse for all sorts of wrongdoing. So, the courts must, for the sake of law

and order, take a firm stand. They must refuse to admit the plea of necessity to the hungry and the homeless; and trust that their distress will be relived by the charitable and the good.

2.1 The Defense of Necessity under Ethiopian Law (Art. 75)

2.1.1 Scope of the Defense:

Under the 1957 penal code, the defense of necessity covers everyone who falls in a state of emergency. So, its scope was wide enough. Under the functioning criminal code, however, the scope of the defense is somehow limited. The second paragraph of Art.75 provides for an exception where necessity is not a defense notwithstanding that all the necessary conditions to raise the defense 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. They shall not breach the special duty imposed upon them to take care of others' life and health. If the duty is breached, they will be liable to punishment even if the punishment is to be extenuated (180). Therefore, the criminal code has reduced the scope of the defense of necessity.

2.1.1.2. Conditions of the 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. Thus, some of the following conditions are expressed under Art.75 and Art.76 and others are just implied from.

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. In the *R v. Loughman* case, the Supreme Court of Victoria, dismissing the appeal of an inmate who relied on the defense of necessity on a trial he was subjected to a charge of escaping from prison along with three other prisoners held:

The criminal act must have been done only in order to avoid certain consequences, which would have inflicted irreparable evil upon the accused or upon others whom he was bound to protect. The accused must honestly believe, on reasonable grounds, that he was placed in a situation of imminent peril.

Similarly, if for instance A enters B's garden without authority, not realizing that he is run after and about to be bitten by a mad dog, A's act, which would be necessary if he knew that he is in danger, is neither justifiable nor excusable as he is not trying to avert the danger created by the dog.

b) The Danger must be Imminent:

The defense of necessity is not meant to allow individuals to encroach up on others rights to save their interest from a danger, which is not yet to be materialized. It is not also available when the danger is already over. The need to make a choice between encroaching up on some one's innocent interest or scarifying oneself must be actual, pressing and urgent. In fact the impending nature of the danger may be relative to its gravity and manner of being eventuating. But 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. If the doer acted in violation of the law and against an innocent interest of his fellow men and women, he is not justified under the defense of necessity. Necessity is

therefore a defense only if the law is violated when there is no hope to exploit or other way outs. So long as there are other possibilities to resort to, the law shall not be violated. If the law has to be violated and innocent interest be scarified, both shall be so at the last resort. If, for instance, A and B were in a life-boat with enough food for three days but A throws B overboard so as to have enough food for six days, he would have been not considered as having faced with an imminent danger. Accordingly, he would have been criminally held liable for homicide.

c) The Danger must be Serious:

Art.75 seems inapplicable when the danger to be averted is not sufficiently serious. In fact, what constitutes '*serious'* is vague and relative. Even the very stipulation of the requirement in the law seems improper. Because the justification of the defense is based, among other things, on the proportionality that must exist between the danger averted and the interest made sacrifice. It is therefore immaterial whether the danger at hand is serious or not as long as a danger is averted at a lesser cost, 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. Thus, what Art.75 has in its present form seems to imply that A, whose hat has been blown away by the wind in the middle of a sea, may not invoke the defense of necessity if he "borrows" someone's boat in view recovering his hat. Such levels of dangers are considered negligible and one seems at least not encouraged to disobey the law under the pretext of necessity.

d) The Danger Could Not Otherwise Be Averted:

The defense of necessity is not available whenever there are legal means in existence to avert the threat: a starving person should seek public welfare rather than steal for his or her survival. Instead 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.

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.

However, the above principle is not applicable to the cases where the actor is mistaken as to the necessity of his act, for instance, because he is unaware of the fact that the danger can actually be averted otherwise than by causing harm. For example, a person not awarding of the fact that there is an extinguisher in his own house and steals it from his neighbor may avail himself of the defense of Art.80 but not Art.75

e) The Harm must be Proportional:

The underlying justification for the defense of necessity is social policy, that is, the act benefits than harming the society. In fact in some jurisdictions, the defense is extended to the situations where the society neither benefits nor defeats. This position of the society is therefore maintained through the proportionality condition, which impliedly governs the doing of an act according to Art.75. This condition implies that, when causing harm is the only way to avoid danger, the doer is justified only if he does not cause more harm than he would have suffered had he refrained from acting. This definition indicates that certain equilibrium must be achieved and that one is not justified in doing anything with a view to protecting one's interests. The proportionality test, which applies in cases of legitimate defense, also, means that a person in a serious and imminent danger may not avoid this danger *at any coast.* More specifically it means that the

threatened right must, as a rule, be at least as important as the right infringed upon by the actor.

Regarding the question as to how will the court estimate the respective values of the interests, Art.76 puts it, that an act is not proportionate "if the abandonment of the threatened right could reasonably have been required in the circumstances of the case or if the encroaching upon the third party's rights exceeded what was reasonably necessary. For example, if A injures or kills someone while attempting to recover his cigarette case, which is lost in the panic, out of a theater house in which a fire starts, he does not protect it by adequate means. The fact remains that a cigarette case, however valuable it is it does not worth the life of a human being, and this is sufficient ground for denying him the benefit of Art.75.

The question of proportionality can be also discussed in light of the means used to avert the danger though that is not expressly provided at least in the English version of Art.75. If the means is disproportionate under the circumstance, obviously excess of necessity will come into picture. Hence a person who can cause bodily injury by using his fist to avoid certain danger shall not use bullet, or if killing with bullet is possible, hand-bomb shall not be used.

Besides, in cases where justification is not available in want 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 well occur when he acts for the benefit of a third party.

f) The Exception: 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. If a person intentionally creates the situation of necessity, he will be held liable for intentionally causing the harm eventuated. If

he negligently produces the state of emergency triggering the necessary act, he will be liable for causing the harm because of negligence provided that the negligent doing of the act is punishable. For instance, a person driving at an excessive speed cannot raise necessity as a defense if he runs over a pedestrian to save the passengers in the car. However, it has to be noted that a person who commits a crime being in a state of necessity is not to be treated alike with others though the necessity is created by his fault. Art.76 provides that he is entitled to mandatory optional mitigation (Art.180).

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

Review Questions:

1. How would you justify Art.75 to exist in the criminal code in the presence of Art.71 and Art.78?
2. Explain the degree of necessity required under art.75.
3. Discuss the proportionality between a danger to be averted and a danger that would have been suffered had the measure been not taken to avert the danger is measured.
4. Explain the requirement of ‘seriousness’ of the danger to justify under Art.75.

5. Who is to decide whether the danger was 'imminent or serious', the defendant who found himself confronted by the danger (subjective) or one who might be called a 'reasonable man'?

Case Problem:

Alemayu and Bisrat went for a voyage on the sea. Unfortunately, there was a shipwreck due to a heavy storm. Some how both of them managed to get into a life boat with some food. They had enough food for the coming three days. Alemayu threw Bisrat overboard to have food for the coming six days. Upon reaching the shore, Alemayu confessed his act of causing the death of Bisrat. Therefore, he has been charged for intentional killing of Bisrat.

Can 'necessity' be claimed as defence by Alemayu? Discuss, in detail, the law relating to necessity as a defence fro criminal liability.

2.2 Legitimate Defense: Arts. 78, 79

No doubt, that it is the primary duty of the state to protect the life and property of its individuals, but no state, no matter how large its resources might be, can depute a policeman to watch the activities of each and every individual and protect him. There may be situations where help of the state authorities cannot be obtained in order to repel an unlawful aggression either because no time is left to ask for such help or for any other reason. To meet such exigencies, the law has given the right of legitimate defense to every individual.

The law of legitimate defense provides that when a person is suddenly faced with an attack to his person or property and immediate aid from the state machinery is not available, that person is entitled to defend himself and resist the attack and to inflict on the attacker any harm that is necessary for the purpose of defense. The

right of legitimate defense serves a social purpose. In as much as a person who unlawfully attacks another is in the wrong, he who repels the attack contributes to ensuring that wrong should not prevail; by restoring the order which the attack has disturbed, he performs a function which is all the more useful to the community since his act may at the same time deter prospective aggressor. Furthermore, the doer is justified in resisting the attack not only morally and socially, but also legally; the defense is lawful since, in the terms of Hegel, ***it negates the negation of the law***

Legitimate defense is one specific type of necessity, and therefore has much in common. In both cases, a situation of distress arises which cannot be solved otherwise than by the doing of harm. But there also some fundamental difference between general state of necessity and legitimate defense. Some of the differences are as follows:

(i) necessity is basically one of aggression while an act under Art 78 is one of defense,

(ii) the doer of a necessary act, unlike a person who defends himself, is not resisting an unlawful assault.

(iii) 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.

From whichever angle one looks at it, the position, therefore, is not the same in both cases. Hence, the fact is that, in the criminal law, the requirements of self-defense are not identical to those of necessity.

2.2.1. Legitimate Defense under Ethiopian Law

- **Conditions Required for the Defence;**

The right to repulse attacks, which are contrary to the law, is not unrestricted. Its exercise is governed by the following conditions.

1. There must be an imminent attack or a thereat of an attack
2. The attack must be unlawful
3. The attack must be proportional
4. The attack could not have been otherwise averted

1. 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. In other words there is no legitimate defense unless the danger is imminent. The defense must always be in response to an attack or a threat of attack. If therefore, the defense is premature or follows the assault, it is not legitimate within the meaning of the law. The phrasing of the penal code (art.74) in this respect is improved under Art.78 of the criminal code to mean the right of defense may be exercised only "against an imminent and unlawful assault or a threat of an assault". Thus, the confusion whether the defense is available for an attack in the course of execution is now removed.

A logical question here is about the commencement and continuance of the exercise of right of legitimate defense. 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. However a reasonable ground for the apprehension is requisite. This on other hand is not to mean that for the exercise of legitimate defense it is necessary that the party exercising the right must have suffered some injury at the hands of his attackers. The right arises as soon as a reasonable apprehension arises and continues till the threat continues.

There is also no right to inflict punishment on the wrongdoer for his past act after the apprehension has ceased to exit. The right of defense ends with the necessity for it ends. So where the deceased was fleeing for his life, there was no justification to shoot him down. This would be a sheer case of murder and nothing else.

2. 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.

In the same token there is no right of legitimate defense against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under his official capacity, though that act, may not be strictly justifiable by law. In other words, there is no legitimate defense against lawful acts, particularly acts of the kind described in Art.68.

Illustration: 1

a) If A, a police officer, arrests B who has commitsed a flagrant offence, B is not entitled to resist the arrest because the arrest by the police officer is a lawful act and the arrested person will not have the right to defend himself since what the police man has done is not contrary to the law.

b) If A inflicts corporal chastisement upon his son B, the latter is not justified under Art.78 in striking his father back because Art.68 of the criminal code allows partents to inflict corporal chastisement upon their children for the purpose of correcting their children. However, B, the son, is entitled to defend himself if the

right of correction is not exercised in a reasonable manner, as is required by Art.68 (b)

Further, the right of legitimate defense is essentially a defensive right circumscribed by the statute, available only when circumstances clearly justify it. 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. If a person goes to kill another with a gun, the intended victim is entitled to exercise the right of legitimate defense, and if he does so, there is no right of legitimate defense in the former to kill the latter. In other words, there is no private defense against private defense. No one is also allowed to devise a mechanism, whereby an attack may be provoked as pretence for killing.

Moreover, there cannot be any question exceeding the right of legitimate defense where the accused intentionally causes more harm than it is necessary for the purpose of his defense. This, however, is true with, in fact one exception. Thus, if in the exercise of the right of legitimate defense against an assault, which reasonably causes the apprehension of death, the defender is so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defense extends to the running of that risk.

***Illustration*: 2**

Support A is attacked by a mob who attempts to murder him. A cannot effectually exercise his right of private defense without firing on the mob, and he cannot fire without risk of innocents who are mingled with the mob. A commits no offence, if by so firing he harms any of the children.

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

In relation to the requirement of the unlawfulness of the attack directed or threatened a mistaken legitimate defense is another topic that warrants discussion. Therefore, ***i***f any individual believes mistakenly that he is unlawfully attack or unlawfully threatened with an imminent attack and kills or injuries the mistaken aggressor, he falls under Art.80 (mistake of fact). The injury is not lawful as it has not been inflicted in a state of legitimate self-defense; however, it has not been intentionally caused and the offender may, therefore, only be punished for negligence if the circumstances so justify.

3. 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". This requirement is similar to the requirement of necessity under Art.75,. There is no right of legitimate defense in cases in which there is time to have recourse to the protection of the public authorities.

For example: A, sees B who is attempting to remove a heavy statue from his (A's) garden. A lives next to a police station and, if he telephoned to the station, he could obtain the assistance of the police before the statue is removed. Should 'A' call the police or is entitled personally to defend his property? In this case the choice is not between flight and defense, but between personally defending the threatened right and calling the police to defend it. In the first case, he who renounces to defend this interest by running away sacrifices it, whereas in the second case he does not sacrifice it by calling the police but entrusts its defense 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 having recourse to the authorities. What is in question here, therefore, is not the right of defense as such, which right exists by the mere fact that an unlawful assault is taking place, but the manner in which it is exercised, i.e., the adequacy of the means used to repel the attack. Consequently, if the attacked person decides in favor of personal action when indirect protection could have been obtained by calling the police, he decides in favor of means of defense, which causes more harms than it would have been caused if the police had been called. In this sense, he goes "beyond the acts necessary for averting the danger" (Art.79 (1) and, since he misuses his right of defense, his act is no longer lawful, but excusable. Therefore, the defense, as a rule, is not legitimate if the threatened right could have been effectively protected by calling the police. This, however, is without prejudice to the cases where this act is lawful under legal provisions other than Art.78. Thus if A, though he has enough time to call the police, is able to prevent his statue from being removed merely by arresting B, the fact that he should have called the police is irrelevant in this particular case; even though one should hold that Art.78 does not legitimate the arrest, A is in any event authorized to make this arrest by Arts.68 (a) of the criminal code and 50 of the Criminal Procedure Code.

4. 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.

Therefore, as with necessity, so with legitimate defense, a comparison must be made between the harm caused by the act of defense and that which the defender could reasonably fear. When an attack endangers several interests, the question

whether the defense is proportionate should be resolved by taking into account a more valuable of these interests. Thus if A, when in the ac of removing a statue from B's garden, sees B coming towards him and pulls out a gun, B, who had originally come to defend his property, is then in peril of his life; if he kills A, his act which would have been disproportionate had A not pulled out a gun, is lawful since, at the time of the defense, it is no longer his property but his life which is at stake.

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. But it may occur that the defender commit mistake as to the proportionality of the defense. In such a case the defense is legitimate when the court is satisfied that, in view of all the material and personal circumstances of the case, the defender exercise his right in a reasonable manner. For instance, 'A' can succeed in legitimate defense if he kills 'B' believing that B has threatened him with a real gun while B is actually holding a popgun.

- **Sources of danger:**

  It is immaterial form 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.

  Illustrations

  a) Z, under the influence of madness, attempts to kill A; Z is guilty of no offense. But A has the same right of private defense, which he would have if Z were sane.

b) A enters at night a house in which he is legally entitled to enter. Z, in good faith, taking A for a house breaker, attacks A. Here Z, by attacking A under this misconception, commits no offense. But A has the same right of private defense against Z, which he would have if Z were not acting under that misconception.

A right of defense exists even against animals used as instruments in the cases provided for by Art.32 (1)(a).

- **Rights Protected:**

Legitimate defense exists against attacks endangering ***any right***, i.e. in Jherig's terms, 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. Art.78 states that an act of defense may be done under the necessity of defending either oneself or another person. It is not required, therefore, that the act of defense should always be done by the person who is or is about to be, unlawfully attacked. Such an act may be done, not only to protect one's own interests, but also those of a third party, whatever these interests may be.

2.2.3. Excess in Self-Defense:

Under Art.79, the defender is deemed to exceed the limits of legitimate defense in the following two conditions:

1. 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"

2. Does more than should reasonably be done to avert the danger (want of necessity requirement):

The second case in which an act of defense 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 the preceding one, what is meant is that the doer is not justified whether the excess accompanies or follows the attack. In the first case, the defender is punishable because the defense 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 has already been repelled in an adequate manner. Strictly speaking, therefore, he no longer defends himself, as he is no longer in danger. Thus, if 'A' strikes B after repelling B's attack by knocking him out, the beating is unlawful.

In assessing punishment in cases of excess, the court according to Art.79 (1) shall without restriction, reduce the penalty under Art.185 when a person in repelling an unlawful assault exceeds the limits of self-defense by using disproportionate means or going beyond the acts necessary for averting the danger. According to Art.79 (2), the court may exempt the actor from punishment when it is satisfied that the excess is due to the 'excusable fear, surprise or excitement caused by the attack." In evaluating the excess, the judge must if possible put himself in the place of the defender and imagine his state of mind at time of the attack. If his psychological investigation shows that the excessive act was not done with a guilty mind, the accused must be acquitted.

Review Questions:

1. How would you explain the social purpose existing behind legitimate defense?
2. What justifies the independent treatment of 'legitimate defense' out of the general state of necessity?
3. Explain the scope of the defense in terms of both the eligible ones to raise it and the nature of the attack.
4. How is proportionality determined in cases of legitimate defense?

Critical Thinking:

1. Can there be any right of self defence against the acts of a person who is exercising his right of self defence?
2. Where a person provokes another and the other reacts out of uncontrollable anger, can the first one use force to protect himself and claim legitimate defence?

Case Problem:

Roger was the owner of a restaurant. One day a group of persons came and demanded some money. He had no alternative but to give them the money as they threatened him to burn down his shop. After a week another group demanded money. On refusal they robbed him. So he obtained a revolver to protect his property in the future from such violent people. On the third occasion when a group of ten came to rob him he shot all of them dead.

1. Can **Roger** claim the right of self-defence?
2. What is the scope of the right of self-defense as defined in the Criminal Code?
3. What are the limitations to the exercise of the right of self defense? Write the important guide lines, generally, to asses the existence of the right of self defense in any given circumstances.
4. Precisely distinguish the differences between the defenses of 'necessity' and 'self defense'.

Section. 3. Mistake of Fact, Mistake of Law and Ignorance of law: Arts.80&81

3.1 Mistake of Fact and Mistake of Law:

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

of larceny. The mistake of fact is a defense because it negates the mens rea element of the crime of larceny. A court would assess the circumstances to determine whether the mistake was both honest and reasonable.

Mistake is not mere forgetfulness. It is a slip "made, not by design, but by mischance". Under Art.80, a mistake must be one of fact and not of law. Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy. Where a man made a thrust with a sword at a place who was not a burglar, it can be held that he had committed no offence. In other words, he was in the same situation as far as regards the homicide as if he had killed a burglar. Similarly, the accused while guarding his maize field shot an arrow of a moving object in the bonafide thinking that it was a bear and in the process caused the death of a man who was hiding there. It can be held that he could not be held liable for murder as his case was fully covered by Art.80. In the same way, where the accused while helping the police stopped a cart which he/she in good faith belied to be carrying smuggled rice but ultimately their suspicion proved to be incorrect, could not be prosecuted for wrongful restraint under- Art. as their case was covered by Art.80

3.1. 1The 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:

1. a phenomenon perceptible by the sense. (e.g. the doer mistakes arsenic for sugar) or
2. a state of mind (e.g. the doer believes that someone intends to kill him)

It is immaterial for the purposes of Art.80, whether the fact as to which the doer is mistaken concerns him personally or not. For example, he marries believing himself to be a widower or he has sexual intercourse with a woman whom he

believes to be unmarried. 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).

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

3.1.2. 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 stating that " 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 possibility, subject to the provisions governing negligence " because the " awareness" (mens rea) component of intentional guilt is vitiated by the mistake.

Article 80 therefore may be invoked on the following cases:

1. ***When the doer is mistaken as to a fact, which is a material ingredient of an offence****.*

Example I:

Suppose A shoots something which he takes to be a gazelle but actually is B, he certainly has a desire to kill, though not the desire to kill a human being, which is a required element of an offence of homicide. Since he does not know that his

target is a human being (mistake of fact), he should not, be found guilty of intentional homicide.

Example II:

If A, after shooting B with the intention of killing him, buries him in the belief that he is dead, but B is still alive and actually dies of suffocation. 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.

2. 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.

Example I:

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.

Example II:

A sees Z commit what appears to A to be a murder. A, in the exercise to the best of his judgment exerted in good faith, of the power which the law gives to all persons of apprehending murderers in the act, seizes Z, in order to bring Z, before the proper authorities. A has committed no offence, though it may turn out that Z was acting in self-defense.

3. When the actor is unaware of the fact that he acts in aggravating circumstances:

Example:

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

3.1.3. Negligence (Bad–faith): 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 excreting the care which could reasonably be expected of him in the circumstances (Art.80 (1), second aliena. 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 international homicide; yet a person in his position should obviously be particularly careful not to commit a mistake of this kind. He could and should have ensured that he actually was administering a medicine or that the patient was not allergic to the drug. Therefore, the doctor is punishable for homicide by negligence.

3.1.4. Separate and Independent Offence shall be 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 offense, may be presented in relation to a different offence, as is the case, for instance when concurrent offences are committed.

Example I

Suppose A, in sight of the public, has sexual intercourse with a girl whose age he is mistaken. He A is punishable for committing an offense of public indecency intentionally committed even though he is not punishable for sexual intercourse.

Example II

Suppose A, deliberately fails to come to the assistance of B, whom he has wounded in a state of imaginary legitimate defense that 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 the relevant provision in the special part, even though he is not punishable for having, caused bodily injury.

3.1.5. Mistake of the Identity of the Victim or the Objective of the Offense:

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 offense 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.

Illustration:

'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 C. 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 offense of homicide.

Illustration:

'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. 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.

3.2. 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. If any individual should infringe the statute law of the country through ignorance or carelessness, he must abide by the consequences of his error; it is not competent to him to claim in a court of justice that he was ignorant of the law of the land, and no court of justice is at liberty to receive such a plea.

The maxim ***ignorntia juris non excusat***, in its application to criminal offences, admits of no exception, not even in the case of a foreign who can not reasonably be supposed in fact to know the law of the land. In a case two Frenchmen were charged with willful murder because they had acted as seconds in a duel in which one man had met his death. They alleged that they were ignorant of the fact that by the law of England killing an adversary in a fair duel amounted to murder. But the plea was overruled. (Barronet, (1852) Dearly 51.). 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. Indeed, it might be urged almost in every case. This rule of expediency has been put to use even in a case where the accused could not have possibly known the law in the circumstances in which he was placed. Thus a person who was on the high seas and as such could not have been cognizant of a recently passed law might be convicted for contravening it. Although a person commits an act, an offence for

the first time by a statute so recently passed to render it impossible that any notice of the passing of the statue cloud have reached the place where the offence has been committed; the person's ignorance of the statue will not save him from punishment.

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. These situations are not common because citizens are generally expected to know the law and a claim of ignorance could be used to excuse virtually any type of illegal conduct. In a California case, Neva Snyder claimed that her conviction for possession of a firearm as a convicted felon should be overturned. She mistakenly believed that her prior conviction for marijuana sales was only misdemeanor. Since the court held that she was "presumed to know" what the law is, her mistake was not reasonable.

In another case, an offender failed to register under a local ordinance requiring convicted persons to do so. The U.S. Supreme Court reversed the conviction, stating that ignorance of law could be used as an excuse in this case. Thus, if the ignorance or mistake is reasonable under the circumstances, and there is no evidence that the defendant should have known of the illegality of the conduct, ignorance or mistake of law is a defense.

The problem of mistake of law and ignorance of law is and always has been a controversial issue. The issue is whether a person who does an act objectively contrary to the law may justify himself on the ground that he has no guilty of mind; since owing to his being unaware of the existence of the legal provision which he violates or mistaken as to its true meaning, he belies his act to be lawful.

3.2.1. 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."

According to this school of thought 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. This presumption is laid down in the general interest, regardless of the fact that the consequences may be hardship upon individuals, so that social peace and order be not constantly disrupted with impunity. "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. He is at fault by the mere fact that he mistakenly believes that his behavior is to be in accordance with he law and the must bear all the consequences of his failing in his duty to know the law. His mistake may, at best, be considered in mitigation of the penalty.

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:

(1) 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.

(2) It is inconsistent with the principle "nulla poena sine culpa" (no penalty without intentional guilty) upon which so many modern codes, including Ethiopian criminal code, are based.

Thus a mistake of law, like a mistake of fact, affects the "knowledge" component of intentional guilt. When it entails that "there is no criminal intention" (Art.80 (1) second *aliena),* it should produce the same juridical effects as a mistake of fact.

3.2.2 **The Ethiopian Law on Mistake and Ignorance of Law:**

According to Art.81 (20) of the criminal code ignorance of law is not excuse but the court may reduce the punishment applicable to a person who in good faith believes that he has a right to act and has definite and adequate reasons for holding this erroneous belief. Again Art.81 (3) states that in exceptional cases of absolute and justifiable ignorance and good faith and where criminal intent is not apparent, the court may impose no punishment. This stand of the criminal code shows that it stands in a half way between the two schools of thought discussed above. 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. Accordingly, the following conditions are stipulated as a condition 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. If a doubt, however, crosses his mind concerning his right to act, he is not in good faith. Once the person is not

in good faith, it is 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. An offender, who is, aware of the fact that he does something unlawful may not plead for ignorance of the law. In other words 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. A person is in good faith when he is not able to be blames for his mistake because it is the result of circumstance, which would equally have led a conscientious person in to error. The fulfillment of this condition must be decided from cases to cases, with regard particularly to the nature of the offence committed.

B. When The Accused Is Not At Fault/No Criminal Intent:

For Art.81 to be applicable, it is essential that the accused should not have been in error ***through his own fault***. Art.81 (3) provides that in exceptional cases of absolute and justifiable ignorance and good faith and where criminal intent is not apparent, the court may impose no punishment. This implies that it is only when the accused did not make the error through his fault that the court may mitigate the penalty or impose ***no punishment***.

1. **Review Questions:**
2. Why all jurisdictions permit the defense of mistake of fact? What kind of relationship exists between Art.80 and Art.58?
3. May a man without full knowledge of fact still be prosecuted under Art.80?
4. What does the word "object" mean in Art.80 (3)?
5. Is Art.81 sufficiently adjusted to the situation in Ethiopia?
6. What kind of difference do you see as the difference between fact and law?

Case Problem:

John was a successful Kenyan trader. He came to Ethiopia for business. During his stay in Ethiopia, he fell in love with Almaz, an Ethiopian girl aged seventeen. John and Almaz had sexual intercourse. John knew very well that Almaz wasseventeen. However, he did not know that sexual intercourse with a minor is punishable under article 626 of the Ethiopian Criminal Code.

1. Would John be liable to the crime under article 626?
2. Assume that a Kenyan law does not prohibit sexual intercourse with girls who are older than sixteen years. Further, assume that John read article 581(1) of the Civil Code that provides "a man who has not attained the full age of eighteen years and a woman who has not attained the full age of fifteen years may not contract marriage."

Would your answer be different from that you have given to question one above? Why or why not?

Unit Summary:

Defenses for criminal liability are circumstances that relief 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.

Criminal law recognizes two categories of defenses for criminal liability. Tsese are special defenses and general defenses. Although our Criminal Code does not follow this dichotomy, general defenses are categorized into justifications and excuses. Criminal law provides for defenses because of two main reasons. First, justice requires the provisions of defenses for certain criminals. Secondly, a crime is not complete when there are defenses available to the accused.

Excuses are the defects and unusual conditions of the criminal during the commission of the crime. Thus, if persons commit crime unwillingly, without understanding the nature and consequences of their act, with mistaken belief of facts or law, the law excuses them from criminal liability. In the cases of the

excuses, the focus is on the individual criminal rather than on the crime committed.

Justifications are another category of defense for criminal liability. In cases of justifications, there are preliminary conditions that enable the doer of the act to take necessary and proportionate action. Thus, when there is an attack on legally protected rights, the steps taken to reverse the attack is justifiable act. Similarly, if the persons found themselves in imminent and serious danger and their only choice is to avoid this situation by committing a crime, their act is justifiable if they have chosen the lesser harm. In justifications, the focus is on the act rather than on the criminal. The society encourages those acts. Justifications include acts required or authorized by law, legitimate defense, necessity and professional duty. Persons who raise defenses for criminal liability in the courts of law admit that they have done the crime that they are charged with. However, they claim that their acts are justifiable or excusable in the eyes of the law because of the conditions of the criminal and circumstances in which they are committed.

References:

Cases:

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UNIT-III

CRIMINAL PUNISHMENT AND ITS APPLICATION

Introduction:

In this unit, you will study how a court passes sentence or penalty on an accused that is found guilty beyond reasonable doubt. Once a person is found guilty of the crime he/she is accused of, the next thing to do for the court is to pass sentence and penalty that it deems appropriate for the crime committed. The court takes many things into consideration before passing the sentence because punishment is a very decisive step on the life, liberty and property rights of the accused. Thus, in this part of the Module you will study matters relating to the determination and application of punishment.

This part explains what punishment is all about including definition, purpose and types of punishments as incorporated in the Revised Criminal Code. Further discussions include the general principles of determination of punishment, the circumstances that mitigate the punishments and the circumstances that aggravate the penalties and limitation to the punishment. The last section of the unit deals with the post conviction processes. It includes the concepts of suspended sentences, conditional release, pardon, amnesty and reinstatement.

Objectives:

By the end of this unit the students will **be able to:**

- Define and understand the purposes of punishment in general and as it is incorporated in the Criminal Code;
- Know the different types of punishment incorporated in our Criminal Code and their application;
- Identify the principles guiding the determination of punishment;
- Identify the circumstances which may lead to the reduction of penalty ((extenuating circumstances); and

- Identify the circumstances which may lead to the increase of penalty (aggravating circumstances).

Section. 1. Definition and Purpose of punishment:

1.1. Definition of Punishment:

It is not easy to give a precise definition to the word "punishment". since because its meaning is highly interrelated with what is considered to be the purpose of punishment. In this regard punishment could be taken to mean the major mechanism by which the purposes of criminal law are achieved.

But let us try to understand some conceptions about the meaning of the term punishment. Broadly speaking punishment is the response of the society to socially dangerous behavior. It is intended to make the offender no more dangerous to the integrity of the society. But if it is not imposed according to certain reasonable principles it might even produce unwanted effects. "Punishment in all its forms is a loss of rights or advantages consequent on a breach of law. When it loses this quality it degenerates into an arbitrary act of violence that can produce nothing but bad social effects." (Williams, 1961-575)

1.2. Purpose of Punishment:

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

1.2.1. Retribution:

The origin of retributive theory lies in the primitive notion of vengeance against the wrong-doer. Punishment satisfies the feeling of revenge. It largely stems from the Biblical saying of "an eye for an eye: a tooth for tooth; and life for life". Many old forms of punishments have been imposed based on this need to avenge the victim of a crime by punishing the criminal in the same manner as he committed the crime. For example, in olden times, when a man injured another, it was the right of the injured to take revenge on the person causing injury. The Mosaic Law of the Bible has been, in fact, overemphasized, to explain the retributive theory of punishment. Consider the following comment:

Lex talionis:

"An eye for an eye… is never in the Old Testament of ***Savagery,*** as it is sometimes portrayed, ***but of equity.*** It is always offered as guidance for the judge to determine appropriate sentence, never as a rule for personal reaction. There is no evidence in the Old Testament that the terms of the law were ever carried out exactly (eyes put out, teeth extracted, etc.). It functions rather as a vivid statement of the principle of exactitude: the equivalence of crime and penalty. This principle was lost in English law when a person could lose his wife for stealing a sheep. It is lost today when judicial ferocity awards a disproportionately harsh sentence (lengthy imprisonment for shoplifting), or when judicial leniency awards a sentence plainly less than a serious offence merits (a short sentence for rape or for causing death driving under the influence of alcohol). It was up to the judge in Old Testament days--as in ours--to determine how the principle should be applied in any given case. (Ref: "The Message of Proverbs"—David Atkinson)

However, in modern times retribution is used in more than one sense. In the first sense, the idea is that of satisfaction by the state of the victim's desire to be avenged; in the second, it is that of the states marking its disapproval of the breaking of its laws by a punishment proportional to the gravity of the crime. In

modern penological thought retribution is not so much considered in the sense of vengeance but in the sense of reprobation.

1.2.2. Deterrence:

The purpose of the punishment is to deter the criminal from committing crime in future and to set as an example to the prospective criminals. It carries the message that those who violate the law will be punished like wise. The idea is that punishment will curb the criminal activities of the potential criminals. In olden times severe punishments and public executions were held mainly with the object to deter others from committing crimes and to set an example that violation of law will be punished. Thus punishment serves as deterrence in two ways:

A. General Deterrence:

The punishment of one criminal and the publicity given to it are assumed to discourage other potential law breakers. Advocates of the death penalty, for example, believe that fear of death may serve as a serious threat to people, and thus the death penalty serves the function of general deterrence of serious crimes.

B. Specific / Individual Deterrence:

Punishment of the criminal is assumed to keep that specific criminal from committing other crimes in the future. Some theories assume that criminals lack internal inhibitors, and hence unpleasant sanctions must be used to teach them a lesson.

1.2.3. Prevention/Incapacitation:

According to this conception, the purpose of punishment is to prevent the criminal from committing crimes by physically disabling him by separating him and keeping him in seclusion from the society for a certain period of time. In this way the society is spared from the disturbance created by the criminal. If a convicted

offender is sent to prison, society can feel safe and confident that the criminal will not committe further crimes.

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

1.2.4. Reformation /Rehabilitations:

Punishment the purpose of which is to change the character of the offender is known as reformative punishment. This theory is also known as corrective or rehabilitative theory'. Reformation means “the effort to restore a man to society as a better and wiser man and as a good citizen.” According to this theory, punishment attempts to make the criminal harm less by supplying him the understanding he lacks and cures him of those drawbacks which made him to commit crime. If a criminal is morally degenerated his tendencies also become, if not, extinct then at least less sensitive. Punishment has, for that reason, been defined as “a physical measure adopted to excite in the soul of the guilty true repentance, respect for justice, sympathy for their fellow creatures and love of mankind." (Oppenheimer. "Rationale of Punishment," p.244) By reformation of the criminal is meant the criminal’s moral regeneration, and developing the sense of honesty in him. A person, who commits a crime and suffers punishment for that, comes back to the society and lives in along with his other fellow beings. Therefore, punishment must aim at making a man worthy of living in the society.

The advocates of reformative theory aim at the rehabilitation of the criminal in the society. This theory admits only such types of punishments which are educative and discipline the criminal, not those which inflict pain on him. Rehabilitative

element of the punishment includes restoration of the criminal to effectiveness or normal life by training etc. In modern time's reformative measures are adopted in cases of juvenile offenders. In prison they are given some education and are subjected to some such prison programs so that they can learn some kind of work which may help them in earning their livelihood after coming out of the prison. The advocates of this theory emphasize that when the prisoner goes to jail he finds himself quite cut off from the rest of the world. The confinement the deprivation of social intercourse and other ways of subjection to rigid discipline never allow him to develop his character. Therefore, what is important is the reformation of the criminal by making him worthy of living in the society.

1.2.5. The Integrative view:

So say we have discussed various theories regarding the purpose of punishment. We feel that while each one of them has some value of its own none of them is universally acceptable. If correction alone is emphasized, the retributive and deterrent elements become ineffective. In official circles, deterrence is strongly supported as a necessary and potent defense of social values. Pure retributionist view makes punishment barbaric and leaves little room for reformation. On the other hand, such treatment is likely to make these criminals feel bitter and turn to habitual criminality.

It is now recognized that 'the prevention of crime and protection of society' are ends asserted by every one. Thus, an inclusive theory' which is a cultivation of all the elements of retribution, deterrence, prevention and reformation has been gaining ground in recent years.

1.2. 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 Code sets out the specific objectives of the Code in the following way:

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

This provision makes a general statement of the aims and objectives of the criminal code. Further, the purposes of deterrence, prevention, reformation and rehabilitation are specifically mentioned in the provisions relating to different types of punishments. Let us see some of them:

Art. 87 The Criminal Punishment And Its Application- Principle.

"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)"

Article. 107: Substitution of Compulsory Labour for Simple Imprisonment.

"Wherever by reason of local administrative difficulties the execution of a sentence of simple imprisonment is not possible or the carrying out of such sentence is not conducive to **the reform** or **the rehabilitation** of the criminal, the court may, in respect of crimes for which the special part of this Code provides for a term of simple imprisonment not exceeding six months, inflict a sentence of compulsory labour instead of the sentence of simple imprisonment."

Article. 108 Rigorous Imprisonment.

Sub (1) Para (2) " Besides providing for the punishment and for the **rehabilitation** of the criminal, this sentence is intended also to provide for strict confinement of the criminal and for special protection to society."

Art. 190 Conditional Suspension of Penalty:

"When the court, having regard to all the circumstances of the case, considers that conditional suspension of the penalty will **promote the reform** and **reinstatement** of the criminal, it may order conditional suspension of the sentence as provided here in after."

Now, let us find the provisions of the Code which advocate for the principle of individualization of punishment.

Art.88 Calculation of Sentence.

Sub. Art (2)"The penalty shall be determined according to the degree of individual guilt, taking in to account the dangerous disposition of the criminal, his antecedents, motive and purpose, his personal circumstances and standard of education, as well as the gravity of the crime and the circumstances of its commission."

1.3. The Principle of Individualization of Punishment:

Whatever might be the relative utility or importance of a particular theory, there is no uniform, generally recognized and universal theory of punishment for all ages and for all people. Therefore, whatever punishment might have been suitable in past may not be so in the present, or whatever might be useful in one country may not be so in another. Then again 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. Modern criminal law, therefore, emphasizes up on the individualization of punishment although there are difficulties in its implementation.

Review Questions:

1. What are the purposes of punishment?

2. Define punishment. What do you understand by individualization of punishment?

Critical thinking!

Which one of the purposes of punishment, in your opinion, is preferable? Why?

Activities:

1. Find out at least five articles in the Criminal Code which specifically state the purposes of punishment you have learnt in the foregoing discussion.

2. Do you find any article in the Criminal Code mentioning retribution/vengeance as its purpose?

Section.2. Kinds Of Punishments:

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.

- Ordinary punishments applicable to Adults –Book II, Title I, Articles 90-156.
- Measures and penalties applicable to young persons-Book II, Title I Articles 57-177.
- Penalties and measures applicable to Petty offences-Petty Code, Book VII Title II Articles 746-764.

Here, under this section we are going to discuss about punishments that are applicable to adults. Each of the crimes defined under the special part of the Criminal Code carries its own penalty. However, on the whole these penalties can be categorized based on their nature. Thus, we find three categories of punishments mentioned in Articles 90-156:

I. Principal penalties

II. Secondary penalties

III. Special measures applicable to Adults

2.1. Principal Penalties

:

Principal penalties can be put under the following heads:

- Pecuniary Penalties-art. 90-102.
- Punishments Restricting or Depriving Liberty – Art. 103-116
- Death Penalty – Art. 117-120.

2.1.1. Pecuniary Penalties:

The Criminal Code includes the following types of penalties which are payable in terms of money:

a) Fine
b) Sequestration
c) Other pecuniary effects

A. Rules Governing Fine: Arts. 90 -97

Under criminal law fine may be defined as, "a pecuniary criminal punishment payable to the public treasury". This penalty is governed by the following rules under the above mentioned provisions:

- Fine is paid in money and is forfeited to the state (Art. 90(1))
- The amount of fine, in normal cases, may extend from 10 birr to 10,000 birr. This amount is subject to any provisions or law to the contrary.
- In case of juridical person the fine may extend from 100 Birr up to 500,000 Birr.
- The specific circumstances of the criminal that are taken in to consideration in fixing the amount of fine are: (Art 90(2))

❖ **In case the Criminal is a Natural Person**:

-The degree of guilt.

-His/her financial condition

-His/her family responsibilities

-His/her occupation and earning

-His/her age and health.

❖ **In case the Criminal is a Juridical Person**:

Where a juridical person (Art. 90(3)) such as a corporation is convicted of a crime punishable by only imprisonment it shall be converted in to fine in the following way:

- A maximum amount of 10,000 Birr for a crime punishable with simple imprisonment not exceeding 5 years.
- A maximum amount of 20,000 Birr for a crime punishable with rigorous imprisonment not exceeding 5 years.
- A maximum amount of 50,000 Birr for a crime punishable with rigorous imprisonment more than 5 years but not exceeding 10 years.
- A maximum amount of 500,000 Birr for a crime punishable with rigorous imprisonment exceeding 10 years.
- For a crime where the Special Part provides for only fine as penalty, the amount shall be multiplied by five times in case of juridical person (Art. 90(4))Even where 'fine' is provided as an alternative to imprisonment by the Special Part of the Code, the Court may impose both fine and imprisonment if it appears expedient. The degree of guilt and other circumstances shall be considered in this regard (Art 91).
- The general maximum amount of fine fixed by the Art. 90(1) (500,000 Birr) may be doubled (100,000 birr) where the crime has been committed with a motive of gain or where the criminal makes a business of crime (Art 92) In addition:
- The profit shall be confiscated.
- Imprisonment or measures provided by law may be imposed (Art.92 (2)).
- Recovery of fine shall be according to the following rules:
- Once fine is imposed it shall be paid for the with (with out delay) (Art 93(1))

- A maximum period of 6 months may be allowed by the court for the payment of fine where the criminal cannot pay it at once. This is subject to the requirement of sureties or security pursuant to Art 94(1).
  - Subject to the requirement of sureties or security as laid down by Art. 94(1), the court may allow payment of fine by installments. In such a case the maximum period of payment shall not exceed 3 years. The court shall take in to consideration the circumstances of the criminal and shall fix the amount and date for payment of each installment. (Art.93 (3))

  - Where the court requires the criminal to produce sureties and security, the same shall be determined having regard to the circumstances of the case, the condition of the criminal and the interests of justice. Art.(94(1) Para 2)
  - The court shall require the surety or security to be deposited in default of payment. (Art 94 (2))
  - In case of deliberate failure to produce surety or security:
- The property of the criminal shall be seized in accordance with law.
- Thereafter, sale of the property shall be effected except the properties protected by Art 98(3).
- Fine may be converted into labour. Where recovery of the fine could not be effected in accordance with Art. 93 and 94, the court shall order the criminal to pay the fine by doing work for the state of for any public authority (Art. 95 Para (1))
- The court shall determine the period with in which the amount of fine should be settled. Such period shall not exceed a maximum of two years.
- Art. 96 provides for condition conversion of fine in to compulsory labour; where the criminal is not able to settle the fine as required under Articles 93-95. The expression compulsory labour has to be defined to distinguish the scope of Articles 95 and 96. Compulsory labour, generally, means, “Work exacted from a person under threat of penalty. It is the work for which the person has not offered himself or herself voluntarily.” However, compulsory labour as a form of penalty does not violate human rights of the prisoner. Under the U.N. Convention on Civil

and Political Right (Article 8) the following do not come under the definition of forced or compulsory labor:

1. Penalties imposed by the court.
2. Compulsory military service
3. Action taken in emergency
4. Normal communal services.

Therefore, under Article 95, the criminal is given another alternative to settle his fine amount. He shall be given an opportunity to work which he does voluntarily and which is part of his income or the whole or as directed by the court he shall pay to settle his fine. But under Article 96 it is extraction of work from him. He/she shall be forced to put in work worth his fine amount. The main difference between the expressions 'labour' under the Art. 95 and 'compulsory labour' under Art. 96, is the element of voluntariness of the criminal in earning and paying of the same to settle fine amount. The maximum period over which compulsory labor can be imposed is 'two years' as indicated under Art.96 also.

- Enforcement of compulsory labor can be suspended pursuant to Articles 97 and 105, if the criminal is unable to carry out compulsory labor:
  - by reason of his poverty
  - his family obligation
  - his state of health or
  - -for any other good reason.

B. **Confiscation of Property: Art.98**

'Confiscation' means, "appropriation of private property to the public treasury by way of penalty." The Court may order confiscation any of the following properties of the criminal:

- His estate or part of his estate.
- Any property of the criminal:

  -Acquired in the commission of the crime directly or indirectly.

  - Acquired lawfully by the criminal, if necessary.

- **Property Exempt from Confiscation:**

  Sub. Art (3) 98 exempts the following properties of the criminal from confiscation:

  - Articles necessary for the livelihood of the criminal and his family, include:
    - domestic articles normally in use,
    - instruments of trade or profession and agricultural implements;
    - Food stuffs and money as are necessary for the support of the family

  of the criminal for a period of not less than 6 months or for a longer period that the court regards just and reasonable having regard to the circumstances.

  - Goods, forming part of family inheritance over which the criminal has no absolute rights including;
  - Half of the common property with regard to the innocent spouse of the criminal,
  - The personal goods of the innocent spouse, children or other persons of which the criminal has, by law or custom, the charge, administration, management or power to dispose.

C. Sequestration of property:

'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." This penalty is resorted to in the case of specific category of crimes mentioned in Art 99, namely:

- Conspiring or engaging in hostile acts against the constitutional order, or,
- Conspiring or engaging in hostile acts again to the internal and external security of the state.

- **Sequestration may be ordered subject to the following conditions:**
  - The criminal should have been convicted and sentenced in his absence,
  - Sequestration of the property of the criminal may be ordered in addition to any other penalty.

  The properties of the criminal which are exempted from confiscation under Art. 98(3) are also exempt from sequestration.

D. Other Pecuniary Effects:

The pecuniary penalties include the following 'other pecuniary effects'. These are:

1. Forfeiture of material benefits to the state
2. Compensation for damages caused to the victim.
   a. To be paid by the criminal Art.101.
   b. To be paid form the proceeds of sale of confiscated property, etc. Art 102.

The following are the important points relating to these pecuniary effects:

❖ **Forfeiture to the state:**

Any material benefits given or intended to be given to a criminal to commit a crime shall be forfeited to the state. (Art.100). If such materials do not exist in the form they are acquired, the person who received them shall be ordered to refund their value. (Art. 100(1))

Forfeiture of the 'crime proceeds' to the state is subject to the following provided by Art. 100(2):

- Any fruits of a crime shall be returned to the owner or any other claimant.
- Where the owner of such property recovered under sub. Art(1), is not found the following steps shall be taken by the court:

- A notice shall be published notifying the recovery of such property.
- In case the owner or other claimant of the property does not appear to claim them within 5 years from the date of publication of notice, the fruits of crime shall be forfeited to the state.
- If such property is a perishable property it shall be sold in accordance with the usual procedure. The money shall be entrusted to a competent authority for a period not exceeding 5 years. After this period it shall be forfeited to the state(Art 100(2))

❖ **Compensation to the Injured: Art. 101**

A. To Be Paid by the Criminal or Those Liable on His Behalf:

Article.101. intends to compensate the injured party for the 'damage' he suffered. 'Damage' means "loss or injury to person or property."

- Loss or injury to the property has been dealt with by Art.101 by following alternative remedies:

  - To make good the damage, or
  - By restitution i.e. return or restoration of the specific thing to its right the owner. or
  - By paying 'damages' by way of compensation.

- **Personal Injuries:**

  Art.101of the Criminal Code does not expressly state about the personal injuries. In fact, the 1957 Penal Code Art.100 has much expressive about injuries to the person. It is clearly stated." that, injuries refers to or the injuries to the body, mind and reputation of the person. Unfortunately, the new Criminal Code doesn't speak any thing about the meaning of the term "injury".

  Under the Article 101, compensation can be claimed by the injured person or by persons having rights from him.

- **Civil Suits for Compensation:**

  A civil suit also may be joined along with the criminal suit as per Art. 101 of the Criminal Code, for claiming compensation. In such cases the claim shall be governed by the provisions of Criminal Procedure Code.

B. To be Paid from the Sale Proceeds etc. Art 102

Where the court is of the opinion that the compensation will not be paid by the criminal or his legal heirs due to their personal circumstances the court may order payment of compensation to be paid from:

- The proceeds or part of the proceeds of the sale of the articles detained, or
- A part of the fine or
- The income of the work on conversions of fine into labors, or
- Confiscated property

The injured party, has been compensated under the sub. Art (1) and these shall assign his claim to the state. The state may enforce it against the wrong-doer. (Sub. Art (2))

Review questions:

1. Explain what sort of penalties affects the property of the criminal?
2. Note the differences, it any, between the compensation in civil law and pecuniary penalties in the criminal law?
3. For which type of crimes are the pecuniary penalties imposed?

2.1.2. Penalties Resulting in Restriction or Loss of Liberty:

The penalties falling under this section of the Criminal Code affect the liberty of the criminal. The penalties may absolutely deprive him of his liberty or restrict the same to a limited extent.

Compulsory Labour:

In cases of minor crimes which are punishable with simple imprisonment for a term not exceeding 6 months; the court may sentence the criminal to compulsory labour with the following variations:

- Compulsory labour with deduction of wages to the benefit of the state, (Art, 103)
- Compulsory labour with restriction of personal liberty (Art. 104)

The Points To Remember Under These Provisions Are:

- The criminal should be a healthy person.
- The criminal shall not be a danger to the society and his imprisonment is not necessary.
- The duration of compulsory labour may extend from one day to six months.
- The sentence of compulsory labour may be served at any of the following places:

- At a place where he normally works, or is employed or
- In a public establishment or public works.

- An amount not exceeding one third of the criminal's wages or profits shall be deducted and forfeited to the state.
- The judgment imposing compulsory labour shall state the following details:

- The exact amount to be deducted,
- The duration of the penalty,
- The place where the sentence is to be served, and
- The nature of supervision.

- Compulsory labour with restriction of personal liberty under Art. 104 shall be resorted to under the following circumstances:

- Where the criminal fails to discharge his obligation as specified under Art. 103(1), or
- With a view to keep the criminal away from unfavorable surroundings or undesirable company.

- The nature and duration of the restriction of personal liberty shall be determined by the court according to the circumstances of the case.
- The nature of restriction or liberty may include, requiring the criminal to discharge the compulsory labour under the supervision of government officials subject to any or the following conditions:
  - By remaining in a particular place of work, or
  - With a particular employer, or
  - Without leaving his residential area, or
  - With out leaving a restricted area (Art. 104(2).
- Non-compliance with any of the above requirements shall make the criminal liable to simple imprisonment for a period equal to any unfinished period of the sentence of compulsory labour.
- Art. 105 provides for suspension of the sentence of compulsory labor during illness, under the following conditions:
  - Under the conditions provided under Art 97and 105, and

- Where he falls ill during the period of his sentence of compulsory labour.
- He shall not be required to do any work until his recovery, (Art 105 Para (1)

- The criminal shall be ordered to resume the compulsory labour after recovery from his sickness.
- If he is not able to resume the compulsory labour he shall be ordered to carry out another work which is suitable to his health and personal circumstances.

However, if it is impossible to give or implement such an order, the court may not impose any other penalty on the criminal.

Imprisonment:

There are two kinds of imprisonment. These are:

1. **Simple Imprisonment**
2. **Rigorous Imprisonment**.

'Imprisonment', as a punishment, is defined as the deprivation of the liberty of the criminal by detaining him in prison. The expression 'imprison' literally means, to confine, to incarcerate or to deprive one of his liberty.

1. Simple Imprisonment:

The rules relating to simple imprisonment are laid down in Articles. 106 and 107 as follows:

- The sentence is applicable to less serious crimes which are committed by persons who are not serious dangers to the society.
- The duration of this sentence ranges shall be fixed by the court in its judgment. The period shall be:

Normally, ten days minimum and three years maximum.

Exceptionally, it may extend up to five years under the following circumstances:

- Where it is prescribed so by the Special Part of the Code owing to the gravity of the crime, or
- Where there are concurrent crimes punishable with simple imprisonment, or
- Where the criminal has been punished repeatedly.

- The sentence of simple imprisonment shall be served in a prison which is specially kept for the purpose of simple imprisonment
- In certain cases simple imprisonment may be substituted by compulsory labour. For two important reasons substitution may be given (Art.107):
- If by reason of local administrative difficulties, the execution of the sentence of simple imprisonment is not possible.
- If it is found that the carrying out of such sentence is not conducive to the reform or the rehabilitation of the criminal.

- Such substitution is possible only in respect to crimes for which the special part of the code provides for a term of simple imprisonment not exceeding six months.
- The substitution of simple imprisonment by compulsory labour under Art. 107 is possible though no such reference is made under the special part of the Criminal Code.

2. Rigorous Imprisonment:

'Rigour' here means 'the quality of being strict.' Art.108 expressly speaks about the nature of the rigorous imprisonment, but not very clearly. It says that this sentence is intended to provide for:

- A strict confinement of the criminal,
- Special protection to society, and
- The punishment and rehabilitation of the criminal.

Sub. Art. (2) Para (2) further adds to the nature of rigorous imprisonment stating that, "the conditions of enforcement of rigorous imprisonment are more severe than those of simple imprisonment. The terms "Strict Confinement" under sub Art (1) and 'Sever conditions of enforcement' under sub-Art (2) seem to give wide scope for interpretation. There are no specific guidelines found in the Criminal Code to understand the 'strictness' or 'severity' in this kind or imprisonment. It appears from Art.109 that these are left to prison regulations.

The duration of rigorous imprisonment is:

Normally, ranges from a minimum of one year to twenty five years.

Exceptionally, it may be "for life", where it is expressly laid down by law (Art. 108(1).

The sentence of rigorous imprisonment shall be served in those prisons which are established for the purpose. (Art.108(2)).

❖ **Provisions Common for both 'Simple' and 'Rigorous' Imprisonments:**

Articles 109-116 lay down the following provisions which are commonly applicable to both forms of imprisonment:

The 'aim' of both forms of imprisonment is, "achievement of the purposes of penalties". The determination of each type of penalty has a definite purpose specially mentioned in the respective articles, including reformation, rehabilitation, protection of the society etc. (Arts. 87, 108). The enforcement of imprisonment shall be for the achievement of these objectives.

The following aspects of enforcement of imprisonment shall be provided by 'the prison regulations".

- The manner of execution of sentences,
- The admission to prison,
- The segregation for prisoners,
- The contact of prisoners with persons outside.
- The interval discipline in the prison, and
- For the education and spiritual welfare of the prisoner.

➢ **Segregation of Prisoners:**

Art. 110 intends to segregate the following categories of criminals and keep them either in different prisons or where it is not possible to keep them so, at least in "different section' of the same prison:

- Male and female prisoners should be kept in separate prisons or separate sections of the same prison, (Art. 110(1))
- Criminals sentenced to rigorous imprisonment or special confinement to be kept away from the following categories of prisoners Art. 110(2):

- Prisoners under the age of 18 years, or
- Adult prisoners who are serving a sentence of simple imprisonment.

- The following persons shall be kept separately from the prisoners serving sentence:
  - Prisoners awaiting judgment, or
  - Persons detained for civil debts, or
- Public servants who, by virtue of their official duty, had contact with prisoners, and who are imprison for a crime or detained for civil debts.

➢ **Obligation to Do Work and Benefits Accruing There From (Art.111):**

Objection to work is an essential element of sentence of imprisonment. According to Art. 111, it is an obligation on prisoners serving a sentence to do work. The conditions that are to be fulfilled while enforcing this essential requirement of imprisonment are:

- The work shall be assigned by the Director of Prisons.
- The prisoner should be in good health to be compelled to do work while being an inmate of prison.
- The nature of such work shall be:
  - Suitable to the prisoner's ability,
  - Of such a nature as to reform and educate the prisoner, and
  - Conducive to his rehabilitation.

- The prisoner shall be entitled to compensation for every day's work. If his work and conduct are satisfactory.
- The Prison Regulations lay down rules regarding:
  - The amount of such daily compensation,
  - The manner of keeping it during the period of imprisonment, and
  - The manner of its payment up on release from imprisonment.

➢ **Variations in the Conditions of Imprisonment (Art. 122):**

During the period of imprisonment, variations in conditions of imprisonment are possible either liberalizing them or making them much more severe. These are intended to bring reformative effect on the prisoner and to enable him to resume a

normal law abiding social life on his release. Both Prison Regulations and the provisions of the Criminal Code under Art.112 lay down rules relating to such variations. 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.

Solitary Confinement:

The prison administration has the power to impose solitary confinement subject to the following directions:

- Solitary confinement may be imposed at the beginning or during the course of the execution of the sentence, whenever it appears as necessary.
- The duration of such a measure shall be fixed after consultation with a medical doctor and where necessary, a psychiatrist.
- The duration of solitary conferment shall not exceed a maximum of 3 months.

Confining a prisoner in isolation for more than this period may be harmful for his mental and physical health.

Isolation of the Prisoner during work Time and Night Time:

Another stricture that can be imposed under Sub. Art(2) is to keep him isolated as far as possible from the other prisoners during periods of work and during night time.

More Favorable Treatment for Good Conduct:

The prison authorities may also decide to give more favourable treatment to prisoners showing improvement in their conduct to encourage reformation and rehabilitation of the prisoners. The favorable treatment may include:

- Relaxations as regards food,
- Access to visitors,
- Favorable treatment in the nature of work and leisure.

- The favorable treatment may be further improved with:

- Improved conduct of the prisoner, and

- The approach of the prisoner's release.

If the prisoner abuses the favorable treatment or falls back to persistent misconduct, the improved treatment may be with drawn or suspended for a definite or an indefinite period of time.

- **Conditional Release before the Expiry of the Period of Imprisonment:**

The prisoner may be released on probation before the expiry of a sentence of either form or imprisonment. This is possible under the following conditions:

- If the prisoner's conduct has been found to be satisfactory, and

- The other conditions laid down by law under Art.202 have been fulfilled.

Before being released the prisoner may be required to live on probation in a penitentiary or labour settlement or other similar establishment. 'Probation' literally mans, "testing of a person's conduct, abilities, qualities etc. before he is finally accepted for a position or admitted into the society". Probation, under the criminal law is testing the prisoner, before he is finally released into the society, whether or not his reformation and rehabilitation have been complete. To ensure that he is no more a threat to the society he shall be kept under the observation of the authorities mentioned in Art.113.

The conditions and the manner of imposing the probation or conditional release are laid down by the law relating to the Execution of Sentences and the Regulations Relating to Prisons.

- **Deduction of Period of 'Remand':**

'Remand' is return of an arrestee to custody, especially to allow further inquiry i.e. the prisoner is kept in custody pending trial. In case the person so detained in prison is convicted, at the time of sentencing, the court shall specify what period of remand shall be deducted from the period of the sentence (Art.115).

However, if the remand was necessitated or prolonged due to criminal's own fault, the court may not make any such deductions in the period of sentence (Art. 115(1) Para). The conditions of remand and the manner in which it is carried in to effect are governed by the Code of Criminal Procedure. (Art. 115(2)).

Period of Hospitalization to Be Part of the Sentence:

If a prisoner falls sick during the period of sentence of imprisonment and has to be transferred to a hospital for treatment, the period spent in the hospital shall be considered as part of the sentence.

However, such period of hospitalization shall not be counted as part of the period of sentence, if:

- The period spent in hospital due to illness is deliberately caused by the prisoner; for example, he injures himself or attempts to kill himself, or
- The admission to hospital is by the misleading statements or behavior of the prisoner.

This means that the period spent in the hospital by the deliberate acts of the prisoner shall be added to the period of sentence. For example, if he is sentenced to one year of imprisonment and spends one month in hospital by misleading the authorities, he shall remain in the prison one month beyond the original sentence of one year of imprisonment.

- **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.

Review Questions:

1. How many types of punishments result in deprivation or loss of liberty?
2. Define 'imprisonment'. How many kinds of imprisonments are mentioned in the Criminal Code?
3. What are the special features of 'rigorous imprisonment'?
4. What is 'solitary confinement'? List the rules relating to this type of punishment.
5. Write a note on 'segregation of prisoners'.

2.1.3. Death Penalty:

This is state imposed death as punishment for a serious crime and is also termed "capital punishment". While pretending to support reverence for human life, capital punishment does in fact destroy it. Capital punishment is generally resorted to in case or serious crimes like homicide.

2.1.3.1. The Arguments For and Against Capital Punishment:

Arguments are made both in favour and against the retention of capital sentence as a form of punishment. "The Temporary New York State Commission on Revision of the Penal Law (1965) summarizes such arguments as follows:

- **Arguments in favour of Abolition (Majority):**

The execution of the penalty of death calls inescapably upon the agents of the state to perpetrate an act of supreme violence under the circumstances of the greatest cruelty of the individual involved. The social need for the grievous condemnation of the gravest crime can be met even by alternative measures.

The retention of the death penalty has a seriously baneful effect on the administration of criminal justice. The very fact that life is at stake introduces a morbid and sensational factor in the trial of the accused and increases the danger that public sympathy will be aroused for the defendant, regardless of his guilt of the crime charged. This morbid factor carries through the period preceding execution and public sentiment, which should support the law and its administration, is often marshaled on the other side.

Some erroneous convictions are inevitable in the course of the enforcement of the penal law and error sometimes cannot be established until time has passed. Such errors cannot be corrected after execution. An injustice of this kind destroys the moral force of the entire penal law.

Experience has shown that the death penalty cannot be administered in the United States with even rough equality. All States have found it necessary that the penalty be one that is discretionary with the Court or jury; even if the sentence is imposed, the chief executive must wrestle with the demands for clemency and clemency is often granted. The number of executions is in consequence, extremely small.

The considerations we have stated would lead us to favour abolition, whether or not the threat of death has a greater deterrent efficacy that the threat of long imprisonment. There may, indeed, be cases in which such unique deterrent power has in fact been exerted. Such data as we have carry assurance that this factor has no major quantitative significance.

- **Arguments in favour of Retention (Minority Report):**

Capital punishment is as harsh a punishment as murder is heinous a crime. Because wanton murder is so extremely morally wrong, the punishment therefore must remain proportionately extremely severe to emphasize to other 'would-be' murderers the high outrage that society feels against the commission of such crimes. Conversely, any unjustified lessening of the severity of punishment for murder in appropriate situations could be taken by the murderer and by others as an indication that our society no longer regards such murderers as the most heinous of crimes.

"Human nature, being what it is, must be understood to demand, on occasion of retaliation, vengeance, and to pacify the outraged community. The experiences of other states that have, over the years, abolished capital punishment and later returned to it because of the occurrence of some one particular murder, should serve as a warning for any move made for its abolition; that abolition should not be entered upon either lightly or on grounds that do not fully take into account the frailties of human nature or the complexities of the society and the disturbances of the times in which we live…"

In the end, the above said Commission chose to vote for abolition of death penalty.

2.1.3.2 Capital Punishment in Ethiopia:

Capital punishment has been retained by the Penal Code of 1957. The Code provided that it shall be executed by hanging and may in the discretion of the court, be carried out in public to set an example to others. In the past, tradition and public sentiment in Ethiopia have tendered to consider murder a family matter to be disposed off either by payment of "blood money" or revenge on the perpetrator, often in the same manner in which he had killed his victim. These feelings were so strong that it was reported that after enactment of the 1930 Penal

Code, a member of the murdered man's family was allowed, in a prescribed place, to pull the trigger which carried out the court's sentence of death.
In the Revised Criminal Code of 2004, there remarkable changes are made relating to death penalty, particularly, the public hanging mode of execution and execution by shooting in case of accused serving in the Armed Forces of Ethiopia have been abolished.

Both traditionally and under the provisions of the Constitution and the Criminal Code, no sentence of death can be executed without the confirmation of the Head of the State. According to the Prison Statistics of 1956, E.C, (1963-64G.C.) 997 persons were held in prison under sentence of death while only 39 death sentences were executed. Although this may partially be due to inefficiency in obtaining confirmations, the more likely reason is that the quite traditional leniency of the Emperor in the use of His pardon and amnesty powers.

2.1.3.3Constitutionality of Death Penalty:

The death penalty or capital punishment as it Is, otherwise known, continues to be legitimate and practiced in a number of states around the world. Some states have outlawed the death penalty except for most extreme cases e.g. crimes committed during war. Other states while they may not have outlawed the death penalty are in practice abolitionist by not actually sentencing offenders to death. Some of the earliest human rights activism, for example, by Amnesty International concerned with protecting political prisoners from being sentenced to death for their political beliefs.

The death penalty might appear to constitute a violation of the right to life but human rights law falls short of insisting that it does. It leaves states the option to impose the death penalty but urges them to move towards abolition and also imposes certain limits on the way in which the death penalty can be imposed. Capital punishment:

1. 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.
2. Anyone sentenced to death has the right to seek pardon or commutation of the sentence;
3. Death sentence is not to be imposed on anyone below the age of 18 or carried out on pregnant women.

Even for states which have agreed to abolish the death penalty, human rights law appears ambiguous, allowing them in some statutes to make reservations maintaining the right to use the death penalty at times of war for example. At the same time, the use of the death penalty is totally prohibited from use by the various international criminal courts, like the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court.

3. 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. However, child rights treaties impose another obligation on states to meet the basic needs of the child in terms of nutrition, health, food, shelter etc. to enable the child's survival.

4. Rights of Victims

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.

5. International and Regional Instruments for Protection and Promotion:

International legal instruments take the form of a *treaty* (also called agreement, convention, or protocol) that binds the contracting states to the negotiated terms. When negotiations are completed, the text of a treaty is established as authentic and definitive and is "signed" by the representatives of states. A state can agree to be bound to a treaty in various ways. The most common are *ratification* or *accession*. A new treaty is ratified by those states that have negotiated the instrument. A state that has not participated in the negotiations may, at a later stage, accede to the treaty. The treaty *enters into force*, or becomes valid, when a pre-determined number of states have ratified or acceded to the treaty.

When a state ratifies or accedes to a treaty, that state may make *reservations* to one or more articles of the treaty, unless reservations are prohibited by the treaty. Reservations may normally be withdrawn at any time. In some countries, international treaties take precedence over national law; in others a specific law may be required to give a ratified international treaty the force of a national law. Practically all states that have ratified or acceded to an international treaty must issue decrees, change existing laws, or introduce new legislation in order for the treaty to be fully effective on the national territory.

The *binding treaties* can be used to force governments to respect the treaty provisions that are relevant to the human right to life. The *non-binding instruments*, such as declarations and resolutions, can be used in relevant situations to embarrass governments by negative public exposure; governments who care about their international image may consequently adapt their policies.

6. 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 Universal Declaration of Human Rights, International Covenants on Human Rights 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.

7. Protection Against Cruel, Inhuman or Degrading Punishment: Art 18/1 of the Constitution:

The Black's Law Dictionary(7th edition) defines 'cruel and unusual punishment' as 'punishment that is torturous, degrading, inhuman, grossly disproportionate to the crime in question, or otherwise shocking to the moral sense of the community". Taking this meaning of the cruel and inhuman punishment to be offensive to the moral sense of the community the question is 'is execution of a criminal offending to the moral senses?'

Supporters of the death penalty argue that, the death penalty is not cruel and unusual punishment. The framers of the Constitution supported the death penalty, and in fact constructed laws in order to carry it out, so it is ridiculous to claim that cruel and unusual punishment refers to the death penalty. They try to argue here that the death penalty is moral and just and that it should not be forgotten that 'no one has to be executed; if no one murders, no one is executed'. Murderers are not innocent people fighting for their lives; that statement describes their victims. They emphasize that *victim rights are more important than criminal rights.*

However, the *Amnesty International* argues that, "the death penalty violates the right to life and it is the ultimate cruel, inhuman and degrading punishment and it has no place in a modern criminal justice system". 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. In Canada the homicide rate has fallen by 40 per cent since 1975; the death penalty was abolished for murder in 1976.
- International human rights treaties prohibit courts sentencing anyone who was under 18 years old at the time of the crime to death, or executing them. But a small number of countries continue to execute child offenders, violating their obligations under international law.

- **Methods of Execution:**

There are eight main methods of execution in current use worldwide:

- **Beheading:** Only two countries execute people by chopping their head off: Saudi Arabia and Iraq.

- **Electric chair:** (US only) Nobody knows how quickly a person dies from the electric shock, or what they experience. The ACLU describes two cases where prisoners apparently lived for four to ten minutes before finally expiring.

- **Firing squad:** The prisoner is bound and shot through the heart by multiple marksmen. Death appears to be quick, assuming the killers don't miss. In the U.S., only Utah used this method. It was abandoned in favor of lethal injection on 2004-MAR-15, except for four convicted killers on death row who had previously chosen death by firing squad. This is used in Belarus, China, Somalia, Taiwan, Uzbekistan, Vietnam, and others.

- **Guillotine:** A famous French invention, not used in North America. It severs the neck. Death comes very quickly.

- **Hanging:** if properly conducted, *this is a humane method*. The neck is broken and death comes quickly. However, if the free-fall distance is inadequate, the prisoner ends up slowly being strangled to death. If it is too great, the rope will tear his/her head off. This method is used in Egypt, Ethiopia, Iran, India, Japan, Jordan, Pakistan, Singapore and others.

- **Lethal injection:** Lethal drugs are injected into the prisoner while he lays strapped down to a table. Typically, *sodium pentothal* is injected to make the prisoner unconscious. Then *pancuronium bromide* is injected. It terminates breathing and paralyzes the individual. Finally, *potassium chloride* is injected to stop the heart. If properly conducted, the prisoner fades quickly into unconsciousness. If the dosage of drugs is too low, the person may linger for many minutes, experiencing paralysis. Executions in the U.S. are gradually shifting to this method. This technique has been challenged recently by those who feel that the prisoner may not be rendered unconscious by the drugs. Some suggest that this method can be extremely painful. After a botched execution of Angel Nieves Diaz in Florida in 2006-DEC, Florida and nine other states have placed a hold on executions. This method is used in China, Guatemala, Philippines, Thailand, and the U.S.

- **Poison gas:** Cyanide capsules are dropped into acid producing Hydrogen Cyanide, a deadly gas. This takes many minutes of agony before a person dies.

- **Stoning:** The prisoner is often buried up to her or his neck and pelted with rocks until they eventually die. The rocks are chosen so that they are large enough to cause significant injury to the victim, but are not so large that a single rock will

kill the prisoner. This method is used in North Afghanistan and Iran, as a penalty for murder, adultery, blasphemy, and other crimes.

Note: Find important Cases on the constitutionality of death penalty in the Appendix.

Critical Thinking:

1. Even if the death penalty is constitutional, does it follow that all existing forms of the execution of death penalty are constitutional?
2. Does the experience suggest that the death penalty deters murder any more than a sentence of life without the possibility of parole? If it doesn't, does it suggest that 'the death penalty is an excessive punishment'?
3. What is the best argument for the retention of death penalty? Is the death penalty necessary to deter life prisoners from committing murder in prisons?
4. Do you think that execution of a criminal is offending to the moral sense of the community?
5. Do you justify the retention of death penalty in Ethiopia?

2.1.3.4. General Principles Relating to Death Penalty Arts. 117-120:

- 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.
- 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.
- It shall be passed only where there are no extenuating circumstances.

- It shall not be passed on a criminal who has not attained the age of 18 years at the time commission of the crime.
- Death sentence shall be carried out only after obtaining confirmation of the same by the Head of the State.
- It shall be executed only after ascertaining of its non-remission or non-commutation by pardon or amnesty.
- The means of execution shall be determined by the executive body having authority over the Federal or the Regional Prison Administration concerned.
- 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. The execution of the sentence shall be carried out without any cruelties, mutilations or other physical suffering.

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)).

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.
- All steps shall be taken for the safety of the prisoner under the supervision of the Director of Prisons.
- 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.

Suspension and Commutation of Death Sentence:

- Suspension and commutation of death penalty are possible in the following circumstances:
- In case of fully or partially irresponsible or seriously ill persons or a pregnant woman.
- 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.

- 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.

Review Question:

What are the rules relating to imposition, execution and commutation of death penalty?

2.2. Secondary Penalitites

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).

2.2.1. Types of Secondary Penalties:

There are different types of secondary penalties. These are:

A. Caution, Reprimand, Admonishment (Article 122):

These are penalties affecting the honor and personal integrity of the criminal. If a court considers that making an appeal to the honor of the criminal will have beneficial effects on the criminal and society at large, it may in open court either during or in its judgment caution, admonish or reprimand the offender.

For your clear understanding of the terms, their dictionary meaning is as follows:

- **Caution**: warning
- **Admonishment**: expression of disapproval of ones actions or behavior
- **Reprimand**: strong official disapproval of some one
- **Public apology (Article. 122)**

The criminal does this to the person injured at the order of a court.

B. Deprivation of rights (Art.123)

The court may give such order when the offender has, by his unlawful act or omission, shown himself unworthy of the exercise of such rights. The rights to be deprived are:

- **Civil rights**, particularly the right to vote, to take part in any election or to be elected to a public office or office or honor, to be a witness to or a surety in any deed or document, to be an expert witness or to serve as assessor; or
- **Family rights**, particularly those conferring the rights of parental authority or of guardianship; or
- **The right to exercise a profession**, art, trade or to carry on any industry or commerce for which a license or authority is required.

They could be permanent or temporary. If it is temporary, the period of deprivation shall be from one to five years. The court will fix the period taking in to consideration the gravity of the crime, the antecedents and character of the criminal, the danger of relapse into crime, the probable effect of the punishment and the interest of society (Article 124).

Review Questions:

1. What is the rationale behind the secondary penalties?

2. When can the Court award secondary penalties?
3. What are the rules relating to 'deprivation of rights' as a secondary penalty?

2.3 Special Measures Applicable to Adults:

Our law does not only penalize a criminal but it also has designed protective measures specially to achieve reformative and rehabilitatory purposes. These measures have the purposes of reforming and educating the person so that he abstains from committing further crime when he gets back to the society after serving his sentence in the prison. It has been the experience that these measures achieve better repression of criminality and rehabilitation and reintegration of a criminal.

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.

Measures could be imposed both on a person convicted for a crime and those not responsible for a crime because it is a protective step. However, for the sake of clarity and understanding our code has three categories of measures. These are dealt with as follows:

2.3.1. Measures applicable Irresponsible persons and criminals with limited responsibility:

For a person to be punished for a crime he should be responsible i.e. there should be no irresponsibility. If a person commits a crime for which he is absolutely irresponsible or responsible in a limited manner, then he is either not punishable or the penalty is reduced as the case may be. However, there will be protective measures to be imposed on such persons.

Theses are the measures of confinement and treatment. According to articles 130(1), if a criminal is found to be a threat to public safety or order or if he proves to be dangerous to the persons living with him, the court shall order his confinement in a suitable institution. As per article 131, if such criminal is suffering from a mental disease or deficiency, deaf and dumbness, epilepsy, chronic alcoholism, intoxication due to the abuse of narcotics or any other pathological deficiency and requires to be treated or placed in a hospital or asylum, the court shall order his treatment in a suitable institution or department of an institution.

The duration of the confinement is indefinite as indicated under article 132 of the Criminal Code. However, the court shall review its decision every two years. The criminal is released only if he has proved to be cured.

2.3.2. 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

2.3.3. Measures of a Material Nature:

- **Guarantee of Good Conduct (Article 135)**

A court may require a convicted person, to enter into a recognizance to be of good behavior together with a surety or sureties in the following cases:

- In case of a criminal who indicates his intention of commit to further crime, or
- When it is likely that he will commit a further crime as in a case of declared hostility or threat.

- A person who has not been prosecuted may also be required to enter into a recognizance as stated above where such person behaves or is likely to behave in a manner which threatens peace or security of the public or a member thereof.
  Such recognizance shall be for a period of from one to five years and the surety shall be in the form of a personal or monetary guarantee.

➢ **Seizure of Dangerous Article (140)**

A court shall order the seizure of all dangerous articles, when they endanger public safety, health or decency, in the following cases:

- Those articles which have been used in the commission of a crime, or
- Where such dangerous articles are likely to be used for the commission of a crime, or
- The dangerous articles which have been obtained as the result of a crime,

In addition to the seizure, the court may also order such articles to be destroyed or rendered useless or handed over to a police or a criminological institute. However, if the possession of such articles is not forbidden by law they shall be returned to their owner.

2.3.4. Measures Entailing Restriction on Activities:

➢ **Suspension and withdrawal of a license (Article 142):**

The suspension and withdrawal or revocation refers to crimes related to any profession or activity of the criminal for which he got a license. If such person committed a crime in a grave or repeated manner then the court will suspend his license for a period of from one month to one year or for life as the case may be.

➢ **Prohibition and closing of an undertaking (article 143):**

The prohibition and closing applies to any undertaking or establishment whether commercial, industrial cultural or political which was utilized to commit or further the commission of a crime, where the crime has been punished with a sentence of rigorous imprisonment exceeding one year.

2.3.5. Measures Entailing a Restriction on Personal Liberty:

- **Prohibition from resorting to certain places (Article 145):**

This is restriction on a convicted person from having access to or remaining in certain places which are deemed to have contributed to the commission of the crime or may expose the criminal to committing fresh crime, in particular public-houses, inns, entertainments halls, markets and other public places. The duration of such restraint may be from three months to one year.

- **Prohibition to settle down or reside in a place (Article 146):**

This restriction is similar with the above except that it refers to settlement or residence in a town, village or a specified are. Such restriction could be temporary or permanent. If it is temporary, it may last from one to ten years.

- **Obligation to Reside in Special Place or Area Article. 147:**

Such an order is given where the criminal is likely to cause further disturbances or pursue a life of crime. The area to be selected should be a place where the likelihood of his committing a further crime is lessened. The period of such residence must be not less than one year or more than five years.

- **Placing under Supervision (Article 148)**

An order under this provision is given on a criminal who is proved dangerous by the gravity or repetition of his criminal acts and who was sentenced to at least a term of simple imprisonment of one year.

Such measure may also be imposed on a person who is unable to furnish the surety or personal guarantee required as a guarantee of good conduct (Art.138).
The supervision could be either by the police or by a charitable organization. Supervision by a charitable organization is considered to be an essential feature of the system aiming at obtaining good results from the enforcement of penalties and measures and the various methods where by such endorsement is carried out.

The duration of the supervision may extend from one year to five years.

- **Withdrawal of Official Papers Article. 149:**

This is the holding of official papers or passport of a convicted person for the purpose of supervision or safety.

- **Expulsion (Article 150)**

This is prohibition from residing in the territory. It applies to a convicted person who is an alien and proves to be undesirable or dangerous. This order is given on a convicted person of any of the following categories:

- who has been sentenced to a term of simple imprisonment of three years or more,
- a habitual criminal sentenced to internment or
- an irresponsible or partially responsible criminal recognized by expert opinion as a danger to public order.
-

The expulsion could be temporary or permanent, as the court may deem necessary.

2.3.6. Measures for the Purpose of Information:

These are of three types:

- **Notification to the Competent Authority Article. 154:**

When a court gives an order of secondary penalty or protective or preventive measure, such order should be notified to the competent administrative, civil, military or police authority so that the order would be enforced and its observation controlled.

- **Publication of the Judgment Article. 155:**

Such publication could be made to serve public or private interests. Such an order shall be given as a matter of course when it is deemed to serve public interest. But

for private interest it is given only when the accused or the injured person requests it.

The publication may be effected by means of posters in public place, or through other mass media.

The order of publication will also indicate the conditions under which the publication shall take place and the number of publications.

- **Entry in the Judgment Register Article. 156:**

This article requires that an order of registration of penalties is measures pronounced in a judgment shall be entered in the judgment register. These provisions shall also determine the particulars to be included in the entities.

Review Questions:

1. What are the different kinds of special measures designed for adult criminals? What are the objective of these measures?

Section.3. Determination Of Punishment:

3.1. 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:

- Punishments and measures designed by the Criminal Code are supposed to be applied
  - In accordance with the spirit of the Criminal Code, and
  - In order to achieve the purpose of the Criminal Code in terms of Art.1
  - Giving due respect to human dignity. (Arts.18(1) and Art.21 of the Constitution)

- The calculation of sentences is expected to be by a meticulous correlation of the General Part and the Special Part of the Criminal Code. Due regard should be given to the general principles of criminal liability and the definitions of specific crimes as put forward by the Special Part of the Code.
- The principle of individualization of punishment should be given effect to by giving due consideration to the personal circumstances of the criminal such as degree of guilt, dangerous disposition of the criminal, his antecedents, motive and purpose. The standard of his education also may be a matter to be considered in the application of different provisions of the Code. The gravity of the crime and the circumstances of its commission are other major considerations in the determination of penalty.
- Careful examination of the complete range of punishments from the lightest to the severe most should be made in choosing the right punishment.
- 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.
- In relation to the determination of sentences in cases of 'Minor Crimes' there are two alternatives provided by Art. 89. These are:
  - The court may apply the provisions of Art. 122 relating to reprimands warning , or
  - The provisions of the Law of Petty Offences

'Minor Crimes' are defined as "crimes which are punishable with simple imprisonment not exceeding three months or fine not more than 1000 Birr.

3.2. Extenuating Circumstances:

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
- General Aggravating Circumstances- Art. 84
- Special Aggravating Circumstances- Art. 85
- Other General Extenuating and Aggravating Circumstances- Art. 86

Let us first see the main categories of extenuating circumstances:

3.2.1. General Extenuating Circumstances: Art. 82

The same kind of crime can be committed by different persons under different circumstances. These circumstances could either lead to reduced punishment or more severe punishments. Extenuating circumstances are those factors surrounding the commission of a crime which favour the criminals and thus lead to ordinary mitigation of punishments in accordance with Art. 179 0f the Code. The general extenuating circumstances include, personal circumstances of the Criminal such as his/her age, intelligence, simplicity of mind, motive, moral distress, grave temptation or serious provocation or violent emotion or an unjust insult etc. Circumstances after the commission of the crime also may provide ground for mitigation. For instance, the criminal shows a sincere repentance for his acts after the commission of the crime, specially by rendering help to his victim, or surrendering himself to the authorities, or by repairing, as far as possible, the loss or injury caused by his crime or by confessing the crime at the trial, all these can be considered as extenuating circumstances.

- **No 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. For example, under Art. 541 it is essential to prove excess of self defense or excess of necessity, or presence of gross

provocation, or violent emotion, or intense passion to establish the crime of 'Extenuated Homicide'. In such cases, the Court may not allow for the same circumstance to reduce the penalty applicable to that crime.

3.2.2. Special Mitigating Circumstances: Art. 83

These circumstances relate to crimes by omission of some legal duty, due to the fear of exposing a family member or some one close ties of affection to a criminal penalty or dishonour or grave injury. Such relationships include:

- Any near relative by blood or marriage, or
- Any person with whom he is connected by special close ties of affection

The circumstances that can be considered as basis for free mitigation in relation to the special relationships above mentioned are:

- Acting contrary to the law and in particular failing in the duty to report to the authority, or
- Fails to afford assistance to the authorities,
- Making a false statement or deposition or supply of false information, or
- Giving assistance to a criminal in escaping the prosecution or a penalty.

The existence and adequate nature of the special relationship shall be examined and determined by the Court.

- **Determination of Sentence under Extenuating Circumstances:**

There are three favourable 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:

- Where the act committed is not very grave, and
- If the ties in question are so close, and
- The circumstances are so impelling that they placed him in a moral dilemma of a horrifying nature.

3.3. 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:

3.3.1. General Aggravating Circumstances Art. 84:

The first type of aggravating circumstances are known as general aggravating circumstances since these are the factors that can be used to increase the punishments in all types of crimes. The increase in the penalty is base on the degree of the guilt which can be aggravated by the presence of these circumstances. The injury caused may be the same but the punishments get aggravated due to the heinous nature of the mental element. For example in the

case of extenuated homicide, aggravated homicide or ordinary homicide the harmful result brought about is one and the same namely the death of a human being. However, for each of these specific crimes the quantum of punishment differs considerably because of the difference in the mental element and the material circumstances preceding, attending or following the commission of the crime.

Art. 84 suggests the increase in the penalty in the following general aggravating circumstances:

- When the criminal acts with treachery, base motive, envy, greed, special perversity or cruelty.
- When the crime is done in abuse of power or functions of confidence, or authority given to him.
- In case of a person who can be found to be dangerous having regard to his previous criminal record, habitual nature of his criminality, circumstances of commission of the crime, use of dangerous weapons and violent instruments.
- If the criminal commits the crime together with others, or is a member of a gang organized to commit crimes, organizer or ringleader.
- Where the crime is committees against a victim who deserves special protection such as, a child or an old person, a woman, a defenseless person, a feeble minded 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.

3.3.2. Special Aggravating Circumstances:

The special cases of aggravation as enumerated by Art. 85 are:

- The cases of concurrence of crimes, and
- The cases of recidivism

❖ **No Double Aggravation: 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. For example, under Art. 539 it is essential to prove premeditation, or motive or use of dangerous weapon or the crime being committed by a member of a band organized to commit homicide or armed robbery, to establish the crime of 'Aggravated Homicide'. In such cases, the Court may not take into account the same circumstance to aggravate the penalty applicable to that crime.

➢ **Determination of Sentence under Aggravating Circumstances:**

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. This article suggests the sentencing of the convict to the maximum extent possible as provided in the relevant provision of the Special Part defining the crime. The Court should take the following things into account before fixing the amount of punishment:

- The nature and the multiplicity of grounds of aggravation, and
- The degree of guilt of the criminal

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
-

4. 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. The Court may apply the provisions of Art. 179 or Art. 183 respectively, either to reduce the punishment or increase the punishment as the case may be. The Court shall record the reasons for such departure made from the express provisions of the law.

3.4 Cumulation 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:

- **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).
- **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.
- **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.

Review Questions:

1. Write the important principles governing the determination of punishments.
2. Explain out the distinction between general and special mitigating circumstances.
3. Explain the purpose and scope of Art. 86.
4. How does the Court determine the penalty in a case that includes both aggravating and mitigating circumstances?

Section.4. Post Conviction Processes:

The following are the 'post conviction procedures':

- Suspension of penalty and conditional release,
- Pardon and Amnesty,
- Reinstatement.

4.1. Suspension of Penalty and Conditional Release:

A penalty or sentence passed by the Court on a criminal may not always be enforced. As we have already seen earlier, punishments have certain specific purposes. Specially, the purposes of reformation and rehabilitation are better achieved, in cases of young offenders and first offenders, not by enforcing them but by suspending them i.e. by giving a chance to the criminal to reintegrate with the society he has disturbed.

4.1.1. Suspension of Penalty:

- **Meaning and Purpose: Art. 190**

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:

- Suspension of Pronouncement of Penalty, Art. 191
- Suspension of Enforcement of Penalty, Art. 192

In 'suspension of pronouncement of penalty', 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." It is a process of testing or putting to proof the criminal's conduct or character by placing under the supervision of a probation officer who acts as a friend and advisor. This means the court will state that the criminal is found guilty if the crime he was accused of but will withhold the pronouncement of sentence that he should be imposed on him. His conviction shall not be entered in the record.

4.1.3 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, or
- Simple imprisonment for less than 3 years, Art. 106

In ‘suspension of enforcement of penalty’ 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.

Conditional Release: Art. 201

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 base on the consideration that it serves as a means of reform and social reinstatement. Therefore, it must be awarded in case of criminals who satisfy the conditions laid down by the Code under Art. 202. Further, conditional release should be adopted only in cases where it affords a reasonable chance of success.

4.1.4.1.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 which includes the following information:

- That the prisoner has, during the period of his confinement in the prison has shown tangible proof of his improved character by his work and conduct; and,
- That he has repaired, as far as he could be reasonably expected to do, the damage found by the court or agreed with the aggrieved party: and
- That his character and behavior of the criminal, as well as the living conditions he may expect to find upon his discharge, lead to the assumption that he will be of good conduct after the release and that this measure will be effective

.

4.1.4.2.Other Important Rules regarding Conditional Release:

- The prisoner shall be informed about the possibility of his release on probation when he enters the prison after his conviction. He shall be briefed that if he shows good progress in his behavior and fulfills certain conditions he shall be released on probation (Art. 203). This will serve as a motivating factor for him to show quick improvement in his behavior.

- The prisoner after serving a certain period of the sentence shall make an application to the Prison Director to recommend his case to the court for the conditional release.

- The Prison Director shall then prepare his report as per the conditions laid down in the article and shall forward the application of the prisoner to the court accompanied by his report.

4.1.4.3. 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.

4.2. Pardon and Amnesty:

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.

Amnesty is also a species of pardon but applies to a certain classes of criminals and specific type of crimes only. Amnesty 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 trail 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'.

Articles. 229 and 230 of the Criminal Code deal with the concepts of 'Pardon' and 'Amnesty'. We shall try to appreciate the essentials of these provisions by making a distinction between the two.

Differences between Pardon and Amnesty:

- Pardon is remittance of penalty while amnesty is a general pardon especially for political crimes against government.
- Pardon is granted by the competent authority where as amnesty is granted by the appropriate competent authority.
- In pardon, the remission of sentence may be whole or in part and in amnesty, it is always complete remission.
- Pardon may completely remit the penalty or commute the same to a penalty of lesser nature or gravity.
- 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.
- 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.
- 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.

Review Questions:

1. What is the meaning and purpose of suspension of sentences?
2. Explain the essential conditions for the grant of conditional release.
3. Write the meaning of the expressions 'pardon' and 'amnesty'.
4. Distinguish between the concepts of 'pardon' and 'amnesty'.

4.3. Reinstatement: Arts.232-237

4.3.1. Meaning if Reinstatement:

Principle: Article 232

The procedure of reinstatement is subject to the following principles:

1. 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:
   a. who has undergone his penalty or
   b. whose penalty is barred by limitation or has been remitted by pardon or
   c. whose penalty has been suspended on probation or
   d. who has been released conditionally
2. Reinstatement must be deserved and shall never be granted as of right.
3. 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.

Conditions for Reinstatement: Article 233

Reinstatement shall be granted by the Court subject to the following conditions:

- **In the cases of a penalty of rigorous imprisonment**,

- If a measure of permanent expulsion or a penalty of general confiscation of property is a period of **at least five years of elapse**
  - since the penalty was undergone; or
  - barred by limitation; or
  - since the convict was released because his penalty was remitted by pardon, or
  - since the penalty was suspended or
  - since the convict was conditionally released, where he successfully underwent the period of probation in case of suspension of penalty or conditional release;
  - **In other cases**, the period must be **two years at** least;
- If the sentence has been enforced as regards any secondary penalties imposed;
- If the convicted person has paid the compensation, damages and costs ordered by the judgment in, so far as it could be expected from him having regard to circumstances; and
- If during the period specified in sub-article (a) of Art 233 the convicted person was always of good behaviour and has not been convicted of a crime punishable with imprisonment.
- The minimum period for the conditions of reinstatement specified in sub-article (a) of Art 233 shall apply only as long as it does not affect the period regarding recidivism as laid down in Article 67 of this Code.
-

5. Reinstatement in Cases where the Penalty is time barred: Article 234

When the penalty is barred by limitation reinstatement may not be ordered before the time at the earliest when the penalty pronounced would have come to an end if it had been undergone on the coming into force of the sentence.

Exception: When a notably praiseworthy act performed by the, applicant in the civil, military or social fields so justifies, reinstatement may be ordered prior to the expiration of the normal period of time.

4.3.4 Effects of Reinstatement: Article 235

Since reinstatement cancels the sentence, it shall produce the following effects:
(1) the convicted person is relieved, for the future, of any forfeitures of rights or privileges, incapacities and disqualifications and recovers the capacity to exercise his civil, family and professional rights;

(2) the sentence shall be deleted from the judgment register and for the future be presumed to be non-existent;

(3) a reproach referring to an old conviction made either ill-will or any other reason shall come under the provisions of criminal law regarding defamation, and his defences based upon justification or public interest shall not be admissible.

- **Dismissal and Renewal of the Request: Article 236**
  If the Court dismisses the request for reinstatement as unjustified it cannot be renewed before a period of two years has elapsed.
- **Revocation of the Decision: Article 237**
  Reinstatement shall be revoked and may no longer be granted subsequently, within a period of five years, a fresh sentence to capital punishment or rigorous imprisonment has been imposed upon the reinstated person by a judgment which is final.

Section. 5. Disposition of the Criminal

5.1. Systems of Determination of Penalty:

To understand the modern system of determination of penalties it is necessary to examine the two systems which are theoretically opposed as to the determination of penalty.

1. 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 if 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"-in brief-to accomplish "an individualization of the penalty". It has, on the other hand, the disadvantage of tending towards the arbitrary and of weakening of the intimidation value of the penalty.

2. 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.

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.

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. Such a scheme also allows for deterrence by

providing, when necessary, very severe penalties. In establishing the scale of penalties the legislator tries to set the penalty according to the seriousness of the crime.

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;

1. The circumstances of commission of the crime
2. The personal circumstances of the criminal.

He has the guidelines enlisted in this regards under the heads of aggravating circumstances, mitigating circumstances as well as Art 86 giving him extra discretionary power to identify any other aggravating or mitigating circumstances. Arts 86, 87 and 88 give reasonable guidance for the judge to play his role effectively.

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 Court makes variations in the sentences either to make them stricter or less harsh at the recommendation of the prison management. The administrative individualization of punishment is very evident in the following three measures:

- Pardon and Amnesty
- Prison Administration
- Conditional release

Unit Summary:

Once a person is found guilty of the crime he is accused of, the court will pass sentence penalizing him with fine or imprisonment or both, which it deems, is appropriate for the crime committed. The definition of punishment is linked with what is considered to be purpose of the punishment. In this regard punishment could be taken to mean the major mechanism by which the purposes of criminal law are achieved.

In the history of criminal law there have been many conceptions as to what the purpose of punishment should be. But modem criminal laws now consider that criminal law cannot have a single purpose but a combination of purposes according to the individual circumstances of each case. Thus, punishment has the purpose of deterring the criminal from committing another crime in the future, the purpose of separating criminal from mixing with the society they have disturbed for a certain time or indefinitely. Punishment also has the purpose of reforming or teaching the criminal so that he can rectify his criminal behavior to integrate himself back to the society.

Our Criminal Code provides for three categories of penalties. These are primary penalties, secondary penalties and measures. Primary penalties can affect the property of the criminal (fines), or liberty of the criminal (imprisonment), and the life of the criminal (death penalty). There is also one special category of penalties specially designed for the young offenders. These have been dealt with in the first part of this module.

Secondary penalties are not imposed as punishment by themselves. They are imposed in addition to at least one primary penalty. The court has the discretion to impose or not to impose secondary penalties. Caution, reprimand, admonition, public apology and deprivation of rights are the secondary penalties recognized under our Criminal Code.

Measures are not strictly speaking penalties. They are ordered for the reformation or protection of the offender and for the protection of the society from the effects of criminal behaviors. The Code has three categories of measure namely: those applicable to adult offenders in special circumstances i.e. recidivists and habitual offenders and irresponsible offenders and offenders with limited responsibility; those applicable to young persons and those general measures taken for the purpose of prevention and protection.

References:

Reader Note:

1. Articles 82-89 of the Criminal Code of FDRE, 2005-Principles relating to determination of punishments
2. Articles 90-156 of the Criminal Code of FDRE, 2005Ordinary punishments applicable to Adults
3. Articles 157-177 of the Criminal Code of FDRE, 2005- Measures and penalties applicable to young persons
4. Articles 746-764 of the Criminal Code of FDRE, 2005- Penalties and measures applicable to Petty offences
5. Fasil N, - "Punishment and Society: A Developmental Approach" JEL, vol. 12, 1982
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UNIT– IV
SPECIAL PART OF PENAL CODE

Introduction:

The crucial part of the Criminal Code is the Special Part that enumerates the conducts that should be prohibited for the purpose of protecting various interests of the society in general and the individual interests of a person in particular. The special Part systematically arranges the crimes affecting different interests in a logical order. The crimes affecting the 'interests of the State' take the first place in the order as the safety, security and stability of the State are crucial for extending protection to its subjects and other inhabitants of the State. A State which is unstable and is experiencing threats from inside and outside can not devote itself to the welfare of the people. Therefore, the law that protects the interests of the State is of utmost priority in criminal law. The crimes that affect the general interests of the community occupy the next place in the Criminal Code. The crimes against the public order, morality, public health etc are found in the second place. The crimes affecting the life, personal liberty, property, marriage and honor of an individual fall in the subsequent sections of the Criminal Code. Finally, the offences of petty nature are incorporated in the Petty Code.

One of the problems for the criminal law is how to grade the seriousness of the various forms of harmful conduct because there may be considerable variations of degree in commission of the acts constituting crimes. For example, in case of crimes involving physical violation the amount of physical force used can be anything from a mere push to a brutal beating extending to even causing death of the victim, similarly sexual interference may be anything from a brief touching to a gross form of sexual violation. Therefore, the legislature has to take care of the widely felt distinctions between kinds of crimes and degrees of wrongdoing are respected by the law, and that the crimes are subdivided and labelled so as to

represent fairly the nature and magnitude of the law breaking. This is the gist of the popular principle of criminal law known as 'the principle of fair labelling'. One good reason for respecting these distinctions is proportionality: one of the basic aims of the criminal law is to ensure a proportionate response to law-breaking, thereby assisting the law's educative or declaratory function in sustaining and reinforcing social standards. This principle is sufficiently reflected in the wide range of aggravated and extenuated forms of each specific crime in the Criminal Code.

The newly incorporated crimes such as harmful traditional practices, cyber crimes, hijacking of air crafts, money laundering, crimes related to corruption of drugs indicate a remarkable progress in the development of criminal law of our country. The revisions brought about by the Revised Criminal Code makes our criminal law more comprehensive though not exhaustive. The responsibility to seriously and meticulously enforce these provisions lies in the hands of the legal professionals. The law students should seriously acknowledge and sincerely discharge this responsibility so as to build a truly democratic, safe and peaceful society.

Objectives:

By the end of this chapter the students will be able to:

- Explain the importance of understanding the relationship between different parts of the Criminal Code
- Understand the systematic and logical arrangement of the harmful conducts that are prohibited under the declaration of punishments in the Special Part of the Criminal Code
- Identify the incorporation of the Constitutional mandates in the Criminal Code
- Interpret the essential elements of various crimes and establish the crimes against the accused according to the requirements of the general principles of criminal liability

- Identify the issues in a given set of facts of hypothetical cases and find solutions for the same

Section.1. General Considerations:

1.1. The Relationship of the General and Special Parts:

The first most important thing that the criminal law students should understand is the relationship between different parts of the Criminal Code. The 'General Part' of the Criminal Code sets out the general principles of criminal liability which are common to all crimes. This part explains the meaning of criminal act, criminal intention or negligence i.e. 'the guilt' and lays down the principles following which an accused's act can be declared punishable. Further, the general part prescribes and defines the kinds of punishments and measures to be applied in each case. The concepts like probation, suspension of sentences, periods of limitation for prosecution as well as enforcement of punishment and conditions relating to pardon and amnesty are clearly provided for in the general part. All these provisions are commonly applicable to all crimes and are essential for two important purposes of a criminal trail:

- To establish the 'criminal liability' by finding the concurrence of the 'act' and the 'guilty mind' of the accused
- To determine the type and the quantum of punishment to be applied to the criminal i.e. the convict(the guilty)

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

Further, the articles prescribe the punishment considered appropriate for each crime. The two parts of the Code do not operate independently. The applicability of the General Part to the Special Part can be understood in the following ways:

a. Establishing the Commission of the Crime:

For instance, suppose 'A' is killed in what appears like a car crash, and the driver of the vehicle has been apprehended in relation to the death of 'A'. To attach criminal liability to the accused as per the requirements of Art 23, three essential elements of the crime i.e. the legal, the material and moral elements of the crime have to be established. To begin with in establishing the commission of crime, we have to find out the 'cause' of the harmful result. The material element of crime i.e. whether the 'death' in the question was the consequence of the conduct of the accused or was there any other adequate reason for the death, such as death due to nervous shock being involved in the car crash or death due to heart attack or mistaken administration of medicine which could be attributed to medical negligence etc. These things can be established by consulting the provisions of General Part i.e. Articles 23 and 24. To find out whether the alleged incident was an intentional killing of the victim or a consequence of rash and negligent driving or was it a pure accident we need to analyze the facts in the light of the principles of criminal liability provided under Articles 57-59 which define an accident, intention and negligence respectively. If the state of mind of the accused satisfies the essential conditions of 'intention' i.e. Art 58, the conduct shall be punishable as 'an intentional homicide' which is defined and made punishable under Articles 538-541 of the Special Part. If it can be established that the death was the direct consequence of the car crash which was the result of his rash and negligent driving the specific crime is 'Homicide by Negligence' made punishable under Art 543 of the Special Part. Thus, the provisions of General Part direct us to the exact provision of the Special Part to be applied to punish a criminal. Therefore, to establish the commission of a crime it is very important to understand the interrelationship between both the parts of the Code.

b. To Fulfill the Requirements of the Principle of Individualization of Criminal Punishment:

Once the criminal liability of the accused is established the next important question is to determine his sentence. The provisions of the Special Part not only define the crimes but also prescribe the appropriate punishment for the crime. However, these articles do not necessarily require the imposition of maximum sentences prescribed thereunder. The minimum and maximum amounts of punishments are provided for and the judge is supposed to look into the circumstances of each and every case and assess the sentence which best suits the occasion for the purposes of deterrence, prevention and reformation of the criminal. The principal guiding principles relating to how the sentences are calculated are found in the following important provisions:

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

2. **Article 88 of the Criminal Code**: This provision lays down very important guidelines relating to calculation of sentences including the individualization of criminal justice and further emphasize the relationship between the General and Special Parts of the Criminal Code:

- The Court shall determine the penalties and measures in conformity with the provisions of the General part of the Criminal Code and the special provisions defining crimes and their punishments (Art 88/1).

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

Art 4 second paragraph of the Criminal Code clearly implies that individualization of punishment does not violate the principle of equality.

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

3. Aggravating and Mitigating Circumstances:

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

4. Special Treatment for Young Criminals, Women and Mentally Challenged:

The provisions of Criminal Code that provide for the special treatment of these special groups also emphasize the need to make references to the General Part of the Code while deciding the cases involving women, children and the feeble minded.

1.2.Finding the Relevant Law:

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

Now the first step to find the relevant law in this case is to look for the specific crime that prohibits causing the death of the human being in the Special Part of the Code. We find the crime of homicide under Book-V, Title-I Chapter-I and Section –I and Art 538. But from the principle relating to homicide embodied in Art 538 the following two questions arise:

Was the killing 'intentional'? Or
Was it a 'negligent' killing?

To establish the state of mind of the accused towards the victim we have to consult either Art 58 or 59 as the case may be. But in any case the accused's state of mind should be established towards the harm that is caused and now is in

question. In fact the accused's act and mind both were directed towards injuring Cherinet with the stick. Since it was dark in the night he missed the aim and the unexpected interference of Mrs. Cherinet also could not be noticed by him. So now, had the blow rightly landed on Cherinet it would have caused only a common willful injury. This is what could be expected in his "foresight of consequences". Therefore, the death of the child may be considered as an accident and he should be convicted for Common Willful Injury under Art 556 which was in his intention and could not be achieved because of the circumstances beyond his control. Art 58/3 too lays down this principle: *" 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"*. Here we cannot even say that he had been negligent to avoid injury to the child because the entry of both mother and the child was unexpected and could not even be noticed due to darkness. That's how we locate the relevant law and ultimately we may land up in a provision which we might not have expected. The injury which he had in fact contemplated was never caused but he will be held liable for that and the death of the child which he neither intended nor expected cannot be attributed to him.

1.3.Interrelationships of Provisions

Understanding the interrelationship of provisions gives us an idea about the order in which different provisions relating to crimes are arranged in the code and this further simplifies our efforts to find the relevant law. In every section of the Special Part we will find the crimes being arranged in the following order:

The principle relating to the crime

Aggravated forms of the crime

Ordinary or simple form of the crime

Extenuated form of the crime

Negligent commission of the crime, in any.

Thus, we find that the crimes are arranged in an order starting for more serious forms to less serious forms. For example:

- Book-V

Title-I Crimes Against Life, Person and Health

Chapter-I Crimes Against Life

Section-I Homicide and It's Forms

Art. 538- Principle

Art. 539- Aggravated Homicide

Art. 540- Ordinary Homicide

Art. 541- Extenuated Homicide

Art. 542- Instigating or Aiding another to Commit Suicide

Art. 543- Homicide by Negligence

All through the Special Part of the Criminal Code we find this kind of systematic organization of the provisions which helps the easy identification of the provision we need to consult in a given case.

1.4Cross-References within the Code

This is another organizational feature of the Criminal Code of Ethiopia. In the Code we find a certain article referring to other articles. We find this on two different occasions:

a.To Find Complete Picture of Crime or a Concept:

The articles referred to in a certain article are important to understand that article otherwise the article may be obscure or sometimes the definition and meaning of the crime may remain incomplete. For example:

- **Conspiracy:** To get a complete picture of the concept of criminal conspiracy under the Code we need to make several cross references.

a. Art. 38/1: Defines conspiracy in general and it refers to Art. 84/1/d from which we understand that is to be considered as a 'general aggravating circumstance.

b. Art. 38/2: Refers to specific kinds of conspiracies which have been defined by the articles it mentions at the end, namely, Arts. 257, 274, 300 and 478.

Now, when we go to Art 257 it makes reference to Art 238-242 and 246-252 and by referring to these provisions we understand that participating in *conspiracies* to commit the crimes against the Constitution and the State specifically defined in those articles are punishable under Art. 257/b and the quantum of punishment in such cases also we find at the end of the same article.

Similarly, Art 300 defines a special kind of conspiracy i.e. Conspiracy to Raise Mutiny. Likewise, Art 478 also needs to be consulted to get the complete idea of the criminal conspiracy as it has been covered by the Code. Art 478 deals with another special type i.e. conspiracy to prepare or commit a serious crime against public security or health, the person or property or persuade another to join such conspiracy.

Thus, cross references within the Code are very important and should be very carefully followed; otherwise it could lead into improper applications of law and thereby serious miscarriage of justice might result in.

b. Where one provision serves in some respect as a general article to a series of articles:

A general rule applicable to a series of provisions may be laid down in an article which makes it important to consult that article whenever we deal with any of such provisions it refers to. For example, Art 628 deals with 'Other Grounds of Aggravating the Crime' in relation to rape and other sexual outrages. The article

starts with the statement “In all cases of rape or sexual outrages (art 620-627), the punishment shall be…..”

Therefore, the aggravating circumstances enlisted thereunder have to be read into every related provision in the series. This is the other important purpose of cross-references within the Code which cannot be ignored.

Where More than One Special Part Provisions Applies to Aa Particular Criminal Act:

This situation relates the concurrence of crimes. The provisions relating to concurrence of crime mainly Art 61-66, 85, 184-187 are very complex in nature. While dealing with these provisions the following things have to be kept in mind:

- The fact that the other provisions applicable might provide for a higher punishment, and
- The purpose, scope or meaning of the article we are dealing with under the Special part i.e. the crime committed by the accused.

For instance, ***A*** and ***B*** got into a fight. ***A*** hit ***B*** by his fist and ***B*** fell on a rock and his skull go fractured and died. Now ***A*** is charged under Art 540 for committing Ordinary Homicide. Here there is a simultaneous breach of provisions relating to causing willful injuries Arts 555 or 556 as the case may be and the provision punishing ordinary homicide Art. 540. The question is should he be punished for causing death of his victim or only for causing injury? Here in this case the *foresight* of the accused and his *desire* to kill his victim are highly doubtful. Here there is a possibility of the judges jumping into conclusions, as they usually react with strong feelings against killings and may be sometimes even hasty in punishing the criminals with long terms of imprisonment. The purpose of the criminal law is to punish only for the contemplated or reasonably foreseen consequences. Here in the given case as the foresight of the accused may reasonably be related to the “injury” rather than to the “death” of the victim application of Art 555 or 556 would be justified.

Therefore, due care has to be taken while deciding the cases involving application of more than one Special Part provisions.

Review Questions:

1. How are the different parts of the Criminal Code interrelated?
2. How do you find the provision relevant to the facts of the case at your hand?
3. What is 'individualization of punishment'? How is it incorporated in the provisions of the Criminal Code?
4. How do you go about finding the most suitable provision when more than one provision of the Special Part applies to the conduct in question?

Section 2. Crimes against the State:

3.1 Treason And Its Kinds:

TREASON (Fr. *trahison,* Lat. *traditio*), a general term for the crime of attacking the safety of a sovereign state or its head. The law which punishes treason is a necessary consequence of the idea of a state, and is essential to the existence of the state. Most, if not all, nations have accordingly, at an early period of their history, made provision by legislation or otherwise for its punishment.

In law, **treason** is the crime of disloyalty to one's nation or state. A person, who betrays the nation of their citizenship and/or reneges on an oath of loyalty and in some way willfully cooperates with an enemy, is considered to be a **traitor**. ***Oran's Dictionary of the Law*** (1983) defines treason as: "...[a]...citizen's actions to help a foreign government overthrow, make war against, or seriously injure the [parent nation]." In many nations, it is also often considered treason to attempt or conspire to overthrow the government, even if no foreign country is aided or involved by such an endeavour.

Traitor may also mean a person who betrays (or is accused of betraying) his own political party, family, friends, ethnic group, religion, or other group to which he may belong. Often times, such accusations are controversial and disputed, as the person may not identify with the group of which they are a member, or may otherwise disagree with the group leaders making the charge. See, for example, race traitor

At times, the term "traitor" has been levelled as a political epithet, regardless of any verifiable treasonous action. In a civil war or insurrection, the winners may deem the losers to be traitors. Likewise the term "traitor" is used in heated political discussion – typically as a slur against political dissidents, or against officials in power who are perceived as failing to act in the best interest of their constituents. In certain cases, as with the German Dolchstoßlegende, the accusation of treason towards a large group of people can be a unifying political message.

Figures in history that are renowned for acts of treachery have subsequently had their names become synonymous with the word "traitor". Some examples are Judas, Benedict Arnold, Pétain and Quisling.

- **Misprision of Treason:**
  Misprision of treason consists in the concealment or keeping secret of any high treason. It is a crime found in many common law jurisdictions around the world, having been inherited from English common law. It is committed by someone who knows a treason is being or is about to be committed but does not report it to a proper authority. It is therefore unusual in that it is a criminal offence which may be committed through inaction.

- **Petty Treason or Petit Treason:**
  Historically, in common law countries high treason was differentiated from petty treason, which was the act of killing a lawful superior (such as a servant killing

his master or mistress). It was, in effect, considered a more serious degree of murder. As jurisdictions around the world abolished petty treason, the concept of petty treason gradually faded, and today the use of the word "treason" generally refers to "high treason."

Petty Treason was, in English common law, any betrayal of a superior by a subordinate. It differed from the better-known high treason in that high treason can only be committed against the sovereign, and the legal defence of benefit of clergy was available for petty treason until 1496 (it was never available for high treason). In the United Kingdom petty treason ceased to be a distinct offence from murder in 1828. It has also been abolished in other countries.
Petty treason was essentially an aggravated form of murder. It consisted of:

1. a wife killing her husband,
2. a man (whether a priest or not) killing his prelate, or
3. a servant killing his master or mistress.

The element of betrayal is the reason why this crime was considered worse than an ordinary murder; medieval and post-medieval society rested on a framework in which each person had his or her appointed place and such murders were seen as threatening this framework. Many people had somebody subordinate to them and feared the consequences if the murder of superiors was not punished harshly. While the penalty for murder was simply hanging, a man convicted of treason was hanged, drawn and quartered.

The most common form of petty treason was a wife murdering her husband and, up until the abolition of this form of punishment, husband-murderers were burned at the stake. The law offered a modicum of mercy to women who were to be executed in this fashion: the executioner was equipped with a cord passed around the victim's throat and, standing outside of the fire, would pull it tight, strangling her before the flames could reach her. In a few instances, things went wrong, with

the cord burning through and the victim burning alive; the ensuing scandals were part of what led to the abolition of this punishment and its substitution by hanging in 1790.

Apart from the difference in punishment, the common law defence of provocation, by which a verdict of murder could be reduced to manslaughter, was not available in treason trials.

- **Treason under Criminal Code of Ethiopia**

  Articles 248-250 of the Criminal Code of Ethiopia define three types of treasons namely, *high treason, treason and economic treason.*

1. **High Treason: Art 248**

   High treason is criminal disloyalty to one's country. Participating in a war against one's country, attempting to overthrow its government, spying on its military, its diplomats, or its secret services for a hostile and foreign power, or attempting to kill its head of state are perhaps the best-known examples of high treason. High treason requires that the alleged traitor have obligations of loyalty in the state they betrayed, such as citizenship, although presence in the state at the time is sufficient. Foreign spies, assassins, and saboteurs, though not suffering from the dishonor associated with conviction for high treason, may still be tried and punished judicially for acts of espionage, assassination, or sabotage, though in contemporary times, foreign spies and saboteurs are usually repatriated following capture.

   High treason Under Art 248 of the Criminal Code requires the fulfillment of the following essential elements:

   1. To establish the crime of treason the accused should have been…

   a. An Ethiopian national; or

   b. A person who has been officially entrusted with the protection of Ethiopian national interests.

2. And any of the following activities must be established against him:

A. Taking up arms or engaging in hostile acts against Ethiopia; or

B. For the purpose of ensuring or promoting the enemy's success in any manner whatsoever, he has dealings with or keeping a secret correspondence with:

i) A power at war with Ethiopia; or

ii) A person or body acting on behalf of such power, or

3. That he has delivered to the enemy whether directly or indirectly, an object, armament, plan, document or resources of any kind used for the national defence; or,

4. That he has aided the enemy by rendering services or delivering supplies to him.

The article declares all kinds of dealings, the direct and indirect participation in the activities above and also the aiding of such activities to be high treason.

- **Punishment for High Treason:**

1. **Rigorous imprisonment from 5-25 years** is the normal penalty for high treason.

2. **Life imprisonment or death penalty** may be awarded in cases of high treason of exceptional gravity.

2. Treason: Art 249

High treason is also called as an 'act of war' as the acts included under the definition of high treason are essentially linked with situations related to war. Note that while our law and the laws of certain other countries like Canadian law describes two separate offences of *treason* and *high treason*, both of these in fact fall in the historical category of high treason.

Treason under Art 249 of the Criminal Code requires the fulfillment of the following essential elements:

1. To establish the crime of treason the accused should have been…

   a. An Ethiopian national; or

b. A person who has been officially entrusted with the protection of Ethiopian national interests.

2. And should have been engaged in anyone of the following activities:

a. Disclosing, delivering, communicating or making accessible,

b. Any secret, any document, negotiations or decision which the interests of Ethiopia, demand shall not be divulged,

c. To a foreign state, political party, organization, or agent. or

d. Manifestly sacrificing the interests he is called upon to defend those of the other power while acting as a representative of the State or while entrusted with the conduct on its behalf of negotiations with a foreign power; or

e. Destroying, suppressing, purloining (stealing something in breach of trust of another) causing to disappear or falsifying documents, papers or means of proof relating to the security, independence or vital interests of the State.

From the above ingredients of the crime of treason it becomes clear that, unlike high treason the forbidden conduct need not necessarily relate to the acts of war.

- **Punishment for Treason:**

There are three alternative penalties suggested for treason under Art 249 having regard to the seriousness of the consequences:

1. **Rigorous imprisonment not exceeding 15 years** is the normal sentence prescribed for the crime.

2. **Rigorous imprisonment from 10 to 25 years,** in cases of exceptional gravity directly endangering the existence or independence of the State.

3. **Simple imprisonment for not less than six months to five years rigorous imprisonment:** Where the criminal has acted negligently a penalty not less than six months may be imposed for treason. This may be increased up to five years rigorous imprisonment in cases of exceptional gravity.

3. Economic Treason: Art 250

This raters to species of treason which is intended to protect the economic structure of the country. Unauthorized disclosures and communications relating to economic negotiations of the State are prohibited under this provision.

Economic Treason under Art 250 of the Criminal Code requires the fulfillment of the following essential elements:

1. To establish the crime of treason the accused should have been…

   a. An Ethiopian national; or

   b. A person who has been officially entrusted with the protection of Ethiopian national interests.

2. And should have been engaged in anyone of the following activities:

   a. Disclosing, delivering, communicating to others or making others accessible to others (unauthorized disclosures) any of the public or abroad economic negotiations, decisions, facts, or documents kept secret in the higher interests of Ethiopia or in those of national defence; or

   b. Disclosing or delivering objects, means or other things of such a nature entrusted to him; or

   c. Participating in or subscribing to a loan floated by a country in a state of war with Ethiopia.

- **Punishment for Economic Treason:**

  Article 250 provides for different penalties for intentional commission of the economic treason and negligent commission of the same in the following way:

  1. **Rigorous imprisonment not exceeding 10 years,** in normal cases.
  2. **Rigorous imprisonment extending up to 20 years,** in more serious cases.
  3. **Simple imprisonment of not less than three months,** in negligent cases.

- **List Of People Convicted Of Treason:**

  Some countries, such as the U.S., have a high constitutional hurdle to conviction for treason, whilst many countries, especially absolute monarchies and dictatorships, have less stringent definitions.

Armenia: **Meruzhan Artzruni**, Lord Prince of **Vaspurakan** (? - 369), for conspiring with Persian King Shapuh II against his liege-lord, Armenian King Arshak II, whom he betrayed to Persia. He was captured by Arshak's son King Pap and executed.

Austria: **Count Lajos Batthyány de Németújvár**, for involvement in the **1848 Hungarian Revolution**.

Austria-Hungary: **Nedeljko Čabrinović, for assassinating Archduke Franz Ferdinand**; **Vaso Čubrilović, for assassinating Archduke Franz Ferdinand ; Veljko Čubrilović, for assassinating Archduke Franz Ferdinand; Dragutin Dimitrijević, for assassinating Archduke Franz Ferdinand; Trifko Grabež, for assassinating Archduke Franz Ferdinand; Danilo Ilić, for assassinating Archduke Franz Ferdinand; Cvjetko Popović, for assassinating Archduke Franz Ferdinand; Gavrilo Princip, for assassinating Archduke Franz Ferdinand; Nazario Sauro, for fighting for Italy in the First World War.**
Canada: **Louis Riel, Métis leader who opposed Canada's expansion into the west; Andrew Westbrook, for fighting for the United States during the War of 1812.**

China**: Zhou Fohai and Chen Gongbo**
Republic of Congo: Pascal Lissouba, former President of the Republic of Congo

Czechoslovakia: Karel Čurda

East Germany: Werner Teske

England: (For those after 1707, see Great Britain and United Kingdom) Anthony Babington, for leading the Babington Plot to overthrow Queen Elizabeth I; Anne Boleyn, wife of King Henry VIII; Henry Brooke, 11th Baron Cobham, who was implicated in the Main Plot against the rule of James I of England; Charles I, who

was executed by Parliament for treason, on the grounds that he had waged war against the people. When his son Charles II regained the throne, he had most of the people responsible for his father's execution prosecuted for treason themselves, as killing the King is treason; Robert Devereux, 2nd Earl of Essex, who led a failed coup d'état against Queen Elizabeth I; Guy Fawkes, for involvement in the Gunpowder Plot; Dafydd ap Gruffydd, for revolting against King Edward I; Catherine Howard, wife of King Henry VIII ; Robert Kett, for leading the Norfolk Rebellion in 1549; Thomas More, Lord Chancellor, for refusing to accept Henry VIII as Supreme Governor of the Church of England; Sir Walter Raleigh ; Lord Russell; William Stanley; William Thomas, member of Edward VI's privy council, implicated in Wyatt's rebellion; Chidiock Tichborne, for involvement in the Babington Plot; William Wallace, for leading the Scottish independence movement against King Edward I; Perkin Warbeck, for pretending and leading a rebellion against King Henry VII.

Fiji: George Speight, for plotting the Fiji coup of 2000.

France: Robert Brasillach; Marcel Bucard; Louis-Ferdinand Céline; Joseph Darnand, for leading the Vichy French Milice; Émile Dewoitine (Plane industrialist; 20 years forced labour sentence for intelligence with the enemy and attack on state security); Pierre Laval, for being Prime Minister of Vichy France; Michel Ney; Henri Philippe Pétain; Marie Antoinette; Louis XVI.

Great Britain: (For those before 1707, see England and Scotland. For those after

Germany: Adolf Hitler, for his role in the Beer Hall Putsch in 1923.

1800, see United Kingdom); Archibald Cameron of Locheil, for his part in the 1745 Jacobite rising; William Maxwell, 5th Earl of Nithsdale, for supporting the Jacobite Rebellion of 1715; Thomas Paine,[1] for publishing anti-British revolutionary literature; Charles Radclyffe, for supporting the Jacobite Rebellion of 1715.

Greece: Georgios Hatzanestis.

Hungary: Imre Nagy, Prime Minister of Hungary, for leading the 1956 Hungarian Revolution; Count Fidel Palffy; László Rajk; Andras Szalai; Tibor Szonyi

Israel: Mordechai Vanunu, for revealing details of Israel's nuclear weapons program to the British press in 1986.

Japan: Kotoku Shusui, Japanese anarchist; Ozaki Hotsumi, journalist and Soviet agent

Kenya: Hezekiah Ochuka, Kenya airforce soldier, for conspiring to overthrow the government of Daniel Moi in 1982

Kuwait: Alaa Hussein Ali, for heading the Iraqi puppet government during the Gulf War.**Netherlands**: Anton Mussert, for leading the Dutch puppet regime under Nazi occupation.

New Zealand: Hamiora Pere, for fighting against the British government in Te Kooti's War.

Norway: Vidkun Quisling, for being Minister President of Nazi-occupied Norway during World War II. The word 'quisling' now means 'traitor'. ; Knut Hamsun Norwegian Nobel Prize winning writer, for supporting the Nazis; Arne Treholt Norwegian diplomat, turned by the KGB.

Russia: Oleg Kalugin ; Mikhail Shein

Scotland: (For those after 1707, see Great Britain and United Kingdom); Robert Baillie, for involvement in the Rye House Plot; Alexander Gordon, for barring Queen Mary I from entering Inverness, on the orders of George Gordon, 4th Earl of Huntly; William Ruthven, 1st Earl of Gowrie, for leading the Raid of Ruthven on King James VI; Murdoch Stewart, 2nd Duke of Albany; Patrick Stewart, Earl of Orkney, for usurping King James VI on the Orkney Islands.

Soviet Union: Sergei Bokhan GRU recruited by CIA; Viktor Gundarev KGB, defected to USA, 1986; KGB Lieutenant Colonel Valery Martynov , resource in place for USA; KGB Major Sergei Motorin recruited by FBI ; Oleg Penkovsky; Leonid Poleschuk KGB, worked for CIA; General Dmitry Polyakov sold secrets to the USA; Pyotr Popov; Gennady Smetanin KGB; Adolf Tolkachev, worked with CIA, executed 1986 ;Gennady Varenik KGB, worked for CIA; Andrey Vlasov Genrikh Yagoda.

Spain: Camilo Torres Tenorio, for leading the independence movement in Ecuador; Francisco Xavier Mina, for fighting against the Spanish government in the Mexican War of Independence.

Sweden: Johann Patkul, protested the land-recovery project of Charles XI of Sweden and, when unsuccessful, sided with Augustus the Strong and tried to wrest Swedish Livonia from Sweden.

Switzerland: Jean-Louis Jeanmaire, sentenced to 18 years of prison (released after 12 for good behavior) for leaking information to the Soviet KGB.

United Kingdom: John Amery, for trying to recruit soldiers and broadcast propaganda for Nazi Germany; Michael Bettaney, for passing MI5 secrets to the Soviet Union; Roger Casement, for negotiating with Germany to provide arms to Irish revolutionaries during the First World War for use in the Irish Easter in 1916 rising; hanged in August in 1916; Participants in the 1916 Easter Rising in

Ireland. Patrick Pearse, Thomas J. Clarke, Thomas MacDonagh, Joseph Mary Plunkett, Edward (Ned) Daly, William Pearse, Michael O'Hanrahan, John MacBride, Éamonn Ceannt, Michael Mallin, Cornelius Colbert, Seán Heuston, Seán Mac Diarmada, James Connolly, and Thomas Kent were shot by firing squad in May 1916; William Joyce, alias 'Lord Haw-Haw', for broadcasting Nazi propaganda to the United Kingdom during World War II; Arthur Thistlewood, John Brunt, William Davidson, James Ings and Richard Tidd, participants of the 1820 Cato Street Conspiracy; Duncan Scott-Ford, for giving information to the Nazis.

United States: Robert Henry Best, convicted of treason on April 16, 1948 and served a life sentence; John Brown, convicted of treason against the Commonwealth of Virginia; Iva Toguri D'Aquino, who is frequently identified with "Tokyo Rose." Subsequently pardoned by President Ford; Governor Thomas Dorr 1844, convicted of treason against the state of Rhode Island; see Dorr Rebellion; Mildred Gillars, "Axis Sally," convicted of treason on March 8, 1949, served 12 years of a 10- to 30-year prison sentence; Hans Max Haupt, convicted of treason and sentenced to life in prison for aiding his son who was a spy for Germany during the Second World War; Tomoya Kawakita, sentenced to death for treason, but eventually released by President Kennedy to be deported to Japan; Martin James Monti, USAAF pilot, convicted of treason for defecting to the Waffen SS in 1944.

Zimbabwe: Ndabaningi Sithole, for conspiring to kill Robert Mugabe.

Revision Questions:

1. Define '*treason'* and *'traitor'.*
2. Distinguish between different kinds of treason enumerated by the Criminal Code of Ethiopia.
3. Write short notes on:
   a. Misprision of treason

b. Petty treason.

c. Economic Treason

Espionage:

- **Espionage-Meaning and Definition:**

Espionage is the practice of obtaining information about an organization or a society that is considered secret or confidential (spying) without the permission of the holder of the information. What differentiates espionage from other forms of intelligence work is that espionage involves obtaining the information by accessing the place where the information is stored or accessing the people who know the information and divulging it through some kind of subterfuge.

Espionage is usually thought of as part of an institutional effort (i.e., governmental or corporate espionage). The term espionage is most readily associated with state spying on potential or actual enemies, primarily for military purposes, but this has been extended to spying involving corporations, known specifically as industrial espionage. Many nations routinely spy on both their enemies and allies, although they maintain a policy of not making comment on this. *Black's Law Dictionary* (1990) defines espionage as: "...gathering, transmitting, or losing...information related to the national defense."

A '***spy'*** is an agent employed to obtain such secrets. The term intelligence officer is also used to describe a member of the armed forces, police officer or civilian intelligence agency who specializes in the gathering, fusion and analysis of information and intelligence in order to provide advice to his government or another organization. Spymaster is a term often used in literature for the superior of a spy ring.

- **Espionage and Spies:**

  Espionage occurs in societies at peace and at war. Nations at peace use spies to gather information on a country's military preparations and plans for war. During war espionage is used to gather information about opposing armies and to mislead opponents through counterintelligence. Those engaged in spying risk imprisonment and death if convicted of treason.

- **Espionage Under the Criminal Code: Art. 252**

  The crime of espionage under the Ethiopian Criminal Code requires the fulfillment of the following two essential elements:

  1. To establish the crime of espionage the accused should have been…
     a. Acting on behalf of a foreign state, political party or organization, and
     b. To the detriment of Ethiopia or of its institutions, organization or nationals
  2. And should have been engaged in anyone of the following activities:

a. Organizing, engaging in or encouraging a political, diplomatic, military or economic intelligence service, or

b. Recruiting or employing another person for such service; or

c. Collecting, transmitting, delivering or making available information of the above said nature which is secret or is not a matter of public knowledge, to an official service or to a private service or to its agents.

- **Punishment for Espionage:**

Once the crime of espionage is established, Art 252 of the Criminal Code proposes five different types of sentences depending on the serious nature of consequences.

5. **Death Penalty,** where the vital interests of Ethiopia are at stake.
6. **Rigorous imprisonment for life**, in cases of exceptional gravity, and especially in the case of, political, diplomatic or military espionage carried out in the time of war or danger of war.

7. **Rigorous imprisonment not exceeding 20 years,** where the information divulged, is calculated directly to endanger the internal or external security of the State.
8. **Rigorous imprisonment not exceeding 10 years,** where the espionage is harmful to the State or to the public interest.
9. **Rigorous imprisonment not exceeding 5 years,** Where the espionage is harmful to private persons or undertakings.

Revision Questions:

1. What is '*espionage'*? How does it differ from *'treason'*?
2. Who is a *'spy'*? Are these the ones who can be tried for espionage?
3. List the different sentences designed by the Criminal Code for the crime of espionage.

Section. 3. Crimes Against life:

3.1. Right to Life Under the Constitution and the Constitutionality of the 'Death Penalty':

Note: Refer to Unit III Section. 2.1.3.3.

- **Right to Life:**

Right to life is a phrase that describes the belief that a human being has an essential right to live, particularly that a human being has the right not to be killed by another human being. The concept of a right to life is central to debates on the issues of *capital punishment, euthanasia, self defense, abortion* and *war*. The right to life is enshrined in Article 3 of the United Nations' Universal Declaration of Human Rights and in Article 6 of the International Covenant on Civil and

Political Rights, making it a legally enforceable right in every United Nations member state:

> " Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

—Article 6.1 of the International Covenant on Civil and Political Rights

Every human being has the inherent right to life and this right must be protected by law. However, this right is not as sacrosanct and inviolable as it sounds. The main principle in human rights law is that no-one shall be arbitrarily deprived of life meaning that states can take human life providing laws and procedures are followed. There are a number of situations where a state may deprive persons of their lives without breaching international human rights law. In some cases, these exceptions are based on the premise that violence used in self-defence is justified. Examples include, imposition of the death penalty; …providing it is a result of a judicial process and does not contravene certain minimum safeguards imposed by human rights law; deaths resulting from lawful warfare i.e. war which meets the standards of international humanitarian law and that does not target protected persons e.g. civilians and prisoners of war; some human rights documents (the European Convention on Human Rights, for example) give other situations where deprivation of life does not contravene the convention. Deprivation of life resulting from the use of force which is no more than absolutely necessary; includes:

a. In defence of any person from unlawful violence;

b. In order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c. In action lawfully taken for the purpose of quelling a riot or insurrection.

Human rights law is silent on other controversial areas concerning the right to life, namely abortion and the right of the unborn child and euthanasia.

- **Homicide-Meaning of the Term:**

Homicide is a neutral term. It describes an act with no moral judgment. Murder is the term that is non-neutral. It describes an act with moral judgment. The law of homicide has the most complex degree (grading) system of any area in Criminal Law. This grading system is reproduced below. The first two (2) fall in a category called "perfect" defenses. The last four (4) fall in a category called "imperfect" defenses. Perfect defenses always involve justifications and excuses.

1. Justifiable Homicides:

These are "no fault" homicides. They ordinarily involve the death of someone under circumstances of necessity or duty (commanded or authorized by law). Examples would be self-defense, capital punishment, and police shootings.

2. Excusable Homicides:

These are misadventures, accidents, or acts of insanity. They ordinarily involve acts of civil fault, error, or omission. This is not enough fault to be criminal negligence. There's a legal defense to this act.

3. Criminal or Culpable Homicides:

a. First Degree Criminal Homicide (Murder):

These are acts involving the death of someone in "cold-blood" or by "lying in wait". They are distinguishable a mental state of "purposely" which is having three (3) elements: (a) premeditated -- meaning fixed or obsessed; (b) deliberate -- meaning "cool"; and (c) malicious -- meaning scheming or clever. Also, the crime of felony murder (someone dies during commission of a felony) is automatically first degree homicide.

b. Second Degree Criminal Homicide (Murder):

These are acts involving the death of someone in the "heat of passion". It's basically a catchall category today for acts such as shooting bullets up in the air, but historically, a number of older terms were associated with this grade; terms such as the "year and a day" rule (for when the death had to occur) and the idea of "malice aforethought" (which meant wicked, evil, depraved, spiteful, or with depraved heart). Of these terms, only the phrase "depraved heart murder" is still being used. Heat of passion murder doesn't require provocation, but it still requires proof of intent.

c. Voluntary Manslaughter:

Manslaughter, in general, involves acts involving the death of someone without thinking. It involves "sudden passion". There's no premeditated deliberation. The requirement is "adequate provocation" and there are three (3) tests: (a) the person loses the ability to reflect coolly; (b) there's no sufficient time to cool off; or (c) the provocation must have caused action. Voluntary manslaughter is often what the jury will return as a verdict when it is deadlocked on the homicide charges. Historically, there are some interesting concepts associated with this grade, such as the *in flagrante* or paramour rule (which is the only exception to the mere words rule, which rules out words as provocation, if the spouse taunts).

d. Involuntary Manslaughter:

This is the crime of Criminal Negligence, sometimes called misdemeanor manslaughter. It's the least serious offense in the law of homicide. It typically involves acts related to public safety, such as operating a motor vehicle, railroad, or bus. Specifically, it involves the careless use of firearms, explosives, animals, medicine, trains, planes, ships, and automobiles. Many states have sorted out a separate category called Vehicular Manslaughter for cases involving automobiles. It's also interesting to know that, by tradition, most prosecutors will draw the line at this point (meaning it's all they'll prosecute for) for cases of corporate crime.

3.2. Homicide and its Forms Under The Criminal Code of Ethiopia: Arts-538-544

- **Principle: Art 538**

The general principle relating to the crime of homicide is incorporated in Art 538 of the Criminal Code. According to this provision '*Homicide*' is:

1. Causing death of a human being by weapons or means whatsoever
2. Such death should have been caused with *intention* or by *negligence*

Thus, there are two main types of homicides, namely, intentional homicide and negligent homicide.

- **Intentional Homicide:**

Under the Criminal Code there are three kinds of homicides that require the proof of 'intention' as the moral ingredient of the crime, namely Aggravated Homicide (Art 539), Extenuated Homicide (Art 541) and Ordinary Homicide (Art 540). The type of homicide that is defined under Art 543 is the only one which makes a person punishable for causing death negligently. The general principle laid down in Art 538/2 requires that to be punishable a homicide should be brought under any of these provisions. It's very important that the essentials of each of these forms of homicides must be precisely and meticulously distinguished, otherwise it may lead to great miscarriage of justice as the punishment to this most serious crime against the sanctity of life itself could once again raise the question of life and death. Therefore, it's of vital importance to examine each one of them in detail.

Aggravated Homicide: Art.539

This type of homicide is also known as the homicide in the first degree. The following are the essential elements of this crime:

1. Causing the death of a human being

2. Accompanied by any of the aggravating circumstances that indicate or suggest that the criminal is exceptionally cruel, abominable or dangerous person, such as,

a. Premeditation, motive, weapon or means, or
b. Any other general aggravating circumstance enlisted under Art 84, or
c. Any other aggravating circumstances that are not expressly provided but duly established under Art 86 by clearly stating the reasons warranting such aggravation (Art 539/1), or

d. Homicide being committed by a member of a band organized (a gang formed especially with a criminal purpose) for carrying out homicide or armed robbery; or

e. If the homicide is committed to facilitate another crime or to conceal a crime already committed.

The mere presence of any of the above listed aggravating circumstances is not sufficient for the application of Art. 539. But any such circumstance should indicate or suggest that the criminal is exceptionally cruel, abominable or dangerous person. Otherwise, if such element is any less serious than what is described under this article, the case is likely to fall under the scope of ordinary homicide under Art.540.

- **Premeditation:**

This is the idea of planned action in advance, coolness. The phrase generally refers to anything "cold-blooded". It's defined as "a careful thought and weighing of consequences, a judgment or plan, carried out coolly and steadily, according to a preconceived plan". "Planning" in the long-term is *not* required. A few seconds will suffice at law, as long as there's sufficient maturity and mental health. There's also something called the deadly weapon doctrine which allows the inference of intent if a deadly weapon is used.

The quality of premeditation that is required under the Art. 539 is that it should be of such a mean nature that it suggests that the criminal is exceptionally cruel, abominable or dangerous person. Therefore, every case of premeditated

killing may not necessarily fall under this article. A premeditation of lesser depravity may take the case to be treated under Art. 540 as an ordinary homicide.

- **Motive:**

Motive is the prompting force behind the intention i.e. it is the longing for the object desired which sets the volition in motion. The expectation that the desired motions will lead to certain consequences is the *intention*. Thus, the intention is not a desire whilst motive is. The terms *intention* and *motive* must be precisely distinguished. We may try to understand by this an illustration. For instance, in beating his victim the person in his act of striking intends to cause him pain. Causing pain may be to satisfy his revenge or cripple him against combating with the accused in a race or merely to indicate his superior strength. Each of these interests is called *motive*. It is because of this reason he does the act. *Intention* is the foreknowledge of the act, coupled with the desire of it, such foreknowledge and desire being the cause of the act, in as much as they fulfill themselves through the operations of the will. An act is *intentional* if, and as far as, it exists in fact, the idea realizing itself in the fact because of the desire by which it is accompanied.

Motive generally serves as a clue to establish the intentions of the accused. Motive though not directly relevant to establish the criminal liability, becomes an important consideration for fixing the quantum of punishment. For example where a person kills another under serious provocation, *the provocation* if adequate becomes a mitigating circumstance, while the other who kills for the sake of money, the motive being *making money* by killing people is a serious aggravating circumstance and he should be punished more severely for his socially dangerous motive.

- **Weapon or Means:**

As per the general principle found in Art 538/1, once the death of a human being is caused *'no matter what the weapon or means used'* the crime of homicide is complete. However, the deadly nature of the weapon and the cruel means used to cause the death are relevant to bring him under Art 539 and make him liable to the aggravated punishment. For example, where a criminal uses a sword and causes the death of his victim by causing several wounds on the body and cuts his body into several pieces to facilitate the packing of the dead body for easy disposal, he surely fits into the description of exceptionally cruel, abominable and dangerous person and should be punishable for aggravated homicide.

- **Punishment for Aggravated Homicide:**

The Criminal Code prescribes different sentences for aggravated homicide. These are:

1. Rigorous imprisonment for life <u>or</u> death, as suggested by Art 539/1. This provision gives discretion for the judge to choose between life and death of the criminal. This is a very high responsibility on the judge that is to be exercised with a great care and caution. This means that even after establishing the case to be clearly falling under the aggravated homicide the punishment may vary from life imprisonment to death. This has to do with the fundamental rights of the convict. The one who gets the sentence of rigorous imprisonment for life apparently looses his liberty for the rest of his life but he still has life…and there may be a hope for variation of his sentence, a conditional release by way of probation, so on and so forth. But in case of the convict who is sentenced to death …it is a final and irrevocable. Therefore, the judge has to be extremely careful and give sufficient reasoning for awarding a death sentence under this provision.

2. A mandatory death sentence, under Art 539/2. Where the criminal, while serving a sentence of rigorous imprisonment for life, has committed an aggravated homicide, the only sentence prescribed by the Code is 'death'. The only requirement under this sub-article is that the homicide must be proved in terms of

Art 539/1. The fact that the sentence of imprisonment for life had no effect on his behaviour and is therefore beyond reformation seems to be the justification for this mandatory death sentence.

3.2.2. Extenuated Homicide: Art 541

The second type of *intentional homicide* is 'extenuated homicide'**.** Within the meaning of Art 541 the following circumstances make the homicide an extenuated one:

- Causing death *intentionally* by exceeding the limits of necessity (Art 75), or
- Causing death *intentionally* by exceeding the limits of legitimate defence (Art 78), or
- Causing death *intentionally* following gross provocation, or
- Causing death *intentionally* under the shock of surprise, or

3. Causing death *intentionally* under the influence of violent emotion or intense passion that is:

a. made understandable and

b. in some degree excusable by the circumstances

1. Homicide in Excess of nNcessity: Art 541/1

Necessity is a situation in which a person is faced with a choice between two unpleasant alternatives, one involving his committing a breach of the letter of the criminal law and the other some evil to himself or others.

Essential Conditions for the Defence of Necessity:

- A legal right of the person performing the act or a third party should have been in danger,
- The act should have been performed to protect such right,
- The said danger should have been 'imminent and serious',
- The danger could not have been otherwise averted.

Illustration:

In a great fire, ***A,*** pulls down houses in order to prevent the fire from spreading to the other houses in the vicinity. He does this with the intention in good faith of saving human life or property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to justify ***A***'s act, ***A*** is not guilty of any crime.

- **Exception:**

Art 75 second paragraph says that no defence shall be given to persons having special professional duty to protect life or health, if they perform acts in similar conditions that result in injuries. It appears that as they are supposed to posses special skills to save people from such dangerous situations their acts should not bring about injuries! The article provides for reduction of punishment without restriction, in such cases. However, the exception seems to be a sort of redundancy in the light of Art 69 which deals with the acts done by professionals.

Necessity excuses the doing of an evil so that good may result. It permits the infliction of a lesser evil in order to prevent a greater evil. It is intended to give legislative sanction to the principle that where on a sudden and extreme emergency, one or other of the two evils is inevitable it is lawful so to direct events that the smaller one shall occur. This is known as the doctrine of *choice of evils* in English law.

Illustration: ***A,*** the captain of a steam vessel, suddenly and without any fault or negligence on his part, finds himself in a position that, before he can stop his vessel, he must inevitably run down a boat, ***B***, with 20 or 30 passengers on board unless he changes the course of his vessel, and that, by changing his course he must incur risk of running down a boat ***C*** with only 2 passengers on board, which he may possibly clear. Here, if ***A*** alters his course without any intention to rundown the boat ***C*** and in good faith for the purpose avoiding the danger to the passengers in the boat ***B***, he is not guilty of a crime, though he may run down the boat ***C*** by doing an act which he knew was likely to cause that effect, if it be

found as a matter of fact that the danger which he intended to avoid was such as to excuse him in incurring the risk of running down the boat ***C***.

- **Excess of Necessity:**

Excess of necessity exists in three cases as provided under article 76 of the Criminal Code, These are:

- First, excess of necessity exists when a defendant who is required to abandon his right inflicts harm on another person. In this case, the doing of harm becomes unnecessary. Whether a person should have abandoned his right or not is to be determined by taking into account the circumstances of the case. The abandonment of the legal right is required when the threatened harm to the right of the person in danger is less than the harm that may be caused by the protective act.

- Secondly, excess of necessity exists when the accused exceeds what is necessary to avoid a serious and imminent danger. In this case, the accused uses harmful means to protect legal rights that he could not reasonably be required to abandon. Thus, if a fire starts on Farah's car, he is not justified in killing Guled who refused to give Farah fire extinguisher because a reasonable man could be expected to let his car burn rather than to kill someone in an effort to save it.

- Finally, excess of necessity exists where the doer, by his own fault, finds himself in a situation where he cannot get out of it otherwise than by committing a crime. For example, Aden sets fire to his own house to defraud insurance company. Aden has no defense of necessity if he breaks into Farah's house in searching for fire extinguisher in order to save a child who unexpectedly entered the house from the back door. While grabbing the fire extinguisher Aden pushes off Farah and he falls on a rock and dies. Aden cannot take advantage of his own fault by pleading necessity here. However, excess of necessity does not exist when the person for whose benefit the doer acts is at fault, as far as the doer

himself is not at fault. In the above example if Aden's son, Guled, breaks into Aden's house to save the life of a child whom he saw entering the house from the back door of the house, he pushes off his dad who tries to stop him from entering the burning house and causes him to fall on a rock nearby and which causes his death by head injury; Guled will be justified for his action taken to save the child and shall not be punished for the death of his father in as much as he did not create the calamity by fire nor did he intend to kill his father.

Wherever necessity *forces* a man to do an illegal act, he will be justified because no man can be guilty of a crime without the will and intention of the mind. Thus the law necessity dispenses with the things which otherwise are not lawful to be done. But it is a defence provided that the harm was not otherwise avoidable.
Stephen has cited the case of two drowning men struggling for a plank which could support only one. If one pushes the other who is then killed by drowning, he would not be guilty because he left him a chance of picking another plank and he did so because of *compulsion by necessity*. This case has been discussed by many and diverse answers are found. The authorities appear to confuse three situations.

They are:
The actor pushes off a person who is already on the plank; or
The actor is on the plank and he repulses one who seeks to push him off,
Both persons reach the plank at the same time and one thrust the other aside so that he may secure the plank for himself.
What Stephen suggested may cover only the latter two situations and not the first one.

Excess necessity is not a defense. However, the fact that a person has committed crime in excess necessity is relevant. It helps the accused in mitigation of the penalty. Thus, excess of necessity serves only as a partial defense to criminal liability. In cases where the excess of necessity results in causing of death, the case falls under Art 541(a) for extenuated homicide.

2. Homicide In Excess of Legitimate Defence: Art 541/1

Article 78 of the Criminal Code lays down certain essential conditions to be satisfied before the accused claims legitimate defense.

- The aggressor must actually attack or about to attack the person who's conduct is in question or any another person,
- The attack must be unlawful,
- The attack could not have been otherwise averted,
- The defense is lawful only when the force used to repel the harm is proportionate to the harm expected.

An act done in repelling an unlawful attack by proportionate means is lawful and therefore, persons who acted under legitimate defense are not liable to criminal punishment. However, when their acts do not fall under the essential conditions for the exercise of the right of legitimate defence they are not justified and are punishable. But they are entitled to get mitigation of punishment.

- **Excess of Legitimate Defence: Art 79**

There is excess in legitimate defense when the defender exceeds the limits of legitimate defense in repelling an unlawful attack by using disproportionate means or by doing more than should reasonably be done to avert the danger.

A person is said to have used disproportionate means when he causes more harm than which he reasonably should have caused. Thus, an act of defense is not lawful when the defense is manifestly excessive. For instance, if Aden shoots Bishar so as to prevent him from abstracting some property of minor value, say watch, the defense is manifestly disproportionate because even though he is entitled to defend his property, he is not entitled to defend it by taking such extreme measure.

A person is considered to have gone beyond what is necessary to repel the unlawful attack when he continues to do harm even though this is not necessary since the assault has already been repelled in an adequate manner. In this case, the

defensive force continues while in effect there is nothing to defend or the attack is sufficiently averted. For example, if Aden strikes Bushra after repelling Bushra's attack by knocking him out, the further beating is unlawful because this goes beyond what is necessary to repel the unlawful attack.

If death is caused by exceeding the limit of legitimate defense, a person who could the death is liable to punishment under Art 541(a) for extenuated homicide.

3. Homicide Following Provocation: Art 541/2

Under the Criminal Code, provocation is an extenuating circumstance alleging a total loss of control as a response to another's provocative conduct sufficient to convert what would otherwise have been an aggravated homicide into extenuating homicide.

Provocation is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable person, and actually causes in the accused, *a sudden and temporary loss of self-control*, rendering the accused so subject to passion as to make him or her for the moment not master of his mind.

Generally, the defence is controversial because it appears to enable defendants to receive more lenient treatment because they allowed themselves to be provoked. Judging whether an individual should be held responsible for his actions depends on an assessment of his culpability. This is usually tested by reference to a reasonable person: that is, a universal standard to determine whether an ordinary person would have been provoked and, if so, would have done as the defendant did. Thus, if the majority view of social behavior would be that, when provoked, it would be acceptable to respond verbally and, if the provocation persists, then to walk away, that would set the threshold for the defense.

But, in Australia, Canada and the UK, the relationship between the defences of provocation and self-defense has become particularly contentious in cases where one partner or former partner kills the other. On the available evidence from court records, critics of the current laws have identified a gender bias so that men who kill their former wives or girlfriends for breaking off the relationship have found

it easy to claim provocation when compared to women in abusive relationships who kill their abuser and then find it difficult to use their history of abuse as self-defence (see battered woman syndrome).

Phil Cleary has been the most publicly visible campaigner on this issue in Australia. Mr. Cleary's sister was murdered by a former partner who then claimed provocation, serving less than four years in jail (Steve Tomsen (1994) *Hatred, Murder & Male Honour: Gay Homocides and the Homosexual Panic Defence*, Criminology Australia, November 1994). Another controversial factor of this defence, especially in UK law, is that the provoked must have carried out their act immediately after the provocation occurred; otherwise know as a "sudden loss of self control". The controversy comes when it is asked "what is immediate". This argument on the grounds of time still occurs and has caused many defendants, particularly women, to lose their cases on this ground, as they will often wait (in wife-battering cases) till the husband is asleep, Shown in *R v Ahluwalia* 1992.

- **Provocation under Art 541/b:**

Provocation as an extenuating circumstance for the crime of homicide under the clause (b) of Art 541 requires the following essential conditions:

1. That there should have been gross provocation from the deceased to the accused,
2. Such provocation should be subjected the accused to any of these conditions:
    a. Shock or surprise, or
    b. Violent emotion, or
    c. Intense passion made understandable and in some degree

excusable by the circumstances.

- **Provocation should be 'Gross':**

Article 541/b r4equires no ordinary provocation but it should be of such a high degree as to be qualifies as 'gross' provocation i.e. it must be capable of subjecting its victim to shock or surprise or violent emotion or intense passion. All these expressions can be understood by the following explanations.

Heat of passion:

Heat of passion refers to rage, terror, or furious hatred suddenly aroused by some immediate provocation, usually another person's words or actions. The terms 'sudden heat of passion', 'sudden heat', 'sudden passion', 'hot blood' (*Lat. furor brevis*) also are used to indicate this state of mind. At Common law, the heat of passion could serve as a mitigating circumstance in a murder case that would reduce the charge to manslaughter.

"*To constitute the heat of passion in this requirement it is not necessary for the passion to be so extreme that the slayer does not know what he is doing at the time; but it must be so extreme that for the moment his action is being directed by passion rather than by reason."*(Rollin M. Perkins & Ronald N. Boyce, Criminal Law, 99, 3rd ed. 1982).

Cool Blood:

Killing in **'**Cool state of blood' or 'cold blooded murder' implies that the defendant's emotion was not in such an excited state that it interfered with his or her faculties and reason.

Cooling Time:

It is the time to recover cool blood after great excitement, stress, or provocations, so that one is considered able to contemplate, comprehend, and act with reference to the consequences that are likely to follow. "*One who controls his temper time after time, following repeated acts of provocation, may have his emotion so bottled-up that the final result is an emotional explosion…In such a case 'the cooling time' begins to run not from the earlier acts, but from the 'last straw'. …As was the position in regard to the adequacy of provocation, so the early holding was the cooling time was a matter of law for the court."*(Rollin M. Perkins & Ronald N. Boyce, Criminal Law 100, 3rd ed. 1982)

Illustrative Case: K. M. Nanavathi vs. State of Maharashtra, A.I.R. 1952 S.C. 605

In this Case Mr. Nanavathi was a naval officer and thus, used to go on the sea for months on his duty. In his absence his wife Sylvia developed an illicit intimacy with one of their family friends Mr. Prem Ahuja. After a period of time she confessed the matter to her husband. Her confession to Nanvathi was made at about 2 p.m. in the afternoon that she had this relationship with the other man. Nanavathi listened to the whole story silently. Thereafter, he took his three children and dropped them at a Cinema Hall and went to his office and borrowed some cartridges on some false pretext, loaded his pistol and went to the flat of his wife's paramour at about 4. 30 p.m. He went straight into the bedroom of Prem Ahuja and shot him dead after an argument.

On his trial Nanavathi pleaded grave and sudden provocation in his defence. He could not succeed in his plea because the Courts said that, there was sufficient time to cool down between the provocation given by his wife's confession and the act of shooting the victim. The way he went about by planning to drop his children at the Cinema and went to fetch his gun etc. shows that he was operating with sufficient degree of calculation.

The Court laid down the following guidelines for determining the presence valid provocation:

- The test of grave and sudden provocation is, whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control.
- In certain circumstances words and gestures may also cause grave and sudden provocation.
- The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation, for committing the offence.
- The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time or otherwise by giving room and scope for premeditation and calculation.

Cooling Down/Boiling Up-Battered Women's Syndrome:

An issue which has received much attention in the realm of domestic violence -- and particularly in situations where women kill their abusers -- is *battered women's syndrome* (BWS), which is a subcategory of post-traumatic stress disorder (PTSD). According to Dr. Lenore E.A. Walker, Ed.D., battered women's syndrome is:

"A group of usually transient psychological symptoms that are frequently observed in a particular recognizable pattern in women who report having been physically, sexually, and/or seriously psychologically abused by their male domestic partners."

Development of Battered Women's Syndrome:

BWS develops as a battering relationship unfolds. This is typically a three-stage process that includes:

1. Small incidents of verbal and minor physical abuse that begin infrequently but increase in frequency;
2. Actual acute battering that often causes serious injury needing medical attention; and
3. A cycle where the abuser is contrited to the abused and ultimately teaches the abused to be submissive and passive toward further abuse.

Recognizing Battered Women's Syndrome:

A woman displaying symptoms of BWS may be apathetic toward subjects or activities for which she used to be enthusiastic, she may become involved in drug or alcohol abuse, and she may also experience completely different attitudes and emotions toward her spouse than she did before the abuse began. The importance in knowing about BWS lies in recognizing predictable, psychological effects caused by domestic violence

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Battered Women's Syndrome and the Law:

BWS is now recognized in legislation by many states and is considered when defending battered wives who kill their spouses. BWS is not used as a defense but more as an indication of the defendant's state of mind or as a mitigating circumstance. A reasonable fear of imminent danger (especially used in self-defense) can be proven using BWS.

The issue of provocation is a pure question of fact and has to be proved by subjective test, i.e. the evidence must show that the defendant actually lost his self-control. In ***R v Duffy*** **(1949) 1 AER 932**, Devlin J. said that

Provocation is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind.

Under normal circumstances, the response to the provocation will be almost immediate retaliation. If there is a "cooling-off" period, the court will find that the accused should have regained control, making all subsequent actions intentional and therefore murder. In ***R v Ibrams & Gregory*** (1981) 74 Cr. App. R. 154 the defendants had been terrorized and bullied by the deceased over a period of time so devised a plan to attack him. There was no evidence of a sudden and temporary loss of self-control as required by ***Duffy***. Even the period of time to fetch a weapon should be sufficient to cool off. In ***R v Thornton*** (1992) 1 AER 306 a woman suffering from "battered woman syndrome" went to the kitchen, took and sharpened a carving knife, and returned to stab her husband. The appeal referred to s3 which requires the jury to have regard to "everything both said and done according to the effect which in their opinion it would have on a reasonable man". The appellant argued that instead of considering the final provocation, the jury should have considered the events over the years leading up to the killing. Beldam LJ. rejected this, saying:

In every such case the question for the jury is whether at the moment the fatal blow was strucked the accused had been deprived for that moment of the self-control which previously he or she had been able to exercise.

But in *R v Thornton (No 2)* (1996) 2 AER 1023 after considering new medical evidence, a retrial was ordered and the defendant was convicted of manslaughter on the ground of diminished responsibility. Similarly, in ***R v Ahluwaliah*** (1992) 4 AER 889 a retrial was ordered. The defendant had poured petrol over her husband and set it alight, causing burns from which he died. When the defence of diminished responsibility on the ground of "battered woman syndrome" was put, she was convicted of manslaughter. In ***R v Humphreys*** (1995) 4 AER 1008, the defendant finally lost self-control after years of abuse and stabbed her partner. She pleaded that the final words had been the straw that broke the camel's back. The conviction for murder was held unsafe because the accused's psychiatric condition stemming from the abuse should have been attributed to the reasonable person when the jury considered the application of the objective test.

R v Ahluwaliah became a land mark case in which the expression provocation was given another dimension by interpretation. The experts opined that, provocation, at times, instead of cooling down with the passage of time may make the victim boil up and finally loose his/her self control. Medical experts observed that this is possible especially when a person has been a victim of prolonged physical and mental abuse.

- **Adequate Provocation:**

This is the idea of extenuating circumstances. Only certain kinds of circumstances will reduce the crime in terms of degree. The reasonable person standard is used to determine if there's a reasonable belief in being of danger of losing one's life or suffering great bodily harm. The law on this point also recognizes the frailty of human nature (reacting without thinking). The following table might be instructive by giving examples of adequate provocation:

Adequate:	Inadequate:
serious fights	scuffles
sudden passion with no time to cool off	slapping or shoving
istol whipping, fists in face, staggering body blows	insulting gestures
waiving a gun around	abusive words

The last example of waiving a gun around might be inadequate also. It depends on situation.

- **Punishment for Extenuated Homicide:**

The penalty under this provision is simple imprisonment not exceeding five years.

3.2.3. Ordinary Homicide: Art. 540

Ordinary homicide is the third type of intentional homicide under the Criminal Code of FDRE 2004. Article 540 doesn't define 'ordinary homicide', but simply says that it refers to those cases that fall neither under the category of aggravating homicide within the meaning of Art 539 nor under the category of extenuating homicide as per the provisions of Art 541 criminals are to be punished as cases of ordinary homicide.

The Court has to very carefully follow the rule of excluding the case from the ambit of Articles 539 and 541 in order to bring the case under ordinary homicide. The following important guidelines can be helpful.

- **Excluding the case from the scope of Art. 539**: The presence of anyone or more of the aggravating circumstances listed under Art. 539 itself is not sufficient to qualify the killing as aggravated homicide. But any such circumstance/s ***should indicate or suggest that the criminal is exceptionally cruel, abominable or dangerous person***. Otherwise i.e. if such element is any less

serious than what is described under this article, the case is likely to fall under the scope of ordinary homicide under Art.540.

- **Excluding the case from the scope of Art. 541**: This may arise from a situation where provocation is pleaded as an extenuating circumstance but the same is not in face proved to the quality required by the Art 541/b. This means that if the provocation claimed is not serious enough to be described as 'gross' the defendant is not entitled to the benefit of extenuated homicide. Such a case falls under the purview of Art.540.

➢ **Punishment for Ordinary Homicide:** Rigorous imprisonment from 5 years 20 years.

3.2.4. Negligent Homicide: Art. 543

Negligent homicide is a charge brought against people, who by inaction allow others under their care or presence intentionally to die. This offense mostly concerns itself with the death of small infants or children, the handicapped, or the elderly. An example of such a case is when an elderly person is allowed to accumulate bedsores, as they are not helped out of a couch or bed for a prolonged period of time and die as a result of necrotic tissue. If a more able person, often a son or daughter, were present or expected to be present during the time when the elderly person was accumulating bedsores, they may be found liable of negligent homicide, as their inaction and blatant disregard for human life resulted in the death of someone under their care.

Negligent homicide generally only applies if a pattern of negligence resulted in the death of the individual. Turning one's back on a child while he/she falls into a well, while tragic and a result of a moment of negligence, would be considered a horrible accident and a hard lesson, not negligent homicide. This offense is

considered less serious than that of the first and second degree murder, in the sense that someone guilty of this offense can expect a more lenient sentence, often with imprisonment time comparable to manslaughter.

Within the meaning of Art 543/1 of the Criminal Code, a negligent homicide is committed where a person:

1. Causes the death of another,
2. With negligence, i.e. a state of mind that has been defined under Art 59

Advertent negligence is acting without the consciousness that illegal and mischievous effect will follow but with the hope that they will not and often with the belief that the actor has taken sufficient precautions to prevent their happening. *Inadvertent negligence* is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution required of him, and that if he had would have the consciousness that imputability arises from the neglect of the civic duty of circumspection.

Illustration:

Where a chemist gives expired date medicine to a patient and the patient dies, the chemist would be liable for causing death by negligence because he has failed to exercise due caution to ascertain whether the medicine that he was giving was expired or not.

- **Rash Driving:**

Sub-article (2) imposes an enhanced punishment in case of negligent homicide committed by professionals like doctors and drivers or others having a professional duty.

In cases relating to rash driving it is the duty of the driver to drive his vehicle at a speed which will not imperil the safety of others using the same road. In order to hold a driver criminally liable it must be proved that a collision was entirely or

at least mainly due to rashness or negligence on the part of the driver. It would not be sufficient if it was only found that the accused was driving vehicle at a very high speed. A person driving a car has a duty to control the car, he is *prima facie* guilty of negligence if the vehicle leaves the road and dashes into a tree and it is for the driver to explain the circumstances under which the car had left the road. Those circumstances may be beyond his control, and may exculpate him, but in the absence of such circumstances, the fact that the car left the road is evidence of negligence on the part of the driver.

Where due to collision of a vehicle injury or death is caused, it cannot be taken for granted that the driver of the vehicle involved in the accident was guilty of the crime. There may be exceptional cases where the rule *res ipsa loquiter* (the thing speaks for itself) applies. Ordinarily it is for the prosecution to establish the guilt of the accused beyond reasonable doubt. Speed alone is not the criterion for deciding rashness or negligence on the part of the driver.

- **Punishment for Negligent Homicide:**

1. In normal cases: Simple imprisonment for 6 months <u>or</u> fine from 2,000 Birr to 4,000 Birr, when the case falls under the sub-article (1). A case that does not involve the professionals and where the victims are not more than one it falls under this sub- article.

In cases of Professionals: Simple imprisonment for 1 year to 5 years <u>and</u> fine from 3,000 to 6, 000 Birr, where the negligent homicide is committed by a person such as a doctor or driver, who has a professional other duty to protect the life, health or safety of another.

2. In cases involving several victims: Rigorous imprisonment from 5 years to 15 years <u>and</u> fine from 10,000 Birr to 15, 000 Birr, in the following cases:

- Where the negligent act of the criminal causes the death if two or more persons, or

- Where the criminal has deliberately infringed express rules and regulations disregarding that such consequences may follow, or
- Where the criminal has put himself in a state of irresponsibility by taking drugs or alcohol.

❖ **Death Caused Without Intention or Knowledge:**

The crime of homicide presupposes an intention or knowledge of likelihood of death. In the absence of such intention or knowledge the crime committed may be either 'common willful injury' (Art 556) or 'grave willful injury' (Art 555) as the case may be. These are the cases of unexpected consequences during the commission of an unlawful act. Such instances may be as the following:

1. **Where the death is attributed to an injury which the criminal did not know would endanger life or would be likely to cause death, and which in normal course of things would not produce such consequences.**

Illustration one:

'A' a land lord employed a laborer ***'B'*** to work in his land. ***'B'*** was not working actively to the satisfaction of ***'A'***. Dissatisfied and irritated by the lazy manner in which ***'B'*** was working ***'A'*** went up to him and gave him a few blows. ***'B'*** complained of severe pain in his stomach and to the surprise of ***'A'*** he died eventually. Not known to ***'A', 'B'*** was in fact suffering from diseased spleen. In such patients even small injuries can produce extensive bleeding that can even kill them. The small blows given by the accused on his victim caused rupture of the diseased spleen and that resulted in the death of the victim. Here, ***'A'*** cannot be held liable for either intentional homicide or negligent homicide since his foresight of consequences was in no way directed to the causing of death.

Therefore, he should be reasonably held liable to whatever he intended to do i.e. causing common willful injury.

Illustration two:

Alex picked up an argument with a shopkeeper Kadir over the quality of an article he purchased from him. The argument got serious and Alex picked up a stick lying there and gave a blow on the head of Kadir. The blow caused an injury on his scalp which resulted in profuse bleeding that became uncontrollable. Kadir was quickly taken to hospital by Alex himself where he died. The doctors found that Kadir was a hemophiliac (whose blood does not clot easily that results in excessive loss of blood) and that's why his bleeding could not be controlled. Here in this case Alex can be held liable for causing grave willful injury but certainly not for any type of homicide since a blow on the head would not in the normal course of things cause death and Alex neither intended nor knew that his act would cause kadir's death. From the circumstances of the case we can reasonably infer that he wanted to give kadir a blow with the stick which could at best be expected to cause a grave willful injury to the victim.

2. Where an unintended consequence had been produced accidentally during the commission of another unlawful act.

Illustration:

Alemayehu and Cherinet were neighbours and were quarelling over an issue on a dark night. When the argument grew intense Alemayehu took a stick and aimed a blow at Cherinet. Suddenly, Cherinet's wife came in between to save her husband from the blow. She was carrying a two month old child in her hands. Unfortunately and to the surprise of Alemayehu the blow landed on the child's head causing its death immediately. Here, Alemayehu cannot possibly be held liable for any type of homicide either negligent or intentional because had the blow fell on Cherinet it could have caused only an injury but not death. Therefore, he should be held liable for causing common/or grave willful injury as this was

what was in the intentions of the accused. It is difficult to attribute even negligence to Alemayehu since the interference of Cherinit's wife was totally unexpected and it was a dark night which made it difficult to see things properly.

- **Homicide a Causing Death of a Person other than the Person Whose Death Was Intended:**

  Where an act is in itself criminal, the doing of the act is a crime irrespective of the individuality of the person harmed. It is common knowledge that a man, who has an unlawful and malicious intent against another and, in attempting to carry it out, injures a third person, is guilty of what the law deems malice against the person injured because the criminal is doing an unlawful act, and that which the judges call 'general malice' and that is enough.

  The English doctrine of 'transfer of malice' or the 'transmigration of motive' is the basis of this principle. Here if ***'A'*** intends to kill ***'B'*** but kills ***'C'*** whose death he neither intended nor knows to be likely to cause, the intention to kill ***'C'*** is by law attributed to him.

  Illustration:

  If ***'A'*** aims his shot at ***'B'*** but it misses ***'B'*** either because ***'B'*** moves out of the range of the shot or because the shot misses the mark and hits ***'C'***, whether within sight or out of the sight ***'A'*** is deemed to have hit ***'C'*** with the intention to kill him.

  Transferred intention occurs when an injury intended for one falls on another. The doctrine or subject to the following qualifications:

1. The harm that follows is to be of the same kind. The reason is that otherwise too great violence would be done to the doctrine of *mens rea* and to the wording of the statute under which the charge made. One cannot be condemned if his *mens*

rea relates one crime and *actus reus* to different crime because that would be to disregard the requirement of appropriate *mens rea*.

2. Since the law of transferred malice does not dispense with the need of proof of the usual *mens rea* it follows that defences in effect transferred with the malice. Thus, there is no guilt if intended force lawful, unless the accused was criminally reckless or negligent in respect of the actual victim.

3.2.5. Infanticide:

The tragedy of maternal filicide, or child murder by mothers, has occurred throughout history and throughout the world. *Maternal filicide is* defined as child murder by the mother. *Infanticide is* child murder in the first year of life. The term *neonaticide was* coined by Resnick to describe murder of an infant within the first 24 hours of life. Almost all neonaticides are committed by mothers. Neonaticidal mothers are often young, unmarried women with unwanted pregnancies who receive no prenatal care.

- **Psychiatry and Infanticide:**

According to psychiatric findings, the filicidal mothers had frequently experienced psychosis, depression, suicidal tendencies, and prior mental health care. Their mean age was in their late 20s. Some were diagnosed with personality disorders and some had low intelligence. Significant life stresses were often noted. A recent study show that mothers found not guilty by reason of insanity in two U.S. states, but the perpetrators were often depressed and frequently experienced auditory hallucinations, some of a command type. Over one third of the homicides occurred during pregnancy or the postpartum year. Almost all the mothers had *altruistic or acutely psychotic motives*. A small New Zealand study that interviewed the mothers after their filicides found that psychotic mothers who had committed filicide often killed suddenly without much planning, whereas depressed mothers had contemplated killing of their children for days to weeks prior to their crimes.

- **Socio-economic Reasons for Infanticide:**

Mothers who were poor, socially isolated, full-time caregivers, who and were victims of domestic violence or had other relationship problems, were found among the perpetrators of infanticide. Disadvantaged socioeconomic backgrounds and primary responsibility for the children were common reasons for infanticide. Persistent crying of child factors were sometimes precipitants for the filicide. Some mothers had previously abused the child, while others were mentally ill and devoted to their child. Neglectful or abusive mothers were often substance abusers. Many of the perpetrators had psychosis, depression, or suicidal tendency. Some of the abusive mothers were rape victims.

- **Infanticide Laws:**

Infanticide laws often reduce the penalty for mothers who kill their children up to one year of age, based on the principle that a woman who commits infanticide does so because *"the balance of her mind is disturbed by reason of her not having fully recovered from the effect of giving birth to the child"* . The British Infanticide Act of 1922 (amended in 1938) allows mothers to be charged with manslaughter rather than murder if they are suffering from a mental disturbance. The law was originally based on the outdated concept of lactational insanity, but the public's desire to excuse sympathetic women caused reluctance to alter the law after lactational insanity was discredited. Women convicted of infanticide often receive probation and referral to mental health treatment rather than incarceration.

Approximately two dozen countries currently have infanticide laws (Australia, Austria, Brazil, Canada, Colombia, Finland, Germany, Greece, Hong Kong, India, Italy, Japan, Korea, New Zealand, Norway, Philippines, Sweden, Switzerland, Turkey and the United Kingdom. The majority of the nations that have infanticide laws have followed the British precedent and decrease the penalty for mothers

killing children under one year old. However, the legal definition of infanticide varies among countries. The murder of children up to age ten is included in New Zealand.

- **The Ethiopian Law on Infanticide:**

Under the Art 544/1 of the Criminal Code, to constitute a crime of infanticide the following essential elements must be fulfilled:

1. There should be an intentional killing of an infant

2.By its mother under either of the two conditions:

   A. while she is in labour, or

   B. while still suffering from the direct effects of labour

The second sub-article of this provision excludes intentional or negligent killings by mothers for any reasons other than specified in the first sub-article i.e. killings not connected with problems that could arise during or subsequent to labour. These mothers are triable under the ordinary provisions relating to homicide (Arts 538-543).

Sub-article (3) of this provision speaks about the participants in the infanticide other the mothers. These participants in whichever capacity they might have participated in this crime. Principals or instigators or accomplices, they shall be governed by the general provisions relating to homicide. They are not entitled to the benefits of extenuation under this provision.

- **Punishment for Infanticide:**

1. **Simple imprisonment** for the completed crime, having regard to the circumstances of the case.
2. **Mitigated punishment under Art 180**, for an attempted infanticide, if the infant has suffered no injury after the attack by the mother.

3.3. Examination of the Ethiopian Law of Homicide:

3.3.1. Ato Abayneh Gebreselassie V. The Attorney General, Supreme Imperial Court, (1963 G.C.)

Tahsas 27, 1956 E.C. (Dec. 25, 1963 G.C.); Justices; Mr. G. Debbas, Ato Haile Aman and Ato Tessemma Negede: __ This is an appeal against the conviction and sentence of the High Court (First Criminal Division) dated 24th Ter, 1950, in Criminal Case No. 661/49, whereby the appellant was found guilty of murder……

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As stated by the eye-witnesses, the deceased was heard crying and screaming in her house; then she ran out from the house and fled to the neighbor's house to which appellant pursued her and dragged her out to the door and stabbed her at the doorsteps. The postmortem examination revealed that there were scars of beating and hitting on the dead body …… The appellant started indeed, after he had stabbed his wife, to cry and weep regrettingly…….. The husband beat his wife first, she ran away to the neighbors, and he pursued her, dragged her out and stabbed her at the doorsteps of the neighbors, and then started crying like a child, after he realized what he had done……..

3.3.2. Ato Leggesse Tumtu and Agraw Mametcha V. Attorney General, Supreme Imperial Court (1964 G.C.)

This is an appeal against the conviction and sentence of the High Court (First Criminal Division) dated 23rd Megabit, 1955, in Criminal Case No. 461/53, whereby both appellants were convicted of murder contrary to Article 522 of the P.C.E. of 1957, and sentenced to death.

It is important to emphasize ever since the beginning that there is not much to discuss in this appeal regarding the question of conviction. Both appellants were

convicted on the strength of their own confession to the police. The murder was considered as aggravated in that the beating was repeated and the deceased had been wounded in six different places, and finally died as a result of intracranial hemorrhage caused by the inflicted wounds. The Court considered this beating as brutal and passed death sentence on both appellants.

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Conviction confirmed.

Group Project:

After carefully reading Arts 538-541, 543 of the Criminal Code, try to place Ato Abayneh within the proper provision governing homicide. Would it help to know that the same court that decided Ato Abayneh case later held in the case of Ato Leggesse Tumtu and Ato Argaw Mametcha v. Attorney General, Supreme Imperial Court, Crime.App. No. 643/55 (1964 G.C.);

Critical Thinking:

Why does Art. 540 not mention Art. 543?

Review Questions:

1. Do you find any particular order among Arts. 538-541, and 543?

2. Are all intentional homicides punishable? (See e.g., Art. 64 P.C.E.) May a death sentence be executed upon court order alone?
3. What degree of negligence constitutes "criminal negligence" to bring the case under Art. 543?

Case Problem 1:

'P' and 'Q' were neighboring owners of land. There was an altercation between them due to 'P's servants throwing agriculture wastes into 'Q's lands. 'Q' and his sons got irritated and picked up arguments with 'P's servants 'Q' tried to persuade 'P' and his servants not to throw wastes into their field and to have the matter

settled amicably through negotiations. Yet 'P' was annoyed with the conduct of 'Q's sons and picked up a physical fight. As 'P' and his servants were at work they had sticks and spades with them. 'P' inflicted two blows on the head of 'Q's eldest with a spade and he fell down. There after 'P' gave two more blows to him and he died.

1. How do you decide the 'Killing' occurred because of a sudden fight, where there was no previous enmity between the offender and the deceased?
2. Is there any defense for 'P' and their servants in the above case? Explain.

Case Problem 2:

'H' and 'W' were married for 5 Years. They used to have quarrels very often due to the nagging nature of 'H' the husband. Finally 'W' the wife got tired of her husbands treatment and went to live with her brother 'B's family leaving her husband. 'H' waited for sometime under the belief that 'W' would return back to him on her own. But she didn't. 'H' then decided to go and pursue her to come back and live with him. On the fateful day he went to his brother-in-law's house and started pleading with his wife 'W' to come back to him and otherwise he cannot live without her. However, 'W' persisted that she did not like to rejoin him. There upon the husband dragged the wife with a view to take her even against her will. 'W's brother 'B' was sitting in the same room and was cutting apples to give to his children. When he saw his sister being dragged by her husband he gave a blow with knife to 'H', which resulted in his death.

1. Does the conduct of 'H' against his wife amount to any crime? If so, how is it defined in the Penal Code? Mention the essentials of such crime referring to the relevant articles.
2. Did the brother 'B' have any right to react in such a way to the situation in which his sister was? If so, what are the principles governing such a right? Refer to the appropriate provisions of law.

Case Problem 3:

Selina and her boyfriend **Sam** were living together for several years before **Sam** moved out after a series of violent rows. On the day of the occurrence **Selina** went

to a party. She was feeling upset due to her separation from her long time boy friend. In the party she had several drinks when **Sam** arrived there with another girl. **Selina** saw them laughing and came to the conclusion that they were laughing at her. She picked up a heavy beer mug and hit **Sam** over the head several times. **Sam** was killed by her violent attack.

1. What would the prosecution be required to prove in order to establish that **Selina** was guilty of homicide of **Sam**?

2. Explain the issues that could be raised in **Selina's defence** to the charge of homicide and state whether you think the defence would succeed. List out the principles governing such a defense.

Case Problem 4:

While walking down a rural road, Abel and Baker come upon Victor, obviously intoxicated, lying on railroad tracks running parallel to the road. Abel saisd "Let him lie. Don't touch him," but Baker dragged the man off the tracks onto the shoulder of the road. Abel and Baker went on their way. 15 minutes passed; a train came by; Victor is not harmed, though he would have been killed if Baker had not moved him. 30 more minutes passed; Victor crawls onto the roadway in front of an oncoming truck; Victor was struck and killed because the driver was speeding and not paying attention. Discuss the liability of Abel and Baker for Victor's death.

Can Abel and Baker be prosecuted for the death of Victor? If yes, on what charges? Discuss in detail.

If no, why? Explain clearly.

❖ **Concurrence of 'Act' and the 'Intent'- Case Analysis:**

- **THABO MELI v. REGINA**
  Judicial Committee, Privy Council, 1 All Eng. Rep. 373 (1954)

The judgment of their Lordships was delivered by Lord Reid. The four appellants in this case were convicted of murder after a trial before Harragin, J., in the High Court of Basutoland, in March, 1953.

It is established by evidence, which was believed and which is apparently credible, that there was a preconceived plot on the part of the four accused to bring the deceased man to a hut and there to kill him; and then to fake an accident, so that the accused should escape the penalty for their act. The deceased man was brought to the hut. He was then struck over the head in accordance with the plan of the accused.

There is no evidence that the accused then believed that he was dead, but their Lordships were prepared to assume that they did; and it is only on that assumption that any satiable case can be made for this appeal. The accused took out the body, rolled it over a cliff, and dressed up the scene to make it look like an accident. Obviously, they believed at that time that the man was dead, but it appears from the medical evidence that the injuries which he received in the hut were not sufficient to cause the death and that the final cause of his death was exposure where he was left at the foot of the cliff.

The point of law which was raised in this case can be simply stated. It is said that two acts were necessary and were separable: first, the attack in the hut; and, secondary, the placing of the body outside afterwards. It is said that, while the first act was accompanied by *mens rea*, it was not the cause of death; but that the second act, while it was the cause of death, was not accompanied by *mens rea*; and on that ground it is said that the accused are not guilty of any crime except perhaps culpable homicide.

It appears to their Lordships impossible to divide up what was really one transaction in this way. Their is not doubt that the accused set out to do all these acts in order to achieve their plan and as parts of their plan; and it is much too

refined a ground of judgment to say that, because they were under a misapprehension at one stage and thought that their guilty purpose had been achieved before in fact it was achieved, therefore they are to escape the penalties of the law. Their Lordships do not think that this is a matter which is susceptible of elaboration. There appears to be no case either in South Africa or England, or for that matter elsewhere, which resembles the present.

Their Lordships can find no difference relevant to the present case between the law of south Africa and the law of England, and they are of opinion that by both laws there could be no separation such as that for which the accused contend, as to reduce the crime from murder to a lesser crime, merely because the accused were under some misapprehension for a time during the completion of their criminal plot.

Their Lordships must, therefore, humbly advise Her Majesty that this appeal should be dismissed.

- **PALANI GOUNDAN v. EMPEROR**

  1920 Madras 862, India

  …… The accused struck his wife a blow on her head with a ploughshare, which, though not known to be a blow likely to cause death, did, in fact, render her unconscious and believing her to be dead, in order to lay the foundation of a false defence of suicide by hanging, the accused hanged her on a beam by a rope and thereby caused her death by strangulation, and it was held by the Full Bench that the accused was not guilty of either murder or culpable homicide not amounting to murder as the original intention was not to cause death but only to cause injury and the second intention was only to dispose of a supposedly dead body in a way convenient for the defence which the accused was about to set up……

Questions:

1. Are the Thabo Meli and Palani Goundan cases distinguishable? What is the defense theory being argued in both cases? Which judgment do you agree with? Does Art. 60(1) P.C.E. helps in clarifying the conflicting holdings in these cases?

2. Does the wording within Arts. 57-61 P.C.E. imply the necessity of concurrence between "act" and "intent" or "negligence" in order to constitute criminal liability in Ethiopia?

Important: "Concurrent offenses" as considered in Arts. 60-63 is a fundamentally different concept from concurrence between "act" and "intent".

Case Problem:

Addisu and Bereket met each other in a drunken state and they started to quarrel, during which they abused each other. All this lasted for half an hour when Bereket ran to his house which was located near by and came back with a heavy iron rod and struck a violent blow on the left temple causing instant death.

1. Make the case against Bereket.
2. Does Bereket have any defence?

Support your case with relevant provisions of law and sufficient reasoning.

Section.4. Crimes against Persons

The principles relating to crimes against person and health are laid down in Article 553. *Intentional* or *negligent* causing of bodily injury or impairing of another's health no matter whatever means or manner used is punishable under this part of the Code. Causing of any manner of whatsoever including bodily

assaults, blows, wounds, maiming, injuries or harm and all damage to the physical and mental health of an individual is prohibited. Therefore, injury under the Code means both 'physical' and 'mental injury'.

- **Mental or Non-physical injury:**

  Non-physical or *psychiatric injury* can be considered causing of willful injury, although there must be medical evidence of the injury (Art 554). This is a confirmed principle of many legal systems. The following two Irish cases are illustrative. In the first case, the accused, during a three month period, who had a substantial record of making offensive telephone calls to women, harassed three women by making repeated silent or heavy breathing telephone calls to them at night. This caused his victims to suffer psychiatric illness. Similarly, in the second case, the accused could not accept the decision of a woman to terminate a relationship, so he harassed her over an eight month period by making silent and abusive telephone calls, distributed offensive cards in the street where she lived, appeared unnecessarily at her home and place of work, took surreptitious photographs of the victim and her family, and sent her a menacing letter. The victim was fearful of personal violence was diagnosed as suffering from a severe depressive illness. The best medical practice today accepts a link between the body and psychiatric injury, so the words 'causing bodily injury' cover recognized psychiatric illnesses, such as an anxiety or a depressive disorder, which affect the central nervous system of the body. However, to qualify, those neuroses must be more than simple states of fear, or problems in coping with everyday life, which do not amount to psychiatric illnesses.

4.1.Grave Willful Injury: Art. 555

The expression 'grave or serious injury' covers the following types of injuries within the meaning of clauses (a) to (c):

- Wounds that endanger life
- Injuries that jeopardize physical or mental health

- Maiming of body or one of the essential limbs of body
- Disabling body or limbs
- Grave or conspicuous disfiguration of a person
- Infliction of any other injury or disease of a serious nature

Punishment: Simple imprisonment not less than 1 year to rigorous imprisonment not exceeding 15 years.

4.2. Common Willful Injury: Art. 556

All other injuries to the person other than those that fall under the specific descriptions under Article 555 are common willful injuries. The injury, at the same time, should not be too trivial as has been mentioned under Art 560 under the head of assaults. Causing of common willful injuries is punishable only upon the filing of a formal complaint.

- **Punishment:**

1. Simple imprisonment not exceeding 1year or fine.(Art. 556/1)
2. Simple imprisonment of 6 months up to 3 years, where the causing of common willful injury is accompanies by the following specific aggravating circumstance:

- Use of poison, a lethal weapon or any other instrument capable of inflicting injuries
- Breach of professional or any other duty
- The victim is weak, sick or incapable of defending himself

Expert Evidence as to the Nature of Injury: Art. 554

In cases where there is a doubt regarding to the nature of injury i.e. whether it is grave injury or common injury, the court may call for an expert forensic medical assessment to assist its decision.

Extenuating Circumstances: Art. 557

The punishment for causing willful injuries shall not exceed 2 years of imprisonment or fine not exceeding 4,000 Birr, in the presence of any of the following extenuating circumstances:

- Excess of necessity (Art 75)
- Excess of legitimate defence(Art 78)
- Existence of understandable circumstances like:

✓ Gross provocation, or
✓ Shock, or
✓ Influence of a surprise, or
✓ An emotion or passion

-which may be excusable to some extent.

- At the request or with the consent of the victim

Here such consenting victim should be the one who capable of understanding the action and its consequences and should have consented to an injury forbidden by law or offending public decency.

However, if such a victim is partially or completely incapable of realizing the consequences of his request or consent due to age, mental or other conditions the punishment shall extend up to simple imprisonment not exceeding 4 years.

- Where a person intending to cause a common injury causes grave injury through criminal negligence, he shall be liable to simple imprisonment ranging from 6 months to 3 years (Art 558).

4.3.Injuries by Negligence: Art. 559

Common injuries caused to person or health by negligence are treated under this article. When it is grave this crime is punishable upon an accusation, but ordinarily when the injury is common it is punishable only upon a complaint filed by the aggrieved party. The nature of the injury is determined in accordance with

articles 555 and 556(Aart559/3). The punishment for the injuries caused by negligent is of two different degrees:

1. **Simple imprisonment not exceeding 6 months or fine not exceeding 1,000 Birr**, if the injury is caused by persons other than having professional duty.

2. **Simple imprisonment of not less than 6 months and fine not less than 1,000 Birr** where the injury is grave within the meaning of Art 555 and is caused by those who are under a special or professional duty.

Having regard to the standard of care and caution required by Art 59/1 Para 2, the degree of punishment is fixed. People who are bound by their professional or special duty to protect life or health of persons are exposed to a greater punishment.

4.4.Assaults: Art 560

Meaning:

Whoever makes any gesture, or any preparation, intending or knowing to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force, to that person, is said to commit an assault. An assault is committed when one person causes another to apprehend or fear that force is about to be used to cause some degree of personal contact and possible injury. There must be some quality of reasonableness to the apprehension on the part of the victim. If the physical contact is everyday social behaviour such as a handshake or friendly pat on the back, this is acceptable even though the victim may have a phobia although, if the defendant is aware of the psychological difficulty, this may be converted into an assault if the intention is to exploit the condition and embarrass the victim.

Normally, both the one making the threat and the victim must be physically present because, otherwise, there would be no immediate danger. However, if a mobile phone is used to transmit the threat (whether orally or by a message) and,

from the words used, the victim reasonably understands that an attack is imminent, this may constitute an assault.

In criminal law, a common assault is a crime when the defendant either puts another in fear of injury or actually commits a battery. A *battery* is an assault whereby any physical force of adverse nature is actually applied to the person (body) of another, or to the dress worn by him, directly or indirectly. Every battery includes an assault but not vice versa. In other words, within the common meaning of an assault there is no actual use of force or violence, there is only a threat to use force or violence.

However, according to Art 560 of the Ethiopian Criminal Code the crime of assault is not defined. But the wording of the article indicates that the article covers both the assaults without use of actual violence and actual violence too, but without causing bodily injury or impairment of health. Art 560/1 Para 2 says that *simple bruises, swellings, or transient aches and pains* are not held to be injuries to the person or health and thereby implies that these are the kind of injuries that may be covered by this provision.

The moral ingredient of this crime is that this fear must have been caused either intentionally or recklessly (Art 553).

Assaults are punishable only upon a complaint.

- **Punishment for Assault:**

1. Fine not exceeding 300 Birr, in ordinary cases, *or*
2. Simple imprisonment not exceeding 3 months, in serious cases.
3. Punishment under Art 840 of Petty Code, in cases of minor crimes that do not come under the Art 560/1.
4. Reprimand or warning for the future on either of the two parties or both of them, where the victim has returned assault for assault.

Review Questions:

1. Note the differences between the crimes of grave willful injury, common willful injury and assaults.
2. What is a 'mental injury'? Is this clear from the provisions of Article 553?
3. Do you think that the provisions of Articles 556 and 560 are clear enough o distinguish the difference between a common injury and a serious assault?

Brain storming!

Are the injuries caused by defective or dangerous products like drugs, cosmetics and other consumer goods punishable under this section of the Criminal Code? If not what is the remedy for these injurues?

Section.5. Crimes against Women and Children:

5.1. Constitutional Principles Relating to the Protection of Women and Children:

Ethiopia has ratified international human rights conventions and treaties that are legally binding and that form international law. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which provides the foundation for reproductive rights, is one such notable convention. The Tehran Proclamation, the International Conference on Population and Development (ICPD), the Fourth World Congress on Women, and the 2000 United Nations (UN) Summit are some of the major forums at which national governments have expressed their commitment to improving the status of women in society. These and other international initiatives have yielded wider recognition of individuals' rights to lead safe and responsible reproductive lives and have underscored the responsibility of governments to not only respect those rights but also to create the legal and policy environment for their realization.

In reference to abortion, the international community has pledged commitment to reducing the need for abortion through expanding and improving family planning (FP) services and, where the laws of the land allow, providing women with high-quality abortion care. Furthermore, at the five-year review of the ICPD, there were calls for governments to consider reviewing laws that contain punitive measures against women who undergo illegal abortions. Governments have also agreed that, in circumstances where abortion is not against the law, health systems should train and equip providers and take measures to ensure that abortion services are safe and accessible. Additional measures to safeguard women's health are also required.

At the UN summit in 2000, governments of the world ratified the Millennium Development Goals (MDGs) as an international tool for reducing poverty and improving the standard of living in the developing world. One of the eight MDGs is to reduce the maternal mortality rate by 75% (from 1990 levels) by the year 2015. Preventing unsafe abortion is one of the five strategies for reducing maternal mortality that was endorsed by the World Health Organization (WHO) in 2004.

In response to these developments at the global level and changes in social and gender relations within the country, the government of the Federal Democratic Republic of Ethiopia (FDRE) has reviewed its laws and policies within the last decade.

Articles 14, 15, and 16 under Section I (Human Rights) of the Constitution refer to the rights to life, liberty, and security of the person. Article 35 refers to women's equality with men and their rights to information and the capacity to be protected from the dangers of pregnancy and childbirth.

The Women's Policy recognizes the low status accorded to women in Ethiopia and elaborates on the unacceptably high level of maternal mortality, high fertility

rates, low use of contraceptives, harmful traditional practices such as female genital cutting and early marriage, and disproportionately high illiteracy rates. It also describes how the laws of the land negatively affect women's status in society. The strategies for improving women's status outlined in the policy include informing and educating the community on harmful traditional practices and ensuring women's access to basic health care and information on FP methods. The policy also states that "…conditions whereby women can have effective legal protection of their rights shall be facilitated."

Art 35/4 of the Constitution of FDRE, 1995: "The State shall enforce the right of women to eliminate the influences of harmful customs. Laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited."
Art 36/1 the Constitution of FDRE, 1995: "Every child has the right:

A. To life;
B. To a name and nationality;
C. To know and be cared for by his or her parents or legal guardians;
D. Not to be subjected to exploitative practices, neither to be required nor permitted to perform work which may be hazardous or harmful to his or her education, health or well-being;
E. To be free of corporal punishment or cruel and inhumane treatment in schools and other institutions responsible for the care of children."

5.2. Some Serious Crimes Committed Against Women and Children:

5. 2.1.Abortion:

"Abortion is more than a medical issue, or an ethical issue, or a legal issue. It is, above all, a human issue, involving women and men as individuals, as couples, and as members of societies" (Tietze, 1978).

- **Definition of Abortion:**

  Abortion is the termination of pregnancy before fetal viability, which is conventionally taken to be less than 28 weeks from the last normal menstrual period (LNMP). If the LNMP is not known, a birth weight of less than 1000gm is considered as abortion.

❖ **Where Abortion Is Legal:**

Article 551 of the Criminal Code of the FDRE lists out the conditions in which termination of pregnancy may be allowed. Abortion performed under those circumstances is not a crime. Article 552 provides for the Procedure of Terminating Pregnancy and the penalty of violating the Procedure**.** This article also provides in its sub-article (1) that, the Ministry of Health shall shortly issue a directive whereby pregnancy may be terminated under the conditions specified in Article 551, in a manner which does not affect the interest of pregnant women. In accordance with this mandate the State issued, the 'Technical and Procedural Guidelines for Safe Abortion Services in Ethiopia, May 2006' which laid down the following implementation guidelines for the legalized abortion:

1. Implementation guide for Article 551 sub-article 1A:

Þ *Where the pregnancy is a result of rape or incest*

- Termination of pregnancy shall be carried out based on the request and the disclosure of the woman that the pregnancy is the result of rape or incest. This fact will be noted in the medical record of the woman.

- Women who request termination of pregnancy after rape and incest are not required to submit evidence of rape and incest and/or identify the offender in order to obtain an abortion services.

2. Implementation guide for Article 551 sub-article 1B :

Þ *Where the continuation of the pregnancy endangers the life of the mother or the child or the health of the mother or where the birth of the child is a risk to the life or health of the mother*

3. The provider should, in all good faith, follow the knowledge of standard medical indications that necessitate termination of pregnancy to save the life or health of the mother.

4. The woman should not necessarily be in a state of ill health at the time of requesting safe abortion services. It is therefore the responsibility of the health provider in charge to assess the woman's conditions and determine in good faith that the continuation of the pregnancy or the birth of the fetus poses a threat to her health or life.

3. Implementation guide for Article 551 sub-article 1C:

Þ *Where the fetus has an incurable and serious deformity*

- If the physician after conducting the necessary tests makes the diagnosis of a physical or genetic abnormality that is incurable and/or serious, termination of pregnancy can be conducted.

4. ***Implementation guide for Arti****cle* ***551 sub-article 1D****:*

Þ *Where the pregnant woman, owing to a physical or mental deficiency she suffers from or her minority, is physically as well as mentally unfit to bring up the child*

- The provider will use the stated age on the medical record for age determination to determine whether the person is under 18 or not. No additional proof of age is required.

- A disabled person is one who has a condition called disability that interferes with his or her ability to perform one or more activities of everyday living. Disability can be broadly categorized as mental or physical.

- It is therefore the responsibility of the health provider in charge to assess the woman's conditions and determine in good faith that the woman is disabled either mentally or physically.

- Termination of pregnancy under Article 551 sub-article 1D will be done after proper counseling and informed consent.

5. Implementation guide for Article 551 sub-article 2:

Þ *In the case of grave and imminent danger, which can be averted only by an immediate intervention, an act of terminating pregnancy in accordance with the provisions of Article 75 of this Code is not punishable*

Health providers responsible for the provision of comprehensive abortion care services are authorized to perform abortion procedures on women whose medical conditions warrant the immediate termination of pregnancy.

Applicable for all sub-articles:

- The provider has to secure an informed consent for the procedure using a standard consent form, which is annexed to this guideline (Appendix I).

- The provider shall not be prosecuted if the information provided by the woman is subsequently found to be incorrect.

- Minors and mentally disabled women should not be required to sign a consent form to obtain an abortion procedure.

o **Proof of Rape or Incest: Art 552/2**

In the case of terminating pregnancy in accordance with sub-article (1) (a) of Article 551 the mere statement by the woman is adequate to prove that her pregnancy is the result of rape or incest.

o **Timing and place for terminating pregnancy:**

1. Termination of pregnancy as permitted by the law can be conducted in a public or private facility that fulfills the pre-set criteria.

2. A woman who is eligible for pregnancy termination should obtain the service within three working days. This time is used for counseling and diagnostic measures necessary for the procedure.

3. All health facilities at the level of a health center and above can perform termination of pregnancy as permitted by Article 551 for pregnancies less than 12 weeks of gestation from the first day of the LNMP.

4. Termination of pregnancy between 13 and 28 weeks of gestation should be done in a secondary or tertiary level of care.

3. Women who are eligible for pregnancy termination should have the necessary information to seek abortion care as early in pregnancy as possible**.**

- **Punishment for violation of the Directive: Art 552/3**

  Any person who is violated the directive mentioned in sub-article (1) above, is punishable with fine not exceeding 1,000 Birr, or simple imprisonment not exceeding 3 months.

- **The Crime of Abortion: Article 545-550**

  Art 545 lays down the essentials of the crime of abortion as follows:

  1. The intentional termination of a pregnancy,
  2. At whatever stage or however effected,
  3. Except as otherwise provided under Article 551.

- **Punishment for Abortion:**

  The nature and extent of the punishment given for intentional abortion shall be determined according to whether it is procured by the pregnant woman herself or by another, and in the latter case according to whether or not the pregnant woman gave her Consent (Art 545/2).

- **Abortion Procured by the Pregnant Woman: Article 546.**

Simple imprisonment shall be imposed on a pregnant woman who intentionally procures her own abortion. Any other person who procured for her the means of, or aids her in the abortion, shall be punishable as a principal criminal or an accomplice, with simple imprisonment.

- **Abortion Procured by Another: Article 547**

1. **Simple imprisonment** shall be imposed on a person who performs an abortion contrary to the law, or assists in the commission of the crime.

2. **Rigorous imprisonment shall be from 3 years to 10 years**, shall be imposed where the intervention was affected:
   - ✓ against the will of the pregnant woman, or
   - ✓ where she was incapable of giving her consent, or
   - ✓ where such consent was extorted by threat, coercion or deceit, or
   - ✓ where she was incapable of realizing the significance of her actions.

3. **Simple imprisonment** shall be imposed on a pregnant woman who consents to an act of abortion except as is otherwise permitted by law.

- **Aggravated Cases of Abortion: Article 548**

Where abortion is performed apart from the circumstances provided by law the punishment shall be aggravated as follows:

1. A person committing an illegal abortion is punishable with fine in addition to the penalties prescribed in Article 547 above, in cases where the criminal has acted for gain, or made a profession of abortion (Art. 92).

2. The punishment shall be simple imprisonment for not less than 1 year, and fine, in cases where the crime is committed by a person who has no proper medical profession.

3. The Court shall, in addition to simple imprisonment and fine, order prohibition of practice, either for a limited period, or, where the crime is repeatedly committed, for life (Art. 123), in cases where the crime is committed by a professional, in particular, by a doctor, pharmacist, midwife, or nurse practicing his profession.

- **Attempt to Procure an Abortion on a Non-Pregnant Woman: Article 549**

The general provisions relating to crimes impossible of completion (Art. 29) shall apply in the case of attempt to procure an abortion on a woman wrongly supposed to be pregnant.

- **Extenuating Circumstances: Article 550**

Subject to the provision of Article 551 under which performance of abortion has been allowed, if the pregnancy has been terminated on account of an extreme poverty the Court shall mitigate the punishment under Article 180.

Review Questions:

1. Define abortion. Discuss the instances in which abortion is not a crime.

2. Examine the 'Technical and Procedural Guidelines for Safe Abortion Services in Ethiopia, May 2006'. Are they sufficiently safe to protect the interests of a woman?

Brain Storming!

Should 'abortion' be legalized? Do you think that a woman should have absolute rights to decide about this question as it is her right to privacy and a matter of her individual autonomy?

Case Problem:

Tigist was a 6 month pregnant woman. One day she picked up an argument over an issue with Demie who was her neighbor. The argument grew very intense and Demie started beating her with a stick which he found lying down near by without even considering that she was a pregnant woman. Two, three blows fell on her belly too. The next day Tigist developed severe pain in her stomach and went for medical check up. The doctor examined her and to her shock informed her that the baby in her womb had died due to the injuries that fell on her belly. The deceased baby had to be removed from her womb by a surgery.

Answer the following questions:

1. Of what crime Demie should be charged?

a. Homicide? Note these point before proceeding:

Is a child in the womb of its mother a 'human being'? Does it amount to 'causing the death of a human being…' as per Art. 538?

Can Art. 58/3 be applied? Note these points:

The actual intention of the man is only to cause injuries to the mother.

Unless the unborn child can be said to have the legal status of a human being how can it be a 'Negligent Homicide' even by applying Art. 58/3?

b. Does the crime fall under any of the provisions dealing with "Crimes Against Life of Unborn" (Arts. 545-552)? Do you think that the harm caused to the unborn here amounts to 'Abortion'?

c. Do you think that there is some lapse in the Criminal Code to rightly cover this case?

5.2.2. Harmful Traditional Practices:

- **Meaning:**

Harmful traditional practices include female circumcision/genital mutilation, facial scarring, and the force-feeding of women, early or forced marriage, and nutritional taboos, traditional practices associated with childbirth, dowry-related crimes, honor crimes, and the consequences of son preference. These practices adversely affect the health of women and children. Through controlling women's bodies for men's benefit and through ensuring the political and economic subordination of women, harmful traditional practices perpetuate the inferior status of women. Despite their harmful nature and their violation of international human rights laws, such practices persist because of the fact that they are not questioned.

There is an encouraging and a growing international awareness that harmful traditional values and practices act as root causes for discrimination and violence against girls. Several studies both scientific and social attest the fact that value based discrimination is systemic and universal.

The studies of the United Nations Special Rapporteur on Traditional Practices Affecting the Health of Women and Girls, Mrs. Halima E. Warzazi undertaken since 1989 have presented compelling evidences of discrimination and violence against girls based on long upheld social values and practices. The socializing processes observed for boys and girls are designed and rigorously applied to instill a feeling of superiority to boys while girls are groomed to accept subjugation and inferiority with apathy. This established patriarchal system has long endured the passage of time cutting across geographical boundaries as well

as religious and class differences. While this unfortunate situation is universally the manifestations of expression of discrimination and the degrees of violence against girls vary from society to society.

An official Report released on June 1, 2001, by the Office of the Senior Coordinator for International Women's Issues, Office of the Under Secretary for Global Affairs, U.S. Department of State, entitled "Ethiopia: Report on Female Genital Mutilation (FGM) or Female Genital Cutting (FGC)" listed the following types of harmful traditional practices prevalent in Ethiopia:

Type I: Type I is the excision (removal) of the clitoral hood with or without removal of all or part of the clitoris.

Type II: Type II is the excision (removal) of the clitoris together with part or all of the labia minora (the inner vaginal lips).

Type III: Type III is the excision (removal) of part or all of the external genitalia clitoris, labia minora and labia majora) and stitching or narrowing of the vaginal opening, leaving a very small opening, about the size of a matchstick, to allow for the flow of urine and menstrual blood. The girl or woman's legs are then bound together from the hip to the ankle so she remains immobile for approximately 40 days to allow for the formation of scar tissue.

Type IV: Type IV includes the pricking, piercing or incision of the clitoris and/or labia. In Ethiopia the "Mariam Girz" involves blood letting with a sharp needle performed on girls with a stunted clitoris who are assumed to have been already circumcised by St. Mary.

The type of procedure and the stage in a woman or girl's life when it is performed vary according to regions of the country. It may take place eight days after birth, at any time between the age of seven and the onset of puberty, or just before

marriage. Women practitioners perform the procedure. It is generally performed without the aid of anesthesia.

- **Practice:**

Type I (commonly referred to as clitoridectomy) and Type II (commonly referred to as excision) are the two most common forms of female genital mutilation (FGM) or female genital cutting (FGC) practiced among Ethiopian women and girls, Type II being the most common. Type III (commonly referred to as infibulation) is practiced in the eastern Muslim regions bordering Sudan and Somalia. Type IV (referred to as "Mariam Girz" in Ethiopia) is practiced mainly in the Amhara region. These practices cross religious boundaries, including Christians, Muslims and Ethiopian Jews (Falashas).

- **Incidence:**

Ethiopia remains one of the Africa's most traditional societies, even when it comes to legislation. Although the country has a great ethnic, religious and cultural diversity, attitudes towards women's rights are relatively homogenous in rural societies, where female genital mutilation and early marriages are the norms. These practices are so deep rooted in the culture and the social psyche of Ethiopia that the people have almost accepted it as part of their life especially in the Oromia and Somalia regions. Therefore, these issues need a careful and sensitive treatment through long term programs with persistence and strong determination. It is a well known fact that these problems are rampant throughout African continent.

An estimated 130 million women in Africa have undergone **FGM (Female Genital Mutilation)**, a practice carried out in approximately 28 African countries. Across East Africa girls and young women face FGM, which violate their rights and pose a severe risk to their mental and physical health. Infibulation, the most severe form of mutilation is practiced predominantly in Sudan, Somalia, and Djibouti as well as in some parts of Ethiopia and Egypt. Ethiopians perform

genital cutting within a few days of birth, and Sudanese girls experience it at age of 12.

In 1997/1998 the National Committee on Traditional Practices in Ethiopia (NCTPE) carried out a national baseline survey to determine the prevalence of this practice. Some 44,000 people were interviewed in a study reaching 65 of Ethiopia's 80 ethnic groups (urban and rural) in all ten regions of the country. The published results show 72.7 percent of the female population have undergone one of these procedures.

Regional statistics of the prevalence from the survey are: Afar Region – 94.5 percent; Harare Region – 81.2 percent; Amhara Region – 81.1 percent; Oromia Region – 79.6 percent; Addis Ababa City – 70.2 percent; Somali Region – 69.7 percent; Beneshangul Gumuz Region – 52.9 percent; Tigray Region – 48.1 percent; Southern Region – 46.3 percent.

Type I, often called the "sunna circumcision" in Ethiopia, is commonly practiced among the Amharas, Tigrayans and the Jeberti Muslims living in Tigray. The Gurages, some Tigrayans, Oromos and the Shankilas practice Type II. Type III, the most drastic and harmful form, is common among the Afar, the Somali and the Harari. Type IV, called "Mariam Girz", is practiced mainly in Gojam in the Amhara region.

A number of groups do not practice any of these forms. These are the Bengas of Wellega, the Azezo, the Dorze, the Bonke, the Shama and some population groups in Godole, Konso and Gojam.

- **Attitudes and Beliefs:**

Cultural practice encourages women to undergo one of these procedures. It is often associated with positive attributes such as gaining respect within the village and becoming a woman. Most importantly, girls who have not undergone one of

the procedures are considered more likely to be promiscuous and, therefore, unworthy of marriage. The belief also exists that external female genitals are unclean

Some use religion as the basis for their justification in performing these procedures, despite the fact they are not required by either the Quran or the Bible. Some Coptic Christian priests refuse to baptize girls who have not undergone one of the procedures.

Other harmful traditional practices surveyed by the NCTPE include uvulectomy, milk-teeth extraction, early marriage, marriage by abduction, and food and work prohibitions. The maternal mortality rate is extremely high due, in part, to food taboos for pregnant women, poverty, early marriage, and birth complications related to FGM, especially infibulation.

- **Performers of FGM:**

Because the majority of African communities still live in rural communities, traditional circumcisers perform the practice using a variety of sometimes contaminated and instruments and without anesthesia. Instruments used range include the traditional circumcision blades, knives, pieces of glass or stones, scalpels, razor blades and scissors. Increasingly, trained health providers (nurses, midwives, doctors and other allied health personnel) carry out FGM/FGC. Hospital cleaners and veterinary doctors have also been reported to perform the practice in some communities. With the increasing awareness of negative health consequences of FGM/FGC, more families especially the educated and urbanized are taking their daughters to the health facilities and/or professionals in order to reduce the immediate complications. Health providers often use hospital equipment and drugs (local anesthesia, antibiotics, ant-tetanus and vitamin K) to reduce the immediate complications of the practice including bleeding, pain and infections. However, WHO, UNFPA and international community condemn medicalization of the practice under any circumstances.

- **Immediate Health consequences of FGM:**

The health consequences of FGM are both immediate and life-long including haemorrhage, trauma, and infections, including HIV/AIDS. In fact FGM is one of the main health hazards that have significantly contributed to a very high maternal mortality rate in Somalia. Obstructed labour due to genital scarring is one of the most common complications of FGM.

The after effects of FGM start during the process of mutilation and continue for a period of a few hours to several years. These include hemorrhage, pain, shock, infection and abscesses, injury to the adjacent tissues, Fractures and dislocation, failure to heal. Wound healing may be delayed as a result of irritation of urine, poor cysts and abscesses on the vulva, recurrent urinary tract infections, infection near the urethra cancer, difficulties in menstruation, chronic pelvic infection, obstetric complications, keloid scar formation, difficulties in providing gynecological care.

- **Harmful Traditional Practices Prohibited Under the Criminal Code of Ethiopia: Arts 561-570**

  - **Traditional Practices Endangering the Lives of Pregnant Women and Children Art 561-563**

The following are the practices traditionally practiced against women and children in Ethiopia and are likely to endanger their lives:

- massaging the abdomen of a pregnant woman, or shaking a woman in a prolonged labour; or
- soiling the umbilical cord of a newly-born child with dung or other similar substances, keeping a newly-born child out of the sun, or
- feeding the newly born-child with butter, excising the uvula of a child or
- taking out milk teeth or
- preventing the child from being vaccinated; or

- the exercise of other traditional practices known by the medical profession to be harmful

➢ **Punishments:**

1. **Fine or simple imprisonment ranging from 3 months to 1 year,** for causing the death of a pregnant or a delivering woman or that of a newly born child as a result of the application of a harmful traditional practice (Art.561/1).

2. **a) Simple imprisonment ranging from 6 months to 3 years or fine from 2,000Birr to 4,000 Birr,** Where the death was caused by negligence,(Art 561/2)(the relevant provision of this Code Art. 543).

b) Simple imprisonment of 1 year to 5 years and fine from 3,000 Birr to 6, 000 Birr, where the death was due to the negligence of a professional medical person9 Art 543/2.

3. **Fine or simple imprisonment not exceeding six months**, for causing bodily injury or mental impairment to a pregnant or delivering woman or to a newly-born child as a result of the application of a harmful traditional practice (Art 562/1).

4. a) Simple imprisonment not exceeding six months or fine not exceeding 1,000 Birr, where the injury to body, mind or health was caused by negligence Art 562/2 (the relevant provision of this Code (Art. 559) shall apply).

b) Simple imprisonment not less than 6 months and fine not less than 1,000 Birr where the injury is grave within the meaning of Art 555 and is caused by those who are under a special or professional duty (Art 559/2).

5. Warning instead of punishment at the discretion of the Court: Art. 563

In respect of the crimes specified under Articles 561 and 562, the Court may give a criminal only a warning instead of fine or a penalty entailing the loss of liberty taking into account the age, education, experience or social status of the criminal,

- **Violence Against a Marriage Partner or a Person Cohabiting in an Irregular Union : Article 564**

This article raises a serious doubt regarding whether this crime rightly falls under harmful traditional practices or not. This article defines a crime relating to violent conduct of a husband or a person living in an irregular union towards his spouse or companion. Where a person being a marriage partner or a person cohabiting in an irregular union causes grave or common injury to his /her physical or mental health by doing violence, he shall be punished under the relevant provision of this Code (Arts. 555 - 560). The criminal shall be punished having regard to the nature of injury that is caused to the victim of such violence.

- **Female Circumcision: Art. 565**

Female circumcision (FC), also known as female genital mutilation (FGM), is a procedure that involves partial or complete removal of external female genitalia. The definition given by the World Health Organization (WHO) states that, “female circumcision comprises of all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs whether for cultural, religious or other non-therapeutic reasons" (WHO, 1998, p.5). The United Nations Children's Fund, the United Nations Population Fund, and the WHO have jointly issued a statement that FC and FGM causes unacceptable harm and issued a call for the elimination of thos practice worldwide. The WHO also contends that female circumcision is a "violation of internationally accepted rights" (WHO, p.1). Female circumcision is a widespread cultural practice and affects millions of young women. Issues related to female circumcision that are of special concern are health consequences, civil rights, cultural considerations, and legal and ethical aspects.

Another problem is that the term ***female circumcision*** is vague, referring to anyone or more of a number of surgical procedures. These have been defined by the World Health Organization as follows:

Female Genital Mutilation comprises all procedures that involve partial or total removal of female external genitalia and/or injury to the female genital organs for cultural or any other non-therapeutic reason.

Classification

Type 1: Excision of the prepuce with or without excision of part or all of the clitoris

Type 2: Excision of the clitoris together with partial or total excision of the labia minora

Type 3: Excision of part or all of the external genitalia and stitching/narrowing of the vaginal opening (infibulation)

Type 4: Unclassified (but may include):

- pricking, piercing or incision of the clitoris and/or labia;
- stretching of the clitoris and/or labia;
- cauterization by burning of the clitoris and surrounding tissue;
- introcision;
- scraping (angurya cuts) or cutting (gishri cuts) of the vagina or surrounding tissue;
- introduction of corrosive substances or herbs into the vagina;
- any other procedure that falls under the definition of female genital mutilation given above

(Source: *Female Genital Mutilation: Report of a WHO Technical Working Group*, Geneva, July 1995. (World Health Organization: Geneva, 1996)

The severity of female circumcision depends on which of these operations are performed (as well as how roughly), and it is true that the most extreme forms (involving the amputation of the external genitalia, with or without infibulation) are significantly worse than even the most radical foreskin amputation.

- **Punishment:**

Simple imprisonment for not less than 3 months, or fine not less than 500 Birr, shall be imposed on anyone who circumcises a woman of any age.

- **Infibulation of the Female Genitalia: Article 566**

Infibulation involves the excision of genitalia and closure of the vaginal opening by stitching and is generally considered the most extreme form of FGM/C. This is disturbing as it indicates that some women who have not undergone infibulation themselves choose to put their daughters through the most severe type of circumcision.

- **Punishments:**

1. Rigorous imprisonment from 3 years to 5 years shall be imposed on anyone performing infibulation of the genitalia of a woman.

2. Rigorous imprisonment from 5 years to 10 years shall be imposed on the criminal where injury to body or health has resulted due to infibulation, subject to the provision of the Criminal Code which provides for a more severe penalty.

- **Punishments for causing Bodily Injuries Through Other Harmful Traditional Practices: Arts. 567-578**

1. One of the penalties prescribed under the provisions of Article 561 or Article 562 above shall be imposed on the criminals inflicting upon another bodily injury or mental impairment through a harmful traditional practice other than the ones specified above and are known for their inhumanity and ascertained to be harmful by the medical profession.

2 .The penalties prescribed for the spread of communicable diseases under Art 514 shall be applied concurrently where the victim has contracted a

communicable disease as a result of one of the harmful traditional practices specified in the above provisions.

- **Punishments for Participation in Harmful Traditional Practices in different capacities: Arts569-570**

1. Simple imprisonment not exceeding 3 months, or fine not exceeding 500 Birr, shall be imposed on a parent or any other person participating in the commission of one of the crimes specified in this Chapter (Art. 569).

2. Simple imprisonment for not less than 3 months, or fine not less than 500 Birr, or both, shall be the punishment imposed on a criminal who incites the commission of anyone of the harmful traditional practices mentioned above, in anyone of the following ways(Art. 570):

- publicly or otherwise incites or provokes another to disregard the provisions of this Code prohibiting harmful traditional practices, or
- organizes a movement to promote such end, or takes part in such a movement, or
- subscribes to the schemes of such movement.

Review Questions:

1. Define harmful traditional practices. Why are they being practiced irrespective of their harmful nature?
2. What is FGM? How many types of FGM are practiced in Ethiopia and what are their evil consequences?

Critical Thinking:

1. Do you think that the punishments prescribed for various harmful traditional practices are sufficiently deterrent?
2. Is violence against a marriage partner a traditional practice? Why is Article 564 included in this chapter of the Code?

5.2.3.Bigamy:

Bigamy is the condition of having two wives or two husbands at the same time. A marriage in which one of the parties is already legally married is bigamous, void, and ground for annulment. The one who knowingly enters into a bigamous marriage is guilty of the crime of bigamy. Unfortunately, it is seldom prosecuted unless it is part of a fraudulent scheme to get another's property or some other crime. Having several wives at the same time is called "polygamy" and being married to several husbands is "polyandry."

- **Bigamy Jeopardizes Traditional Institution of Marriage:**

Bigamy more directly jeopardizes the traditional institution of marriage, and more than morality is in play. Recordkeeping by states, the safety and well-being of children and the stability of the family unit are all potentially implicated by bigamous relationships. Bigamy also finds no widespread tradition of tolerance, either in our country's recent or more distant past. Society sees bigamy as morally wrong. Bigamy has ever been protected by our society – to the contrary bigamy has always been illegal, and a basis for marital dissolution.

- **Bigamy Under Ethiopian Family Law: Article 650-651**

Article 650 requires the following essential elements to constitute a crime of bigamy:

1. Intentionally contracting another marriage
2. While still being tied by the bond of a valid marriage i.e. before the first union has been dissolved or annulled

- **Punishments for Bigamy:**

1. Simple imprisonment, in normal cases.

2. **Rigorous imprisonment not exceeding five years**, in grave cases, and especially where the criminal has knowingly misled his partner in the second union as to his true state.
3. **Simple imprisonment** shall be imposed on any unmarried person who marries another he knows to be tied by the bond of an existing marriage (Art. 650/2).

- **Suspension of Limitation Period: Art 650/3**

  Limitation of criminal proceedings is suspended until such time as one of the two marriages shall have been dissolved or annulled. In other words, the limitation period starts running only after one of the two marriages have been declared as dissolved or annulled.

- **Exception to Bigamy: Article 651**

  Marrying again during the subsistence of a valid marriage may not amount the crime of bigamy where it is in conformity with religious or traditional practices recognized by law. This provision is in fact in line with the Constitutional provisions Art. 34 (4) and (5). Under Art 34/4 the Constitution provides that, laws may be enacted to give recognition to religious and customary marriages. Accordingly, the Civil Code recognizes such marriages. Art. 34/5 allows the use of customary and religious laws to adjudicate disputes of a family and personal law nature, provided the parties consent thereto. On the basis of Art.34 (5), Article 78(5) of the Constitution provides that "…the Council of people's Representatives and state councils can establish or give official recognition to religions and cultural courts."

  Therefore, under Ethiopian law, marriage could be concluded in anyone of the following three ways:

  - before an officer of civil status,
  - according to the religion of the parties, or
  - according to local custom (Art.577 of the Civil Code).

  All these types of marriages produce the same legal effects (Art.625 of the Civil Code). Arts. 605(2) and 606(2) specifically provide that *religious and customary*

marriages are subject to the conditions common to all forms of marriage, most important of which are age, prohibition of marriage between persons related by consanguinity and affinity, the prohibition of bigamy, and the requirement of consent of the spouses. If this is so, Art 561 of the Criminal code seems to be contradicting with the provisions of Art 606/2 of the Civil Code which makes even the customary marriages subject to the common conditions of a valid marriage and thereby being in a valid marriage is a disqualification for a subsequent customary marriage.

Art. 34(5) of the FDRE Constitution provides that adjudication of family disputes by religious and cultural laws is allowed … if all parties to the dispute agree. But this goes contrary to CEDAW Art.5 (a) which imposes an obligation of modifying social and cultural prejudices and practices based on the inferiority and superiority of the sexes, and CEDAW Art. 15 under which all agreements which have the effect of restricting the legal capacity of women (in this case voluntary submission to the jurisdiction of customary and religious tribunals.) Art. 34(5) of the Constitution fails to protect the rights of women. Art.34(1) of the Constitution gives women equal rights as regards to marriage, during marriage and at its dissolution, and if religious laws, which are given recognition according to Art. 34(5) discriminate against women; it can be argued that they are unconstitutional.

The Civil Code prohibits bigamy (Art. 588). Bigamous marriages are dissolvable on the request of either spouse or the public prosecutor; and non-conformity with Art. 585of the Civil Code is punishable.

Since bigamy is an indignity to women and a violation of CEDAW Art.5(a) which requires the modification of cultural practices which are prejudicial to women, the revision of Art 34/5 of the Constitution and Art 561 of the Criminal Code should be seriously considered in order to meet the standards of the international instruments on the point. In other words, Art.34(5) of the FDRE Constitution

which allows adjudication of personal or family disputes by religious or cultural laws is by itself contrary to our treaty obligations.

❖ **Judicial Trend towards Bigamy and Proof Marriage**

• Ansha Seid V Tsehay Abebe (Addis Abeba High Court, Civil Case No 37/82)

• Diribe Ana V Yeshi Zewge (Addis Abeba High Court, Civil Case No 402.85)

• Tsehay Assefa V Sunka Biyan (Region 14 Regional Court, 1987, Case No 404/85)

All these cases reveal that Courts are in favor of finding that bigamous marriages are valid. Bigamy is an indignity to women, but, if the bigamous marriage is concluded in accordance with the law (in either of the 3 modes) and if it is not dissolved in accordance with the law (in either of the 3 dissolving modes), the marriage, albeit a bigamous one, must be recognized as legally valid. This is good for the second wife who would otherwise be denied access to common property and pension. The danger, however, is that it encourages polygamy. In any event, the Court's decisions are in line with the law and provide legal protection for women whose rights were infringed by the practice of bigamy. This protection is in line with CEDAW Art. 2 (c). The problem of bigamy can be seen in light of the failure for compulsory registration of marriages.

Review Questions:

1. Define bigamy. Is this a limitation to individual autonomy?
2. Art 651 create an exception to the crime of bigamy. Is it not volatizing the principle of equality?

Critical Thinking!

Why is the crime of adultery made punishable only on the filing of a formal complaint and for a crime of bigamy there is no such procedural formality? Does this mean that on the information of bigamous marriage state prosecution can be instituted? Isn't the crime of bigamy of private nature?

Brainstorming!

Having regard to the judicial trend in finding the bigamous marriages valid what purpose do the provisions in the Criminal Code serve? Can the criminal still be punished for bigamy even after the bigamous marriage being declared valid?

6. Rape:

Rape is an act of sexual intercourse without women's consent. It is a pervasive form of gender-based violence. As a result, women suffer physically, socially, psychologically and emotionally. Rape is simply the ultimate weapon that men use to exercise their power over women and to exhibit their alleged natural domination. It is an act of hostility, power, control, humiliation, degradation and it is an attack on a woman's body, on her feelings and on her whole life, since, in the final analysis, it is a violation of the most sensitive part of her body as well as her psyche. Rape is not just the problem of the developing world; it is also a global problem that needs global attention.

- **Definition of Rape:**

The word 'rape' has different definitions. For example, *Webster's Dictionary* (1975) defines it as the 'illicit carnal knowledge of a woman without her consent, effected by force, duress, intimidation, or deception as to the nature of the act.'

Miller further defines it as ‘a conscious process of intimidation by which all men keep all women in a state of fear’. Morris, in her book *Women, Crime, and Criminal Justice,* speaks of rape as motivated by anger (involving an expression of hostility towards women and a desire to humiliate them) and power (involving the assertion of dominance over women).

These definitions, however, are limited because the victims of raping are not just women. It is an open secret that a significant number of children and men are raped daily, and that the rapists and the victims are not only heterosexual. Rape and fear of rape has significantly affected the lives of the victims, whether women, men or children. (*Excerpt from Reflections: Documentation of the Forum on Gender, Number 5, July 2001, Panos Ethiopia)*

- **Causes of Rape:**

Even though the potential causes of rape are varied and controversial, because of personal and cultural beliefs as well as economic status, the most commonly attributed causes of rape are inequality in gender power relations and the anger and sadism of the rapists. Sexiness is not the primary motive underlying rape, as most people might tend to think. Evidences reveal that the sexual aspect of a rape is of secondary importance, as married men and women with partners have been reported to have forced themselves on other women or children.

In Ethiopia's case there is a range of other complex contributing factors for raping, such as culture and tradition, poverty and war.

- **Culture:** Culturally transmitted assumptions about men's dominance over women, men's power over women, etc. contribute highly to the ever increasing number of rape cases reported. There is a tremendous denial about the issue of violence against women and children in Ethiopia. Ethiopians are defensive about any criticism directed against their society. The evidence that the Ethiopian culture tolerates sexual violence against girls and women is the practice of marriage by abduction. Abduction and early marriage, always followed by rape,

are the norms in some parts of our society. Kidnapping and the concomitant raping of a woman, as one way of acquiring a wife, is a common occurrence. The social acceptance of this practice puts all women and children in a state of fear, so much so that the UN has reported that women are severely reducing the daily water and nutritional intake of their families in order to avoid being raped in the field or walking to wells to collect water

- **Poverty**: Poverty drives women and children into commercial sex and streetism, which make them vulnerable to sexual exploitation, abuse and rape. As early marriage is rampant in the rural areas, those escaping this type of marriage, or those simply escaping rural poverty, migrate to towns and cities where they will either become maidservants or join the commercial sex industry. They are, more often than not, raped in these places where they make their living as prostitutes or even at the homes where they serve as maids.

- **War**: History is smeared with a lot of ugly lessons about the interrelation between war and rape. This has happened in almost all the wars that history has known. Rape is used in most wars as revenge against certain races, ethnic groups and religious communities. Putting aside for the moment the unforgivable victimization of individual women, the victors use rape for the purpose of demoralizing and intimidating the side to which the victims belong. UNICEF's Progress of Nations 1997 report has revealed that over 20,000 Muslim women were known to have been raped in Bosnia-Herzegovina during the recent war in the Balkans, and that more than 15,000 women were raped in one year in Rwanda. Mass rape has also been reported to have taken place as a weapon of war in Cambodia, Liberia, Peru, Somalia and Uganda. Ethiopian media have reported that Eritrean soldiers raped Ethiopian women during the two year Ethio-Eritrean conflict.

- **Consequences of Rape:**

1. Psychological Injury:

Though the complications of raping vary enormously, depending upon age, culture and other related factors, it leaves the victims, their family members, as well as their communities with enormous psychological trauma. Other forms of torture and ill-treatment that are always accompanied by rape leave victims scarred for life. About 90% of the victims suffers some degree of physical injury and threats of violence compounded by the presence of weapons and intimidating verbal abuses. As a result, the following are some possible psychological consequences which raped women and children face: fear and phobia, repressed anger leading to overwhelming depression and anxiety, feeling of guilt, self-blame, shame, loss of control over oneself, immense shock and disbelief, confusion, difficulty in making decisions, hatred towards men, diminished self-esteem, feelings of worthlessness, fear of being alone, disobedience, aversion to sexual intercourse, thoughts of suicide, desire for revenge, etc. At least two or three of these emotional disorders occur in any given victim. It is also easy to imagine how horrendous the outcome will be when it happens to physically, psychologically and mentally immature children. Worldwide 40-90 percent of sexual assaults are perpetrated against girls who are 15 years old or younger.

2. Effects on Physical Health:

Rape brings significant health problems to the victims. Most importantly, it can lead to unwanted pregnancies and transmissions of STDs, including HIV/AIDS. Sometimes the rape victims are forced to resort to unsafe options to abort their pregnancies usually carried out by incompetent people, which are more often than not followed by complications. Some of the complications are infection, including HIV/AIDS, torrential bleeding, perforation of the uterus, infertility, etc. These and other physical damages occur especially when rape victims are those who are biologically weak.

Moreover, due to the high biological receptivity to viral transmission of young victims, there is a greater risk of contracting STDs, including HIV/AIDS.

Worldwide, women between the ages of 15 and 24 account for half of new HIV infections, and there is no doubt that most of them are due to raping. Generally, the consequences of raping are all interrelated. The process is like a vicious circle.

- **Social Stigma:**

Because raping is associated with social stigma, the victims lose their dignity and respect in the society. They also find it difficult to participate in social activities, as a result of which they alienate themselves from the society. In rural areas, when a woman is abducted and raped, she will no longer get a husband unless her rapist marries her, which of course will add to her misery. She will run away to cities where nobody knows her, only to face prostitution, streetism and other social problems.

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- **Rapists and Victims of Rape:**

All women are potential victims of raping and all men are potential rapists. The act of raping has no boundaries. It can happen to anyone and anywhere, because it is a social attack against women, irrespective of religion, race, age, color, economic status, etc. Rapists, too, are members of a varying racial, religious, socio-economic and age groups. It is an act that may involve your mother, sister, daughter, friends, and even yourself as victim, and the rapist could be your father, brother, relative, stranger, loved one, neighbor, friend or a casual acquaintance. It is continuously becoming impossible for anyone to completely guarantee their own personal safety in their environment.

In the majority of cases, raping is a deliberately planned act in which rapists carefully select their victims as well as the time and place to perpetrate the crime. Rapists take advantage of circumstances and look for opportunities to get their victims alone, particularly targeting young girls. In every act of raping the sexual act is a means of expressing the aggressive needs and feelings that operate in the perpetrator. The coercion takes a variety of forms, involving the use of physical force, threat, or tactics of bargaining by the rapist.

U. D. Nujoma says that the majority of rapists are not pathological monsters but psychologically 'normal' men. The image of the rapist as a lone, psychopathic stalker is the exception and not the rule. On the other hand, others argue that men who have serious psychological and personality disorders, which they discharge through sexual violence, have no regard to what may happen to them or to others. Therefore, they are not deterred by such logical considerations as the punishment they may face or the disgrace they bring upon their families, or the pain they cause to their victims. But what we can generally agree about is that a rapist is a sexually deviant person whose actions are universally condemned. The majority of the rapists carry out the acts to express their hostility towards women (anger), to assert their dominance over women (power), or as an outlet for their aggressive behavior.

❖ **The Extent of Rape in Ethiopia:**

In Ethiopia there is hardly any statistical evidence or data on raping apart from what is occasionally mentioned on the media. So, we cannot state the extent of its prevalence and distribution in the country. This is because raping is one of the most unreported crimes due to the prevailing attitude that it is shameful and degrading to the victims, and thus, the less said about it a better way.

However, it is believed that raping has increased over the last few years. Though the reasons for this belief are not still clear, one reason could be that rape cases reported to the police have increased so late. The problem could not be effectively solved, however, as there is no systematic research done yet. But we can have a glimpse of how raping is putting our society in danger from a survey conducted by Kasaye Mulugeta in high schools of Addis Ababa and Western Shoa. In 1997, a self-administered anonymous questionnaire was distributed to determine the prevalence of raping and reported the outcomes of sexual violence. A total of 1401 female students were involved in the study. The prevalence of completed rape and attempted rape against female students was 5% and 10%, respectively. The age range of those against whom actual raping was committed was between

12 and 23 years, and 85% of the raping victims were less than 18 years of age. Of the total respondents 78% believed that raping was a major problem constraining their educational performance. Among the 72 girls who reported that they had been raped, 24% had vaginal discharge and 17% had become pregnant. Social isolation, fear and phobia, hopelessness and suicide attempts were reported in 33%, 19%, 22%, 6% of the rape cases, respectively. It was concluded that the prevalence of sexual violence among high school students is a serious problem. Considering that this data provide only a very small sample of the experiences of female students in Ethiopia, one can imagine the extent of the danger that the society is facing. (*Excerpt from Reflections: Documentation of the Forum on Gender, Number 5, July 2001, Panos Ethiopia).*

- **The Ethiopian Constitution and Criminal Code on Rape:**

Article 35(4) of the Constitution provides protection for women and children from crimes of raping and abduction. Whatever the motivation for rape, the vast majority of the victims do not feel adequately protected by law. Despite the fact that laws against raping exist on paper, ostensibly for women's protection, there are effective social and legal constraints which prevent women from utilizing their legal rights. The 1957 Penal Code addresses the question of raping in article 589, according to which the act is "punishable with rigorous imprisonment not exceeding 10 years." Where it is committed "on a child under 15 years of age; or on an inmate of a hospital, alms-house or asylum, or any establishment of education, correction, internment or detention, whose is under the supervision or control or dependent upon the accused person; or by a number of persons acting in concert," it is "punishable by a rigorous imprisonment not exceeding 15 years." This Penal Code is what we have been using for almost 44 years now. The law books reflect the attitude of the culture. But it is ridiculous to still maintain such laws (Original Wolde Giorgis of EWLA) at the present.

EWLA should be commended for what they have been doing on behalf of all Ethiopian women. They have revised the law regarding raping as well as other

laws related to women, and they are also giving legal aid to women. At one forum presentation it was reported that there were some improvements in the new draft law, such as specifying the minimum (5 years) and the maximum (20 years) penalties of rigorous imprisonment, depending on circumstances; similarly, the category of 'young' regarding rape victims has been changed to include persons who are 18 years old. But in some cases, the problem does not lie with the law itself but with the judiciary system. Few cases come to court, still fewer rapists are convicted, and the victim, rather than the rapist, is put on trial, rendering rape still a serious threat to women. When one considers that it is the rapist who benefits most from the silence on the part of the judiciary, it is hard to avoid the conclusion that social attitudes and their articulation in the legal process operate to protect not the victim but the rapist. As things stand now, being raped is what is punished and what at the same time constitutes the crime The reasons provided by rapists for their act is that the victim was 'walking alone' or at the wrong place at the wrong time, or that she was asking for it during a date. Let us grant that such sexual myths are true. But what of child victims? It is too obvious to state here that there is a need for arresting and convicting rapists so that they don't go about raping more people at will.

The duties of parents to their children, as being their natural guardians, consist in maintaining and educating them during the season of infancy and youth, and in making reasonable provision for their future usefulness and happiness in life, by a situation suited to their habits, and a competent provision for the exigencies of that situation.

❖ **Essential Elements of Raping: Article 620**

To establish a crime of raping the following essential elements should be proved:

1. Compulsion of a woman to submit to sexual intercourse
2. Outside the wedlock
3. The compulsion may be by any of the following means:

a. Use of violence; or

b. Grave intimidation, or

c. After having rendered her unconscious or incapable of resistance

➢ **Punishment for Raping:**

1. **Rigorous imprisonment ranging from 5 years to 15 years** in normal cases.
2. **Rigorous imprisonment ranging from 5 years to 20 years** in the following circumstances as mentioned in the sub-article (2), where the raping is committed on:

a. A young woman between 13 and 18 years of age; or

b. An inmate of an alms-house or asylum or any establishment of health, education, correction, detention or internment which is under the direction, supervision or authority of the accused person, or on anyone who is under the supervision or control of or dependant upon him; or

c. A woman incapable of understanding the nature or consequences of the act, or of resisting the act, due to old age, physical or mental illness, depression or any other reason; or

d. By a number of men acting in concert, or by subjecting the victim to act of cruelty or sadism,

3.Imprisonment for life, where raping has caused grave physical or mental injury or death. (Sub-art.3)

4. **Enhanced punishment for concurrence,** where the raping is related to

a. Illegal restraint; or

b. Abduction of the victim, or

c. Where a communicable disease has been transmitted to the victim

The relevant provisions punishing these crimes shall be concurrently applied.

5. Rigorous imprisonment ranging from 5 years to 25 years or any other more severe penalty if a relevant provision prescribes so. Art. 628 enumerates such aggravating circumstances as the following:

a. Where the victim becomes pregnant; or

b. Where the criminal transmits to the victim a venereal disease with which he knows that himself is infected; or

c. Where the victim is driven to suicide by distress, anxiety, shame or despair.

Review Questions:

1. What are the causes and consequences of raping?

2. What are the essential elements of raping under the Art. 620? Explain each one of them in detail.

Critical Thinking!

If raping is against the will, consent and dignity of a woman why is forcible intercourse with one's wife is not raping? Is consent given by the woman at the time of contracting marriage a 'blanket consent' for all the sexual life between the spouses after the marriage? Why is 'marital rape' not a crime?

Brain Storming!

According to Art.627 (1) whoever performs sexual intercourse with a minor of the opposite sex, who is under the age of thirteen years, or causes her to perform such an act with her, is punishable with rigorous imprisonment ranging from thirteen years to twenty-five years.

Why is the conduct described in this article does not amount raping? Here even if the infant consents the act it is not a valid consent and thus amounts to an act against the consent of the victim.

Don't you think that the definition of raping under Art 620 should have used the expression "without the consent of the woman or against her will"?

7. Maltreatment of Minors: Article 576

- **Meaning of Maltreatment:**

Maltreatment of minors includes physical abuse, sexual abuse, neglect, and corporal punishment. Causing mental injury is also included in the physical abuse. Neglect means conduct involving failure to provide required care for a child, failure to protect a child from endangerment, or failure to provide appropriate supervision.

- **Corporal punishment**: Hitting or spanking a student with or without an object or the use of unreasonable physical force that causes bodily harm or substantial emotional harm are also maltreatment.

➢ **Punishment for Maltreatment of Minors:**

1. **Simple imprisonment not exceeding three months** shall be the punishment for maltreatment of minors if the following essentials are fulfilled:

a. The criminal should be the one, having the custody or charge of a minor,

b. The criminal should have committed any of the following thins towards the minor:

- Ill-treating him, or
- Neglecting him, or
- Over tasking him, or
- Beating him

2. Simple imprisonment of not less than one year shall be the punishment where the crime causes grave injury to the health, well-being, education or physical or psychological development of the minor. In addition to the imprisonment the criminal shall be deprived of his family rights.

- **Defence for Acts of Correction: Art 576/3 and Art 68/b**

Parents, guardians, teachers and masters are impliedly authorized by Art. 2039/c of the Civil Code to exercise justification for inflicting reasonable corporal punishment on their children, wards, pupils or servants as the case may be. However, such taking of a disciplinary measure by parents or other persons having similar responsibilities, shall not contravene this provision, provided that

such acts are within the limits of the legally permissible limits. Art 68/b of the General Part provides that:

"Acts required or authorized by law do not constitute a crime and are not punishable; in particular, acts reasonably done in exercising the right of correction or discipline;"

The modern society believes more in the modern methods of correction such as, moral influence, persuasion, subtle mechanisms like praise and criticism. A country's cultural development is expected to replace corporal punishment with these methods.

5.2.6.Failure to Maintain: Article 658

- **Meaning of Maintenance:**

Maintenance is the support that one person who is bound by law to do so, gives to another for his living (*Bouvier Law* Dictionary). Every child has the right to basic necessities such as:

1. Food
2. Shelter
3. Clothing
4. Medical care
5. Schooling

Children should get these basic needs from their parents or relatives. This support given by parents or relatives is called **maintenance**.

- **Criminal Liability by Omission:**

Failure to maintain (Art. 658) and failure to bring up (Art 659) are crimes by omissions. As has been studied under the general principles of criminal liability, it is only under certain circumstances, that an 'omission' to act becomes criminal. In fact the law imposes responsibility for omissions reluctantly. Omission" with reference to the performance of a duty involves the idea of conscious or willful

omission. The expression *omission* does not connote any obligation. Omission is a colorless word which merely refers to the not doing of something. Under the criminal law only failures to perform legal duties can amount to criminal omissions. Legal duties to act might arise out of relationships or contracts, or might be imposed by statutes. Failures to perform moral duties cannot constitute the *actus reaus*.

Limiting criminal omissions to failures to perform legal duties is based on the proposition that the individual conscience, peer group pressure and other informal compulsion regulates behaviour more effectively than direct criminal prosecutions. Also, it would not only be burdensome but also impossible for the criminal justice system to enforce moral obligations.

- **Care of Children or Other Dependents:**

  The general rule is that parents, legal guardians, spouses (see *R v Smith* (1979) CLR 251 where the wife died after giving birth to a stillborn child, delivered by her husband at home) and anyone who voluntarily agrees to care for another who is dependent because of age, illness or other infirmity, may incur a duty, at least until care can be handed over to someone else. In three cases, the duty was implied:

- *R v Instan* (1893) 1 QB 450, Instan lived with her aunt, who was suddenly taken ill and could no longer feed herself or call for help. She was convicted of manslaughter because she neither fed her aunt, nor called for medical help, even though she continued to stay in the house and ate her aunt's food.
- *R v Stone & Dobinson* (1977) QB 354. Stone and his mistress agreed to care for his sister who was suffering from anorexia. As her condition deteriorated, she became bed-ridden but no help was summoned and she died. They were convicted of her manslaughter because they had accepted her into their home and so assumed a duty of caring for her.
- *R v Gibbons & Proctor* (1918) 13 Cr App Rep 134. A father and lover neglected his child by failing to feed him. The lover had taken on a duty of caring for the child when moving into the house and was under an obligation to care for him.

Art. 658 of the Criminal Code imposes criminal liability on persons falling under any of the following categories:

a. Persons refusing or omitting to provide maintenance which he owes, by virtue of law, to be entitled persons, including a spouse who brought action for divorce, until such divorce is pronounced; or

2. A persons failing to meet the financial obligations he has incurred, by virtue of law or formal undertaking;

a. towards a woman whom he has made pregnant out of wedlock; or

b. towards a person with whom he has lived in an irregular union.

❖ **Persons Entitled To Maintenance By Virtue Of Law:**

Arts. 197 and 198 of The Revised Family Code includes a person's ascendants, descendants, brothers, sisters, and persons related by affinity such as wife's mother and father in the list of persons that are entitled to maintenance.

➢ **Punishment for Failure to Maintain:**

This crime is prosecuted and punished only on the filing of a formal complaint. The criminal is punishable with:

1. **Fine, or**
2. **Simple imprisonment not exceeding six months**

5.2.7.Failure to Bring Up: Article 659

This provision makes parents and other persons having the authority of guardians or tutors but failing in their duties in such capacity. Parent's natural duty to bring up their children has been recognized as a legal duty by this provision to bind negligent parents to their obligations as parents.

The essential elements of this crime under Art 659 are:

1. A parent or other person exercising the authority of guardian or tutor,
2. For gain or in dereliction of his duty, commits any of the following acts:

a. grossly neglects the children under his charge and abandons them without due care and attention or to moral or physical danger; or

b. entrusts a child for a long time to a person, an organization or an institution with whom or where he knows, or could have foreseen, that it will be reduced to physical or moral destitution, or will be physically or psychologically endangered

- **Punishment for Failure to Bring Up:**

2. **Simple imprisonment or fine,** in normal circumstances of the commission of the crime.
3. **Simple imprisonment or fine and deprivation of the criminal's family rights,** in grave cases.
4. **Enhancement of punishment with concurrence (Art 63)** shall apply where the child has suffered injury, whether foreseen or calculated, whether by abuse of the right to administer chastisement or through ill-treatment.

Review Questions:

1. Define 'maltreatment of minors'. What are the possible defences for this crime?
2. Explain the concept of criminal liability for omissions?
3. Explain the meaning of the term 'maintenance'. Why failure to maintain is a crime? Why cannot it be dealt with civil remedies only?

5.2.8.Traffic/Trafficking in Women and Minors:

The expression 'traffic' means, illegal or disreputable business or activity. According to ***'the Convention on Transnational Organized Crime and its***

Protocol on Trafficking', (Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organized crime, United Nations, 2000 (article 3), signed by Greece, December 12, 2000), trafficking in persons means,

"the recruitment, transportation, transfer, harboring or receipt of persons, by means of threat or use of force or other form of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include at a minimum, the exploitation of the prostitution of others or other form of sexual exploitation, forced labour or services, slavery or practices similar to services, servitude or the removal of organs".

The consent of a victim is irrelevant. Trafficking in women and children is not a new phenomenon (O. Philippon). Over centuries, women and children were bought, sold and sexually exploited. However, recent developments have led to its promotion and expansion: since the 1970s and especially during the 1990s it has become a flourishing and lucrative industry in Asia and Europe. The problem is acute in Eastern Europe and especially in the Balkan countries. The above mentioned conditions continue at the beginning of the 21st century often in a highly organized and systematic manner, resulting in a modern form of slavery under which conditions today live thousands of women and children like today in the European Union.

Trafficking is a different notion from that of the prostitution of women, (Ph. Williams) which itself is an activity covering the spectrum – from individual women acting independently to highly organized arrangements in which women are controlled by pimps or criminal enterprises. As Scambler points out, women "sex workers" a heterogeneous body of workers, and many of them are autonomous. It is inappropriate to characterize them as passive victims; they are not dupes but require resourcefulness and expertise to cope with day to day

activities and to sustain their livelihoods. However, other scientists have estimated that 80-95% of all prostitution is pimp controlled (J. Faugier and M. Sargeant). Others (O. Philippon) distinguish the difference between forced and free prostitution, in which the forced type involves the exploitation of women.
in many of the richer nations' child prostitution and pornography markets.

- ***Pornography***, According to IMO (International Organization for Migration) pornography is *"the abuse of the basic right of liberty and expression and trading it is an outrage upon fundamental human rights of third parties"*. Pornography is manifested via publications, photography, films, videos and computer games. Before the emergence of the Internet, an active trade in illicit videocassettes was carried out in sex shops. The new digital era creates and fuels "special preferences". Absolute discretion, dozens of branches of pornography and harmless sexual intercourse without personal contact convert the Internet into the paradise of pornography in general and child pornography in particular.

- ***Trafficking in children*** for the commercial sex industry and pornography is even more pronounced than that of the women. Around the world, children are being sought for a variety of illicit purposes, (e.g. forced work, forced begging sometimes after mutilation by unscrupulous traffickers) and are being bought, abducted or lured away from their families, often to be transported across borders and then sold for adoption (especially children from Latin America and Eastern Europe with emphasis on war orphans) or for the removal of their organs, tissues and other body material, although information on this activity is limited. The most widespread purpose of trafficking in form children is that of commercial and sexual exploitation. According to the Protocol of the United Nations Convention against transnational organized crime child is considered any person under eighteen years of age (IOM). These main forms of sexual exploitation were defined by the ***World Congress Against Commercial Sexual Exploitation of Children, 1996***:

- prostitution;
- trafficking and sale for sexual purposes: transferring persons from one party to another in exchange of money or other recompense;
- child pornography.

In many cases, these three forms are interconnected. ***The Council of Europe, 2000*** gives the following definitions:

a) ***Sale of children*** means any action transaction whereby a child is transferred by any person or group of persons to another for remuneration or other consideration;

b) ***Child prostitution*** means the use of a child in sexual activities for remuneration or other form of consideration;

c) ***Child pornography*** means any representation by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of sexual parts of a child, the dominant characteristics of which is depiction for a sexual purpose.

The United Nations (1996) considers the commercial sexual exploitation of children as invisible, mobile, global, escalating, and a highly profitable business. The advent of digital photography and new digital technologies allow child pornography to be copied, stored and transmitted quickly with perfect accuracy. The abundance of child pornography available in cyberspace means that traditional printing and photography are likely to be eclipsed by digital technology as the dominant media for the production and distribution of the material. UNICEF and UNESCO reports indicate that international criminal organizations in Eastern Europe and Russia are becoming increasingly involved in trafficking children from these areas to Western Europe for the use of many of the richer nations' child prostitution and pornography markets.

❖ Trafficking/Traffic in Women and Minors Under Ethiopian Criminal Code: Arts. 597-600 and 634-638

The Ethiopian Criminal Code deals with the crime of trafficking under two different heading basing on the purpose of this criminal conduct. They are;

1. Trafficking for the purpose of forced labor, Arts. 597-600
2. Traffic for the purposes of prostitution, Arts. 634-638

➢ Trafficking For the Purposes of Forced labor: Arts. 597-600

This criminal conduct is punishable under four specific crimes, namely:

- **Trafficking in Women and Children: Article 597**

The essential elements of this crime include the following:

1. Recruiting, receiving, hiding, transporting, exporting or importing a woman or a minor for the purpose of forced labour,
2. By violence, threat, deceit, fraud, kidnapping or by giving of money or other advantages and having control over a woman or a child

Sub-Article (2) makes people who aid or render any type of the assistance for the above said purposes are equally punishable along with the principal criminal.

➢ **Punishment for Trafficking:** Rigorous imprisonment ranging from 5 years to 20 years, and fine not exceeding 50,000 Birr.

- **Unlawful Sending of Ethiopians for Work Abroad: Article 598**

While Article 597 is a crime against women and children this is crime against both women and men equally. The essential elements of this crime are:

1. Sending of an Ethiopian women or men [Sub-Art. (3)] for work abroad,
2. Without having obtained a license or by any other unlawful means

➢ **Punishment for Unlawful Sending for work abroad:**

1. Rigorous imprisonment ranging from 5 years to 10 years, and fine not exceeding 25,000 Birr.
2. Rigorous imprisonment ranging from 5 years to 20 years, and fine not exceeding 50,000 Birr , where an Ethiopian woman or man sent to abroad, owing to the act mentioned above, and suffers an injury to her/his human rights, or to her/his life, body or psychological make-up.

The Code also punishes the illegal associations and juridical persons for participating in the above said crimes and the officials at any level of the governmental hierarchy who fails to take the appropriate measure expected of him for the control or prevention of traffic under Articles 599 and 600 respectively.

- **Traffic For The Purposes Of Prostitution**: **Arts.634-638**

There are three crimes falling under this section, namely, Habitual Exploitation for Pecuniary Gain (Art 634), Traffic in Women and Minors (Art 635) and Organization of Traffic in Women and Minors (Art 637).

- **Habitual Exploitation for Pecuniary Gain: Article 634**

A person is said to have committed the crime of habitual exploitation for pecuniary gain if he does any of the following things:

1. Makes a profession of or lives by procuring or on the prostitution or immorality of another, for pecuniary gain, or
2. Maintains a brothel, as a landlord or keeper

- **Punishment:** Simple imprisonment and fine.

- **Traffic in Women and Minors: Article 635**

Within the meaning of this provision traffic in women and minors requires the following essential elements:

1. Seducing, or enticing, or procuring, or otherwise inducing for prostitution women or minors, or keeping such a person in a brothel to let him out to prostitution,

2. With an intention to make pecuniary gain, ***or*** to gratify the passions of another

3. Either with or without their consent of the victim

The phrase, 'Whoever, for gain, ***or*** to gratify the passions of another' makes it clear that doing of any of these activities even without any gain to himself but to gratify the passions of another is well within the purview if this provision and is a punishable crime

- **Punishment:**
  - **Rigorous imprisonment not exceeding 5 years, and fine not exceeding 10,000 Birr,** subject to the application of more severe provisions especially where there is concurrent illegal restraint (Art 585).

- **Rigorous imprisonment shall be ranging from 3 years to 10 years, and the fine shall not exceed twenty 20,000 Birr** in the following aggravating circumstances (Art. 536):

a) Aggravating Circumstances relating to the victim:

- the victim is a minor; or
- the victim is the wife or a descendant criminal, his adopted child or the child of his spouse, his brother or his sister, or his ward, or where the victim has been entrusted, on any ground whatsoever, to his custody or care; or
- the victim is intended for a professional procurer, or has been taken abroad or where the victim's whereabouts or place of abode cannot be established; or
- the victim has been driven to suicide by shame, distress or despair.

B) Aggravating Circumstances relating to the criminal:

- the criminal has taken unfair advantage of the material or mental distress of his victim, or of his position as protector, employer, teacher, landlord or creditor, or of any other like situation; or

- the criminal has made use of trickery, fraud, violence, intimidation, coercion, or where he has misused his authority over the victim;

- **Organization of Traffic in Women and Minors: Article 637**

The crime of 'organization of traffic in women and minor' lies in the conduct of, 'making arrangements or providing of any kind of facilities for the procurement of or traffic in women or minors'.

Punishment:

1. **Simple imprisonment**, or according to the circumstances of the case.
2. **Rigorous imprisonment not exceeding 3 years, and a fine which shall be not less than 500 Birr,** in grave cases, especially where a professional procurer is involved or where the arrangements are fully made and intended to apply to many victims.

- **Criminal Liability of a Juridical Person: Article 638**

Where a juridical person takes part in the crimes specified in this Section, it shall be punishable in accordance with Article 90(3) of this Code, depending on the nature of the crime and the circumstances of the case.

Review Questions:

1. Define 'trafficking in women and minors". Are the definitions under the Ethiopian Criminal Code in conformity with those given under the international instruments?
2. How many types of crimes relating to trafficking are found under the Ethiopian Criminal Code? What are they?
3. Does the consent of victim neutralize the crime of trafficking?
4. Is the pecuniary gain of the criminal an essential element for all types of trafficking?

Critical Thinking:

Having regard to the serious nature of these crimes of trafficking particularly of minors, do you think that the punishments prescribed under the Criminal Code of Ethiopia are sufficiently severed?

Section. 6. Crimes Against Property:

Constitutional Principles Relating to Right to Property:

The constitutional protections of state, public and private properties in Ethiopia are found in Article 40 of the Constitution of FDRE 1995. The principles relating to the right to property embodied in this article are the following:

1. Every Ethiopian citizen has the right to the ownership of private property. Unless prescribed otherwise by law on account of public interest, this right shall include the right to acquire, to use and, in a manner compatible with the rights of other citizens, to dispose of such property by sale or bequest or to transfer it otherwise.
2. "Private property", for the purpose of this Article, shall mean any tangible or intangible product which has value and is produced by the labour, creativity, enterprise or capital of an individual citizen, associations which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common.
3. The right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and in the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange.
4. Ethiopian peasants the have right to obtain land without payment and the protection against eviction from their possession. The implementation of this provision shall be specified by law.

5. Ethiopian pastoralists have the right to free land for grazing and cultivation as well as the right not to be displaced from their own lands. The implementation shall be specified by law.
6. Without prejudice to the right of Ethiopian Nations, Nationalities, and Peoples to the ownership of land, government shall ensure the right of private investors to the use of land on the basis of payment arrangements established by law. Particulars shall be determined by law.
7. Every Ethiopian shall have the full right to the immovable property he builds and to the permanent improvements he brings about on the land by his labour or capital. This right shall include the right to alienate, to bequeath, and, where the right of use expires, to remove his property, transfer his title, or claim compensation for it. Particulars shall be determined by law.
8. Without prejudice to the right to private property, the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property.

The criminal law is concerned with the unlawful violations of these protections guaranteed under the Constitution. Article 662 of the Criminal Code declares all interference with property and economic rights or rights capable of being calculated in money *forming a part of the property of another* as punishable conduct. State, public and private properties are protected under the Criminal Code. Damage to rights in property within the meaning of this Criminal Code is constituted by *any injury or prejudice suffered in comparison with the normal situation in the absence of the crime*.

Interferences of minor importance with property rights are subject to the provisions and sanctions regarding petty offences.

6.2. Some Serious Crimes Committed Against Property:

6.2.1. Theft, Robbery and their forms:

- **Robbery:**

In the criminal law, robbery is an aggravated form of theft that involves violence or the threat of violence against a victim in his presence. Many criminologists have long regarded statistics on robbery to be one of the most accurate gauges of the overall crime rate.

- **Categories of theft:**

Robbery is the commission of theft in circumstances of violence and involves the application or the threat of force in order to commit the theft or to secure escape. Robbery takes many forms, ranging from muggings to bank robberies. The penalty for robbery is usually more severe than that of the larceny. Many criminologists consider statistics on robbery to be among the better indicators of the overall...

- **Comparison with extortion:**

The scope given to the offense of extortion in a particular legal system is determined partly by the content of the related offense of robbery. Robbery is typically confined to taking property from the person or presence of the victim by violence or by threat to do an immediate physical harm. More remote and less terrifying threats fall within the province of the extortion and blackmail...

❖ **General Principles relating to the Crimes against Property Under The Criminal Code:**

Crimes against property include one of the following essential elements:

- Damage to the rights of the owner or possessor in the property rights(Art 663), e.g. disturbance of possession, disturbance of another's holdings etc. or

- Damage to the rights of the owner or possessor in the property rights and unlawful or unjustifiable enrichment to the criminal (Art 664), e.g. Theft, Robbery, misappropriation etc.

Presumption of Unlawful or Unjustifiable Enrichment: Art 664

Where the law requires, in order that there be a crime, that the criminal shall have acted with intent to obtain for himself or to procure for a third person an unlawful enrichment, there is a presumption that the act was done in order to obtain or procure a benefit or an unjustifiable advantage.

In such event, the crime is completed from the time when such special intent, joined to the material elements, is proved, notwithstanding that the intended enrichment has not taken place. Repayment or the making good of the damage, even if unsolicited, after such time, does not vitiate the crime, but the Court may take account thereof in determining the sentence (Art. 79 (e)).

- **Essential Elements of Theft Art. 665**

A crime of theft is committed if the following essentials are satisfied:

1. Abstraction of another person's movable property or a thing detached from an immovable property,
2. Whether by taking and carrying or by direct appropriation, or by having it pass indirectly to his own property,
3. With an intention to obtain for himself or to another an unlawful enrichment.

'Abstraction' means, taking or appropriating or taking from another with intent to defraud. It is defined as, 'Wrongful abstraction' is unauthorized and illegal taking or withdrawing of funds etc., and appropriation thereof to the taker's benefit (Black's Law Dictionary).

➢ **Punishment for Theft:**

1. **Simple imprisonment or rigorous imprisonment not exceeding 5years** according to the circumstances of the case.(Art 665/1)
2. **Damage to Property:** Where the criminal himself has detached the movable object from an immovable property, and while doing so has caused damage to the movable or immovable property, the provisions relating damage to property i.e. Arts 689-691 shall apply concurrently. (Art 665/2)
3. **Petty Abstraction:** Where any person has committed petty abstraction of the property of another of very small value, he shall be punished according to the provisions of Art 852 and 853 of the Petty Code.(Art. 665/3)

- **Aggravated Theft Art. 669:**

  Where theft as defined under Art 665 is accompanied by one or more of the aggravated circumstances listed out in three sub-articles of Art 669, the punishment shall be **Simple imprisonment of not less than 1year and may extend up to rigorous imprisonment not exceeding 15 years** if the gravity of the crime so demands.

❖ **Robbery Art 670:**

The crime of 'robbery' includes the following essential conditions:

1. Abstraction of a movable property of another
2. With an intent to obtain for himself or to procure for another an unlawful enrichment, and
3. By use of violence or grave intimidation towards a person:

a. for facilitating such abstraction, or

b. to render useless any resistance offered during or after the abstraction, or

c. otherwise to render such a person incapable of resisting

- **Punishment for Robbery:** Rigorous imprisonment not exceeding 15 years.

- **Aggravated Robbery Art. 671 :**

The following circumstances make a crime of robbery to be an aggravated one under this provision:

1. Robbery committed by a member of a gang formed in order to commit acts of violence against persons or property; or
2. Robbery committed :
   - by seriously threatening the victim with death in particular by means of arms or of a dangerous weapon, or
   - by submitting the victim to suffering or grave bodily injury; or
3. in any other circumstance showing that he is particularly dangerous.

- **Punishment of Aggravated Robbery:**

1. **Rigorous imprisonment ranging from 5 to 25 years** under the circumstances enlisted under the sub-art. (1).

2. **Rigorous imprisonment for life** where the criminal acted together with a gang, used arms or other dangerous weapon, means imperiling collective security or means of particular cruelty or where the acts of violence committed have resulted in permanent disability or death(Art 671/2).

3. **Death penalty** may be given if the aggravated robbery is committed can be said to be the most serious case committed under the circumstances mentioned in sub-art. (2).

6.2.1. Breach of Trust and Misappropriation: Arts. 675-681

- **Breach of Trust: Art 675 and 676**

The crime of ‘breach of trust’ is similar to that of the offence of embezzlement under the English law. It suggests that the gist of the crime is 'dishonest misappropriation' or 'conversion to own use' another's property, which is nothing but the offence of criminal misappropriation. The only difference between the two is that in the respect of the criminal breach of trust, the accused is entrusted with property or with dominion or control over the property.

- **Entrustment:** As the title of the crime itself suggests, entrustment or property is an essential requirement before any crime under Art 675 takes place. The language of the article is very wide. The words used are 'property delivered to him in trust or for a specific purpose'. So, it extends to entrustments of all kinds-whether to clerks, servants, business partners or other persons, provided that they are holding a position of trust.

The essential elements of the criminal breach of trust as per Art 675 include:

1. Appropriating or procuring of the property delivered to the criminal in trust or for a specific purpose
2. With an intention to obtain unjust enrichment
3. Either for the benefit of the criminal himself or that of a third person

- **Meaning of ‘Property’:** The expression ‘property’ for the purposes of this article includes a sum amount of money, object or a thing of value received by the criminal in consideration of a sum amount of money, object or thing of value entrusted to him for sale, purchase, exchange or other specific purpose(Art 675/2).
- **Presumption of Wrongful Intention:** The intent to obtain for himself or to procure for a third person an unjustifiable enrichment shall be presumed under the following circumstance:
  - Where the criminal is unable to produce or repay the thing or sum entrusted when called upon to do so
  - Where the criminal fails to return or account for at the time he should have done so.

- **Punishment for Breach of trust:**

1. **Simple imprisonment,** in normal cases; or
2. **Rigorous imprisonment not exceeding 5 years,** according to the circumstances of the case.

Aggravated Breach of trust: Art 676

The crime of breach of trust as has been defined under the previous article is punished for an aggravated crime under the following circumstances Art. 676/1:

1. If the crime is committed against the property of the State or that of a public organization; or
2. Where the criminal is a public official, an appointee or a public trustee or an elected representative

- **Punishment for aggravated breach of trust:**

3. **Rigorous imprisonment ranging from 5 to 15 years and fine not exceeding 100,000 Birr,** in the circumstances specified under the Art 676/1.
4. **Simple imprisonment for not less than 1 year or rigorous imprisonment of not exceeding 15 years,** where thee criminal is one of the categories specified under Art. 676/2.

- **Misappropriation: Art.679**

The crime of 'misappropriation' under this provision requires the following essential elements:

1. Appropriation of property of another which the criminal got into his possession by mistake, accident, the operation of natural forces such as wind or water or in any other manner independently of the will of the owner
2. With intent to obtain for himself or procure for a third person an unjustifiable enrichment
3. The property may include a a thing or an animal which was strayed into his possession

- **Punishment for Misappropriation:**

Simple imprisonment or fine shall be the punishment for misappropriation upon the filing of a formal complaint.

Review Questions:

1. What are the general principles relating to property under the Criminal Code?
2. Explain the Constitutional principles relating to right to property?
3. Define theft and distinguish it from robbery.
4. What is the difference between an aggravated theft and a robbery?
5. What does breach of trust mean? Distinguish it from misappropriation.

Critical Thinking!

Do you think that the expression 'the property of another' sufficiently covers all possible unlawful conducts in this area? Can a person commit theft of his own property?

Illustration: ***A*** keept his valuable jewellery in his friend ***B'***s house for keeping it safely. ***A*** had free access to ***B***'s house as he was his neighbor and were known to each other for quite sometime. One day in the absence of ***B***, ***A*** entered B's house and took away his jewellery and sold it and made money. Later he demanded ***B*** to return his jewellery.

What is the remedy available for B? Whose property was stolen new?

If the wrongful conduct of A is revealed what kind of crime can he be charged?

Don't you think that had definition of theft been something like ***"the dishonest taking of property out of the possession of any person without that person's consent"*** that it would have better covered the unlawful conduct of this nature?

Unit Summary:

A good understanding of the relationship between different parts of the Criminal Code is the first most important thing that the criminal law students should have. The 'General Part' of the Criminal Code sets out the general principles of criminal liability which are common to all crimes. This part explains the meaning of criminal act, criminal intention or negligence i.e. 'the guilt' and lays down the principles following which an accused person's act can be declared punishable. Further, the general part prescribes and defines the kinds of punishments, measures to be applied in each case. To find the relevant law the interrelationships of provisions and cross-references within the Code have to be appreciated very clearly.

The Special Part of the Criminal Code incorporates the conducts that are prohibited under the threat of punishment. The objective of the criminal law is to protect the "interests" of the state, the community and the interests of the individual in order to ensure peace and security. Therefore, crimes against such interests are kept under various titles in a systematic order. The individual interests of a person protected under the Code include his life, his person (body), his liberty, his honor, his morals attributes, his family, his property etc.

Treason is betrayal of sovereignty of a state. There are three types of treason under the Criminal Code of Ethiopia. High treason is also called an 'act of war' as the acts included under the definition of high treason are essentially linked to the situation of war. Treason is not necessarily related to the acts of war. Economic treason is the species of treason which is intended to protect the economic structure of the country. Unauthorized disclosures and communications relating to economic negotiations of a state are prohibited under this provision.

Espionage is the practice of obtaining information about an organization or a society that is considered secret or confidential (spying) without the permission of the holder of the information. During war espionage is used to gather information

about opposing armies and to mislead opponents through counterintelligence. Those engaged in spying risk imprisonment and death if convicted of treason.
Under the Criminal Code there are three kinds of homicides that require the proof of 'intention' as the moral ingredient of the crime, namely Aggravated Homicide (Art 539), Extenuated Homicide (Art 541) and Ordinary Homicide (Art 540). The type of homicide that is defined under Art 543 is the only one that makes a person punishable for causing death negligently. *Infanticide is* child murder in the first year of life. Under the Criminal Code a mother gets a mitigated punishment provided that she commits the crime while she is in labour, or while still suffering from the direct effects of labour.

Crimes against the person, women and children and property are very carefully treated by the Criminal Code. It is essential for the students to have a thorough understanding of the different crimes that are included under the Code. The students may follow the different ways in which crimes are interpreted in this unit for the fact the rest of the crimes are included in the Code.

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UNIT – V

THE CODE OF PETTY OFFENCES

Introduction

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

In order to better appreciate the meaning of petty offences and the significance of the Petty Code it's worthwhile to consider, briefly, the development of the concept of 'social regulation'.

All Criminal law is a compromise between two fundamentally conflicting interests, ---the public interest and the individual interest. The public interest demands restraint of all who injure or threaten the social well-being whereas the individual interest demands the maximum liberty and freedom from interference. The history of criminal law shows a constant swinging of the pendulum so as to favor the public interest at times and the individual interest yet other times. During the nineteenth century it was the individual interest which retained its prominence. The criminal law machinery was overburdened with innumerable checks to prevent possible injustice to individual defendants as a result of which the public interest often suffered. The reaction to this state of affairs came in the twentieth century. The concern now is more of the protection of social and public interests. The teaching of the modern criminologists in the field of legal administration is that, the objective underlying the correctional treatment should change from the barren aim of punishing human beings to the fruitful one of protecting social interests. As a direct result of this new emphasis upon the public

and social, as contrasted with the individual interests, courts have naturally tended to concentrate more upon the injurious conduct of the defendant than upon the problem of his individual guilt. In the case of true crimes, however, although the emphasis may shift, courts can never abandon insistence upon the evil intent as a prerequisite to criminality, partly because individual interests can never be lost sight of and partly because the real menace to social interests is the intentional, not the innocent doer of the harm. But the new emphasis being laid upon the protection of social interests encouraged the development of a special type of regulatory offense involving a social injury so direct and widespread and a penalty so light that in such exceptional cases courts could safely override the interests of the innocent individual defendants and punish without proof of any guilty of intent.

Another important and inevitable consequence of the growing complexities of the twentieth century life is an increasing social regulation; and for this purpose the existing machinery of the criminal law has been seized upon and utilized. The original objective of criminal law was to keep the peace. To this end during the Middle Ages, under the strong influence of the Church, the function of the criminal law was extended to curb moral delinquencies of one kind or another. For these purposes it developed suitable procedure, requiring proof of moral blameworthiness or a criminal intent. But today the crowded conditions of life require social regulation to the degree never attempted before. The invention and extensive use of high powered automobiles require new reforms of traffic regulation; the increased social evils from drink due to the more crowded and complex conditions of modern life require new reforms of liquor regulation; the development of modern medical science and the congested living accommodations of modern cities require new forms of sanitary and health regulation; the growth of modern factories require new forms of labor regulation; the development of modern building construction and the growth of skyscrapers require new forms of building regulation. The traditional elaborate procedures of the criminal law, designed to try the subjective blameworthiness of individual

offenders, is not suitable for exercising petty regulation on a wholesale scale. Therefore, a considerable amount of this developing regulation has been placed under administrative control. However, certain conducts defined and prohibited under those regulations are purposely left to the jurisdiction of the criminal courts for effective implementation of these special penal legislations and to retain the deterrent effect. Therefore, the existence of the Petty Code in the Criminal Code cannot be underestimated. It's a very important part of the Criminal Law which needs to be meticulously implemented having regard to the spirit and nature of the law (Art 3 para 2), to put it in the words of Art 734. Clearly, it is for the protection of the collective interests of the society and thereby for the welfare of the society.

Objectives:

By the end of this unit the students will be able to:

- Understand the concept of 'public welfare offences' and the basic philosophy underlying this category of offences
- Explain the Objective and scope of the Petty Code
- Identify the similarities and differences in the applicability of general principles of criminal laws to the crimes under the Special Part and Petty offences
- Know the procedural requirements for the prosecution of petty offences

Section1. General

1.1. Petty Offence – Definition:

Within the meaning of Art 735 of the Criminal Code commission a 'petty offence' lies in anyone of the following conducts:

- An infringement of the mandatory or prohibitive provisions of law, or
- An infringement of a regulation issued by a competent authority, or
- Commission of a minor offence which is not punishable under the Criminal Law.

Such a petty offence is subject to punishment under the provisions of the law found in Articles 746-775 of the Petty Code.

The mandatory or prohibitory provisions of the law or the regulations mentioned under Art 735 should be understood having reference to Art 3 of the Criminal Code. It specifically refers to the special laws of penal nature and makes the general principles of criminal law applicable to them as well. To make these laws more effective and meaningful there are penalties prescribed for certain violations of those laws. If such penalties fall within the range of penalties prescribed under the Petty Code they will be tried according to the provisions of the Petty Code and are punished thereunder. Examples of such laws may be, The Weights and Measures Proclamation, 1973, The Wild Life Conservation Order, 1970, the Currency Proclamation, 1942 (Proc. No. 31), the Currency Amendment Proclamation of 1947 (Proc. No. 99), etc.,

- **Petty Offences Governed by the Petty Code:**

  Art 736 clearly defines the classes of petty offences that are made punishable by the Petty Code. Art 736/1 giving effect to the principle of legality specifies for the applicability of the Petty Code, the offense in question should have been one that is defined:

  - By one of the provisions of the Criminal Code, or
  - By the provisions of a special law (Art 3 read with Art 735).

  The penalties applicable to such offenses shall be those which are expressly prescribed in respect thereof.

- **Petty Code is Applicable Only in the Absence of a Provision for More Severe Penalty: Art 736/1 Para 2**

  We find offences of similar nature being defined under Petty code and the Criminal Code too. For example, Articles 830, 831, 832 etc, define the petty offences mentioning that cases apart from those falling under Articles 514-533 are to be punished under the provisions of the Petty Code. This means that, those crimes that are made punishable under the Special Part of the Criminal Code

though essentially of same description, against the same subject matter etc., they produce more severe consequences and thus they are punishable with more severe penalties. Therefore, when the unlawful conduct does' not strictly fall under the provisions of the Criminal Code the next step is to check whether there is any petty offence relating to such conduct. Thus, only if there is no provision that punishes the conduct more severely, it becomes punishable under the Petty Code.

But under no circumstances the same conduct becomes punishable under both the criminal Code and the Petty code at the same time. That would clearly amount to double jeopardy (Art 2/5 and Art 736/1 Para 3).

- **Petty Offences Shall not be Punished Retroactively: Art. 736/2**

  Petty offences shall always be punished under the provisions of laws which are in force *at the time of their commission.* They shall not be punished retrospectively.

1.3. Jurisdiction of Petty Code: Art 738

Within the meaning of Art 738/1 the petty offences shall be governed by *the principle of territoriality* (Art 11). The place of commission of the offence is the place of where the offender had either committed or omitted the act resulting in the offence (Art 25).

Petty offences committed on the territory of Ethiopia shall always be tried in accordance with Ethiopian laws when the offender is in Ethiopia. The following rules relating to jurisdiction ***do not apply*** to the petty offences.

3. There is no question of either delegation of jurisdiction or extradition of the offender in case of petty offences. Thus, Articles 12 and 21 have no application to petty offences.
2. Petty offences committed in a foreign country by an Ethiopian or against an Ethiopian shall not be punished in Ethiopia (Art 18).

5. Petty offences committed in a foreign country by an Ethiopian enjoying immunity shall not be punished in Ethiopia (Art 14).

   The only petty offences committed outside the territorial jurisdiction but are still triable in Ethiopia are 'petty offences of purely military character provided by the Ethiopian Military law' 9Art 792). Such offences shall always be tried by the military authority and punished according to Ethiopian law whether they were committed in Ethiopia or in a foreign country (Art 738/3). However, if such offender was already tried for the same act by the foreign Court he may not be punished here again.

- **Effect of Foreign Sentences: Art 739**

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

1.3. General Principles of Liability in case of Petty offences:

- **Requirement of the Moral Ingredients:**

It is evident from the provisions of Art 741 that the doctrine of *mens rea* is generally applicable to petty offences too. The latter part of the Article 741/2, says that even all negligent petty offences are punishable except where the law creating the offence expressly exempts from liability to punishment in respect of an act committed by negligence. This means that the principle relating to the liability for negligent crimes under the main Code goes exactly in the opposite direction. Under Art 59/2 a negligent crime is not generally punishable but exceptionally punishable. That is, the negligent crimes are punishable only where

the law so expressly provides that negligent commissions/omissions of certain specific crimes are punishable by reason of their nature, gravity or the danger they constitute to the society. In other words, in case of ordinary crimes negligent crimes are not always punishable unless expressly provided whereas in case of petty offences negligent offences are always punishable except where expressly exempted from liability.

The applicability of the provisions relating to irresponsibility (Art 48-50) to the Petty Code (Art 741/1) emphasizes the requirement of *mens rea* in these cases.

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

- In case of petty offences only completed offences are punishable. The stages of preparation and attempts are not punishable.
- In these cases only principal offender (Art 32) is punishable. Inciters, co-offenders, and accessories after the fact are not punishable. Each offender shall be punished for his own act irrespective of the participation of another. Art 741/3 clearly lays down that the responsibility and liability for petty offences shall always be individual (Art 41 and 88). There is no collective responsibility under the Petty Code.

- Juridical persons are also not liable for incitement or complicity relating to petty offences. A juridical person is punishable only when its employee violates laws, regulations or directives as a petty offender in accordance with Art 32 of the Criminal Code.

- **The Question about Liability of Young Persons Under the Petty Code:** The provisions of Art 740/4 create a confusion regarding to the applicability of the defence of 'infancy' to the Petty Code. The article runs thus:
  "The provisions relating to petty offences <u>shall apply</u> <u>also to young persons</u> within the meaning of the Criminal Code (Arts 52-55).

As it appears from this provision the Petty Code does not seem to exempt the young persons from liability. This sub-article says that the Petty Code shall also apply to the young persons described under Articles 52-55. Does it mean that an infant (Art 52) from the time of its birth becomes subject to the provisions of the Petty Code? Obviously this cannot be the case. While all the other articles of the Petty Code that speak about the applicability of the General Part of the Criminal Code are framed in a way that take the General Part as the source of the principle, only this article puts the idea in the opposite direction and says that "*The provisions relating to petty offences shall apply also to young persons…"* This gives the meaning that the young persons are subject to the provisions of the Petty Code irrespective of their non-age. Reasonably speaking, the rule should have been expressed in the following words:

"The provisions relating to young persons within the meaning of Arts 52-55 shall apply also to the Petty Code". Then it would have rightly meant that:

- Infants below the age of 9 years are completely immune from the provisions of the Petty Code, and
- The young persons between the ages of 9 and 15 years are liable but are subject to the special measures that are provided by the Articles 157-168.
- The assessment of penalties in case of these young offenders should be according to the rules laid down in the articles 54, and 55.

It is better say that the provisions of the Art 740/4 are to be revised and put in the right form.

- **Expert Evidence only under Exceptional Circumstances: Art 742**

The general provisions relating to expert evidence under Arts 51 and 54 shall not be ordinarily resorted to in cases of petty offences. They shall be ordered only if questions as to the petty offender's responsibility *cannot otherwise be decided* by the Court.

- **Applicability of Affirmative Defences: Art 743**

The following *justifications* that provided under the General Part of the Criminal Code are equally applicable to the petty offence too:

- Lawful acts (Art 68)
- Professional duty (Art 69)
- Consent of the victim (Art 70)
- Necessity(Art 75)
- Legitimate defence (Art 78)
- The cases of resistible coercion, excess of necessity and excess of legitimate defence are generally punishable but reduction of sentence is possible within the limits authorized by law (Art 766).
- In case of superior orders the subordinate shall not be punishable,
  - if he obeyed a person of higher rank acting within his authority
  - and the subordinate did not exceed the order he received

The superior giving the orders shall be fully responsible for any undesirable or unlawful consequences.

The subordinate shall be responsible for any conscious and intentional excess in the performance of the order received.

- Ignorance of law or mistake as to right is not justification to a petty offence as well (Arts. 744 and 81).
- Mistake of fact which excludes knowledge or intention to commit an offence is a valid defence under the Petty Code (Arts 744/2 and 80).

- **Applicability of the Extenuating and Aggravating Circumstances: Art 745**

While determining the penalties under the Petty Code the Court may take into consideration the extenuating circumstances (Arts 82 and 83), aggravating circumstances (Arts 84 and 85) and even the combination of the both as in the case of the ordinary crimes.

Under the Petty Code *reduction of penalty* or alteration of the nature of penalty due to the extenuating circumstances shall be done as provided under Art 766.

The Court shall increase the penalties in case of petty offences as per the provisions of Arts 767-770. While considering the combination of circumstances the court shall refer to Art 189 of the General Part of the Criminal Code.

Section.2. Kinds of Penalties and other Measures under the Petty Code:

The key issue that makes a remarkable difference between the petty offences and the ordinary crimes is the kinds of penalties. Art 746 declares that, *'Petty offences differ from ordinary crimes by reason of the different penalties they merit'*. The main points of departure from the ordinary crimes in this regard are the following:

- Art 746/1 clearly excludes imposing of ordinary penalties in the cases of petty offences. Therefore, petty offences shall not be punished with rigorous or simple imprisonment prescribed for ordinary crimes.

The only punishments which may be imposed for petty offences are those specified in Arts 747-775. The exceptions to this general rule are:

- Special forms of punishments applicable to military petty offenders, and
- Special measures applicable to young persons (Arts 157-168 of the Criminal Code)
- Protective or therapeutic measures in respect of irresponsible persons (Arts 130 and 131 of the Criminal Code).

In these cases Art 746/3 requires the Court to inform the matter to the competent authority (Art 154).

2.1. Principal Penalties of Arts 747-755

2.1.1. Arrest- Art. 747

a. Ordinary or police arrest-**Art. 748**

b. Home arrest or arrest in an establishment-**Art. 749**

c. Arrest in case of members of armed forces and young offenders-**Art.750**

d. Compulsory labour in substitution for arrest- **Art 751**

Arrest is the only penalty involving deprivation of liberty which may be imposed in case of petty offences. The duration of this penalty shall be a minimum of one day and a maximum of 3 months. In cases of recidivism it may go up to a higher maximum as provided by Art. 769.

Arrest may be an ordinary one which shall be undergone in special premises for detention attached to Courts or in the home of the person sentenced or in the home of a reliable person or in a lay or religious community designed for this purpose.

In the case of military petty offenders arrest shall be carried out under military discipline and control in the premises used for this purpose in their establishments.

Young persons sentenced to arrest shall undergo their punishment either by school or home arrest (Art 161). Arrest in case of young offenders may be served at different times. And period of arrest shall be for less than 3 hours and the total period of arrest shall not exceed 15 days.

2.1.2. Fine-Art 752

a. Ordinary case-Art 752/1

b. Fine in addition to arrest-Art 752/2

c. Conversion of sentence into compulsory labour-Art. 753

d. Recovery of fine in special cases-Art 754

- Members of armed forces-Art. 754/1
- Young persons-Art. 754/2

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

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

2.1.3. Reparation of the Damage- Art. 755

Reparation is making good to the loss suffered by the injured party. Where the petty offence has caused considerable damage to the injured person or his property or to those having rights from him the offender may be ordered to make good to the loss suffered or make restitution or to pay damages by way of compensation(Arts 101 and 102).

This order may be given irrespective of the fact that any other type or types of penalties are imposed on him as well.

Secondary Penalties Arts. 756

Secondary penalties may be substituted for principal penalties in case of extenuating circumstances or minor offences. Warning, reproof, reprimand or making of amends as provided for in Art 122 of the Criminal Code are the kinds of secondary penalties that are designed by the Petty Code. They may also be

imposed by the Court in addition to the penalty of arrest, or compulsory work or fine.

- **Exclusion of Forfeiture of Rights: Art 757**

  Deprivation of the criminal of some of the civil rights, family rights and the rights to discharge an office is one of the secondary penalties envisaged by the Criminal Code in case of ordinary crimes under Art 123. Such a forfeiture of rights may not be ordered in case of petty offences (Art 757/1).

  In cases of members of Defence Forces too there are such secondary penalties under Art 127 of the Criminal Code. They are reduction in the rank and exclusion from the Defence Forces. These penalties cannot be applied in case of petty offences (Art. 757/2).

2.3. Safety Measures: Arts. 758-762

1. Guarantee of good conduct-Art. 758
2. Confiscation and forfeiture to the State-Art. 759
3. Prohibition of undertakings and suspension of work permits-Art 760

- of material nature-Art. 761
- of the liberty affecting persons-Art. 762

A petty offender may be required to enter upon a guarantee for keeping good behaviour (Art. 134) only on the following circumstances:

In cases of repeated petty offences against public order or tranquility, or the safety of persons of things, and

Where the commission of further offences is probable.

Confiscation of certain objects of the offender may be ordered as a preventive measure where public safety so requires9 Art. 141). The objects or material means endangering security, order, health or decency, or intended to facilitate, or to be used for the commission of the offence(Art. 140) may be confiscated by the order of the Court. All such objects shall be forfeited to the State (Art. 100).

In suitable cases, the Court may order withdrawal of license (Art. 142) of the offender or closing down of an establishment or suspension of its activity. For example, a rash driver's driving license may be withdrawn or a food factory which does not meet the standards of hygiene etc. may be ordered to be closed down temporarily (Art. 143). Whether total or partial this penalty may be imposed only as a temporary measure in case of repeated petty offences connected with the use of a license or the management of an establishment. The maximum duration of this prohibition should not exceed 6 months.

Where it is justified, prohibition may also be placed on the personal liberty of the petty offender from resorting to certain places conducive to the commission of further petty offences (Art. 145). Particularly this penalty is applied where there has been recidivism or where recidivism is likely. The duration of this prohibition shall not exceed 6 months.

- **Restrictions that cannot be imposed in Cases of Petty offences: Art 762/2**

  The General Part of the Criminal Code envisages certain other kinds of restrictions on the personal liberty of the criminal as secondary punishments. However, all such restrictions (Arts 146-150) are not applicable in cases of the petty offences. The Petty Code prohibits the imposition of the following restrictions on the personal liberty of the offender:

  - Prohibition to reside in a place
  - Obligation to residence in a specified place or area
  - Placing under supervision
  - Withdrawal of official papers (Passport, etc.)
  - Expulsion from the territory of Ethiopia.

2.4. Measures for the Purposes of Information: Arts. 763, 764

1. Notice to the authority concerned publication- Art. 763
2. Entry into the register of judgment-Art. 764

These measures are either for the sake of facilitating the enforcement of the decisions of the Court or in the interest of the general public. In every case where the Court pronounces a secondary or protective or preventive measure, it shall notify without delay the administrative, civil, military or police authority concerned or any other competent public authority with a view to the enforcement of the decision and the control of its observation (Art.154).

Publication of the judgment or parts thereof is another important measure that can be applied when it serves the public or private interests (Art. 155). The publication shall be effected in the following two instances:

- In the interest of the public, the Court orders as a matter of procedure
- In the interest of a private party, only based on the written request by the interested party.

Publication may be effected by means of posters in a public place, or through other mass media.

Art. 764 provides that, in order to facilitate the Court to have full information of the antecedents of the accused person, the judgments which are final shall be ordered to be entered in the judgment register (Art.156).

Section.3. Prosecution and Enforcement of Penalties:

3.1. Procedural Requirements for Prosecution in Case of Petty Offences:

Arts.771-775 lay down the procedural requirements relating to the prosecution of petty offences. Prosecution for a petty offence shall be instituted as per the following rules (Art. 771):

- **Prosecution of Petty Offences:**

Petty offences shall be normally prosecuted only on a complaint by the aggrieved party.

- **In cases of Petty offences against another Person Art. 771/1/a**

Prosecution shall be instituted only on a complaint lodged by:

- The injured party, or
- The representative of the injured party or those having rights from him, after being duly authorized by law.

This requirement applies to the cases involving offences against, the person (bodily injuries), his freedom, and honor or against his private property.

- **In cases of braches of laws, orders, regulations, etc.: Art. 771/1/b**

In these cases the complaint should be filed by the authority concerned. For example, a vegetable vendor is found to use false weights it is the authority concerned under the Weights and Measures Proclamation, 1973, that has to file the complaint against the offender. If every person who feels aggrieved by such offender's acts is to file a complaint there will be hundreds of complaints against the same offender and it would be very difficult to deal with the matter. Therefore, the aggrieved parties are supposed to report the matter to the authority concerned and he in return, after conducting the preliminary inquiry in to the matter files the complaint with the Court to prosecute the offender.

- **Incases of purely military petty offences: Art 771/2**

The prosecution of these offences shall be governed by the military law.

- **All other offences: Art. 771/c**

In case of all other offences, (excluding the above mentioned ones), shall be prosecuted by the public prosecutor by virtue of his office (*ex officio)* following the rule of procedure under the criminal Procedure Code.

- **Conditions as to Complaint: Art. 772**

All the general provisions under the General Part of the Criminal Code, governing complaints (Arts. 211-213) i.e. relating to conditions, time limit and right to lodge such a complaint are applicable to the prosecutions of petty offences too.

- **Limitation Periods as to Prosecution and Enforcement of Sentence:**

  Art. 773

  In all cases of the petty offences of any nature whatsoever the periods of limitation are prosecution and enforcement of sentimigare as follows:

- One year for initiating prosecution
- Two years for the execution of the sentence passed.

  The general provisions relating to the beginning, suspension, interruption and absolute end of the limitation periods according to Arts. 219-222 and 225-228 shall apply to the proceedings of petty offences.

- **Pardon and Amnesty:**

  The usual conditions of pardon and amnesty (Arts 229-231) apply to petty offences as well. The penalties in respect of petty offences may be cancelled by pardon and amnesty.

3.2. Enforcement of Penalties under Petty Code:

The rules of enforcement of penalties relating to petty offences show certain departures from the rules of enforcement relating to the ordinary crimes. The main point of difference lies on the matter of suspension of penalties and conditional release.

- **Exclusion of suspension of penalties and conditional release in case of Petty Offences, Article 765:** The principle of conditional suspension of penalty **(**Art

199-200) is for the promotion of the reform and reinstatement of the criminal by giving him room to help himself in his own reformation. Such an objective of punishment is more relevant to the ordinary crimes where the sentences are punitive in nature. The penalties in case of petty offences are more formal in nature. Further, the uniform and rapid enforcement penalties in these cases are of utmost importance to indicate the strictness in applicability of the provisions of this part as well as the special laws and there by make those laws more effective and meaningful. Thus, strict enforcement of penalty is very essential for the attainment of the objectives of special laws and regulations. Therefore, policies relating to reformation and rehabilitation have little relevance in enforcement of penalties imposed in cases of petty offences.

- **Extenuation of Penalty, Art 766:** Where there are extenuating circumstances mentioned under Art 745/1 the court may reduce the punishment from arrest to compulsory work of fine. In cases of offences of trivial nature the court may restrict the penalties to reproof, reprimand or a warning for the future, particularly in the cases involving :
  - First offences, and
  - Mere imprudence

- **Aggravation of Penalty, Arts. 767-770:**
  - **Ordinary Aggravation Art 767:** Aggravation is done in cases of general aggravating circumstance mentioned in Art 745/2 subjects to the limits pro-vided by Art 180.
  - **Aggravation In cases of Concurrence Art 768:**

    1. In case of material concurrence, the aggregate penalty of after aggravation may exceed the ordinary maximum penalty fixed in Art 747 or 752. However, the maximum on such aggravation may not go beyond the following limits:
    - One year arrest and fine may not exceed 1,200 Birr

- Fine may not exceed 5,000 Birr in case of a juridical person

3. **In cases of notional concurrence,** the aggravation of penalty is according to the general rule laid down in the Art 187 of the General Part of the Criminal Code.

4. Aggravation in Cases of Recidivism Art 769:

- **Repetition of offence after one year:** If there is at least one year of time gap between the imposition of penalty for a previous petty offence and the time of trial of the new petty of offence committed by the same offender, recidivism shall not be taken into consideration. Whether such penalty on the previous occasion had been enforced in part or in whole or remitted by pardon or by limitation, does not make any difference for the application of this rule.
- **Repetition of offence within one year:** If a new petty offence is committed by the petty offender within a period of one year from the imposition of penalty on a previous occasion, the court is not bound by the ordinary maximum of penalty prescribed for the new offence. The court may go up to double the legal maximum penalty provided, if the circumstances so justify (Art 747 and 752).

- **Aggravation in Cases of Both Recidivism and Concurrence Art 770:**

In case of a petty offender who is a recidivist within the meaning of Art 769/2 i.e. one who repeats the commission of a petty offence within a period of one year, and commits concurrent offences (Art 768) at he same time the aggravation shall be in accordance with both Arts 768 and 769. However the following upper limits have to be followed:

- 2, 400 Birr in case of individuals, and
- 10,000 Birr in case of juridical persons

Review Questions:

1. Petty offences are also referred to as 'regulatory offences', 'public welfare offences' etc. What do these different labels signify about the nature of these offences?
2. Define petty offence. What penalties are applicable to petty offences?
3. Do all general principles and rules of the General Part of the Criminal Code apply to the petty offences by virtue of Arts 3 of the Criminal Code and 734 of the Petty Code? State the exceptions, if any.

Case Law:

- **The Federal Prosecutor V. Lisci Sofia**

  Federal Supreme Imperial Court, Federal Criminal Appeal No.7/51 (1959 G.C.*)*

  Ethiopia

  Hedar 3, 1953 E.C. (November 13, 1960)

  Justices: Afenegus Takelle Wolde Hawariat, Dr. W. Buhagiar, Ato Bereket-ab Habte Sellassie:

  This is an appeal by the Federal Prosecutor against a judgment of the Federal High Court of Asmara acquitting the respondent on various charges in connection with the alleged offence consisting in the fact that the respondent had imported into the Empire of Ethiopia E$1,060, in addition to E$150 permitted by law, and thus contravened the provision of Article 8(c) of the Currency Amendment Regulations, 1949, published as Legal Notice No. 127 of 1949. There were also other counts included in the charge which are dependent on the first one.

  The Federal High Court in Asmara acquitted the respondent on the ground that Article 8(c) of the Currency Amendment Regulations, 1949, was not valid law in that it was enacted by the Minister of Finance *beyond the powers* vested in him by law.

The Currency Amendment Regulations, 1949, were enacted by the Minister of Finance by virtue of the powers conferred on it by Article 3 (iii) of the Currency Proclamation, 1942 (Proc. No. 31) as amended by the Currency Amendment Proclamation of 1947 (Proc. No. 99). It may be useful to set out here briefly the provisions of these two proclamations. Article 1 is the title of the Proclamations; Article 2 is the definition clause; Article 3 provides that, except with the permission of the Ministry of Finance, no person, except an authorized dealer, is allowed to buy or borrow, or lend or sell, any foreign currency to any person who is not an authorized dealer; Article 4 prohibits the transfer out of the Empire of any money, coin, bank notes or any cheques, bills, drafts, negotiable instruments or foreign currency, or bonds, shares, bearer warrants or securities except under license; sub-articles (ii) of the said Article 4 provides that no valuable things may, in any manner, be transported or transferred across the customs boundaries or frontiers of the Empire unless certain customs formalities are complied with; sub-article (iii) of the same article gives the Minister of Finance the power to make regulations by notice published in the Negarit Gazeta as may be necessary to administer the Proclamation; sub-article (ii) of the same Article 4, provides that "valuable things" as used in sub-article (ii) includes any article of value and any goods or merchandise but does not include money, cheques, bills drafts, negotiable instruments or foreign currency, nor any bonds, shares, bearer warrants or securities. Article 5 is a penalty clause.

It is abundantly clear that the said Proclamations contain nothing to prohibit the importation within the Empire of money (notes). The whole object of the Proclamations is to prohibit the export of the money, notes, etc., therein mentioned and to ensure that any foreign currency acquired by the export of valuable things is given up to the authorized dealer. If it is argued that the words "transported or transferred across the customs and boundaries of the Empire" as used in Article 4 (ii) apply to transportation and transfer in and out of the Empire, then it is to be noted that the provision applies only to "valuable things" which according to Article 4(iv) does not include money, cheques, bills, etc.

Furthermore, it is to be noted that from the context of Article 4(ii) there can be no doubt that the words "transported or transferred across the customs, boundaries or frontiers of the Empire" apply only to the export of valuable things; the whole provision is intended to ensure that any foreign currency acquired through the transport or transfers to be paid or assigned to the authorized dealer.

That being the position under the Proclamations the next point to be considered is the power of the Minister of Finance to make regulations. The power given under Article 4(iii) is limited "to issue…. such regulations and designations as it may determine to be necessary to administer the Currency Proclamation". This power to issue regulations and designations *to administer* the proclamation may be exercised for a variety of purposes but such purposes must be limited to the *administration* of the Proclamation. This power does not include the power to create new offences which are not contemplated in the proclamation; to exercise such power goes beyond the power of administering the Proclamation. The power to make laws is by the Constitution vested in the legislative organ; and no person or officer or authority has the power to make any legislation unless he is expressly authorized so to do by the laws enacted by the legislative organ; and when such power is given to a person, authority or officer such power must be exercised strictly within the limits conferred. In the case of the Currency Amendment Regulations, 1949, (Legal Notice No. 127 of 1949) the Minister of Finance in making provisions regarding the prohibition of importing money, currency, etc., exceeded the powers conferred on it. By the Proclamation such provisions create new offences which are beyond the powers of issuing regulations and designations necessary to administer the Proclamation. Such are the provisions contained in Article 8(d) and 8(e) of the said Regulations; they are, therefore, *ultra virus* and *void*. Being void, they are of no effect, have no legislative coercion and are not binding on the subject; there can, therefore, be no offence under those provisions. The respondent cannot be found guilty of an offence in that she imported E$1,060 in excess of what is alleged to be allowed, that is, E$150. Such an offence can be created only by the legislative organ. The

respondent was also charged with smuggling a golden bracelet; with regard to this the Federal High court of Asmara held that his bracelet was a personal effect. This Court agrees with this.

The judgment of the Federal Court of Asmara must therefore be confirmed and the appeal is dismissed.

Group Assignment:
Is it possible for bodies or officials other than the legislature to promulgate penal laws? What is the position in *Lisci Sofia's* case? What powers should a legislature be allowed to delegate to other bodies?

Unit Summary:

Petty offences can be described as ***'public welfare offences'***. These are also called as ***'the regulatory offences'***. These are conducts declared by special statutes as offensive to the social interest. They are offences of minor character involving minor punishment. They are offences connected with sale of adulterated food or drugs, or offences of possession of prohibited articles, offences connected with road traffic, or offences against custom rules and foreign regulations.

By virtue of Art 3 para 2 and Art 734 the principles laid down in the General Part are applicable to the Petty Code too except where it is stated to the contrary. Petty offences are not punishable retrospectively; there is no joint liability in cases of petty offences. Petty offences are punishable only if they are completed. The other stages of the offences are not punishable.

There is no question of either delegation of jurisdiction or extradition of the offender in case of petty offences. Petty offences committed in a foreign country by an Ethiopian or against an Ethiopian shall not be punished in Ethiopia.

In case of ordinary crimes negligent crimes are not always punishable unless expressly provided whereas in case of petty offences negligent offences are always punishable except where expressly exempted from liability. Justifications for criminal liability are generally applicable to petty offences. Ignorance of law is no excuse for petty offences. The provisions of Art 740/4 create a confusion relating to the applicability of the defence of 'infancy' to the Petty Code. It appears from the wording of the provision that the young offenders are not exempted from liability under the Petty Code. The wording of the articles seems to be erroneous.

The key issue that makes a remarkable difference between the petty offences and the ordinary crimes is the kinds of penalties. Art 746 declares that, *'Petty offences differ from ordinary crimes by reason of the different penalties they merit'*. Art 746/1 clearly excludes imposing of ordinary penalties in the cases of petty offences. Therefore, petty offences shall not be punished with rigorous or simple imprisonment prescribed for ordinary crimes. The only punishments which may be imposed for petty offences are those specified in Arts 747-775. Petty Code applies only in the absence of more severe penalties elsewhere in the Code. The penalties under the Petty Code are classified into, principal penalties, secondary penalties, safety measure and measures for the purpose of information. Expert evidence is only taken in relation to petty offences under exception circumstances. Foreign sentences produce no effect in relation to petty offences.

References:

Cases:

- The Federal Prosecutor V. Lisci Sofia (Ethiopia) Federal Supreme Imperial Court, (1959 G.C.) Ethiopia

Reader Note:

1. Articles 734-685 of the Criminal Code of FDRE, 2005
2. Steven Lowenstein – "Materials for the study of the Penal Law of Ethiopia" (1967), HSIU, Addis Ababa, Ethiopia.
3. Sayre, Public Welfare Offenses, 33 Columbia L.Rev.67-69(1933)

UNIT-VI

CRIMINAL LAW IN A CHANGING WORLD

Introduction:

As expressed by an eminent American authority (Wechsler) ' the purpose of penal law is to express the social condemnation of forbidden conduct, buttressed by sanctions calculated to prevent it". To understand this explanation of Penal law three questions have to be answered:

1. What kind of conduct is 'forbidden'?
2. What kind of 'formal social condemnation' is considered appropriate to prevent such conduct?
3. What kinds of 'sanctions' are considered as best calculated to prevent officially out lawed conduct?

The concept of forbidden conduct is not a static one; it changes with the change of social norms. The very definition and concept of crime itself is not only according to the values of a particular group and society, such as, faith, religious attitudes, customs, traditions and taboos but also according to the form of government, political and economic structure of society and a number of other factors. At the same time we should remember that 'public order' itself is not a static concept. In a theocratic or totalitarian society-the later exemplified in its extreme form by Orwell's 1984- the regulation of sexual practices, or freedom of discussion, even if held in private, it may become very much a matter of 'public order'. Thoughts are private expressions of opinion that may be 'ungood' in the framework of totally controlled society. The much more limited concept of public order as it has been expressed by Mill, Hart and the Wolfenden Report, is acceptable only in the context of a liberal society, which allows individual a maximum of physical, intellectual and spiritual freedom, and correspondingly limits the function of criminal law. The protection of juveniles, or the condemnation of public exposure, are among the minimum elements of public order as conceived in a liberal society

where the between the permissible private conduct and interest of the community in maintenance of public order is to be drawn, cannot be answered in absolute terms. (W. Friedmann, 1972). The evidence of these observations is clearly reflected at all spheres of social life. The ever changing values of different societies have drastically changed the concept of the crime itself.

Objectives:

By the end of this unit, the students will be able to:

- Clearly understand the concept of social change and its impact on the concept of crime
- Have a wide perspective of the changes that are occurring in different legal systems of the world owing to the changing values
- Understand the increasing significance of the criminal liability of corporations in the context of an increasingly complex corporate world
- Know the impact of the modern advancements of psychology and psychiatry on the principles of criminal responsibility
- Identify the changing purposes of punishments
- Appreciate the need for finding alternative penalties to increase the efficacy of the penal system

Section.1. Impact of Social Change On the Criminal Law

1.1. Social Values and the Ambit of Criminal Law:

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

It may suffice here to illustrate the dependence of the scope of prohibited conduct on changing values and canons of social policy, by presenting two examples:

- **The Area of Economic Crime**: In this area, the transition from a *laissez-fair* to a regulated and, in varying degrees, publicly controlled economy has led to the condemnation and criminality of actions in which, a system of economic individualism were legitimate and perhaps praiseworthy.

- **The Area of Sexual Behavior**: The change is the other way round in the case of sexual behavior, where changing attitudes and social conditions have increasingly led to the abolition of criminality for actions that were formerly and severely condemned and subject to criminal sanctions. (W. Friedmann)

1.2. Economic Crimes against the Community:

In *a laissez-fair* economy, the waste of property is, like its accumulation, a matter of private concern. The rape of the earth, through deforestation, overgrazing, waste of water, dust-bowl farming, is a matter for the individual owner, who is presumed to suffer the appropriate penalty through the diminution of his crops and financial returns. The same applies to the neglect or non-use of machinery, such as power plants, tractors, or of mineral resources, even if such abuse should lead to scarcity and the impoverishment of the community. Such a philosophy is no longer held, except by a diminishing band of passionate believers in the absolute sacrosancity of property, immune from any official interference or regulation. A major cause of change in the public philosophy has been the incidence of total war in the twentieth century. Scarcity of food has made the careful use of land a vital necessity, in blockaded countries, such as Germany in the First World War, or densely populated, entirely industrialized countries, dependent largely on sea supplies, like England in both world wars. This has meant at least temporary change in legal values. Similarly, waste or unauthorized use of precious resources becomes, in such situations, a criminal and social offence (W. Friedmann).

Outside the emergencies of war conditions, the growing recognition of the social function and use of property has led to more permanent changes in legal values. The changed evaluation of the relation of property and individual has gone to the greatest extent in socialized legal systems. Following the constitutionally enshrined concept of 'public, socialist property as the sacred and inviolable foundation of the socialist system….', in the Soviet Constitution the destruction, the theft and the misuse of state-owned property-that embraces the bulk of the industrial, commercial and agricultural assets of the nation- is attended with criminal sanctions. To a large degree, penal sanctions in a socialized system must serve as a substitute for the regulatory effect of financial incentives, the 'profit motive'. But the philosophy of penalizing waste and misuse of public property has deeper roots. Where the national philosophy is the development of the national economy to the general benefit by the planned use of resources, the intentional or careless waste of national assets acquires basic importance (W. Friedmann).

The growing consciousness of the need to preserve vital assets for the community, and to protect it from the rapaciousness of neglect of the individual, goes far beyond the socialized systems of the Soviet pattern. In some western parts of the United States, scarcity of water has produced restrictive legislation not only on the use of water, but also on the ownership of land. If, as many demographers and ecologists believe, the growth of the world's population will increasingly outstrip available resources, the conservation of agricultural, mineral and other natural assets will become an increasingly vital social and legal value, strengthened by harsh criminal sanctions. (W. Friedmann)

Meanwhile, the protection of vital resources and commodities, in non-socialist societies, has mainly developed through regulatory measures, attended with penal sanctions. Here, the most notable development has probably been in German Law, where the outcome of scarcity situations produced by two world wars, with intervening inflations, raw material, and currency shortages. Out of the multitude

of statues and decrees, controlling and regulating the supply of scarce commodities, and especially transactions in foreign exchange, have developed a whole body of law called *Wirtschafts-strafrecht.* After the Second World War, the Federal German Republic consolidated the concepts and offences gradually developed in to a comprehensive law referred to as *Wirtschafts-strafrgesetz.* The law distinguishes a graver type of economic offence called *straftat* and a lesser type, called Ordnungswidrigkeit. (W. Friedmann)

The most interesting aspect of this new classification of economic offences is its differentiation between what we might call the old-style type of criminal offence and the new type of administrative offence. The yardstick is both the gravity of the interest that has been injured, and the *mens rea* of the offender. There are new types of interest deserving protection by the state that are unknown to the older criminal law, but not all of these can be measured in terms of older concepts of the criminal law.

Long before the development of these new concepts of economic crime in the Soviet Union, Germany and some other countries, following the economic dislocation of the present century, Canada (in its Criminal Code of 1889) and the United States (in its Anti-trust Legislation of 1890) had attempted to utilize the criminal law for another type of economic offence, which marks an equally significant, though differently based on, departure from the traditional scope and purposes of the criminal law. By making it a misdemeanor to contract or engage in any combination or conspiracy in restraint of trade or commerce among the several States or with foreign nations, or to monopolize such trade or commerce, the Sherman Act of 1890 clearly recognized that it was *the function of criminal law not only to protect private property against unlawful interference, but also to protect the basic economic order of the nation,* and the conditions of its existence, against unlawful interference by private subjects of the law. This was, indeed, a revolutionary departure from the established concepts. It was, of course, based on an economic philosophy radically different from that later embodied in the Soviet

Constitution, or even in that of the German *Wirstchaftsstrafgesetz*. The interest to be protected was the maintenance of a competitive economy based on private enterprise. The state did not mean to become owner or entrepreneur, but it felt compelled to use its legislative, administrative and judicial machinery for the protection of the economic well-being of the community as a whole – as conceived by a liberal economic philosophy – and to defend it against powerful industrial and commercial interest. This is not less a revolution in legal thinking than the establishment of economic crimes in the Soviet law, despite the radical difference in the economic philosophies underlying American and Soviet law. United States anti-trust legislation, later supplemented by the establishment of the Federal Trade Commission, with powers largely parallel to those of the Department of Justice, envisages not only criminal action, but also a civil suit by the Department of Justice, either as an alternative or an addition to criminal action. (W. Friedmann)

The real effectiveness of legal sanctions depends, of course, above all, on the degree and methods of their practical implementation. In Canada, criminal sanctions are comparable to those of the Sherman Act remained practically a dead letter until the reinvigoration of anti-trust enforcement after the Second World War.

In the United States, a few years ago, criminal proceedings were instituted against a small number of middle senior executives of some major corporations, including the General Electric Company and Westinghouse, for violation of the anti-trust law provisions prohibiting price-fixing. The top executives of the corporations concerned were permitted to allege ignorance, while their subordinates served short sentences of imprisonment. Whether this kind of procedure actually served the end of justice, it must remain a matter of doubt. This use of the criminal sanction has remained exceptional.

On the whole, it must be concluded that, in so far as the anti-trust law has been effective in the restraint or elimination of monopolistic conditions, it has been due predominantly to administrative and civil measures, or just to the general sense of awareness caused by the existence of the legislation and the possibility of its interference with business operations. It is significant that the various recent anti-trust laws of other countries – with the limited exception of the German *Wettbewerbsgesetz* – have discarded the criminal sanction and relied on measures of publicity and administrative regulation rather than on the deterrence of criminal offence. (W. Friedmann)

1.3. Environmental Pollution and the Criminal Law:

An increasing use of the criminal sanction – often complementary to damages and administrative sanctions – is likely to result from the belated but traumatic recognition in the industrially developed nations that a massive pollution of the environment, through despoliation of land, water and the air, by industrial waste, chemical, oil, the dumping of garbage, the indiscriminate use of pesticides and by many other means, threatens the very conditions of social survival. Thus, an area, which until very recently, has remained outside legal regulation altogether – a concomitant of the profit-and-consumer-oriented society – is likely to become a major object of social condemnation buttressed by criminal sanctions. Already several countries have prohibited or severely restricted the use of DDT. The pollution of water and air through sulfur-laden oil and motor-car exhausts, the overheating of seas and rivers through thermal processes, the discharge of industrial solids into the rivers and lakes of North America and Western Europe, have apidly becoming threats of such magnitude to the continued supply of the basic elements of life that the severest form of prohibition, i.e. criminal sanctions, in addition to monetary charges, damages and administrative injunctions, will become an absolute necessity. (W. Friedmann)

1.4. Sexual Permissiveness and the Criminal Law:

In contrast to the increasing need for criminal sanctions to combat economic risks and social offences, notably the pollution of the environment, certain types of individual behavior, once severely condemned by prevalent concepts of morality and public order, have become widely tolerated and more acceptable to society. This is notably so in the area of sexual behavior, as shown by the spreading abolition of criminality of homosexual conduct between consenting adult males who carries out in private, and the rapidly growing number of jurisdictions that have abolished, or greatly limited, the criminality of abortion.

The greater permissiveness towards homosexuality is essentially a product of changed ideas of social morality. In most western societies, homosexual conduct, if limited to adults and carried out in private, is no longer regarded as morally so blameworthy that it deserves the attention of the criminal law. In Britain, where a statute of 1967 abolished the criminality of this type of homosexual behaviors, the matter was fully discussed in the Report of the Wolfenden Committee, which recommends the abolition of the offence by a majority of twelve to one. Its philosophy is summed up as follows passage:

"Unless a deliberate attempt is made by society acting through the agency of the law to equate this sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business".

Whereas the growing tolerance of male homosexuality is essentially the expression of a changing social morality, i.e. of changing ideas on the range of permissible individual behavior in the field of sex, the rapidly spreading movement towards the abolition or modification of criminal sanctions for abortions is mainly a product of social change, i.e. of the growing need to permit a variety of ways to slow down or counter the world-wide growth of population –

now perceived as one of the major dangers to the civilized survival of mankind. Combined with it is the realization of the fact – largely a product of the same social forces- that millions of illegal abortions have long made a mockery of the law, and that the growing pressure towards abortion will make the legal sanctions increasingly ineffective. Whereas, until very recently, the great majority of criminal laws in the western world legalized abortion only where the life (and, more dubiously, the health) of the mother were in danger (Williams, 1957, ch. 5), a rapidly growing number of laws now greatly widens the grounds of permissible abortions, or abolishes its criminality altogether. (W. Friedmann)

Brain Storming!

1. Can criminal sanctions control the massive pollution of environment which the huge amounts of fines could not do?
2. How do you reconcile the right to development and the right to healthy environment?

Critical Thinking!

'The greater permissiveness towards homosexuality is essentially a product of changed ideas of social morality'. Should such conducts be legalized having regard to the changing ideology?

Section.2. Criminal Law in the Welfare State:

4.1. *Mens Rea* and the Public Welfare Offence:

A whole new area of criminal law has developed out of the steadily increasing responsibilities of the modern state for the maintenance of certain crucial

standards demanded by the proper functioning of a modern industrialized and urbanized society. These standards are embodied in a great variety of statutory regulations. They concern safety appliances and sanitary standards in factories and mines, minimum standards in housing accommodation, purity and minimum quality of foodstuffs, drugs and medical preparation offered to the public, compliance with statutory obligations, unemployment insurance and other forms of social security, registration of professional and trade qualifications, and a multitude of other matters which have become the accepted responsibility of a properly governed contemporary state. Almost invariably, the statues provide sanctions for the fulfillment of such obligations, mainly in the form of fines. These fines are often imposed by administrative process in the first place, but subject to a trial, if contested by the defendant. In 1902, a German legal scholar, James Goldschmidt, characterized this whole area of criminal law as 'administrative penal law' *(Verwaltungsstrafrecht).* Much more recently, common lawyers have directed their attention to this type of criminal offence, and characterized the whole group as *'public-welfare offences'*. (W. Friedmann)

This type of offence, while going under the general label of criminal law, is of an essentially different character from the criminal offences based on individual wrongdoing. Like all law, the conditions under which criminal liability is imposed *depend up on a balance of values in a given society*. Even the innocent killing of a man harms the society, but the law generally considers that a severe penalty for murder or manslaughter should not be imposed, except on proof of individual guilt. Public-welfare offences are, by contrast, essentially standardized. In the balance of values, it is generally considered more essential than violations of traffic rules or food laws that d be strictly punished, *in the interests of the public*, rather than that the degree of individual guilt should be measured in each case. Moreover, a vast proportion of these offences are nowadays imputable to corporations rather than individuals in such areas as social-insurance obligations, safety and health standards, and the like. It is entirely socially desirable that the corporation, under whose name the business is conducted, should be the carrier of

responsibility rather than the individual, although the person immediately responsible may, of course, be subject to a concurrent liability. Given the enormous number of offences falling under these categories, such as violations of traffic regulations, there is also the sheer practical difficulty involved in the limitless number of trials, in which individual guilt would have to be measured. On a balance of social interests, the widespread – though by no means universal – tendency of modern statutes to impose strict liability for violation of public-welfare laws is therefore justifiable. There should also be support for the principle proposed by the Model Penal Code of the American Law Institute (section 2.07(2), that states *absolute liability is imposed for the commission of an offence, a legislative purpose to impose liability on a corporation shall be assumed, unless the contrary plainly appears'*.

Such a formulation leaves room for contrary interpretations where they must be reasonably inferred from the wording and spirit of a statute. Attacks against the spread of the strict liability principle for this type of offence have often been based on the ground that the imposition of a relatively small fine, e.g. for the operation of dangerous machinery or the sale of injurious drugs, is in any case not n quite sanction (Hall, 1947, p. 331). Such criticism seems to misconceive the essentially different character of the sanction imposed in these cases. The purpose is to impose certain standards of conduct in the interest of the community at large, and the maintenance of these standards would be seriously impaired if the individual defense of mistake or blamelessness were generally admitted. This was brought out clearly in a decision of the English Court of Criminal Appeal in the case of *R. v. St. Margaret's Trust Ltd* (1958) 2 All E. R. 289.

A company whose business comprised the financing of hire purchase transactions had innocently offended on seven occasions against a statutory order which, to safeguard the currency, had fixed minimum cash payment of 50 per cent for purchases of motor cars. The finance company had been deceived by the car dealer who had stated an inflated price and already paid the required 50 per cent. Yet the finance company was convicted (though the nominal fine took account of its bona fides).

The court pointed out that, "If Parliament enacts that a certain thing shall not be done it is not necessarily an excuse to say: 'I carry on my business in such a way that I may do this thing unwittingly and therefore should suffer no penalty if I transgress.' The answer in some cases is that the importance of not doing what is prohibited is such that the method of business must be rearranged so as to give the necessary knowledge".

The last-quoted sentence points to the real rationale of the apparent strictness of this type of offence.

The finance company was guiltless in the sense of the traditional criminal law. But it was not entirely blameless in the sense of managerial standards required by this type of public-welfare order. The fraud of the motor-car dealer was not beyond detection. This was not a case of *force majeure*. The finance company could easily have obtained verified statements, receipts, or affidavits on the relevant aspects of the transaction. (For a recent judicial discussion of public welfare offences see *Lin Chin Aik v. The Queen* [1963] A.C. 160, [1963] 1 All E.R. 223; *Sweet v. Parsley* [1969] 1 All E.R. 347).

What is emerging in this type of public-welfare offence is a kind of 'negligence without fault' as it developed in the law of tort within the conceptual framework of fault liability. Its purpose is to compel business to apply stricter standards of inquiry and control to transactions which may endanger public security. This is a logical and sensible development, provided we recognize the importance of public interest in this type of contravention.

Whatever the specific solution may be to recognize that a whole new area of law has developed, as a concomitant to the social responsibilities of the modern state, an area to which the principles and procedures of traditional criminal law are only applicable to a very limited extent. W have to accept that casional injustice to the

individual is part of the price we have to pay for living in a highly mechanized and closely settled kind of society, in which the health, safety, and well-being of each member of the community depends upon a vast number of other persons and institutions. (W. Friedmann)

- **The Corporation and Criminal Liability:**

  Today, the corporation is the predominant unit. Therefore, the normal defendant, in actions of economic and social impact has a profound effect on this branch of the criminal law. A corporate body is, by the law, equated to a physical individual, but it is not an individual. The characterization of the corporate body as a living organism is a symbolic gesture, even where it is not simply a disguise for the legitimating of omnipotence of the state over the individual. Except for the purely administrative or welfare offence- with which we have dealt in the preceding sections – the criminal law appeals to the individual. It can direct itself to the corporate body only by a further process of imputation. Accordingly, the problem of the criminal responsibility of corporations divides itself into several aspects:

First, a clear distinction should be made between vicarious liability of the master for acts of the servant, and imputation of the actions of a person in the employment, or acting on behalf, of the corporation which are properly imputable to the latter. Imputed liability is not vicarious, but original, liability. The principle of vicarious responsibility has been developed in the law of tort, because it has seemed socially and economically necessary to hold the master- and that is in many cases a corporation – liable vis-à-vis third parties for acts committed within his sphere of operations. The held master is able to recover against his servant. The law of tort is, however, concerned with the economic adjustment of burden and risks, and the principle of vicarious liability is applicable to the criminal law only in so far as the criminal law is approximated to the objectives of the law of tort, i.e. where the law is essentially concerned with the enforcement of certain objective standards of conduct, through the imposition of fines, rather than with the individual guilt of a person.

These points to the area of strict responsibility which is largely, though not entirely, coextensive with the area of the alled public-welfare offences. For this reason, there has been justified criticism of an English decision where a company was convicted of making false tax returns with intent to deceive, the managers of the company having embezzled the proceeds of sales of the company's stock and then made false returns in respect of the purchased tax. Since the managers were acting in the course of their employment, vicarious liability in tort would have been entirely justified in this case, but hardly the criminal responsibility which the court imposed.

Secondly, the nature of criminal sanctions imposes certain obvious limitations on the categories of crimes which may be imputed to a corporation. Corporations cannot be executed or imprisoned. This would seem to exclude certain intensely personal offences, such as murder, rape and bigamy, and neither practice nor doctrine has hitherto extended the criminal responsibility of corporations to these offences. This leaves as a principal field of offences (other than public-welfare offences) crimes that arise out of economic dealings. Convictions for criminal offences that involve *mens rea* have, both in England and the United States, occurred mainly in the sphere of thefts, fraudulent dealings, and conspiracies (the latter relating to the most part of conspiracies to defraud or to acts in restraint of trade under the anti-trust laws). Further limitations are indicated by the purpose of punishment. In the case of at least the larger corporations, statutory fines are seldom of a magnitude which would act as an effective deterrent through the suffering of serious financial injury. And the shareholders are usually too far removed, both financially and personally, to suffer effective personal detriment. A shareholder of General Motors does not feel personally affected by even a heavy fine imposed up on the corporation. Nor is he financially hit, since his participation is limited to his shareholding (Wechsler, in Michael and Wechsler, 1956, p, 159). The main effect and usefulness of a criminal conviction imposed upon a corporation cannot be seen either in any personal injury or, in most cases, in the financial detriment, but in the public contempt and stigma that attached to a criminal convictions of corporations, for offences other than those

which are essentially of an administrative character, to those offences that can property and fairly expose the corporation to a moral contempt.

Third, the rejection of vicarious, as distinct from imputed, liability in the field of criminal law makes it necessary to define the type of relationship which makes it proper to impute the criminal action of an individual to the corporation. The basic criterion for this was laid down many years ago by Viscount Haldane L.C. in a classical passage:

> *" The fault or privity (of the company within the meaning of a statute) is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable up on the footing* ***respondeat superior****, but somebody for whom the company is liable because his action is the very action of the company itself".*
> What Lord Haldane has characterized in this way as the *alter ego* of the corporation is essentially described in the definition of the Model Penal Code suggested by the American Law Institute, by the term 'high managerial agent'. This is defined as, "An officer of a corporation or an unincorporated association, or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association (Proposed Official Draft, $ 2.07 (4) (c) (1962)).
>
> However precise the definition is, a measure of discretion will always have to be left to the individual court in the decision of whether a given high officer or group of officers or members of a corporation must, in any individual case, be deemed to have represented the corporation as such.

- **Liability of Government or a Government-Controlled Corporations:**

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

These problems arose directly in an interesting Australian decision in the case of *Cain v. Doyle* 72 Crim. L. Rev. 409. Under the Australian Commonwealth Re-establishment and Employment Act 1945, employers are under a duty to reinstate persons who have completed a certain period of war service in their former employment. A further section provides that they shall not without reasonable cause terminate or vary such employment. Offenders are liable to a penalty of $100, to be imposed by a court of summary jurisdiction. Other sections of the Act provide, for certain other offences, imprisonment not exceeding six months, alternatively or in addition to penalty. The whole Act is specifically declared binding upon the Crown.

The defendant, who was a manger of a Commonwealth munitions factory, was prosecuted before a court of petty sessions in Victoria for unlawful termination of the plaintiff's employment. Conviction was possible only under section 5 of the Commonwealth Crimes Act, which provides that 'any person who procures or by any act of commission is in any way directly or indirectly knowingly concerned in or party to any offence against any law of the Commonwealth, shall be deemed to have committed that offence, and shall be punishable accordingly'.

The conviction of the manager, a servant, was dependent upon his being an accessory to an offence committed by the Crown. Although the High Court decided by a bare majority to confirm the order of the magistrate dismissing the information, the majority of the judges did not reject the possibility of the Crown being convicted for a criminal offence.

Only the Chief Justice (Latham C.J.) dismissed the idea that the Crown might commit a criminal offence as unacceptable in principle. His objections were, first, that the fundamental idea of the criminal law is a prosecution of offences against the King's peace; secondly, that the Crown itself would have to be a prosecutor in the case of serious offences; thirdly, that the Commonwealth would have to pay a

fine to itself; and fourthly, that where imprisonment was at least an alternative penalty, the Crown could not be included as it could not be imprisoned. The other judges considered the criminal conviction of the Crown at least theoretically possible, though two of them formed the majority with the Chief Justice in rejecting this conviction in the particular case.

At a time when government departments and many independent corporations, directly or indirectly controlled by the government, assume an increasing variety of functions and responsibilities in the social and economic life of nations, the exemption of either government or government corporations from criminal liability generally is neither morally nor technically justified. As we have seen, the main purpose of a fine is not primarily to hurt the defendant financially.

It is to attach a stigma-pronounced by independent law courts on the breach of legal obligations which have been imposed in the interest of the community. If a modern giant industrial concern is fined for a statutory offence, this does not normally hurt an individual. But an accumulation of such convictions will deservedly impair the standing and reputation of such a concern.

In the case of the British statutory public corporations formed in the process of nationalization of basic industries after the Second World War there is in fact no doubt that they are liable to be fined for statutory offences.

Moreover, private corporations have been quite frequently convicted of offences, for which imprisonment is provided, even though it cannot be inflicted on a corporation. (W. Friedmann)

Modern Science and the Responsibility of the Individual:

So far we have outlined some of the impacts of the changing structures of contemporary society, on the ambit of criminal law, the purposes of punishment,

and the partial displacement of *mens rea* by strict liability for certain types of offences of an essentially regulatory and administrative character. These are, as it were, changes from without.

It remains to examine some of the subtler but no less important changes brought about or adumbrated by contemporary scientific research into the structure of the human being. Modern psychology has explored the complex web of instincts and the area of the unconscious, and its impact on human behaviour. This has led to a reexamination of the causes of criminal behaviour, and the various degrees of mental abnormality. More recently, biological research and more particularly modern genetics – has led to the discovery and isolation of man's genetic structure, which determines his character and behaviour. From this, we are about to pass to the next phase, described as 'genetic engineering'. This comprises various methods by which it may be possible to alter or determine the genetic structure of human beings, so as to eliminate or add certain characteristics. These developments may profoundly affect the traditional bases of moral and legal responsibility. (W. Friedmann)

2.2 Modern Psychology, Control over Behaviour and the Criminal Law:

In the approach to a generally condemned act, such as murder, rape or arson, the legal system may go from the one extreme of penalizing the act as such, without regard to subjective factors in the individual offender, to the other extreme of complete individualization, i.e. taking each individual as a composite of moral and intellectual faculties, genetic factors, social environment. Ultimately, this is a question of values, of the balancing between the interest in the safety and vigor of the community, and the consideration of the individual as a person. In no field has the conflict of these values been more dramatically, and often tragically, tested than in the treatment of insanity or mental deficiency. Thus persons afflicted are unquestionably burden to the society. And just as the Spartans (Ancient Greek Town) killed children by exposure weakling so as not to impair the martial vigor

of their state, so in recent times ‘the suggestion has sometimes been made that the insane murderer should be punished equally with the sane, or that, although he ought not to be executed as a punishment, he should be painlessly exterminated as a measure of social hygiene’. Such doctrines commended themselves to Nationalist Socialist Germany, which practiced the extermination, confinement or sterilization of whole groups of people, considered as inferior, objectionable or useless, on a large scale. Overwhelmingly, the tradition of civilized nations, and of the criminal law, has been to take account of weaknesses of the individual as a defence against criminal prosecution, or at least in mitigation of punishment. But while some modern legal systems have gone a long way towards substituting alternative social sanctions for punishment, in the case of insane or mentally deficient persons as well as of juveniles, first offenders, and other special categories, none has held it possible to abolish the criminal law as a major and vital instrument of protection of society. Hence, the question is that at what point the borderline should be drawn, by what criteria criminal responsibility should be measured. (W. Friedmann)

For more than a century, the basic test in the common-law jurisdictions has been supplied by the “M’ Naghten Rules”, laid down by the House of Lords in the case of Daniel M’Naghten. The essence of the directions given by the judges in that case to juries and for cases where the defence of insanity is raised is contained in the following passage:

The jury ought to be told in all cases that every man is presumed to be sane, and to posses a sufficient degree of reason to be responsible for this crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did known it that he did not know he was doing what was wrong.

This test – adopted throughout the British Commonwealth and almost universally in the United States – rests on the criterion of knowledge. It assumes

that a person who intellectually apprehends the distinction between the right and wrong of a given conduct must be held criminally responsible. As such, it was soon attacked, above all by members of the medical profession, but also by some eminent lawyers (Stephen, 1883, vol. 2, p. 157), on the ground that 'insanity does not only, or primarily, affect the cognitive or intellectual faculties, but affects the whole personality of the patient, including both the will and the emotions' (Report, p. 80). As long ago as 1870, it was abandoned in the state of New Hampshire, in favor of the test whether the accused *'had the capacity to entertain a criminal intent – whether, in point of fact, he did entertain such intent*'. In the light of modern psychiatric developments, criminological science and changing conceptions of guilt, the criticism has assumed overwhelming proportions in recent years, both in England and the United States. The substance of these criticisms can be summed up in the following formulation of an eminent American criminologist:

These tests proceed upon the following questionable assumptions of an outworn era in psychiatry:

(1) That lack of knowledge of the 'nature or quality' of an act (assuming the meaning of such terms to be clear), or incapacity to distinguish right from wrong, is the sole or even the most important symptom of mental disorder;

(2) That such knowledge is the sole instigator and guide of conduct, or at least the most important element therein, and consequently should be the sole criterion of responsibility when insanity is involved; and

(3) That the capacity of knowing right from wrong can be completely intact and functioning perfectly even though a defendant is otherwise demonstrably of disordered mind.

In other words, 'a person must be seen in his entirety, and the faculty of reason, which is only one element in that personality, is not the sole determinant of his conduct' (Sheldon Gluek, 'Psychiatry and the Criminal Law, 12 mental Hygiene 575, 580 (1928) as quoted in Durham v. U.S., 36 214 F. 2d D.C. Cir.1954).

There is far less agreement on the alternative. It is almost universally conceded that some persons, who are perfectly capable of intellectually distinguishing between right and wrong, are yet driven to commit a criminal act by forces outside their control. This makes it improper to hold them criminally accountable in a legal system that bases criminal liability on personal responsibility. A widely accepted alternative, at least as a supplement to the M'Naghten Rules, has been the test of *'irresistible impulse'*. But a recent thorough investigation of the problem by a British Royal Commission, which, by a large majority, favored the abolition or modification of the M'Naghten Rules, has described the concept of the 'irresistible impulse' as 'largely discredited' and as 'inherently inadequate and unsatisfactory'.

The real objection to the term 'irresistible impulse' is that it is too narrow, and carries an unfortunate and misleading implication that, where a crime is committed as a result of emotional disorder due to insanity, it must have been suddenly and impulsively committed after a sharp internal conflict. In many cases, such as those of *melancholia*, this is not true at all. The sufferer from this disease experiences a change of mood which alters the whole of his existence. He may believe, for instance, that a future of such degradation and misery awaits both him and his family that death for all is a less dreadful alternative. Even the thought that the acts he contemplates are murder and suicide pales into insignificance in contrast with what he otherwise expects. *The criminal act, in such circumstances, may be the reverse of impulsive. It may be coolly and carefully prepared; yet it is still the act of a madman* (The British Royal Commission Report, section 314).

Instead, a powerful trend in modern psychiatric and legal opinion favors the adoption of a broader test, which correlates criminal liability with the capacity of the individual to control his conduct in conformity with the requirements of the law. Thus, a widely discussed decision of the United States Court of Appeals for the District of Columbia has formulated the rule 'that an accused is not criminally

responsible if his unlawful act was the product of mental disease or mental defect'(Durham v. U.S., 36 214 F. 2d D.C. Cir.1954) .

The majority report of the British Royal Commission suggests that:
The jury must be satisfied that at the time of committing the act, the accused, as a result of disease of the mind or mental deficiency, (a) did not know the nature and quality of the act or (b) did not know that it was wrong or (c) was incapable of preventing himself from committing it (The British Royal Commission Report, Para. 317). A smaller majority preferred to abolish the M'Naghten Rules altogether 'and leave the jury to determine whether at the time of the act the accused was suffering from disease of the mind or mental deficiency to such a degree that he ought not to be held responsible'.
A Model Penal Code, prepared by the American Law Institute, suggests the following formulation:
1. A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.
2. As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

It should be noted that all these formulations not only supplement the purely intellectual appreciation of right and wrong of the M'Naghten Rules by a test of control over conduct as a guide for criminal responsibility, but that they also accept the finding of modern psychiatry in regard to mental 'disease' or 'deficiency', in addition to insanity. Mental deficiency generally connotes an 'intellectual defect or defect of understanding, existing from birth or from an early age' (The British Royal Commission Report, p.117). Mental abnormality is a more comprehensive concept, but it is mainly concerned with two categories of abnormal persons who are neither insane nor mentally deficient, namely,

epileptics and *psychopaths.* It is the latter category that forms probably the main preoccupation of modern psychiatrists, and is also the most difficult to define. It comprises a vast variety of persons who, for emotional reasons, stand, permanently or temporally, to a greater or lesser extent apart from the 'normal' member of society.

The almost infinite variety of psychopathic disturbances and the still continuing and widening scope of psychiatric study of mental disturbances add to the complexity of the problem. The M'Naghten Rules not only greatly oversimplify the problem of criminal responsibility by the 'right and wrong' test, but they also leave nothing between black and white, no intermediate stage between responsibility and irresponsibility (The British Royal Commission Report, appendix 9, p. 413). The *doctrine of diminished responsibility* was universally rejected in the law of England and in the common-law jurisdictions of the Commonwealth, until England accepted it for homicide in a recent statutory reform. In the United States the position is somewhat obscure. On the other hand, the laws of Scotland, in regard to murder, and a number of Continental legal systems, have long accepted the doctrine of diminished responsibility as enabling the courts to mitigate the penalty. Perhaps, the most representative formulation is that of the Penal Code of Switzerland (Article 17):

1. The administrative authority of the Canton will put into effect the judge's decision ordering detention, treatment or removal to hospital of offenders not responsible or only partially responsible for their actions.

2. The competent authority will order the termination of detention, treatment or confinement to hospital as soon as the reason for it no longer exists.

The judge will decide if and to what extent the sentence passes on an offender only partially responsible for his actions is then to be carried out.

Clearly, the development in modern psychiatry which, between the fully normal and the fully abnormal person, recognizes an infinite variety of shades of disturbances lessening, to a varying degree, the emotional powers and capacities of self-control rather than intellectual discernment, calls for a corresponding elasticity in the legal approach to the problem of responsibility. But this very development makes it very difficult to devise precise legal formulas, by either statutory or judicial legislation. Any attempt to elaborate a series of new additional criteria, superimposed on the M'Naghten test, in correspondence with the many types and grades of mental disturbance, would lead to misleadingly subtle reasoning and a multitude of interpretations by different judges and juries. Hence, the above-quoted reform proposals of the British Royal Commission, often American Model Penal Code, and others, suggest broad formulae correlating *responsibility to control*. It would seem not only logical but indispensable to extend this approach to the concept of 'diminished responsibility' as it has, by general consent, operated to general satisfaction in Scotland and in many Continental countries (where it is extended from murder to any criminal offence). In the evidence presented to the Royal commission, preparatory to its Report, the British Medical Association suggested a reform to the effect that:

"When a jury find that an accused person, at the time of committing the act, was laboring, as a result of disease of the mind, under a defect of reason or a disorder of emotion to such an extent as not to be fully accountable for his actions, they shall return a verdict of *guilty with diminished responsibility"* (The British Royal Commission Report, p. 93, section 264).

The introduction of such a flexible standard would add to the individualization of each case, in the light of the medical evidence presented, and the estimate given in the judge's direction and the jury's verdict. It is clear that any solution compatible with modern thinking will place a wide measure of discretion, and a great burden of responsibility, on the court. But it has hardly been different under the M'Naghten Rules, for the decision whether a person is capable of distinguishing

between right and wrong is no less arduous and difficult a task for a court than the proposed more general tests of *control* and *responsibility*. It is, however, as we have seen, entirely out of tune with modern scientific and social thought. *The modern formulations give greater scope and proper weight to expert evidence on maters which call for scientific scrutiny*.

Because of the inherent difficulty of finding any test that it will not leave a great measure of individual discretion in the hands of the court; a good many critics have suggested the abandonment of the M'Naghten Rules altogether, without the substitution of an alternative legal formula, so that the jury would be left to determine in any individual case whether the accused ought to be held responsible or not. This is a realistic recognition of the fact that, under the guise of a directing formula, judges and juries have, in fact, given widely varying interpretations to the rule.

These tests do not, of course, pretend to give anything but a broad guide for an individual decision of a court or, as the case may be, of an administrative authority. As the Report of the British Royal Commission observed wisely,

"That a criterion of criminal responsibility is not necessarily to be rejected because it is imperfect and cannot be guaranteed to cover every case which it ought to cover. All legal definitions necessarily involve an element of abstraction and approximation, which may make their application difficult in marginal cases and may reasonably exclude cases which ought to be included; this is inevitable, since it is precisely the function of the law to draw clear lines for general guidance where there is no clear line in nature, and to deal with the difficulties and anomalies inherent in borderline cases by preserving a reasonable flexibility of interpretation" (Report, section 325).

Modern legal theory has long recognized that general legal formulae could not or should not try to dispense with the individualizing application of justice to the

case at hand. It is nevertheless of vital importance that the general directive should be in broad harmony with contemporary rather than outdated philosophy, morality and social thought.

Yet, a translation of modern medical insight into law, the acceptance of the complexity of the human being, the understanding of the many forces and emotions that struggle in the breast of a human being and produce an almost infinite scale of variations, from 'normality' to 'abnormality', in turn raises serious problems. Somewhere, society must draw the borderline and hold a person guilty of a crime, even though psychiatrists may regard the offender as a very disturbed human being, and philosophers may deny the 'free will' to choose between right and wrong. Many of those who would be held not responsible for their actions under the amended M'Naghten Rule are unquestionably individuals who are highly dangerous to society, usually with a long record of dangerous actions. The alternative is inevitably between punishment and compulsory confinement to an institution for the care of mentally disturbed people. Where execution is ruled out, either because of the fact that capital punishment has been abolished or is not applied, or because of the fact that the defendant has been found 'guilty but insane', the choice is between the overcrowding of two sets of institutions, both of them inadequate, quantitatively and qualitatively, in the great majority of modern states. Above all, it is still the overwhelming opinion of modern criminologists and sociologists that punishment for the criminal is an essential outlet in modern, as in earlier, societies (Flugel, 1945, p.168; Reiwald, 1950). These needs of the society might be threatened beyond danger point if the concept of 'mental defect' or 'mental disease' were stretched too far – if it were, for example, extended to the case of Mr. Dallas O'Williams (*New Yorker*, 19 April 1958, p.85), who, between 1932 and 1958, was arrested more than a hundred times, convicted of eleven major crimes, ranging from assault to homicide. He had been judged criminally insane, but when committed to a mental institution, the psychiatrists were unable to find any evidence of mental disease or defect, other than propensity for crimes of violence. But if propensity for crime

comes to be recognized as a mental disease as such, without any additional element indicating incapacity of the minimum degree of reasoning or control sufficient to prevent the commission of a crime, the way is open not only for a far-reaching frustration of the process of criminal justice, but for the obliteration of the borderlines of criminal law altogether. (W. Friedmann)

Review Questions:

1. Can criminal sanctions control the ever growing corporate criminality? Can tax evasion, misleading advertisements, embezzlement of public funds etc. can be other checked effectively by the criminal law?
2. In the light of the advancements of psychiatry and the recent case law do you think that there is any more clarity brought about in the tests to be applied in establishing the defence of insanity?

Section.3. Changing Philosophy Underlying Criminal Laws

3.1 Purposes of Punishment:

Generally, the philosophy of deterrence still prevails in modern criminology. We continue to be concerned with preventing, by appropriate punitive sanctions, both the individual offender and other members of the society from the repetition of the crime, or the imitation on the part of others by similar actions. But the contemporary approach to the best way of achieving this general objective has undergone a profound transformation. We are no longer certain that the harshest punishment is necessarily the best way of preventing repetition of the offence. Where we have to concede that the severest possible punishment – execution – will certainly prevent the particular criminal from committing this, or any other, offence again, we are no longer sure that this '*spezialpravention'* (specific prevention) will also have the effect of *'Generalpravention'* (general prevention),

i.e. that it will reduce the proportion of capital offences in the body politic. In the continuing controversy about capital punishment, one of the most powerful arguments of those who advocate the abolition of the death penalty is that ‘there is no clear evidence… that the abolition of capital punishment has led to an increase in the homicide rate, or that its reintroduction has led to a fall’ (Report on the Royal Commission on Capital Punishment 1953, section 65).

When, as it is generally accepted in the light of recent thorough investigations, the statistical evidence does not support, for example, capital punishment on the ground of deterrence; the problem comes back to one of the basic theoies. Here, the older philosophies of retribution-in its various shades (Report, section 50-61) are increasingly inadequate although they continue to be supported by some eminent theologians, jurists and others. Modern civilized society has, in general, receded more and more from this philosophy of ‘an eye for an eye, a tooth for a tooth’. The reason is for some, but only a minority, a revulsion against the arrogation by society of the right to take the life of a human being, a view which could be held consistently only by radical pacifists, and hardly by the great majority who justify killing *en masse* (in a group) in case of war by order of the state. A more practical reason is the danger of an irretrievable error of justice. Both these arguments apply, of course, only to the capital punishment, and not to the theory of punishment in general. What is of far greater importance to the theory of punishment as applicable to all major offences is, the progress of social science in a manner parallel to that of the modern psychology and psychiatry. We are far from having an exact estimate of the facts which modern urbanization and industrialization, with all the social disruption they entail, have on the rate of crime. We do, however, know beyond reasonable doubt that such factors as congregation of large families and, especially, juveniles in overcrowded slums have a considerable effect on delinquency, as have the diversion of vast numbers of married women in modern industrialized societies from domestic care to paid employment, or the disruption of family ties in estranged families. *Individual and social psychology touch each other, when it comes to an appreciation of the effect*

of social environment or emotional upsets, in family, school, or elsewhere, on the mental balance and health of an individual. The more we understand of the complex web of conditions that go into the makeup of a person, the less we can accept the simple equations of sin and expiation, offence and retribution, and the like. But we are also faced again, as in the more specialized case of the mentally disturbed individual, with the problem of the proper balance. (W. Friedmann)

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

In the case of persons adjudged insane-whether before trial, at the beginning of the trial (insane on arraignment), as the result of evidence during trial (special verdict), or after sentence – it is obvious that alternative detention or care must be provided for, for the interest of both the individual and society. This must be extended, as the categories of these persons widens from the 'insane' in the older sense to others adjudged 'mentally distributed' or 'mentally deficient'. Various procedures for caring for the mentally ill prisoner are provided in the English Mental Health Act 1959(Walker, 1965, pp.263-94).

A revolution of far greater proportion has, during the last generation, taken place in the treatment of juvenile offenders. Almost universally today, in civilized countries, the juvenile offender (usually a person between the ages of eight and eighteen), who not so long ago used to be subjected to the harshest penalties and thrown together with hardened criminals – is now subjected to a special procedure. The predominant pattern is that of the juvenile court – as introduced,

during the last half century in England, Germany, in the great majority of the American States and in many other countries – a court differs radically, in procedure and the type of sanctions to be imposed upon the offender, from the ordinary criminal court. Probation and approved schools have become the substitute for imprisonment. A number of modern legal systems (Notably, the Scandinavian countries and, following the American law Institute 1940, California, Wisconsin, and Minnesota) have gone further and removed the sanction power altogether from the courts, putting it instead into the hands of the child-welfare authorities. In California the powers of the youth authority have been extended further. This authority has power now to deal with children below the age of juvenile criminality, and to mete out treatment in accordance with the diagnosis of their position.

The substitution of corrective measures for punishment proper has spread from the juvenile offender to the adult offender. The principal emphasis is on probation of first offenders, as a conditional alternative to punishment. (W. Friedmann)

But emphasis on the need for corrective measures is not confined to the first offender. At the other end of the scale, the recidivist, the habitual offender, is becoming increasingly the object of attention of modern penology. In the case of a first offender, it is felt that corrective measures of an educational and the reformative character will serve to deter him from further offences. This approach is followed in the footsteps of the pioneer work of Sheldon and Eleanor Glueck on juvenile delinquency, which has included a social prediction scale for proneness to delinquency.

It is not our purpose to analyze and compare in detail the multitude of educational, corrective and preventive measures that, in a growing number of countries are now applied not only to mentally disturbed person, juveniles, first offenders, but to all criminal. What emerges as a highly significant and critical fact is the increasing intermingling of the criminal and the administrative

processes in the modern science and practice of the criminal law. That the criminal offender is no longer seen as an isolated and guilty individual who, at a given moment, is brought before a court, duly sentenced by whatever term appears appropriate to the court within the often fantastically wide range of maximum and minimum penalties and then disappears for ever from the sight of the judicial authorities, represents and evolution in the legal thinking on crime from which there can be no retreat. In a properly administered and enlightened modern legal system, the process, in which welfare, administrative and criminal process elements are mixed, starts when the welfare of the child that lacks proper family care and attention, or otherwise shows symptoms that might, in the future, turn him into a criminal, is taken over by the appropriate public authority. It continues when – either despite such measures or in their absence – a juvenile offender comes before a special corrective authority with judicial attributes. From there, administrative and welfare authorities take over again, in the shape of the probation officer, child-welfare board, youth authority and of the various official institutions to which the juvenile offender is remanded in lieu of punishment . To these must be added a variety of medical, social and educational experts who enter the process at some stage. Obviously, the old borderlines are becoming less distinct, and it is often uncertain at what stage the criminal process stops and the administrative process begins. (W. Friedmann)

This vital and needed change causes, however, in its turn, some grave problems:

1. There must be a degree of coordination between the judicial authorities proper, i.e. the judge and jury, or the judge alone, land the various welfare and administrative authorities, which is still often lacking. This appears to be particularly true of the length of prison sentences, which often bears no relation either to the social usefulness of the sentence imposed, or to the administrative facilities available either in prisons or in other institutions. It is probably still true – as it was certainly not so long ago – that the majority of the judges have never visited a prison or one of the other institutions now figuring in the punitive process.

2. The distribution of functions between judicial authorities and various administrative and welfare officers emphasizes the need for adequate training and social and professional status of the latter, especially of the probation service, a relatively recent but vitally important institution. The change from a purely repressive to an educative function also emphasizes the need for properly trained prison officers, whose arduous lot must be balanced by adequate recognition in the social and financial scale. This, too, is far from being the case.

3. Lastly, and perhaps, the most important is that the blurring of the borderlines between the criminal and the administrative procedure that holds not only benefits, but also dangers for the effect on the individual. The administrative process is in its essence discretionary, whereas criminal procedure has, at least in the democratic scheme of values, been surrounded with safeguards against arbitrariness.

   As corrective and educational procedures have become intermingled with criminal or quasi-criminal processes, so the fear has grown that benevolent but autocratic authority may be able to deprive persons falling under its jurisdiction of liberty, for indefinite periods, without the judicial safeguards attending criminal trail. Criticism has been particularly vociferous instates which, like criminal procedures in regard to juvenile offenders. The title of an article is: 'We need not deny justice to our children', while a California judge has written that the juvenile court is 'fast developing into a complete system of Fascism, as dangerous to our institutions as Communism'. Such complaints are based on the vagueness or elasticity in the procedure of a juvenile court in regard to such essential safeguards as the powers of the police to arrest, the precise formulation of the offence, the right of trial by jury, the right to refuse testimony, the acceptance of hearsay evidence, or the right to counsel. (W. Friedmann)

3.2 Alternatives to the Criminal Sanctions:

To those who consider retribution as the principle or exclusive purpose of punishment, there can be no alternative to the criminal sanction for offensive and

prohibited conduct. But for the adherents of a utilitarian philosophy there are alternatives. In a recent discussion of this question Professor Packer proposed a classification of sanctions into four categories (1978, pp. 23, 205): *compensation, regulation, punishment and treatment.* **Compensation** involves the exaction of money or performance to recompense an identifiable beneficiary or class of beneficiaries for damage done or threatened by the actions of another. **Regulation** embraces a constellation of devices used to bring the impact of public authority directly to bear on private conduct, both before and after the fact. The granting and withdrawal of licenses is a prominent example of regulation. **Treatment** is essentially a diagnostic response. It implies the appraisal of socially condemned conduct as a disease rather than a crime. A widely used form of treatment, as a sanction alternative to punishment, is compulsory civil commitment. This raises the question of how if at all such a measure of deprivation of liberty differs in any thing but name from imprisonment. But there are of course many lesser forms of treatment in response to criminal conduct. A contemporary British sociologist (Wootton, 1963) argues in favour of a sentencing policy primarily as a prevention of crime. This means, for example 'that custodial sentences should be in determinate in respect to the type of institution to which an offender should be committed, and indeed that the rigid division of institutions into the medical and the penal should be obliterated'. Essentially 'decisions as to the treatment of offender should be common administrative, instead of a judicial, matter' (Wootton, 1963, p. 112). Professor Packer goes less far. For him, *"the criminal sanction is the best available device we have for dealing with gross and immediate harms and threats of harm. It becomes less useful as the harms become less gross and immediate. It becomes largely inefficacious when it is used to enforce morality rather than to deal with conduct that is generally seen as harmful"* (1968, p. 365).

The criminal sanction, in other words, is not society's inevitable response to evil, but he most serous of various kinds of remedies. (W. Friedmann)

3.3 **What Future for Criminal law?**

As a leading criminologist has observed, “the study of crime must be brought into a closer connection with psychiatry, psychology and social science. There has been very little change since the nineteenth century in the basic concepts of substantive criminal law, apart from the accretion of what may be described as ‘administrative criminality’, a product of the growing complexity of modern life and of the new protective and remedial functions of the welfare state. But there has been a sweeping transformation in the penal sphere. A Victorian lawyer would still feel quite at home with our basic offences, but he would be puzzled and bewildered by our methods of punishment and treatment and indeed by our whole attitude.” (Radzinowicz, 1962, p.181).

It is, not as we have seen, no longer sufficient to concentrate on the alternative purposes and sanctions of criminal law as such. We have to think increasingly of criminal law as only one of the varieties of instrumentalities, by which public authority deals with the complex and manifold problems of order in contemporary industrial society. That a criminal sanction- even with the greater variety and flexibility of methods of punishment used today – is but one of a number of devices by which a modern state seeks to exercise authority over private conduct, is the gist of Professor Packer’s important book, and particularly of his juxtaposition of compensation, i.e. monetary adjustment, and regulation, i.e. administrative sanctioning, with the sanctions of punishment and treatment which may be regarded as within the ambit of criminal law proper. In the modern ‘positive’ state, regulation is a particularly powerful means of dealing out rewards and punishment, outside the purviews of criminal law. The granting, refusal, or withdrawal of an occupational or professional license, or the refusal of security clearance for an individual, which makes him unemployable, are in their moral and economic effect, more powerful sanctions than most of the punishments. To this we may add another factor that is not stressed by Professor Packer: The power of quasi-public organizations that enjoy an effective monopoly in their

professional or occupational area, to make or break their members by admission to, or exclusion from membership. A doctor struck from the medical list, a bricklayer excluded from his union may in effect suffer punishment for life. But this occurs entirely outside the ambit of criminal law and the criminal process. It involves the complex relationship between public authority and private or quasi-public institutions.

While, on the one hand, criminal law and the criminal processes must become increasingly more flexible so as to accommodate a variety of sanctions that are not necessarily punitive in the traditional sense of the word, it is equally necessary to compare the moral, social and economic impact of non-criminal sanctions – including the power of non-public bodies to impose sanctions on their members – with the impact of the criminal sanction.

There must be a much closer coordination of criminal, administrative and civil procedures, with respect to the effect that they have on the status of the individual. While the criminal law proper may well come to occupy a more limited place in the public sanctioning process than it has traditionally done, it is imperative that the technically non-criminal sanctions be subjected to adequate procedural safeguards, so as to protect the basic rights of the individual. (W. Friedmann)

Review Questions:

1. What is your opinion on the classes of sanctions proposed by Professor Packer: *compensation, regulation, punishment and treatment?*

Critical Thinking!

"The increasing understanding of the social and psychological causes of crime has led to a growing emphasis on *reformation* rather than *deterrence* in the older sense, as the best way to protect both the individual criminal from himself, and society from the incidence of crime". How?

Brain Storming!

From the foregoing discussion it becomes clear that on the one hand it is being felt that even corporations should be brought under more and more criminal responsibility to ensure deterrent effect while on the other hand there are arguments in favour of alternative punishments which more in line with reformative justice. How do you reconcile these two opposite trends?

Unit Summary:

The type of conduct that a particular society considers as sufficiently worthy of condemnation to prohibit it by criminal sanctions is deeply influenced by the values governing that society. The very definition and concept of crime is not only according to the values of a particular group and society and ideals with faith, religious attitudes, customs, traditions and taboos but also according to the form of government, political and economic structure of society and a number of other factors. For instance, what is a sex crime in India and Eastern countries may be a sweet heart virtue in West and Scandinavian countries. What is an offence against property in a capitalist culture may be a lawful way of living in a socialist society. What is permissible in a free and affluent society may be a pernicious vice in a conservative set up. The notion about crime also changes with time. What is an offence today may not be an offence tomorrow and what has not been an offence till yesterday may be declared a crime to day. In short, the concept of crime changes with the change of ideology and other factors in the society. The socio- economic crimes, the sexual permissiveness etc are glaring examples of this truth.

The principles of vicarious liability and corporate liability are undergoing profound changes. Opinions are in favour of extensive application criminal sanctions to corporate crimes for the sake of deterrent effect. At the same time arguments supporting reformative justice in the place of serious deterrent sanctions are on the raise. Civil remedies and administrative sanctions limiting the scope and application of substantive criminal laws are becoming apparent. Thus, the changes in criminal law consequent to a clear shift in the social ideologies and values are conspicuous every where, in every legal system.

References:

Reader note:

1. W. Friedmann, "Law in Changing Society', (Second Edition, 2001) Universal law Publishing Co. Pvt. Ltd under special arrangement with Sweet & Maxwell Ltd., U.K.
2. Peter De Cruz, "Comparative Law in a Changing World", (Third Edition 2007) Routledge-Cavendish Publications

Annex I. Model Exam With Model Answers

CASE ONE **40 POINTS**

Addis and Diana had been married for 10 years. At times the marriage was stormy, mostly because of the fact that both were insanely jealous and suspicious. Toward the end of 2005, however, things went well for them; the marriage was calm for a couple of months. They decided to celebrate with an evening out for New Year's Eve.

Unfortunately, Addis did not work on the last day of the year. He joined some friends early in the morning and started drinking. He got home later than scheduled and this made Diana furious. They got ready to go to the New Year's

Eve Party, but argued furiously for more than an hour. By the time they left for the party both were fuming mad. Addis had continued to drink, which did not help the matter.

At the party, Addis and Diana ran into some people with whom Diana worked. At some point Diana was asked to dance by a man from work and she consented. Addis said nothing, but it was apparent to Diana that he was burning. She danced with the man three times before Addis said anything about it. Then he called her a "slut" and threatened to knock her teeth out. He continued to drink. Diana continued to dance with her friend from work.

Addis left the hall where the party was being held and went to his car. He kept a gun in the glove compartment. He got the gun, returned to the dance floor, and found Diana on the dance floor still continuing her dance with her friend dancing standing very close to him. Addis ran across the floor shouting and shooting. He emptied the gun; He put three shots in his wife and three in her friend. Both died instantly.

There was sufficient evidence to prove that all the above said facts. Later, in his own statement to the police Addis said he loved his wife, intended her no harm, and was so drunk on the occasion in question that he could not remember anything that happened.

1. Suppose that you are the Public Prosecutor in this case. Prepare a prosecution case against Addisu for causing the death of his wife and her friend. Explain the essential ingredients of the crime you are charging the accused with and support your case with sufficient reasoning. **20 Points**

Prosecution Case:

1. The Crime Committed: It is against the life of a person, i.e. 'Homicide' Essential elements and causation of crime: Arts. 538, 58, 23 and 24 have to be applied to establish that it is an intentional homicide and the causation.

Intention to cause death is sufficiently manifested by the fact that he purposefully went to his car to pick up his gun and fired at both of them after returning back. There is no doubt about the causation since it was committed in a party in the presence of many eyewitnesses.

2. Specific type of homicide: Ordinary homicide under Art. 540

   Addisu can be charged under Art 540 of the Criminal Code, 2005 for committing ordinary homicide by causing death of both his wife Diana and her friend.

   Reasons for the Charge under Art 540:

1. **The killings in the case are not *'aggravated homicides'*** because, though the conduct of the accused indicates the presence of premeditation it is not of such a serious quality as to bring the case under aggravated homicide. A husband killing a wife and her male colleague under enraged condition cannot describe a dangerous or an exceptionally cruel personality as required by Art. 539. ***The quality of premeditation that is required under the Art. 539 is that it should be of such a mean nature that it suggests that the criminal is exceptionally cruel, abominable or dangerous person. Therefore, every case of premeditated killing may not necessarily fall under this article.*** A premeditation of lesser depravity may take the case to be treated under Art. 540 as an ordinary homicide.
2. ***The*** **killings are not an extenuated homicides** too for the following reasons:

a. Though there is provocation it does not amount to 'gross' provocation as required by Art 541.

b. Provocation to be a valid defence it should come from the deceased person. Here in this case Diana is the reason for provocation but that was not such a serious one to describe it as a 'gross provocation'. So for the act resulting in the death of Diana provocation as required by Art. 541 cannot be established thereby disqualifying Addis from the benefits of extenuation.

c. Diana's friend is ignorant of the disturbances between the wife and the husband. He did not do any thing in particular to provoke Addisu. Therefore, for causing death of Diana's friend Addisu can never claim the defence of provocation.

As the killings in the above case do not fit into the definitions of neither aggravated homicide nor extenuated homicide the right provision under which he should be prosecuted is 'ordinary homicide under Art. 540.

3. **Intoxication cannot be a defence: Art. 50/1**

The accused got intoxicated by his own fault and the act he committed was not a simple disturbance that can get the benefit defence of intoxication.

2. If you were the defense counsel what defense would you raise for the defendant. State the principles, in detail, governing such defense/s under the Criminal Code. 20 Points.

Defence Case:

If I were the defence counsel for the defendant in this case I would raise the following contentions:

1. **Intoxication:** Art. 50/3read with Art. 491

Though the defendant got intoxicated voluntarily, he neither contemplated nor intended that he would do any such act subsequent to his drinking. Therefore, he should be rightly treated under Art 50/3 read with Art 491. Following this, his sentence by no means should go beyond simple imprisonment not exceeding 1 year.

2. **Art50/2 read with Art 543/1:**

If the Court is not convinced that his case does not fit into Art 50/3, it should at least be treated under Art 50/2 and is entitled to the benefit of his crime to be a negligent one. Under Art. 543/1 the accused may be punished with no more than 3 years simple imprisonment.

3. **Provocation Art 541/b:** The conduct of Diana and her friend were sufficiently provocative to a husband to react in such a way. There was no sufficient time to cool down there either. The provocation was from the deceased wife herself; therefore, provocation can be claimed as a defence. In this case his punishment should not exceed 5 years simple imprisonment. I humbly request the honorable Court to be considerate towards the accused having regard to the serious mental and emotional disturbances he had gone through and that his state of being

intoxicated had made his state of mind even more incapable of regulating his conduct and grant him even a lesser sentence to him.

In any case the defendant's case does not fall under Art 540. Therefore, I humbly submit to the honorable Court to consider the grounds for the defence so that justice is done my client.

CASE TWO **10 POINTS**

Alemayehu sold and transferred his estate to Zelalam. Alemayehu afterwards, executed a transfer of the same estate to Bayisa, dated six months earlier than the date of transfer of the estate to Zelalam, intending it to be believed that he transferred the estate to Bayisa before he transferred it to Zelalam. Did Alemayehu commit any crime? If so, establish the crime against him as per the essential elements of the crime under the relevant provisions of the Criminal Code.

Key Answer: Yes he has committed a crime of 'Material Forgery' punishable under Art. 375 of the Special Part. As this could cause serious material damage to the victim this case should be treated with sufficient seriousness and his sentence should be sufficiently severe too. The punishment for this crime is a minimum sentence of 3 months simple imprisonment and a maximum of 10 years of rigorous imprisonment.

III. PLEASE, GIVE EXPLANATORY ANSWERS FOR THE FOLLOWING: 10 X 4=40 POINTS

1. **"Every accused is presumed to be responsible". Discuss. What are the differences between Art. 48 and Art 49? 10 POINTS**

Key Answer: 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:

1. The proof that the act was done by the accused---It is the burden of the prosecutor.
3. The fact that the accused is responsible for his acts—This is presumed by the Court.

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

- 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.
- 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 trail by the conduct of the accused on the trial.

Once the 'question' arises it becomes necessary to decide the facts in the light of Arts. 48 and 49. Then it becomes the burden of the defence to prove the accused is irresponsible beyond reasonable doubt. Then the burden of the prosecution is only to raise a reasonable doubt in the mind of the Court that the accused is responsible and deserves punishment.

- **Differences between Art. 48 and Art 49:**

- Regarding the causes of insanity the articles supplement each other.
- Art. 48 deals with absolute irresponsibility where as Art. 49 deals with limited or partial irresponsibility due to disease of mind.
- Absolute irresponsibility under Art.48 entitles the accused to complete immunity from the punishment, while under Art. 49 the accused is partially protected from punishment since he/she suffers from only partial incapacity to understand the nature and consequences of his/her conduct.
- Under Art. 48 the actions taken are, measures of treatment or measures for protection as provided Arts. 129-131. In case of Art 49 the accused is given free mitigation of punishment in accordance with Art. 180 as well as any other measures for treatment or protection shall be ordered.

2. The increasing understanding of the social and psychological causes of crime has led to a growing emphasis on *reformation* rather than *deterrence* in the older sense, as the best way to protect both the individual criminal himself, and society from the incidence of crime". Analyze this statement critically. **10 POINTS**

   Key Answer: By reformation of the criminal is meant his moral regeneration, and developing the sense of honesty. A person, who commits a crime and suffers punishment for that, comes back to the society and lives in along with his other fellow beings. The advocates of reformative theory aim at the rehabilitation of the criminal in the society. This theory admits only such types of punishments which are educative and discipline to the criminal, not those which inflict pain on him. Therefore, punishment must aim at making a man worthy of living in the society. However, purely reformative punishment has the disadvantage of dilutes the pain of the penalty. And may not deter the criminal from repeating similar crime on the other hand it may even encourage the criminal to repeat his criminal behaviour.

   The purpose of the punishment is to deter the criminal from committing crime in future and to set as an example to the prospective criminals. It carries the message that those who violate the law will be punished like wise. The idea is that punishment will curb the criminal activities of the potential criminals. Strongly deterrent punishments may be successful in maintaining the full intimidation value of the penalty. However, it has the disadvantage of restricting the chances of reforming. Too lengthy and too harsh punishments in the name of deterrence may harden the criminal instead of reforming him.

   Therefore, punishment should be designed in each and every case by carefully including the deterrent as well s reformative elements.

3. **a**. Petty offences are also referred to as 'regulatory offences', 'public welfare offences' etc. What do these different labels signify about the nature of these offences? **5 Points.**

   Key Answer: The petty offences originated as result of the need to protect the social interest i.e. the interest of the public in general. The necessity of social

regulation arose out of the growing complexity of social life. The special regulatory legislations such as examples of such laws may be, The Weights and Measures Proclamation, 1973, The Wild Life Conservation Order, 1970, the Currency Proclamation, 1942 (Proc. No. 31), the Currency Amendment Proclamation of 1947 (Proc. No. 99), road traffic rules etc., The violations of such mandatory provisions are made punishable more in order to give effect such laws than to inflict pain in the name of punishment on the law breaker. Therefore, the above said names signify that these offences are for the purpose of regulation of social conduct in the general interest of the community as opposed to the private interests of a specific victim.

b. Do all the general principles and rules of the General Part of the Criminal Code apply to the petty offences by virtue of Arts 3 of the Criminal Code and 734 of the Petty Code? State the exceptions, if any. **5 Points.**

Key Answer: No, all the general principles and rules of the General Part of the Criminal Code do not apply to the petty offences. The following are some of the important differences:

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

- In case of petty offences only completed offences are punishable. The stages of preparation and attempts are not punishable.
- In these cases only principal offender (Art 32) is punishable. Inciters, co-offenders, and accessories after the fact are not punishable. Each offender shall be punished for his own act irrespective of the participation of another. Art 741/3 clearly lays down that the responsibility and liability for petty offences shall always be individual (Art 41 and 88). There is no collective responsibility under the Petty Code.
- Juridical persons are also not liable for incitement or complicity relating to petty offences. A juridical person is punishable only when its employee violates laws, regulations or directives as a petty offender in accordance with Art 32 of the Criminal Code.

4. **a**. Define 'trafficking in women and minors". Are the definitions under the Ethiopian Criminal Code in conformity with those given under the international instruments? **5 Points.**

   Key Answer: The Ethiopian Criminal Code deals with the crime of trafficking under two different heads basing on the purpose of this criminal conduct. They are:

1. Trafficking for the purpose of forced labor, Arts. 597-600
2. Trafficking for the purposes of prostitution, Arts. 634-638

   b. Does the consent of victim neutralize the crime of trafficking? Is the pecuniary gain of the criminal an essential element of the crime of trafficking? **5 Points.**

   Key Answer: No, the consent of a victim is irrelevant. These crimes are punishable even where there is consent of the victim or where there is no pecuniary gain to the criminal. Art. 597 does not mention 'pecuniary gain' to the criminal as an essential element. Under Art. 635 'pecuniary gain' is one of the two alternative purposes of the crime, the other being to 'gratify another'.

Annex II. Key to Solve a Case Problem:

While solving a case problem the students are required to systematically deal with the facts given to them keeping certain key points in their mind in order to achieve these beneficial results:

1. To have clarity in presentation of their case, and
2. To avoid mixing up of prosecution and defense cases.

Students have this common problem of mixing up of prosecution case with that of defence. They should remember that while preparing a prosecution case they should stick to that side and challenge the defence with their contentions. Switching to defence points in between reflects their uncertainty and makes their case weak. The same is true while preparing a defence case; the student should completely explore his chances of defending his case by identifying different

grounds to establish the innocence of the accused in a right case or at least try to limit his liability in a case where the defendant's involvement is obvious.

I. Being a Prosecutor:

Before proceeding to prepare your case always read the facts thoroughly, if need be more than once to clear any lingering doubts about the facts in your mind. Note the names of the parties, dates, timings etc. perfectly in a chronological order (according to the order of occurrence). The prosecution case should necessarily consist of three important parts namely, identification of the conduct under specific provision of the Special Part, fixing the criminal liability of the accused and recommendation of the sentence.

1. **Identification of the Accused's Conduct:**

The first thing that comes to the mind after reading the facts is the specific kind of crime that the accused has committed. It is the harmful result that directs you to the relevant provision; say for example if the facts include the killing of a human being it will be identified as:

- A crime of homicide Arts 538-543
- The specific type of homicide i.e. whether intentional [Aggravated (Art. 539), Ordinary(Art. 540) or Extenuated (Art. 541)]or Negligent homicide(Art. 543)

At this stage just identification of the conduct under the relevant provision is sufficient.

2. **Fixing the Criminal Liability of the Accused:**

a. Essential elements of the crime identified:

The material and moral ingredients of the crime in accordance with the identified provision of the Special Part has to be discussed here clearly. For example, if it is a case of aggravated homicide, the facts should be shown to disclose:

- Intention of the accused in terms of Art. 58,
- At least one of the aggravating circumstances in terms of Art.539/1/a or b

b. Causation of crime:

If the facts include more than one cause then it has to be shown that the accused's act was the actual and adequate cause for the harmful consequence i.e. 'death of a

human being' as in the case of the example we are considering. This is done in accordance with the rules laid down in Art.24 of the General part.

Always try to give sufficient reasoning for your stand. Yes/ No answers are neither useful for scoring maximum marks nor useful for your future practical application. This will help you to write nice reasoned judgments of academic as well as practical importance in future.

3. Recommendation of the Quantum of Punishment:

The last and very important part of the prosecution case is that it should contain a well reasoned recommendation for a specific 'quantum' of punishment. Though it is the judge that has the final word in deciding the nature and length of the sentence to be given, it should form part of the prosecution's request. For example, in a case of aggravated homicide you will conclude that the accused be given a sentence of rigorous imprisonment for life unless there are convincing grounds for demanding a death penalty. You have to support your sentence with sufficient reasoning too which will stand as an answer for the demands of the defence for mitigation of punishment.

The sentence recommendation should include aggravating circumstances, previous convictions, if any, and a description of the disposition of the accused.

II. Being a Defence Counsel:

Normally the defence case begins with a 'plea of not guilty' where in the accused denies all the charges made against him. The defence may base its case on anyone of the following grounds:

1. Absence of Legal Ingredient:

It may be shown that the harm caused is not one of those which are specifically prohibited under the Special Part of the Code. For example, 'raping' is a crime under the Ethiopian Criminal Code where as 'fornication' is not. Therefore, unless there is a strong proof of and element of 'force' the conduct cannot be a crime. The principle of legality prohibits the creation of crimes by analogy (Art.2/3). ***Or,***

2. Absence of Material Ingredient:

a. By proving the absence of 'cause' and 'effect' relationship:

In a case where several causes are present like preceding, concurrent or intervening etc. (Art. 24) 'the act/conduct of the accused' may be proved to be 'not the one' that had brought about the result or that it was the 'inadequate one' to have brought about the harmful result in question.

You need to show facts supporting your argument. ***Or,***

b. By plea of 'alibi':

The Latin expression *'alibi'* literally means 'elsewhere'. It is a plea by a person accused of an offence that he was 'elsewhere'…that having regard to the time and place when and where he is alleged to have committed the crime, he could not have been present.

The *plea of alibi* postulates the *'physical impossibility of the presence'* of the accused at the scene of the crime by reason of his presence at another place. It should be shown that the accused was so far away at the relevant time that he could not be presented at the place where the crime was committed.

Note: While solving a hypothetical case '*alibi'* can be raised only in the light of the given facts. You cannot modify the facts by imagination. You cannot assume the facts unless you are asked to. ***Or,***

3. Absence of Moral Ingredient:

a. By Proof of Incapacities: Arts. 48-56

The defence may claim anyone of the incapacities like insanity, intoxication or infancy to prove the incapability of the defendant to form the guilty mind necessary to bring about the harmful consequences in question. Here again you have an obligation to support your contentions in the light of the facts given and the principles governing such a defence by referring to the relevant provisions of law. ***Or,***

b. By Proof of an Affirmative Defence; Arts. 68-81

i) Where justifiable-No punishment at all:

Where all the essential conditions and the limitations specified under the relevant provision are fulfilled, the defence can claim complete immunity from punishment.

ii) Where excusable-Mitigation of punishment:

Where the conduct of the accused does not fulfill the requirements for an absolute justification a free mitigation of punishment pursuant to Art 180 can be claimed.

III. Being a Judge:

a. Analysis of issues on both sides:

If you are asked to decide the case assuming yourself to be a judge, you have to briefly discuss both prosecution and defence cases and then come to a reasoned decision which can answer the contentions of both the parties.

b. Determination of punishment:

This exercise should be done carefully following important principles relating to determination of punishment incorporated in Arts. 87 and 88. Due attention should be given to the aggravating, mitigating as well as combination of both kinds of circumstances (Arts. 82-86, and179-189). Supporting your sentence with sufficient reasoning is the most important part of your judgment.

THE END