Chapter two

Basic Principles of Criminal Law

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- A person accused of a crime is put under the peril of his life and liberty. Therefore, it becomes necessary that certain safeguards should be provided to the accused.
- To this end, there are important principles providing protections to accused persons. As embodied in the constitution and criminal law, the ff are the most important pples:
- The Principle of Legality
- The Principle of Equality
- The Principle of Individual Autonomy

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- The principle of legality requires that prosecutions and punishments for crimes should be strictly in accordance with a pre-existing legal provision.
- The principle also requires that wrong-doers should be punished strictly within the prescriptions of law.
- Legality is a ppl by w/c the justice or fairness of a state's +v law can be assessed. It is a pple of justice by which +v law is criticized for falling short of doing what it ought to do. ToL refers to ToJ w/c commends +v law for achieving what it ought to achieve.
- On the other hand, Principle of equality requires that all those who violate the law should be dealt with equally in terms of trial and punishment.
- There should not be any discrimination in the application of Criminal Laws.

The Principle of Legality

- ***Nullum crimen, nulla poena sine praevia lege poenali*** (Latin, *No crime (can be committed), no punishment (can be imposed) without a previous penal law*) is a basic maxim of the pple of legality. *(having been prescribed by)*
- This maxim states that there can be no crime committed, and no punishment meted out, without a violation of penal law as it existed at the time.
- Primarily cts cant punish acts or omissions w/c are not prohibited by law. Secondly, cts cant impose penalties or measures other than those prescribed by law. Courts can't at their own discretion impose penalties out side the range stated in the law, subject of course, to aggravating and mitigating circumstances stipulated in the law.
- The pple relates to the ff distinct rules the a) rule against retroactive criminalization b) the rule that criminal statutes be construed narrowly c) the rule against judicial creation of criminal offences and d) the rule that vague criminal statutes are

- All these rules are elements of pple of legality. All these elements of pple of legality, in one or another way, are related to the pple of fair warning and notice.
- In other words, Notice is the basic element of pple of legality. It has also much to do with fairness. Crimes must be **defined in advance** so that individuals **have fair warning of what is forbidden**/prohibited: lack of notice poses a trap for innocent & violates the 1st essential of due process of law.
- The kind of notice required is strictly formal. That is a state is required to publicize criminal statutes in certain official document and understandable language.

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- The principle can be viewed as one of political rights, b/c it provide protection of citizens from different abuses by the government. more than as a rule of criminal policy only.
- When the government find it necessary, it has used criminal law as instrument of politics and moves to invent crimes and punishments.
- But the principle of legality severely restrict unbridled discretions in the hand of the gov't.

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- The principle of legality was a specific reaction against this repressive device, intended to restrict/end its use by requiring the government to announce in advance the rules of conduct it would enforce by criminal law.
- The *principle of legality* is that, '*there is no crime or punishment without a pre-existing law that prohibits that crime*'.
- Thus, the conduct must be deemed a crime before the act is committed. If the person knows in advance that the act is illegal he may refrain from doing that act.
- The policy behind the principle of legality is that "fair warning" should be provided to a criminal so that he does not inadvertently commit a crime that he has no reason to believe is illegal.

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- There is no deterrence value in having unwritten crimes because people do not know what actions to avoid.
- Also, it is not morally culpable to do an act that a person reasonably believes is not illegal. The person lacks culpability if he believes it is not illegal. No CrLia at all in such
- Lastly, it would be unconstitutional under the *ex post facto* clause to do so.
- The rule of *lenity* is a corollary to the principle of legality - it follows naturally from it. The rule of lenity requires that all ambiguities in statutory language be resolved in the defendant's favor.
- The policy reasons are the same as the rule of legality. Also, the rule of lenity encourages the legislature to write more clear statutes. Offences & corresponding penalties be clearly defined.

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- **Art. 2 of the Ethiopian Penal Code** incorporate the principle of legality. The principle, according to this provision, has three important ingredients:
- ***"nullum crimen sine lege"*** - No crime unless specified by law, (Art. 2/1)
- ***"nulla poena sine lege"*** - No penalties other than prescribed by law, (Art. 2/2)
- ***"non bis in idem"*** – Nobody shall be punished twice for the same act, (Art. 2/5)

‘nullum crimen sine lege’

- The first ingredient of the principle of legality is that “there are no offences other than those which are expressly provided by law”.
- ‘Criminal Law’ within the meaning of Art.2 is not only the Penal Code, but also it includes any law duly passed and published, which contains penal Provisions.

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- The principle "nullum crimen" conveys four different rules, namely:
- 1) Principle of lex scripta (Crime must be based on written law)
- 2) Principle of lex certa (what constitutes criminal conduct must be clearly defined and distinguishable);
- 3) Principle of lex praevia (prohibition against retroactive criminalization of conduct);
- 4) Principle of lex stricta (the prohibition against creation of crimes by analogy).

The pple has Four attributes:

- Certainty in Legislation,
- Accessibility of the law,
- Rule of strict Construction,
- Non-retroactivity of penal laws.

Certainty in legislation:

- *'nullum crimen',* is an injunction to the legislature not to draw its statutes in such broad & general terms that almost anybody can be brought within them at the whim of the prosecuting authority and the judge.

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- In England, the statutes offending the maxim must be interpreted restrictively but in the United States, such statutes might be held unconstitutional and void.
- Penal law should be sufficiently definite for those to be affected by it. People must know their duty and be precisely aware about the prohibition created by law.
- This is possible only when the law is certain and definite. People can then regulate their conduct and behavior in order to avoid the hazard of falling within the grips of the penal provisions of laws.
- Certainty in legislation does not only mean that crimes should be created by law but it also means that a prohibition must also be drafted in *clear,*

Accessibility of the Law

- The Penal law must be accessible and intelligible because it is addressed to people in society who are bound to obey it on pain of punishment.
- There is no branch of law of which it can be claimed with such assured conviction that it should be certain and knowable as criminal law.
- It is notoriously contrary to fact that everyone knows the law, but it is very important that he should be able to ascertain it.
- Whatever may be the form of law it must be properly publicized then only it can be said to be duly promulgated.
- What is certainty in legislation? What if the legislator draw statutes in broad & general terms? How possible to ensure accessibility of criminal law?

The Rule of Strict Construction:

- The rule is that, ‘Penal statutes must be constructed strictly’. Since all penal laws endangers the life and liberty of the person being charged (subject), they have to be constructed strictly.

The rule implies the following things:

- A. In the prosecution of an accused, the court must see that the act or omission charged as a crime is within the plain meaning of the words used in the provision making that act or omission a crime.
- **B.** The court must not strain the words on any account in defining a given crime; such as to provide for an omission (i.e., *casus omissus*) or a slip nor can the court extend the meaning of Criminal Statues by construction. Nothing can be regarded as being with in the meaning of the statute which is not within the letter.

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- C. Full effect is to be given to every word used in the statute.
- D. Strict construction in relation to penal statutes requires that "no case shall fall within a penal statute which does not satisfy all the elements of the crime as defined by the statute."
- E. The rule requires that where the ambiguous language of a statute leaves a reasonable doubt about its meaning and scope, the benefit must go in favor of the accused.

'nullum Crimen' prohibits analogical extension of Penal statutes:

- According to '*nullum crimen,*' as embodied in Art 2/1, primarily, courts cannot punish acts or omissions which are *not prohibited* by law. For example, although 'prostitution' is morally repulsive, it is not expressly stated as a crime.
- Hence, the conduct cannot be made punishable on the basis of its evil effect on the society.

- To give further effect to this principle, there is a “prohibition of analogy” inserted by Art 2/3, which states – “The court may not create crimes by analogy”.
- This means courts are not free to punish an act on the basis of similarity in its evil nature to that of a punishable act.
- For example, a nurse who is under a “legal duty” (professional duty) to give medicine meticulously according to the doctor’s prescriptions to a terminally ill patient, omits to do her duty properly and thereby brings about the death of the patient, may be made responsible for the consequences of her criminal negligence (Art.

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- Whereas, on an analogy, an expert swimmer who fails to save a child drowning in a river in front of his eyes may not be made liable under any of the provisions of the Criminal Code, for his conduct amounts only to an omission of "a moral duty".
- The principle of legality requires '**a legal provision specifically forbidding the conduct**' in question to attach criminal liability.

Principle of Strict Interpretation (Art. 2/4)

- we said that cts can't creat offences by analogy. However, The duty not to depart from what the law prescribes for the purpose of creating new crimes does not preclude courts from interpreting the law if this is found necessary.
- Art 2 forbids the creation of crimes by analogy thereby requiring courts to be confined to "interpretation in cases of doubt'. If an act is not at all referred to as an offence in the CC, the court can not declare it as an offence by analogy (by comparing the act with another offence stated in the code).
- This doesn't however, rule out interpretation in cases of ambiguity, inconsistency or unreasonable

- The power of courts to interpret the law is only allowed in cases of doubt. A ct may be in doubt under various circumstances. w/r the law is clear, the issue of int should not arise. But there are instances w/r clear readings lead to unexpected and unreasonable absurdities.
- Or a certain legal provision may be ambiguous or contradictory, thereby putting the ct in doubt. In this case, the ct is empowered by art 2(4) to interpret the law based on the meaning & purpose intended by the legislature.
- As long as the courts take due precaution not to create crimes by analogy, they are empowered by Art 2/4 to interpret the law in cases of doubt.

- Krzzeczunouczwitch enumerates 3 kinds of int doctrinal, legislative and judicial
- Acc. To him, when the law is ambiguous or silent, word meaning should be interpreted through
- - overall context
- - the specific meaning of general terms, and
- - positive interpretation
- However, positive interpretation should in no way be used to the disadvantage of the accused.

- It has been argued that chichinovichs rules of int that deal with civil law are equally relevant to criminal law.
- W/r 2 or more laws of d/t ranks are contradictory or inconsistent, a higher law prevails over the lower.

If the laws of the same rank contradict:

- Posterior law prevails over prior law
- Special law prevails over general laws
- Inexplicable repugnance in the same law will require int by overall context, reason & leg intent.

- HOWEVER, THESE PPLES ARE NOT APPLICABLE AUTOMATICLLY IN CRIMINAL LAW UNLIKE CIVIL LAW. Straus states that the framework of the PENAL code is a rational and consistent system of laws, thereby necessitating the consideration for consistency during interpretation.

  He underlines the ff assumptions:

- It is fair to attribute consistency to the penal code and thus to seek consistency in results under the code.
- It is fair to assume that language usage is consistent throughout the code.
- It is fair to interpret the code to avoid redundancies b/n provisions.

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- However, this provision sets out specific conditions to ensure that they do not misuse such power; for not every legal provision is open to construction, nor should construction take place in disregard of certain basic rules.
- Therefore, interpretation may be considered only in legitimate instances such as the following:
- In cases of ambiguity (unclear) of the law, i.e. when the law contains provisions which are on the face of them inconsistent (contradictory), or,
- Where, by reason of the language used, a provision is of such an uncertain or obscure meaning that its true sense is doubtful.

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- In general, w/r by reason of the language used, a provision is of such an uncertain or obscure meaning that its true sense is doubtful, int is permissible.
- Where a doubt arises as to the meaning or the scope of the legal provision, according to **Graven**, the court must have regard to "the meaning intended by the legislature". To this end, he proposes the following two methods of interpretation:
- **Grammatical or logical interpretation**, in which the meaning is sought *from within the text* of the law, or
- **Historical interpretation**, in this method the meaning may be sought *from without the text* of the law.
- In either of the cases, the court should bear in mind the general purposes of the law as defined in Art 1 and the **particular purposes** of the provision calling for interpretation.

- If, however, the rule construction have failed to remove the ambiguity, obscurity, uncertainty of the law ….. The doubt must be resolved in favor of the accused.
- The foundation of this view probably lies in the inequality of power & resources b/n the ind def & the state,

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- Inexplicable inconsistency in the same law will require interpretation by overall context, reason and legislative intent. The Criminal Code, Art 2/4, says in this regard – *"In cases of doubt the court shall interpret the law according to its spirit, in accordance with the meaning intended by the legislature so as to achieve the purpose it has in view"*.

of the law

- The purpose of non-retroactivity is to make sure that **citizens shall in no way be punished** for acts w/c were not punishable offences w/n they were committed.
- The pple of non-retroactivity in addition secures **citizens against retroactive enforcement of more severe penalties** embodied in new laws. But if the law is more favorable, it will be applicable. Lesser penalties …
- The concept of non-retroactivity has been incorporated in the Constitution of Ethiopia under article 22(2)Which reads:
- *"Not withstanding the provisions of sub Article 1 of this Article, a law promulgated subsequent to the commission of the offence shall apply if it is advantageous to the accused or convicted person."*
- ***The same pple is incorporated under art 6 of CrC.***

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- The rule of '***nullum crimen'*** is that 'no person shall be punished except in pursuance of a statute which fixes a penalty for a criminal conduct.
- It means there can be no *ex-post facto* Criminal law or in other words, the Criminal laws should not have retrospective operation. (Art 5 of Criminal Code**).**

  It would be unjust that:
- What was legal when done should be subsequently held criminal,
- What was punishable by a certain sanction when committed should later on be punished more severely,
- That procedure changes to the serious disadvantage of an accused and should be applied retrospectively.
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Application of the More Favorable Law Art. 6

- This rule is an exception to the second component of the principle of legality i.e. ‘no penalties other than those prescribed by the law’. As per this provision, *though the criminal is tried under the old Code for the crime committed earlier to coming into force of the new code (Art. 5/1), he shall be sentenced under the new Code if the new provisions are more favorable to him.*
- *The Court shall decide in each case which law is more favorable to the criminal*.

'Non bis in idem' (Nobody shall be punished twice for the same act) (Art 2/5):

- By virtue of Art.2, sub-Article 5, a person cannot be "tried or punished twice for the same act". According to Art 2 of the Criminal Code of 2005, this is the third component of the principle of legality. This principle forbids **double jeopardy**, as enshrined in Art 23 of the FDRE Constitution.
- The doctrine of double jeopardy means that **no person can be tried or punished more than once for the same crime**. This is an important principle of the administration of criminal justice.

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- The rule is contained in the common law maxim "***autrefois acquit and autrefois convict***" which means "the previous acquittal or previous conviction may be pleaded by the accused as a bar to the subsequent trial".
- These rules or pleas are based on the principle that "a man may not be put twice in jeopardy for the same crime".
- The basic rule here is that 'a person who has been tried by a court of competent jurisdiction for a crime and convicted or acquitted of such crime shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same crime'.

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- In other words, where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, **is final as to the matter so adjudicated upon** and may be pleaded in bar to any subsequent prosecution for the same crime.
- Double jeopardy allows for protection against the ff main legal abuses.
- The first, double jeopardy protects against is a second prosecution for the same crime after acquittal.

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- Double jeopardy also protects against a second prosecution for the same crime after conviction and also for multiple punishments for the same crime.
- The point here is that, once the accused has been acquitted of certain set of facts, attempt may be made to charge him again on the same facts under different nomenclature. The principle, therefore, has to be understood clearly that, even though the crime in the second trial is not 'the same crime', still the **second trial will be barred if it is based on the same facts for any other crime** for which a different charge from the one made against him (such accused person) might have been made.

- Another important question is, at what point jeopardy is said to be exist? "Jeopardy" begins with framing of charges and ends with a suitably error-free judgment.

The Principle Of Equality

- The right to equality before the law is one of the fundamental huma
  the international covenant on Civil and Political Rights and FDRE c
  is an inalienable right of every one to have equal treatment before t
- All men are born equal and must be treated equally. Clauses direct
  arbitrary discrimination and aiming to ensure equal rights are cont
  all modern constitutions.
- These constitutional guarantees of equality take a great number of
  of the formulations are most often used. They are:

  That there should be “Equality before the law” and

  That “the equal protection of the laws” should not be denied.
- From this it follows that all laws shall be applied to every one equal
  shall be preferred than others or discriminated against in the appli
  law. On account of d/t grounds.
- By the same taken, a criminal law is to be applied to every one wit
  discrimination of whatever kind. Thus, Any one who has committed
  be subject to provisions of the criminal law. in no way Impunity (say
  tolerated.

In this regard Article 4 of FDRE Criminal Code has stated the following.

- ***"Criminal law applies to all alike without discrimination as regards persons, social conditions, race, nation, nationality, social origin, colour, sex, language, religion, political or other opinion, property, birth or other status.***
- ***No difference in treatment of criminals may be made except as provided by this Code, which are derived from immunities sanctioned by Public International law and Constitutional law, or relate to the gravity of the crime or the degree of guilt, the age, circumstances or special personal characteristics of the criminal, and the social danger which he represents"***

- A person who has committed crime shall be prosecuted and punished for his act irrespective his social conditions, race, nation, nationality, social origin, color, sex, language, religion, political or other opinion, property, birth or other status.

- It is a fundamental principle of law, that the law be applied equally and impartially to every one: rich and poor, black and white, the powerful and the helpless.

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- Under Art 25 of the constitution, **"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law"**.
- Precisely, the principle, as applicable to criminal field, means two things:
- That all individuals **may claim the same legal protection** if they have been injured by a crime, and
- that all persons who have come into conflict with the law must **be treated equally and tried exclusively in accordance with the provisions of the law** they have infringed.

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- However, the treatment of criminal is subject to **certain exceptions** as expressly provided by the FDRE Criminal Code. Let's see some of the exceptions.
- Under the FDRE Constitution members of the Federal and Regional State Houses of Representative are **immune** from being arrested or prosecuted without the permission of the house for the crime they commit unless they are caught red-handed.
- However, this is not an absolute immunity rather procedural immunity. Thus, a member of parliament who has committed a non flagrant crime will be responsible for his act and punished for it where the house to which he belongs **cancels** his immunity.

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- The other exception is the case of immunity. This immunity accord to individuals a protection from being crime they commit in a country in **not citizens.**
- This sort of immunity is to be exer the diplomatic agreements betwee or public international law. There a entitled to enjoy Diplomatic immun does not relieve absolutely such sp from a criminal responsibility.
- A foreigner with a diplomatic imm commits a crime in Ethiopia, thoug immunity from being tried in Ethio tried in his own country for the cri in Ethiopia in accordance with his

- Furthermore, criminals may be treated di
depending on the gravity of the crime or
their guilt.
- In assessing punishment, courts **fix differ**
punishments to persons who have comm
aggravated crime and persons who have
aggravated crime.
- Differential treatment can also be made t
account the age of a criminal. For instanc
exonerated from the provision of the crim
- Besides, the punishment that will be impo
criminals is not the same as the one that
prescribed for juvenile offenders.
- Similarly, a differential treatment can be
persons with special circumstances. For e
way irresponsible persons treated by the
quite different from the way responsible p
be treated.

The Principle Of Individual Autonomy:

- One of the fundamental concepts in the justification of criminal laws is the principle of individual autonomy---- states *that each individual should be treated as* ***responsible*** *for his or her own behaviour.*
- This principle has factual and normative elements that must be explored.

The Factual Element of Autonomy:

- The *factual element* in autonomy is *that individuals in general have the capacity and sufficient free will to make meaningful choices*.

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- Over centuries the *free will* argument has been contradicted by the 'determinist' claim that all human behaviour is determined by causes that ultimately each individual cannot control.
- In certain circumstances, behaviour may be so strongly determined that the **normal presumption of free will** may be displaced, for instance, where the individual is overpowered by the threats of another.
- Because of absence of freewill, **the capacities assumed by the law may not be present** in those who are too young or who are mentally disordered.
- However, sane adults may properly be held liable

The Normative Element of Autonomy:

- The second important element of the principle of Autonomy is normative: *that the individuals should be respected and* ***treated as agents capable of choosing their acts and omissions****, and that without recognizing individuals as capable of independent agency they could hardly be recognized as moral persons.*
- Such a principle moves on to say *that each individual is entitled to equal concern and respect.*

Cont'd ....

- The thrust of normative element of autonomy is that the H.L.A. Hart's famous principle on Punishment and Responsibility is …….. that an individual should not be held criminally liable unless **he had the capacity and fair opportunity to do otherwise**.
- Such an argument is grounded on in the primary importance of individual autonomy

Principle of Respect for Autonomy:

- As commonly understood today, autonomy is the capacity for self-determination. Being autonomous, however, is not the same as being *respected* as an autonomous agent.
- Respecting persons as an autonomous agent requires acknowledgement of these persons' right to take choices and take action based on their own values and belief system.
- Respect involves not only refraining from interfering with others' choices, but sometimes entails providing them with the necessary conditions and opportunities for exercising autonomy.
- The principle of respect for autonomy implies that one should be free from coercion in deciding to act.

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- The principle of respect for autonomy, however, *does not* imply that one must cooperate with the actions of another in order to respect that individual's autonomy.
- Autonomy is given a central place in the prevailing modern liberalism of contemporary society.
- However, it can be overridden by **competing moral considerations**.

  For example, if an individual's choices endanger public health, potentially harm others, or require a scarce resource, that individual's autonomy may justifiably be

Cont'd ....

- The purpose of discussing the philosophical principle of individual autonomy is to identify those interests that warrant the use of Criminal Law. which sometimes gives the impression of interfering with an individual's freedom to a certain extent.
- The principle requires that each individual should be treated as responsible for his or her own behaviour.