Criminal Law II

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❖ The Need for the Criminal Code

- The FDRE Constitution, which was promulgated in 1995, vests the power to enact penal code in the Federal Government.
- This Criminal Code is the third independent Criminal Code of Ethiopia.

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

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- The Criminal Code could be taken as having at least three purposes;

1. **Gap-filling:** The 1957 Penal Code was among the best and most comprehensive Penal Codes on the world at the time of its enactment. But, as time passed by, it could no longer maintain this quality. Therefore, the Criminal Code has tried to fill up these and other gaps in the 1957 Penal Code by bringing some wrongful and socially undesirable conducts under its purview.

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2. **Amendment**: There were many legal provisions under the 1957 Penal Code which needed amendment for various reasons. For instance, the provisions of the 1957 Penal Code were too inadequate in relation to crimes like rape and homicide by negligence to achieve the purposes of the current criminal law; that is, they entail lenient penalty which could hardly deter contemporary criminals.

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- Further, the Criminal Code has made amendments to the 1957 Penal Code in areas of criminal law defense, execution of penalties, the scope of certain crimes like corruption, money laundering, and crimes to be committed by juridical persons.

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 Repeal: Certain provisions of the 1957 Penal Code are repealed by the Criminal Code because of their obsolescence.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

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

- The structure of the Criminal Code is the same with that of the 1957 Penal Code. It contains three parts: the General Part (Part I), the Special Part (Part II), and the Part of Code of Petty offences (Part III). The first part, the General Part, contains different criminal law principles which are the bases for application of the other parts.

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- The second part, the Special Part, is a catalogue of crimes. It contains the list of conducts which are deemed to be crimes and the penalties the commission of such crimes would entail. Any conduct which is not mentioned in the special part is not a crime without prejudice to the other part of the Criminal Code (Part III) or other penal legislation.

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- The third part, the Code of Petty offences, deals with offences which are of minor importance. This part has its own general part, which contains general principles applicable to petty offences, and special part, which contains list of petty offences together with the punishments they would entail.

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- As far as the relationship between these parts is concerned, Part 1 is a basis for Part II. Therefore, the general principles of Part I should be heeded any time Part II is to be applied.
- However, if Part II contains, something which is not compatible with what is provided in Part I, Part II should prevail as it is a special part. Moreover, Part I is somewhat a basis for Part III as well. Of course, Part III has its own general part containing the general principles applicable to petty offences.

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- However, this part of Part III sometimes makes cross-reference to Part I. So, if inconsistencies exist between Part I and Part III, the later prevails.
- In relation to Part II and Part III, there will hardly be any relation between them since the subject- matters regulated in the two parts are different. But if any relation exists and this relation gives rise to some sort of incompatibility, though unlikely, Part III prevails in as long as petty offences are concerned and Part II prevails as far as major crimes (non-petty offences) are concerned.

Object and purpose of criminal law

- It can be said the existence of criminal law is closely related the existence of society since it is a law which is indispensable for communal life. After all, what makes criminal law different from civil law is the fact that its purpose is protecting the society while civil law is meant to protect persons and their properties.

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- Coming to the object and purpose of the Criminal Code, Article 1 clearly states that criminal law aims at ensuring the peace, order, and security of the State and its inhabitants for the public good.
- For the achievement of its objectives, article 1 provides for the use of three means. Firstly, it stipulates that the *principle of due notice* should be used.

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- This principle states that individuals should be given advance warning about conducts amounting to crimes, the penalties attached thereto and the absence of defense based on ignorance of law.
- The second mechanism article 1 recognizes to be used for the achievement of the purpose of criminal law is *punishment.* It is stated that in case the due notice becomes ineffective punishment should be provided.

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- Punishment normally refers to measures taken by the government against criminals as the consequences of their criminal activities so as to affect, inter alia, their property, liberty and at times lives.
- In the Criminal Code, there is an express stipulation that punishment aims at achieving two goals.

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- Firstly, it is meant to deter criminals and the other members of the society from committing future crimes. So, punishment, in this sense, has the purpose of reducing the commission of further crimes.
- Secondly, punishment aims at rehabilitating criminals. At times, individuals may commit crimes due to the problems, external or internal, they are suffering from. Thus, since they may get rid of their problems through punishment, the Criminal Code stipulates the use of reformative penalties.

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- The third means to be employed to hit the target of criminal law is measures. They can be used to prevent the commission of further crimes and this can happen where there is an indication to the effect that a crime will be committed. For example, if a person has health problem, hospitalization may be ordered.

Characteristics criminal law: the principle of legality

- Criminal Law, unlike other laws, has certain unique features. Principle of legality is one of the fundamental criminal law principles.
- It is claimed that there will be no fair play in the field of criminal law in default of the principle of legality.
- Accordingly, this principle is enshrined in almost all criminal laws. Article 2 of the Criminal Code also provides for the principle of legality.
- The following are the important ingredients or sub-principles of this principles.

No law, no offence

- No person shall be penalized for an act or omission which does not constitute a crime at the time of doing or omitting to do it, respectively.
- This has to do with giving due notice about criminal conducts before imposing penalties when they are performed or omitted, as the case may be.

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- This ingredient of the principle of legality is embodied in article 2(1) of the Code because when it states that *criminal law specifies the various crimes* it means an act which is not specified as a crime is not a crime.
- Incidentally, it is important to note that this part of the principle of legality is also recognized by the FDRE Constitution.

No law No punishment

- No person shall be subject to penalty that is not recognized at the time he commits the criminal act.
- This means, he should be given the penalty prescribed by law at the time of violating the law because it is this penalty that the criminal assumes as a risk at the time of violating the law.

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- This sub-principle of the principle of legality is also enshrined in the Criminal Code, article 2(1), which provides that *criminal law specifies the penalties and measures applicable to criminals.* The FDRE Constitution also recognizes this same principle under article 22.
- We can apply a penalty or measure that is not stipulated at the time of committing a crime if it favors the criminal.

Execution of penalty in a prescribed manner

- Punishment should be enforced in the manner provided by the criminal law. As a result, if the criminal law provides for a certain manner of enforcing imprisonment, the imprisonment should be executed in that manner.
- However, even if the third ingredient of the principle of legality is not recognized under article 2, the other provisions dealing with the execution of penalties such as articles 90 and the following for line, article 106 and the following for imprisonment, and article 117 for death penalty provide for the modes of their executions which should be adhered to.

No offence by analogy [and no penalty by analogy]

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

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- This ingredient of the principle of regality is regulated under **article 2(2**) and **(3)**. The Criminal Code prohibits not only the creation of offences by analogy, but also the creation of penalties by analogy.
- It stipulates that, firstly, an act or omission not regarded as a crime should not be treated as a crime. Secondly, different penalty than the ones provided by the law cannot be imposed.

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- for example, **article 621** of the Code criminalizes the compulsion of a man by a woman to submit to sexual intercourse. This means, the provision regulates raping a man. So, the idea is courts cannot impose the penalty provided for raping a woman (article 620) merely because under both provisions the conduct regulated is the same (rape) but the one provided for raping a man (article 621). If article 620 is applied, the judge is said to have created penalty by analogy.

Interpretation of criminal law

- Criminal law is drafted in such a way that it is possible for a common man to understand what is permitted and what is prohibited because there is a possibility of going to jail if mistake is made.
- The fact that courts are prohibited from creating offences or penalties by analogy does not mean that they are not free to interpret the law. ***Article 2(4) of the criminal code.***

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- The provision states that in case doubt exists courts are free to interpret the law by relying on the rules of interpretation. From the different rules of interpretation, article 2(4) mentions only one; that is, interpretation in accordance with the legislative intent.
- But there is one rule of interpretation which is unique to criminal law; that is, the rule of ***strict construction*** of criminal law. Criminal law, unlike other laws, should be interpreted strictly.

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- What it means is that if the meaning of a given criminal provision is equivocal and the equivocation cannot be avoided by using the other rules of interpretation, that provision should be interpreted in favour of the suspect or to a criminal.

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- It should be borne in mind that if the difficulty created can be resolved by making the Amharic version prevail over the English version, the rule of strict construction should not apply.
- Because, in our legal system, in particular in relation to federal laws, the Amharic version is clearly stipulated to trump the English version in case disparity exists between them and as such the prevalence of the Amharic version over the English version can be taken as another rule of interpretation unique to Ethiopia.

The principle of prohibition of double jeopardy

- In the field of criminal law, double jeopardy is strictly proscribed. That is to say, if a person is tried and punished for his criminal conduct he will not be subjected to subsequent trial and punishment for the same criminal conduct.
- So, there are two prohibitions in this principle: ***prohibition of double trial*** and ***prohibition of double punishmen***t.

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- The rationale behind such prohibitions is the fact that any criminal, upon serving his sentence, becomes an innocent person. Thus, subsequent trial and punishment for the same criminal conduct amount to the trial and punishment of an innocent person.
- This principle is recognized under article 2(5) of the Code. Accordingly, double trial or punishment, regardless of the accused person's conviction or acquittal, for the same criminal conduct is prohibited.
- Article 23 of the FDRE Constitution also prohibits both double trial and Punishment.

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- It should be known that article 2(5) of the Code has an exception. Because article 16 of the Code stipulates that a person who is subject to Ethiopia's principal jurisdiction and is tried and sentenced in a foreign country may be tried and sentenced *again* the same charge if he is found in Ethiopia or extradited to it.
- This means, his acquittal or conviction in a foreign country is irrelevant for new trial or sentence in Ethiopia. But the punishment served abroad will be taken into account to fix the extent of sentence to be served in Ethiopia.

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- However, if the person tried and punished abroad is a foreigner, he cannot be tried and sentenced to punishment again if he is found in Ethiopia. His conviction or acquittal will be taken into account. Besides, pardon, amnesty and period of limitation under the foreign law should be considered in his favor. (Art 12 of the criminal code)

The principle of non-retroactivity of criminal law

- The principle of non-retroactivity of criminal law is, meant to answer the question that may arise in relation to the scope of application of a new criminal law.
- The principle states that any criminal law is prospective in nature. Accordingly, it cannot be applied retroactively; that is, it does not apply to acts that are committed or omitted before its coming into effect.
- This principle is corollary to the principle of legality; no law, no offence.

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- The principle of non-retroactivity of criminal law is one of the principles of criminal law the FDRE Constitution has recognized.
- Under article 22, the Constitution proscribes the application of criminal law retroactively. The Code also reiterates the same principle under article 5.

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

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- Interestingly, however, the principle of non-retroactivity of criminal law has got many exceptions. The exceptions are the following

1. If an act was a crime under the 1957 Penal Code, while it is not declared to be so under the Code, it will not be penalized.

- If, however, sentence is passed and it is being served with respect to this crime, the execution of the penalty will be discontinued.

2. The second exception comes into picture where the criminal act performed under the Penal Code of 1957 is declared to be a crime under the Criminal Code, too. In this case, the Criminal Code should apply only if it provides for lesser penalty.

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

The scope of the criminal code

- The determination of the *scope of criminal law is* perhaps one of the most controversial issues in the making and study of criminal law. This is particularly so because every state has its own conception of punishable behavior, its own definitions of offences, its own principles for determining questions of self-defence, necessity, negligence, and complicity.

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- In any criminal system, it is possible to find one or the blend of more than one theory in favour of how the scope of criminal law was/is determined.

A. Legal Moralism: According to this theory, criminal law should preserve moral principles. Thus, the determination of the scope of criminal law should be based on what moral principles need to be enforced by criminal law.

- One of the proponent of this theory is ***Sir Patrick Devlin***, who is of the opinion that criminal law has to protect and preserve moral principles and nothing else.

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

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C) Economic Theory: According to this theory, what needs to be criminalized is any conduct which makes the *economy inefficient and a conduct which violates market rules.*

D) Feminist Theory: This theory does not seem to provide for its own criteria to determine the scope of criminal law. Rather, it emphasizes on the need to consider acts affecting the interests of women as criminal acts because past criminal laws were not/less gender sensitive.

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E) **Ethiopia criminal law**: it stands somewhere in between the theory of legal pluralism and liberal theory.

- The Ethiopia criminal code has a modest scope: it is not too wide because certain public immoralities such as suicide and prostitution are not criminalized; nor is it too narrow since it criminalizes other public 'immoralities‘ like homosexuality (Article 6291f), incest (Article 654), and adultery (Article 652)

Distinction between criminal law and civil wrongs

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

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- It is also argued that crimes are public wrongs while civil wrongs are private or individual wrongs. In other words, crimes are the violations of the rights of and duties to the public while civil wrongs are the violations of the rights of and duties to private individuals.
- Crimes entail punishment and criminal punishment, with emphasis on incarceration, is more drastic than civil sanctions such as payment of compensation. Further, crimes are the business of the government while civil wrongs are not.

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- It is also important to note that civil wrongs can arise from the violation of both civil laws and criminal law whereas the violation of civil law cannot give rise to crimes.

Basic premises of criminal law

- Criminal law does not apply in abstract. It applies only when there is a crime. And for the existence of a crime, there are certain conditions precedent that need to exist. These conditions are expressly and impliedly envisaged under the criminal code (Art 23, 24,57-59). These are:-

1.the legal element;

2. the material element;

3.the moral element;

4. concurrence between the material and the moral elements; and

5. the causal element

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- Although these conditions are important, it does not mean that their cumulative existence is always required for the application of criminal law.

The legal element

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

The material element(actus reus)

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

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

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- The voluntary conduct envisaged under article 23(2) may take two forms; commission and omission.
- Commission refers to a conduct which is done contrary to law while omission refers to failure to do what is ordered by law under the pain of penalty.
- One may feel that a person who abstains from doing anything should not be punished. But the law is interested in punishing such person because his intentional failure to do what he is required to do under the pain of penalty isas good as doing what he is prohibited from doing.

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- Therefore, punishing omission can serve the purpose of criminal law equally as punishing commission can. All the same, most crimes are crimes of commission.
- Crimes resulting from omission are generally classified into two: ***crime of commission by omission*** and ***crime of pure omission***.
- Crimes of commission by omission are those crimes which are, under the circumstance, committed by abstinence but which can also be committed by doing

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- These types of crimes are envisaged under different provisions of the Criminal Code and they include crimes of Failure to Lend Aid to Another (Article 575), Maltreatment of Minors (Article 576), Failure to Maintain (Article 658), and Failure to Bring-up (Article 659).
- On the other hand, the crimes of pure omission are those crimes which cannot be committed by doing. These crimes result only from failure to act. Any positive behaviour in relation to them will amount to obeying the law.

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- For example, ***Failure to Report (Article 443), Failure to Pay Tax (Article 349), Failure to Register the Birth of a Child (Article 656),*** and ***Unjustified Refusal to Render Military Service (Article 284)*** are crimes of pure omission because if the concerned persons do what they are expected to do, they will not be criminals.
- It is only failure to do what is required that will make them criminals.

Requirements to criminalize omission

- Criminal laws make the existence of the crimes of omission subject to the fulfilment of different requirements. These requirements include the *existence of duty to act*, *the existence of knowledge as to the existence of the duty and the situation giving rise to its performance*, *physical possibility to perform the duty*, and *absence of danger to oneself or third party in the performance of the duty.*
- In Ethiopia, article 23 does not provide for the requirements of crimes of omission. All the same, the different special part provisions defining crimes of omission recognize the requirements that should be satisfied whenever omission qualifies as a crime.

Crime of status and crime of possession

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

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- Moreover, sometimes individuals are punished merely because they have something under their possession. For example, no one is prohibited from carrying a knife. But if the possession of the knife raises a doubt that it may be used for the commission of a crime, the possessor can be punished.
- In this case, as well, the person is not prohibited from possessing a knife; nor is he ordered to carry it Hence, strictly speaking, there is neither commission nor omission. All the same, he will be punished. These types of crimes are called crimes of *possession.*
- For example, the crime regulated under article 854 of the Criminal Code is a crime of possession.

The moral element *(mens rea)*

- The moral element of a crime, in short, refers to a reprehensible state of mind of a person at the time of violating the provision of criminal law. An act does not make a man guilty of a crime unless his mind also be guilty.
- The conduct must be attributable to some sort of bad thought or evil state of mind. This requirement of crimes is justified on the idea that a man should not be held criminally responsible and so liable to punishment unless he is morally blameworthy.
- The Criminal Code, under article 23(2), provides for this moral element as one of the necessary conditions precedent for crimes to exist Thus, it is only when this element is fulfilled that the commission of a crime is said to be completed, and the author thereof will be punished.

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- But it should be understood that since the moral element refers to the state of mind of a person at the time of violating the provision of criminal law, it applies only when the law is violated by human beings since entities other than human beings lack moral element.
- The Criminal Code has made an express exception to the requirement of the moral element (Article 23(3)) and has also recognized relatively fair number of crimes that can be committed by juridical persons.

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

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- The Ethiopian criminal system follows the continental system. It recognizes two broad classes of moral elements (Intention and Negligence) which are further classified into four (Direct Intention, Indirect Intention, Advertent Negligence, and Inadvertent Negligence) as regulated under articles 57-59.
- Accordingly, it is necessary that any of these moral elements exists if a crime is to exist and the author thereof is to be punished.

Criminal intention

- Criminal intention is the upper degree and more reprehensible part of the moral element. This type of moral element exists when a person knows what he is doing and the consequence thereof.
- When a person knowingly performs an act contrary to criminal law because he desires the result thereof, the criminal intention is said to be direct.(Article 58(l)(a), Criminal Code)

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- Similarly, if a person knows what he is doing and he is also certain or nearly certain that his act will produce a result contrary to criminal law but proceeds with his own plans, his intention is said to be direct.
- This is so because ***his knowledge of certainty or near certainty*** is assimilated to his desire.
- The Ethiopia criminal code does not recognize knowledge of certainty or near certainty as part of direct intention.
- Nevertheless, a person who knowingly lets the occurrence of a given result contrary to criminal law which he is sure or nearly sure about should be punished as though he desired the result This would not amount to creation of offence by analogy for logical reasons.

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- The other component of criminal intention is indirect intention. A person is said to commit a crime with indirect intention if he knows that his conduct will probably cause a punishable consequences but proceeds to act because he does not care.
- This person does not desire the criminal consequence; nor is he certain or nearly certain that it will happen. But he knows that the result will probably (not certainly or nearly certainly) occur. Thus, he gambles; that is, he is ready to accept the result if it happens.

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

1. If the end the actor is seeking is important to him than the harm he has foreseen, then it is more likely that he has accepted the result
2. Any act or statement made by the actor before the occurrence of the harm can be used to ascertain his moral element,
3. The accused person’s own admission

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4. The probability of the harm's occurring is another method of ascertaining indirect intention. This is the most objective way of establishing *dolus eventualisstite(indirect intention)* of mind. The point is, if there is, under the circumstances, less probability of going safe but the accused continues without taking any care, it will be taken as he accepted any eventualities of his move.

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- As far as the legal effect of criminal intention (both direct and indirect) is concerned, a person who commits a crime intentionally will always, regardless of the type of intention, be punished unless the law expressly exempts him from liability. This is so because intention is the upper degree of criminal guilt. Besides, it is a more blameworthy and deterrable state of mind.
- The exception to the rule that intention is always punishable works when a person has one of the criminal law defenses to invoke.

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- one may wonder what the difference between conscious negligence and indirect intention is. Their difference lies in the mental stand that exists against the harm foreseen.
- A person who has an indirect intention accepts the result, and that is why he does not take any measure against the harm he foresees.
- A person who is consciously negligent, on the other hand, rejects the result. He also takes a measure against it although the harm occurs due to his miscalculation or contrary to his expectation.

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- As far as the determination of negligence is concerned, article 59 (1), the last paragraph, provides for the guidelines to be employed.
- Accordingly, it states that the lack of precautions which is reasonably expected of a person, under the circumstance, amounts to negligence. For this purpose, different factors such as the age, experience, education, occupation and rank of a person should be taken into account.

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- With regard to its legal effect, article 59(2) stipulates that negligence can be liable to punishment only when the law expressly provides. Therefore, the silence of the special part provisions in relation to negligence means that the negligent doing of the conduct they regulate is not punishable.
- One may wonder why negligence is not, as a rule, punishable. But the rationale behind such stand is the fact that negligence shows person's mistake. Everybody commits a mistake.

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- Therefore, we should not, in principle, be punished for our mistakes. But, at times, the mistakes we commit are so gross that they cause grave consequences. In this case, punishment is proper to discourage such mistakes or to encourage taking precautions not to cause grave harm/danger.

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- In short, no court should find a person guilty of an offence against criminal law unless he has a guilty mind (intention or negligence). The burden of showing this state of mind is that of the prosecution.
- Of course, the proof of guilty mind, unlike the proof of guilty act the existence of which can be proved by producing witnesses, is very difficult and onerous. Despite such difficulty, it has to be proved at all times unless its proof is legally and expressly excluded.

Concurrent crimes

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

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A. Material concurrence (Article 60(a)): This type of concurrence exists where there are many criminal producing many different or similar crimes.

- For instance, if a person breaks into somebody's house, steals some property, and also rapes a lady in the house, there will be three different crimes.

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B. Notional concurrence (Article 60(b)): This type of concurrence comes into picture where there is only one criminal act which, however, violates two or more criminal provisions.

- For example, if a married person publicly rapes his sister many legal provisions will be violated notwithstanding that there is only one act of sexual intercourse.
- However, it should be noted that if one act repeatedly violates the same provision, it will not give rise to notional concurrence because for notional concurrence to exist, the provisions violated need to be different.

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C. Concurrence of victims (Article 60(c)): Under sub-article (c), article 60 regulates a kind of concurrence which is neither material nor notional nor imperfect.

- For this type of concurrence to exist, the criminal fault has to be one. Besides, the harm has to be the same though it victimizes more than one person.

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- For instance, if a person throws a bomb on a group of people standing somewhere because he wants to kill them all, his case will give rise to the concurrence of victims under article 60(c). The act is one, the criminal fault is one (intentional kill), and the harm is also the same (homicide) but the victims are many. In this case, it is possible to charge the offender for committing *crimes* of homicide against all the victims.
- This type of concurrence was not recognized under the 1957 Penal Code.

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D. Imperfect concurrence (Article **61**(1)): This is not the case of concurrence so to say. The crime is only one and the victim is also one. But it seems that there is concurrence merely because there is /are an act/acts which is/ are common elements) to two or more legal provisions.

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- For example, if a person takes other's property by force, two things will come into picture: abstracting other's property and use of violence. Out of the two things, the first belongs to both the crime of theft (Article 665) and the crime of robbery (Article 670). But this does not mean that the offender will be charged under both provisions. For the purpose of charging, we have to see the provision that can fully cover everything that has happened.

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- But if, for example, in the robbery case, the public prosecutor is uncertain about the existence or non-existence of the violence element, he can institute alternative charge against the offender for both crimes pursuant to article 113(1) of the Criminal Procedure Code.
- However the punishment will be for violating only one provision depending on which crime the prosecution proves during trial.

Cont’d

- For the application of article 61(1), there should exist a single criminal provision fully covering what has happened (and the elements thereof). If such provision does not exist the offender can be charged for all the provisions his single act (and its elements) violates.
- Similarly, the application of article 61(1) of the Code requires the existence of the same criminal fault. If the criminal act or the combination of criminal acts does not flow from the same criminal fault (from single intention or negligence), article 61(1) does not apply.

Cont’d

- Further, article 61(1) requires the criminal act or the combination of criminal acts to be against the same legally protected right. This seems to mean the offender must violate one provision in relation to the interest of a single person.
- Because if the victims are many, it is article 60(c), not article 61(1), that will be applicable even if there is only one provision that is violated.

Criminal responsibility of Juridical persons

- A "juridical person" is an artificial person created by law. As such, it does not have physical existence; nor does it have moral element like human beings. Hence, it cannot commit crimes except through its members.
- It is for this reason that until the 19th century the concept criminal responsibility of juridical persons was rejected.
- Today, however, it is generally accepted that legal persons can incur liabilities: both civil and criminal.

Cont’d

- But the criminal Liability of legal persons is always in a sense vicarious because it is necessarily incurred through the acts of their members. It is only the act of their employees that is imputed to the juridical person.
- In Ethiopia, the 1957 Penal Code recognized the liability of juridical persons. But it did not deal with them adequately.
- The Criminal Code also recognizes the concept 'criminal responsibility of juridical persons' and this recognition is by far better than the recognition under the 1957 Penal Code.

Cont’d

- Under article 23(2), while it states the legal element, the material element, and the moral element as the basic premises for criminal responsibility to exist, the Code expressly makes an exception to this rule, under the third sub-article, and states juridical persons are also responsible for their criminal acts notwithstanding that the moral element requirement cannot be fulfilled.

Cont’d

- Nonetheless, the responsibility of juridical persons comes into picture only when the law so expressly provides.
- This is so because article 23(3) makes cross reference to article 34 and article 34(1), first paragraph, stipulates that juridical persons are criminally responsible only when the law expressly provides.
- Hence, the silence of the law in relation to the responsibility of juridical persons with respect to a given crime means that juridical persons will not be liable if they commit such crime.

Cont’d

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

Who are responsible juridical persons?

- Even though it is claimed that juridical persons are criminally liable for their acts, it does not mean that all juridical persons are so exposed to criminal liability.
- Some of these persons are excluded from the realm of criminal responsibility. The exclusion covers *administrative bodies*, provided under article 34(1).

Cont’d

- All administrative institutions are free from any criminal responsibility. For instance, if the Federal Police Commission commits an act which would otherwise be a crime for non-administrative organs, the act will be at most a civil wrong, not a crime.

Types of crimes juridical persons can commit

- Juridical persons can commit crimes does not mean that they can commit any type of crime. It is claimed that juridical persons cannot commit crimes for which they cannot be sentenced.
- For instance, they cannot commit homicide if the punishment is mandatory life imprisonment since legal persons are incapable of being imprisoned.

Cont’d

- However, the Criminal code, after providing that a juridical person an be a party to a crime either as a principal or an instigator or an accomplice when it is expressly provided, provides for the conversion of imprisonment to fine if the crime committed entails imprisonment.
- Hence, the fact that the special part of the Code provides only for imprisonment in relation to certain crime does not mean that that crime will not be committed by legal persons. The crime can be committed and the liability thereof will be determined via the conversion provision of the Criminal Code (Article 90(3)).

Cont’d

- It should, however, be noted that it is still possible to raise some issues in relation to punishing legal person in the light of the Criminal Code, too.
- Under article 90(3), what is provided is only the conversion of imprisonment to fine. The Code does not provide for the conversion of death penalty to fine. So, it can be argued that, to some extent the above mentioned logic can work to argue that still there are crimes which juridical persons cannot commit.
- As a result, the gap that seems to exist is only apparent.

Cont’d

- Article 90 provides for the conversion of imprisonment to fine only when the crime committed entails imprisonment as a *sole* penalty. If the crime committed entail fine as a *sole* penalty, the same provision provides for making such fine *fivefold*.
- Therefore, the situation where a juridical person commit crimes entailing the two penalties as *alternative* penalties is not regulated under article 90.

❖***So, what are the possible solutions?***

Whose acts are the acts of juridical persons?

- It is the acts of their members that are taken as the acts of juridical persons. The point worth considering, then, is whether the acts of each and every member can be attributable to a juridical person for the purpose of criminal liability.
- There is a position that a legal person is not criminally liable for the act of each and every member. Its criminal liability arises only in relation to the acts of persons who are regarded as 'the directing mind and will of the organ'.

Cont’d

- These persons are called the controlling officers; that is, individuals who control the affairs of the legal person. Therefore, if a member of a juridical person lacks supervisory or controlling role, his criminal act will not be imputed to the juridical person.
- It should be known that even as regards the acts of the controlling officers, juridical persons are criminally liable only for acts performed within the scope of their employment. Anything done out of their scope of employment is not imputable to the juridical persons.

Cont’d

- Under the Criminal Code, the question whose act is juridical person's act is not expressly answered. So, whether the so-called "managerial staff s" act is to be regarded as the juridical person's act or that of all employees may be a matter of interpretation.
- If one follows the abovementioned generally accepted position, non-controlling members' acts are not the acts of juridical persons for the purpose of criminal law.

Cont’d

- And there seems to exist some provisions in the Criminal Code in favor of this position. Under article 716(2), the Code chooses the members of the legal person's administration to be personally liable for the crime committed in addition to the legal person's liability.
- This has an implication that the law wants to attribute the acts of these people to legal persons, not everybody's act.
- All the same, the existence of this provision alone may not be a sufficient guarantee to say the Code has adopted the above position.

Cont’d

- On the contrary, there is another equally strong argument in favor of making all members' acts the acts of a legal person. That is, if a person is employed, then he is the agent of his employer in as long as he is acting within the scope of his authority.
- Owing to this, his act, even if he is not a controlling officer or a managerial staff, should be ascribed to his employer like any other contractual obligation. Article 34(1) also seems to support this position because it simply regulates the acts of officers or employees in general.
- This second argument has some merit in it. The juridical person will be encouraged to strictly supervise its employees if everybody's act is to be ascribed to it for the purpose of criminal liability.

What type of penalty on juridical persons

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

Cont'd

- As legal persons are financial more potent than natural persons, subjecting them to the same fine as natural persons cannot achieve the purpose of criminal law.
- Criminal law permits the imposition of fine on juridical persons for their criminal responsibility.
- But this is not the only measure to be taken against juridical persons. At times, other measures which are worse than fine can be taken. For instance, the Criminal Code authorizes courts to *suspend*, *close*, or *wind up* juridical persons, as additional penalty if such measures are deemed necessary. (Art 34(2) and 599 of the CC.)

Concurrence between material and moral elements

- The presence of the requirements of article 23(2); that is, the legal, material, and moral ingredients may be necessary for the existence of a crime. But they may not be sufficient.
- Some more requirements are required for the existence of a crime. Among others things, the requirement of concurrence between the material and moral elements must be satisfied.

Cont’d

- By concurrence between the two elements what is meant is that they must be brought together' in the sense of a causal relation between the *mens rea (*the moral element) and the *actus reus* (the material element).
- Stated differently, the *actus reus* be attributable to the *mens rea*, or the *actus reus* be the manifestation of the *mensrea*.

Cont’d

- The idea is that the moral element must come first and result in the material element. If the existence of the moral element is interrupted at the time the material element is met, there will be no concurrence. Thus, punishable crime will not exist.
- Therefore, for punishable crimes to exist, the two elements must exist simultaneously although normally the *mens rea* comes first.

Cont’d

- ***For example***, if a person takes others property thinking that it is his, he will not commit the crime of theft although he intentionally retains it upon subsequent discovery that it belongs to someone else. Because, the moral element required under article 665; that is, intention, is formed after the act. The act of taking was not the result of the intention. So, his decision to keep the property of another which he has come into possession by mistake will give rise to another crime which is misappropriation (article 697), not theft.

Cont’d

- The Criminal Code does not expressly make the concurrence element a requirement. But if one reads articles 57,58 and 59 very closely, he will arrive at the conclusion that it is indeed one of the necessary requirements for a crime to exist.
- In short, the concurrence element is just an implied element within articles 57-59. No one can be guilty unless his intention or negligence subsists when the criminal act is performed.

Cont’d

- Nonetheless, this rule should not be considered to be an absolute rule. It is possible that individuals can be punished even if the concurrence element is missing.
- ***For instance***, pursuant to article 50(1), a person is liable to punishment provided for a crime he commits if he puts himself in a state of absolute Irresponsibility by means of alcohol or drugs or otherwise in order to commit the crime. In this case, the moral element that is taken into account is the one that exists before the' person puts himself into such circumstance.

Causation

- The causal element is another basic premise of criminal law. That is, if the casual element is fulfilled the application of criminal law will be set into motion.
- Nonetheless, unlike the other basic premises of crime, the causal element is indispensable only when certain result is achieved contrary to criminal law. Stated differently, the causal element is relevant only when the application of criminal law requires the achievement of a given result.

Cont’d

- What, then, is a *cause!* Unfortunately, no precise definition can be given to the concept *cause*. *S*o, instead of trying to define the concept, it is more helpful to look at its type first.

A. Cause in fact: This means, anything that comes before the result and makes certain contribution, however trivial it may be, to the occurrence of harm is a cause in fact.

Cont’d

- ***For instance***, if A called his friend B, and B while going to visit A, was knocked down by a car and was taken to a hospital where he received wrong treatment and eventually died, all the calling, car accident and wrong treatment are causes in fact. This is so because all of them contributed to the occurrence of the death.

- **Cause in law:** *Cause in laws* a cause in fact that is selected by law-maker as a sole cause of certain result. To the above example, in the previous scenario, the law-maker may say, under such circumstances, the wrong treatment should be regarded as the cause of the death.
- It should, however, be noted that a cause in law is selected from among causes in fact.
- Some of the theories of causations are discussed in the next slide.

Cont’d

I. *Sine quo non (but-for)* theory: If this test is adopted, a cause in law will be defined as an event without which the result would not have occurred. Stated in other words, if certain result would not occur *but for* a given event, then that event is a cause in law.

- For instance, if Abebe shoots Belay on his head and Belay dies, the shooting is a cause in law because Belay would not have died had it not for the shooting.

Cont’d

- This theory of causation has got certain drawbacks. First and for most it sometimes ridiculously widens the scope of the concept *cause.*
- Secondly, in case two but-for causes exist (which are attributable to different persons), this theory leads us to a paradoxical conclusion renders both of them non-causes.

II. **Adequate cause theory:** The theory of *adequate causation* was formulated to rectify the defects of the *but-for* theory. If this theory is adopted, a cause in law is an event which, *in the normal course of things*, produces the result achieved. That is to say, if the occurrence of a given event in most cases produces a given result, then that event is a cause in law for that result.

- It does not matter whether the case is one or more but whether the cause is adequate or not.

Cont’d

- ***For instance***, stubbing a person on his feet with cutlass does not in normal course of thing, cause death. But if it exceptionally produces death, the stubbing will not be taken as a cause in law. If somebody is slapped on his face and dies, the slapping will not be treated as a cause in law because it is not, in the normal course of things, capable of producing death.
- This theory leaves intervening factors which facilitate the commission of crimes intact.

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

- The obvious problem with this theory is the fact that sometimes the act closer in time and place to a given result may not be that relevant for the production of the result.
- ***For instance***, the theory considers the act of beating another slightly as a cause in law by leaving shooting aside merely because the former might have happened at last.

Cont’d

- The element of causation is replated under article 24 of the Criminal Code. Firstly, article 24(1), first paragraph, stipulates that the causal element is necessary only where the commission of a crime requires the achievement of a given result.
- Secondly, in the same paragraph, article 24 stipulates that when causation is important the crime committed is deemed to be non-existent as far as a given person is concerned, unless it is produced by the act or omission with which he is charged.
- That is to say, if his commission or omission has not contributed to the occurrence of the result then he is not deemed to have committed the crime in question.

Cont’d

- What this, in effect means is that the Code adopts the *adequate causation theory.*
- ***For example***, cutting one of the fingers of a person does not, in normal course of things, produce death. If, however, it extraordinarily produces death, the person who cuts the finger of another will not be deemed to have committed homicide because his act does not qualify as a cause in law under article 24(1), second paragraph.
- Interestingly, article 24(3) provides for an exception to the adequate causation theory adopted under article 24(1). It states that if there are many causes which are, independently treated, incapable of producing the result achieved, they may be considered causes in law if their cumulative effect has produced the result.

Cont’d

- What would happen when all the causes are by themselves capable of producing a criminal result?
- What would happen when all the causes are by themselves capable of producing a criminal result.
- Intervening cause refers to "an event that occurs after another event which has set the production of a given result into motion and makes its own contribution to the achievement of the result.

Cont’d

- The intervening cause may be more than one. Likewise, they can be concurrent if they occur simultaneously or non-concurrent if they occur at different times.
- In relation to concurrent and non-concurrent intervening causes, article 24(2) states, they will interrupt the relationship established between the initial cause and the result if they are:
  a) attributable to third party or natural or fortuitous event;
  b) extraneous to the initial cause; and
  c) by themselves produce the result

Cont’d

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

Stages in the commission crimes

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

Cont’d

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

A. Preparatory acts

- As said before, bad thought is non-punishable because, among others things, it is insusceptible to ascertainment.
- Preparatory acts are, however, not insusceptible to proof because they are overt acts through which individuals' bad thoughts are manifested. That is to say, individuals' decisions to commit crimes can be revealed by the acts of preparation they make.

Cont’d

- All the same, in principle, criminal law refrains from punishing acts of preparation because of their equivocation and remoteness from results.
- Firstly, no one can speak with sufficient precision or certainty that acts of preparation have the commission of crime as their sole objectives.
- Hence, punishing a person before the equivocal nature of his act disappears amounts to punishing him for a *presumed*, not ascertained, intention which would be contrary to the principle of presumption of innocence.

Cont’d

- Secondly, preparatory acts are both materially and psychologically remote from the result.
- It is obvious that not all those who decide to commit crimes will commit crimes as not all who have laid foundation stones will build houses. So, there should be ample chance for dropping one's criminal decision.
- If this chance is not given, criminal law will defeat its own purposes because criminals will be encouraged to go ahead with their criminal designs and implement them since there will be no difference between preparation to commit a crime and committing it.

Cont’d

- Article 26 of the Criminal Code regulates the issue of preparations to commit crimes and stipulates that preparatory acts are not liable to punishment. However, it provides for two exceptions where preparations become punishable.
- ***Firstly***, if the preparations in themselves constitute independent crimes, the authors will be punished not for the intended result but for the crime they have already committed.

Cont’d

- ***Secondly***, if the law expressly provides that, under the circumstance, preparations to commit certain crimes will constitute special crimes, preparatory acts will be punishable. At times, criminal law penalizes preparatory acts if the crime intended is grave or the interest to be protected is so important.
- So, in such situations, the law wants to avoid attempt by itself, and to do that, it has to penalize preparations which is proximate and capable of leading to attempt.

Cont’d

- Under the Criminal Code, for example, any preparations to commit the crimes defined under articles 238, 239, 240, 241, 246, 247, 248, 249, 250, 251, 252 (via article 256); 269, 270, 271, 272, 273 (via article 274); and 385 and the following by virtue of article 390 constitute special crimes.
- Note that if the crimes intended are committed, the authors of the preparatory acts will not be charged for both preparations and the crimes they have committed.
- Their charge should be only for the completed crimes because, according to article 61(1), preparation is a necessary element of the crimes committed.

B. Attempt

- **Preparatory** acts are acts of laying foundation to commit a crime. So, **attempt** refers to a step taken on the basis of the foundation laid (that is, preparatory acts) to consummate the **commission** of a crime.
- All the same, the author of the preparation fails to obtain the result for various reasons which may be attributed to his own effort or external factors. That is why attempt is characterized by failure.

Cont’d

- Accordingly, failure is necessary to consider issues pertaining to attempt. But failure is not the only requirement for attempt to exist. There are some other elements that must be present. These are:

1. Normally, for attempt to exist, the requisite moral element is intention. Hence, there is no attempt by negligence.

- In as long as the intention element is fulfilled, the material element can be either commission or omission. So, there is no distinction in relation to the *actus reus*.

Cont’d

2. Attempt within the meaning of criminal law can exist only if the result intended, if achieved, is a crime. If the result intended is innocent, attempt to do it can in no case be a crime.

3. Attempt can be completed only if the elements of the intended crime are completed.

- However, sometimes, it is very difficult to know where preparatory acts end and attempt begins.

Cont’d

- Criminal attempt is recognized and regulated under article 27 of the Criminal Code. The Code subjects criminal attempt to certain requirements for its existence.
- ***Firstly***, failure should be there because the law is deals with individuals who do not pursue or are unable to pursue their criminal activity *to its end*, or who have pursued their criminal activity to its end but *without achieving the result intended*.
- Secondly, the pursuit should be intentional. Hence, attempt by negligence is not recognized.

Cont’d

- Thirdly, the article does not make distinction between the two types of material elements. In particular, the cumulative reading of the Amharic version of article 27(1) and 23(1), 2nd paragraph, leads us to a conclusion there can be attempt by both commission and omission despite the use of the term *commit* in article 27(1).
- Fourthly, when article 27 states, "whoever intentionally begins to commit a ***crime***...", the word *crime* tells us that the intended result should be, if obtained, contrary to criminal law.

Cont’d

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

Cont'd

1. Exceptionally, attempts are made non punishable. Hence, if the law does not expressly exclude attempt from punishment, attempters will be punished.

- ***For example***, even if instigation and accomplice are punishable, attempt to instigate or assist is as a rule excluded from the realm of punishment (Article 27(2), 2nd paragraph). Similarly, any attempt to commit petty offences is non-punishable (Article 740).

Cont’d

2. An attempter will not be punished by death even if the crime he attempted to commit would entail death penalty. Because, article 117(1) stipulates that death penalty can be imposed only for completed crimes.

3. Even if an attempter is to be punished as though he committed the intended crime, he may be granted a mitigated penalty (Article 27(3), 2nd paragraph).

Cont’d

- Therefore, a person who attempts to commit a crime will be punished as though he committed that crime (article 27(3)) except that he may be entitled to the abovementioned benefits. Nonetheless, article 80(3) seems to provide for some sort of exception to article 27(3).
- ***For instance***, if Getahun wanted to kill Alemayehu but he killed Guta who wore Alemayehu's close friend, there is no doubt that Getahun attempted to kill Alemayehu. However, article 80(3) stipulates that he should be punished as though he killed Guta deliberately. Hence, there will be no punishment for attempting to kill Alemayehu separately as stipulated under article 27(3).

Cont’d

- But one may wonder why individuals, after making all the necessary preparations, fail to commit the crimes they want to commit They may fail to succeed in the commission of crimes because:

1. they could not pursue their criminal activity to its end due to the existence of factors external to them;

2. they might decide not to pursue their criminal activity to the end;

Cont’d

3. even if the criminal activities are pursued to their end, the result may not be achieved due to the existence of factors external to them; or

4. even if the criminal activities are pursued to their end, the result may not be achieved as the actor may decide not to succeed; that is, he may undo what he did.

Cont'd

- The first two factors give rise to what is known as ***incomplete attempt***. If the failure is due to the second factor the actor is said to have ***renounced intention***. As a result the court shall, as per article 28(1), mitigate the penalty to be imposed on him either within the limit allowed by law (Articlel79) or freely (Articlel80), as the case may be, provided that the renunciation is ***freely willed***.
- If it is proved that the renunciation was prompted by reasons of honesty or high motives the court is obliged to exempt the person from liability.

Cont’d

- The last two factors give rise to what is known as ***completed attempt.*** If the result does not happen because of the fourth factor, the attempter is said to have ***repented actively***.
- Pursuant to article 28(1) and (2), the Criminal Code regulates **r*enunciation*** and ***active repentance***.
- Finally, the concepts ***renunciation*** and ***active repentance*** also apply to instigation and accomplice. That means, individuals who freely renounce their intention to incite or help, or who actively repent and have done everything that is expected of them to prevent the occurrence of the crimes incited or the crimes for which assistance is given will get the benefits provided under article 28.

Crimes impossible of completion

- Sometimes, individuals may try to commit crimes which cannot be committed either because the object of the crime is absolutely insusceptible to harm or the means used is absolutely incapable of producing the result intended.
- ***For example***, if a person tries to kill a dead person or to steal his own property, the offence of homicide or theft, respectively, cannot be committed.

Cont’d

- This crime is a crime of attempt because the actor fails, despite his efforts, to produce the result. This type of attempt can be called a ***special attempt*** because the result intended can never be produced by any person against the same object or by using the same means.
- ***For example***, if a person tries to kill another by ***sorcery or cursing,*** he should be exempted from liability as such means will never produce death and it also reflects the user's gross stupidity than his dangerousness.

Cont’d

- Crimes impossible of completion can also be committed in relation to instigation and accomplice.
- ***For instance***, if a person incites someone to kill a dead person or a living person by using innocent means like milk, or if he gives assistance to kill a dead person or to buy milk to kill a person, he is said to have committed a crime of instigation or accomplice in relation to a crime impossible of completion.

Part Two: Criminal Law Defences and the Law of Participation

Criminal law Defenses

- In criminal justice system, accused persons may raise any ground to avoid liability. This ground is what we call *defence.*
- So, a *defence*, in criminal law, is an assertion made by a defendant to claim that he/she is innocent or does not deserve penalty.
- For instance, if a person commits a crime because of health problem, age, or intoxication, he may be allowed to invoke these grounds to avoid criminal liability and these grounds can be his defences against liability.

Insanity

- Currently, there is virtually no doubt that an insane person will not be punished for his criminal act. But there are some fundamental problems pertaining to the issue of insanity.
- Firstly, is insanity a condition or an excuse? If insanity is a condition, like infancy, for the existence of a crime, then there will be no criminal charge against an insane person.

Cont’d

- The second fundamental issue pertains to the determination of the extent to which insanity remains a scientific issue. Since insanity is a health problem, it is imperative that health professionals get involved in its determination.
- The issue then is, if science should be used to determine insanity, to what extent should legal professionals be bound by scientific findings? Can they consider other factors in drawing legal conclusions, or should they be bound solely by experts' reports to make conclusions?

Cont’d

- Anyway, some of these questions can be answered by making policy decisions while others will continue to persist.
- What is important is to fathom the fact that insanity still remains a legal issue insofar as drawing a legal conclusion from the data presented by experts is concerned.
- Thus, legal professionals should make legal conclusions based on the scientific findings tabled before them.

Cont’d

- The third fundamental problem pertaining to the issue of insanity relates to the identification of a person who is considered insane in the eyes of the law-the identification of 'legal insanity'.
- There are disagreements between reasonable minds on whom to treat as a legally insane person.
- As a result, many tests were formulated to identify legally insane persons from others. These tests are discussed below:

Cont’d

A. **M'Naghten (Right-Wrong) Test:** The 1854 *Daniel M'Naghten*Urease is the source of this test. According to the test everyone is presumed to be sane until the contrary is proved.

- Hence, to establish a defense on the ground of insanity, it must be clearly proved that at the time of committing the criminal act, the accused was labouring under such a defect of reason from disease of the mind as not to know the nature or the quality of the act he was doing, or if he did know it, that he did not know he was doing wrong.

Cont’d

- Stated differently, if a person does not know what he is doing or that he does not know that what he is doing is wrong, he should be considered insane provided that the incapacity to know the nature or the wrongfulness of his act is due to mental disease.
- Incidentally, it is worth mentioning that this test focuses on the loss of cognitive power; thus, excluding the loss of volitional power since loss of control over one's conduct is not recognized to render one a legally insane' person.

Cont’d

B. Irresistible Impulse Test: this test is supplementary to (not a substitute for) the M'Naghten's test. As a result, it stipulates that a verdict of not guilty by reason of insanity should be entered if it is found that the defendant had a mental disease which kept him from controlling his conduct.

- Hence, if he could not resist his impulse which forced him to do the criminal act, or if the acting power within him was the disease he suffers from, he should not be responsible for his act even if he knew what he was doing and that it was wrong.

Cont’d

C. Durham (Product) Test: The Durham test was adopted in 1954 and it provides that a person who does something wrong due to a mental disease or defect is to be considered insane.

- So, persons having mental disease or defect are to be considered insane for the purpose of criminal law provided that their criminal acts are the results of their mental diseases or defects.
- Yet the test does not tell us what is meant by mental disease or defect.

Cont’d

D. Substantial Capacity Test: This test is the test that is adopted by the Model Penal Code of the USA.

- It provides that a person will be considered insane or will not be responsible for his criminal act if, at the time of the act he lacks, due to mental disease or defect, substantial capacity either to appreciate that his conduct is wrongful or to conform to the requirement of the law.

Cont’d

- That is, legal insanity exists only if a person suffers from mental disease or defect and this disease or defect leads to the commission of a crime by causing loss of either cognitive or volitional power.
- Thus, they all incorporate what is referred to as the '***bio-psychological***' method of determining legal insanity.
- The '***biological***' method of determining insanity provides that an insane person is a person who suffers from certain biological problems such as mental disease or defect, other illness, and senility.
- The '***psychological***' methods, on the other hand, provides that an insane person is a person who does not have cognition or volition at the time of his act whatever the cause may be like anger, hatred and lust.

Cont’d

- The *"**bio-psychological'*** method is the combination of the two methods. It provides that a legally insane person is a person who is deprived, at the time of his act, of his cognition or volition due to the mental disease or defect he suffers from.
- By combining the two tests, this method reduces the number of individuals who can be considered insane in the eyes of criminal law.

Cont’d

- Finally, it should be borne in mind that a person who is acquitted on the ground of insanity should not be allowed to go home unless it is unlikely that he will commit another wrong. This is because the public at large ought to be protected from the danger this person will pose or the risk he will create by being let go home.
- Therefore, it is likely that acquittal on the ground of insanity will be followed by commitment to hospitalization for mental treatment until the person gets rid of his problem.

Cont’d

- The Criminal Code does not mention the term *insanity.* Nonetheless, this does not mean that issues pertaining to insanity are not regulated by the Code.
- Instead, the Code deals with these issues under a different title: *criminal responsibility Vs irresponsibility.* Therefore, despite the absence of the term insanity, article 48 of the Code covers issues related to insanity plea.

A. Non-Responsibility (Irresponsibility): the question of non- responsibility (irresponsibility) is regulated under article 48 of the Criminal Code.

Cont’d

- According to 48(2) of the criminal code, , if a person loses his cognition or volition or both due to biological causes, he will not be responsible for what his acts cause. These biological causes are listed under article 48(2) and article 49(1).
- For example, illness, age (senility, not infancy), abnormal delay in development, deterioration of mental faculties, and derangement of mind are some of the biological causes.

Cont’d

- So, what matters is not the type of the biological cause but the effect it has on the person's cognitive or volitional power.
- If any of these causes exists and absolutely abolishes a person's cognitive or volitional power, then he will not be responsible for the crime he commits however heinous the crime may be.
- The requirements that should be fulfilled are:

- Firstly, the causes must be biological. For example, anger, hatred or lust is not a biological cause.
- Secondly, the biological causes should produce psychological effect(s). That is to say, the two must have a causal relationship.
- Thirdly, the effects of the biological causes (that is, loss of intelligence) should exist at the time of doing the criminal act.
- Lastly, the loss of intelligence should be total. Partial loss of intelligence is not regulated under article 48; hence, not an exempting ground.
- So, if these eligibility conditions are satisfied, a person will be considered irresponsible and will not be punished for his criminal act.

Cont’d

- As far as the legal effect is concerned, the Criminal Code attaches two consequences to irresponsibility (insanity).
- Firstly, as indicated above, irresponsible (insane) person will not be punished. Because punishment cannot serve its purposes in relation to such person since he cannot understand the reason why he is punished. Besides, an irresponsible person is not/less morally blameworthy since he could not help in relation to what happened.
- Secondly, the person can be subjected to measures since unless something is done he will continue committing crimes. So, the society must he assured that such person will not commit a crime again by subjecting him to measures.

Cont’d

- At any rate, if a court decides that an accused person should be subjected to measures, the Code has provided for different curative or preventive measures to be imposed under articles 129-131.
- Accordingly, he can be subjected to confinement at a suitable place if he is found dangerous to public safety or to persons living with him, or to treatment if his need of treatment outweighs his dangerousness.
- Lastly, since the determination of insanity is a 'medico-legal' issue, a judge should, in its determination, be assisted by medical experts.
- To what extent should a judge be assisted by an expert or what is the extent of the role of experts in the determination of insanity?

Cont’d

- The Criminal Code, under article 51, resolves this issue. It obliges courts to obtain expert evidence when there is doubt as to the ***responsibility {irresponsibility)*** of the accused person.
- The experts are to be appointed by the court itself. Upon appointment, the court should tell them what to do; that is, it has to tell them that they have to check the status of the intelligence of the accused person *at the time of doing the criminal act*.

Cont’d

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

Cont’d

- Therefore, experts do have four roles in the determination of non-responsibility: ***description of the condition of the intelligence of the accused person at the time of his criminal act***, ***description of the present condition of the intelligence of the accused person***, ***advising a court on whether taking measures is expedient***, and if so, the nature of such measures (medical treatment or safety measures).

Cont’d

- With regard to courts, their role is limited to making legal conclusion based on the scientific findings of experts.
- Accordingly, it should not be everyone's testimony but that of professionals' that must bind courts since only their testimony can be taken as scientific finding. Moreover, even with regard to professionals' scientific findings, courts are bound only if the scientific findings are *definite*. Hence, *indefinite* scientific findings do not bind courts.

Cont’d

B. Partial Responsibility: Sometimes, the existence of biological causes may deprive a person of his cognitive or volitional power only in part. This means, the person still retains his intelligence even if it is reduced. In relation to such person, therefore, article 49(1) provides that he will be liable to punishment in part.

- In relation to the determination of the partial loss of capacity, the court should follow the same procedure with the one it follows for the determination of absolute irresponsibility.

Cont’d

- The other legal consequence of partial responsibility is the subjection of the person concerned to measures of treatment correction or protection (Articles 129-133).
- This is so, because since the person is having some problem, he has to be helped, and the society should also be assured that this person will not cause damage any more.
- Finally, it is necessary to note that there is a possibility of letting partially responsible person go free upon the termination of the measures applied to him if the court deems such step expedient.

Intoxication

- Normally, intoxication can be either voluntary or involuntary. It is a generally accepted practice that an involuntary intoxication is a defence. The reasons seem self-evident. This type of intoxication can be assimilated to insanity since the loss of cognition and/or volition is caused contrary to the will of an intoxicated person.
- Moreover, punishing a person who commits a crime as a result of involuntary intoxication will not serve the purposes of either deterrence (both general and particular) or rehabilitation.

Cont’d

- As far as voluntary intoxication is concerned, however, the position is different. In most common law and continental law criminal laws, voluntary intoxication is not a defense because it is believed that the fault of the actor before getting intoxicated will deprive him of the benefits of the loss of cognition and/or volition at the time of his act.
- Therefore, a person who willingly gets intoxicated, unlike insane person, is seen as a self-induced insane.

Cont’d

- Interestingly, some criminal codes such as that of Italy aggravate the punishment for the crime committed under such circumstance let alone granting defense based on voluntary intoxication.
- Nevertheless, there are still some countries which permit voluntary intoxication to serve as a defense. ***For example***, under the German Penal Code, voluntary intoxication is a defense against the crime committed although it penalizes the intoxication itself if the actor had an intention or was negligent in relation to the commission of the crime that has transpired.

Cont’d

- Interestingly, it is claimed that even in those countries where voluntary intoxication is not generally a defense, there are certain exceptions. ***Firstly***, it is claimed that voluntary intoxication is a defense if a man is charged with an offence in which a specific or ulterior intent is essential, such as murder, since this man cannot form the intent required being in the state of intoxication. ***Secondly***, it is claimed that voluntary intoxication is a defense if it causes insanity, though temporarily, so as to make the man incapable of knowing or understanding what he is doing or that it is wrong, or if he knows or understands that it is wrong but he cannot act accordingly.

Cont’d

- The Criminal Code regulates issues of intoxication under article 50. The Code perceives the issue from two different angles. If a person commits a crime while intoxicated which he is coerced into or for which he has no fault on his part, the intoxication can be raised as a defense provided that it is ***absolute***.
- That means, involuntary intoxication is a defense provided that the loss of cognition or volition or both is absolute or total, or if the intoxication is voluntary, if there is no fault on the side of the person.
- Unless the coercion is absolute, the defense of intoxication should not be allowed in accordance with article 50(4). That is to say, the intoxication should not be regarded as involuntary intoxication.

Cont’d

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

Infancy

- Maturity is a condition for criminal liability and there will be no crime if the actor is an infant. Therefore, infancy is a universal defense, like insanity, and infants are absolutely exonerated from criminal liability.
- The rationales behind such exoneration are; first, infants are deemed incapable of forming guilty mind necessary for the commission of crimes; second, punishment cannot serve its purpose in relation to them; and, third, punishment is not a proper means to deal with them.

Cont’d

- Under the Criminal Code, the upper limit of infancy or immaturity, as regulated under article 52, is eight years. This means, infants are individuals who *have not attained* the age of nine or who are between 0-8 years.
- So, if these individuals commit criminal acts, they are not answerable therefor. Instead, the Code stipulates that their families, schools and guardianship authorities may take appropriate steps to correct them. As long as they remain under nine, they are not the responsibilities of the society, so to say.

Youth

- Young persons within the meaning of the criminal code are persons who have attained the age of nine but who have not completed the age of fifteen.
- Like anyone, these individuals may commit crimes for various reasons.
- In this case, they will be responsible for their criminal acts since, unlike infancy which is recognized as a defense, youth is not recognized as a defense.
- Nonetheless, unlike adults, they are subject to special treatments. This means, the measures and penalties they are exposed to are special and different from the ordinary ones.

Cont’d

- Under the Criminal Code, these measures and penalties are those which are provided under articles 158-168, not the ones provided in the special part of the Code. The measures are admission to a curative institution, supervised education, reprimand (censure), school or home arrest, and admission to a corrective institution.
- So, whenever a young person commits a crime and is convicted therefor, article 157 obliges courts to impose any one of the above measures.
- If a young person commits a crime because of irresponsibility, as envisaged under article 48, the measures to be applied are those that are provided under articles 129-133, 155 not those which are provided under articles 158-168.

Intermediate age persons

- In our criminal system, persons who have attained the age of 16 but who are below the age of 18 are said to have attained majority. So, criminal majority is attained at the age of 16.
- These persons are also referred to as persons of intermediate or transitory age since they are in the transitory period from criminal majority to civil majority. But for the purpose of criminal law, a person who has attained the age of 16 can be treated like an adult.

Cont’d

- However, the following considerations may/shall be made if he is below 18:

1. The court mitigate his penalty161 merely because he is below 18.
2. The court *may* apply one of the special penalties provided for young offenders, if it deems necessary.
3. The court *may* apply measures provided for young offenders, if it deems necessary.

Cont’d

4. There is a less likelihood that such person can be sentenced to life imprisonment. This is due to the fact that Ethiopia is a state party to the UN Convention on the Rights of the Child and the Convention wants states parties not to impose life imprisonment on children and, when they do so, it prohibits them from doing it without the possibility of release. Moreover, if we consider the *best interest of the child* as recognized in both domestic and international law, the imposition of life imprisonment may not be justified.

Cont’d

5. Finally, under no circumstance can a court sentence a person under 18 to death.

- Except for the last point the other stipulations are optional. Thus, the court may impose the penalty attached to the crime committed if it considers such step appropriate to achieve the purpose of criminal law.

Other non-affirmative(negative) criminal law defenses

- The Criminal Code provides for some defenses which can be treated as negative defenses under articles 48 (irresponsibility), 50 (intoxication) and 52 (infancy).
- The following two constitutional defenses are explained as examples of other negative criminal defenses.

The defence of prohibition of double jeopardy

- The prohibition of double jeopardy is a constitutional prohibition. It has two sub-prohibitions: ***prohibition of second prosecution for the same crime*** and ***prohibition of second punishment for the same crime***.
- If a person is prosecuted for the second time for the same offence, he can object to such prosecution claiming that he has already been jeopardized by prosecution for that crime, if, regardless of such objection, the prosecution is sustained and punishment is to be imposed, the accused can claimed that he cannot be punished for the crime in question because his/her criminal liability for that crime is already paid.

Cont’d

- The defense of double jeopardy is recognized under article 23 of the FDRE Constitution. Article 2(5) of the Criminal Code also makes the same stipulation.
- However, the Criminal Code stipulates that there are instances where double trial and punishment can be justified. Under Article 16, the Code provides that the prohibition of double jeopardy does not apply when a person who is subject to Ethiopia's principal jurisdiction is tried and punished in a foreign country.

The defense of non-retroactivity of criminal law

- A retroactive criminal law is one that makes an act illegal after the act was taken, increases the punishment or severity of a crime after it occurred, changes the procedural rules so as to increase the chances of conviction after the crime occurs.
- Non-retroactivity of criminal law is a defense. In our case, such defense is recognized under article 22(1) of the FDRE Constitution.
- Article 5(2) of the Criminal Code also provides for the same principle. Hence, non-retroactivity of criminal law is one of the negative criminal law defenses as it challenges the very existence of the crime in question, not the liability of the accused person.

Affirmative Defenses

- Beside to negative defenses, there are certain factors which are recognized by the Criminal Code as criminal law defenses. These factors are known as *affirmative or proper defences* because they assume the complaint or charge to be correct but raise other facts that if true, would establish a valid excuse or justification or a right to engage in the conduct in question.

Cont’d

- In other words, the accused person *affirms* the allegation that something was committed or omitted but claims that punishment is improper. Hence, an affirmative defense does not concern itself with the elements of the offence at all; it concedes them. Rather, a person who produces an affirmative defence says, "Yes, I did, but I had a good reason‘
- So, the target of affirmative defences is avoiding liability, not responsibility for what is done. These defences include the defence of lawful acts, justifiable acts and excusable acts.

Cont’d

- In the first case, the accused admits that he committed or omitted the act in question but maintains that his commission or omission was lawful.
- In the second case, the accused claims that he committed or omitted the act in question and also admits that his act is not lawful but challenges that it is wrong.
- In the third case, the accused admits that he committed or omitted something and also asserts that his commission or omission is wrongful but claims that he is not answerable therefor.

Lawful acts

- Lawful acts are neither justifiable nor excusable acts.
- Justifiable acts are acts which are prohibited by law but the violation of the law will be acceptable under the circumstance because it brings about some benefit to the society.
- Excusable acts, on the other hand, are acts which are prohibited by law and do not bring benefit to the society. But the author of an excusable act will not be punished because he suffers from certain disabilities, external or internal, in the case of lawful acts, they are just lawful and they do not give rise to crimes.

Cont’d

- The criminal Code classifies lawful acts into acts required or authorized by law and acts performed in the exercise of a professional duty and deals with them under articles 68 and 69, respectively.
- So, if individuals cause harm to others in the performance of acts required or authorized by law, or while exercising their professions, they will not commit crimes provided that they are done within the limits provided by law and also the conditions attached thereto are observed.

Cont’d

- But the list provided under article 68 and 69 is not exhaustive as the expression *in particular*, under article 68, shows. Hence, other lawful acts can be brought into picture and reliance on article 68 for the purpose defence is possible.

Justifiable and excusable acts

- Thus, justifiable acts are those acts which bring about greater advantage to society than the harm they cause. For example, society will be better off if A kills B to save the lives of C, D and E because three lives will be saved at the expense of one.
- So, justifiable acts, though unlawful, are non-punishable because they are morally right. That is why it is argued that justified conducts represent superior social interest and therefore ought to prevail.

Cont’d

- On the other hand, excusable acts are neither lawful nor justifiable (because they do not represent superior social interest). They are inimical acts to the society. For example, if an insane person kills another, there is nothing that the society will gain; rather, the society will be worse off. Hence, the acts are wrong both legally and morally.
- Nevertheless, the authors of excusable acts will not be punished because they are persons suffering from certain disabilities (external or internal) at the time of their unlawful and wrongful acts.
- Hence, they deserve excuse regardless of the loss they cause to the society. So, unlike justification which focuses on conducts, excuse focuses on the authors.

Consent of the victim

- Criminal matters are, by their nature, not individual matters but public. Hence, crimes are harms to the public, not to individuals. If this is so, it would be illogical to argue that individuals can license the doing of harm to the public.
- It is for this reason that their consent is generally not accepted as a defence against punishment. If it is to serve as a defence, it has to be obtained from the public, not from the direct victim of the criminal act.

Cont’d

- The absence of defence based on the consent of a victim is just a rule. Hence, consent of the victim can serve as a defence under exceptional circumstances.
- A person raising the issue of consent should not be punished not because consent is a defence but because the alleged crime by itself does not exist. Therefore, for consent of the victim to serve as a defence it should not be an element of the crime committed.

Cont’d

- Under the 1957 Penal Code, article 66 prohibits consent of the victim from serving as a defence even under exceptional circumstances.
- The Criminal Code has rectified the problem of the 1957 Penal Code by permitting consent as a defence.
- Firstly, the Criminal Code classifies crimes, under article 70(1), into crimes which are liable to punishment only upon complaint and those which are liable to punishment even in the absence of complaint from the victim or his legal representative.

Cont’d

- The first category of crimes is crimes against rights which are relatively protected while the second is crimes against right which are absolutely protected. ***For example***, under the Criminal Code homicide, rape, and theft are liable to punishment whether the victim has lodged a complaint or not. Hence, the rights protected by the laws defining these crimes (Articles 598ff, 620 and 665) are absolutely protected rights.

Cont’d

- On the other hand, the commission of certain crimes calls for the attention of criminal law only if the direct victim of the criminal act lodges a complaint to the effect that the criminal be punished. ***For instance***, if crimes defined under article 580 (Intimidation), article 625 (Taking advantage of the distress or dependence of a woman), and article 686 (disturbance of possession) of the Criminal Code are committed, the criminal will be liable to punishment only if the direct victims complain.
- Then, article 70(1) stipulates that consent of the victim can serve as a defence with regard to crimes liable to punishment upon complaint.

Cont’d

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

Cont'd

- The unwritten version of article 70(1) provides that consent of the victim is not a defence in respect of crimes which are liable to punishment *without* complaint of victims. However, article 70(2) provides for an exception to this rule.
- In any case, unlike the 1957 Penal Code which never permitted consent as a defence, the Criminal Code allows consent as a defence under two circumstances: when the crime committed is punishable only upon complaint and when the harm caused is bodily injury and it is caused upon the consent of the victim free of commercial purpose and for appropriate and necessary scientific research or experiment or for personal use.

Consideration to use consent as a defence

1. **Effective consent**

- Consent can serve as a defence only exceptionally. Even under this exceptional situation, it can serve as a defence only if it is effeetive. The issue then is; when is consent said to be effective?
- Consent is said to be effective only if two requirements are satisfied. First, it has to be given by a capable person. If consent is given by a person who cannot make reasonable judgment as to the nature and consequence of the conduct to be performed onto him, it cannot serve as a valid defence.

Cont'd

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

Cont’d

- The second requirement for consent to be effective is the absence of defect. It is provided that consent which is affected by defect is not a defence. Consent can be affected by defect if it is extorted by duress, fraud or mistake. The requirement is that consent has to be given out of the victim's own free will.
- Under article 70 of the Code, this requirement is not provided. But this does not mean that defective consent can serve as a defence. The element seems an inbuilt requirement of article 70(1).
- Of course, the second sub-article of article 70 makes free consent a requirement since it deals with the conclusion of contract (valid contract) freely willed and, according to articles 1678(1) and 1696 of the Civil Code, a contract can only be valid or enforceable at law if it is free from defect (that is, fraud, duress and mistake).

II Time of giving consent

- The general understanding is that consent given after the fact cannot serve as a defence. It simply amounts to ratification of the act for various reasons such as the victim is compensated.
- In conclusion, the Criminal Code does not, in principle, recognize consent as a defence. However, under exceptional circumstances, it recognizes consent as a defence provided that certain requirements are fulfilled.

Coercion

- Sometimes, individuals violate the literal meaning of criminal law contrary to their will.
- This may happen, among others things, when one person is compelled by another to disobey the law. In such situation, and upon the fulfillment of certain conditions, criminal law lets them go unpunished.
- Thus, the defence of duress (coercion) is recognized in almost all legal systems and the following are some of the reasons behind the recognition of the defence.

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A. **Loss of Volition:** A person who is coerced to commit a crime is a person who does not have a say on his act Like an insane person, he is totally deprived of his freedom of choice. Hence, he deserves the same treatment in as long as the loss of volitional power is not willed.

B. **Social benefits**: In the eyes of the society, a person who is subjected to duress is a disabled person because if he has to avert a given danger he has one and only way to do so; that is, doing what his coercer is telling him to do.

- Sometimes the permission of duress as a defence may be socially beneficial for individuals may avoid greater harm by submitting to the unlawful demands of others thereby making the society better off.

Cont’d

C) **Purpose of punishment**: punishing a person who is, for instance, irresistibly coerced to commit a crime is not going to serve the purpose of criminal law. This means, a coerced person, in most cases, submits to the unlawful demand of his coercer whether or not he was punished before for similar incident.

- Second, it is very hard to think of rehabilitation in relation to a coerced person because the problem does not lie with him but with his coercer.

Cont’d

- In Ethiopia, the defence of duress developed quite slowly. Under the 1930 Penal Code, duress was not a defence at all regardless of its nature and intensity. A coerced person was rather treated as a co-offender with his coercer. So, the 1930 Penal Code demanded extreme heroism from any person.
- Nevertheless, that position was modified by the 1957 Penal Code. This Penal Code classified coercion into moral and physical coercion, which refers to coercion denying freedom of movement, was permitted as a defence.

Cont’d

- On the other hand, moral coercion, which denies freedom of choice, was not recognized as a defence; rather, it was recognized as a mitigating ground.
- Under the Criminal Code, coercion has become a full-fledged criminal law defence. Under article 71, coercion is recognized as a defence regardless of its nature: physical or moral.

Cont’d

- Although coercion is a defence, it is accepted only if the following conditions are met:
- First, the *source* of the compulsion should be a human agent. If the compulsion emanates from extra human agents like fire and flood, coercion cannot be raised as a defence although other defences such as necessity may be raised.
- Second, since the law does not want to encourage cowardice, it demands relative and resistible coercion to be avoided. No one is supposed to submit to the unlawful demand of another where the coercion is not absolute and is irresistible. Thus, coercion qualifies as a valid defence only if it is *absolute* and *irresistible*.

Cont’d

- Third, the defence of coercion is sustainable only if the coerced person causes a lesser damage.
- Fourth, coercion as a defence is accepted only if the damage feared is *imminent*, that is, very close. If the danger is not imminent, the coerced person should say no to the demand of his coercer.
- Fifth, the defence of duress is permitted only if it exists throughout. If there is interruption, the law expects the coerced person to make use of the gap to avoid the commission of a crime.
- Sixth, in some jurisdictions, the defence is permitted only if the coerced person has not contributed by his own fault to the occurrence of the coercion.

Cont’d

- Under article 71 of the Criminal Code, only some of the above conditions are expressly recognized.
- What are the conditions recognized in the code? Discuss it with your classmates?

Superior order

- Who should be liable for harm is caused through the execution of the order of a superior? Should the superior be liable for the damage caused by another? Or should the subordinate be liable for the damage caused in the course of obeying his superior's order?
- To begin with the liability of the boss, it is known that a superior's mandate is to give only lawful orders. Hence, if they give lawful orders and as the result of the execution of such orders harms occur, they will not be answerable because their acts will be lawful acts.
- But if they give unlawful orders and as the result of the execution of such orders harms transpire then they will be liable for such harms provided that they constitute crimes.

Cont’d

- It is claimed that an order becomes unlawful if it fails to pass the tests of *service matters* and *relevance.*
- In the first place, the order, to be lawful, should pertain to the service rendered by the institution to which the superior belongs. ***For example***, no superior can give a lawful order to rape a lady since there is no legal institution established to give raping service.
- Secondly, even if the order pertains to the service rendered by his institution, it has to, under the circumstance, be relevant.

Cont’d

- Article 73 of the criminal code makes a person giving order liable if his subordinate commits a crime on condition that certain requirements are fulfilled.
- ***First***, the two persons must have superior-subordinate relationship regardless of the rank of the superior; that is, whether he is a high-ranking boss or not.
- ***Second***, the relationship must exist in administrative or military institution. This is so because in other institutions such as the parliament and the judiciary, we do not have superior-subordinate relationship that will lead to the commission of crimes. Incidentally, it has to be noted that both the superior and the

  subordinate should belong to the same administrative or military institution if article 73 is to apply.

Cont’d

- ***Third***, the superior must give an order. If the subordinate commits a crime without the order of his superior, no issue involving the superior's liability will arise.
- ***Fourth***, the order must be unlawful.
- ***Fifth***, the unlawful order must be express. A superior is made liable for the act of his subordinate only if the subordinate executes an express order.
- Hence, if the superior has not given an express order but the subordinate makes a move presuming that there will be such an order, the superior will not be liable for the harm caused on the basis of such presumed order.

Cont’d

- ***Sixth***, the superior must be competent to give such express order.
- ***Seventh***, the order of the superior must be executed.
- ***Eighth***, the execution of the order must cause harm.
- ***Ninth***, the harm should amount to a crime. If it simply constitutes a civil wrong, then the criminal liability of the boss cannot arise.
- ***Tenth***, the subordinate should not exceed the order of his boss since the superior will be liable only for the direct consequence of his order.

❖For any excess, the subordinate alone will be liable although this does not affect the liability of the superior for negligence pursuant to article 59.

Cont’d

- Should a subordinate be liable for the crimes they commit in the course of implementing their superiors' orders.
- The response to this issue is different in different legal systems. In some systems where the philosophy of ***blind or passive obedience*** is adopted, subordinates are absolutely immune from liability. Because, there will be no difference between order and law in such system. Hence, a person executing an order is the same as a person executing a law.

Cont’d

- On the other hand, in systems where the philosophy of ***intelligent infantry*** is adopted, a subordinate who executes an unlawful order is liable to punishment. This is because, in these systems, a subordinate has the right to question the legality of any order given by his superior.
- Lastly, in systems where the philosophy of ***manifest illegality*** followed, a subordinate is liable only if the unlawful order he executed is apparently or clearly illegal. Hence, a subordinate who executes an order which is illegal but not manifestly will not be liable to punishment.

Cont’d

- The position adopted by the Criminal Code(art 74) is closer to the last philosophy although it does not exactly adhere with it. It provides that a subordinate is liable to punishment if he was aware of the illegal nature of the order but executes it.
- For the purposes of determining the awareness of a person about the illegal nature of a given order, the Code seems to provide for two examples. ***First*** it expects any subordinate to bow the illegality of an order if he knows that the order giver does not have the mandate to give it.
- ***Second***, the Code expects subordinates to know the illegality of an order if the acts ordered are criminal in nature and it provides for examples where subordinates are supposed to know the illegal nature of an act such as homicide, arson, genocide, mutiny and forgery.

Necessity

- A necessary act is a non-condemnable act though contrary to law, because condemnation is (should be) based on the cost-benefit analysis of the society.
- If there is societal benefit there will not be condemnation. The society accepts and even encourages acts which bring about societal benefits, such as necessary acts.
- Therefore, if an act performed is a necessary act though contrary to criminal law, it is accepted as an affirmative criminal law defence.

Cont’d

- The Criminal Code recognizes the defence of necessity under article 75. However, under the Code, necessity is accepted as a valid defence only if the following requirements are fulfilled.

Imminence: The Code demands the danger feared to be imminent or very close. The defence of necessity applies only where a person is in an emergency situation and faced with the choice of two evils.

- Necessity is a defence only if the law is violated upon the disappearance of any hope to avoid violating the law. ***For instance***, a person starving to death cannot raise necessity as a defence if he steals bread from bakery because he has other alternatives to avert the danger (starvation) like begging.

Cont’d

B. Seriousness: The Code further requires the danger at hand to be *serious.* In fact what constitutes *'serious‘* is vague and relative.

- Of course, it can be argued that the seriousness' requirement is stipulated to demand causing lesser damage by avoiding greater damage, or maybe to discourage law violators.

C. Fault: Under article **76** of the Code, it is provided that the defence of necessity ceases to exist if the emergency situation is created by the fault of the actor.

Cont’d

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

D. Intention: A necessary act is an intentional act. If an act is not performed with the intent to avert a certain danger, it cannot amount to a necessary act. This requirement is implied under article 75.

Cont’d

E. Source: In some jurisdictions, it is provided that a necessary act is a reaction against natural forces such as storm, fire, flood, starvation, landslide. Thus, measures that are taken to avert dangers created by human forces do not constitute necessary acts.

- Under articles 75 and 76, however, such requirement is not stipulated either expressly or tacitly. Hence, it can be argued that the defence of necessity can extend to reactions against human forces provided that these forces are not covered by article 71 (coercion), article 73 (superior order), and article 78 (legitimate defense).

Cont’d

F. Proportionality: The underlying justification for the defence of necessity is social policy; that is, the act benefits the society.

- Individuals causing proportional harms are allowed to benefit from the defence.
- Under the Criminal Code, the requirement of proportionality is not clearly provided although article 76 contains an ambiguous expression which excludes the defence of necessity when the balance is not positive and entitles a person to a mitigated punishment.

Cont’d

G. **Means used:** Under article 75, it is provided that a person in an emergency situation should use a means proportionate to the requirement of the case. If the means is disproportionate, under the circumstance, obviously excess of necessity will come into picture.

- At any rate, if the requirements provided under both article 75 and article 76, either expressly or impliedly, are met necessity can be raised as a defence.

Cont’d

- Under the 1957 Penal Code, the defence of necessity covers everyone in a state of emergency. So, its scope was wide.
- Under the Criminal Code, however, the scope of the defence is somewhat limited. The second paragraph of article 75 provides for an exception where necessity cannot be raised as defence notwithstanding that all the necessary conditions are met. The Code stipulates that necessity cannot be invoked by persons who have special professional duty to protect life or health.
- Indeed, the existence of necessity entitles them to mitigation, not to exemption from liability.

Cont’d

- Accordingly, if a given boat has some people in excess of its carrying capacity (and this is not attributable to the fault of the crews of the boat) and as a result it is about to drown, it is possible to throw some of the people into a sea to save the lives of the others. But according to the exception, except for the crew members who are necessary to navigate the boat, the other crew members must be sacrificed first.
- Therefore, the Criminal Code has reduced the scope of the defence of necessity. However, the feasibility of this exception may be questioned because individuals may not be willing to sacrifice their interests, particularly their life, if they bow that they may get a mitigated penalty.

Legitimate Defence

- Legitimate defence is one of the oldest criminal law defences. It has about three components: self-defence (the defence of 'self-preservation'), the defence of others and the defence of property.
- According to the theory of legitimate defence, if a person causes harm to another to defend his own or third party's right he must be allowed to go free.

Cont’d

- Nevertheless, whether or not a person causes harm to another for the purpose of defending his own interest or that of third party, the following conditions should be fulfilled to validly invoke legitimate defence.

A. Attack or threat to attack: First of all, the issue of legitimate defence can only be raised if the harm caused to another is triggered by the attack of or threat to attack posed by an aggressor.

Cont’d

B. Culpable Aggression: Legitimate defence will be available to people only if the responsive actions they take are meant to repel aggressors' unlawful conducts. Stated differently, legitimate defence is permitted only against unlawful attack or unlawful threat to attack.

- Hence, there is no right of legitimate defence against lawful attack or lawful threat to attack. For instance, one cannot lawfully defend his liberty against a police officer who is effecting arrest according to the law.

Cont’d

C. Non-aggressor defender: The defender should not be the aggressor himself. There is no legitimate defence for the aggressor against the defensive action of other's since the latter's action is lawful.

- But any aggressor has the right of legitimately defending himself against any excessive action for the excess becomes unlawful.
- ***For example***, if a person is trying to rob another but upon discovering that his intended victim has a gun runs away, the intended victim cannot chase and cause harm to him. If the intended robber is attacked, he will have the right to defend himself because the intended victim is not entitled to chase and injure him as there is no threat to harm him.

Cont’d

D. Proximity: Inflicting harm on other's interest is permitted only if the aggression is imminent or immediate. In other words, a person is permitted to cause harm to another to defend a lawful interest only if he cannot resort to the law for its protection.

E. Retreat: Normally, legitimate defence is taken as the last avenue to avert the unlawful attack or unlawful threat to attack. If there is another choice to resort to than causing harm to a person, it is believed that that choice should be exploited.

Cont’d

F. Belief: It is claimed that the existence of a real situation giving rise to legitimate defence is not necessary. A person can still avail himself of the defense if he reasonably believes that he is defending an unlawful aggression.

G. **Proportionality:** The question of legitimate defence necessarily raises the issue of proportionality. The requirement of proportionality should be fulfilled if a person is to avail himself of the defence of legitimate defence. Here, the proportionality element has two ingredients. ***First***, the means chosen to repel the unlawful attack or unlawful threat to attack should be the minimal force necessary under the circumstance.

Cont’d

- ***Second***, the harm to be caused to the aggressor should not be greater than the harm to be averted.
- Therefore, both proportionality of the means and proportionality of the harm should be observed.
- When it comes to the legal system of Ethiopia, one can argue that legitimate defence is one of the oldest criminal law defences. ***For instance***, the *Fetha Negest* provided that "no guilt...falls upon one who kills a man who comes into his home at night for the purpose of injury, as it is for the purpose of defending his own life."

Cont’d

- The 1930 Penal Code also recognized the defence under article 145. The article states that "there is no punishment for the man who commits a crime in defending himself against a strong man, if he thinks that he is guarding and saving his life and honour, his money and family".
- The 1957 Penal Code also recognized legitimate defence under article 74, which is better and more comprehensive than the preceding stipulations.

Cont’d

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

Ignorance or mistake of fact

- It is held that if the crime committed requires intention, ignorance or mistake of fact can serve as a defense whereas if the crime committed requires negligence, ignorance or mistake of fact can serve as a defense only if it is reasonable.
- Mistake relates to misunderstanding or misconstruction of a given fact while ignorance relates to lack of awareness about the existence of a given fact which renders one's act a crime.

Cont’d

- The Criminal Code, under article 80(1), tries to regulate this issue only in part because article 80 deals only with mistake of fact and not about ignorance of fact.
- However, it would be an anomaly to think that ignorance of fact does not entitle a person to the benefits mistake of fact does. This is so because a person who does something wrong not knowing that there is a fact which makes his conduct a crime is less blameworthy, if he is blamable at all, than a person who does something wrong by misunderstanding that the fact does not entail a crime.

Cont’d

- In relation to mistake of fact, the Criminal Code stipulates that a person who commits a crime as a result of mistake of fact will be treated according to his understanding (appreciation) of the fact.
- Therefore, mistake of fact is a defence against intentional crimes basically because it affects the person's mental stand towards the result achieved.

Cont’d

- If the mistake committed pertains only to the identity of the victim or the object of the crime, the mistake cannot be a defence (Article 80(3)). ***For example***, if Abebe wants to kill Belay but by mistake he kills Chala who wears Abebe's clothes, he will be punished as if he intentionally killed Chala.
- The idea in this case is as long as the intention of the person to commit a given crime is ascertained with sufficient precision, the law should take measures against him so as to achieve its purposes.

Cont'd

- Moreover, mistake as to the identity of the victim or the object of a crime is not as such fundamental to earn a person an excuse.
- Ignorance or mistake of fact cannot relieve a person from liability if he is found negligent (in the light of article 59) in doing something and the negligent doing of that thing is punishable.
- If what a person does gives rise to an independent crime, he will be punished therefor. (art 80(2))