

UNIT-I: INTRODUCTION TO CRIMINAL LAW

"The criminal law represents the pathology of civilization." -Morris R. Cohen, Reason and Law 70 (1961)

- ✓ Criminal Law is the body of law defining crimes against the community at large, regulating how suspects are investigated, charged, and tried, and establishing punishments for convicted criminals.
- ✓ Often the term 'criminal law' is used to include all that is involved in 'the administration of criminal justice' in the broadest sense.
- ✓ The criminal law identifies, defines and declares the conducts that it seeks to prevent and prescribes the appropriate punishments for them too.

Section 1: General Considerations:

The Place of Criminal Law in Criminal Science:

- ✓ **"Crime"** is an offence committed by an individual who is a basic unit of a society. Therefore, study of crime i.e. Criminal Science" is a social study. The main aims of Criminal Science are:

1. To discover the causes of criminality,
2. To devise the most effective methods of reducing the amount of criminality,
3. To perfect the machinery for dealing with criminals.

- ✓ Based on these three objectives, three main branches of Criminal Science have developed. They are:

1. Criminology: It is the study of crime and criminal punishment as social phenomena. This branch of criminal science is concerned with causes of crimes and comprises of two different branches.

a) Criminal Biology: This investigates causes of criminality, which may be found in the mental or physical constitution of the delinquent himself such as hereditary tendencies and physical defects.

b) Criminal Sociology: This deals with enquiries into the effects of environment as a cause of criminality. This branch focuses on the objective factors like social, political and economic conditions leading to criminality, also termed as *criminal anthropology*.

2. Criminal Policy or Penology: This branch of Criminal Science is concerned with limiting harmful conduct in society. It makes use of the information provided by Criminology. Therefore, the subjects of Criminal policy for investigation are:

- a) The appropriate measures of social organization for preventing harmful activities,
- b) The treatment to be given to those who have caused harm, whether the offenders are to be given warnings, supervised probation, medical treatment, or more serious deprivations of life or liberty, such as imprisonment or capital punishment.

- ✓ This branch of study is also termed as 'Penology' and deals with treatment, prevention and control of crimes.

3. Criminal Law: Criminal policies are implemented through the agency of criminal law. The criminal law decides the special sanctions appropriate in each case. These sanctions range from death penalty through various kinds of degrees of deprivation of liberty, down to such measures as medical treatment, supervision as in probation, fines and mere warnings (admonishment).

Branches of Criminal law

1. Substantive Criminal Law: lays down the principles of criminal liability, defines offences and prescribes punishments for the same. The Ethiopian Criminal Code does this business. However, the substantive criminal law by its very nature cannot be self-operative.

2. Adjective/Procedural Criminal law: designed to look after the process of the administration and enforcement of the substantive criminal law. In the absence of procedural criminal Law, the substantive criminal Law would be almost worthless. Because without the enforcement mechanism the threat of punishment held out to the lawbreakers by the substantive criminal law would remain empty in practice. Thus, the procedural criminal law is to administer the substantive criminal law and give enforcement to it.

Nature and Scope of Criminal Law

- ✓ Criminal law has to do with crimes, which are different from other wrongful acts such as torts and breaches of contract.

- ✓ The distinct nature of Criminal Law can be understood by defining some of its unique features. According to Edwin Sutherland, Criminal Law of a place can be defined as "a body of special rules regulating human conduct promulgated by state and uniformly applicable to all classes to which it refers and is enforced by punishment." It means the whole body of

criminal law to be efficient must have four important elements, viz.,

- **Politicality:** implies that only the violations of rules made by the state are regarded as crimes.

- **Specificity:** connotes that it strictly defines the act to be treated as crime. In other words, the provisions of criminal law should be stated in specific terms.

- **Uniformity:** implies its uniform application to all alike without any discrimination, thus imparting even-handed justice to all alike. The idea is to eliminate judicial discretion in the field of administration of criminal justice.

- **Penal sanction:** imposed under the criminal law that the members of society are deterred from committing crimes. It is, therefore, obvious that no law can be effective without adequate penal sanctions.

❖ General Objectives Of Criminal Law:

1. Protection of Persons and Property:

- ✓ Safety and a sense of security are the most important things for the survival of any society.

- ✓ Safety of a society includes **personal safety** i.e. safety of life and liberty and **safety of property**.

- ✓ To ensure safety there is the necessity of maintaining peace and order. This is possible only by an effective penal system, which is strong enough to deal with the violators of the law and enable the people to live peacefully and without fear of injury to their lives and property. Thus, the prime objective of criminal law is protection of the public by maintenance of law and order.

- ✓ "Tort law", a branch of civil law, also protects persons and property. The difference between tort law and criminal law is that tort law results in money damages, whereas criminal law results in loss of freedom by sending a person to jail or prison. Private interests are served through the awarding of damages. The public interests are served by punishing criminal activity.

2. Deterrence of Criminal Behavior:

- ✓ A key to the hoped-for reduction in criminal behavior is that our criminal laws present a sufficient deterrent to antisocial behavior.

- ✓ A "deterrent" is a danger, difficulty or other consideration that stops or prevents a person from acting. The presumption inherent in criminal law is that if we make the punishment sufficiently harsh, persons who might do something criminal are prevented from doing so

because they fear punishment. If enough people fear punishment, there will be considerable reduction in criminal activity. However, our Constitution states in Art. 18 state that, there shall be no cruel and unusual punishment.

3. Punishment of Criminal Activity:

- ✓ Since we will most likely be unable to deter all criminal activity, our laws accept that a certain level of criminal activity will exist in society. Accordingly, we punish criminal activity for punishment's sake. If a criminal takes something without paying for it or injures other without a justification, the criminal law makes that individual pay for it through deprivation of liberty for a period of time.

4. Rehabilitation of the Criminal:

- ✓ Once convicted, a criminal will begin to serve a sentence in a prison. But that is not where our criminal justice system ends. Our government has designed various programs to educate and train criminals in legitimate occupations during the period of incarceration. Upon release, therefore, there should be no reason to return to a life of crime. Sometimes a sentence is suspended (Arts. 190-210 of the Criminal Code); that is, it is not put into effect. In such cases, the court supervises the individuals' activities to ensure that they have learned from their mistakes.
- ✓ The specific purpose and function of Criminal Law are clearly stated in Art. 1 of the Criminal Code of the Federal Democratic Republic of Ethiopia, 2004. Art. 1. Para 1 sets out the purpose of criminal law (Code) as follows: ***"The purpose of the Criminal Code of Federal Democratic Republic of Ethiopia is to ensure order, peace and the security of the state, its peoples, and its inhabitants for the public good"***.
- ✓ The second paragraph of Art. 1 proceeds to state the type of activities it aims to take up in order to achieve the purpose mentioned in the first para. Art. 1 Para 2 lays down that: ***"It aims at the prevention of crimes by giving due notice of the crimes and penalties prescribed by law and should this be ineffective by providing for punishment of criminals in order to deter them from committing another crime and make them a lesson to others, or by providing for their***

reform and measures to prevent the commission of further crimes."

❖ Criminal Law, Private law and Morality-Distinguished:

- ✓ A *wrong* is an act forbidden by the society. In other words, it is a violation of rules, which are accepted by the society. Society prohibits certain activities basing on the general conscience of the society, which is found in the *values and norms* of the society. The concept of morality explains the values of a particular society. This means that a given society declares certain acts, which offend the moral conscience of that society as forbidden. These forbidden acts can be described as *moral wrongs*. However, All moral wrongs are not wrongs in the legal sense.

Classification of Wrongs:

- ✓ **Moral wrong:** There is a long list of such acts including ingratitude, hard-heartedness, absence of natural love and affection, habitual idleness, sensuality, pride and all such sinful thoughts. Such acts are called wrongs and are looked upon with disapprobation. The evil tendencies of these anti-social acts widely differ in degree and scope. Some of these wrongs such as lies, refusal to give a morsel of food to save a fellow human being, omission on the part of a swimmer to rescue a man from drowning, etc., are not considered sufficiently serious for the notice of law and are merely disapproved. These acts are considered as moral or ethical wrongs and are checked to a great extent by social and religious laws. Sinful thoughts and dispositions of mind might be the subject of confession and penance but not of criminal proceeding.
- ✓ **Legal Wrong:** The category of wrongs such as nuisance, deceit, libel (defamation in visual form) robbery, dacoity, murder, rape, kidnapping, etc., are considered to be sufficiently serious for legal action. The state may respond to any of such acts in two different ways: (1) Where the state takes action against the wrong-doer at the instance of the injured party, it is called the civil wrong, and (2) Where the state by itself proceeds against the wrong-doer, the wrong is referred to as criminal wrong.
- o **Civil Wrong:** Where the magnitude of injury is supposed to be more concentrated on the individual, the state, at the instance of the injured individual or the group, directs the wrong

doer to compensate the injured in terms of money as in the case of deceit, libel, nuisance, negligence, etc. This type of wrong is called civil wrong or Tort, for which civil remedy is open to the injured.

o **Criminal Wrong:** Where the gravity of the injury is more directed to the public at large (including the specific victim), the state by itself can take a direct action against the wrong-doer. In this instance public condemnation or provision for compensation is ineffective as in the case of moral or civil wrong. Wrongs, like dacoity, murder, kidnapping, sedition, treason and the like, disturb the very fabric of law and order and jeopardize the state's existence or create a wide spread panic. Therefore, the state stresses the necessity of punishing the wrong-doer rather than concerning itself with the question of payment of compensation to the injured party by the wrong-doer. This category of wrongs is called as "public wrongs" or "crimes" for which criminal proceedings are instituted by the state and the culprit is punished.

❖ Relation between Morality and Criminal Law:

- ✓ They are related to each other in that they both aim at maintaining social order.
- ✓ There is a category of wrongs towards which law and morality react with common hatred. They are offences like murder, rape, arson, robbery, theft, etc. Law and morals powerfully support and greatly intensify each other in this matter.
- ✓ Everything that is regarded as enhancing the moral guilt of a particular offence is recognized as a reason for increasing the severity of the punishment awarded to it.
- ✓ According Sir Stephen year the criminal law proceeds upon the principle that "it is morally right to hate criminals and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it." However, the recent tendency of the reformists is on the opposite lines, they say "hate the crime not the criminal" basing their argument on the Gandhian philosophy i.e. "hate the sin not the sinner", because a criminal is not born, he is made. Different circumstances and experiences after his birth in the society become responsible for his becoming a criminal. Thus, today the "Reformative Justice" is the philosophy of the state.

- ✓ **Cohen**, in his article “Moral Aspects of the Criminal Law” (49 Yale L.J.989-990 (1940) observes “ what I wish to insist on is that the criminal law is an integral part of the legal system and is subject to same considerations which do and should influence the whole. More specifically, the criminal law cannot be distinguished from the rest by any difference of moral principle. Some crimes, to be sure, are shocking; but there are many crimes that are felt to be much less reprehensible than many outrageous forms of injustice, cruelty or fraud, which the law does not punish at all, or else makes their perpetrator liable to money damages in a civil suit....”

Section 2: The Concept of Crime:

Crime is a Deceiving Concept:

- ✓ Crime is *deceiving concept* because it covers an enormous range of human behavior. Crime may be associated in the public mind with pick-pocketing, robberies, house-breakings, and riots, but crime is also a businessman placing bribe to win a city contract. It is also syndicate-controlled loan shark taking over a business from a businessman who couldn't meet the exorbitant repayment schedule.
- ✓ Crime is often mistakenly thought of as the vice of the few. It is not. It is everywhere in the society.
- ✓ The concept of crime has always been dependent on public opinion. In fact “law” itself reflects public opinion of the time.
- ✓ Without law there can be no crime at all, although there may be moral indignation which results in law being enacted.” Therefore, in order to know the nature and the content of crime we must first of all know what ‘Law’ is, .
- ✓ “Law”, is the aggregate of rules set by men politically superior, or sovereign, to men as politically subject. Law is a command enjoining a course of conduct to be observed by all the members of the society and is backed by a sanction. The command may be of a sovereign or the command of a political superior to political inferiors, or the command of a legally constituted body or the legislation duly enacted by a legally constituted legislature and addressed to the members of the society in general. That being the definition of law, disobedience or violation of law may be termed as crime. But all violations of law are not crimes for an act done in breach of

law of contract, personal law or a civil law, are only civil wrongs leading to civil proceedings. Only such violations, which endanger the safety of individual, his liberty and property, are crimes. To common man crimes are those acts which people in society “consider worthy of serious condemnation”. Therefore, crime is an act which both forbidden by law and the moral sentiments of the society.

Forbidden Conduct:

- ✓ The concept of forbidden conduct is not a static one; it changes with the change of social norms. The very definition and concept of crime is not only according to the values of a particular group and society, its ideals, faith, religious attitudes, customs, traditions and taboos but also according to the form of government, political and economic structure of society and a number of other factors

- ✓ The notion about crime also changes with time. What is an offence today may not be an offence tomorrow and what has not been an offence till yesterday may be declared a crime to day.

- ✓ Social changes affect the criminal law in many ways, such as:

- Through changes in structure of society, especially in its transition from rural self-contained and relatively sparsely populated to a highly urbanized and industrial pattern.
- Through changes in the predominant moral and social philosophy.
- Through developments in science especially in Biology and Medicine.

Impact of Social Change on the Law of Crimes:

- ✓ Criminal offences dealing with protection of life and liberty have essentially remained unchanged throughout all ages all over the civilized world. Only certain crimes against human body like abortion and sexual crimes took new forms due to changes in the attitude of the society towards such conduct.

Crime is A Multidimensional Problem:

- ✓ Crime is not just the responsibility of the police, the courts, and the prisons.
- ✓ Crime cannot be controlled without the active support of individual private citizens, schools, businesses, and labor unions. This is so because crime has its effects on everyone-not just the criminal and his victim. The fear of crime has

affected basic patterns of life of people. People in society are in need of an efficient system that is capable of checking the incidence of crime in the society so that they can feel a sense of safety and security which is essential for a peaceful living. Therefore, the problem of crime has been the concern of more than the law enforcement machinery.

- ✓ Crime has many dimensions.
- To the **student of crime**, it is a problem of explanation and interpretation.
- To the **legislator**, it is a problem in definition and articulation.
- To the **police**, it is a problem in detection and apprehension.
- To the **judge**, it is a problem of due process and of punishment.

- ✓ But, it is a problem too for more than these. It is a problem to the person who is engaged in breaking the law; it is a problem to the **victim** who may be deprived by it of life, possessions and even the pursuit of happiness. And finally to others it is a threat to tranquility and a disturbance in the social order.

❖ Definition of Crime:

- **Literal Meaning of Crime:** The word “Crime” was originally taken from a Latin term “Crimen” which means “to charge”. The Greek expression “Krimos” is synonymous to a Sanskrit word ‘Krama’ which means “Social order”. Therefore, in common parlance the word crime is applied to *those acts that go against social order and are worthy of serious condemnation.*

- **General Meaning of Crime:** The Oxford English Dictionary defines crime as “an act punishable by law as forbidden by statute or injurious to public welfare”.

- **Crime is a “Public Wrong”—Blackstone:** Blackstone, (1968) has defined crime as “*an act committed or omitted in violation of a public law either forbidding or commanding it*”.

- **CRIME is A “Moral wrong” - Stephen:** According to Stephen (year) crime is “an act forbidden by law and which is at the same time revolting to the moral sentiments of the society”. Defining crime, as something against the moral sentiments cannot be accepted because there are acts though not immoral, classified as highly criminal, e.g., Treason i.e. ‘anything done to displace the governing body of state.’ Treason is graded as a crime in the highest degree and

considered as a heinous crime by all Penal Codes. This is not because the moral sentiments of the society are being affected but for the security and stability of the government. Similarly, there are acts, which are highly immoral but not criminal. For example, an expert swimmer stands by the side of a river and sees a child drowning in the river and makes no effort to save the child and the child dies by drowning. His act may be highly immoral but it is neither a criminal nor a civil wrong.

- **Crime is A “Procedural Wrong” -John Austin:** Austin (year) and some writers (e.g....) define crime in terms of the proceedings adopted in such cases. Austin defined crime while making a distinction between civil and criminal wrongs. He observed, “*A wrong which is pursued by the sovereign or his subordinates is a crime. A wrong which is pursued at the discretion of the injured party and his representatives is a civil injury*”.
- **Crime is a “Creation of Government Policy”:** ‘Russell’ has rightly observed that, “to define crime is a task which has so far not been satisfactorily accomplished by any writer. In fact, criminal offences are basically the creation of a criminal policy adopted from time to time by those sections of the community who are powerful or astute enough to safeguard their own security and comfort by causing sovereign power in the state to repress conduct which they feel may endanger their position”. We find ample evidences supporting the observation made by some of these are Kenny’s “*Outlines of Criminal Law*” (1966, 19th ed., by J.W. Cecil Turner, Cambridge University Press, UK) brings out the following examples in this regard.
- **Crime Is A “Legal Wrong”:** Since no satisfactory definition of crime acceptable and applicable to all situations could be derived, penal statutes define, specifically, different criminal behaviors, which they purport to check. Even the Criminal Code of FDRE, 2005, which has codified the great bulk of the criminal law of the country, does not give any standard definition of crime. Art. 23(1) simply states that, ***A crime is an act which is prohibited and made punishable by law. In this Code, an act consists of the commission of what is prohibited or omission of what is prescribed by law.***”

‘Crime’ Distinguished From ‘Civil Wrongs’:

- ✓ “Crimes” are said to be harms against the society and are therefore, considered as graver wrongs. “Torts” (cases of non-contractual liability) are wrongs against individuals and are treated as lesser wrongs.
- ✓ “Tort” is a private wrong and the remedy available is reparation for the injury suffered and not punishment. But unlike criminal law, the state will not be involved in the dispute or litigation other than legislating the legal framework that facilitates contractual transactions, providing remedies in case of non-performance and adjudicating over the case if the creditor files a suit.
- ✓ Torts also include certain harms or damages caused by fault that are designated as offences like assault, defamation, negligence etc. But unlike criminal offences non-contractual liability may arise irrespective of fault (strict liability) or due to harm caused by others for whom a person is answerable (vicarious liability) as in the case of harm caused by one’s child, one’s employee in due course of his work, etc.,
- ✓ Tortious liability is said to be “strict” (or irrespective of fault) in the following instances.
 - a) If it arises from acts that do not constitute fault, or
 - b) Due to harm caused by things owned or possessed by a person namely, animals, buildings, machines, and vehicles and manufactured goods.
- ✓ Faults that result in tortious liability are wider in scope of application than offences, because in addition to offences the term “fault” for the purpose of “tortious liability” may include violations of private law (Art. 2035 ECC), Professional fault (Art. 2031, ECC) and other faults that are considered to be faults on the basis of the “standard of a reasonable man’s conduct under similar circumstances” (Art. 2030 ECC).
- ✓ Criminal liability invariably requires moral guilt (intention or negligence) and personal act or omission while non-contractual liability doesn’t.
- ✓ “analogy” is forbidden in criminal cases (Art. 2 (1), The Criminal Code, 2005), but may be permissible in Civil (i.e. contractual and tort) cases where legal provisions embody illustrative (rather than exhaustive) lists.

- ✓ The distinction between the two also lies in the degree of certainty of evidence. Criminal cases require certainty beyond reasonable doubt while the preponderance of evidence in the balance of probability suffices in civil cases.
- ✓ In addition to these, the following are some more important legal aspects which distinguish these legal wrongs:
 1. **Nature of wrong:** Crime is a public wrong i.e. a harm done against the society. A ‘tort’ is a private wrong committed against an individual generally or the public in a given locality. A ‘breach of contract’ is committed when any term or condition of an agreement enforceable by law is violated by any one of the parties to the agreement.
 2. **Nature of the Right Violated:** In a crime and a tort there is a breach of ‘*right in rem*’ whereas in a breach of contract there is breach of ‘*right in personum*’.
 3. **Origin and Nature of the Duty:** In a crime the duty not to cause harm is fixed by the state. In tort such Duty is fixed generally by the operation of law where the law of non-contractual liability remains un-codified and by the state where it has been incorporated in codified law (Art.2035ECC).Under criminal law the duty is towards the whole world and it arises on account of the statutory enactments. In case of torts the duty is towards the public generally. Duty either arises on the basis of statutory enactments (Art.2035ECC) or on the basis of general responsibility towards the society and it is independent of any personal obligation under a contract. Whereas, in case of breach of contract the duty is fixed as a result of contractual relationship of the parties and the duty is specifically towards the contracting party. The duty is breached as the result of failure to perform contractual obligation.
 4. **Consent of the Victim:** Consent of the victim to the injury caused is a qualified defense in criminal law. (Art 70 Criminal Code). In torts, consent of the plaintiff to the alleged injury nullifies right to remedies. A contract is founded upon consent. Therefore, if there is consent to the breach of any term or condition of the contract, the plaintiff forgoes his right to claim the remedies.
 5. **The Element of Intention:** Intention is an essential element of crime (Art.57 and 58 of

Criminal Code). Intention may form one of the ingredients of tort but not an essential precondition for the Tortious liability. In an action for breach of contract whether the breach was intentional, is an irrelevant question.

6. **The Element of Negligence:** Negligence attended with criminal lack of foresight amounts to a crime (Art.59 Criminal Code). Mere negligence may amount to a tort (Art.2029 ECC). There is no question of negligence in an action for breach of the obligation arising out of a contract.
7. **Relevancy of Motive:** Motive may be a factor for consideration in deciding the quantum of punishment in criminal liability. Motive is taken into consideration in deciding tortious liability. Motive is irrelevant (1717 ECC) in an action for breach of contract. A breach is a breach with whatever motive it was committed.
8. **Initiation of Legal Proceedings:** Criminal proceedings are conducted in the name of the state. The state steps into the shoes of the victim as the protector of interests of its inhabitants. In case of the other two civil wrongs, it is the injured party that brings the action against the wrong-doer.
9. **Remedies Available:** The criminal is punished by the state. The punishments may range from fine, compensation through imprisonment of different kinds to capital punishment. In torts the remedies available are damages, compensation, restitution and injunction. For breach of contract cancellation of contract, damages, specific performance and forced performance of contract are the available remedies.

Section 3. The Development of Criminal Law of Ethiopia

3.1. Historical Background:

- ✓ The history of Ethiopian Criminal law reveals the following important legislations incorporating the Criminal law of the country before the enactment of the existing Criminal Code of FDRE, 2005.
 - A. The Fewuse Menfessawi,
 - B. The Fetha Negest,
 - C. The Ethiopian Penal Code, 1930.
 - D. The Penal Code of the Empire of Ethiopia, 1957.
 - E. The 1974 Revolution and Criminal Law
 - F. Special Penal Code of 1981

A. The Fewuse Menfessawi (The Canonical Penance):

- ✓ The first attempt to compile the law was made by the emperor zar'a Ya'equob (r.1434- 1468). Desiring to govern his realm by a written law rather than by amorphous customary law and oral tradition, the emperor ordered distinguished Ethiopian Orthodox Church Scholars to compile an authoritative written law. The compilation had 62 articles mainly on criminal matters. Since this was far less than comprehensive, it was not able to resolve many of the legal problems that arose during that period.

B. The Fetha Negest (The Law of the Kings):

- ✓ The failure of the Fewuse Menfessawi led to the next codification by the same Emperor Za'ra Ya'eqob . The Fetha Negest is a very interesting legal compilation.
- ✓ As highlighted by Graven (year), Fetha Negest included the following important criminal law principles :
 - those concerning “intention” and “negligence”,
 - relating to the proportion between the fault and sanction,
 - the individualization of punishment,
 - the forgiveness and redemption of offenders, and
 - the sharing of guilt case of fighting etc.
- ✓ These solutions in case of fighting etc. are most current, familiar and understandable situations for the people.
- ✓ The Fetha Negest was formally incorporated into the Ethiopian legal system in 1908 by Emperor Menelik II.
- ✓ It can be said that in most cases, the Fetha Negest has attempted to incorporate the most suitable legal principles, which could be conceived in the epoch of its emergence. However, it suffered from the following drawbacks:
 - It lacked the systematization and other characteristics of modern codes,
 - Neither the ‘specific’ is differentiated from the ‘general’ nor the ‘exception’ from the ‘rule’,
 - Aggravating and extenuating circumstances were not clearly provided for,
 - In general, the arrangement of the provisions is so haphazard that it is hard to locate the most relevant provision ,and
 - The Fetha Negest was accessible and understandable only to those who continuously studied it i.e. the clergy.

- ✓ The criminal provisions of the Fetha Negest were applied in Ethiopia until they were replaced by the Penal Code.

C. The Ethiopian Penal Code of 1930:

- ✓ The Penal Code of 1930 reflects the norms and values of the old absolutist monarchy of the generation of Emperor Menelik II and Emperor Zewditu (i.e. the era between 1889 and 1930).
- ✓ It was also drawn up in a less systematic and clear manner and did not follow the rules of a modern codification process.
- ✓ The main attributes of the Code were as follows:
 - The crimes and respective punishments were defined in exact fashion, and
 - The penalties were considerably softened and improved by setting the fines in proportion to the then economic and monetary situations of Ethiopia.
 - The Code under its Special Part protected the three great classic categories of interests. These were:
 1. The state and Community,
 2. Persons, and
 3. Property.
- ✓ Provisions of “Petty Offences” were incorporated.
- ✓ The sources of the Penal Code of 1930 seem to have been the Fetha Negest and the Siamese Penal Code and the Penal Code of the French Indo-China of the time.
- ✓ The drafter of the Code is believed to have been a Frenchman.
- ✓ The Penal Code of 1930 was in force until it was repealed and replaced by the 1957 Penal Code of Ethiopia.

D. The Ethiopian Penal Code, 1957:

- ✓ Criminal laws do indeed reflect the conditions generally prevailing in the country where they apply. Therefore, they necessarily change. If substantial changes occur in the society, substantial modifications also become necessary in the legal and other rules. The old codified laws used in Ethiopia, approximately between 1450 and 1931, did not follow the rules of modern codification process and thus eventually proved unsatisfactory. When the necessity was felt for transformation of legal system in the second half of the 20 century, the modern codification process was initiated.
- ✓ The task of drafting a new comprehensive penal code was entrusted to **Jean Graven** , a Swiss jurist who at that time had been the Dean of

Faculty of Law and President of the Court of Cassation in Geneva, Switzerland.

- ✓ The primary source of the Code was the Swiss Penal Code of 1937 and the pre- 1957 Swiss Jurisprudence.
- ✓ The secondary sources were the French Penal Code of 1810 with respect to general format, the Yugoslav Penal Code of 1951 in relation to military offences, and more generally the code of Norway, Denmark, Poland the Federal Republic of Germany, the Netherlands, Portugal, Spain, Italy, Brazil and Greece.
- ✓ Some provisions of 'the Universal Declaration of Human Rights' and 'the Red Cross Geneva Convention' were also incorporated in the 1957 Penal Code of Ethiopia. The incorporation of the latest principles of law in present day jurisprudence made the penal code of Ethiopia one of the modern and sophisticated criminal codes of the time.
- ✓ The drafter also included a wide range of provisions that covered legal institutions that might arise in the future. New concepts, not only juridical, also sociological and criminological were developed into a homogenous penal code, which aimed at the prevention of crimes and rehabilitation of criminals. The object of criminal law should not be retributive from the outset, despite the fact that punishment will serve as deterrent of prospective offenders.
- ✓ The Fetha Negest, as well as the Penal Code of 1930, started from the presumption that criminals have to pay, i.e. have to be penalized for the injury they would cause to the individuals and to society at large. The objective of punishment was, according to these laws, in essence retributive. Now the draft penal code came up with new proposition with principal objective of that the prevention of crime and rehabilitation of criminals.
- ✓ After an arduous exchange of arguments, the draft was accepted mainly because it **aimed at not only satisfying the then state of affairs, but guiding society as an instrument of change.** The new code was **intended to affect national unity and to provide for the progressive development of Ethiopia.** On some points, however, compromises had to be made. Some were the following:
 - **Collective Punishment:** According to customary law, where offences had been

committed by one or several persons, it was found impossible to ascertain which of the persons involved was the criminal, the court could, where equity so required, order 'the damage' to be made good jointly by the group of persons who could have caused it and among whom the persons who caused the damage were certain to be found. As this traditional practice seemed not be in line with rule of law and human rights, the compromise formula that was reached after a long debate between the foreign experts and the Ethiopian members of the codification commission was that, 'where an offence is committed by a group of persons, the persons who proved to have taken no part in the commission of the offence shall not be punished.'

➤ **Mutilation of Human Body as Punishment- Abolished:** According to the old practice, habitual offenders were punished by mutilating the human body so as to give it the maximum deterrent effect. There was a general consensus not to incorporate this form of punishment. However, flogging was to be inflicted on such offenders provided that it was medically ascertained that the life of the offender would not be endangered.

➤ **'Presumption of Innocence'- Introduced:** In the past, the accused was required to prove his innocence. In modern penal legislation, however, the generally accepted principle is that the accused enjoys the presumption of innocence, according to which the burden of introducing evidence to prove the guilt of the accused is on the Prosecution. This is opposed to the previous principle of "presumption of guilt". In addition to this, accused has the right to produce defense witnesses.

➤ **Rules Applicable to Young Offenders:** In the past, all offenders who were thought to have the capacity to discriminate between what is good and what is bad were brought before the regular courts. In the modern penal law, on the other hand infants are completely exonerated from criminal provisions. Infancy is according to art 52 of the Penal Code, 'the period extending from birth up to nine years.' Infants are not deemed to be responsible for their acts under the law. The measures to be taken against such offenders should have curative, educational or corrective measures as may be necessary for their own good. Penalties and measures to be imposed on

offenders between the ages of 9 and 15 years were those provided by Arts. 161-173 of the Penal Code. Thus, young persons were not subjected to the ordinary penalties applicable to adults nor should they be kept in custody with adult offenders. For purposes of the criminal law, the age of majority for young persons is 16 years.

➤ **Probation and Suspension of Sentences:** In the past all forms of sentences were executed. Present-day penal legislation provides that certain offenders may, under defined circumstances, be granted release on probation or the sentence may be suspended for a fixed time. Even after the execution of a sentence of imprisonment, one may be granted a reduction of the term which one is required to serve. In accordance with the rationale of modern principles of criminal law, the Ethiopian Penal Code aims at not punishing the offender, but at rehabilitating and educating him. As a result, it provides ample opportunities for probation and suspension of sentences.

➤ **The Personal Nature of Criminal Punishments And Measures:** If a convicted person died before the execution of a sentence, there was, according to customary laws, the possibility of proceeding against his property or the property of his next of kin. This was not retained in the Penal Code of 1957. The principle is that, 'crime is personal to the one who is found to have committed it', it is thus an innovation made in the present criminal law.

➤ **The Punishment for Burning of Crops (Arson):** since Ethiopian society is predominantly an agricultural society, severe penalties are prescribed for offences relating to or committed on agricultural products. Recognizing this deep-seated value, burning of crops (arson) entailed more severe penalties than other comparable crimes provided in the new penal code. In addition to the above matters, drafter of the Code, Jean Graven, also pinpointed the following areas where new and old ideas have been reconciled:

- Capital punishment and corporal punishment (flogging) were maintained but with all the necessary precautions as to the instance of application and the conditions of administration.
- Pecuniary punishments particularly confiscation of property were made to be applicable in limited

instances of serious crimes against the sovereign and the state

- The principle of collective responsibility for certain crimes involving tribes or anonymous criminals were made to rest on customary practices which had their own justification.
- The severe provisions on abduction and enslavement and the flexibility one sees with regard to adultery, concubine and illicit damage to property by stray animals of others are reflections of the changing modes of life of Ethiopia. In the words of the drafter while enacting the Penal Code : *"...the Ethiopian legislator has made every effort to construct a complete edifice, one maison nouvelle... where one can find order and peace security and progress, united in a single wh*
- ✓ The historical objective behind the enactment of the Penal Code of 1957 was to let it serve as a unifying force and as a machinery to enhance future development of the country the Penal Code of Ethiopia was promulgated on July 23, 1957 and came into force on May 5, 1958, and was in force until May 8th 2005.

E. The 1974 Revolution and Criminal Law:

- ✓ Following the 1974 revolution, a "revolutionary" system of neighborhood justice emerged.
- ✓ It was difficult to distinguish between criminal acts and political offenses according to the definitions adopted in post-1974 revisions of the Penal Code.
- ✓ In November 1974, a proclamation which introduced Martial Law, was introduced. The martial law set up a system of military tribunals empowered to impose the death penalty or long prison terms for several political offenses. The Proclamation applied the law retroactively to the old regime's officials. The revolutionary government these officials responsibility for famine deaths, corruption, and mal-administration. Special three-member military tribunals sat in Addis Ababa and in each of the country's fourteen administrative regions.
- ✓ In July 1976, the government amended the Penal Code of 1957 to institute the death penalty for "anti-revolutionary activities" and "economic crimes". Investigation of political crimes came under the overall direction of the Revolutionary Operations Coordinating Committee in each *awraja*. In political cases, the courts waived search warrants required by the Criminal

Procedure Code. The government transferred jurisdiction from the military tribunals to *kebele* and peasant association tribunals. Political trials constituted the main business of these tribunals until 1978.

- ✓ Generally, the 1976 revision of the Penal Code empowered association tribunals to deal with criminal offenses.
- ✓ The revision limited the jurisdiction of association tribunals to their urban neighborhood or rural area.
- ✓ Elected magistrates, without formal legal training, conducted criminal trials. Procedures, precedents, and punishments varied widely from tribunal to tribunal, depending on the imperatives of the association involved.
- ✓ Peasant association tribunals accepted appeals at the Wereda (district) level. Appellate decisions were final. But decisions disputed between associations could be brought before peasant association courts at the Awraja level. In cities, Kebele tribunals were similarly organized in a three-tier system. Change of venue was arranged if a defendant committed an offense in another jurisdiction.
- ✓ The judicial system was designed to be flexible. Magistrates could decide not to hear a case if the defendant pleaded guilty to minor charges and made a public apology. Nonetheless, torture was sometimes used to compel suspects and witnesses to testify. Penalties imposed at the local association level included fines of up to 300 birr. The tribunals could determine the amount of compensation to be paid to victims. The tribunals could impose imprisonment for up to three months and hard labor for up to fifteen days.
- ✓ Association tribunals at the Awraja or Wereda level handled serious criminal cases. These tribunals were qualified to hand down higher sentences. Tribunal decisions were implemented through an association's public safety committee and were enforced by the local People's Protection Brigade. Without effective review of their actions, tribunals were known to order indefinite jailing.
- ✓ The 1976 Special Penal Code, which was further elaborated in 1981, created new categories of so-called economic crimes. The list included hoarding, overcharging, and interfering with the distribution of consumer commodities. More serious offenses involved: engaging in sabotage

at the work place or of agricultural production, conspiring to confuse work force members, and destroying vehicles and public property. Security sections of the Revolutionary Operations Coordinating Committee investigated economic crimes at the Awraja level and enforced land reform provisions through the peasant associations. These committees were empowered to charge suspects and held them for trial before local tribunals. Penalties could entail confiscation of property, a long prison term, or a death sentence.

F. Special Penal Code of 1981:

- ✓ This amended Code included offenses against the government and the head of state, such as crimes against the state's independence and territorial integrity, armed uprising, and commission of "counterrevolutionary" acts.
- ✓ It also included breach of trust by public officials and economic offenses, grain hoarding, illegal currency transactions, and corruption; and abuse of authority, including "improper or brutal" treatment of a prisoner, unlawful detention of a prisoner, and creating or failing to control famine.
- ✓ It also abolished the Special Military Courts.
- ✓ The Code created new Special Courts to try offenses under the Amended Special Penal Code. Special Courts consisted of three civilian judges and applied the existing Criminal and Civil Procedure Codes. Defendants had the right to legal representation and to appeal to a Special Appeal Court.

The Criminal Code of the Federal Democratic Republic of Ethiopia, 2005 Proclamation No. 414/ 2004

- ✓ The factors that necessitated the revision of the Penal Law of Ethiopia are as follows:

1. To Incorporate the Modern Legal Concepts:

Since the 1957 Penal Code came into enforcement, several radical political, economic and social changes have taken place in Ethiopia. Among the factors that brought the changes, recognition of modern legal concepts by the Constitution and the international agreements ratified by Ethiopia were the major. The important phenomena that have been recognized in the Country in the recent past are:

- The equality between religions, nations, nationalities and peoples,

- The democratic rights and freedoms of citizens and residents,
- The Human rights,
- The rights of social groups like women and Children.

2. **To Fill in the Lacunae:** The 1957 Penal Code fails to properly address some of the criminal behavior arising out of advances in technology, the complexities of modern life as well as sufferings caused by reason of harmful traditional practices. Some such areas are:

- The High Jacking of aircraft,
- Money laundering,
- Crimes related to corruption and drugs,
- Grave injuries and sufferings caused to women and children by reason of harmful traditional practices.

✓ It is true that the Constitution guarantees respect for the cultures of peoples, surely it does not intend to support those practices which are scientifically proved to be harmful. It is the responsibility of the legislature, by adopting progressive legislations, to educate and guide the public to discontinue such harmful traditional practices.

3. **To Adopt a Comprehensive Criminal Code:** It is desirable to adopt a comprehensive Criminal Code by putting together various Criminal provisions in the Negarit Gazeta in a disintegrated manner. Similarly, since the parallel application of the regular Penal Code, 1957 and the Revised Special Penal Code of the Provisional Military Administration Council 1982 (Proclamation No. 214/1982), in respect of similar matters disregards equality among citizens. The Comprehensive Criminal Code, 2005 is intended to put an end to such practice.

4. **Punishments for Certain Offences Increased:** On the basis of public opinion taken during discussions on the draft Criminal Code, punishments in respect of crimes like rape and aggravated theft have been increased.

5. **Matters Concerning the Determination of Sentence Revised:** Since it is essential to facilitate the method by which the courts can pass similar punishments on similar cases, some major changes have been made in the provisions of the Code. Provisions of the Penal Code that used to make sentencing complicated and difficult have been amended. Provisions have been inserted which enables the courts to pass

the appropriate penalty for each case by carefully examining from the lightest to the severe most punishment. A provision (Art. 88/4) has been introduced requiring the Federal Supreme Court to issue sentencing manual to ensure and control the correctness and uniformity of sentencing.

6. **Purpose of Criminal Law and Objectives of Punishment Redefined:** Another important point in respect of the determination of sentence is that, the purpose of Criminal Law is to preserve the peace and security by preventing the commission of crimes and a major means of preventing the commission of crime is punishment. Punishment can deter wrongdoers from committing other crimes; it can also serve as a warning to prospective wrongdoers. Although imprisonment and death are enforced in respect to certain crimes the main objective is to prevent wrongdoers temporarily or permanently from committing further crimes against society. And in such cases with the exception of the death sentence even criminals sentenced to life imprisonment can be released on parole before serving the whole term. In certain instances, convicts can be released on probation without enforcement of the sentence pronounced. This helps wrongdoers to lead a peaceful life and it indicates the major place which the Criminal Law has allocated for their rehabilitation. The fact that wrongdoers, instead of being made to suffer while in prison, take vocational training and participate in academic education, which would benefit them upon their release, reaffirms the great concern envisaged by the Criminal Code about the reform of criminals. These express provisions in the new Code are included with intention that the Courts should, on passing sentence, take into account the purpose of the Criminal Law and the different aims of punishment.

Scheme of the Criminal Code of FDRE, 2005:

✓ The Criminal Code of 2005 has incorporated the Ethiopian Criminal law systematically, coherently and comprehensively. The Code is organized into three main parts.

Relation between General and Special Parts of the Code:

✓ The '**General Part**' of the Criminal Code sets out the general principles of liability which are common to all serious crimes. This part explains

what is meant by a criminal intention, negligence, imprisonment, probation and the like.

✓ The '**Special Part**' describes the various acts which are deemed to be 'criminal' and lays down the penalties applicable to them. It defines the essential elements of each crime such as murder, theft, robbery etc, and prescribes appropriate punishments for each of such crimes. However, the said penalties cannot be ordered unless the conditions prescribed by the General Part with respect to liability to punishment are fulfilled. In other words, the Special Part does not operate by itself but has to be considered together with the General Part. This means, a person who behaves in a manner contrary to provisions of the Special Part is not automatically punishable. He shall be punishable only where his conduct is found guilty in accordance with the general principles of criminal liability laid down in the General Part of the Code.

✓ Furthermore, even after the liability to punishment is established, mechanical imposition of sentence is not what is expected of a Judge, simply by referring to the punishment mentioned in the pertinent article of the Special Part. Those who administer justice are in fact dealing with 'criminals' rather than 'crimes' with 'human beings' rather than with 'cases'. They are expected to individualize their decisions. To this end, they must bear in mind the provisions of the General Part; since these provisions, more than those of Special Part, will enable them to arrive at a decision truly reflecting the circumstances of each individual case.

✓ Moreover, as any action taken under the law must serve the purposes of law, those who administer justice will have to satisfy themselves that their decisions are really capable of achieving these purposes as defined in the General Part. In other words "**punishments have to be tailor-made**" for each and every criminal having regard to his personal circumstances and other relevant matters in order to bring him back to the society as a law abiding citizen.

Classification of Crimes under the Criminal Code

1. **Classification based on the "Seriousness of the Crimes":**

- ✓ Crimes are generally classified into different categories according to varying degrees of seriousness. For example, English Law classifies offences into treason, felony and misdemeanors.
 - ✓ Anything done in the nature of an attempt to displace the governing body is classed as **Treason**. This crime finds its place in the penal codes of every country 'as a crime against the state'.
 - ✓ **Felony** is a serious criminal offence punishable by at least one year imprisonment.
 - ✓ **"Misdemeanor"** is a criminal offence which is less serious than a felony, and is usually punishable by no more than a year in a country jail, and /or a fine, restitution or some other minor penalty. These include all offences which are not felonies and treasons.
 - ✓ The Criminal Code of FDRE has not adopted such a 'tripartite' distinction but simply classifies crimes into various titles **on the basis of content** rather than on the scale of punishment. Although an explicit distinction is not made between crimes, the range of punishment implies the gravity of crimes.
 - ✓ "Crimes of very grave nature" are punishable with 'rigorous imprisonment' in Central Prisons for a period of one to twenty five years (Art.108). "A crime of not very serious nature" may subject to special provisions that may face 'simple imprisonment' for a term of ten days to three years (Art. 106), subject to Special provisions that may extend the period beyond three years. "Petty offences" on the other hand, are punishable with fine or arrest for a relatively shorter period of one day to three months (Art .747), subject to certain aggravating exceptions (Art.767-769).
 - ✓ The three variations in the deprivation of liberty , namely, 'rigorous imprisonment', 'simple imprisonment' and 'arrest' apparently denote a *de facto* classification into 'very serious crimes', 'not very serious crimes, and 'petty offences'.
- 2. Classification Based On the "Subject Matter" Of The Crime:**
- ✓ The object of the criminal law is to protect the "interests" of the state, the community and the interests of the individual in order to ensure peace and security .Therefore, crimes against such interests are kept under various Titles. The classification mainly makes distinction between "crimes" in Part II (special part) of the Code and

'Petty offences' embodied in Part III of the Code entitled 'The Code of Petty Offences. Further, the Special Part of the Code organizes the various interests to be protected in the following order:

- **Interests of the 'State':** Crimes against state or against National or international interests, Arts. 237-374.
- **Interests of the 'Community':** Crimes against the Public Interests or the Community Arts.378 – 537.
- **Interests of the 'Individual':** Crimes against the individuals and the Family Arts.538-733.

The Petty Offences: A 'petty offence' is an infringement of a mandatory or prohibitory provision of a law or regulation issued by a competent authority or a minor offence which is not punishable under the Criminal Law. Such acts or omissions are made punishable under the Petty Code.

The policy underlying the classification of crimes under the Criminal Code of FDRE, 2005, can be better understood from the following observation made by the drafter of the 1957 Penal Code Prof. Jean Graven in this regard... "... abandoning the famous 'tripartite division' of the offences according to their supposedly different natures into felonies, misdemeanors and petty offences, the new Ethiopian law has deliberately enthroned the identity of the nature of the offences retained in the Penal Code, all of them simply called "offences", and the unity of all general principles, which are applicable to them. On the other hand, it has detached from them the minor, formal and petty offences, which form the subject matter of the Code of Petty Offences. Here the natural distinction between evidently different fields is instantly perceptible..."

UNIT -II: BASIC PRINCIPLES OF CRIMINAL LAW

- ✓ A person accused of a crime is put under the peril of his life and liberty. Therefore, it becomes necessary that certain safeguards should be provided to the accused. These protections are almost common to all civilized legal systems of the world including that of ours. Most of these principles are enshrined in the Constitutions and International Conventions. The most important of such principles embodied in the Criminal law, specifically, are the following:
 - The Principle of Legality
 - The Principle of Equality

- The Principle of Individual Autonomy

The **principle of legality** requires that prosecutions and punishments for crimes should be strictly in accordance with a pre-existing legal provision. A person cannot be made criminally responsible for producing a harmful consequence if such harm is not declared as a prohibited one by legal classification. The principle also requires that wrong-doers should be punished strictly within the prescriptions of law. A person cannot be made criminally responsible for producing a harmful consequence if such harm is not declared as a prohibited one by legal classification. The principle also requires that wrong-doers should be punished strictly within the prescriptions of law. There should not be any discrimination in the application of Criminal Laws. The other important principle that is discussed under this unit is the **principle of equality** which requires that all those who violate the law should be dealt with equally in terms of trial and punishment. There should not be any discrimination in the application of Criminal Laws.

Section 1: The Principle of Legality A Brief History of the Principle

- ✓ Nullum crimen, nulla poena sine praevia lege poenali (Latin, No crime (can be committed), no punishment (can be imposed) without (having been prescribed by) a previous penal law) is a basic maxim in continental European legal thinking.
- ✓ This maxim states that there can be no crime committed, and no punishment meted out, without a violation of penal law as it existed at the time. Another consequence of this principle is that only those penalties that had already been established for the offence in the time when it was committed can be imposed.
- ✓ This principle first became prominent at the time of the French Revolution towards the end of the eighteenth century. A statement of the principle was included in 'the French Declaration of the Rights of Man'.
- ✓ Then, as in Ethiopia today, the principle was viewed as one of political rights, as a protection of the citizen against his government, more than as a rule of criminal policy only. Under the ancient regime, the pre-Revolution government of France, judges were closely tied to the kings or feudal lords, and were thought to exercise an

arbitrary power to define crimes and punishments in a way which benefited the political power of the ruler. That is, the king and the nobility were able to oppress their enemies and use the criminal law as an instrument of politics through the capacity of their judges to invent crimes and punishments as the need arose. The judges had a tool for repression and arbitrariness which apparently, they were willing to use. The principle of legality was a specific reaction against this repressive device, intended to end its use by requiring the government to announce in advance the rules of conduct it would enforce by criminal law.

- ✓ The *principle of legality* is that, '*there is no crime or punishment without a pre-existing law that prohibits that crime*'. Thus, the conduct must be deemed a crime before the act is committed.
- ✓ The policy behind the principle of legality is that "fair warning" should be provided to a criminal so that he does not inadvertently commit a crime that he has no reason to believe is illegal. There is no deterrence value in having unwritten crimes because people do not know what actions to avoid. Also, it is not morally culpable to do an act that a person reasonably believes is not illegal. Lastly, it would be unconstitutional under the *ex post facto* clause to do so. The rule of *lenity* is a corollary to the principle of legality - it follows naturally from it. The rule of lenity requires that all ambiguities in statutory language be resolved in the defendant's favor. The policy reasons are the same as the rule of legality. Also, the rule of lenity encourages the legislature to write more clear statutes.
- ✓ "***Nullum crimen sine lege, nulla poena sine lege***", is an important principle of Criminal law that has been inherited from the Roman Law. This Latin expression means that "*there must be no crime or punishment except in accordance with fixed predetermined law*".
- ✓ **Art. 2 of the Ethiopian Penal Code** incorporate this principle. The principle, according to this provision, has three important ingredients:
 - "***Nullum crimen sine lege***" - No crime unless specified by law, (Art. 2/1):
- ✓ "There are no offences other than those which are expressly provided by law".
- ✓ Criminal Law' within the meaning of Art.2 is not only the Penal Code, but any law duly passed and

published, which contains penal Provisions. Thus, no person may be deemed to have been committed an offence if his act is not in violation of 'Criminal Law' in force at the time of its commission, at the place where the act is performed.

- ✓ The principle "Nullum crimen" conveys four different rules, namely: **certainty in legislation, accessibility of the law, rule of strict construction and non retroactivity of criminal law.**

1. Certainty in Legislation: 'Nullum crimen', is an injunction to the legislature not to draw its statutes in such broad general terms that almost anybody can be brought within them at the whim of the prosecuting authority and the judge. Penal law should be sufficiently definite for those to be affected by it. People must know their duty and be precisely aware about the prohibition created by law. This is possible only when the law is certain and definite. People can then regulate their conduct and behavior in order to avoid the hazard of falling within the grips of the penal provisions of laws. Certainty in legislation does not only mean that crimes should be created by law but it also means that a prohibition must also be drafted in *clear, certain and unambiguous language*

2. Accessibility of the law: The Penal law must be accessible and intelligible because it is addressed to people in society who are bound to obey it on pain of punishment. Thus, almost in every country penal law is enacted. But even such penal law is subject to authoritative interpretation. There is no branch of law of which it can be claimed with such assured conviction that it should be certain and knowable as criminal law. It is notoriously contrary to fact that everyone knows the law, but it is very important that he should be able to ascertain it. Whatever may be the form of law it must be properly publicized then only it can be said to be duly promulgated.

3. Rule of strict Construction: The rule is that, 'Penal statutes must be constructed strictly'. Since all penal laws affect the liberty of the subject, they have to be constructed strictly. The rule implies the following things:

- i) That in the trial of an accused, the court must see that the act or omission charged as a crime is within the plain meaning of the

words used in the provision making that act or omission a crime.

The court must not strain the words used in defining a crime on any account; such as to provide for an omission (i.e., *casus omissus*) or a slip nor can the court extend the meaning of Criminal Statutes by construction. Nothing can be regarded as being within the meaning of the statute which is not within the letter.

Full effect is to be given to every word used in the statute. The degree of strictness applied in the construction of a penal statute depends to a great extent on the severity of the statute.

Strict construction in relation to penal statutes requires that "no case shall fall within a penal statute which does not satisfy all the elements of the crime as defined by the statute."

The rule requires that where the ambiguous language of a statute leaves a reasonable doubt about its meaning and scope, the benefit must go in favor of the accused.

The rule of strict construction applies to penal statutes because the charge of crime endangers the life and liberty of the person charged.

- **'nullum Crimen' prohibits analogical extension of Penal statutes:** To give further effect to this principle, there is a "prohibition of analogy" inserted by Art 2/3, which states - "The court may not create crimes by analogy". This means courts are not free to punish an act on the basis of similarity in its evil nature to that of a punishable act. For example, a nurse who is under a "legal duty" (professional duty) to give medicine meticulously according to the doctor's prescriptions to a terminally ill patient, omits to do her duty properly and thereby brings about the death of the patient, may be made responsible for the consequences of her criminal negligence (Art. 543/2 r/w Art. 59 of Criminal Code). Whereas, on an analogy, an expert swimmer who fails to save a child drowning in a river in front of his eyes may not be made liable under any of the provisions of the Criminal Code, for his conduct amounts only to an omission of "a moral duty". The principle of legality requires 'a legal provision specifically forbidding the conduct' in question to attach criminal liability.

- **Principle of Strict Interpretation (Art. 2/4)**
The duty not to depart from what the law prescribes for the purpose of creating new crimes does not preclude courts from interpreting the law if this is found necessary. As long as the courts take due precaution not to create crimes by analogy, they are empowered by Art 2/4 to interpret the law in cases of doubt. However, this provision sets out specific conditions to ensure that they do not misuse such power; for not every legal provision is open to construction, nor should construction take place in disregard of certain basic rules. Therefore, interpretation may be considered only in legitimate instances such as the following:

- a) In cases of ambiguity (unclear) of the law, i.e. when the law contains provisions which are on the face of them inconsistent (contradictory), or,
- b) Where, by reason of the language used, a provision is of such an uncertain or obscure meaning that its true sense is doubtful.

Where a doubt arises as to the meaning or the scope of the legal provision, according to **Graven**, the court which interprets such provision must have regard to "the meaning intended by the legislature". To this end, he proposes the following two methods of interpretation:

- a) **Grammatical or logical interpretation**, in which the meaning is sought *from within the text* of the law, or
- b) **Historical interpretation**, in this method the meaning may be sought *from without the text* of the law.

In either of the cases, the court should bear in mind the general purposes of the law as defined in Art 1 and the particular purposes of the provision calling for interpretation. To locate the sources of external help as historical interpretation suggests, it is worthwhile to refer to the article written by Prof. George Krzeczunowicz entitled "**Statutory Interpretation in Ethiopia**". He enumerates three kinds of interpretation, namely **doctrinal**, **judicial** and **legislative**. **Doctrinal** (academic) interpretation may be persuasive, but not authoritative and binding, **Legislative** interpretation, which means subsequent legislations that have been made to remove ambiguities and inconsistencies, are conclusive and relatively explicit. **Judicial** interpretation occurs in due course of court

'judgments' over cases. In a civil law country, these interpretations also have persuasive value only. However, it has legal authority in the case concerned, and if settled, i.e., customary, it has at least factual authority over like cases in future. But now that the new policy is to adopt the system of precedent, these interpretations can be authoritative too. Although Prof. George Krzeczunowicz, in his article, mainly deals with interpretation of Civil law; his points are equally relevant to Criminal Law. His article emphasizes on the principle of prohibition of analogy in Criminal law wherever the law is silent, and states the rules to be followed in the interpretation of such *lacunae*:

1. When the law is ambiguous "word meaning" should be interpreted through over all contexts (e.g. Art. 1734 ECC). The specific meaning of the general terms shall be taken in relation to the matter in the context (Art. 1735).

2. *The rule of positive interpretation* lays down that 'provisions capable of two meanings' shall be given a meaning to render them effective rather than a meaning which would render them ineffective (Art. 1737 ECC). However, it has to be noted that the rule of positive interpretation in relation to criminal law, should in no way be construed to the disadvantage of the accused in cases of ambiguity. **Philippe Graven** states, in this connection that, "(W)hen the rules of construction have failed to remove the ambiguity, obscurity or uncertainty of the law ... the doubt must be resolved in favor of the accused". In short, if a legal provision is so drawn as to make it really difficult to say what was intended and what facts come within it, the benefit of obscurity should be given to the accused person.

3. Where a provision is neither clear nor fully explained by the context, the judge should examine what the legislature had in mind. This means that, a statute is to be interpreted so as to put upon the language of the legislature honestly and faithfully, its plain and rational meaning and to promote the object of the statute.

4. Where two or more laws of different ranks are contradictory or inconsistent, a higher law prevails over the lower. For example the Constitution prevails over statutory laws, and statutes (proclamations) supersede executive ordinances (e.g. Regulations).

5. If laws of the same rank contradict.

- Posterior law prevails over prior law,

- Special law prevails over general law,

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

4. Non-retroactivity of Criminal law Arts. 6-10 The History of The Principle Of Non-Retroactivity:

✓ The principle that people should be free from retroactive law has its roots in another principle: that there is no crime or punishment except in accordance with law. According to Williams (year), this principle was first formulated in Article 8 of the French Declaration of the Rights of Man of 1789, which reappeared in the French Constitution of 1791, and remains in the French Code Pénal. It became part of the Bavarian Code in 1813, when Feuerbach formulated the Latin maxim ***nullum crimen sine lege, nulla poena sine lege***. It headed the German Penal Code of 1871 and was guaranteed by the Weimar Constitution. It is clear that the principle had wide acceptance in Europe by the end of the nineteenth century.

✓ From the *nullum crimen* maxim, jurists have deduced the principle of prohibition of retrospective penal laws. As early as 1651, Hobbes wrote: "*No law, made after a fact done, can make it a crime ... For before the law, there is no transgression of the law*".

✓ This principle was stated in 1789 in Article 1, section 9(3) of the American Constitution which prohibited ex post facto laws. Article 7 of the European Convention on Human Rights provides that no one shall be held guilty of a penal offence made so retrospectively. Article 7 includes the important proviso that it: ... shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilized nations.

✓ Article 15 of the International Covenant on Civil and Political Rights states, inter alia: "*No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or*

international law, at the time when it was committed”.

- ✓ In 1985, the unsuccessful Australian Bill of Rights Bill included a proposed Article 28 which provided, inter alia: “No person shall be convicted of any criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it occurred”.

❖ **Ethiopian Constitution on the Principle: Art 22/2 of the Constitution**

- ✓ The concept of non-retroactivity has been incorporated in the Constitution of Ethiopia under article 22(2) which reads: “**Notwithstanding the provisions of sub Article 1 of this Article, a law promulgated subsequent to the commission of the offence shall apply if it is advantageous to the accused or convicted person.**”
- ✓ The rule of ‘**nullum crimen**’ is that ‘no person shall be punished except in pursuance of a statute which fixes a penalty for a criminal conduct. It means there can be no *ex-post facto* Criminal law or in other words, the Criminal laws should not have retrospective operation. (Art 5 of Criminal Code). It would be unjust that:
 - What was legal when done should be subsequently held criminal,
 - What was punishable by a certain sanction when committed should later on be punished more severely,
 - That procedure changes to the serious disadvantage of an accused and should be applied retrospectively.
- ✓ Art 5 of the Criminal code lays down three important rules relating to the applicability of law in respect of a crime committed before the coming into force of the new Code.
 - As per the Sub-Art. (1) , if the crime in question is one which is declared a crime under both the old and new Codes the crime shall be tried in accordance with the old Code. Because it is the old Code that he violated and obviously he cannot violate the new Code which was not in existence at the time of its commission.
 - Under the Sub-Art. (2), if the said act is declared crime only under the new Code and not under the new Code such an act is not punishable, since there was no violation of law when it was committed.
 - The Sub-Art. (3), says that if the act is a crime under the old Code only and not under the new

Code , any proceedings instituted in respect of such an act shall be discontinued , since now it ceases to be a crime.

➤ **Application of the More Favorable Law Art. 6**

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

➤ **Application as to Measures. Art. 7**

In passing the sentence on the crimes committed under the repealed law, the Court shall apply the measures prescribed under this Code. This is to give effect to the new measures which are, obviously, adopted to be more effective to achieve the purpose of the Criminal Law.

✓ Article 8 provides that the periods of limitation in relation to the crimes committed under the old law shall be determined according to the new Code. And the rules of enforcement of judgments in such cases are laid down in Art. 9. “*No law, made after a fact is done can make it a crime for before the law there is no transgression of law*”.

✓ Application of ex-post facto law in the criminal field is prohibited in French, German, American and many other Constitutions. Art. 11(2) of the Universal Declaration of Human Rights incorporate this principle. This was also inserted in Art. 7 of the European Convention on Human Rights, though with an important rider that punishment is allowed for acts that are criminal according to the general principles of law recognized by Civilized Nations.(Art.22 of the FDRE Constitution)

❖ **‘nulla poena sine praevia lege poenali’ (no punishment (can be imposed) without (having been prescribed by) a previous penal law)**

✓ Not only the existence of the crime depends on there being a previous legal provision declaring it to be a penal offense (*nullum crimen sine praevia lege*), but also, for a specific penalty to be imposed in a certain case, it is also necessary that the penal legislation in force at the time when the crime was committed ranked the

penalty to be imposed as one of the possible sanctions to that crime (*nulla poena sine praevia lege*). Thus, the second ingredient of the principle of legality is that a person who has committed a crime may not be subjected to a punishment other than that which is provided for by law in respect of the crime committed. A court may make with regard to a convicted person only such order as he knew or should have known would be made. Therefore, with due respect to aggravating circumstances, a court cannot at its discretion impose a sentence beyond the range of punishment stated in the law.

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

✓ By virtue of Art.2, sub-Article 5, a person cannot be “tried or punished twice for the same act”. According to Art 2 of the Criminal Code of 2005, this is the third component of the principle of legality. This principle forbids **double jeopardy**, as enshrined in Art 23 of our Constitution.

✓ The doctrine of double jeopardy means that **no person can be tried or punished more than once for the same crime**. This is an important principle of the administration of criminal justice. The rule is contained in the common law maxim “*autrefois acquit and autrefois convict*” which means “the previous acquittal or previous conviction may be pleaded by the accused as a bar to the subsequent trial”. These rules or pleas are based on the principle that “a man may not be put twice in jeopardy for the same crime”. The basic rule here is that ‘a person who has been tried by a court of competent jurisdiction for a crime and convicted or acquitted of such crime shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same crime’.

✓ Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, **is final as to the matter so adjudicated upon** and may be pleaded in bar to any subsequent prosecution for the same crime.

✓ Double jeopardy allows for protection against three main legal abuses. The **first**, double jeopardy protects against is **a second prosecution for the same crime after**

acquittal. Double jeopardy also protects **against a second prosecution for the same crime after conviction** and also for **multiple punishments for the same crime.**

- ✓ A single sentence may embody more than one items of punishment (e.g. Imprisonment and payment of fine). Where the law prescribes that a person who commits a given crime may be punished with five years rigorous imprisonment and fine and must in addition be deprived of his political rights, the criminal who commits the said crime may be sentenced to these three different penalties, and he may not allege that he is being punished more than once. They are the components of a single sentence of punishment. It is true that more than one penalty is inflicted for one crime, but this does not amount to punishing the criminal twice within the meaning of Art. 2, for nothing in this Article precludes various punishments being combined or cumulated in the manner and within the limits provided for by law so as to achieve the various purposes of criminal law.
- ✓ If punishments are for different crimes then there is no double jeopardy protection. Double jeopardy can be put into effect only in cases where the crimes have same elements. The legal test here is that, whether or not crimes in question can be differentiated based on certain criteria.

Section 2: The Principle of Equality

“All men are equally the children of God and Equal in his sight despite their widely differing Temporal circumstances” ---Harris, ‘The Quest for Equality’ (1960)

- ✓ The principle of equality originated in the process of the development of Roman law.
- ✓ For many years, Romans and non-Romans within the empire were governed under different sets of laws. Roman citizens were governed by ‘*jus civile*’ (Civil Law). The Romans developed a special set of laws called the ‘*jus gentium*’ (law of the nations) to rule the peoples they conquered. They based these laws on principles of justice they believed would applying to all people i.e. worthy of universal application. Such principles are known as ‘natural laws’. Once the Romans started believing in the natural law concept, they recognized that ‘slaves’ had human rights that should be respected. Romans thus began to require that slaves be treated fairly and decently.

- ✓ The belief in natural law also led to the idea that non-Romans within the empire should have the same rights as citizens. Thus, in A.D/212 the Romans granted Roman citizenship to most of the peoples they had conquered except slaves. The ‘*jus civile*’ then became the law of the entire empire.

- ✓ However, the principles of natural law set down in the ‘*jus gentium*’ remained part of Roman law. These principles were important to future generations because they led to the belief in equal rights for all citizens. But hundreds of years passed before people fully developed the principles of equality that were outlined by Romans. Once the principles have been fully developed they contributed to the building of democratic governments in USA, France and many other countries.

Meaning Of the “Equality” Principle:

- ✓ All men are born equal and must be treated equally. Clauses directed against arbitrary discrimination and aiming to ensure equal rights are contained in almost all modern constitutions. These constitutional guarantees of equality take a great number of forms but two of the formulations are most often used. They are:
 - That there should be “Equality before the law” and
 - That “the equal protection of the laws” should not be denied.

1. Equality Before The Law:

- ✓ *Before the law only connotes the equal subjection of all to a common system of law whatever it’s content.*
- ✓ According to Lord Wright, “all persons are equally subject to the law, though the law to which some are subject may be different from the law to which others are subject”. In this sense the concept of equality principally means that there should be no lawlessness but that all should be within the some frame work of laws, whatever the generality or quality of the laws in question.
- ✓ A procedural concept pertaining to the application and enforcement of laws and the operation of the legal system. The formulation equality before the law gives rise to the following derivations:
 - Equality means the denial of any special privilege or status in the sphere of the law’s enforcement by reason of characteristics such as

language, religion, political or other opinion, race, color, sex, and the like,

- That all are subject to the ordinary law of the land as administered by the ordinary law courts.
- That all enjoy equal access to society’s legal tribunals and other dispute resolving agencies.
- That all are entitled to impartiality in the administration of justice.
- That there should be no special privileges in litigation in favor of a particular classes or individuals barring certain lawful and reasonable exceptions.
- That there should be independent tribunals to which all may resort.
- That state and individual before the law should be equal. (Marshall) Officials and others are not exempt from the general duty of obedience to the law resting upon others.
- That law should define any special public powers. Discretionary powers, so necessary today for carrying on modern government, must not be abused.
- That any excess or abuse of authority by the organs of the state and any other wrongful acts on the part of public officers should be under the supervision and subject to the eventual control of the courts or other appropriate law enforcing agencies. The task of superintending their employment falls upon an impartial independent and fearless judiciary.
- That the argument of state necessity can provide no defense to prosecutions for crime or civil actions in respect of legally wrongful acts.
- That among equals the laws should be equal and should be equally administered that is, “like should be treated alike”.

Therefore, the privilege of ‘equality before the law’ is invariably used in a procedural sense, namely that as a rule the laws of the land should be enforced against all impartially and without distinction, that no person or class is above the law or outside it, and that independent tribunals, exist for the vindication of right and the imposition of any relevant penalties.

In the words of Jennings (year), ‘equality before the law’ is ... “the right to sue and be sued, to prosecute and be prosecuted, for the same kind of action, should be the same for all citizens of full age and understanding, and without distinction of race, religion, wealth, social status or political influence”.

The Equal Protection of Laws:

“Equality consists in treating equals, equally and unequal unequally.” --ARISTOTLE.

- ✓ “Equal protection of the law” is a more positive concept implying equality of treatment in equal circumstances. This expression is exclusively associated with written constitutions and embodies guarantees of equal treatment normally applied not only to the procedural enforcement of laws but also to the substantive content of their provisions. In other words, the equal protection of the laws is invariably treated as a substantive constitutional principle, which demands that laws will only be legitimate if they can be described as just and equal. The concept of ‘Equal protection of laws’ leads the following inferences:
 - That all persons in similar circumstances shall be treated alike, both in the privileges conferred and liabilities imposed by the law.
 - That equal law should be applied to all in the same situation. That there should be no discrimination between one person and another. As regards the subject matter of the legislation their position is the same.
 - That the like should be treated alike and not that unlike should be treated alike.
 - That law cannot be uniform and that almost all legislation must make numerous distinctions and classifications between persons, things and situations.
 - That a modern state may adopt political and legal measures and policies in order to promote either a just and fair society, or more specifically, greater equality in advantages, burdens and protections for various classes and sections of its population.
- ✓ Some other themes also associated with the idea of equality are, recognition of the right to vote for all, the abolition of unacceptable forms of political privileges, elimination of racial discrimination, achievement of sexual equality and eradication of other forms of arbitrary social discriminations; the persistent demand for equal opportunity calls for a fairer distribution of wealth and material resources and securing a decent level of living and many other. Therefore, “the expression equal protection of law” requires that all men must be treated alike except when there are relevant differences between them and the person or authority must prove the relevance of

the supposed differences responsible for the distinctions under investigation.

- ✓ “Equality before the law and Equal Protection of the Laws” can be seen in one common dominant idea that is of “EQUAL JUSTICE”.

✓ **Article 4 of the Criminal Code** runs: ***“Criminal law applies to all alike without discrimination as regards persons, social conditions, race, nation, nationality, social origin, colour, sex, language, religion, political or other opinion, property, birth or other status. No difference in treatment of criminals may be made except as provided by this Code, which are derived from immunities sanctioned by Public International law and Constitutional law, or relate to the gravity of the crime or the degree of guilt, the age, circumstances or special personal characteristics of the criminal, and the social danger which he represents”***

- ✓ Precisely, the principle, as applicable to criminal field, means two things:

- a) that all individuals **may claim the same legal protection** if they have been injured by a crime, and
- b) that all persons who have come into conflict with the law must **be treated equally and tried exclusively in accordance with the provisions of the law** they have infringed, regardless of their race, religion, social position or other circumstances of a similar nature which do not affect their degree of guilt.

Exceptions By Virtue Of Recognized Immunities:

- ✓ The principle of equality before the law does not prohibit making certain differences in the treatment of criminals. Art. 4 of the Criminal Code specifically mention three exceptions to the principle of equality:
 - Immunities sanctioned by Public International law,
 - Immunities sanctioned by Constitutional law, and
 - Requirements of individualization of Criminal Justice.

1. Immunities Sanctioned by Public International Law:

- ✓ Art. 4 of the Criminal Code recognizes the existence of immunities as are enjoyed, in

pursuance of Public International law, by certain categories of **foreign officials** who may commit a crime while in Ethiopia.

- ✓ These officials are protected from criminal prosecutions by virtue of the so-called diplomatic immunities founded on international usages of mutual courtesy.

✓ “Persons who partake in the functions which are to a greater or lesser extent of **“diplomatic character”** enjoy the same immunity as the Head of the State which they represent and are for all juridical purposes deemed to be still in their own country and not in the country in which they carry out their official duties”. These persons are, accordingly, considered not to be subject to the laws of the state of residence or sojourn and may, therefore, not be prosecuted and punished in that state.

In fact this is not an absolute immunity, properly speaking, as it is immunity from prosecution in Ethiopia only. Foreign diplomats who violate the laws of Ethiopia are not punishable in Ethiopia under Ethiopian law, but they are naturally liable to prosecution and punishment in their own country under their national law. However, such prosecution may be conditional upon the fulfillment of certain requirements. Normally, if a person enjoying diplomatic immunity grossly offends or misuses his office or does an act detrimental to the country, the remedy is to make a demand of his recall by the sending state, where appropriate action may be taken against him at the discretion of the sovereign whom he represents. The effect of diplomatic immunity is then merely to create an exception to the general principle of the territorial application of the law, as the criminal is not punishable at the place where he committed the crime under the law which he violated (Arts 11(2) of EPC and Art. 39(1) (c) of Criminal Procedure Code.)

Therefore, the diplomatic immunity only raises question of jurisdiction and in no way creates a situation contrary to the principle of equality before the law. The immunities under the principles of International Law extend to the following:

a. Persons Enjoying Diplomatic Immunities:

Art.4 of the Criminal Code does not specify the persons who enjoy diplomatic immunity. Generally speaking, this privilege attaches to the following classes of persons:

b. Foreign Sovereigns:

According to the well established principles of International law foreign sovereigns, ambassadors, diplomatic agents, war-ships of foreign countries are exempted from the liability before municipal (domestic) courts of the state.

It is common understanding between the nations that one sovereign cannot be subjected to the law of the other. One sovereign is in no respect amenable to another. Sovereignty admits no superior; therefore, it would be incompatible with the concept of sovereignty to submit to the jurisdiction of some other sovereign. A sovereign if made subject to the jurisdiction of another it would amount to degrading of the dignity of his nation.

c. Ambassadors and Diplomats:

Ambassadors, their families, secretaries, messengers and servants also enjoy the same immunity as the sovereign or the state which they represent. Their immunity is based on the principle that they, being the representatives of the sovereign or the state which sends them, are admitted up on the faith, to be clothed with same independence of and superiority to all adverse jurisdictions as the sovereign authority that they represent would be. In **Magdalena Steam Navigation Co. vs. Martin (1859 2 E&E 94 at p 111)**, a land mark case, it was held that, 'an ambassador does not owe even a temporary allegiance to the sovereign to whom he is accredited. He is supposed to be still living in his own country'.

For certain purposes, the premises of the foreign missions are not considered as part of this country but as a part of the country which they represent. They enjoy this immunity on mutual basis. Therefore, crimes committed within the premises of the foreign mission cannot be tried by the local courts.

Remedies against the Harmful Conduct of the Diplomats:

- ✓ If a person enjoying diplomatic immunity grossly offends or misuses his office or does an act detrimental to the country, the remedy is to make a demand of his recall by the sending state, where appropriate action may be taken against him at the discretion of the sovereign whom he represents.
- ✓ Such privileges and immunities are also available to the representatives of the United Nations Organization, as well as to the representatives of

other International Organizations. The *Vienna Treaty* and the *Aix-la-Chapelle* bring out the following list of persons who may be granted diplomatic immunity:

- a) Public ministers who, under the treaties of *Vienna* (1815) and *Aix-la-Chapelle* (1818), are divided into ambassadors, legates or nuncios; envoys, ministers and other persons accredited to the Head of the State; ministers resident; *charges d'affairs*;
- b) the family, suite and servants of public ministers, where they are not citizens of the state of residence;
- c) Persons of a quasi-diplomatic character (consuls and consular officers);
- d) Representatives of the United Nations and officers of international organizations when engaged on United Nations or other international business.

In a majority of cases, it is possible to know with precision whether a person is a "diplomat" as most countries maintain a list of these persons.

Whenever a doubt arises as to whether a person who has committed a crime in Ethiopia does or does not enjoy diplomatic immunity, the decision must be made according to:

- a) Such laws or regulations as may have been enacted in the state of which the person concerned is a citizen or, by the international organization which he represents, or
- b) According to international practice.

d. Alien Enemies: Alien enemies for their acts of war shall be dealt with Martial Law. If an alien enemy commits a crime unconnected with war as theft, cheating, etc., they would be triable by the local criminal courts. Troops of foreign nations are also treated under the Martial Law.

e. Foreign Army: When armies of any state are stationed on the land of another state with the consent of the government of that State, they are immune from the jurisdiction of the local criminal courts. This is a well settled international law practice.

Immunities Sanctioned By the Ethiopian Constitution:

- ✓ As the Constitution is the Supreme law of the State, any provision it makes for immunities is binding upon the prosecutors and the courts as regards prosecution and punishment. However, immunities under Constitutional law exist only in the cases provided for by the Constitution.

Therefore, when a doubt arises as to whether or not a person who has committed a crime does or does not enjoy immunity, the decision will be made exclusively in accordance with Constitutional law.

- ✓ Articles, 54 (5) & (6) and 63, of the 1995 Constitution, declare immunities to the 'Members of the House of People's Representatives' and the 'Members of the House of the Federation' respectively. The Members of the Houses of the Federation cannot be arrested or prosecuted without the permission of the House concerned, except in the case of **flagrante delicto**. The effects of such immunities are specified in Arts 39(1) (c) and 130 (2) (e) of the Criminal Procedure Code. It is clear that the immunities granted to these members do not conflict with the principle of equality before the law. Thus, even here it becomes evident that these rules do not provide for any exception to the ordinary provisions of the Criminal Code but only result in creating a temporary immunity from prosecution, and in no case they create an absolute immunity from punishment. The fact that special formal conditions govern the institution or the continuance of the proceedings does not affect the fundamental rule according to which no discriminations may be made among criminals which are based on social conditions only.

Requirements of Individualization of Criminal Justice:

- ✓ In actual operation, Criminal justice is individualized, that is, choices are made in each case, within limits; laws are not automatically applied. Given the nature of the crime problem, the resources available for crime control, and the often conflicting purposes of criminal justice administration, **discretion** in the application of criminal law is inevitable.
- ✓ Art. 88(2) of the Criminal Code, incorporates the fundamental principle that, **'the penalty shall be determined according to the degree of individual guilt'**, having regard to all the circumstances of the case and not only to the material seriousness of the crime. The necessity of individualizing the penalty renders it inevitable that certain differences be made in the treatment of criminals, since the degree of guilt depends on circumstances which may be purely personal to the criminal, such as his age, mental condition or antecedents. These differences do not contradict

the rule of equality before the law so long as they are based on considerations which affect the liability to punishment and criminal guilt of the person concerned. Art. 4 does not mean that all persons who violate the same legal provision are liable to a mathematically identical punishment. For example, a person having committed a theft of 10 bags of 'theft' may be sentenced to 3 months imprisonment while another person having also committed the 'theft' of the same amount of 'theft' may be sentenced to one year imprisonment without the principle of equality being thereby infringed, provided that this difference is justified for reasons pertaining to the guilt of the accused.

Grounds for differential treatment in sentencing:

- ✓ The Criminal Code provides for several considerations to give effect to the principle of individualization. They may relate to:
 - 1) The conditions in which the crime was committed, for instance, at night, by violence etc.,
 - 2) Certain differences may exist among the criminals themselves, even when they have acted in similar conditions. For example, it may not be justified to pass the same sentence on an adult as on a young person or on a first criminal as on a habitual criminal, or on a person who is fully responsible for his acts as on a lunatic.
 - 3) Special situations might arise in which the court would have to deal with persons acting under special duties, e.g. Public servants, members of Armed Forces etc. A misappropriation of public funds cannot be dealt with as an ordinary breach of trust, an insult uttered by a soldier against an officer cannot be dealt with as an ordinary insult.
- ✓ It is understandable that all these circumstances should be taken into consideration wherever they are indicative of the greater or lesser degree of guilt of the criminal. However, in order to ensure that courts do not arbitrarily decide whether or not differences ought to be made which might lead to discrimination contrary to the equality principle, the law itself makes provision for the cases where such differences may or must be made. This is nothing but giving further effect to the principle of legality.

Special Treatment of Women, Young Persons and the Feeble Minded:

✓ The expressions 'special circumstances of the criminal' and 'age of the criminal' used in the second paragraph of Article 4 make room for differential treatment of women, children and the mentally abnormal criminals.

✓ In case of women, the biological factors sometimes pose a serious concern while applying the law uniformly. Thus, Article 119 provides for suspension of death sentence passed on a pregnant woman while she continues to be in that state. Further, Article 120 (1) of the Criminal Code provides for commutation of death sentence passed on a pregnant woman. If at the time of passing of the sentence the woman is with child and the child is born alive, the law takes into consideration of the fact that the mother has to nurse the child and therefore, her sentence of death may be commuted to rigorous imprisonment for life. Another important provision that takes care of women's right to privacy and dignity is Article 110(1), which provides for segregation of prisoners. The prisoners of different sexes shall serve their sentences in different prisons. In case this is not possible the male and female prisoners shall be kept in different sections of the same prison and shall not be allowed to mix with the prisoners of the opposite sex.

✓ The juvenile delinquents and the young criminals are given a special treatment under the Criminal Code due to the fact that this group of criminals is immature in their understanding and that they fall an easy prey for the bad influence of others. It has been universally accepted that the young criminals have to be dealt with sensitivity so that they can be corrected of their bad ways rather than punishing them for their wrongful acts. To achieve this objective more effectively the Criminal Code puts the young criminals under three categories. First, *the infants* i.e. children under the age of '9 years' are deemed to be not criminally responsible and therefore, are not punishable under the Code (Art. 52). The Code suggests that appropriate steps to correct them may be taken by the family, school or guardianship authority. The children between 9 and 15 years fall under the second group who are referred to as '*the young persons*' under Art. 53. Children of this age group are exposed to criminal liability but the Criminal Law deals with them with more care and caution so as to ensure

that they are not put to unnecessary rigor of the punishments designed for the mature individuals. These young criminals are of immature understanding and are vulnerable to the undue influences from other adult criminals, peer pressures, other psychological and emotional problems such as being abandoned by the family or victims of broken families, or even victims of poverty etc. Taking into consideration of the various circumstances in which these tender-aged children could have become involved in criminal activity, the Criminal Code devised special types of treatments that best suit the objectives of correction, reformation and rehabilitation. Thus, Articles 157-168 of the Code prescribe admission into curative institutions, supervised education, reprimand and censure, school or home arrest, admission into corrective institutions as modes of treating the young criminals of 9-15 age groups. The third group of young criminals, as per Art 56 falls between 15 and 18 years. In criminal law 15 years is the age of full responsibility and they can be tried under the ordinary provisions of the Code. However, preference shall be given to their treatment with the special measure designed for the young criminals unless they appear to be incorrigible or of dangerous disposition. Suspension of sentences and probation of criminals are the other strategies that are preferred in cases of first criminals and young criminals.

✓ Feeble minded people are the other group of criminals who deserve special treatment. Articles 48 and 49 lay down the principles relating to the negation of the moral ingredient in the acts committed by them and declare that they are irresponsible and thus they cannot be exposed to criminal liability. However, since they proved to be dangerous by causing harmful results to others they cannot be simply released freely in to the open society. Once their irresponsibility is duly proved in the Court of law the Court orders such appropriate treatment, correction or protection as are provided by Articles 129-131. Directions are given in these provisions for the confinement and treatment of irresponsible criminals.

Section 3. The Principle of Individual Autonomy:

- ✓ To criminalize a certain kind of conduct is to declare that it should not be done, to institute a threat of punishment in order to supply a pragmatic reason for not doing it, and to censure those who nevertheless do it. This use of state power calls for justification...justification by reference to democratic principles, and justification in terms of sufficient reasons for invoking this coercive and censoring machinery against the individual subjects.

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

1. The Factual Element of Autonomy:

- ✓ The *factual element* in autonomy is that *individuals in general have the capacity and sufficient free will to make meaningful choices*. Whether this is true cannot be demonstrated conclusively. Over centuries the *free will* argument has been contradicted by the 'determinist' claim that all human behavior is determined by causes that ultimately each individual cannot control. However, there is a reasonable amount of consensus on the opinion that behavior is not so determined that blame is generally unfair and inappropriate, and yet to accept that, in certain circumstances, behavior may be so strongly determined that the normal presumption of free will may be displaced, for instance, where the individual is overpowered by the threats of another. Similar in many ways is the *principle of alternative possibilities*, according to which an individual may be held responsible for conduct only if he or she could have done otherwise.
- ✓ In support of these approaches is the fact that most of everyday life is conducted on the basis of such beliefs in individual responsibility, and that in the absence of proof of determination we should not abandon those assumptions of free will that pervade so many of our social practices. However, as Hudson (year) has warned: *"the notion of free will that is assumed in ideas of culpability...is a much stronger notion than that usually experienced by the poor and the powerless. That individuals have choices is a basic legal assumption: that circumstances constrain choices is not. Legal reasoning seems*

unable to appreciate the existential view of the world as an arena for acting out free choices is a perspective of the privileged, and that potential for self actualization is far from apparent those whose lives are constricted by material or ideological handicaps."

2. The Normative Element of Autonomy:

- ✓ The second important element of the principle of Autonomy is normative: *that the individuals should be respected and treated as agents capable of choosing their acts and omissions, and that without recognizing individuals as capable of independent agency they could hardly be recognized as moral persons*.
- ✓ The principle of autonomy assigns great importance to liberty and individual rights in any discussion of what the state ought to do in a given situation.
- ✓ A major part the principle's emphasis is that the individuals should be protected from official censure, through the criminal law, unless they can be shown to have chosen the conduct for which they are being held liable.
- ✓ On the other hand, considering the scope of criminalization, this emphasis on individual choice goes against creating offences based on paternalistic grounds. If autonomy is to be respected, the State should leave individuals to decide for themselves and should not take decisions 'in their best interests'.
- ✓ While the principle of autonomy gives welcome strength to the protection of individual interests, it seems less convincing in other respects. The question 'whose autonomy?' must always be asked: the criminal law is often claimed to be neutral, and yet certain form of bias ---such as gender bias---may be evident in the law's assumptions and reasoning. In some of its formulations the principle of autonomy pays little or no attention to the social context of powerlessness in which many have to live. The idea that individuals should be free to choose what to do cannot be sustained without wide ranging qualifications. A developed autonomy-based theory should find a central place for certain collective goals, seen as creating the necessary conditions of maximum autonomy.
- ✓ Thus Joseph Raz argues that: "Three main features characterize the autonomy-based doctrine of freedom. First, its primary concern is the promotion and protection of positive freedom

which is understood as the capacity for autonomy, consisting of the availability if an adequate range of options, and of the mental abilities necessary for an autonomous life. Second, the state has the duty not merely to prevent the denial of freedom, but also to promote it by creating the conditions of autonomy. Third, one may not pursue any goal by means which infringe people's autonomy of the people or the others." This third feature proposes a minimalist approach to the use of the criminal law.

Some Instances which can raise Dilemmas relating to the Principle of Autonomy:

➤ Euthanasia:

▪ Your Body, Your Death, Your Choice?

- ✓ The word euthanasia stems from the Greek words, "*euthanatos*" meaning "good death" and refers to the action of a third party, usually a doctor to deliberately end the life of an individual.
- ✓ The individual must give consent for the procedure, which is known as **voluntary euthanasia**. **Non-voluntary euthanasia** occurs when the individual is unable to ask for the procedure e.g. if s/he is unconscious or otherwise unable to communicate and another person makes the decision on his/her behalf. In such cases the final decision might be based on the previously expressed wishes of the individual e.g. as stated in an advance healthcare directive (living will).
- ✓ **Assisted suicide** refers to the practice of an individual taking his/her own life on the basis of information, guidance and/or medication provided by a third party. For example a doctor might prescribe a lethal dose of medication for an individual, who then administers the medication him/herself.
- ✓ In certain circumstances, treatments may be withheld or withdrawn from a patient because their provision would no longer be deemed to be in the best interest of the patient. For instance, if a treatment is considered futile i.e. it offers a low probability of success or its provision would be overly burdensome on a patient then it may be withheld. Also if a treatment is initiated but becomes a burden on the individual and no longer offers any therapeutic benefit then it may be withdrawn.

▪ The Principle Of Double Effect:

- ✓ While euthanizing a patient, the doctor intends to cause the death of the individual. It is this intention that distinguishes euthanasia from other medical practices, which might also result in an individual's death. For example, if a patient is in severe pain, a doctor may prescribe pain medication, the intention of which is to ease the patient's suffering. However, in some cases the dose of pain medication required to relieve the pain may also be sufficient to end that patient's life. This is known as the **doctrine of double effect** since the treatment provided to ease pain has the additional effect of ending the patient's life.

- **Does an individual have the Right to Choose How and When to Die?**

- ✓ It is generally accepted that as **an expression of autonomy** i.e. one's right to make independent choices without any external influences, a competent adult can refuse medical treatment, even in situations where this could result in his/her death. However, when it comes to actively ending a life via euthanasia there is widespread debate regarding the rights of an individual to make that choice.
- ✓ Proponents argue that euthanasia allows terminally ill people to die with dignity and without pain and state that society should permit people to opt for euthanasia if they so wish. Proponents also state that individuals should be free to dictate the time and place of their own death. Finally, they argue that *forcing people to live against their wishes violates personal freedoms and human rights and that it is immoral to compel people to continue to live with unbearable pain and suffering.*
- ✓ Opponents of euthanasia, on religious grounds, argue that life is a gift from God and that only God has the power to take it away. Others contend that individuals don't get to decide when and how they are born, therefore, they should not be allowed to decide how and when they die. They also raise concerns that allowing euthanasia could lead to an abuse of power where people might be euthanized when they don't actually wish to die.
 - **Euthanasia and the Issue of Limitations to Autonomy:**
- ✓ Few decisions are as important as those related to end of life healthcare. While an individual might want to express his/her autonomy by

deciding to end his/her life, that decision will, in all likelihood, be influenced by the views of third parties i.e. the individual's doctor, family or friends.

- ✓ Proponents of euthanasia argue that the decision to end a life of pain and suffering is an expression of one's right to personal autonomy, which should be respected by one's family, healthcare providers and society at large. However, opponents argue that because we live in an interdependent society, where one's decisions will impact on others physically, emotionally and financially, limits should be placed on personal autonomy in relation to end-of-life healthcare choices. Opponents have raised concerns about the implications legalizing euthanasia would have for society. They state that governments have a duty to protect society as a whole, as opposed to individual citizens and that allowing euthanasia could harm society. Therefore, they argue that governments should balance an individual's right to die against potential negative consequences for the wider community. On the other hand, proponents argue that society is made up of individual citizens, whose rights should be protected and that if euthanasia is properly regulated then the rights of society would not be harmed.

- **Euthanasia and value of Life:**

- ✓ It has been argued that permitting euthanasia could diminish respect for life. Concerns have been raised that allowing euthanasia for terminally ill individuals who request it, could result in a situation where all terminally ill individuals would feel pressurized into availing of euthanasia. There are fears that such individuals might begin to view themselves as a burden on their family, friends and society or as a strain on limited healthcare resources. Opponents of euthanasia also contend that permitting individuals to end their lives may lead to a situation where certain groups within society e.g. the terminally ill, severely disabled individuals or the elderly would be euthanized as a rule. However, proponents of euthanasia argue that legalizing the practice would not devalue life or result in pressure being put on individuals to end their lives but would allow those with no hope of recovery to die with dignity and without unnecessary suffering. They state that it would be imprudent not to implement legislation

because this would drive euthanasia underground where it would be unregulated. Opponents state that suffering assists in forming personal identity and therefore, argue against euthanasia. However proponents argue that there is no value in suffering and state that individuals who have no hope of recovery should not be obliged to suffer unduly.

- **Legalizing Euthanasia a Challenge to the Value of Health Care:**

- ✓ There are fears that allowing euthanasia would encourage the practice to become the norm, as it might be easier and cheaper to provide than other forms of end-of-life healthcare. Palliative care attempts to improve the quality of life for patients facing a life-threatening or life-limiting illness through the prevention and relief of pain and other symptoms, including physical, psychological, social and spiritual problems. However, it has been estimated that in a minority of cases (approximately 5%) an individual pain cannot be eased with palliative drug treatment and concerns have been raised regarding the profound spiritual and psychological suffering experienced by individuals faced with their imminent death. Opponents of euthanasia argue that more resources should be put into palliative care, which allows people to die with dignity and which offers support and comfort to family and friends. Proponents argue, however, that individuals might prefer to die on their own terms and at a time of their choosing and suggest that euthanasia should be offered as a viable alternative for those individuals who are not satisfied with palliative care.

- **The consequential Arguments of Legalized Euthanasia could be Frightening:**

- ✓ While euthanasia is often associated with terminally ill patients, there have been suggestions that voluntary euthanasia might also be relevant to very elderly individuals, individuals with chronic or degenerative illness, individuals with mental health problems and society as a whole. One area of healthcare where euthanasia has been widely debated of late is in the care of severely premature babies. In effect, the same treatment and care decisions apply for extremely premature babies (those born after only 22 - 25 weeks of pregnancy) as with end-of-life care decisions for adults i.e. should treatment be administered or should the baby be allowed to

die. For extremely premature babies, the chances of survival can be very low, and those babies who do survive can show increased incidence of serious and long-lasting health problems. Some would argue that, because of potential future health risks, extremely premature babies should not be made to suffer and argue that under such circumstances euthanasia for babies would be acceptable. On the other hand, opponents state that euthanasia should never be considered in such cases because they believe that all possible treatment should be provided to give severely premature babies every opportunity to survive and potentially live a normal life.

➤ **AIDS and the Law:**

- ✓ The second important instance which raises the question of individual autonomy lies with the legislations coming up all over the world relating to AIDS patients. Those legislations, (Public Health Act, Proclaimed Diseases Regulations, Public Health [Skin Penetration] Regulation, Public Health [Funeral Industries] Regulation, Human Tissue Act, Human Tissue Regulations-New South Wales), for example, have clauses like:
 - Doctors must notify government of AIDS and "AIDS virus" patients.
 - Patients may be compulsorily removed, detained and hospitalized.
 - Criminal offence to have sexual intercourse without disclosure of virus infection or AIDS to partner.
 - Persons with AIDS or associated conditions prohibited from giving or receiving treatment involving skin penetration e.g. tattoo ear-piercing, chiropody etc.
 - Elaborate requirements for wrapping and transport of dead bodies as well as compulsory protective clothing for funeral industry workers.
 - Compulsory certificates by blood and semen donors relating to own health history and sexual activities and health history and sexual activities of donors' present and past sexual partners.
 - Criminal sanctions for false or misleading statements.

➤ **Obligation of the personal income taxpayers to submit so-called proprietary declarations to tax offices:**

- ✓ Such proprietary declarations are, usually, to include all of the most important elements of the taxpayer's property. The individual's right to legal protection of his private life, guaranteed by the Constitution Art. 26, also comprises informational autonomy, meaning that the individual has the right to decide whether to disclose personal information to others and also has the right to review such information where it comes into another's possession

➤ **Principle of Respect for Autonomy:**

- ✓ As commonly understood today, autonomy is the capacity for self-determination.
- ✓ Being autonomous, however, is not the same as being *respected* as an autonomous agent. To respect an autonomous agent is to acknowledge that person's right to take choices and take action based on that person's own values and belief system. On his account, respect involves not only refraining from interfering with others' choices, but sometimes entails providing them with the necessary conditions and opportunities for exercising autonomy.
- ✓ The principle of respect for autonomy implies that one should be free from coercion in deciding to act, and that others are obligated to protect confidentiality, respect privacy, and tell the truth. In the practice of health care, a person's autonomy is exercised through the process of obtaining informed consent. The principle of respect for autonomy, however, *does not* imply that one must cooperate with another's actions in order to respect that individual's autonomy.
- ✓ Autonomy is given a central place or primary status in the prevailing modern liberalism of contemporary society. However, the principle of *respect* for autonomy implies that autonomy has only a *prima facie* standing, that is, it can be overridden by competing moral considerations. For example, if an individual's choices endanger public health, potentially harm others, or require a scarce resource, that individual's autonomy may justifiably be restricted.
- ✓ Respect for autonomy, then, should not be construed as an absolute and foundational value, but a "middle principle" that requires every individual to respect every other individual's self-determination to an appropriate extent within the context of community. A health care institution is a moral community that can be properly

considered as an autonomous agent in its own right.

UNIT-III JURISDICTION OF THE ETHIOPIAN CRIMINAL CODE (Arts 11-22 of the Criminal Code of FDRE, 2005)

- ✓ 'Jurisdiction' refers to particular aspects of the general competence of states often referred to as 'sovereignty'.
- ✓ Jurisdiction is an aspect of sovereignty and refers to judicial, legislative, and administrative competence.
- ✓ The '*prescriptive or legislative jurisdiction*' refers to the power to make decisions or rules. '*The enforcement or prerogative jurisdiction* refers to the power to take executive action in pursuance of or consequent on the making of decision and rules. The starting point in this part of the law is the proposition that, at least as a presumption, jurisdiction is territorial. The discussion which follows concerns the general principles on which municipal (domestic) courts of a country may exercise jurisdiction in respect of acts criminal under the law of the forum, but of course the issue on the international plane is only acute when aliens, or other persons under the diplomatic protection of the state, are involved.
- ✓ 'Jurisdiction', generally, means "the legal competence of a particular court to hear a certain type or class of cases". When it relates to the application of the law as to a place, jurisdiction implies "the geographical area covered by a particular court or legal system".
- ✓ The provisions of the Criminal Code relating to jurisdiction are intended to determine the scope of application of Ethiopian Criminal Law by Ethiopian Courts and to prevent conflicts of jurisdiction. The conflicts of jurisdiction might arise when the courts of two or more places decline to try a crime, or when the courts of two or more places claim to have jurisdiction to try one and the same crime. These conflicts in jurisdiction may be of two kinds:
 1. '**Negative** conflict of Jurisdiction: It may arise when different courts deny the existence of jurisdiction, over the matter in question. In this case there is the possibility of a criminal escaping punishment.
 2. '**Positive** conflict of Jurisdiction: When different courts claim to have jurisdiction on the same crime, there is a risk that the

criminal might be exposed to “double jeopardy”.

- ✓ The conflicts of jurisdiction might arise at different levels:

Conflicts of Jurisdiction at National level: Such conflicts may arise as between Ethiopian Criminal courts, which shall be settled in accordance with Arts 99-107 of the Criminal Procedure Code.

Conflicts of Jurisdiction at International level: These conflicts arise between an Ethiopian court and a foreign court, which can be settled in accordance with Arts 11-22 of the Criminal Code. These provisions are new in Ethiopian legislation, inserted in view of the increase in exchanges and relations of all kinds between Ethiopia and other parts of the world.

Section 1: Fundamental Principles of Application of Jurisdiction:

- **The Principle of Territoriality:** The principle that the courts of the place where the crime is committed may exercise jurisdiction has received universal recognition. This principle has a number of practical advantages, including the convenience of the forum and presumed involvement of the interests of the state where the crime is committed. According to this principle all crimes committed on Ethiopian territory fall within the jurisdiction of Ethiopian Courts (Art. 11);
- **The Principle of Quasi-Territoriality or the Protective or Security Principle:** Nearly all states assume jurisdiction over aliens for acts done abroad which affect the security of the state, a concept which takes in a variety of political crimes, but is not necessarily confined to political acts. Currency, immigration, and economic crimes are frequently punished by the states under this principle. Art. 13 refers to certain specific crimes directed against Ethiopia to be tried in Ethiopia even though they have not been committed on Ethiopian territory
- **The Principle of Active Personality or the Nationality Principle:** Nationality, as a mark of allegiance and aspect of sovereignty, is also generally recognized as a basis for jurisdiction over extra-territorial acts. According to this principle, crimes committed in foreign countries by Ethiopian citizens may be tried in Ethiopia [Arts. 14, 15, (2) and 18 (1)]. Under this principle, a person becomes amenable to the jurisdiction of the country by his nationality. The application of

the principle may be extended by reliance on the residence and other connections as evidence of allegiance owed by aliens and also by ignoring changes of nationality. On the other hand, since the territorial and nationality principles and the incidence of dual nationality create parallel jurisdictions and the possible double jeopardy, many states place limitations on the nationality principle and are often confined to serious crimes. In any event, nationality provides a necessary criterion in such cases as the commission of criminal acts in locations such as Antarctica, where ‘territorial’ criterion is inappropriate.

➤ **The Principle of Passive Personality or the Passive Nationality Principle:** According to this principle, aliens may be punished for acts abroad harmful to the nationals of the forum. This is the least justifiable, as a general principle, of the various bases of the jurisdiction, and in any case certain of its applications fall under the principles of protection and universality considered above. Art. 17(1) of the Criminal Code incorporates this principle according to which some crimes committed in foreign countries against Ethiopian citizens may be tried in Ethiopia.

➤ **The Principle of Universality or the Principle of Universal Jurisdiction:** A considerable number of states have adopted, usually with limitations, a principle allowing jurisdiction over acts of non-nationals where the circumstances, including the nature of crime, justify the repression of some types of crimes as matter of *international public policy*. Instances of common crimes such as murder, where the state in which the crime occurred has refused extradition and is unwilling to try the case itself, and also crimes by stateless persons in areas not subject to the jurisdiction of any state, i.e. *nullius in terra* or *res communis*. Hijacking and crimes related to traffic in narcotics etc. are subject to the universal jurisdiction.

➤ **Crimes Under International Law:**

✓ It is now generally accepted that breaches of the laws of war, and especially of The Hague Convention of 1907 and the Geneva Convention of 1949, may be punished by any state which obtains the custody of persons suspected of responsibility. This is often expressed as an acceptance of the principle of universality, but

this is not strictly correct, since what is punished is the breach of international law; and the case is thus different from the punishment, under the national law, of acts in respect of which international law gives a liberty to all states to punish, but does not itself declare criminal. In so far as the invocation of the principle of universality in cases apart from war crimes and crime against humanity creates misgivings, it may be important to maintain the distinction. Certainly universality in respect of war crimes finds expression in the Geneva Convention of 1949

- ✓ The Ethiopian Criminal Code incorporates this principle in relation to the following cases:
 - a) To try crimes committed against international law (Art. 17)
 - b) To try any other crime of extreme seriousness, whether or not carried out on an international scale (Art. 18(2)), irrespective of the following facts:
 - i. That the crime was not committed on Ethiopian territory,
 - ii. Nor was it done against Ethiopia,
 - iii. Nor was it done by or against one of her citizens.

Application of the Criminal Code as To Place:

The jurisdiction of the Ethiopian Criminal Code may be studied under the following heads:

1. Principal Jurisdiction:

- ✓ The Criminal Courts of Ethiopia are deemed to have principal jurisdiction within the meaning of the code in the cases provided for by Arts. 11, 12, 13, 14 and 15(2). The effect of these courts having principal jurisdiction is that they are entitled to try a criminal even though he may also be or has already been tried in a foreign country for the same offence. The principal jurisdiction of the EPC is applicable both territorially and extra-territorially.

Territorial Application Of The Principal Jurisdiction

➤ **Crimes Committed on Ethiopian Territory: Art.11 ‘Normal Case’**

- ✓ The principle of territoriality is laid down in Art. 11. According to this principle, crimes committed in a given country are triable by the courts and under the laws of such country which are known as ‘territorial laws’ of the country.

- ✓ Thus, within the meaning of Art. 11 when a crime is committed within the territory of Ethiopia, the code shall apply and the courts can try and punish irrespective of the fact that the person who had committed the crime is an Ethiopian national or a foreigner. This is known as

- **The Code Shall apply to “any person”:**

- ✓ The words **any person** under Art. 11 mean and include a citizen of Ethiopia as well as a non-citizen. Any person irrespective of his nationality, rank or religion, is triable by the Ethiopian Criminal Courts provided, the crime with which he is charged has been committed on any part of the Ethiopian territory. Any foreigner who enters the Ethiopian territories accepts the protection of Ethiopian laws, and submits to the operation of the laws and to the jurisdiction of the Ethiopian courts. A foreigner cannot be allowed to plead that he did not know that the act he was doing was wrong because of the act not being a crime in his own country.

- **Exceptions to “any person” Art 11(2):**

- **Ambassadors and Diplomats:** Ambassadors and some other foreign diplomats are protected from the jurisdiction of the courts. They enjoy the same immunity as the sovereign of the state which they represent. Their immunity is based on the principle that they, being representatives of the sovereign or the state which sends them, are admitted upon the faith to be clothed with the same independence of and superiority to all adverse jurisdictions as the sovereign authority that they represent would be. He does not owe even temporary allegiance to the sovereign to whom he is accredited.

- **Premises Occupied By The Foreign Missions:** An **Ambassador** or a **diplomat** is supposed to be still living in his own country. For certain purposes the premises of the foreign missions are not considered as part of this country but as a part of the country which they represent. They enjoy this immunity on mutual basis. This means, Ethiopian Embassies abroad enjoy the same immunity as they are considered as parts of territory of Ethiopia (Art 104 of Criminal Procedure Code). Therefore, crime committed within the premises of the foreign mission stationed in Ethiopia cannot be tried by the local courts. Such privileges and immunities are also available as well to other international organizations and their representatives.

“territorial jurisdiction” because submission to the jurisdiction of the court is by virtue of the crime being committed within the Ethiopian territory. Here the jurisdiction attaches with territory. For the territorial application of jurisdiction three conditions have to be fulfilled:

- **Crimes Punishable under Ethiopian Law:**

- ✓ The principle of legality prohibits Ethiopian Courts from trying a person who does an act which is not declared unlawful by the territorial law of the country. It may so happen that the crime is committed by a ‘foreigner’ and is punishable by the national law of his country. Even then he cannot be punished by Ethiopian courts for having committed the crime on the Ethiopian territory, if the crime is not the one punishable by the Ethiopian national law. Therefore, it follows that for the applicability of Ethiopian territorial jurisdiction it is essential that the act committed must be the one which has been declared as ‘unlawful’ by the Criminal Code of Ethiopia or any other Ethiopian law containing penal provisions.

- **Crimes Committed on the Territory of Ethiopia:**

- ✓ This essential condition may be understood in the light of Art. 25(1) of the Criminal Code. – “A crime is committed at the place where at the time when the criminal performed or failed to perform the act penalized by criminal law. Thus, the courts of Ethiopia have principal jurisdiction when an ‘act’ or ‘omission’ constituting an ingredient of the crime has occurred in Ethiopia, although the consequential harm might have been caused outside Ethiopia.

- **Meaning of Ethiopian ‘National Territory’:** The territorial jurisdiction applies by the fact that the crime was committed on the national territory of Ethiopia. In terms of Art 11 **“The national territory” comprises land, air and bodies of water, the extent of which is determined by the Constitution”.**

- ✓ Within the meaning of this provision, the crime must have been committed in any one of the following places:

- a) **On the “land”:** The land part of Ethiopia can be identified by the provisions of Art. 2 of Constitution of Ethiopia, which states thus, **“The territorial jurisdiction of Ethiopia shall comprise the territory of the members of the Federation and**

1. Crime committed by **any person**,
2. The crime must be punishable under the Ethiopian law
3. The crime must have been **committed on the Ethiopian territory**,

its boundaries shall be determined by international agreements”. The land comprises not only that portion of the earth within the boundaries of Ethiopia, but by virtue of Art 104 of Criminal Procedure Code. The following places are deemed to form part of the Ethiopian territory i.e.:

- a) Ethiopian embassies abroad,
- b) Ships, flying Ethiopian flag, and
- c) Aircrafts flying Ethiopian flag.

b) In the “air”: According to International Conventions of 1919 and 1944, “air” i.e., the atmosphere above the land area of a country forms part of the National Territory of that country.

c) Bodies of Water: Crimes committed in the bodies of water in the territory of Ethiopia and the vessels sailing in such waters are triable by the criminal Courts of Ethiopia.

- **Warships or Men of War:**

- ✓ Men of War of a state on foreign waters are exempted from the jurisdiction of the state within whose territorial jurisdiction they are. There are two theories relating to jurisdiction on ships in territorial waters.

1. A public ship of a nation for all purposes either is or is to be treated by the other nation as part of the territory of the nation to which she belongs.
2. A public ship in foreign waters neither is nor is to be considered as territory of her own nation.

- ✓ In accordance with the principles of International Law certain immunities are accorded to the ships, its crew and its contents by the domestic courts. The immunities can be waived by the country to which the public ship belongs. War ships of a foreign country can enter territorial waters of a state only with the permission of that state.

Crimes by Foreigners on the Ethiopian Territory Art 12 “Special Case”:

- ✓ These cases relate to crimes committed by foreigners on Ethiopian Territory. In fact, by virtue of place of commission of the crime, the original jurisdiction lies with Ethiopian Criminal

Courts. However, certain practical impossibilities might arise if the 'criminal-foreigner' flees and takes refuge in his country of origin. Art 12 deals with such problems:

- **Impossibility to "try" the accused-foreigner in Ethiopia Sub-Art. (1) of Art 12:** If his extradition cannot be obtained in accordance with Art 11(3), the Ethiopian authorities shall request that he be tried in the country of refuge. Thus, the original jurisdiction of Ethiopian courts gets delegated to the Foreign Courts, in relation to a crime committed on Ethiopian territory.
- **Impossibility to 'retry' the accused-foreigner in Ethiopia Sub-Art. (2) of Art.12** This provision gives effect to the rule '*non bis in idem*'. Where the criminal has been tried and sentenced in the country of refuge, Ethiopian courts may not try him again for the same crime, should he subsequently be found in Ethiopia. This rule applies in the following instances:
 - When the criminal has been tried and convicted or acquitted abroad by judgment which has become final, and
 - When the sentence passed abroad has been remitted by pardon or amnesty, or
 - If the prosecution or sentence has been barred by limitation

Therefore, except in cases of discharge, Ethiopia is bound by any decision made abroad since, after she has delegated her jurisdiction to the country of refuge, the authorities, judicial or others, of such country have fully substituted themselves for the corresponding Ethiopian authorities. Any thing done contrary to this would conflict with the doctrine of "double jeopardy".

Resumption of Delegated Jurisdiction:

- ✓ Although Art. 12(2) does not expressly say so, it is clear that Ethiopia retains her principal jurisdiction when a delegation of jurisdiction has been effected but the criminal has nevertheless **not been tried** in the country of refuge. In such a case, if the criminal reappears in Ethiopia, he may be tried by Ethiopian courts under Ethiopian law as though he had never left Ethiopia and as though a delegation had never been made. The only requirement in this case is that the proceedings should not have been barred by limitation.

▪ **"Enforcement" of Punishment in Ethiopia Sub-Art (3) of Art. 12:**

- ✓ Article 12(3) applies to a case where the criminal has been sentenced in the country of refuge but has escaped serving of the sentence either fully or partly. If he comes to Ethiopia without so serving the sentence, the punishment may be enforced in Ethiopia unless barred by limitation on the following conditions:
 1. If the punishment given in the Foreign Court and the one prescribed for the crime under the Criminal Code, differ in nature or form, such punishment as is closest to one that is imposed by the foreign courts shall be enforced.
 2. The criminal cannot be made to serve in Ethiopia a penalty of a kind which does not exist in Ethiopian Law.

Extra-Territorial Application of the Principal Jurisdiction (Arts 13-16):

- ✓ The Ethiopian Criminal Code extends its principal jurisdiction to not only the crimes committed on the territory of Ethiopia but also to certain special kinds of crimes committed outside her territory. Arts 13-16 of the Criminal Code deal with these cases of extra-territorial application of the Criminal Code.
- ✓ If jurisdiction were to be exclusively governed by the principle of territoriality, the national courts of the country would be unable to try crimes which endanger the vital interests of the country, just for the reason that the crimes have been committed outside the territory of the country. Therefore, Art 13 incorporates the so-called **principle of quasi-territoriality** which says that, "when a crime is committed which infringes upon the fundamental rights or interests of a given state, the aggrieved state is entitled to protect itself and to punish the criminal under its own laws even though the crime has been committed in a foreign country and the criminal might already have been tried and sentenced in the other country"
- ✓ The Criminal Code envisages three specific instances that necessitate the extra-territorial application of its jurisdiction:
 1. Crimes committed by any person in a foreign country against interests of Ethiopia, Art. 13,
 2. Crimes committed by an Ethiopian enjoying immunity in a foreign country Art. 14,

3. Crimes committed by a member of Ethiopian Defence Forces in a foreign Country, Art 15 (2).

▪ **Crimes Committed Against Ethiopia Outside Its Territory: Art.13**

- ✓ The principle of quasi-territoriality is applicable only to the specified by Art. 13., namely:
 - ✓ Crimes against the state of Ethiopia, Arts, 238-260
 - ✓ Crimes against Ethiopian currency, Arts, 355-374,
- ✓ For the purposes of prosecution and punishment, the specific crimes mentioned above shall be treated as crimes committed on Ethiopian territory irrespective of the place where they have in fact been committed. Therefore, they may be tried and punished in accordance with the provisions of Arts 11 (territorial jurisdiction) and Art. 16 (effect of foreign sentences). This means Art. 13 operates on the following essentials:
 - o **The criminal must be found in Ethiopia,**
 - o **If he is not found in Ethiopia, his extradition shall be requested in accordance with Art. 11(3)**
 - o **If the requisition for extradition is not granted*,**
- ✓ A delegation of jurisdiction may not be effected and the provisions of Arts. 160-164 (procedures in cases of default) of Criminal Procedure Code shall apply, where appropriate.(Refusal of extradition is possible since many of the crimes referred to in Art. 13 are so-called political crimes which are not extraditable crimes according to international practice.)
- ✓ However, the courts of the place of commission of such crimes retain their power to punish the criminal under their territorial law and the effect of Art. 13 is merely that **Ethiopia has principal jurisdiction concurrently** with the state where the crime was committed.

▪ **"Crimes Committed in a Foreign Country by an Ethiopian Enjoying immunity" Art. 14**

- ✓ Art. 14 provides for another exception to the principle of territoriality, with a view to prevent the miscarriage of justice, when a person may not be tried under "territorial law" being under protection of diplomatic immunities. The

provision applies to the following classes of persons:

- ✓ members of the Ethiopian diplomatic and consular services,
- ✓ Ethiopian officials and agents,
- ✓ Who cannot be prosecuted at the place of commission of the crime by virtue of international principles of immunity. These persons can be brought under this Article, provided the following conditions are fulfilled:
 1. The crime must not be the one covered by Art. 13
 2. The crime must be the one which is punishable under the law of the country where it was committed,
 3. The crime must also be the one punishable under the Ethiopian Criminal Code, and
 4. If the crime falls under the 'category of crimes' which requires filing of 'formal complaint' for the institution of criminal proceedings, either under the foreign law or under the Criminal law of Ethiopia, such "complaint" should have been filed.

"The Crime must be punishable" both under the foreign law and Ethiopian Law:

a) Crime punishable under Ethiopian law but not under foreign law: An Ethiopian diplomat committing a crime contrary to Art 652 of the Criminal Code, in a country where adultery is not punishable may not be charged with the said crime on his return to Ethiopia,

b) Crime punishable under foreign law but not under Ethiopian law: If an Ethiopian diplomat, being a bachelor has sexual intimacy with an adult unmarried female, with her consent, in a country where fornication is declared to be a crime, he may not be charged with the said crime on his return to Ethiopia, since fornication is not penalized in Ethiopia.

Persons enjoying immunity remain subject to their own national law and are expected to regulate their behavior in accordance there with. The principle of legality does not allow him to be punished in Ethiopia if they did not contravene any provision of Ethiopian legislation, although they may have acted in violation of the provisions of a foreign law.

▪ **"Crimes Committed in a Foreign Country by a member of Ethiopian Defense Forces" Art.15:**

✓ Art 15 operates on two different rules:

1. Sub-Art. (1) Does not operate on the extension of principal jurisdiction but only on deriving jurisdiction from the foreign court under certain circumstances that means, under this provision the Ethiopian Courts have **subsidiary jurisdiction only**.
2. Sub-Art. (2) Operates on the principle of active personality like Art. 14 and here the courts have **Principal Jurisdiction**.

Essential Conditions for the application of Art 15:

✓ Art 15 applies only to the members of the Ethiopian Defense Forces. Sometimes even a person enlisted in the Defense Forces may be acting in a different status in the foreign country, for example a **military attaché**, i.e., a person who is employed to help the representative (e.g. ambassador) of one country in another country – is entitled to diplomatic immunity. Thus, the diplomatic status of the criminal overrides his military status and Art, 14 is to be applied.

a) Acting in the capacity of soldier: Art. 15 require that the criminal must have been acting in **the capacity of soldier**. Therefore, if a retired Ethiopian captain commits a crime in a foreign country, Art. 15 is not applicable to him, for he did not commit the crime in a military capacity.

b) In a foreign Country: Article 15 applies only when the crime has been committed in a foreign country. This may occur on occasions of international police action.

Application of Art 15

1) Violations of "Ordinary law" of the Foreign Country:

✓ Sub-Art (1) deals with violations of 'ordinary law' of the Foreign country i.e. crimes of a non-military character or, in other words, a crime that may be committed by anyone, even though he is not a member of the Defense Forces.

✓ Where an Ethiopian soldier commits a crime such as theft or rape, he commits a crime that can just as well be committed by any civilian. The fact that the criminal is wearing a military uniform does not justify treatment different from that of a civilian having committed the same crime. Therefore, any crime under the 'ordinary law', committed by an Ethiopian soldier in a foreign country will be dealt with as though the criminal

was not a member of the Ethiopian Defense Forces. Ethiopia will have subsidiary jurisdiction in these cases under the following circumstances:

- ✓ If the criminal was able to escape and take refuge in Ethiopia prior to being tried in the foreign country, and
- ✓ His extradition is not requested **or** the requisition for extradition is dismissed (Art 21(2)).

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

2) Violations of International law and Military Crimes: Art. 15(2)

✓ Sub- Art (2) of Art. 15, extends the principal jurisdiction of the Criminal Code to cover crimes against International law and military crimes defined in Arts. 269-322, committed by the members of Armed Forces while in abroad. These crimes are covered by the principal jurisdiction not only because they imply unsoldierly behavior, but also in view of safety of the Ethiopian Army and national interests of the country.

▪ **Effect of Foreign Sentences Art. 16:** The concept of 'Principal Jurisdiction' seems to imply that Ethiopian courts may try a criminal even though he has already been tried in a foreign country. So, in all the cases covered by the principal jurisdiction i.e. Arts 11, 13 14 (1) and 15(2) a new trial is possible in Ethiopia, regardless of the fact the criminal might already have been tried for the same crime. This is apparently, contrary to Art. 23 of the Constitution and Art 2(5) of the Criminal Code since the principle of '*non bis in idem*' prohibits not only a person being punished twice for the same crime but also being tried twice. Principal jurisdiction should in fact be taken as involving the *primary right* to prosecute the criminal and probably not that the Ethiopian Courts can try the criminal even after he has been tried, punished or acquitted by the courts abroad.

- **Effect of ‘Discharge’ or ‘Acquittal’ Art. 16(2):** The ‘discharge’ or acquittal’ in a foreign court shall not be a bar to fresh proceedings in Ethiopia. The Ethiopian Courts are not bound by a judgment of acquittal passed by a foreign court. The same is true for the proceedings that has been instituted abroad but has been discontinued or where the accused has been discharged. This clearly contradicts Art. 23 of the Constitution and Art 2(5) of the Criminal Code as they categorically say that ‘acquittal’ also is a bar to a second trial, without any qualification.
- **Effect of ‘Conviction’ in a Foreign Court Art. 16(3):** Where the criminal was tried and sentenced abroad, and served all or part of the sentence, the rule against double jeopardy demands that the term of sentence served in the foreign country be deducted from the sentence imposed in Ethiopia. Therefore, the court which tries him in Ethiopia must have regard to the sentence passed abroad. For example, the sentence of the foreign court is 5 years imprisonment and in Ethiopia the crime is punishable with 15 years imprisonment, the punishment has to be assessed as follows:
 - ✓ if the foreign sentence has not been served at all, the criminal may be sentenced to 15 years imprisonment,
 - ✓ if the foreign sentence has been fully served, the criminal may not be sentenced to more than 10 years, and
 - ✓ if the foreign sentence has been served to the extent of 3 years, the criminal may not be sentenced to more than 12 years.

The deduction prescribed by Art. 16(3) must be affected only in so far as the criminal is convicted in Ethiopia of the same crime as that with respect to which the foreign sentence was passed.

Subsidiary Jurisdiction:

- ✓ “Subsidiary Jurisdiction” relates to crimes that do not directly and chiefly concern Ethiopia. These crimes also are committed extra-territorially.
- ✓ Under certain specified circumstances the Ethiopian Courts substitute foreign courts in trying criminals who ought to have been tried in a foreign country but were not so tried. Therefore, it is also referred to as **derivative jurisdiction** as the Ethiopian Courts derive the jurisdiction from the foreign courts. This is to prevent a negative conflict of jurisdiction.

- ✓ The subsidiary jurisdiction applies to the following categories of crimes:
 - 1) Crimes committed by members of the Defense Forces against the ‘ordinary law’ of a foreign country (Art. 15(1))
 - 2) Crimes committed in a foreign country “against international law or international crimes specified in Ethiopian legislation, or against an international treaty or convention to which Ethiopia has adhered (Art. 17/1/a.)
 - 3) Crimes committed in a foreign country “against public health and morals specified in Art. 510, 567, 605, 606, 609 or 610 of EPC. (Art. 17/1/b)
 - 4) Crimes committed abroad against an Ethiopian national or crimes committed by Ethiopians while abroad- if the crime is punishable under both the laws and are grave enough to justify extradition. (Art. 18(1))

Conditions for Application of subsidiary jurisdiction Art.19(1)

The Subsidiary jurisdiction of the Criminal Code may be applied only on the fulfillment of these conditions:

1. When the lodging of the complaint by the victim or his dependants is necessary for prosecution under the law of place of commission or Ethiopian law, it has been so lodged.
2. The criminal is within the territory of the Ethiopia and has not been extradited, or that extradition was obtained because of the crime committed.
3. (a) That, the crime was not legally pardoned in the country of commission of the crime, and (b) That the prosecution is not barred either under the law of the country where the crime was committed or under the Ethiopian law.

Exemption of Conditions for application of the Subsidiary jurisdiction Art (19) (2):

- ✓ The conditions relating to filing of complaint or not being legally pardoned in the country of commission and the prosecution not being time barred under the Sub Art (1) Clauses (a) & (b) need not necessarily be satisfied as regards the crimes committed against the International Law or Universal Order (Art. 17) and in relation to the crimes by foreign nationals. However, the requirement under Art 19(1) (b) relating to the extradition has to be satisfied here too.

- As per Sub. Art (3) Prosecution under subsidiary jurisdiction shall be instituted only after consultation with the Minister of Justice.
- The punishment to be imposed shall be the one which is more favorable to the accused when there is a disparity between the punishment prescribed under this code and that of the country of commission of the crime-Sub. Art (4).

Effects Of Foreign Sentences Under Subsidiary Jurisdiction

1. Effect of “Discharge” and “Acquittal” Art 20:

In all cases where Ethiopian courts have **subsidiary jurisdiction only** (Arts. 15(1), 17 and 18), the criminal cannot be tried and sentenced in Ethiopia if he was regularly discharged or acquitted for the same act in a foreign country. The phrase ‘subsidiary jurisdiction only’ in this article too is impliedly saying that if the crime is one over which the Ethiopian Courts have principal jurisdiction, it can be tried again.

2. Effect of “Conviction”: If the criminal was tried and sentenced in a foreign country, but did not undergo punishment or served only part of the punishment in the other country, the same may be enforced in Ethiopia. The total punishment in case where it has not been served at all, or the remaining part where only part of the sentence has been served in the foreign country, may be enforced here in Ethiopia if it is not barred by limitation. The enforcement shall be according to the forms prescribed in this code. The provisions of Art 12(3) are applicable *mutatis mutandis* to this Article regarding enforcement of foreign sentences. This means that, all the provisions of At 12(3) apply here too with the necessary changes in points of detail.

• Place and Time of Crime: Art. 25

- ✓ To decide questions relating to causation of crime and the applicability of the Criminal Code it is crucial to know exactly **when** i.e. the exact point of time the crime has been committed. For the application of the appropriate jurisdiction it is important to know **where** the crime has been committed. Article 25 lays down the principles relating to the time and place of commission of crime.
- ✓ Art. 25 the *commission of crime* refers to both the performance of the *act* penalized by Criminal law (commission) or failure to perform an *act*

required by the Criminal law (Omission) and the place where result of such an act has been ensued. Unfortunately there is an error in this article. It says "...when the criminal performed or failed to perform the act penalized by the criminal law." Failure to perform an act penalized by law cannot be a crime. It should have been properly put as follows: "...when the criminal performed the act penalized by criminal law or failed to perform act required by criminal law."

1. Time and place of the crime in case of a completed crime:

- ✓ Art 25 lay down the relevant rules relating to a completed crime having regard to three possible situations:

The General Rule: Sub- Art. (1)

- ✓ The **place** commission of a crime is where the prohibited act has been performed or where the failure to perform the required act has occurred;
- ✓ The **time** of commission of the crime is at the time when the prohibited act has been performed or when the failure to perform the required act has occurred.

With regard to Non-Instantaneous Crimes: Sub-Art. (2)

Where the act and the criminal result do not coincide in terms of time the crime is said to be a non-instantaneous crime. In other words, the result of the act is not immediate it may take time to give the desired result. In such a case the crime is deemed to have been committed both at the place of the unlawful act and that of the result.

In cases of combination or Repetition of Acts: Sub- Art. (3)

This provision refers to the following instances:

1. Where a crime is the result of several acts committed at different points of time, Or,
 2. Where repetition of criminal acts may be an element of an ordinary or aggravated crime as defined in Art. 61,
Or,
 3. When the act is pursued over a period of time.
- In these instances:
- The **time** of commission of the crime is the time **when** any one of those combined or repeated acts or part of the acts pursued is committed;
 - The **place** of commission of the crime is **where** any one of those combined or repeated acts or part of the acts pursued is committed;

Time and place of crime in case of an attempted crime:

The place and time of an attempt are to be decided as per the following rules:

1. As a general rule, the place where and the time when the criminal performed or failed to perform the preliminary acts which constitute such an attempt.
2. In case of non-instantaneous crimes, an attempt is deemed to have been committed both at the place where the criminal attempted the crime and the place he intended the result to be produced.

Section 2: Extradition:

- ✓ The term 'extradition' denotes the process whereby under a treaty or upon a basis of reciprocity one state surrenders to another state at its request a person accused or convicted of a crime committed against the laws of the requesting state, such requesting state being competent to try the alleged criminal.
- ✓ The following rational considerations have conditioned the law and practice as to extradition:
 - a. The general desire of all states to ensure that serious crimes do not go unpunished: Frequently a state in whose territory a criminal has taken refuge cannot prosecute or punish him purely because of some technical rule of criminal law or for lack of jurisdiction. Therefore, to close the net round such fugitive criminals, international law applies the maxim, '*aut punire aut dedere*' i.e. the offender must be punished by the state of refuge or surrendered to the state which can and will punish him.
 - b. The state on whose **territory** the crime has been committed is best able to try the criminal because the evidence is more freely available there, and that state has the greatest interest in the punishment of the criminal, and the greatest facilities for ascertaining the truth. It follows that it is only right and proper that to the territorial state should be surrendered such criminal as have taken refuge abroad.
- ✓ There are some divergences on the subject of extradition between the different state laws, particularly as to the following matters:
 1. Extraditability of nationals of the state of asylum;

2. Evidence of guilt required by the state of asylum; and
3. Relative powers of the executive and judicial organs in the procedure of surrendering the fugitive criminal.

- ✓ Before an application for extradition is made through the diplomatic channel, two conditions are as a rule required to be satisfied:

- a. There must be an **extraditable person**.
- b. There must be an **extradition crime**.

1. **Extraditable Persons:** There is uniformity of state practice to the effect that the requesting state may obtain the surrender of its own national or nationals of third state, but many states usually refuse the extradition of their own nationals (Art 21/2 of Criminal Code of FDRE, 2004) who have taken refuge in their territory, although as between states who observe absolute reciprocity of treatment in this regard, requests for surrender are sometimes acceded to. This does not necessarily mean that the fugitive from justice escapes prosecution by the country of his nationality.

2. **Extradition Crimes:** The ordinary practice as to extradition crimes is to list these in each bilateral extradition treaty. Generally, states extradite only for serious crimes, and there is an obvious advantage in thus limiting the list of extradition crimes since the procedure is so cumbersome and expensive. Certain states, for example France, extradite only for crimes which are subjects to a 'definite minimum penalty', both in the state requesting and in the state requested to grant extradition. As a general rule, the following offences are not subject to extradition proceedings:
 - i. Political crimes;
 - ii. Military crimes, for example, desertion;
 - iii. Religious crimes.

War Crimes:

Recent practice shows a general dispassion of states to treat alleged 'war crimes' extradition crimes, however, there are a number of decisions of, municipal courts treating war crimes as political crimes for the purpose of extradition (cf *Karadzoler Artukovic* 247 F (2d) 198 (1957), so that extradition is refused. In one decisions, **Re Wilson, ex p the witness T (1976) 50 ALJR 762**, the High Court of Australia declined to treat war crimes as being crimes of a political character.

Different criteria have been adopted to identify a political crime:

- the motive of the crime;
- the circumstances of its commission;
- that it embraces specific crimes only, e.g., treason or attempted treason; (A number of bilateral and other treaties after the second world war, including the Paris Peace Treaties of 1946 with Italy, Rumania, Bulgaria, Hungary, and Finland, provided for the surrender of 'quislings' (persons guilty of treason) and so-called 'collaborationists' with the enemy occupying authorities).
- that the act is directed against the political organization, as such, of the requesting state;
- the test followed in the English cases, **Re Meunier [1894] 2 QB 415**, and **Re Castioni [92] QB 149**, that there must be two parties striving for political control in the state where the crime is committed, the crime being committed in pursuance of that goal, there by excluding anarchist and terrorist acts from the category of 'political crimes'.

International law leaves to the state of asylum the sovereign right of deciding, according to its municipal law and practice, the question whether or not the crime which is the subject of a request for extradition is a political crime.

- **The Rule of Double Criminality:**

As regards the character of the crime, most states follow the rule of **double criminality**, i.e. that it is a condition of extradition that the crime is punishable according to the law both of the state of asylum and of the requesting state. Substantial similarity of the alleged extradition crime to the crime punishable according to the legal system of the state of refuge is sufficient to bring into effect the double criminality rule so as to justify a grant of extradition.

- **The Principle of Specialty:**

A further principle sometimes applied is known as the '**principle of specialty**', i.e. the requesting state is under a duty not, without the consent of the state of refuge, to try or punish the criminal for any other crime than that for which he was extradited. This principle is frequently embodied in treaties of extradition and is approved by the supreme court of the United States.

Extradition under the Criminal Code of FDRE, 2004 Art.21:

1. **Extradition of a "Foreigner" Art. 21(1):** Any foreigner who commits an ordinary crime (i.e. non-political) outside the territory of Ethiopia and takes refuge in Ethiopia may be extradited in accordance with the provisions of the law, treaties or international custom. However, it should be noted that if the crime with which the foreigner is accused of, falls under the scope of Art. 13 he may not be extradited. Ethiopia retains its right to prosecute him under its principal jurisdiction as the crime directly and principally concerns her.

2. **Extradition of "Ethiopians" Art. 21 (2):**

An Ethiopian national cannot be extradited to a foreign country. No person having the status of Ethiopian national at the time of commission of the crime in a foreign territory may be handed over to that country. However when such denial to surrender is made, he shall be tried by Ethiopian courts and under Ethiopia law. This article endeavors to protect the Ethiopian nationals from foreign jurisdictions in the following ways:

- If the accused has the status of an Ethiopian national **at the time of commission of the crime**, even if he ceases to be an Ethiopian thereafter, he shall still fall within the scope of this provision.
- An accused shall be governed by this provision provided he becomes an Ethiopian **by the time of request for extradition**, though at the time of commission of the crime he was not an Ethiopian national.

Therefore, it is sufficient that the accused is in the status of Ethiopian national either at the time of commission of the crime or at the time of the request for the extradition, for the applicability of this provision.

Procedure to request for Extradition (Art. 21/1 and 3)

- ✓ Extradition shall be granted on the application made in proper form by the state where the crime was committed provided; the crime does not directly and principally concern the Ethiopian state (Art. 13).
- ✓ Art. 21 (3) lays down that where an crime raises a question of extradition the requisition shall be dealt with in accordance with the principles of Ethiopian law and provisions of existing treaties.

✓ However, if the crime complained of is of a political nature, the criminal, instead of being surrendered, may be granted political asylum. Extradition of criminal is a well recognized rule of International law and is governed by the Extradition treaties.

✓ Extradition is made, as to a legal right, in respect of only those countries with which there is an agreement for this purpose, although countries generally do not, as a matter of international practice, even in the absence of an Extradition treaty refuse extradition.

UNIT-IV: CONDITIONS OF CRIMINAL LIABILITY

✓ Generally, criminal law is concerned with blaming a conduct and imposing punishment on perpetrators of harmful actions. However, the law determines whether a certain act is punishable or not by considering the circumstances or conditions under which the act is committed or omitted. A person's act does not make him criminally liable for the mere fact that he committed a wrong.

✓ The principles of modern criminal law require the establishment of certain essential elements to fix criminal liability to an accused person. All crimes, whatever their nature or seriousness, have some elements in common.

✓ The Revised Criminal Code first defines the essential conditions in the absence of which no such behavior may be deemed to be criminal or punishable. This means the "general ingredients" which permit deciding whether or not a crime has been committed and whether the criminal is guilty thereof, are dealt with by the Code, before it proceeds to lay down the "special ingredients" of various crimes, which differentiate one crime from another.

✓ In the earliest times, the mental attitude of a criminal was not a relevant consideration at all and a man was held strictly liable for the consequences of his active conduct whether he intended them or not. The importance of these "general essential conditions" in establishing a crime can be better understood by an appreciation of the gradual development of the modern principles of criminal liability.

✓ The elements of criminal liability are the legal, material and mental elements of the crime. The **Legal element** consists of sub-principles that include: the principle of legality, non-retroactive

effect of Penal Laws, jurisdiction and period of limitation.

- ✓ The **material element** of the crime includes preparation and attempted offences. It also covers causation in cases where the offence requires a result to be constituted. Causation is required to establish a link between the act and the result and helps to identify the final stage of the material element of the crime.
- ✓ The mental element of the crime is also one of the important prerequisites for a crime to exist. This element covers the general principles regarding mental element: intention in the form of direct or indirect with its legal effects, negligence in the form of conscious or unconscious with its legal effects, and the standards of measuring negligence.

❖ **General Principles of Criminal Liability:**

Section 1. The Crime and Its Commission:

- ✓ Crime is generally a breach of legal obligation or rule. If the breach of legal rule or the wrong has criminal consequences attached to it, it will be a criminal offence. An offence or a crime is, therefore, a wrong to a society involving a breach of a legal rule which has criminal consequences attached to it. (i.e. prosecution by the state in the criminal courts)

The Essential Elements of Crime:

The maxim '**actus non facit reum nisi mens sit rea**' makes it clear that, "*no man may be found guilty of crime and therefore legally punishable unless in addition to having brought about a harm which the law forbids, he had at the same time a legally reprehensible state of mind*". This principle recognized that there are two essential elements of crime:

- Physical element (*actus reus*)
- Mental element (*mens rea*)
- The legal and material elements can be jointly referred to as the *actus reus* i.e. the physical element of crime and the moral element refers to the *mens rea* i.e. the mental element of crime.

Ingredients of a Crime:

- The legal element, the material and the moral element. The "Legal" and "Material" Ingredients of Crime: (*Actus reus*) as the physical element of crime may be studied under two heads: Meaning of '*actus reus*' and Causation of crime

Meaning of *actus reus*:

Actus reus means, **the result forbidden by law brought about by human conduct**. A harm brought about by evil conduct manifests the evil mind behind it. Until then the guilty mind remains hidden in man's thought and it is impossible to detect the evil intentions of a man. Moreover, simply having an evil intention does not make a man punishable unless it ends in a harmful result. The act done or omitted must be an act forbidden or commanded by some law in force. Thus, *actus reus* in terms of Art 23 includes the following:

- Whether the offender's act or omission has caused:
 - the event, for example, death, hurt etc. or
 - A state of affairs, for example, disturbance to public peace or morals etc
- Whether bringing about such a result or state of affairs is prohibited by law. This is the legal element of crime.

The Legal Element of Crime:

- ✓ This ingredient of the crime refers to the infringement of any law, which is a criminal nature. This, in other words, means that a law must exist and this law must be violated so as to hold a person criminally liable. In most cases it is clearly said that a particular act is a crime or an offence and that there should be a law against it; but an act is not a crime for the mere reason it is wrong.
- ✓ In the absence of prohibition by the law, no act is a crime even if it may seem wrong to the individual conscience. That is why Article 2 of the Criminal Code of Ethiopia provides that no act or failure to act may be regarded as an offence unless the law so prescribes. Therefore, a person who performs an act which is not penalized by any law, such as prostitution or intoxication commits no offence.
- ✓ In addition to this, the law which prohibits the crime should be in force, not only when the act is committed, but when it is punished. If the law ceases to operate due to repeal before judgment is delivered, the accused cannot be punished for its infringement even though it was in operation when he or she did the act forbidden by law and when he or she was convicted except in cases where the defendant benefits.

✓ The Ethiopian Criminal Code also incorporates these essential elements in Art. 23, sub-Articles (1) & (2) in the following way:

- (1) A crime is an act which is prohibited and made punishable by law. In this Code, an act consists of the commission of what is prohibited or the omission of what is prescribed by law.
- (2) A crime is only completed when all its "legal, material and moral ingredients are present".
- ✓ The provision distinctly states the requirement of three elements of a crime:
 - The legal element,
 - The material element and
 - The moral element

The Material Element:

- ✓ Is also called the criminal act or *actus reus* which normally is a pre-requisite for criminal liability.
- ✓ It refers to the existence of some sort of conduct on the part of the perpetrator in order to make him/her liable criminally.
- ✓ It may be defined as a physical or muscular movement towards a given object which may also include willful restraint from doing a given act. It is considered to be a requirement to constitute criminal liability as it is undesirable to punish one merely for his/her thoughts.
- ✓ Accordingly, the material element of a crime may be classified as commission, omission, and commission by omission.
- ✓ The material element (*Actus reus*) may consist of:
 - 1. Deed of commission, or
 - 2. Result of omission.
- ✓ In the words of Art 23/ 1, "A crime is an act which is prohibited and made punishable by law".
- ✓ An act can be defined as "a willed muscular (bodily) movement"
- ✓ The phrase "material ingredients" means facts surrounding the act. The same act of shooting under different material circumstances, for example, warfare, execution of death penalty etc, may render the act lawful.
- ✓ The second paragraph of the same provision clearly puts it in terms of acts (commission) and omissions: "In this Code, an act consists of the commission of what is prohibited or the omission of what is prescribed by law".
 - **Deed of Commission:**
- ✓ The word '*actus*' connotes a deed i.e. a material result of human conduct. When criminal policy

regards as sufficiently harmful, it prohibits such a deed and seeks to prevent its occurrence by imposing a penalty for its commission. Thus, 'actus reus' is constituted by the 'event' or the 'result' and not by the activity or conduct which produced the event. Thus, the voluntary movements of the human beings cannot be prohibited but producing certain harmful results by such activity is prohibited. However, every harmful event produced by human conduct is not *actus reus*, but only such event which is forbidden by the law is an *actus reus* forming the basis for criminal liability.

- ✓ A 'deed' may cause harm such as destruction of property or even of life but it is not a crime unless it is legally prohibited. Infliction of harm is legally permitted, justified or even commanded under certain circumstances and these do not constitute *actus reus*. Thus, there are four categories of harmful events resulting from active conduct, of which only one category comes under the expression of *actus reus*.

➤ **Events resulting from acts "Commanded" by law:**

E.g. 'Death' caused by execution of a criminal, 'Demolition of buildings' under the town planning scheme etc.

The officers executing the lawful orders of the state in these examples, are not punishable for the harmful consequences brought about by them i.e. death of a human being, destruction of property.

➤ **Events resulting from acts "Permitted by law":**

E.g. Injuries caused by the force used in the arrest of a criminal, Injury Caused by a surgeon by operating on a patient; Hurt caused by reasonable chastisement of a child by a parent.

All these examples include "painful bodily injuries" which are necessarily inflicted upon the subjects without which certain lawful objects cannot be achieved. There fore, law permits the infliction of such harms subject to certain limitations.

➤ **Events resulting from acts "Justified" by law:**

E.g. Injuries or even death caused by acts done in the exercise of right of private defense or self-defense. Law recognizes the right of self-defense of a person and allows him to use necessary force to repel the apprehended assault against human body or property.

➤ **Unlawful Events: Commission of "Events" Prohibited by Law:**

It is this category of harmful results of human conduct that constitutes *actus reus*. Therefore, an act or omission becomes punishable only if it produces a result that does not fall under any of the categories falling under "lawful events". This means that producing the result that is prohibited by law, establishes the legal ingredient of crime.

• **Result of Omission:**

- ✓ The word 'omission' is generally used in the sense of intentional non-doing. It is only under certain circumstances, an 'omission' to act becomes criminal. In fact the law imposes responsibility for omissions reluctantly. Omission" with reference to the performance of a duty involves the idea of conscious or willful omission. The expression *omission* does not connote any obligation. Omission is a colorless word which merely refers to the not doing of something. Under the criminal law, only failures to perform legal duties can amount to criminal omissions. Legal duties to act might arise out of relationships or contracts, or might be imposed by statutes. Failures to perform moral duties cannot constitute the *actus reus*.
- ✓ Limiting criminal omissions to failures to perform legal duties is based on the proposition that the individual conscience, peer group pressure and other informal compulsion regulates behavior more effectively than direct criminal prosecutions. Also, it would not only be burdensome but also impossible for the criminal justice system to enforce moral obligations.
- ✓ The general rule is that parents, legal guardians, spouses and anyone who voluntarily agrees to care for another who is dependent because of age, illness or other infirmity, may incur a duty, at least until care can be handed over to someone else.
- ✓ A crime, according to Art 23/1, is also committed when a person fails to perform an act the performance of which is prescribed by law. This means, not all omissions are punishable but only those that are in breach of a legal duty For example, 'A' happened to walk along a deserted road at night during winter. He saw a just born infant abandoned on the roadside but did nothing to save it and went away. Next morning the infant died being exposed to the chilly climate. His attitude towards the dying infant may involve

omission of a moral duty but is not punishable under any legal provision. Therefore, omissions to be punishable crimes must involve breach of some specific duty either imposed or recognized by law. Basing on the said requirement of violation of a duty "omissions" are of two kinds:

1. Crimes of Omission: Where there is a Duty Imposed by Law:

The law often imposes the duty to do something, e.g. to report about the criminals, to register the birth of a child, etc. and penalizes the failure to carry out these duties. Crimes of this type are referred as "Crimes of Omission" and are characterized by the non- performance of a mandatory act. The following are some of the crimes by omission under the Criminal Code:

- Failure to report the preparation, attempt or commission of a crime Art 39.
- Failure to report the preparatory acts of treason and mutiny Art 254-256
- Failure to inform of a crime punishable with death or life sentence, Art 443.
- Failure to report danger in time of emergency, general mobilization or war Art 308.
- Failure to obey enlistment or mobilization, or failure to enlist Art. 284-285.
- Failure to appear before courts as a witness or an accused person Art, 448
- Failure to lend aid to another. Art 575.
- Failure to provide the maintenance allowances stipulated under Article 658.
- A parent's gross neglect in bringing up a child. Art 659
- Failure to report the possession of counterfeit money, Art. 779
- Failure to exercise proper supervision over dangerous persons or animals. Art. 824.
- Failure to notify the competent authority and concealment of property. Art. 855

2. Crimes of Commission by Omission: Where there is a Duty Recognized by Law:

- ✓ A crime is committed when a person fails to perform a duty recognized by law, such as, professional duty of a doctor. Refusal to provide professional service by a doctor, pharmacist, dentist etc., who contrary to his duty and without just cause refuses to provide his services in a case of serious need, is made punishable under Art 537 of the Criminal Code. If

harm is caused by such refusal, it is a crime of commission by omission.

- ✓ The term *failure* and *refusal* at times require a careful distinction. For example in a case falling under Art 778, a shopkeeper expressly states his refusal to accept a legal tender (i.e. National money or currency) by saying 'No' or "I won't take", he has performed an act through a willful act i.e., "words of his mouth". If his refusal takes the form of a negative sign, he has still acted through customary signs of refusal. Failure on the contrary involves non-action in violation of law. The precise distinction between the three different methods of bringing about a harmful result may be appreciated as follows:

"Actus reus" or the physical element of Crime

1. Deed of Commission

- **Crimes of Commission "Acts":** These are characterized by positive behavior, i.e. by actively doing something to bring about the harmful 'result'.

2. Results of Omission

- **Crimes of Omission "Failure":** It is impossible to bring about these results by positive behavior. These are the results of negative conduct omitting to act expected of him.
- **Crimes of Commission by Omission "Refusal":** These offences include behaviors which include both positive and negative elements refusal to perform a duty includes a positive expression of 'unwillingness to act' expected of him
- ✓ A person who "intentionally leaves without help a person in imminent and grave peril of his life, person or health when he could have lent him assistance, direct or indirect, without risk to himself or to third parties ..." (Art. 575/1) is deemed to have committed the crime.
- ✓ If a criminal is "under an obligation professional or contractual, medical, maritime, or other, to go to the victim's aid or to lend him assistance" (Art. 575/2) the crime is relatively grave. However, the provisions of the article represent crime of omission, as in the case of failure to bring up children under Art. 659/1. If instead, the gross neglect in the latter example causes injury to the child (/art. 659/2) the crime falls under commission by omission.

THE 'MORAL INGREDIENTS' OF CRIME (*mens rea*)

This has got something to do with the guilty state of mind of a person which is associated with the principle "*Nulla poena, sine culpa*" which means there is no punishment without guilt. This implies that a person cannot be held criminally liable for those acts he/she commits without there being any fault what so ever on his or her part unless there exists some sort of blameworthiness.

The very principle of this element is provided under Article 57 of the Criminal Code which reads as follows: "*No one can be punished for an offence unless he has been found guilty there of under the law. A person is guilty if, being responsible for his acts; he committed an offence either intentionally or by negligence.*"

- ✓ No one can be convicted under Criminal Law for an act penalized by the law if it was performed or occurred without there being any guilt on his part, and was caused by force major, or occurred by accident. Nothing in this Article shall be a bar to Civil Proceedings.
- ✓ According to this Article, that lays the general principle of guilt or fault a responsible person can be convicted and be punished for his or her acts in so far as he or she commits the offence based on guilty state of mind. Guilt, therefore, is an essential factor in determining whether a crime has been committed.
- ✓ The perpetrator should be held criminally liable and be punished if he or she acts in a blameworthy manner.
- ✓ According to Art 23 of the Criminal Code, any crime comprises legal, material and moral ingredients, all of which must be present so that the crime may be deemed to have been completed.
- ✓ The provisions of Arts 57-67 dealing with 'Criminal Guilt' define this moral ingredient i.e. the state of mind of the criminal at the time of committing the unlawful act. Although there is a legal presumption that every accused is responsible for his acts, there is no presumption that every responsible accused is guilty.
- ✓ The important principle of criminal law that requires proof of guilt before attaching criminal liability to a person is recognized by the Constitution under Art. 20(3) which provide that, "accused persons have the right to be presumed innocent until proved guilty". Therefore, it must, always be established that, "the state of mind of

the accused at the time of the commission of crime was of the nature defined in Art 58 or 59".

• Meaning of Mental Element:

- ✓ One of the main characteristics of our legal system is that the individual's liability to punishment for crimes depends, among other things, on certain mental conditions. The absence of these conditions where they are required, negatives the liability. This means that, the liability to conviction of an individual depends not only on his having done some outward acts that the law forbids, but on his having done them in a certain frame of mind or with a certain will. These are known as "moral ingredients or mental elements" in criminal responsibility. That is, while acting in a particular way one intended certain consequences or might foresaw the possibility of those consequences. Therefore, an act in order to be a crime must be committed with a guilty mind.
- ✓ These requirements of criminal liability are rightly expressed in the Latin maxim "***actus non facit reum nisi mens sit rea***" (act alone does not make a man guilty unless his intentions were guilty).
- ✓ No person could be punished in a proceeding of criminal nature unless it can be shown that he had a "guilty mind". However, unlike physical element of crime the mental element poses a difficulty in its proof. Since, it is a known fact that we cannot know what was going on in the mind of a person at the time of commission of the crime and it is natural that we cannot expect him to confess what was on his mind, it is mainly on the circumstantial evidence that the Court depends to establish the moral ingredients of crime. To this end, the Courts have tried different methods to find the mental element of crime.

• Attempts to Determine the "Moral Ingredient" of Crime:

- ✓ The 'Moral ingredient' of a crime refers to the 'state of mind' of an accused at the time of doing the act constituting a crime. What was going on in the mind of the accused at the time of commission of crime only he should know and at the same time we cannot expect him to come and confess before the court sincerely about his state of mind. Therefore, it becomes the task of

the court to infer from different facts and circumstances before, after and attending at the time of the commission of the crime. In an attempt to assess the “state of mind” in establishing a crime, the courts adopted different tests at different points of time during the history of development of doctrine of *mens rea*.

- ✓ The following are the various tests applied in investigating the working of the mind of the person at the time of doing the act resulting in crime:

1. **Objective standard of Morality:** The first test to establish the ‘moral ingredient’ of the crime was applied objectively. That is to say, “the facts of each case were studied to see whether the accused’s behavior did or did not reach the moral standard generally accepted and approved in the period”. This is nothing but the essence of the test of reasonable man. In this test the true question was not whether he himself thought that his conduct had been blameworthy or not, but the courts went on the assumption that their own standard of what was right or wrong was the true test. The real test is that, ‘it must be known to everyone including the accused and that if facts showed that the accused had not conducted himself as a man obedient to the moral code would have been expected to conduct himself, this established his *mens rea*. The working of this objective test in this ethical framework would have been more likely to magnify than reduce his liability to conviction, in case the prisoner tried to argue that he had acted upon different criterion of good and evil.

2. **The Test of Subjective Standard:** The adoption of the accepted rules of morality as a criterion of *mens rea* in practice meant “the courts appraised the accused’s conduct objectively giving no much opportunity to the accused to prove his state of mind otherwise”. Yet a consideration of the actual working of mind of the prisoner was necessarily involved, at least to some extent, in certain cases. For example:

- If a man was honestly mistaken as to the facts upon which he took action, or
- He was so insane as not to understand what he was doing, or
- He was compelled by overpowering physical force to be helpless instrument in another person’s misdeed.

In all these cases, he could not be reasonably said to be guilty. In all these circumstances, criminal guilt was often negated in the courts by the argument that “what had been done was not the accused’s act”. This means that the accused had not caused the harm, as there was no *mens rea* on his part.

The new doctrine of subjective *mens rea* gave the courts a new method of avoiding excessive hardship in reasonable cases of self-defence, accident, mistake of fact etc. All these came to be accepted as grounds of excuse from criminal liability.

3. **Voluntariness of Conduct:** Gradually, the courts adopted another method of establishing *mens rea*. The courts felt that if the man’s conduct could be proved to be voluntary i.e., “the movements of his body in producing the harmful result were willful movements then his *mens rea* was established”. In cases where he could show that his conduct was involuntary i.e., his bodily movements were not operated by his will, he would have no responsibility. Thus, the first stage in the adoption of subjective *mens rea* was reached when it was recognized that a man should be held guiltless if he could show that his movements that led to the harm were involuntary. Thus, according to the test of Voluntariness of conduct, it was essential that the conduct of accused should have been the result of the exercise of his will in all crimes. However, *mens rea* in this sense relates not to the harm which the man brought about but to the movements (physical acts) by which he brought about the harm. In other words, it indicates his mental attitude to his conduct and not to his mental attitude to the consequence of his conduct. Therefore, in cases of persons acting under the influence of Somnambulism (sleepwalking), insanity, intoxication or automatism the defense of involuntary conduct was available.

4. **Foresight of Consequences:** The method of determination of *mens rea* through establishing voluntary conduct was found not satisfactory in certain instances. For example, in cases of ‘pure accident’ where there is no foresight of consequences if the voluntary conduct of the person in driving the vehicle is taken to be his *mens rea* then he should be punished even for an accident. Thus, it is not enough to be satisfied that an accused person conduct was

voluntary. There should be proof that “he must have had foresight of consequences” of his conduct. A man cannot be held guilty if his voluntary actions result in harm but the harm was not contemplated. Accordingly, there has developed a principle that “a man should not be punished unless he had been aware that what he was doing might lead to mischievous results”. The nature of the precise circumstances, the foresight of which attracts criminal guilt, is fixed by law and varies from crime to crime. Now, foresight of consequences is the common requirement for all crimes and it is this subjective element of foresight which constitutes *mens rea*.

- **Various Forms of “Mens rea”:**

Usually when a man intends to produce a particular result, he regulates his conduct in order to produce it. In other words, his conduct is actuated or inspired by his intention/*mens rea*. However, there are cases involving criminal liability where the *mens rea* does not actuate the conduct, it simply accompanies the conduct or coincides with it, like where he is reckless as to the result, he acts with knowledge that the deed may result from his conduct and it cannot be said that the conduct has been actuated by *mens rea*. Since in this instance, though he takes risk of the result consciously, he does not intentionally regulate or design his conduct in order to produce such result. Therefore, *mens rea* does not mean a single precise state of mind but it takes on different colors in different surroundings. The truth is that there is no single precise state of mind common to all crimes. The forms of *mens rea* that are required by the Ethiopian Penal Code may be better appreciated with an understanding of common the forms of mental element.

Analysis of Provisions Relating to Essential Ingredients of Crime under the Criminal Code of Ethiopia:

- ✓ Within its description of crime in Ethiopia, Criminal Code of 2004 defines it under Article 23, reads:

1. Criminal offence is an act or omission, which is prohibited by law.
2. The criminal offence is only completed when all its legal, material and moral ingredients are present.

- 3. A criminal offence is punishable where the court has found the offence proved and deserving of punishment.
- ✓ From this definition one can understand that crime is an intentional or negligent act or of intentional omission which is prohibited by law that subjects a person liable criminally when it is proved beyond any reasonable shadow of doubt.
- ✓ This is to mean that crime in Ethiopia requires legal element, material element and mental element. It is also important to bear in mind that independent existence of these elements at different times in one person is not sufficient to constitute criminal liability. Rather, they shall exist together at the time of the commission of the offence.

• Common Forms of 'States of Mind':

1. Intention:

- ✓ "To intend" is to have in mind a fixed purpose, to reach a desired objective.
- ✓ The noun "intention" is used to denote the state of mind of a man who not only foresees but also wills the possible consequences of his conduct. Even in cases of omission, the desire and foresight are the same, for example, a man knowingly leaves a helpless invalid or an infant without nourishment or other necessary support until death occurs. He had the foresight and desire for the result.
- ✓ There cannot be intention unless there is foresight, since a man must decide to his own satisfaction and must accordingly foresee that to which his express purpose is directed.
- ✓ Again, a man cannot intend to do a thing unless he desires to do it.
 - **Recklessness (indirect intention)**
- ✓ Intention cannot exist without foresight, but foresight can exist without intention. A man may foresee the possible or even probable consequences of his conduct and yet not desire them to occur. In spite of this foresight if he precedes on his course of action he knowingly runs the risk of bringing about the unwished result. To describe this state of mind the word 'reckless' is the most appropriate.
- ✓ A man who is reckless may prefer that -
 - the event shall not happen, or
 - he may not care whether it happens or not.

- ✓ Nevertheless, in either case he does not desire it to happen and therefore, does not act with the purpose that it shall happen. Unfortunately, this is a very common attitude of mind and is found mostly in the cases of dangerous driving of motor vehicles, adulteration of food materials, drugs and medical negligence etc.,

Forms of "Moral ingredients" Under the Ethiopian Criminal Code (Arts. 57-59)

- ✓ The cardinal principle of criminal liability, as embodied in the maxim '*actus non facit reum nisi mens sit rea*,' is expressed in the sub Art (1) of Art 57 of the Criminal Code, according to which "no one can be punished for an offence unless ... he commits a crime either intentionally or by negligence".
- ✓ These states of guilty mind are defined in Arts. 58 and 59. It is a general and absolute condition of liability that the offender should have had a guilty mind for fixing criminal liability. However, there is no uniformity in the moral ingredient required for all crimes, since the same act may be an ingredient of several different crimes it must be established from case to case exactly, what the accused had in mind before one can decide the crime of which he is guilty.
- ✓ The fact that the moral element of a given crime is absent, for example, in cases of theft (Art. 665) if the intent to obtain an unlawful enrichment is absent, the accused is not punishable for that crime. But it does not necessarily follow that he is not punishable at all, and he may well be found guilty of a different crime for example, unlawful use of the property of another (Art. 678), for which no intent to enrich oneself is required.
- **Criminal Intention: Art. 58**
 - ✓ 'Criminal intention', constitutes the highest degree of criminal guilt and comprises of two elements in the words of Art. 58. According to Sub-Art. (1) a person intentionally commits a crime who infringes law:
 - with full knowledge and
 - Intent.
 - ✓ The terms full knowledge and intent in Article 58 can thus be taken to respectively mean awareness and will.
- **Full knowledge:**
 - ✓ "Knowledge" is "awareness" of the consequences of an act, though the person may not intend to bring it about.

- ✓ "Awareness" means the ability to foresee the nature, factual circumstances and consequence of one's act or omission.
- ✓ Thus, criminal intention firstly implies awareness. Therefore, it follows that:
 - where an act is penalized by law regardless of its consequences, the person who performs this act may not be deemed to perform it intentionally unless he is aware
 - of the circumstances which have the effect of rendering it criminal e.g. a person does not intentionally commit a breach of official secrecy if he does not know the information he discloses is "secret" (Art. 397)
 - Likewise, if under the law certain consequences must be achieved so that a crime is complete, a person may not be regarded as having intentionally committed this crime unless he knew that such consequences would follow. For example, a person does not intentionally commit homicide if he is not aware of the fact that his target is a human being and that he is going to produce the death of human being (Mistake of fact, Art. 80).
- ✓ Therefore, in every case, the object of the criminal's intent must be ascertained having regard to the ingredients of the crime as laid down in the Special Part of the Code.
- **Intent:**
 - ✓ If we refer to the original French term la volente, we understand that the word 'intent' is used in Article 58/1 to mean 'will' or 'volition'. Every conscious act that we do is preceded by a certain state of mind. No physical act is possible without bodily motions. And every bodily motion which constitutes an 'act' is preceded by a desire for those motions. According to Austin, "bodily movements obey wills. They move when we will they should. The wish is "volition" and the consequent movements are "acts". 'Will' involves a desired objective or active desire, i.e. desiring the result as an objective of the act or omission. Such a will exists where a person, for example, deliberately strikes another with the desire to inflict bodily injury. In this case, there are:
 - 'awareness' of the act, the circumstances and the probable result,
 - the 'desire' for the probable result.

Under such cases, there is criminal intention even though the chances of achieving the desired result are small.

- **Volition, Intention and Motive:**

- ✓ Every conscious act that we do is preceded by a mental condition. Every bodily motion that constitutes an act is preceded by a desire for those motions. The desire that impels the motion is known as volition. When an act done is preceded by a desire for the act and if such a desire is not produced by fear or compulsion we say it is a voluntary act. Thus, all bodily motions, which constitute an act, are preceded by the desire for those motions. This desire is called volition.
- ✓ The longing for the object desired which sets the volition in motion is **motive**. The expectation that the desired motions will lead to certain consequences is the **intention**. Thus, the intention is not a desire whilst motive is.
- ✓ Intention, under Article 58 is found in two different forms:
 - **Direct Intention Art 58/1/Para (a)**
 - ✓ The existence of will accompanied by awareness proves criminal intention as per Art. 58/1, Para (a). This category of intention is usually referred to as direct intention as there are these distinct characteristics of this form of state of mind:
 - a fixed object,
 - a clear foresight of consequences, and
 - a desire for consequences.
 - ✓ The state of mind of the person is unmistakably directed towards the object and the offender willingly and deliberately brings about the "harmful result".
 - **Indirect Intention (Dolus Eventualis):**
 - ✓ Art. 58/1, Para (b), reads thus, "... he being aware that his act may cause illegal and punishable consequences commits the act regardless that such consequences may follow".
 - ✓ In this state of mind, the criminal does not desire the occurrence of the harm. However, he is aware of the possible consequences and yet is unwilling to renounce his act since he has some other object in his mind. In other words, though the criminal does not desire, he accepts the occurrence of possible harm in order to achieve his own object.

- ✓ In 'indirect intention', the offender does not foresee the harm as a certainty (or near certainty) but only as a possibility.
- ✓ It, thus, differs from the direct intention where the criminal is aware of the certainty or near certainty of the harm. Yet, it has much in common with direct intention, because the accused is aware of possible consequences and willingly pursues his act by accepting the occurrence of the possible harm.
- ✓ This kind of mental attitude is commonly referred to as "recklessness".

Criminal Negligence Art 59:

- ✓ "Criminal Negligence" constitutes criminal guilt of a lower degree. Where criminal intention must be excluded on the ground that the conditions laid down in Art. 58 are not fulfilled the question arises as to whether negligence is present.

Negligence:

- ✓ 'Negligence' is another form of mens rea. Culpable negligence is a condition for criminal liability.
- ✓ Negligence is not taking care where there is a duty to take care.
- ✓ In negligence, there is a state of mind in which there is absence of desire to cause a particular consequence. The standard of care established by law is that of a reasonable man in identical circumstances.
- ✓ Negligence means the failure to exercise care there by causing harm (undesired by the accused) that could or should have been normally expected. Article. 59/1 provides: "A person is deemed to have committed a criminal act negligently where he acts:
 - (a) by imprudence or in disregard of the possible consequence of his act while he was aware that his act may cause illegal and punishable consequences; or
 - (b) By a criminal lack of foresight or without consideration while he should or could have been aware that his act may cause illegal and punishable consequences."
- ✓ The essential elements of the provision are:
 1. Acting by imprudence or (inadvertent)
 2. Being aware that his act may cause illegal and punishable consequences acts in disregard of such consequences, or (Advertent)
 3. Acting by a criminal lack of foresight, or (Advertent)

4. Acting without consideration of possible consequences while he should or could have been aware that his act may cause illegal and punishable consequences. (Inadvertent)

- ✓ A careful consideration of these essential elements of negligence reveals two kinds of negligence:

1. Advertent (conscious) Negligence.
2. Inadvertent (unconscious) Negligence

- ✓ It is the element of "consciousness" in bringing about the consequences that differentiates these two forms of negligence. In both cases criminal lack of foresight or imprudence must be proved.

- **Advertent Negligence:** Acting in disregard of possible consequences defines conscious type of negligence. In this form of negligence the criminal, like in the case of in direct intention, foresees the possibility of some harm but disregards (or rejects) its occurrence. Under indirect intention the criminal accepts the occurrence of the possible harm whereas in the advertent negligence the person rejects the possibility of the harm which in fact materializes as a result of his negligence.
- **Inadvertent Negligence:** Acting without consideration represents the unconscious type of negligence. Under inadvertent negligence the accused is not aware of a possible harm. The offender does not foresee the result at all. For example, the accused believing that the gun is unloaded pulls the trigger and to his surprise finds some one injured. It cannot possibly be a case of pure accident since he is handling a deadly weapon, which requires the exercise of care and caution on his part. His failure to take care makes him liable for negligently injuring the person. In the same example, if the offender having foreseen the possibility of hitting 'B' but disregarding the same, shoots at a certain target and unfortunately injures 'B', his state of mind may be described as advertent negligence.

• **Criminal Lack of Foresight:** This expression used by Art.59, denotes want of care with which people of reasonable prudence are expected to

act and want of which is culpable. These acts are done in haste without due deliberation and caution. These acts produce a result the criminal never expected and which he may most regret. But he is punished not for the effect produced which he could not perhaps foresee, but for the manner of doing the act which was fraught with danger. It is his attitude towards his conduct that is blameworthy.

▪ **Standard of foresight and Prudence: Art.59/1/ (b)**

What amounts to negligence depends on the facts of each particular case. Foresight, to be reasonable, requires care and attention relating to the matter in question. The law does not expect the same degree of care and caution from all persons irrespective of the position they occupy. This means the objective standard cannot be purely ideal because as rightly put forward by Art59/1/(b) due consideration has to be given to subjective factors such as the "age, experience, education occupation and rank" of the accused. The care that is reasonably expected of an accused person as per the "reasonable man's standard", therefore, does not denote an abstract mythical model, but refers to the "prudent man" under the circumstances of the accused.

"Due care and attention" implies genuine effort to reach the truth and not the ready acceptance of an ill natured belief. The determination of lack of foresight may be said to have dependant on 3important factors:

- The nature of the act done by the accused,
- Magnitude and importance of the act done; and
- The facility a person has for the exercise of care and attention.

- **Liability to Punishment in Case of Negligence:** Art. 59/2 provides that, "crimes committed by negligence are liable to punishment only if the law so expressly provides by reason of their nature, gravity or the danger they constitute to society". Accordingly, negligence is not punishable unless a specific provision under consideration expressly embodies negligence as its component part. For example, Arts. 543, 559 expressly incorporate negligence as an ingredient of the offence. There are other provisions such as Arts. 493, 541, etc, which do not distinctly refer to intention or negligence. Yet, because the punishment of negligence requires an express inclusion of

'negligence' such provisions invariably imply criminal intention

- **Distinction between Different Forms of mens rea Under the Code**

1. Art 58 Criminal Intention

➤ **Direct Intention:**

- There is full knowledge i.e., awareness of consequences accompanied by with (intent).
- The foresight is certain or nearly certain as to the consequences.
- There is desire for the consequences.
- Clear foresight of consequences.

➤ **Indirect Intention**

- There is awareness of consequences and unwillingness to renounce the course of conduct.
- The foresight is not certain but awareness of the possibility of the consequences is present.
- There is no desire for consequences but disregards and runs the risk of possible harm. i.e. accepts the occurrence of possible harm
- Uncertain foresight

2. Art 59 Criminal Negligence

➤ **Advertent Negligence**

- There is awareness of consequences but disregards the possibility
- There is awareness of possibility of consequences.
- Rejects the occurrence of the possible harm.
- Criminal lack of foresight.

➤ **In advertent Negligence**

- There should or could have been awareness of consequences but lack of consideration of the same
- Failure to foresee the consequences.
- Lack of fore sight i.e. failure to exercise care. Does not foresee at all.
- Imprudence

Accident:

- ✓ **Stephen** observes, "An effect is said to be an accident when the act by which it is caused is not done with intention of causing it and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought under the circumstance in which it is done, to take reasonable precaution against it."

✓ Art. 57 (2) of the Criminal Code of FDRE provides: **"No one can be convicted under criminal**

law for an act penalized by law if it was performed or occurred without there being any guilt on his part, or was caused by force majeure, or occurred by accident."

- ✓ A person's act is not deemed to be a criminal act if he infringes the law under circumstances that amount to accident or force majeure. This means, in order to make a person criminally liable, his act must have been committed or omitted by his guilty act. The act must have been performed either intentionally or by negligence within the meaning of Art 57(1). Therefore, the absence of intention or negligence on the part of the accused while committing the act that resulted in the harmful consequences can be claimed as a defense for criminal liability.

- ✓ Generally speaking, the essential conditions for pleading a case of accident are:

1. The act must be an accident or misfortune.
2. The act must have not been done with any criminal intention or knowledge.
3. The act must have been done with proper care and caution.

- **Misfortune or accident:** Both the words 'accident' and 'misfortune' imply injury to another. **Accident** involves injury to another; **misfortune** implies as much injury to the author as to another unconnected with the act. For example, where, two men **A** and **B** went to shoot wild rats, and they took their positions and laid waiting for the game. After a while, some rustle was heard and 'A' believing it to be wild rat, fired in that direction. The shot caused **B's** death. '**A**' will be protected under the defence of accident because the death was caused by accident. In this case, the gun, with which the accused had fired, was an unlicensed so, he would rather be liable for the use of unlicensed gun but it cannot deprive him of the defence of accident. But where two cars running in opposite directions collide with each other resulting in injuries to the drivers of both the vehicles, it will be a case of misfortune. However, in practice no distinction is maintained between misfortune and accident. An injury is said to be caused accidentally, when it is neither willfully nor negligently caused.

- **Absence of both intention and negligence:** For the purpose of establishing the defiance of accident, the presence of both the forms of

mental elements 'intention' and negligence should be negative. Proof of mental element in any of the forms described in the Articles 58 and 59 while committing the act leading to injury to another cannot not be a case of accident.

- **Act Done with Proper Care and Caution:** e.g. A is at work with an axe. The head of the axe suddenly flies off and hit a person standing nearby injures him seriously. There is no negligence on the part of A. He can claim the defence of accident here provided he had taken proper care of fixing the axe before he starts working with it. Where as, if a driver drives his car rashly and causes the death of a pedestrian, he liable for causing death by negligence as he failed to take care and caution required by a person of his profession.

Section 2: Relationship of Cause and Effect:

- ✓ Art. 24. of Criminal Code, lays down the principle that, "a person is answerable for the consequences of his act or failure to act only in so far as there exists a relationship of cause and effect between his act or failure and the consequences.
- ✓ The general meaning of the term 'cause' is the 'act' or 'the agency' that has caused or produced an effect.
- ✓ The doctrine as to the connection of causes and effects is known as causation in law. It is an investigation of act which caused effect. A harm which has been suffered is an event and majority of such events are products of a plurality of factors. A 'factor' is said to have caused a particular event if, without such factor the event would not have happened. From this, it would follow that a man can be said to have caused the *actus reus* of a crime if that *actus* would not have occurred without his participation in what was done.

Tests to Establish the Relationship of Cause and Effect:

1. Sine qua non Test or the Theory of Absolute Causation:

- ✓ 'Sine qua non' is a Latin term which means "without which not" - an indispensable condition or an important prerequisite.
- ✓ The test says, "An act in the absence of which the result would not have been achieved is deemed to be the cause of such result".
- ✓ This theory, known as the theory of absolute causality, goes too far because it mixes up

'causes' and the 'occasion' of the harm. However, it makes it clear that no person can be liable for harm unless he did something, which was necessary condition of this harm.

- ✓ As such, the test, is useful since it permits selecting of possible candidates for liability. However, criminal liability cannot be established through the sine qua non test quite clearly.

2. Adequate or Proximate Cause Test:

- ✓ The second paragraph Art 24/1 states that an act or omission may not be deemed to have caused the harm in issue unless this act or omission "...would, in the normal course of things produce the result charged". Therefore, according to the "proximate cause rule", two things have to be fulfilled:
 - The criminal's behavior that brought about the result, and
 - A relevant condition of the harm resulted.

Circumstances not Capable of Bringing the Result in the Normal Course of Things:

Sometimes, certain circumstances, though they might have effectively contributed to the occurrence of the harm, in the ordinary course of their nature, are not capable of bringing about such harm. Such circumstances may not be regarded as the "cause" of the harm produced, in the legal sense of the term. Only acts that are generally capable of producing the result in issue are deemed to have caused it. Any relationship that might exist between the result and an act not normally capable of producing it has no legal consequences since Art. 24(1) uses the words, "in the normal course of things produce the result charged". For example, 'A' simply pretends to shoot at 'B' with his gun and 'B' who has a weak heart dies of "fright". In this case, two possible considerations have to be made:

- In the ordinary course of things, one cannot kill a person by pretending to shoot him,
- If the offender knows that his victim is suffering with a heart condition, then the issue will be "whether one can frighten to death" a person with such a heart condition. If
- 'Yes', then his act can be defined as the cause for the death of the victim. If 'no', his act is not the cause of the 'death' of the victim and thereby he cannot be made liable for his death.

Presumption in favor of the Prosecution:

- ✓ Here generally the presumption is probably meant to operate in favor of prosecution. This

means that, it is sufficient for the prosecutor to prove that acts of the same kind as "the acts charged", when done in the same circumstances as those in which the accused acted, are ordinarily capable of bringing about the harm done in the particular case. He need not prove that this causal relationship also existed in the present case. It would be the burden of the defendant to rebut such a presumption by adducing sufficient evidence to the contrary.

Factors That Might Break the Chain of Causation:

- ✓ Art. 24(2) provides for the circumstances in which the cause and effect must be excluded because a chain of causation does not exist or is broken. This may happen in the following occasions:

1. Existence of Preceding Causes:

- ✓ A preceding cause is the one that exists even before anything is done by the accused towards commission of the crime. The chain of causation would cease to exist if there exists a cause prior to the act or omission of the accused and makes a material difference in the consequences foreseen or ought to have been foreseen by the accused. This means that the presence of the preceding cause brings an extraordinary result for the acts or omission of the accused.
- ✓ For example, 'A' hit 'B' a hemophiliac, with a broken glass bottle that had very sharp edges. 'B' died of excessive loss of blood in consequence. Evidence is brought on record to show that 'A' had not caused the said injury with the intention of causing B's death and that 'A' did not know that 'B' was suffering from hemophilia. In this case 'A' will be liable for causing grave willful injury to 'B' and not for causing death causing death because he did not know the existence of a preceding cause i.e. 'B' being suffering from hemophilia. The relation between the cause i.e. the act of the accused and the result produced i.e. the death of the victim cannot be said to have been established where the preceding cause has contributed materially to the result produced.

2. Existence of Concurrent Causes:

- ✓ The problem arises when, through or despite the application of the relevancy test, two or more persons are found to be eligible for liability. Here the problem arises when a given result may be attributed to two or more simultaneous causes.

For example, if 'A' and 'B' simultaneously shoot 'C' with the intention of killing him and 'C' is hit by bullets from both and dies, the question is whether both A and B are liable or A or B alone is liable.

- ✓ This question cannot be answered unless one investigates which bullet brought about the death to establish which act i.e., whether A's or B's act is relevant cause of C's death. In this case, in fact the acts of both 'A' and 'B' are relevant causes, because both the bullets hit simultaneously. Then the question would be which one of them was the efficient cause of B's death. Here again, there can be various possibilities like the following:

- If it is proved that both the bullets were fatal, 'A' and 'B' will be equally liable for the homicide.
- If the bullet fired by 'A' hit 'C' in the leg while the bullet fired by 'B' hit 'C' in the heart, 'B's act will be regarded as the efficient cause of 'C's death.

However, the Court, while deciding on liability, is not required to bear in mind everything that might possibly have occurred if 'C' had only been shot in the leg by 'A' and not also in the heart by 'B'. Therefore, 'A' may be found guilty only of attempted homicide, where as 'B' will alone be liable for C's death. This is subject to be provisions of Art 32 regarding co-offenders.

3. Intervention of extraneous causes

- ✓ Here, the problem arises when a given result may be attributed to a multiplicity of causes.
- ✓ The difference between this case and the case of concurrent causes lies in the time element involved. The task is to know which of the two or more consecutive (not simultaneous) events has caused the harm in issue.
- ✓ For instance, if 'A' beats up his child and inflicts on him an injury that, though not fatal, makes it necessary that he is admitted to. The child, while under treatment at the hospital, catches some deadly infectious disease and dies. There is no doubt that the efficient cause of the child's death is not the injury, but the disease. The latter is an intervening cause, the effect of which is that no chain of causation exists between the beating up and the death since, the initial act done by 'A' could not, in the normal course of things, produce the result eventually achieved. Therefore, here in this case, 'A' would be liable

for maltreatment of his child under Art. 576 only since the efficient cause that brought about the death is the disease and not the injury caused by the accused. To put it in the words of Art 24 (2), the extraneous cause was in itself sufficient to produce the result.

Cumulative Effect of Different causes:

- ✓ According to Art 24(3), where the result achieved is the cumulative effect of different causes mentioned in Sub Art (2) the cause and effect relationship shall be presumed irrespective of the fact that none of these causes can independently produce the result in question. For instance, 'A' and 'B' simultaneously/ consecutively shoot 'C' with the intention to kill him. 'A' shoots in his leg whereas, 'B' shoots in his upper arm and death ensues due to excessive bleeding from the wounds. The cause and effect relationship can be presumed to exist between the acts of both 'A' and 'B'. Both are equally liable for the crime of homicide.

Difficulties in the Assessment of "Physical Element" Of Crime:

- ✓ An analysis of the attempts which have been made by the courts to assess the physical element in criminal liability and the illustrative cases reveals the difficulties in establishing the causal relationship. It can be most conveniently examined under the following heads:

I. Where there is no Physical Participation:

A man may be held fully liable although he has taken no physical part at all in the actual commission of the crime. Thus, the law has, from the very early times, attached to the one who procures or advises another to commit a crime at least an equal responsibility with that of "the actual perpetrator of the deed". The law relating to such situations comes under the special heads of principals and accessories, incitement and conspiracy. In these cases, the accused may not be present on the scene of occurrence and even sometimes be far away from the place of occurrence. For e.g.: A man in 'Addis Ababa' may be held liable for having instigated and arranged the commission of a crime in 'Dire Dawa'.

- #### **II. Where Participation is Indirect:**
- A person will be held fully "responsible if he has made use of an "innocent agent" to commit a crime. E.g.: 'A' secretly puts poison into a

drink, which he knows or expects Mrs. 'B' will offer to Mr. 'B' or 'A' recklessly leaves a dangerous machinery which may cause harm to person or property through being operated or moved inadvertently by someone else or otherwise. In these instances, the innocent agent is guiltless and is not responsible criminally, but the one who had brought about such results intentionally or recklessly is held criminally liable

III. Where another Person has intervened:

Cases might arise in which it would appear that the harm would not have occurred but for an act or omission of the accused, but in fact it could be established that the more direct and immediate cause of the harm was the intervention of some other person. In such circumstances, the prisoner has been exonerated (absolved from liability), the reason being given that the harm was not the consequence of what the prisoner did, but was the consequence of what the intervener did.

IV. Contributory Negligence of the Victim:

This is an important principle in Civil Law that, "When the plaintiff by his own want of care contributes to the damage caused by the negligence or wrongful conduct of the defendant, he is considered to be guilty of "contributory negligence". At Common Law contributory negligence on the part of the plaintiff was considered to be a good defense and plaintiff lost his action. Plaintiff's own negligence disentitled him to bring any action against the negligent defendant. The defendant has to prove that the plaintiff failed to take reasonable care of his own safety and that was a contributing factor to the harm ultimately suffered by the plaintiff. E.g. If 'A' going on the wrong side of the road is hit by a vehicle coming from the opposite direction that is being driven rashly by 'B' the defense of contributory negligence is available to 'B' against 'A' since he has contributed to the occurring of the incident by walking on the wrong side of the road. No such defense is available to the accused in criminal proceedings. The victim of an offence may himself have contributed to the harm by his own negligence.

V. Where the Participation is Superfluous:

An intentional participation in a crime is not excused by the fact that it would have taken place irrespective of the co-operation of the accused. In such a circumstance, a man is involved in responsibility for the *actus reus* though his assistance in it was superfluous, and even though any opposition which he might have offered to it would have been quiet ineffective. E.g. 'A' and "B" two strong men were engaged in beating 'C' to death. 'X' a stranger rushed in unasked and undesired by them and gave some small blows to the victim. If 'C' dies 'X' would be guilty of the murder of 'C' just as 'A' and 'B' are responsible of the murder, if it can be established that each of the three offenders foresaw that the death of 'C' would be the result of the general attack which has been made upon him.

Section.3 Concurrence of Crimes- Guilt In Case Of Concurrence Crimes Art 60-67

- ✓ 'Concurrence' of crimes occurs in either of the following two ways:
 1. When several unlawful acts are done in contravention of one or more articles of the law. This type of concurrence is known as **concurrence of crimes or Material Concurrence**, or
 2. When one unlawful act is done in contravention of several articles of the law. This is called **concurrence of criminal provisions or Notional Concurrence**.
- ✓ The provisions relating to 'Concurrence' deal with two important questions:
 - (a) Whether the commission of several acts or faults affects the doer's degree of guilt, if so, to what extent?
 - (b) Determination of punishment to which he is liable as a consequence concurrence.
- 1. **Concurrence of Crimes: (Material concurrence)**
 - ✓ Several Criminal acts may also constitute one or more crimes. Such concurrence is referred to as material concurrence in Art 85. For example, if a criminal robs B's shop and C's residence, there is a case of material concurrence due to the criminal's successive acts. If the criminal in addition ravishes a maidservant while robbing

C's residence, there is a material concurrence of three crimes, i.e., two crimes of robbery and a crime of rape.

- ✓ Materially concurrent crimes may be 'independent' or 'related'. In concurrent related crimes, a criminal commits a crime with the intention of causing or facilitating the commission of another punishable crime (Art 65). In some cases, related crimes whose components fall under different provisions are in combination embodied in a special aggravated crime (185/2). For instance, Coercion (Art-582) and 'theft' (Act. 665) is embodied in 'robbery' (Act. 670).
- ✓ But there are related crimes that are not embodied in an aggravated special crime. In such, cases criminal law resorts to aggravation of penalty by concurrence (Act-65, 185/1) if the crime under consideration is at least attempted. For example, infringement of literary or artistic copy right (Art. 721) to "further the commission" of fraudulent misrepresentation (Arts. 723) is subject to an aggravation of penalty on the basis of material concurrence of related crimes. Yet, such related crimes are not invariably concurrent because they may be considered as ancillary or subordinate under the exceptions stated in Art. 61/3.
- 2. **Concurrence of Criminal Provisions (Notional Concurrence):**
 - ✓ A single criminal act or omission may give rise to concurrent crimes by violating two or more provisions. Such events are referred to as national concurrence in Article 85. For instance, if a married man ravishes his relative in a public place he is punishable for four crimes. The crimes of rape (Art.620) incest (Art.654), adultery (Art.652) and public indecency (Art. 639) arise from the criminal's single act. Here several legal provisions are applicable because the act or combination is not an ingredient of only one of them. Art. 620 covers the sexual outrage, but not the relationship between the criminal and the victim which is covered by Art. 654, nor the marital status of the criminal, which is taken care of by Art. 652, nor the fact that the crime was committed in the view of the public, which is covered by Art.639.
 - ✓ When a single criminal act results in several punishable crimes, it is classed as Simultaneous Notional Concurrence. Under this type of concurrence, if the criminal is proved to have

caused one of them with criminal intention or negligence, he is held guilty of all the crimes because they invariably occur at the same time from the same causal relation. In the illustration here above the accused has simultaneously committed four concurrent crimes by the same act and causal relation.

✓ 'Notional concurrence' may also include a non-simultaneous combination of crimes as stated in Art. 66 where by causation and the particular state of mind must be proved independently for each of those crimes. There are three possibilities of combined notional concurrence, namely :

- Concurrence of intentional crimes, Art.66/1/a
- Concurrence of intentional and negligent crimes. Art. 66/1/b, and
- Concurrence of negligent crimes, implied in Art. 66/1/c.

- ✓ For example, if 'A' sets fire to B's hut with an intention to destroy it, it is obviously an intentional crime of 'Arson' under Art. 494. If 'B' dies while asleep inside the hut, a possibility which the criminal had foreseen and accepted, "A" is concurrently (Art. 66/1/a) punishable for intentional homicide (*dolus eventualis*). If 'A' having foreseen the possibility and had believed that 'B' might not be present inside the hut at the crucial point of time or had the opportunity to save his life, there is concurrence of intentional arson and the resulting negligent homicide (Art. 66/1/b).

Rules Regarding Determination of Punishment in Cases of Concurrence:

1. Cumulative of punishment is not allowed in all cases of concurrence because under certain circumstances the cumulated punishment may go beyond a person's lifetime. The only exception where cumulative punishment is permissible is in case of material concurrence of petty offences as stipulated in Art. 768.
2. Upon finding concurrence of crimes, the court, according to Arts. 184-187:
 - Imposes a penalty on the most severe crime, and
 - Aggravates the penalty without exceeding the maximum limit allowed in Art. 184.

Mechanism of 'aggravation' has two specific advantages:

- It discards an unseasonable cumulative of punishments,
- It avoids the absorption of lesser penalties, which had been allowed under Art. 42 of the 1930 Criminal Code.
- **Unit of Guilt and Penalty: Art. 61:**
 - ✓ Certain acts constitute a single crime though they may seem concurrent at first glance. For example, a storekeeper who has stolen 50 wristwatches over a period of 6 months (by taking advantage of his status) commits the crime of aggravated theft under Art. 669/2/d, the very day he took the first wrist watch. Is he considered to have committed concurrent crimes of aggravated theft if he has stolen the items on 20 different occasions, until his theft was discovered? On the other hand, in case a criminal stabs a person with a knife intending to cause death, but fails to bring about the desired result, is he punishable for concurrent crimes of bodily injury and attempted homicide? Art. 61 states the following three instances of imperfect concurrence where by the seemingly concurrent crimes are merged (united) by the same criminal guilt and purpose.
 - 1. **Single Act or Combination of Criminal Acts:**
 - ✓ By virtue of Article 61/1, a criminal cannot be charged and punished under two or more concurrent provisions of the same nature if the following 3 conditions are satisfied:
 - If a single act or a combination of criminal acts are committed,
 - Against the same protected right,
 - Flowing from a single criminal intention or act of negligence.
 - ✓ For example, in a crime of robbery, there are acts of coercion and theft, which must be committed only once. If such act or acts are repeated, there is a material concurrence within the meaning of Art. 82 (1)(a), unless this repetition is an ingredient of the offence committed, such as: Art 477, dangerous vagrancy, Art. 535, unlawful exercise of the medical profession, Art 634 habitual exploitation of the immorality of others etc.
 - ✓ As per the second requirement, the act or acts must be "against the same protected right". If

two provisions safeguard the same right they can't be invoked concurrently (subject to other factors as well). Articles 670 robbery and Art 665 theft protect the same right to property though the former in addition safeguards liberty against coercion. Art. 670 is not thus concurrently invoked with Art 665 because it fully covers the right protected by the latter provision. On the contrary, in the example that has been seen earlier of a married man ravishing his relative in a public place, the offender violates more than one protected interest i.e. liberty, sexual integrity, reputation etc. and the concurrent offences are not covered by a single penal provision.

- ✓ Thirdly, the offence under the consideration must "flow from a single criminal intention or act of negligence". In the example stated earlier, the offender who stabs (but fails) to kill is not charged for the concurrent offences by bodily injury and attempted homicide. He is charged only for attempted homicide because bodily injury is an inevitable ingredient of homicide and the injury flows from the single criminal intention "to kill. If instead, an offender causes miscarriage to Miss. B in such an unskillful manner that she is permanently disabled from bearing children, there is combined notional concurrence (Art. 65) of abortion under Art. 545 or 546 and injury under Art. 556 or 559.

2. Successive non-concurrent acts Art. 61/2

- ✓ According to Art.60/2, a person who commits a so-called successive offence is guilty of, and punishable for only one offence and not for each of the act which he repeatedly does. Under this sub-article the essentials are:
 - Successive or repeated acts done
 - against the same protected right.
 - Flowing from the same criminal intention or act of negligence, and
 - Aiming at achieving the same purpose
- ✓ For example, a cashier who misappropriates 5 Birr a day over a period of one year commits a successive 'offence of breach of trust' since the acts which he repeatedly does are of the same kind (misappropriation) and directed against the same legally protected interest (property). The concept under Art. 60/2 is known as the

"continuing offence" and is relatively clear in Article 288/2 whereby act "exercised on several separate occasions... and pursued over a period of time" are considered in 'continuum' for the purpose of calculating limitation periods.

3. Ancillary (subordinate) Acts. Art. 60/3

✓ Art. 60/3 deals with the problem of so-called non-punishable acts of execution preceding or following an offence. In the course of carrying out a given design, a person may do several unlawful acts of some of which, however, appear to be ancillary to the others in the sense that they must be performed if the design is to be brought about. The Sub-Article refers to 3 such instances - i.e. acts committed after the commission of the main offence in cases of offences resulting from injury to property,

1. The putting into circulation of counterfeit coins, or
2. The use of forged documents.

- ✓ Any subsequent act the offender performs for the purpose of carrying out his initial criminal scheme shall not constitute a fresh offence liable to punishment and are merged by the unity of intention and purpose. If a person forges a document under Art. 383, he is not concurrently punished for the subsequent act of using the forged instrument under Art. 386. Similarly a person who utters (puts into circulation) the false money under Art. 369 that he has forged, is punishable for the main offence of forgery under Art. 367 and not for the ancillary offences of uttering under Art. 369/1.

Renewal of Guilt and Penalty Art. 62.

- ✓ The provisions of this Article must be read in conjunction with those of the Art. 60.
- ✓ Under Art. 60, a single offence is deemed to have been committed and there is "unity of penalty" on the condition that there is "unity of guilt". When this condition is not fulfilled, it follows that there is plurality of offences and consequently, of penalties. This may occur in any of the three situations described by Art. 60, though not in the absence of the repetition of acts.
- ✓ However, there can be 'cases of renewal of guilt' as mentioned under Art. 61. The offender becomes punishable where there is repetition of acts or omissions with renewed criminal intention or negligence. For example, if a truck driver who did not fasten his load of bricks is aware of this fact that a brick has fallen off and killed

someone, he will, if another brick falls off and kills a second person, be punishable for concurrent offences of 'negligent homicide' because the death of the second victim is attributable to a new failure to ensure that bricks would not fall off the truck. In case an offender's five shots miss the target it is apparently a single (non-concurrent) attempt (Art. 60/2). But if the offender fires at the victim a week after he missed him, prosecution may invoke renewal of criminal intention under Art. 61 and charge the offender for concurrent offences.

Jurisdiction and Periods of Limitation:

- ✓ Persons subject to the Criminal Code of Ethiopia are subject to the jurisdiction of the Ethiopian courts.

Period of Limitation: This refers to the cessation for the application of the Criminal Law for the purposes of conviction and punishment. This is to mean that the law itself may cease operation due to lapse of time provided by itself. This period of limitation may be provided with by the constitution or by the Criminal Code. Accordingly, Articles 216-228 of the Criminal Code provides the principles of lapse of period of limitation. Lapse of period of limitation bars prosecution in the following cases as shown in the box:

- Twenty five years for crimes punishable with death or rigorous imprisonment for life (Art. 217(a))
- Twenty years for crimes punishable with rigorous imprisonment exceeding ten years but not exceeding twenty five years (Art. 217 (b))
- Fifteen years for crimes punishable with rigorous imprisonment exceeding five years but not exceeding ten years Art. 217(C)
- Ten years for crimes punishable with rigorous imprisonment not exceeding five years (Art. 217 (d))
- Five years for crimes punishable with simple imprisonment exceeding one year (Art. 217(e))
- Three years for crimes punishable with simple imprisonment not exceeding one year, or with fine only. (Art. 217(f))
- Two years for crimes punishable upon complaint (Art. 218)).

Lapse of period of limitation as well bars penalties or measures in the following situations as shown hereunder:

- Thirty years for a death sentence or a sentence for rigorous imprisonment for life (Art. 224 (a))
- Twenty years for a sentence for rigorous imprisonment for more than ten years (Art. 224(b))
- Ten years for a sentence entailing loss of liberty for more than one year (Art. 224(c))
- Five years for all other penalties (Art. 224(d))

✓ This, however, is subject to Article 28(1) of the FDRE Constitution which states that criminal liability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture shall not be barred by statute of limitation. Such crimes may not be commuted by amnesty or pardon of the legislature or any other state organ.

Section. 4. Corporate Criminal Liability

✓ Only natural persons used to be subjects of commission of crime. Individuals are regarded as autonomous having freedom to control their actions including the choice to do wrong. Such persons can be held responsible for their choices. They can be praised or blamed and punished for their acts. This concept of responsibility does not include artificial persons like companies.

✓ Recently, developments have been made in criminal law with respect to wrong doings by legal persons. In law, personality is manifested not only in natural persons but also in legal persons. The application of the doctrine that companies are legal persons separate from the individual persons involved in its operations, is that a company can commit many crimes of strict liability. For instance it can cause pollution, provide products that are unsafe to the public etc.

Goals of Corporate Criminal Liability:

✓ The main goals of criminal liability of corporations are similar to those of criminal law in general as enumerated below:

- The first characteristic of corporate criminal punishment is deterrence—effective prevention of future crimes.
- The second consists in retribution and reflects the society's duty to punish those who inflict harm in order to "affirm the victim's real value."
- The third goal is the rehabilitation of corporate criminals.
- Corporate criminal liability should achieve the goals of clarity, predictability, and consistency with the criminal law principles in general.
- The fifth goal is efficiency, reflected by the first three goals mentioned above, but also by the costs of implementing the concept.
- Finally, it is the goal of general fairness.

Kinds of Corporate Liability:

✓ The imposition of criminal liability is only one means of regulating corporations. There are also civil law remedies such as injunction and the award of damages which may include a penal element.

✓ Generally, criminal sanctions include imprisonment, fines and community service orders. A company has no physical existence, so it can only act vicariously through the agency of the human beings it employs. While it is relatively uncontroversial that human beings may commit crimes for which punishment is a just desert, the extent to which the corporation should incur liability is less clear. Obviously, a company cannot be sent to jail, and if a fine is to be paid, this diminishes both the money available to pay the wages and salaries of all the remaining employees, and the profits available to pay all the existing shareholders. Thus, the effect of the only available punishment is deflected from the wrongdoer personally and distributed among all the innocent parties who supply the labor and the capital that keep the corporation solvent.

✓ Because, at a public policy level, the growth and prosperity of society depends on the business community, governments recognize limits on the extent to which each permitted form of business entity can be held liable (including general and limited partnerships which may also have separate legal personalities).

Criminal Liability:

- Represents formal public disapproval and condemnation because of the failure to abide by the generally accepted social norms,

codified into the criminal law. Police powers to investigate can be more effective, but the availability of relevant expertise may be limited. If successful, prosecution reinforces social values and shows the state's willingness to uphold those values in a trial likely to attract more publicity when previously respected business leaders are called to account. The judgment may also cause a loss of corporate reputation and, in turn, a loss of profitability.

- Justifies more severe penalties because it is necessary to overcome the higher burden of proof to establish criminal liability. But the high burden means that it is more difficult to secure a judgment than in the civil courts, and many corporations are cash-rich and so can pay apparently immense fines without difficulty. Further, if the corporation knows that the fine is going to be severe, it may seek bankruptcy protection before sentencing.
- The theoretical value of punishment is that the offender feels shame, guilt or remorse, emotional responses to a conviction that a fictitious person cannot feel.
- If a state turns too often to the criminal law, it discourages self-regulation and may cause friction between any regulatory agencies and businesses that they are to regulate.

✓ **Civil Liability:**

- With the lower burden of proof and better case management tools, civil liability is easier to prove than criminal liability, and offers more flexible remedies which can be preventative as well as punitive.
- But there is little moral condemnation and no real deterrent effect so the general management response may be to see civil actions as a routine cost of business which is tax deductible.

Principles of Corporate Liability:

✓ A company can be held liable for its wrongful acts by virtue of two legal principles:

1. Vicarious liability: The legal principle of vicarious liability applies to hold one person liable for the actions of another when engaged in some form of joint or collective activity. The general rule in the criminal law is that there is no vicarious liability. This reflects the general principle that a crime is composed of both an actus reus and a mens rea and that a person should only be convicted if he, she or it is directly responsible for causing both elements to occur at the same time. Thus, the practice of holding one person liable for the actions of another is the exception and not the rule in criminal law. In the criminal law, corporate liability determines the extent to which a corporation as a fictitious person can be liable for the acts and omissions of the natural persons it employs. It is sometimes regarded as an aspect of criminal vicarious liability. A company can be vicariously liable to many offences of strict liability and negligence for the acts of its employees in the course of their duties.

2. Direct liability: The idea that a company is a legal person that could sue and be sued in its own name, has given way to the law maker superimpose its individualistic conception of criminal liability to legal persons. The acts of individuals who had committed the offence are identified with the company itself. In such circumstances the company as well as the individual could be criminally liable. This is known as the identification doctrine.

• **Meaning of 'Juridical Person/Corporation': Art 34/4 of the Criminal Code:**

For the purpose of the applicability of Art 34, "juridical person" means a body which has

- o governmental or non-governmental,
- o public or private structure and
- o includes any legally recognized institution or
- o association set up for commercial, industrial, political, religious or any other purpose.

Principles relating to Criminal liability of Corporations under the Criminal Code of Ethiopia: Art 34

A juridical person, other than the administrative bodies of the State is punishable, where it is expressly provided by law, in any of the following capacities (Art.34/1):

1. Principal criminal,
2. An instigator or
3. An accomplice

• **Essentials to attach criminal liability to juridical persons:**

A juridical person shall be deemed to have committed a crime and punished as such if the following essential elements of such commission are established:

1. One of its officials or employees commits a crime as a principal criminal, an instigator or an accomplice,
2. In connection with the activity of the juridical person
3. with the intent of promoting its interest
4. by an unlawful means or by violating its legal duty or by unduly using the juridical person as a means.

Punishment in case of juridical persons:

1. Fine under sub-article (3) or sub-article (4) of Article 90 of this Code; and
2. Suspension or closure or winding up of the juridical person may be ordered where necessary
3. Individual liability on the officials or employees of the juridical person may be additionally imposed for their personal criminal guilt.

UNIT-V DEGREES IN THE COMMISSION OF CRIME

Section.1. Different Stages in The Commission Of Crime:

- ✓ The material element of the crime may result in a completed or incomplete offence. Completed offences that mostly are related with causation will be dealt with after dealing with all incomplete but different degrees of offences.
- ✓ Incomplete offences are taken to be incomplete degrees of the material element of a crime as it would be difficult to say that one could not be criminally liable unless he or she carries out an unlawful activity to its end. There are degrees in certain cases at the time of the commission of an offence in which the law intervenes by reason of their gravity or the danger they entail. No doubt that many acts may be done from the day when

a criminal intent comes into being until the day it materializes.

1. Preparation:

- ✓ Criminal law punishes “overt acts” and not mere intentions.
- ✓ A criminal intent, no matter how immoral it may be, is beyond the grip of criminal law until it is manifested by external conduct. The requirements of Art. 23 imply that a mere criminal intention does not in itself constitute a crime and is not punishable
- ✓ Therefore, the Criminal Code does not apply unless a person crosses the line of demarcation between the mental and the material phases. A criminal crosses this line firstly by preparing the commission of a crime within the meaning of Art. 26.
- ✓ Various phases normally precede acts. The phases of desire, decision and initial planning (in the thoughts of the criminal) are mental that do not involve exterior acts. From the moment these phases develop into “external conduct” that aims at the commission of a crime, the phase of preparatory act is said to have begun. However, not every preparatory act is punishable.
- ✓ Most Criminal Laws including Ethiopian Criminal Code do not in principle punish preparatory acts.
- ✓ Preparatory Acts are defined under Art. 26 of the Penal Code of Ethiopia as those acts which are merely designed to prepare or make possible an offence, by procuring the means or creating the conditions for its commission.
- ✓ Preparatory acts are not punishable as a general principle for two main reasons. That is, it is difficult to safely conclude that a person manifests the material element of the crime due to the equivocal nature and remoteness of the preparatory acts towards the offences intended to be committed. In other words, behaviors cannot be considered to constitute the material element of the crime unless they are proximate and definite that the offence is likely to be committed.

Legal Effects of Preparatory Acts:

✓ **Article 26 of Criminal Code reads:** “Acts which are committed to prepare or make possible a crime, particularly by procuring the means or creating the conditions for its commission are not usually punishable, however, such acts are punishable where

- a) In themselves they **constitute a crime defined by law:** A person who buys a gun as a preparatory step towards homicide is punished for the completed “petty offence” of retaining a gun without license (Arts. 808, 809) even though he is not punishable for his preparatory act; the act of keeping a gun without a license itself is a petty offence.
- b) They are **expressly constituted a special crime by law by owing to their gravity or the general danger they entail**: Certain preparatory acts are expressly constituted a special crime by law owing to their gravity or the general danger they necessarily bring upon the society. For example, material preparation of offences against the state (Art. 256, 257), preparing a mutiny or seditious movement (Art. 300) and preparing machinery and means of counterfeiting currency (Art. 371) are expressly stated to constitute special crimes.

- ✓ Punishing preparatory acts is therefore an exception than a rule under Ethiopian criminal law. Nevertheless, the Criminal Code has a mechanism of precaution against preparatory acts where a person behaves or is likely to behave in a manner which threatens peace or security of the public or citizen (Art. 141). In such cases dangerous articles are seized (Art. 140) and the person who poses a threat is required to enter into recognizance. The remedy of such precautionary measures is available for unpunishable preparatory acts. But this is not always so because preparatory acts are punishable under the circumstances stated in Article 26.
- ✓ Preparation is punishable only when it has reached such an advanced stage and is close to an attempt that there is no doubt as to the purpose of the arrangements made and as to the willingness of the person who made them, to

carry them further if he is given the chance of doing so.

2. Attempt:

It is a substantial but unsuccessful effort to commit a particular offence. It is a willful effort but without success. The effort must be unsuccessful because a person cannot be prosecuted for both an attempt and completed crimes as the attempt can be considered to have been merged with the completed offence, thereby abrogating itself. Attempt obviously implies more than preparation. However, the difference between the two is not always apparent since there is in both cases a movement towards the commission of a crime.

Overt Act: This goes with the known principle of Penal Law that it does not punish mere thoughts, as a breach of the law can't occur in the absence of a given behavior. A person, therefore, can be held liable criminally if he/she manifests his/her intent by some open deed tending to the execution of his/her intent. There is of course an act or movement towards the commission of an offence in both attempt and preparation. Attempt requires an act more than preparation. As prosecuting attempt is one of the several ways in which the Penal Law can reach conduct merely tending toward the doing of some harm otherwise proscribed by law, there must at least be commencement of an act. In other words the stage of acts towards the commission of the offence shall reach at a point of no return. That is, the act shall be a step towards the commission of the crime or it has to be in part execution of the intent, or a direct movement towards the commission of the offence, or the commencement of the execution. There is, however, a problem of drawing a line between preparation and attempt. Accordingly, some tests have been utilized by the common law courts. These include: the proximity approach, the probable distance approach and the equivocally approach.

Intent: An act to constitute an attempted offence shall be preceded by purely internal mental process, which begins with the thought of executing an offence and ends with the decision to commit it, but which does not manifest itself by any overt act. The convictions of attempt rests upon the doctrine that “Voluntas reputabitur pro facto- the intention is to be taken for the deed.

Hence, whatever a person does towards the commission of an attempted offence, he must do it intentionally. i.e. Art. 58(1) of the Penal Code shall be met. Attempt, therefore, requires a purposeful behavior. A person can be said to have attempted an offence when he purposefully acts to accomplish what he has originally intended to commit. In connection to this, it has been said that the intent in the mind covers the thing in full; the act covers it only in part. Accordingly, negligent attempt is inconceivable as the person in such case does not desire the consequences. One thing must be mentioned here that a person can be liable for attempted offence when such offence is punishable upon intentional state of mind.

Kinds of Attempt:

- ✓ Basing on the 'reason' for the failure to achieve the intended result attempts can be classified into three categories:

a. "Incomplete Attempt":

- ✓ If the accused chooses not to do or is prevented from doing the last act of the crime, the attempt is said to be incomplete.
- ✓ The words "... do not pursue ... his criminal activity to its end" in Article 27 define "incomplete attempts" because of voluntary withdrawal.
- ✓ The part of the provision that reads, "... or is unable to pursue his criminal activity to its end", on the other hand, indicates an incomplete attempt because of external interventions, that is outside the volition or will of the accused. For example, an accused aims at a person, touches the trigger and then changes his mind is said to have voluntarily withdrawn.
- ✓ Article 28/1 gives due credit to an offender who renounces the pursuit of his criminal activity by allowing reduced punishment (Art. 179), free mitigation (Art. 180) "if circumstances so justify" or no punishment "if the renunciation was prompted by honesty and high motives".
- ✓ In cases where the withdrawal occurs due to external circumstances, the non pursuance of criminal activity is involuntary. **Taylor's Case** (1859): The defendant approached a stack of corn with the intention of setting fire to it and lighted a match for that purpose, but abandoned his act on finding that he was being watched. The case illustrates the external circumstances resulting in withdrawal.

b. "Complete Attempt":

- ✓ An attempt is said to be complete when the wrongdoer has performed everything on his/her part, which is considered to be necessary without, however, result having occurred. In other words the perpetrator has done all that he/she intended to bring about the result, but the desired result has not followed.

- ✓ The reasons for the failure to achieve the result may be of two types: one, it may happen that the **offender did every thing that was necessary to bring about the result but the achievement has not occurred due to situations beyond his/her control**. This point has the idea that the attempter would in all probability have achieved in causing the desired result had it not been for the existence of unexpected events. This category of attempt includes impossible offence. Attempt could also be felt to achieve the result **due to the active involvement of the perpetrator him/herself**. This is known as **active repentance**.

- ✓ Where the accused has done the last act, which he expects to carry out, and which he thinks causes the harm intended, the attempt is said to be complete. Complete attempts may take the forms of voluntary undoing or involuntary failure to achieve the result.

- ✓ E.g. If a criminal having poisoned a victim with a dosage sufficient to cause death, regrets and voluntarily takes him to hospital there by enabling complete recovery, the criminal has apparently "undone" the effects of what he had done. Such an "active repentance" (Art. 28/2) enables courts to reduce punishment without restriction (Art 180). Involuntary failure to achieve intended result occurs upon missing a target, abortion of result or impossibility of achievement as specified in Art 29. If target is missed, the attempt is considered complete if the criminal's intentional shot, for instance, misses the intended victim. In the above example of poisoning, if a person other than the criminal does the act of taking the poisoned person to hospital the intended result is said to have been aborted there by rendering the crime a case of complete attempt.

c. "Impossible Attempt" Art. 29:

- ✓ Article 29 covers the cases of absolute impossibility and not relative impossibility where the circumstances in which the criminal acted

are unable to cause the criminal's intended harm due to the means used or because of the object against which the act is committed.

- ✓ Failure to achieve result because of an unloaded gun is an absolute impossibility due to the means used. Poisoning a person with an insufficiently fatal poison is a case of relative impossibility due to insufficient means. If a doctor attempts abortion over a woman who is not pregnant, there is absolute impossibility due to the missing object. In case however, the attempted abortion fails because the woman is conditioned to a particular drug, the doctors attempt is said to be relatively incapable of achieving result due to the nature of the object over whom it is practiced.

- ✓ Such a distinction between absolute and relative impossibility is significant because free mitigation (Art. 180) may be allowed under cases of absolute impossibility. Further more, no punishment shall be imposed if a person "from superstition or owing to the simplicity of his mind acted by using means of processes in themselves innocuous which could in no case have a harmful effect." Such a consideration of objective harm rather than subjective criminal intention is apparently inconsistent with the overall subjective inspiration of the Criminal Code.

Mens rea in Attempts:

- ✓ The mental element assumes paramount importance in attempts, because sometimes *actus reus* may be a perfectly innocent and harmless act, for example 'D' intending to murder 'P', puts sugar in his tea, believing that it is Arsenic the act is absolutely harmless. His 'Object' failed only because of his mistaken appreciation of the material circumstances. Therefore, without establishing his guilty intention it is impossible to make him liable for an attempt. As long as the consequence is intended, erroneous appreciation of the material circumstances may not alter the liability for attempt.

Section 2. Importance of Distinction between Preparation and Attempt:

- ✓ The relative proximity between the 'act' done and the 'evil consequences' contemplated largely determines the distinction. Firstly, preparation consists in devising or arranging the means or measures necessary for the commission of the crime; while an attempt is the direct movements towards the commission of the crime after preparations have been made. An attempt is manifested by the acts, which would end in the consummation of the crime, but for the intervention of certain circumstances independent of the will of the party. Secondly, preparations are generally not punishable, whereas attempts are always punishable. The reasons why preparations are not punished are fourfold, namely:
 - a) A preparation apart from its motive is generally an harmless act;
 - b) It would be impossible in most cases to show that preparation was directly towards a wrongful end or was done with an evil motive or intent. Therefore, if mere preparations were punishable it would cause unnecessary harassment to innocent persons as there is a *locus poenitentiae*, and the doer may have changed his mind;
 - c) It is not the policy of law to create and multiply crimes. If preparations were to be punished, innumerable crimes will have to be created;
 - d) A mere preparation does not and cannot ordinarily affect the sense of security of the individual to the wronged, nor would the Society be disturbed or alarmed as to rouse its sense of vengeance.

Identification of the Stage of Attempt:

- ✓ Some tests have been evolved by the courts to determine at what stage an act or a series of acts done towards the commission of the intended crime would become an attempt. These tests are:
 - **Reasonable Inference test or Unequivocality Test:**
- ✓ In this test, the nature and circumstances of the act must give a reasonable inference of the attempter's criminal intent. According to this test, ".... an act done with intent to commit a crime is not a criminal attempt unless it is of

such a nature as to be in itself sufficient evidence of the criminal intent with which it is done".

- ✓ If the only reasonable inference that can be drawn from the overt acts of the accused is that he would have completed the crime had he not been interrupted, then there can be no doubt that he is guilty of an attempt to commit a crime". The interdependence between intent and behavior is apparent in this test. Overt acts emanate from intention and in turn verify criminal intent and determination.
- ✓ To constitute an attempt, the act must be such as to clearly and unequivocally indicate the intention to commit the crime. If what is done indicates beyond reasonable doubt that the end is towards which it is directed, it is an attempt, otherwise it is a mere preparation. The act must refer to the commission of the crime and it must be evident and clear on examination. The acts must speak for themselves. As stated by Turner; "Cinematographic film, which had so far depicted merely the accused person's acts without stating what was his intention, had been suddenly stopped and the audience were asked to say to what end those acts were directed. If there is only one reasonable answer to this question, then the accused has done what would amount to an 'attempt' to attain that end. If there is more than one reasonably possible answer, then the accused has not yet done enough.

➤ The Commencement of Execution Test:

- ✓ According to this test, there is an attempt as of the moment the accused begins to commit the crime. "An act amounts to the beginning of execution when the intention behind it is irrevocable. The doer should, therefore, go beyond what might be called the point of no return. The execution of the crime includes the doing of an act, which in the criminal's plan amounts to a decisive step towards the achievement of the result, after the taking of which there is normally no possibility of drawing back..."
- ✓ This test is basically subjective. Yet, it does not disregard objective considerations, because the objective overt act of the 'decisive step' serves as a landmark in embarking upon the subjective point of no return.
- ✓ The Ethiopian Criminal Code defines attempt in Art. 27/1 Para 1, as the intentional act of

beginning to commit a crime and thus has much in common with the "commencement of execution test". The second paragraph of the provision states what is meant by the act of beginning to commit as offence. It reads: "The crime is deemed to be begun when the act performed clearly aims, by way of direct consequence, at its commission".

- ✓ From this, two questions would possibly arise:
 1. When does an act clearly aim at the commission of a crime?
 2. When do the acts performed would aim at the commission of the crime by way of direct consequences?
- ✓ The term "clearly" is intended to mean an unequivocal manner. An act unequivocally aims at a desired harm where the doer's criminal intent and determination clearly or unequivocally aim at the completion of crime.
- ✓ A given act normally manifests two things namely:
 - a. Intent (the doer's subjective state of mind)
 - b. The acts' material (objective) proximity or remoteness to the intended consequence.
- ✓ If the term "... clearly" refers to the doer's subjective state, of mind the term "direct" can logically be presumed to apply to the objective location of an act in the path towards the desired result. For example, "A" buys a gun for the purpose of killing 'B'. This act of buying a gun does not unequivocally prove the "intent" of the criminal and is remote from the desired result. On the contrary, if he aims at 'B' and pulls the trigger, even if the bullet does not hit the target the person renders his intention unequivocal and the harm imminent. The former is a typical act of preparation and the latter is a punishable attempt.
- **Proximity test:**
- ✓ An act of attempt must be sufficiently proximate to the crime intended, it should not be remotely leading towards the commission of a crime.
- ✓ The act of the accused is proximate if, though it is not the last act that he intended to do, it is the last act that was legally necessary for him to do, if the contemplated result is afterwards brought about without further conduct on his part. Let us take an example, A, intending to murder Z, buys a gun and loads it with the intention to kill Z. A is

not yet guilty of an attempt to murder. A fires at Z, but misses the mark for want of skill or due to some defect in the gun, since the act of A could not bring the desired effect, say death of 'Z', A could not be held liable for murder. However, A would be liable for attempt to murder, because 'A' has done what was legally necessary for him to do under the circumstances. If 'A' could not succeed in his object, it was not because of his desisting from the act of killing, but because of something beyond his control.

➤ **Locus poenitentiae Test:**

- ✓ The Latin term 'locus poenitentiae' means 'place of repentance'. i.e. a point at which it is not too late for one to change one's legal position; the possibility of withdrawing from a contemplated course of action, esp. a wrong, before being committed to it.
- ✓ An act would amount to preparation and not an attempt, if a person voluntarily gives up the idea of committing a crime before the criminal act is carried out. So long as the steps taken by the accused leave room for a reasonable expectation that he might, either of his own accord, or because of the fear of the consequences that might befall him as a result, desist from the act to be attempted, he would still be treated on the stage of preparation.

➤ **Social Danger Test:**

- ✓ The seriousness of the crime attempted and the apprehension of the social danger involved is taken into account to distinguish an act of 'attempt' from that of 'preparation'. 'A', gives some pills to a pregnant woman to procure abortion, but it had no effect because the drug turned out to be innocuous. 'A', would be guilty of attempt to cause miscarriage since the acts of such kind would cause an alarm to society and will have social repercussions.

Accomplishment or Completion of Crime:

- ✓ When the intended consequences are achieved by the conduct of the accused, the crime is said to have been completed and thus making the accused liable to punishment for full fledged crime.

➤ **Renunciation And Active Repentance:**

- ✓ **Renunciation** is provided under Article 28 of the Penal Code as "if an offender of his own free will renounce the pursuit of his criminal activity the

court shall reduce the punishment within the limits provided by law (Art. 179) or may reduce it without restriction (Art. 180) if circumstances so justify.

- ✓ No punishment shall be imposed if the renunciation was prompted by reasons of honesty or high motives." It refers to situations where a person abandons the pursuit of his or her criminal activity by his or her own free will without completing the act required producing the result.

- ✓ Renunciation exists when the criminal activity is abandoned absolutely. As it is in an attempted crime, it must be accompanied by guilty state of mind in the form of intent. There is also no doubt that the act should not achieve the result. In such a case, the person is held criminally liable for an attempted offence, but there is a possibility of reduction of punishment within the limits of the law as per Article 179 of the Penal Code, or beyond the limits of the law as provided under Article 180 of the same code which reads as: In cases where the law provides the mitigation without restriction of the penalty, whether compulsorily or optionally, the court shall have power to determine it in accordance with the following principles:

- o The court shall not be bound by the kind of penalty provided in the special part of this Code for the offence to be tried, nor by the minimum which the provision enacts; it may without restriction impose a sentence for a term shorter than the minimum period prescribed or substitute a less severe sentence for the sentence provided;
- o The court shall be bound solely by the general minimum provided in the general part, (Art 82, 86) as regards the penalty it imposes, whatever its nature may be.

- ✓ The person may also be exempted from punishment when the abandonment is grounded on honesty and high motive.

- ✓ The failure to achieve the result after the completion of the act may also occur when, after having performed all the acts to bring about the desired result, the perpetrator himself either prevents or contributes for the prevention of the result. This is what is called **active repentance** which is dealt with under Article 28(2) of the Penal Code that reads: If an offender, having

completed his or her criminal activity, of his or her own free will prevents, or contributes to prevent the consequent result, the court may without restriction reduce the punishment (Art. 180).

UNIT- VI: PARTICIPATION IN THE COMMISSION OF CRIME

- ✓ It is obvious that a crime should not always be committed by single persons. A crime can be committed by several persons who participate in the commission of a crime at different or same capacities. It is therefore important to determine the degree of involvement and the role played by such persons in the commission of the crime.

Section.1. Participation In Principal Capacity:

- ✓ In Ethiopia, principal participation is defined broadly that it takes the forms of material, moral and indirect offenders. These forms of principal participation are provided under Article 32 of the Criminal Code, which states that "*a person shall be regarded as having committed a crime and punished as if:*

- (a) *he actually commits the crime either directly or indirectly, in particular by means of an animal or a natural force; or*
- (b) *he without performing the criminal act itself fully associates himself with the commission of the crime and the intended result; or*
- (c) *he employs an infant or a person who is mentally deficient or unaware of the circumstances, for the commission of a crime or compels another person to commit a crime.*
- (2) *Where the crime committed goes beyond the intention of the criminal he shall be tried in accordance with Article 58(3).*
- (3) *Where two or more persons are involved as principal criminals in the commission of a crime, each shall be liable to the punishment attaching thereto. The Court shall take into account the provisions governing the effect of personal circumstances (Art. 41) and those governing the award of punishment according to the degree of individual guilt (Art. 88).*

1. Material Criminal:

- ✓ This form of participation is dealt with under Article 32(1) (a) of the Criminal Code. It exists when the one, who, with the requisite mental

state, personally engages in the act or omission concurring with mental state which causes the criminal state.

- ✓ A person is a material criminal in a crime of homicide if he or she takes the life of another. Such form of principal criminal can commit the offence either directly or indirectly. It is direct when every person directly, physically or personally commits the offence. Suppose that Ahmed takes the life of Balcha, Chernet, Daba, and Endale by shooting, stabbing, poisoning or strangling respectively. Ahmed is the material Criminal as he personally commits the crime.
- ✓ It could also be indirect when the perpetrator commits the crime by using instruments like animals or natural force. This happens when Alemitu sets fire on Bereket's house with the intention of killing the latter. It is also the case if Abera trains his dog in shop lifting and successfully commits or attempts to commit the crime or, the same holds true when Dawit employs a flood in the destruction of property which belongs to Almaz.
- ✓ There can be more than one principal party as a material criminal when more than one actor participates in the actual commission of the crime. Thus, when one man beats a victim and another stabs him with a knife, both are material criminals in the murder. It is also the same when two persons forge separate parts of the same instrument. They can be considered as material offenders in the offence of forgery.
- ✓ It is also possible for a person to be regarded as a material criminal if he or she negligently performs an act and produces a forbidden harm. This is to mean that a person should not always commit the crime intentionally in order to be regarded as a principal party in the form of material criminal. Negligent performance of an act can constitute for material criminal. This is the case when Bahiru while driving his car from Addis to Adama and Kifle while driving his car from Adama to Addis collided each other in the middle of the street in Debrezeit and killed two people. Bahiru and Kifle are material criminals for the death of the two people through their negligent state of mind as they physically and personally performed the act which constitutes a criminal offence under Article 543 of the Criminal Code which states that "whosoever, by criminal

negligence, causes the death of another....., is punishable with simple imprisonment or fine...".

2. Moral Criminal:

- ✓ Moral Criminal is a person who fully associates himself/herself with the commission of the crime and takes the crime as his or her own even though he or she is not present at the time when and the place where the crime was committed.
- ✓ Moral criminal is a person who plays no part physically in the commission or omission of the offence. Persons who involve in the commission of the crime in such a way are considered to be working brains or master minded. He/she just takes part in the process by designing plans, providing means, facilitating everything necessary for the commission of the offence, as it is dealt with under Article 32(1) (b) of the Criminal Code.

3. Indirect Criminal:

- ✓ This form of principal party is contained under Article 32(1) (c) of the Criminal Code. Such a party to a crime uses an intermediary to commit a crime. In this case, the intermediary is a mere instrument and the originating actor is the principal participant in the form of indirect criminal.
- ✓ Indirect criminal refers to a person listed below:
 1. Compel another to commit a crime..
 2. Employ mentally deficient persons in the course of the execution of a crime.
 3. Use an irresponsible person that can come under Articles 48-50.
 4. Use infants who are immature persons as provided under Article 52.
 5. Use another person by taking the advantage of his or her mistake or ignorance as per Articles 80 and 81 of the Criminal code.

What does the law provide for persons who participated in the commission of a crime?

• Legal Effects Of Participation:

- ✓ A person who involves himself or herself in the commission of a crime in different forms of participation as material, moral or indirect criminal is liable for the crime committed being considered as a criminal in the first degree.
- ✓ Of course, all principal criminals may not be subjected to the same degree of punishment as personal circumstances and degree of individual guilt may be taken into account as per Articles 35 and 41 of the Criminal Code which provide the

following respectively: That is, where a crime is committed by a group of persons the person who is proved to have taken no part in the commission of the crime shall not be punished. That also is the case of participation whether as principal or accomplice in a crime each of the participants shall be punished for his or her own act, according to the extent of his or her participation, his or her degree of guilt, and the danger which his or her act and his or her person represent to society.

- ✓ Special circumstances or personal incidents or relationships, which have the effect of excluding punishment or justify its reduction or increase, are not transmissible to another person. They operate to the benefit or the detriment solely of the person to whom they attach.
- ✓ It must be mentioned here that the principal criminal or criminals may not be liable for what goes beyond their intention unless it is possible to prove negligence on their part as per Article 58(3) of the Criminal Code.

4. Co-criminals:

- ✓ Co-criminals are also defined differently in different legal systems. Some define it to include only of the material criminals. Others, including the Ethiopian Criminal Code, define it broadly so as to include all principal parties who involve in the commission of the crime either as a material criminal, moral criminal or indirect criminal.
- ✓ Accordingly, co-criminals are dealt with under Article 32 and 33 of the Criminal Code of Ethiopia as "where several co-criminal are involved, they shall be liable to the same punishment as provided by law (32/3)". An accused person may be prosecuted as a co-criminal when, by his/her acts he/she fully participated with knowledge and intent in the commission of a crime which can be committed only by certain specified persons such as members of the Armed forces or officials or only by male persons as in the case of rape.
- ✓ Co-criminals are those persons who participate in a crime in their principal capacity either as a material or moral or indirect parties.
- ✓ Co-criminals may, in fact, be of with or without conspiracy. Co-criminals with conspiracy are those actors who involve themselves in a crime in their primary degree based on prior agreement as between themselves to realize the intended crime. Co-criminal without conspiracy on, the other hand, refers to those principal

parties in a crime without there being any agreement.

Co-Criminals in general Crimes and special Crimes

- ✓ Several persons may be considered as **co-criminals in crimes in general** when the crime in question can be committed by any one. This relates to homicide, theft, robbery, bodily injury and so on.
- ✓ Persons are **co-criminals in special crimes** when the crime in question requires special qualification. Art. 33 of the Criminal Code points out this situation as *"an accused person may be prosecuted as a principal-criminal when, by his/her acts, he/she fully participated with knowledge and intent in the commission of a crime which can be committed only by certain specified persons, in particular by a member of the Defence Forces in the case of military crimes, or by a public servant in respect of crimes against public office, or only by male persons as in the case of rape"*. This Article refers to a person who intentionally involves himself/herself in a crime which is committed or omitted by another which he or she cannot commit it materially as the crime requires special qualification. The person in this case has equal physical or moral involvement with the original criminal. That means he or she fully associates himself or herself with the crime. He/she adopts the criminal intent as his or her own and work towards achieving the result. This kind of co-criminals require some elements to be fully understood:
- ✓ The crime should only be committed by specified person who has special qualifications. When the crime to be committed requires the person to possess special qualification, those without the same may be said to have participated in the crime as co-criminals under Article 33 of the Criminal Code.
- ✓ The special co-criminals should fully participate in the commission of the crime. This is to mean that the participation of the special co-criminal must be indispensable without which the commission of the crime would not have been accomplished. The special co-criminal must participate in the crime intentionally or purposely.

Section.2. Participation in the Secondary Capacity:

- ✓ This exists either before or during the commission of the crime. A person is not considered to be principal criminal as his participation in this case is less than the principal criminals. This relates to incitement or complicity, which are also called accessories either before or during the commission of the crime. Accessory after the fact does not come under participation for one cannot take part in the commission of the crime after it is consummated. It is, therefore, dealt with independently as shall be discussed under Article 40 of the Criminal Code. Secondary participation refers to incitement and complicity.

1. Incitement:

- ✓ This form of participation is secondary before the commission of the crime. It is dealt with under Article 36 of the Criminal Code as:
 - 1) *"whoever intentionally induces another person whether by persuasion, promise, money, gifts, and threats or otherwise to commit a crime shall be regarded as guilty of having incited the commission of the crime."*
 - 2) *The person who incited the commission of a crime shall be liable to punishment provided the crime was at least attempted"*.
 - 3) *The punishment to be imposed shall be that provided by law for the intended crime. It may be reduced within the limits specified by law if the circumstances of the case justify such a reduction (Art. 179).*
 - 4) *When the person who committed the crime went beyond what was intended by the instigator, the latter shall be liable to punishment only for the crime he intended or could foresee. (Art.58 (3). The actual criminal shall alone be answerable for the more serious crime which he committed.*
- ✓ From this, it is possible to envisage the following elements:
 - **Incitement requires at least two persons.** These are the inciter/instigator and the incited/instigated. The incited is the one who actually commits the crime either in the form of material, moral or indirect criminal. The instigator is the person who initiates the idea of committing the crime by the principal by using different means. Here, it should be borne in mind that the instigator and the principal may be two or more than two. This

is the case when Aster and Bayush persuade Mohammed and Degu to abduct Almaz.

- **The instigator or instigators should convince the principal criminal/criminals** until the latter reaches a determination or decision to commit the crime based on the inducement/instigation/incitement. That is, the principal criminal should be stimulated to take the decision as a result of the incitement. Pre-existing intention of the principal criminal is irrelevant as long as it is proved that the same would not have committed the crime had he not been persuaded by the instigator.
- **Such provocation or inducement must be carried out intentionally.** The instigator should have the knowledge of what he incites. This is to mean that there is no negligent incitement. This is the case when Alemitu friendly tells to Degu that Almaz goes alone to a river to fetch water every morning where the latter acted upon the information and committed abduction.
- **There shall be causal relationship between what the instigator does and the act of the principal criminal.** This in other words means that the incited must be convinced and commit the crime as is intended by the instigator. Causation in incitement involves the following three chains of events:
 - a. That there shall be an act of incitement by the instigator to induce or convince the other person
 - b. That the principal criminal takes his or her decision as a result of the inducement
 - c. That the principal criminal should commit the crime
- Finally, **the crime should be committed or at least attempted.**

➤ **The legal effect of being an instigator:** The instigator will be liable to punishment under the law for the intended crime. This is the case for instance that a person who incited the commission of the crime of robbery will be liable under Article 36/670.

What if the *incited* goes beyond the intention of the instigator?

Art 36/4 the principal offender is punished alone for what goes beyond the intention of the instigator. This is the case that the incitee /principal/ criminal is alone liable for the rape he committed while he was persuaded to commit robbery. There is, however, a possibility that courts may reduce the punishment to be imposed upon the instigator within the limits of the law as per Article 179 of the Criminal Code.

2. Complicity:

- ✓ It is also a secondary participation which may exist either before or during the commission of the offence as provided under Article 37 of the Criminal Code as *“an accomplice is a person who knowingly assists a principal criminal either before or during the carrying out of the criminal design, whether by information, advice, supply of means or material aid or assistance of any kind whatsoever in the commission of an crime. 2) An accomplice in an intentional crime shall always be liable to punishment. 3) The accomplice shall be liable to punishment provided the crime was at least attempted.4) The punishment to be imposed shall be the punishment for the crime in so far as such crime does not go beyond the accomplice’s intention (Art. 58(3). The court may, taking into account the circumstances of the case reduce the punishment in respect to an accomplice within the limits specified by law. (Art.179).*

For complicity to exist, the following elements should exist:

- **One**, it requires at least two persons i.e. the accomplice and the principal criminal. This is the case when Ayele, knowingly, gives his pistol to Getachew in order to kill Beyene. Ayele is an accomplice and Belay is the principal criminal.
- **Two**, assistance must be given to the principal criminal. The assistance may be given either before (accessory before the fact) or at the time (accessory during the fact) of the commission of the crime. The assistance should, however, be given before the result is achieved.
- **Three**, such assistance may be material or non-material. It is material when the assistance relates to guns, money, supplies, instrumentalities, being at a look out, ran the gateway car, signal the approach of the victim, send the victim to the actor, prevent a warning from reaching the victim, facilitate the crime by getting the victim, or possible witness away from

the same. It is non-material when it relates to advice, command, counsel, encourage, and so on.

Four, the assistance given to the principal criminal should always be intentional i.e., the accomplice should have the knowledge that he/she is giving help or assistance to the principal criminal in order to realize the latter's criminal design. Assistance that is given by negligence does not fall under Article 36. Generally, it may be said that accomplices liability exists when he or she intentionally encourages or assists in the sense that his or her purpose is to encourage or assist another in the commission of a crime as to which the he or she has the requisite mental state. It should, however, be known that the principal criminal is not necessarily required to know the assistance given to him or her by the accomplice. Rather what is required is that the accomplice should intentionally assist the principal criminal in the commission of the crime.

Five, the assistance should relate to the crime for which it was rendered. If the accomplice agrees with the principal criminal to give the latter assistance for theft, but the principal criminal commits robbery thus the accomplice will only be considered as an accomplice for theft but not for the robbery. It is the principal who will only be liable for the robbery. Thus, as first degree murder requires a deliberate and premeditated killing; an accomplice is not guilty of this degree of murder unless he acted with deliberation and pre-meditation. Also as a killing in a heat of passion is man slaughter and not murder, an accomplice who aids while in such state is guilty only of man slaughter even though the killer is himself/herself guilty of murder. Similarly, it is equally possible that the killer is guilty only of manslaughter because of his or her heat of passion but that the accomplice, aiding in a state of cool blood, is guilty of murder.

Finally, the crime should be completed or at least attempted. This is to mean that the crime intended must be at least begun so as to hold a person liable as an accomplice.

The following are the legal effects of complicity:

1. The accomplice is liable for the punishment under the law regulating the intended crime.
2. The accomplice will not be liable for what goes beyond his intention.

3. Punishment may, however, be reduced within the limits of the law as per Article 179 of the criminal code.

Criminal Conspiracy:

- ✓ Conspiracy is defined as an agreement between two or more persons to effect something unlawful. In case of conspiracy there is a need of an overt agreement beyond independent intentions of the persons involved which of course constitutes the material element of the crime.
- ✓ The crime of conspiracy is completed at the moment when two or more persons have agreed that they will do at once or at some future time an act which is unlawful. Therefore, the crime of conspiracy is said to be completed even if there is no further act to put the agreement into effect.
- ✓ Agreement in conspiracy refers to the meeting of two or more minds. It is the understanding of the parties each other to perform an act which is forbidden.
- ✓ In the Ethiopian law, conspiracy, as a rule, is *not* considered to be an independent crime. Rather, it is a ground for aggravating punishment when persons participate in the commission of a crime based on prior agreement as per Article 38(1) of the Criminal Code of Ethiopia which provides as.

The Provisions of Art. 38. Of the Criminal Code:

1. Where two or more persons enter into an agreement to commit a crime, the provisions regarding participation and aggravation of punishment due to the above mentioned circumstances are applicable. (Art. 84(1)(d)).
2. The foregoing provision shall, however, not affect the provisions contained in the Special Part of this Code relating to conspiracies against the essential interests of the State and its defense, the forming of unlawful associations and the participation therein, as well as to the organization of gangs or associations of wrongdoers. (Art. 257, 274,300 and 478).
- ✓ Though our law disregards the act of conspiracy as an independent crime, Article 38(2) provides exceptions that it is taken as an independent crime

Art. 257 Provocation and Preparation: (Crimes against the Constitutional Order and the internal Security of the State)

- ✓ Whosoever, with the object of committing, permitting or supporting any of the acts provided for in the preceding section of this chapter:

- a) publicly provokes them by word of mouth, images or writings; or
- b) **conspires** towards, plans with another, urges the formation of, or himself forms, a band or group, joins such a band or group adheres to its scheme or obeys its instructions
- c) joins such band or group, adheres to its schemes or obeys its instructions; or
- d) enters into relations or establishes secret communication with a foreign government, political party, organization or agents; or
- e) launches or disseminates, systematically and with premeditation, by word of mouth, images or writings, inaccurate, hateful or subversive information or insinuations calculated to demoralize the public and to undermine its confidence or its will to resist, is punishable with simple imprisonment from one month to five years or, where the foreseeable consequences of his activities are particularly grave, with rigorous imprisonment not exceeding ten years.

- ✓ When persons conspire to commit offences against the law of nations as per Article 274(b) which reads as:

Art 274. Provocation and preparation: (Crimes in Violation of International Law)

- ✓ Whosoever, with the object of committing, permitting or supporting any of the acts provided for in the preceding Articles:
- a) Publicly encourages them, by word of mouth, images or writing; or
- b) **Conspires** towards or plans with another, urges the formation of, or himself forms a band or group, joins such a band or group, adheres to its schemes or obeys its instructions,
- ✓ Is punishable with rigorous imprisonment not exceeding five years.
- ✓ When persons conspire to commit crimes against the military or police force as per Article 300 which states:

Art. 300 - Concert or Conspiracy to raise a Mutiny.

Whosoever **conspires** or joins with others for the purpose of preparing a mutiny or seditious movement is punishable according to the circumstances of the case, with simple imprisonment, and, with simple imprisonment or

with rigorous imprisonment not exceeding to ten years.

- ✓ When persons conspire to commit offences which are of serious in nature as per Article 478 which provides:

- 1) Whosoever **conspires** with one or more persons for the purpose of preparing or committing serious crimes against public security or his health, the person or property, or persuades another to join such conspiracy, is punishable, provided that the conspiracy materializes, with simple imprisonment for not less than six months and fine.

For the purpose of this Article, "serious crimes" are crimes which are punishable with rigorous imprisonment for five years or more.

- 2) Where the conspirators are numerous, or here they are armed or possess instruments or means fitted by their nature for the commission of a crime, the punishment shall be simple imprisonment for not less than one year or a fine.
- 3) Where the dangerous nature of the conspiracy has been demonstrated by the commission of a serious crime, whether against life of person, public safety or property, by the commission of a series of crimes, whether not of the same kind, or by act, such as traffic in arms, narcotic substances or persons, the Court shall pronounce the maximum sentence provided by law, taking into consideration the provisions relating to concurrence (Art. 62 and 63).

The Rationale For Holding A Person Criminally Liable For conspiracy:

- ✓ It is clear that a person may not be punished for what he or she intends to do or for what he or she has planned in his or her mind only. Rather, a person is punished when three basic elements under Article 23 are established. Accordingly, one cannot be punished for his or her intention because the other two elements. i.e. material and legal are missing in accordance with Article 23 of the Criminal Code.
- ✓ Conspirators, however, commit a crime for their intentional agreement. The reason to hold conspirators criminally liable is that collective action towards antisocial behavior involves a

greater risk to the society. The more parties there are the larger the probability for the commission of the crime, the greater the threat to the community for conspirators

- may encourage each other.
- may feel bolder than if they were on their own.
- may fear reprisal from the other
- may not want to loose face from the others.

Participation Of Juridical Persons In A Crime:

- ✓ Juridical person is defined under Art. 34(4) of the Criminal Code of FDRE as: "*.....a body which has governmental or non governmental, public or private structure and includes any legally recognized institution or association set up for commercial, industrial, political, religious or any other purpose.*"
- ✓ As it has been discussed earlier, corporate are held liable for the acts of persons acting in their names. With this regard, Art. 23(3) of the Revised Criminal Code of Ethiopia read: "*Notwithstanding the provisions of sub Article (2) of this Article, a juridical person shall be liable to punishment under the conditions laid down in article 34 of this code.*"
- ✓ Accordingly, juridical persons who participate in the commission of a criminal activity are punished. Article 34 of the Revised Criminal Code of FDRE states: "*A juridical person other than administrative bodies of state is punishable as a principal criminal, an instigator or an accomplice where it is expressly provided by law.*"
- ✓ A juridical person shall be deemed to have committed a crime and punished as such where one of its officials or employees commits a crime as a principal criminal, an instigator or an accomplice in connection with the activity of the judicial person with the intent of promoting its interest by an unlawful means or by violating its legal duty or by unduly using the juridical person as a means."
- ✓ The essential elements of this provision are that:
 1. Administrative bodies are not punishable for crimes they commit, though they are juridical persons.
 2. Other juridical persons are punishable where they participate in the commission of a criminal act at any degree. i.e. as a principal criminal, instigator or accomplice.

3. Such Juridical persons are punished for their criminal act where only the law so provides .
 4. Such juridical persons are considered as criminals where one of their officials or employees commits a crime.
 5. An official or employee of such juridical persons must have committed a crime in connection with the activities of the juridical person.
 6. The official or employee of the juridical person must have committed a crime with the intent of promoting the interest of the juridical person which employed him.
 7. The act of such official must have been performed by unlawful means or by violating its legal duty or by unduly using the juridical person as a means of committing a crime.
- ✓ This, however, does not mean that the official or employee who in connection with the activity of the juridical person, remains free of criminal liability. Such person shall be punished for the criminal act he committed personally. Art. 34(4) the criminal code of FDRE.

Accessories After The Fact Art 40

- ✓ Accessory refers to a person who gives assistance to the principal criminal after the realization of the crime. The form of assistance may be, hiding and aiding the criminal as per Article 445 of the Criminal Code: under the topic Harboring and aiding that reads as: *"Whosoever knowingly saves from prosecution a person who has fallen under a provision of criminal law, whether by warning him or hiding him, by concealing or destroying the traces or instruments of his crime, by misleading the investigation, or in any other way, is punishable with simple imprisonment or fine."*
- ✓ Receiving or hiding a property, which is obtained by a crime committed by the criminal as per Art 682 that reads as:
- 1) *Whosoever receives a thing, which he knows or has reason to believe is the proceeds of a crime committed against property by another, or acquires the thing, or receives it on loan, as a gift, in pledge or in any manner whatsoever, or consumes it, retains or hides it, resells it or assists in its negotiation, is punishable with simple imprisonment, or, in more serious case, with rigorous*

imprisonment not exceeding five years, and fine. ✓

- 2) *Whosoever, within the meaning of the above provision, within the meaning or sub-section (1) intentionally receives a sum or a thing arising out of the realization or replacement of a thing obtained through the commission of an offence, is liable to punishments prescribed under sub article (1).*
- 3) *Where the act under sub article (1) or (2) is committed negligently, the punishment shall be simple imprisonment not exceeding one year.*
- 4) *The sentencing of the accused is without prejudice to the sentencing of the original criminal.*
- 5) *The provisions permitting the immunity of the principal offender from charge, by reason of kinship (Art. 664) or the mitigation of the punishment by reason of close affection (Art.83) do not apply to a receiver.*

✓ Helping a person to escape from prosecution as per Article 460 that reads as: *"Whosoever, in any manner, saves a person from the execution of the punishments or measures to which he has been sentenced by a court, is punishable with simple imprisonment or fine".*

What are the legal effects of being accessory after the fact?

✓ Such a person cannot be considered as an accomplice, which is one form of participation and hence cannot be treated under Article 36 because there is no participation in the commission of a crime once it has been completed. So an assistance given to the criminal after the commission of the crime is independent crime.

Failure to Report:

✓ Article 39 Failure to Report:

- 1) *Failure to report the preparation, attempt or commission of an offence or of the person who committed the offence, shall not be liable to punishment as an act of an accomplice or an accessory after the fact except in the cases expressly provided by law. (Art. 254 and 335)*
- 2) *The provisions regarding the failure to report to the authorities in the cases specified under Art. 443 shall apply,*
- 3) *The above-mentioned obligations are to be construed in a restricted manner.*

Failure to report refers to situations where a person fails to inform the concerned authority about the preparation, attempt or commission of a crime. Such a person cannot be said to have participated in the commission of the crime. He is, rather, treated as an independent criminal when the law expressly provides so as in the cases provided here under. Such failure constitutes an independent crime with the view of safeguarding public interest. These situations include:

1. Art. 254 Indirect Aids and Encouragement:

- 1) Whosoever, being aware that a crime under Articles 241-246, 252-258 has been committed or attempted or is being prepared , fails to inform the authorities thereof, or does not do the best of his ability to try to prevent the offence from being carried out and to bring the criminal to justice, save in cases of force majeure or manifest impossibility is punishable with rigorous imprisonment not exceeding five years.
- 2) When the offence is committed in time of internal or external emergency, the punishment shall be rigorous imprisonment not exceeding ten years.
- 3) Official or professional secrecy cannot be invoked to evade the obligation to inform the authorities.
- 4) Kinship or close ties of affection with the perpetrator or perpetrators of the crime cannot be invoked as an excuse in the above-mentioned cases. (Art. 83)

2. Art. 335. - Failure to report Crimes against the Armed Forces and Breaches of Military Obligations:

- 1) Whosoever, being aware of plans to commit or of the commission of mutiny or desertion, fails to report them or makes no attempt to prevent their commission or to cause the offender to be arrested, is punishable with simple imprisonment. Where the offence is committed or attempted, or in the more serious cases, with rigorous imprisonment not exceeding three years.
- 2) Official or professional secrecy is no defense to a charge under this Article. In time of emergency, general mobilization or war,

kinship or close ties of affection (Art. 83) are no excuse.

- 3) Failure to report treason or espionage is punishable under the provisions of this code on security of the state and protection of national Defense Forces (Article 254.)

3. Art. 443. - Failure to report a crime.

- 1) Whosoever, without good cause:
 - a) knowing the commission of or identity of the perpetrator of a crime, punishable with death or rigorous imprisonment for life, fails to report such things to the authorities; or
 - b) is by law or by the rules of his profession, obliged to notify the competent authorities in the interests of public security or public order, of certain offences or certain grave facts, and does not do so,Is punishable with fine not exceeding one thousand Birr, or with simple imprisonment not exceeding six months.
- 2) Nothing in this Article shall affect the provisions of Art. 254 and 355.