

# **Criminal Law I**

## **Teaching Material**

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## UNIT-I

### INTRODUCTION TO CRIMINAL LAW

*“The criminal law represents the pathology of civilization.”*

*-Morris R. Cohen, Reason and Law 70 (1961)*

#### **Introduction:**

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. The law of Crimes has always been one of the most attractive branches of Jurisprudence, though it is true that both crime and criminal are looked upon with greatest hatred by all sections of the people in society. In fact the law of crimes has been as old as the civilization itself. Wherever people organized themselves into groups or associations the need for some sort of rules to regulate behavior of the members of the group inter se has been felt, and where there were rules of the society, infringements were inevitable. And it was realized that there was the necessity of devising some ways and means to curb such tendencies in the society that lead to violation of its rules. In every organized society. This should briefly explain the contents of the Unit. Certain acts are forbidden under the pain of punishment. Where one person injured another and the injury could adequately be compensated by money value, the ‘wrong-doer’ was required to pay damages or compensation to the ‘wrongs’ individual. But in certain cases in addition to the liability to pay compensation the state imposes certain penalties upon the wrongdoer with the object of preserving peace in the society and promoting good behavior towards each other and towards the community at large. To prevent a crime from happening, or to deal effectively with a crime once it has occurred, we have to know ‘what the

crime is' and 'what the related legal ramifications' are. The study of criminal law aims at having an understanding of these concepts.

### **Objectives:**

The purpose of this chapter is to Help the students understand the concept of crime and its transient nature, to define crime and distinguish it from other civil wrongs. The chapter also discusses a brief outline of the historical development of the Criminal Law in Ethiopia.

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

- explain the meaning of the character, function, purpose, and principles of criminal Law.
- distinguish Criminal Law from Private Law and Morality.
- have a basic understanding of the historical development and the Criminal law of Ethiopia.
- note the Classification of Crimes under the Ethiopian Criminal Code.

### **Section 1: General Considerations:**

#### **1.1. The Place Of Criminal Law In Criminal Science:**

The definition of a crime has always been regarded as a matter of great difficulty. Where the task of definition is difficult, it is advisable that a student should not address himself to it until he has acquired some considerable knowledge of the subject matter to be defined. Therefore, before making an attempt to understand the definition of crime, we shall endeavor to have some basic information relating to crime and criminal law.

“**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:** The Criminal Policies postulated by the above twin sister-branches i.e. Criminology and Penology, are implemented through the instrumentality of ‘Criminal law’. In other words, 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:** Criminal law in its wider sense consists of two branches.

- a) Substantive Criminal Law,
- b) Adjective/Procedural Criminal law.

‘The 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. A person committing a crime is not automatically stigmatized and punished. At the same time, generally, a criminal would not be interested in confessing his guilt and receiving the punishment. It is for this reason that ‘Procedural Criminal law’ has been 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. The scope of our study i.e. ‘Criminal law’ falls under the branch of substantive criminal Law.

### **1.2. Nature And Scope Of Criminal Law:**

Laws can be classified into different branches. For instance, *Civil law* spells out the duties that exist between persons or between citizens and their government, excluding the duty not to commit crimes, *Contract law* for example is a part of civil law. The whole body of *tort law* or the law relating to Extra Contractual Liability, which deals with the infringement by one person on the legally recognized right of another, is also an area of civil 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,
- Specificity,
- Uniformity, and
- Penal sanction

*Politicality* implies that only the violations of rules made by the state are regarded as crimes. *Specificity* of criminal law 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* of criminal law 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. It may, however, be noted that the recent legislations provide scope for more and more judicial discretion through judicial equity to attain criminal's reformation which is the ultimate goal of criminal justice. Finally, it is through '*Penal sanctions*' 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.

### **1.3. General Objectives Of Criminal Law:**

The objectives of Criminal law are the protection of persons and property, the deterrence of criminal behavior, the punishment of criminal activity and rehabilitation of the criminal.

#### **a. 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. If all persons respected everyone else's person or property, there would be very little reason for criminal law.

**b. 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 that, there shall be no cruel and unusual punishment. Certainly if our laws allowed the death penalty for even minor offences, there would probably be fewer minor offences. But is that just? To lose one’s life for stealing a loaf of bread seems too high a price to pay for fewer loaves of bread being stolen. The problem is to decide how much punishment will deter criminal behavior without going too far.

**c. 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.

**d. 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”.***

‘Purpose’ can be defined as the ultimate objective to be attained. The above provision embodies ensuring order, peace and security of the state and the people of the country as its ultimate end to be achieved. 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.”***

This paragraph states “*What*” the function of criminal law is ... it is prevention *crimes*. It also states “*How*” the Criminal Code undertakes this function i.e. the methods adopted in performing this function, they are\_\_\_\_

- Giving due notice of the crimes and penalties prescribed by the law.

- If such declaration of the punishable acts does not deter people from committing of crimes then the following methods are employed to deal with the criminals:
  - a) Provide for punishment and reform of criminals, and
  - b) Provide for measures to prevent the commission of further crimes.

Therefore, the *function* of a thing is ‘what it is meant to actually do’ towards a certain purpose. Function is thus a special activity or task while purpose is the ultimate objective to be achieved. Therefore, it follows that the Criminal Code of Ethiopia endeavors to achieve the purpose of “ensuring order, peace and security of the state and its inhabitants for the public good” through declaration of forbidden conduct, providing for suitable punishment, reform of criminals and preventive measures to control the commission of crimes.

#### **1.4. Criminal Law, Private law and Morality-Distinguished:**

For a proper appreciation of the distinction between criminal law, civil law and morality, it is necessary to understand the “concept of wrongs” and their classification.

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.

Since all violations of law cannot be characterized as crimes, there is a necessity to identify the particular class of violations or forbidden acts or wrongs, to understand

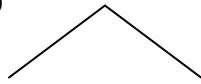
the concept of crime. Therefore, we shall proceed to broadly classify the body of wrongs.

### **Classification of Wrongs:**

Since all violations of law cannot be characterized as crimes, there is a necessity to identify the particular class of violations or forbidden acts or wrongs for the purpose of defining what ‘crime’ is.

### **Wrongs**

(Acts forbidden by the Society)



#### **Moral wrongs**

(Interference of law is considered necessary)  
unnecessary)

#### **Legal Wrongs**

(where the interference of law is unnecessary)

#### **Civil wrongs**

#### **wrongs**

(Law interferes at the instance of the injured party)

(State as a matter of right interferes in most of the cases)

#### **Criminal**

#### **✓ Moral wrong:**

This is a wider term including a wide range of reprehensible acts, which tend to reduce human happiness. 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.

○ **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.

○ **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:**

Though morality and law can be precisely distinguished, they are not totally distinct phenomena. 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.

Sir Stephen year stated, "the sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax". When a member of the society does a wrong involving serious moral guilt, the moral sentiment of the society gets offended so seriously that the whole society waits in all its eagerness to see that the offender is punished severely. This general disapprobation excited against the wrong doer may pass away with time. But the fact that he has been convicted and punished as a "thief" or "murderer" or "cheat" or "rapist" stamps a mark upon him for life. Thus the moral sentiment of the public gets converted into a permanent final judgment what might otherwise be a transient sentiment.

Thus, according to the author 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....”

**Review Questions:**

1. Briefly discuss the scope of Criminal Law in the field of Criminal Science.
2. What are the main objectives of criminal law?
3. Explain the purpose and functions of Criminal Law in terms of the Revised Criminal Code of 2004.
4. Explain the relationship between morality and criminality.

**Exercise:**

Examine the Criminal Code and find out the provisions that emphasize the objective of reformation.

**Group Discussion:**

What specific objectives of punishment are fulfilled in death penalty? Should we still retain it as a type of punishment in our Criminal Code?

### **Brain Storming!**

1. There were many people standing on the bank of the river Blue Nile. Among them there were several people who knew swimming. Suddenly, a woman fell in to the water and started to scream for help. None of the onlookers made a move to help her. In front of all of those people the woman drowned and died. Answer the following Questions:
  - a. Did any one of the people standing on the bank of the river have duty to save the woman from drowning?
  - b. If at all they committed a wrong, what kind of wrong was it? Can you prosecute any of those people for the death of the woman?
2. Can the moral duties make legal duties?

## **Section 2: The Concept Of Crime:**

### **2.1. Crime is a Deceiving Concept:**

There are no easy explanations for the phenomena collectively called crime. Crime is *deceiving concept* because it covers an enormous range of human behaviour. 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. It is quiet a student suddenly a rifle to the top of a university tower and begins shooting at those below. Crime is often mistakenly thought of as the vice of the few. It is not. It is everywhere in the society. It is in the bed room of a married couple where wife battering and marital rape happen, among the family members where child abuse and incest happen on the road where eve teasing and cheating happen, at work place where a variety of criminal behaviour is found including abuse of power, corruption and sexual harassment. Therefore, trying to find a single comprehensive answer to

“the crime problem” is, like trying to lump together measles and schizophrenia, or lung cancer and a broken leg.

The concept of crime has always been dependent on public opinion. In fact “law” itself reflects public opinion of the time. Obviously, every society formulates certain rules to regulate the behavior of its members, the violation of which is forbidden. However, the problem arises as to what acts should be forbidden, or what acts should be selected for punishment by the society or the state, in other words what acts should be declared as crime. According to Terence Morris, “Crime is what society says is crime by establishing that an act is a violation of the criminal law. 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, because the two questions “Crime” and “Law” are so closely related with each other that it is very difficult to understand one without knowing the other. “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.

According to Wechsler, “the purpose of penal law is to express the social condemnation of forbidden conduct, buttressed by sanctions calculated to prevent

it". To understand this explanation of Penal law three questions have to be answered:

1. What kind of conduct is 'forbidden'?
2. What kind of 'formal social condemnation' is considered appropriate to prevent such conduct?
3. What kinds of 'sanctions' are considered as best calculated to prevent officially outlawed conduct?

▪ **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. For instance, what is a sex crime in India and Eastern countries may be a sweet heart virtue in West and Scandinavian countries. What is an offence against property in a capitalist culture may be a lawful way of living in a socialist society. What is permissible in a free and affluent society may be a pernicious vice in a conservative set up.

The notion about crime also changes with time. What is an offence today may not be an offence tomorrow and what has not been an offence till yesterday may be declared a crime to day. For example, polygamy, till the passing of the legislation prohibiting a man from marrying again during the subsistence of the first marriage, marrying more than one wife was no crime. Now it is a punishable crime under the Criminal Code. Another example is "abortion". Forcibly aborting the foetus from the womb of the mother for reasons whatsoever was considered as a great sin against the humanity by all societies till recent past. Now, with the advancement of medical sciences termination of pregnancy on medical grounds has been legalized and approved by many though not all.

Thus, the concept of crime is ever changing. What was not crime yesterday may be a crime today and what is a crime today may not remain a crime tomorrow. Therefore, 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.

The crimes against property have undergone a lot of profound changes mainly as a result of transformation of a primitive agricultural society into a commercial or industrial society. The original crime ‘theft’ has been widened to include embezzlement, fraudulent conversion that is designated as “White Collar Crimes”. The concept of property has widened including not only physical things but also varieties of other assets i.e. even the things which are not capable of being taken away physically. These include electricity, shareholders claims, Copyrights, etc., which have become subjects of such crimes.

#### **2.2. 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 labour 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.

Clearly, then, 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. (Robert Quiney)

### **2.3 Definition of Crime:**

The transient nature of crime makes it very difficult to derive any precise definition of the term. In spite of the attempts made by various jurists, a satisfactory definition of crime has not been achieved.

#### **➤ 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”. It is a very wide definition including many things in the present day complex society. Any act like selling adulterated food, molestation of women or young children in buses and railways, misleading advertisements can be said to be injurious to public welfare. It is too wide a definition and fails to precisely identify the thing it purports to define. Though there is no precise definition for crime, we can still have an understanding of the word by examining different definitions put forward by different jurists.

➤ **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*”. Thus, according to Blackstone crime is an act in violation of public law. But what is ‘public law’? It has several accepted meanings. According to **Austin**, (year) public law is identical with “Constitutional law”. This being so, the crime would then mean an act done in violation of Constitutional law. The definition would thus cover only political crimes namely crimes against the state, and crimes like arbitrary deprivation of life, personal liberty and property, leaving aside a vast area of other criminal behavior. **Germans** interpret public law to include both constitutional law and criminal law. As we have already seen, it is fallacious to define crime with the help of constitutional law. And it would be meaningless to define crime using the expression “criminal law”. It would rather amount to arguing in a circle. What is a crime? - Violation of criminal law. What is criminal law? -The law that deals with “Crimes”. In this sense also Blackstone’s definition fails to define crime satisfactorily. There is yet another accepted meaning of public law given by **Kenny**, (year) According to him, public law means all “positive law” or “municipal law” which means “any law made by the state”. Then crime would mean an act done in violation of all positive law which is not true for many acts though done in

breach of law are not crimes. Thus it may be said that, whatever meaning we attach to the expression “public law”, the definition of Blackstone proves unsatisfactory.

Blackstone, (year) perhaps visualizing the inadequacy of his first definition of crime tried to give a modified definition and said, “*A crime is a violation of the public rights and duties due to the whole community, considered as a community in its social aggregate capacity*”.

The second definition of Blackstone proceeds in terms of “public rights and duties” replacing the phrase “public law”. In fact even this definition is not without error. In addition to that Stephen, while editing Blackstone’s Commentaries committed further error as he slightly modified the definition and reconstructed it in the following words: “*A crime is a violation of a right, considered in reference to the evil tendency of such violation as regards the community at large.*”

Stephen (year) committed two errors in modifying Blackstone’s second definition:

1. He dropped the word ‘duties’ from Blackstone’s definition narrowing down the scope of crime to the violation of rights only, whereas criminal law fastens criminal liability even on those persons who omit to perform duty required by law, for example, failure to report the preparation or commission of a crime (Art. 39 & 443 of the Criminal Code) failure to appear before courts as a witness or an accused person (Art.448 of the Criminal Code) a parent’s gross neglect in bringing up a child (Art. 659 of the Criminal Code), failure to provide the maintenance allowances stipulated under (Art. 658 of the Criminal Code), etc.

Similarly, are other acts, which do not violate any one’s right but are nevertheless crimes, e.g., being in possession of arms and ammunition, (Art.808 of the Criminal Code) carrying of prohibited arms (Art. 809 of the Criminal Code).

2. The second error committed by Stephen in editing Blackstone’s definition lies in the expression *evil tendency* of such violation as regards the community at large. It means that crimes are breaches of those laws, which injure the community.

However, all the acts that are injurious to the community are not necessarily crimes. Even transactions of civil nature can injure community. For example, where the Directors of a company fail to manage its affairs properly, the mill is closed, workers are rendered unemployed, production of a commodity essential for the society is stopped—will it not be an act which is injurious to the society? But can we prosecute the Directors for any crime? The answer to this will probably be “NO”.

Thus, as has been rightly pointed out by Kenny, “it is possible that, without committing any crime at all, a man may by breach of trust or by negligent mismanagement of a company’s affairs, bring about a calamity incomparably more wide spread and more severe than that produced by stealing a cotton pocket handkerchief, though that petty theft is a crime.” Therefore, to define crimes as those breaches of law which injure the community is not completely true.

➤ **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*”.

The definition does not explain a number of crimes under the Criminal Code in which the prosecution could be initiated only at the instance of injured party as is done in the case of civil wrongs. For example, in case of Adultery (Art. 618 Criminal Code) no court shall take cognizance of the crime except on a complaint made by the injured spouse (Art 13 Cr. P. C). Thus, even Austin’s definition of crime in terms of procedural wrong also is not without defect.

➤ **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.

In the first place, as the history of the early Roman law reveals, an offensive conduct may become recognized as a crime as a result of the combined effect of a number of different social forces. For instance, in a primitive monarchy or Oligarchy when all nominal state power rested in the hands of a personal sovereign

or a small group of men, anything done in the nature of an attempt to displace the governing body was classed as “*Treason*” and such behavior is criminal in the highest degree. Such an attempt would be repressed by all means available to the ruling element. The person who commits treason is called a traitor; and any one who slew him was held guiltless.

Another example is that of *the English Law of Outlawry*. The ancient city-states of Europe depended largely on the strength and construction of their “City Walls”. For this reason erecting private buildings near the City Walls was prohibited since these might hinder the movements of defending troops within the city walls and offer cover to approaching enemies from outside. The maintenance of these walls in a state of efficiency was so important that at Rome religious superstition was invoked for their protection and they were classed as “*res sanctae*” (things sacred). It was a capital offence to harm them or even to climb over them to enter the city instead of coming through the gates in the proper way.

Different social forces and impulses affected the development of law everywhere. Such forces varied from the legislative power of the dictator to the unidentified pressure of public opinion. An illustration of the dictator’s power bringing a change in the law is of Emperor Claudius for his private purposes. Desirous of marrying his brother’s daughter Agrippina, he brought a change in the ‘law of incest’, permitting marriage between a niece and her uncle leaving the rest of the law relating to such prohibited marriages i.e. between uncles and nieces or aunts and nephews incestuous.

Therefore, Kenny (year) opined that, so long as crimes continue to be created by the government policy, it was difficult to give a true definition of the nature of crime. Hence, he resorted to broadly describing a crime as he realized that it is nearly impossible to give a scientific definition of crime. While doing so, he kept in view an all-important aspect of the matter i.e. “the controlling power of the state with

regard to criminal prosecution is an undeniable fact". According to him "Crime" has the following three characteristics:

1. A crime is a harm brought about by human conduct, which the sovereign power in the state desires to prevent,
2. Among the measures of prevention there is threat of punishment,
3. Legal proceedings of special kind (criminal proceedings) are employed to decide whether the person accused did in fact cause the harm and is according to law to be held legally punishable for doing so.

➤ **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."*

This provision is nothing but a statement of fact, which is made for the purposes of the Code, and cannot be regarded as a definition of crime. It refers to the specific kinds of conduct prohibited under the Special Part of the Code.

**2.4. '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. "Breaches of contract" are also civil wrongs, which result from non-performance of contractual obligation.

“Tort” is a private wrong and the remedy available is reparation for the injury suffered and not punishment. “Breach of contract” entails civil liability of the defaulter that may result in forced (specific) performance, cancellation of the contract or payment of damages. 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. Moreover, the remedies unlike criminal law do not involve punishment but performance of obligations and payment of damages.

There are several factors that distinguish torts from crimes. However, 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.

Further, 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). In short, criminal liability invariably requires moral guilt (intention or negligence) and personal act or omission while non-contractual liability doesn’t.

Another important difference lies in the fact that “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. Therefore, this too is a private wrong committed against a specific individual.

**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 defence 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.

All these distinctions show a difference in the legal proceedings, which are taken upon the commission of a wrong. But they do not indicate any essential intrinsic difference in the nature of ‘crimes’ and ‘torts’. Some times the same injury such as negligence, defamation, amulet etc, may fall under both the categories. Therefore, Kenny (year) rightly observes that, “in a way there is no distinction between crime and tort in as much as a tort harms an individual, where as crime is supposed to harm a society. But then a society is made up of individuals, harm to an individual is ultimately harm to the society”. Writers on English legal history have often mentioned that in early law there was no clear distinction between criminal and civil offences. The two have been called ‘a viscous intermixture’, and it has been explained that the affinity between tort and crime is not the least surprising when we remember in the history of law how late in the history of law there emerged any clear conception of difference between them; this is more, not a peculiarity of the English system, as was pointed out by Maine (year). There is indeed no fundamental or inherent difference between a crime and a tort. Any conduct which harms an individual to some extent harms society, since society is made up of individuals; and therefore all that is true to say of crime that it is an offence against

society, this does not distinguish crime from tort. The difference is one of degree only, and the early history of the common law shows how words which now suggest a real distinction began rather as symbols of emotion than as terms of scientific classification. Thus the word ‘felony’ originally indicated something cruel, fierce, wicked or base. As Maitland (year) says: ‘In general it is as bad a word as you can give to man or thing, and it will stand equally well for many kinds of badness, for ferocity, cowardice, craft.’

**Review Questions:**

1. “Crime is any form of conduct which is forbidden by law under pain of punishment”. Discuss.
2. Explain the concept of crime as a breach of public right. Does this explanation satisfactorily identify all crimes?
3. “Crime is the creation of government policy”. Critically evaluate the statement giving practical examples from the experiences in the development of Ethiopian Criminal Law.
4. Enumerate the specific legal aspects that differentiate crime, tort and a breach of contract.

## **Importance of Identifying the Nature of the Matter in Question:**

***Case 1. The Public Prosecutor V. Woz. Atsede Habtessellassie***

*High Court, Criminal Appeal No. 618/51 (1959G.C) Ethiopia*

**Private**

**Respondents:**

Woz. Abeche Woldekiros

**Complainant:**

Woz. Atsede Habteselassie

**Charge:** Trespass Art.442 of the old Ethiopian Penal Code.

**Facts:** Woz. Atsede Habte Selassie bought from Ato Hailemariam Wodesik a plot of land adjacent to a plot of land belonging to the private complainant, Woz. Abeche Woldekiros . Woz. Atsede Habteselassie wanted to have the boundaries of her land fixed and one Sunday she went with the person who had sold her land, i.e. Ato Hailemariam, and the local governor, to lay down the demarcation lines. According to the complainant, the boundaries were marked inside her land, i.e. at a width of 18 meters and a length of 24 meters inside her land. On this complaint the Public Prosecutor charged the respondents with tress pass under Art.442 of the old EPC in the fourth Woreda court.

The Accused pleaded that this was a civil matter and not a criminal matter. On this plea the Woreda court ruled that the matter should proceed as a criminal matter.

**Appeal to the Awradja Court by the Respondent:** From the order of the Woreda Court the respondent appealed to the Awradja Court. After several hearings the Awradja Court held that the question between the parties was a matter of the Civil Court.

**Appeal to the High Court by the Complainant :** From the order of the Awradja Court woz. Abeche Woldekiro appealed to the High Court. As the case had been throughout conducted by the Public Prosecutor. The High Court ordered the Public

Prosecutor to give opinion on the appeal lodged by the private complainant. The Public Prosecutor opined that, “with regard to the merits of the case the facts as alleged by the prosecution do not, in our opinion, disclose an offence against the Penal Code. To have a criminal case of trespass, there must be an *intention of depriving a person of his property unlawfully with the knowledge that the land from which that person is deprived belongs to that person*. If a person in the honest belief that a piece of land belongs to him, takes his cattle to graze on that land or cuts trees growing on that land, that does not amount to criminal trespass, such acts may amount to civil trespass for which a civil action for damages may lie.”

**Judgment:** In the present case, the respondent had purchased land from Ato Hailemariam and naturally she had every interest to have the boundaries marked. She went on the land with him and with the local governor to lay down the demarcation lines. Her intention was obviously to take possession of property which she believed to be hers and not to deprive the complainant of her property. In the opinion of this court the facts set out above *do not disclose the ingredients of a criminal offence and the order of the Awradja court must be confirmed.*

**Case 2. Ato Mekonnen Tacle Haimanot V. The Public Prosecutor**

*High Court, Criminal Appeal No. 281/53 (1961G.C) Ethiopia*

**Private Complainant:** H.E Afenegus Takelle Wolde Hawaria Ato Bedane Senbata

**Charge:** Disturbance of possession. Art.650 EPC

**Principle:** The main object of Art.650 EPC is not to decide questions of ownership but to ensure that no person takes the law into his own hands and thereby cause a breach of peace.

**Facts:** The prosecution evidence shows that the land in question had been in the possession of the complainant Ato Bedana Senbata for three years and the land had been cultivated with tomatoes and potatoes however the appellant tried to forcibly oust the complainant Ato Bedane Senbata out of the land. The appellant was charged with Art. 650 of EPC for causing ‘disturbance of possession.’

A great deal of evidence was heard as to whose property the land is; on behalf of the prosecution it was stated that the land is the property of his Excellency Afenegus Tekelle Wolde Hawariat and on behalf of the defence it was stated that the land was the property of Fit. Asfaw Kebede.

At this stage it is important to point out that there is a certain amount of confusion in the application of Art. 650 of the Penal Code. Hundreds of cases come before the courts in their criminal jurisdiction where attempts are made to prove the ownership of land in dispute. ‘Ownership of land’ and ‘possession of land’ are two completely different matters. A person may be the owner of land but not in possession thereof as for example, a land lord who has given his land on lease to a farmer; similarly a person may be in possession of land without being owner there of. Now, the main object of Article 650 of EPC is to protect quiet possession of land and under that Article it is possible to prosecute the owner of the land who interferes with the quiet possession of a person who, like a tenant, is law fully in possession of that land by virtue of the lease granted to him by the owner. In most of the cases, therefore, the question of ownership does not arise, it is sufficient for the prosecution to prove possession.

The main object of Art.650 the Penal Code is not to decide questions of ownership, (this is a civil matter) but to ensure that no person takes the law into his own hands and there by cause a breach of place.

Now, in the present case, it has been established that Ato Bedane Senbata had been in possession of the land for three years and had been cultivating the land; even assuming that the land belonged to Fit. Asfaw Kebede, the appellant had no right

whatsoever to act as he did and forcibly oust the said Ato Bedane Senbata out of the land without the due process of law.

**Exercise:**

1. ‘The Ato Mekonnen case’ states that “hundreds of cases come before courts in their criminal jurisdiction where attempts are made to prove the ownership of land in dispute.” Why do you think a citizen might prefer Criminal to Civil proceedings?

### **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 towards the end of .....? .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 Sources and the Merits of the Penal Code Of 1957:**

Obviously, the Criminal Code that appears in present-day society should be able to provide solutions to the complexities of modern life. In view of this fact, the drafter looked into the most modern penal codes that embodied the latest thinking in the sphere of criminal law. 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.

In addition to this, 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.

It was the rationale of the penal code and the concepts embodied in some of its provisions that aroused bitter controversy among the members of the codification commission. 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. It was this deviation from the traditional approach that took some members of the commission by surprise.

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 otherhand 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 mouuelle... where one can find order and peace security and progress, united in a single whole.”*

Thus, 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 8<sup>th</sup> 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:**

In 1981, the Revised Special Penal Code replaced the Special Penal Code. 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. The 1981 amendment 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. The Amended Special Penal Code 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.

### **3. 2.The Criminal Code of the Federal Democratic Republic of Ethiopia, 2005**

#### **Proclamation No. 414/ 2004**

The 1957 Penal Code of Ethiopia, was on 9<sup>th</sup> May of 2005, and a new Criminal Code was brought into enforcement. The factors that necessitated the revision of the Penal Law of Ethiopia are as follows:

##### **1. To Incorporate the Modern Legal Concepts:** During, nearly half a century?

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.

In order to introduce all the above mentioned revisions and to adopt a comprehensive Criminal Code, substantive activities have been undertaken throughout the country. Discussions have been held on the draft Criminal Code prepared by the Ministry of Justice and the Justice and Legal System Research Institute. Legal and medical professionals, psychiatrists, different institutions of higher education and professional associations have made significant

contributions through the opinions they have to the enactment of the law. Representatives of the people selected from different sectors and associations have forwarded important views in discussion forums on the draft laws conducted in Addis Ababa and the regions. Moreover, the opinions of legal scholars and the laws and exigencies of foreign countries have been consulted to enrich the content of the Criminal Code.

It is hoped that the new Code will ensure respect for order, peace and security of the state and its peoples as well as respect for the rights and freedoms of its citizens and inhabitants. The Code is also expected to accelerate the economic progress of the State, strengthen a steady order of free market and above all contribute towards the promotion of a fair judicial system in the country.

**Activity:**

Identify the modern concepts of Criminal Law that were adopted from foreign legal systems and justify the incorporation of those principles into the Ethiopian Criminal Law.

### **3.3. 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.

#### **I. General Part:**

Part I of the Criminal Code is entitled “General Principles of Criminal Liability”, Part II Special Part and Part III is Petty Code. The General Part has two Books, namely:

**Book. I. Arts. 1-86 “Crimes and the Criminal”.** It lays down the general principles relating to “Criminal law and its Scope”(Art. 1-22), “The Crime and its Commission” (Art. 23-47), and the “Conditions of Liability to Punishment” (Art. 48-86).The General Part of the Criminal Code is the most technical part of the Code and the basic tool in the interpretation of any provision that embodies a specific crime. Issues such as the principle of legality, negligence, criminal responsibility, participation, lawful acts, justifiable and excusable acts, extenuating and aggravating circumstances etc, are covered in Book I.

**Book. II (Arts. 87-237)** is titled **“The Criminal punishment and its Application”**. This book deals with calculation of sentences, kinds of punishment, ordinary punishments applicable to adults, special measures applicable to adults, penalties applicable to young persons and also rules regarding determination , suspension, discontinuance and extinction of penalty.

## **II. The Special Part:**

The “SPECIAL PART” of the code embodies ‘**Specific Crimes**’ which are organized under different titles systematically. This part of the Code includes four books. Each Book is sub – divided into Titles, chapters, sections, paragraphs and finally Articles. The Books of part II of the Code are follows.

**Book III (Arts.238-374)** incorporates ‘Crimes against the State or National or International Interests’. **Book IV** (Arts.375-537) deals with ‘Crimes against Public Interest or the Community’, **Book V** (Arts. 538-661) embodies ‘Crimes against Individuals and the Family’, and ‘Crimes against Property’ are found in **Book VI** (Arts. 662-733) of the Code.

**Part III** of the Criminal Code incorporates **“The Code of Petty Offences”**. This part of the Code also has two subdivisions, a General Part and a Special Part. The

General Part embodies the rules governing liability to punishments and the Special Part deals with “Petty Offences” under specific heads.

The Criminal Code of FDRE, 2005, on the whole, consists of three parts, eight books, twenty eight Titles which include 865 Articles arranged in seventy two Chapters.

- **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. For example,

Art.665 of the Special Part prescribes 5 years imprisonment for an crime of Theft. It does not mean that whoever commits theft should be sentenced for 5 years imprisonment. Therefore, in order to decide whether, in a particular case, imprisonment should be ordered for 5 years or for six months, or less than that, the Court must of necessity, has to make reference to the General Part. 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.

### **3. 4. Classification of Crimes under the Criminal Code**

Generally, offences may be classified based on two criteria:

1. Classification based on the “Seriousness of the Crimes”.
2. Classification based on the “Subject matter” of the Crime.

- **Classification based on the ‘seriousness of the Crime’:**

Crimes are generally classified into different categories according to varying degrees of seriousness. For example, English Law classifies offences into treason, felony and misdemeanors.

**Treasons** are the most heinous, although the rarest species of felony. Anything done in the nature of an attempt to displace the governing body is classed as Treason. It is a breach of duty of allegiance to the state. 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’.

- **Classification Based On the “Subject Matter” Of The Crime:**

A more clear cut and explicit kind of classification of crimes that is found in the Criminal Code is based on the content or 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 individual interests of a person protected under the Code include his life, his person (body), his liberty, his honor, his morals, his family, his property etc.

▪ **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...”

- **Scheme Of The Criminal Code Of FDRE, 2005**

Please refer to the chart in Annexure to Unit-I

### **Unit Summary:**

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. The criminal law identifies, defines and declares the conduct that it seeks to prevent and prescribes the appropriate punishments for them too. To prevent a crime from happening, or to deal effectively with a crime once it has occurred, we have to know ‘what the crime is’ and ‘what the related legal ramifications’ are. The study of criminal law aims at having an understanding of these concepts.

The study of crime i.e. Criminal Science” is a social study that has three important branches namely, criminology, criminal policy and criminal law. Criminal Law has two divisions substantive criminal law and procedural criminal law. The law incorporated in the Criminal Code forms part of the substantive criminal law. Procedural criminal law provides for the procedure for enforcement of the rights and liabilities embodied in the substantive criminal law. Without procedural criminal law the substantive criminal law is totally ineffective.

The objectives of Criminal law are the protection of persons and property, the deterrence of criminal behavior, the punishment of criminal activity and rehabilitation of the criminal. The provisions of the Criminal Code are aimed at achieving these important objectives.

Criminal law, private law and morality may be distinguished on the basis of some of their legal aspects. For a proper appreciation of the distinction between criminal law, civil law and morality, it is necessary to understand the “concept of wrongs” and their classification. Moral wrongs are those which are detested by the general

conscience of the society but all such wrongs are not worthy of legal interference and remedies. The body of wrongs that calls for legal interference and appropriate legal remedies are called legal wrongs.

Crime is deceiving concept because it covers an enormous range of human behaviour. It is not even static. It keeps changing with the ideology of the society and the developments that take place in the advancement of knowledge. It changes from society to society and from time to time. This transient nature of crime makes it difficult to define crime. In spite of the several attempts made by various legal scholars the undeniable fact that remains is that ‘crime is the creation of government policy’. History has lot of evidences to this truth.

The history of Ethiopian Criminal law reveals six important legislations incorporating the Criminal law of the country before the enactment of the existing Criminal Code of FDRE, 2005. They are, the Fewuse Menfessawi, the Fetha Negest, the Ethiopian Penal Code, 1930, the Penal Code of the Empire of Ethiopia, 1957, the 1974 Revolution and Criminal Law, Special Penal Code of 1981. The Penal Code of Ethiopia, 1957 has been repealed as from the 9<sup>th</sup> May of 2005, and a new Criminal Code has been brought into enforcement. Of many different reasons for the revision of the criminal law, the need to recognize the modern legal concepts adopted by the Constitution and the international agreements ratified by Ethiopia is the most important one. The other major features of the new Criminal Code are: redefining the objectives of punishment, including harmful traditional practices, hijacking of air crafts, cyber crimes etc., in the list of punishable conducts under the special part of the Criminal Code.

The classification of crimes under the Code may be identified on the basis of the punishments entailing them. 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’.

**Review Questions:**

1. Do you think that the organization of different parts in the Criminal Code is convenient for the proper application and interpretation of different provisions of the Code? Why/Why not?
2. How do you co-relate the provisions of the General Part, Special Part and Petty Code of the Criminal Code?
3. How are the crimes classified under the Criminal Code? What is the significance of such classification?
4. Write a critical appraisal on the Revised Criminal Code of Ethiopia, 2004. Do you consider the revision as a comprehensive one?

**Brain Storming!**

1. Do you think that ‘Petty Code’ of the Criminal Code is necessary while there are other Penal Legislations and Art. 120 Of the Criminal Code to punish crimes of petty nature?

**Group Discussion:**

Do you think that the Revised Criminal Code of Ethiopia is close to the prevailing social values of Ethiopia? Do the social values of a country come in the way of implementation of criminal laws of the country?

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4. C.M.V. Clarkson, and H.M Keating, “Criminal Law”, forth edition, 1999 pp.1-9
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## **UNIT -II**

### **BASIC PRINCIPLES OF CRIMINAL LAW**

#### **Introduction:**

The purpose of this unit is to give the students a basic understanding of the fundamental principles on which the Criminal Law operates. These unit also thoroughly prepares the students to appreciate the scope and application of criminal laws.

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. 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. 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.

### **Objectives:**

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

- Grasp Know the essential skills to interpret Criminal Legislations
- Understand the scope and application of the provisions of the Criminal Code to different situations in which the crimes committed and to people committing crimes while being in different capacities.

### **Section 1: The Principle of Legality**

#### **1.1 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*". The rule is known as the "principle of legality" and has been regarded as self-evident principle of justice ever since the French Revolution.

**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)
- “***nulla poena sine lege***” - No penalties other than prescribed by law, (Art. 2/2)
- “***non bis in idem***” – Nobody shall be punished twice for the same act, (Art. 2/5)

### **1.2. ‘*nullum crimen sine lege*’**

The first ingredient of the principle of legality is that “there are no offences other than those which are expressly provided by law”. ‘Criminal Law’ within the meaning of Art.2 is not only the Penal Code, but 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,
- Non-retroactivity of penal laws.

#### ➤ **Certainty in legislation:**

‘*nullum crimen*’, is an injunction to the legislature not to draw its statutes in such broad general terms that almost anybody can be brought within them at the whim of the prosecuting authority and the judge. In England, the statutes offending the maxim must be interpreted restrictively but in the United States, such statutes might be held unconstitutional and void. Penal law should be sufficiently definite for those to be affected by it. People must know their duty and be precisely aware

about the prohibition created by law. This is possible only when the law is certain and definite. People can then regulate their conduct and behavior in order to avoid the hazard of falling within the grips of the penal provisions of laws. Certainty in legislation does not only mean that crimes should be created by law but it also means that a prohibition must also be drafted in *clear, certain and unambiguous language*.

➤ **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. Emphasizing the importance of publicity of the law the Indian Supreme Court in **Harla Vs. State of Rajasthan** (1952 S.C.R.110) observed that, “... it would be against the principle of natural justice to permit the subjects of a state to be penalized by laws of which they had no knowledge and of which they could not even with the exercise of due diligence have acquired any knowledge. Natural justice requires that before a law can become operative it must be promulgated and published”.

➤ **The 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.
- ii) 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.
- iii) 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.
- iv) 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.”
- v) 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:**

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

To give further effect to this principle, there is a “prohibition of analogy” inserted by Art 2/3, which states – “The court may not create crimes by analogy”. This means courts are not free to punish an act on the basis of similarity in its evil nature

to that of a punishable act. For example, a nurse who is under a “legal duty” (professional duty) to give medicine meticulously according to the doctor’s prescriptions to a terminally ill patient, omits to do her duty properly and thereby brings about the death of the patient, may be made responsible for the consequences of her criminal negligence (Art. 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 Krzecunowicz 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 Krzecunowicz, 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”.

#### ➤ **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".*

Article 15 includes a proviso identical to that contained in Article 7 of the European Convention on Human Rights, except that the phrase "civilised nations" is replaced by "the community of nations".

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”.*

The proposed article contained no proviso regarding any act or omission which was "criminal according to the general principles of law recognised by the community of nations".

#### ❖ **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 old 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)

### **1.3 ‘*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.

#### **1.4. ‘*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’.

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

Double jeopardy allows for protection against three main legal abuses. The first, double jeopardy protects against 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.

It should, however, be noted that 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.

The Double Jeopardy Clause speaks of the "same" crime, and yet the Court casually applies the Clause to crimes that are not the same but obviously different. Premeditated homicide is not the same as attempted homicide or ordinary homicide; armed robbery is not the same as robbery. The point here is that, once the accused has been acquitted of certain set of facts, attempt may be made to charge him again on the same facts under different nomenclature. The principle, therefore, has to be understood clearly that, even though the crime in the second trial is not 'the same crime', still the second trial will be barred if it is based on the same facts for any other crime for which a different charge from the one made against him (such accused person) might have been made.

### **Illustrations:**

- (i) A is tried upon a charge of theft (Art 665) as a serve and acquitted. He cannot afterwards, while the acquittal remains in force, be charged with 'Breach of trust (Art 675), on the same facts.

- (ii) **A** is charged before the court for negligent homicide (Art 543) **B** and convicted of it. **A** not afterwards be tried for the on the same facts for ordinary (Art 540) homicide **B**.

Another important question is, precisely when "jeopardy" attaches. "Jeopardy" begins with framing of charges and ends with a suitably error-free judgment. However, the Double Jeopardy clause itself does not exhaust the scope of constitutional principle involved in multiple prosecution and multiple punishment cases. Rather, the clean and simple rules of the Double Jeopardy Clause must be supplemented by several broader but more flexible commonsense principles protected by the Due Process Clause.

Double jeopardy is referred to as a legal technicality instead of a legal right. Double jeopardy allows the defendants not to address whether the crime was actually committed or if they are guilty or innocent. Any evidence that is uncovered and which may show that a person is guilty is inadmissible if they were already tried for the same crime.

### **Brain Storming!**

Find out the essential elements of the rule against double jeopardy as incorporated under the Constitution of Ethiopia as well as under the Criminal Code. Do you find any ambiguities in the application of this principle under these laws?

### **Review Questions:**

1. What are principles of legality? How did they originate? Why are they insisted on?
2. What do you understand by *nulla poena sine lege*? Is this principle properly incorporated in the Criminal Code of Ethiopia in its true sense?

3. Is interpretation of law totally ruled out within the meaning of principle of legality?
4. Can a judge interpret an ambiguous provision if he finds it reasonable and necessary?
5. What is *nullum crimen*? Explain the principle strict interpretation.

**Exercise:**

Evaluate the provisions of non-retroactivity of criminal laws under the Code in the light of the relevant provisions of the Constitution.

## 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 apply 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.

## **2.1. 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.

### **2.1.1. Equality Before The Law:**

A number of distinct meanings are normally given to the provision that there should be equality before the law. One meaning is that, *equality before the law only connotes the equal subjection of all to a common system of law whatever its 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.

The expression “equality before the law” has also been explained as 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”.

### **2.1.2. 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.

To conclude, the essence of the principle of equality contained in the above two expressions, “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”*

It is a fundamental principle of law, that the law be applied equally and impartially to every one: rich and poor, black and white, the powerful and the helpless. Under Art 25 of the constitution, “**All persons are equal before the law and are entitled without any discrimination to the equal protection of the law**”. The principle of equality before the law, which is also found in the Universal Declaration of Human Rights, means that the law, whatever its nature, applies to all individuals alike and governs the conduct of all inhabitants of a state, and not only of a certain classes among them. This principle is not relevant solely to Criminal law but Civil law as well.

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.

## **2.2. 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.

### **2.2.1. 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.

**2.2.2. 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.

### **2.2.3 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.

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

Criminal law, in principle, does not make any distinctions in dealing with the criminals. However, it would amount to injustice if a different kind of treatment were not given to criminals in certain circumstances. 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.

Similarly, 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 has 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.

These special groups of criminals receive differential treatment obviously without violating the principle of equality since the circumstances in which they are given special treatment are sufficiently justified.

**Review Questions:**

1. What are the important formulations of the principle of equality?
2. Trace the origins of the equality principle.
3. Examine the special treatments given to women, children and feeble minded persons under the Code.
4. In the words of Art 4 of the Criminal Code, ‘Criminal law applies to all alike without any discrimination.’ How do you, then, justify the immunities granted to the foreign sovereigns, ambassadors and diplomats?
5. What is the rationale behind the immunities granted to the higher dignitaries of the state under the Constitution?
6. What are the remedies available against the offensive conduct of the diplomats?

**Exercises:**

1. Critically differentiate between the phrases ‘equality before the law’ and ‘equal protection of the law’.
2. Find out from the provisions of the Criminal Code that whether any others are given special treatment.

### **Section 3. The Principle Of Individual Autonomy:**

#### **3.1. Meaning of the Principle:**

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 censuring machinery against the individual subjects.

The purpose of this part of the unit is to identify those interests that warrant the use of Criminal Law which sometimes gives the impression of interfering with an individual's freedom to a certain extent. 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 behaviour*. This principle has factual and normative elements that must be explored.

#### **3.2. 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 behaviour is determined by causes that ultimately each individual cannot control. However, there is a reasonable amount of consensus on the opinion that behaviour is not so determined that blame is generally unfair and inappropriate, and yet to accept that, in certain circumstances, behaviour may be so strongly determined that the normal presumption of free will may be displaced, for instance, where the individual is overpowered by the threats of another. 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."*

This point may be conceded without denying the fundamental assumption of freewill, so long as the possibility of qualifications is recognized. Thus, for example, the capacities assumed by the law may not be present in those who are too young or who are mentally disordered. These capacities relate to what are known as 'preconditions of criminal liability'. Preconditions refer to the ability to participate in a trial as a communicative enterprise. The general assumption is thus that sane adults may properly be held liable for their conduct and for matters within their control, except in so far as they can point to some excuse for their ...for example, duress, mistake, or even social deprivation.

### **3.3 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.* Some such principles lie

at the centre of the most liberal political theory, and can be found, for example, in Ronald Dworkin's principle *that each individual is entitled to equal concern and respect*. 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. Similar idea can be witnessed in the central element in the *defensive* approach to criminalization advanced by Nils Jareborg and others, insisting the importance of protecting the individuals from undue state power. The thrust of the H.L.A. Hart's famous principle on Punishment and Responsibility is on the same lines that an individual should not be held criminally liable unless he had the capacity and fair opportunity to do otherwise. Clearly his argument also is grounded on in the primary importance of individual autonomy.

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'.

In liberal theory, the principle of autonomy goes much further than this. Feinberg (year) states in this respect that: "*the most basic autonomy-right is the right to decide how one is to live one's life, in particular how to make the critical life-decisions---what courses of study to take. What skills and virtues to cultivate, what career to enter, whom or whether to marry, which church if any to join, whether to have children, and so on.*"

The difficulty is to decide how far this is to be taken. 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.

### **3.4. 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 do not 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.

The important questions that could be raised here is that Do these legal provisions violate the individual autonomy? Does the health condition of these people deprive them of their right to privacy, dignity, and honor when they are compelled to disclose their most private information?

➤ **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. In that case, are the provisions of proclamations relating to tax in violation of individual autonomy?

➤ **Principle of Respect for Autonomy:**

As commonly understood today, autonomy is the capacity for self-determination. Being autonomous, however, is not the same as being *respected* as an autonomous agent. 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 Summary:**

It is necessary that certain safeguards should be provided to the accused as he is put under the peril of his life and liberty. The most important of such principles embodied in the Criminal law, specifically, are the Principle of Legality, the Principle of Equality and the Principle of Individual Autonomy. These principles are enshrined in the Constitutions and International Conventions.

The principle of legality requires that prosecutions and punishments for crimes should strictly be 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. The principle of equality requires that all those who violate the law should be dealt with equally in terms of trial and punishment. There should not be any discrimination in the application of Criminal Laws. Principle of individual autonomy considers the extent to which the criminal laws encroach upon the personal freedom of individuals in the name of ensuring law and order and the justifiability of such encroachment.

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. The principle as incorporated in our Criminal Code has three important ingredients namely, *nullum crimen sine lege* - No crime unless specified by law, (Art. 2/1)’ *nulla poena sine lege*” - No penalties other than prescribed by law, (Art. 2/2), *“non bis in idem”* — Nobody shall be punished twice for the same act, (Art. 2/5). Another 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).

The cardinal principle of criminal law i.e. the principle of equality requires that, all men are born equal and must be treated equally. This principle has its roots in the Roman jurisprudence. 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 namely, that there should be “Equality before the law” and that “the equal protection of the laws” should not be denied. However, the principle of equality before the law does not prohibit certain differences from being made in the treatment of criminals. Art. 4 of the Criminal Code specifically mention three exceptions to the principle of equality. They are in the form of immunities sanctioned either by Public International law or Constitutional law, and the requirements of individualization of Criminal Justice.

The purpose of discussing the philosophical principle of individual autonomy is to identify those interests that warrant the use of Criminal Law which sometimes gives the impression of interfering with an individual’s freedom to a certain extent. The principle requires that each individual should be treated as responsible for his or her own behaviour. This principle has two elements, the factual and the normative. The factual element in autonomy is that individuals in general have the capacity and

sufficient free will to make meaningful choices. The second element of the principle is normative which says 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. There are certain areas of law which challenge the principle of autonomy and invoke serious debates such as euthanasia, AIDS and the law, conducts involving sexual behaviour, obligation of the personal income taxpayers to submit so-called proprietary declarations to tax offices, etc.

**Review Questions:**

1. What do you understand by individual autonomy?
2. What are the factual and the normative elements of the principle of individual autonomy?

**Activity:**

Find out some other provisions of law that can be said to be violative of individual autonomy.

**Group Project:**

Students of the class may be divided into groups and each group shall read the following article thoroughly and prepare their comments in the light of the following legal provisions and important concepts:

1. Arts 13, 15, 17, 24 of the Constitution of FDRE, 1995
2. Art 542 of the Criminal Code of FDRE, 2004
3. All Relevant International Documents

**Guidelines:**

1. Does individual autonomy include the right to die?

2. Should right to human dignity mean living a healthy and painless life?
3. Does right to life include right to die by any logical interpretation?

## **Death, Dignity and Discrimination: The Case of *Pretty v. United Kingdom***

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By Susan Millns

#### **Introduction**

[1] Diane Pretty died of natural causes on 11 May 2002 from motor neurone disease, a paralysing, degenerative and incurable illness. Her fight to choose the time and manner of her death assisted by her husband was a resounding legal failure. A unanimous body of judicial opinion in both the English Divisional Court and the House of Lords, (1) followed by the European Court of Human Rights, (2) denied that her rights under the European Convention on Human Rights had been infringed. Thus, the refusal of the Director of Public Prosecutions (DPP) to exempt Mrs. Pretty's husband from prosecution were he to undertake efforts to assist Mrs. Pretty in taking her own life was ultimately held to be lawful. (3) At the same time, the domestic legal prohibition on assisting suicide, found in Section 2.1 of the Suicide Act of 1961 was found to be in conformity with the Convention. (4)

2] Mrs. Pretty's case raises important legal questions at both domestic and European levels. While this note concentrates primarily upon the decision of the European Court of Human Rights, the preceding discussion in the domestic courts is not unimportant. This is particularly so because of the entry into force in October 2000 of the UK's Human Rights Act of 1998, which, for the first time, incorporates key aspects of the European Convention into national law. The enactment of the Human Rights Act makes it possible to invoke substantive rights contained therein directly before the domestic courts. (5) The discussion of the House of Lords in the *Pretty*

case, therefore, served as a rehearsal of the arguments eventually heard before the Fourth Section of the European Court and offers an important example of the way in which the new discourse on fundamental rights in the UK can provide an opportunity for litigants to present novel arguments at the national level. (6) In *Pretty v. Director of Public Prosecutions* the House of Lords gave one of its most thorough considerations of Convention rights to date, which was notably more cautious than the subsequent interpretation of the European Court regarding the scope of the right to respect for private life (discussed further below). The House of Lords' decision also sets clear jurisdictional limits on the powers of the domestic courts in human rights matters demonstrating the judiciary's unwillingness to encroach upon parliament's continued sovereign legislative jurisdiction. The clear message from the House of Lords is that it must "ascertain and apply the law as it is now understood to be" and if this law is wrong then it is for parliament and not the courts to amend it. (7) As Lord Bingham, delivering the leading judgment in the House of Lords stated, that body "is not a legislative body. Nor is it entitled to act as a moral or ethical arbiter." (8)

3] Difficult as it is to separate the legal and ethical issues in Mrs. Pretty's case, her claim in law was based upon an alleged infringement of Convention Article 2 (right to life), Article 3 (prohibition on inhuman and degrading treatment), Article 8 (right to respect for private life), Article 9 (freedom of conscience and belief) and Article 14 (prohibition on discrimination). The European Court found no violations of these rights and held that only Mrs. Pretty's right under Article 8 was at issue in the dispute and that the interference here (with her attempts to secure a right to assisted suicide) was necessary to protect the rights of others. Couched in the language of a compelling ethical claim to die with dignity, Mrs. Pretty's case lays bare the difficulty of framing such a demand within the available confines of European human rights discourse. This note considers the arguments made out with regard to each alleged Convention violation and the response of the European Court to these in the context of what it means to end one's life with dignity.

## B. Dignity and Dying

[4] Mrs. Pretty, paralysed from the neck down, with virtually no decipherable speech and fed by a tube, knew she had only a few weeks or months left to live. Her illness, motor neurone disease, is a progressive neuro-degenerative disease of motor cells within the central nervous system. The victim suffers progressive muscle weakness through the arms, legs and eventually those muscles which control breathing. Death usually occurs as a result of respiratory failure and pneumonia. Not wishing to endure the distressing final stages of this disease, frightened at the suffering and indignity which faced her, and unimpaired in her decision-making capacity, Mrs. Pretty was of the view that she wished to control the time and manner of her death so as to die with dignity.

[5] Respect for human dignity is not expressly articulated in any of the substantive rights guaranteed by the Convention. It can, however, be viewed as one of its fundamental objectives (9) and would seem specifically to underpin a number of guaranteed rights such as the right to life, the prohibition on inhuman and degrading treatment and the right to respect for private life. Likewise, although not guaranteed expressly in English law, it has been argued that dignity (alongside autonomy, respect, status and security) constitutes one of five common values in domestic public and private law. (10) As such, Mrs. Pretty's appeal for a dignified death does not lack resonance within either a European or national legal framework. The question, however, is to what extent the law is capable, in its current form, of permitting dignity to reign in the final stages of life. More particularly, it appears that the elasticity of dignity discourse with its capacity to pull in many directions means it can be invoked by all protagonists (the elderly and infirm, their families, the medical team, the state) to justify all outcomes (preserving life and seeking death). Its duplicitous nature, therefore, when combined with the claims and counter-claims which infuse rights discourse, appears ultimately to undermine the cause of those who try to use it to assert their right to die with dignity.

### C. Article 2 The Right to Life and the Right to Die

[6] Article 2.1 of the Convention guarantees that "Everyone's right to life shall be protected by law..." (11) It was argued on behalf of Mrs. Pretty that this Article protects not simply the right to life but its corollary the right to die. The Article, it was suggested, should encompass the individual's right to self-determination in relation to issues of life and death, and so should respect a choice to live or to die where this choice was exercised in order to avoid inevitable suffering and indignity. The state, it was argued, had a positive obligation to protect both rights. In opposition, the UK government maintained that this reliance on Article 2 was inconsistent with existing Convention case law and with the language of the provision. Article 2, it was argued, imposed primarily a *negative* obligation and, in the few cases where it had been found to impose positive obligations, these concerned steps to be taken to *safeguard* life and not to end it. (12) The wording of Article 2 required that no one should be deprived of their life intentionally and as such the right to die was not the corollary but rather the antithesis of the right to life.

[7] So, one right or two; and a positive or negative obligation? Both the House of Lords and the European Court were persuaded by the force of the government's argument. Lord Bingham in the House of Lords found the Secretary of State's objections to Mrs. Pretty's claim "unanswerable," holding that the right to life guaranteed in Article 2 did not extend to the right to die – quite the reverse in that it was framed to protect the sanctity of life. (13) The European Court agreed, outlining the pre-eminence of Article 2 as one of the most fundamental provisions of the Convention. In reiterating the obligation of the state to positively protect life, the Court did not accept that Article 2 could be interpreted to encompass a negative aspect without grossly misrepresenting the content of that Article:

*Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-*

*determination in the sense of conferring on an individual the entitlement to choose death rather than life.* ([14](#))

[8] In sum, Mrs Pretty's claim to a dignified end to her life via the legal recognition of an individual right to die fell well outside the confines of Article 2 given its fundamental concern to ensure respect for the sanctity of life. Thus, in the context of this Article, the dignity of all humanity expressed in its most universal and objective form so as to protect life is given force over and above the individual and subjective dignity of the person seeking assistance to terminate a state of personal suffering. The Court, consistent with its previous case law on this Article has, therefore, confirmed that Article 2 may only be instrumentalized to promote and not to end life.

#### **D. Article 3 – The Prohibition on Inhuman and Degrading Treatment**

[9] Mrs. Pretty's principal contention of a Convention violation was based upon Article 3 which states that:

*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

[10] That dignity and degradation are two sides of the same coin has already been recognized by the European Court, which has used Article 3 to link respect for dignity with situations of humiliating and debasing treatment, notably in relation to conditions of detention in custody. ([15](#)) The degrading treatment in Mrs. Pretty's case, however, was of a rather different order, being the suffering and indignity she faced in the final stages of her disease as her breathing became more difficult and ultimately impossible. While Mrs. Pretty acknowledged that the state was not directly responsible for this "treatment," she maintained that it had, nevertheless, a positive duty to protect her from the suffering she was set to endure, by recognizing

the illegality of the DPP's refusal to give immunity from prosecution to Mr. Pretty were he to assist her in her efforts to commit suicide.

In countering this position, the government submitted that Article 3 was simply not at issue. The obligation Article 3 imposes, it was argued, was negative. This meant that, while the state should not inflict torture or inhuman or degrading treatment or punishment, the obligation did not extend to the type of situation in which Mrs. Pretty found herself where the allegation of an Article 3 violation was posed in terms of a failure to act on the part of the state, thus breaching a positive obligation.

[11] Once more both domestic and European judges were persuaded by the force of the Government's rather than Mrs. Pretty's argument. Both Lord Bingham in the House of Lords and subsequently the European Court reiterated that Article 3 imposes primarily negative obligations upon the state to refrain from inflicting serious harm, albeit that this might be flexibly interpreted to encompass other situations which give rise exceptionally to positive duties. (16) Given that it was beyond dispute that the government had not itself inflicted any ill-treatment upon Mrs. Pretty and that it was nowhere suggested that she was not receiving adequate care from the state's medical authorities, the European Court maintained that to find the state responsible for inhuman and degrading treatment would be to place a new and extended construction on the notion of treatment under Article 3. This it was not prepared to do. Rather, while the Court was prepared to acknowledge that the Convention was a flexible, "living instrument," (17) it maintained that an extension of its scope of the magnitude envisaged by Mrs. Pretty would go beyond its fundamental objectives and impose a sense of incoherence in interpretation, notably as regards Article 2. Thus, the Court reiterated the substantive limits of Article 3 and excluded what would seem on its face to be the most appropriate Convention guarantee to ensure respect for human dignity, finding that it has no application in this context.

#### **E. Article 8 – The Right to Respect for Private Life**

12] While the European Court and the House of Lords were in agreement with respect to their interpretation of Articles 2 and 3 of the Convention, there was some disagreement as regards the material scope and applicability of Article 8.1, which provides the right to respect for private life. Lord Bingham with whom all the other Law Lords concurred (with the exception of Lord Hope), reasoned, as the UK government had urged, that this right was not at issue in Mrs. Pretty's case given that it involved respect for the way a person conducted her "life" rather than death. The European Court on the other hand, like Lord Hope, found that the right was engaged by Mrs. Pretty's circumstances. In so doing it offered a somewhat broader interpretation of private life than the House of Lords, suggesting that the national judiciary may be over cautious in their new role as custodians of domestic fundamental rights protection.

3] Thus, the European Court accepted Mrs. Pretty's suggestion that Article 8.1 epitomized the right to self-determination encompassing the right to make decisions about one's body and including the right to choose when and how to die so that suffering and indignity could be avoided. In coming to this conclusion the Court stressed the broad construction already attributed to the concept of "private life" by the Strasbourg jurisprudence to include aspects of an individual's physical and psychological integrity, (18) social (19) and gender identity, (20) and sexual orientation. (21) It thus stressed that the notion of personal autonomy was an important aspect of the Article 8 guarantee. Taking the imposition of medical treatment against the will of a competent patient as a starting point the Court suggested that this would interfere with a person's physical integrity in a manner capable of engaging the rights protected under Article 8.1 and, although medical treatment was not the issue in this case, the applicant was suffering from the effects of a degenerative disease that would cause her increased physical and mental suffering as her condition deteriorated. Hence, the Court reasoned, the way she chose to pass the final moments of her life were part of the act of living and she had the right to ask that this choice be respected.

[14] It is, in fact, at this moment in the judgment that the Court brings to the fore its discussion of respect for human dignity which, it is reiterated is "the very essence of the Convention." (22) More importantly, the notion is linked not to the sanctity of human life (as per Article 2) but rather to "quality of life," which, it is suggested, may fall within the scope of Article 8. In a statement of principle the European Court stressed the link between law and the development of medical technologies arguing that the increasingly sophisticated body of medical knowledge which allows longer life expectancy should not mean that people are "forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity." (23) The Court's recognition of the impact of the continual advancement of medical knowledge upon perceptions and experiences of death and the dying process is a significant step towards the acknowledgment that respect for dignity comprises a social component regarding quality of life issues, and is not simply limited to a consideration of life *per se*. To the same extent this interpretation gives value to an individual's need for self-respect rather than the more general requirement for respect for the human person, which surfaces in the interpretation put upon the dignity considerations that underlie Article 2.

15] From a constitutional point of view, a further interesting feature of the discussion of Article 8.1 in both the European Court and more particularly in the House of Lords is the reference (considerable in the case of the latter) to the Canadian Supreme Court's decision in *Rodriguez v. The Attorney General of Canada*, (24) a case involving a woman with a similar disease and level of incapacity who, like the Mrs. Pretty, sought medical assistance to end her life. The discussion is interesting to the extent that, at a technical level, it is redundant – the issue being easily decided on the Convention provisions alone.

[16] For the comparative lawyer, however, the reference represents an exciting example of the communicability of legal knowledge and transplantation of legal solutions from one system to another. In so doing it amply demonstrates the paradox

of the project to "bring rights home" to the UK, as the process of enactment of the Human Rights Act of 1998 and the determination of rights claims by English (as opposed to foreign/Strasbourg) judges had been presented to a sceptical British public. (25) Instead of a mere "Europeanization" of fundamental rights arguments before the national courts, the House of Lords and European Court in fact display their cosmopolitan credentials by going global and looking to Canada for precedent. Of course, there are good reasons for doing so in the case of the House of Lords, given the weight Mrs. Pretty had placed on the *Rodriguez* decision in her submissions and the fact that the Canadian Charter of Rights and Freedoms and decisions of the Supreme Court of Canada show what is possible in marrying fundamental rights discourse with the common law tradition. For the European Court one can imagine too that the importance of the issue and the growing Western interest in developing legal provisions on euthanasia and assisted suicide called for consideration of the issue from a world-wide rather than purely European stand-point. (26)

[17] Hence the decision of the Canadian Supreme Court in *Rodriguez* provides an important example in determining the degree to which Mrs. Pretty's case was capable of falling within Article 8. In fact, herein lies the point of disagreement in interpretation of the scope of Article 8 by the House of Lords and the European Court. While Lord Bingham found that Article 7 of the Canadian Charter (the right to life, liberty and security of the person), which had been held applicable to Ms. Rodriguez, had no direct equivalent in the European Convention (with its separate Article 5 guarantee of liberty and security of the person not being invoked by Mrs. Pretty and Article 8 containing no direct reference to personal liberty or security), (27) the European Court on the other hand found that the right of autonomy – described as self-determination and private life in the Convention context - was at issue and therefore any interference required justification in order to avoid a finding of a Convention violation.

[18] Thus, the European Court went on to examine whether the interference in Mrs.

Pretty's private life could be legitimated under the second paragraph of Article 8 in order to protect the rights of others. In assessing the justification the Court was faithful to its previous case law demanding that the interference be "in accordance with the law," having a legitimate aim under Article 8.2 and being "necessary in a democratic society" for the pursuit of that aim. (28) The key issue in the Pretty decision was the necessity of the interference given that the restriction on assisted suicide was clearly imposed by law in pursuit of the legitimate aim of safeguarding life and so protecting the rights of others. The European Court noted in its usual manner that the idea of necessity demands that the interference correspond to a "pressing social need" which is proportionate to the legitimate aim pursued and that, in assessing the degree of necessity, the Court would take into account the margin of appreciation left to national authorities. In applying the formula to Mrs. Pretty's situation, the Court was ultimately not persuaded by her suggestion that the ban on assisted suicide was disproportionate despite its blanket nature and the lack of consideration given to her individual situation as a mentally competent adult. Finding that Mrs. Pretty was not herself a vulnerable person the Court again referred to the Canadian Supreme Court's decision in *Rodriguez*, agreeing that states are entitled to use the criminal law to regulate activities which may in general be detrimental to life and public health and safety.

19] Holding, therefore, that Section 2 of the Suicide Act of 1961 was designed to protect the lives of weak and vulnerable persons, the Court maintained that, while the condition of the terminally ill may vary, many such persons are at risk of abuse and that it is the vulnerability of the class which provides the reason for the law. Mrs. Pretty's individual claim, as under Articles 2 and 3, ultimately had to give way to the protection of a wider class of persons in need of protection. In this way it is once more the dignity of the human person in its most general, life-promoting, sense rather than the dignity of the individual understood in terms of personal quality of life and expression of identity, which command greatest respect. To the extent that individual circumstances were relevant there was found to be a sufficient degree of flexibility in the enforcement and adjudication process in view of the fact that the

DPP had to consent to a prosecution and that a maximum sentence was provided which allowed for lesser penalties where appropriate. Thus, a balance between collective and individual interests was finally drawn under Article 8, which required Mrs. Pretty to face a painful and undignified death in order to protect a class of unidentified victims more vulnerable than herself.

#### **F. Article 9 – The Right to Respect for Freedom of Thought, Conscience and Religion:**

[20] Having given considerable analysis to the complicated balancing exercise required by the highly applicable Article 8, it was not surprising that the European Court, like the House of Lords before it, had no difficulty in swiftly dismissing any notion that Article 9 applied to Mrs. Pretty's case. This Article, the first paragraph of which guarantees the right to freedom of thought, conscience and religion, including freedom of belief, was invoked by the applicant as encompassing the expression of her belief in, and support for, the notion of assisted suicide which, in the light of the blanket ban on assistance, allowed for no consideration of her individual circumstances.

[21] Finding that not all opinions or convictions are capable of constituting beliefs in the sense protected by Article 9.1 and that Mrs. Pretty's claims did not involve a form of manifestation of religion or belief through worship, teaching, practice or observance as required by the Article, the European Court's discussion of Article 9 is cursory. (29) Slightly more sensitive to the issue, Lord Bingham in the House of Lords acknowledged the sincerity of Mrs. Pretty's belief and her freedom to hold and express it. (30) That said, he went on to find that this belief alone could not form the basis of a requirement that her husband should be absolved from the consequences of conduct, which, consistent with his wife's belief, was nonetheless prohibited by the criminal law. Furthermore, he argued that, even were Mrs. Pretty to establish an infringement of her right under Article 9.1, the state would be capable

of justifying the infringement pursuant to Article 9.2 for much the same reasons as those given by the European Court in the context of its discussion of Article 8.

#### **G. Article 14 – Discrimination and Dying:**

[22] Having found that no Convention rights were at issue, the House of Lords, as represented in the leading judgment of Lord Bingham, was not ostensibly required to pronounce upon the alleged infringement of Article 14's prohibition on discrimination in the enjoyment of Convention rights "on any ground such as sex ... or other status." This did not, however, stop it doing so in order to give a full airing to the claims raised by Mrs. Pretty and to the suggestion by Lord Hope that Article 8 was engaged and therefore that Article 14 was relevant to the case at hand. The European Court, likewise finding that Article 8 was in play was required to respond directly to the possibility of a violation of the prohibition on discrimination in conjunction with the right to respect for private life.

[23] The approach taken to the discrimination issue in the case deserves consideration as much for what it does not encompass as for that which it does. Arguably, the issue is not explored to its fullest potential, as it rotates purely upon the axis of the "other status" of the disabled *vis-à-vis* the able-bodied with no alternative basis being suggested as a component of the alleged discriminatory treatment. It is possible, however, that, in a broad sense, gender too may have played a part in Mrs. Pretty's call for assisted suicide and that to deny that call constitutes a form of indirect sex-based discrimination.

#### **H. Disability Discrimination**

[24] It was argued for Mrs. Pretty that she was discriminated against *vis-à-vis* those people who are able to take their own lives without assistance – *i.e.* a distinction was drawn on the basis of (dis)ability. The effect of her disability was such that she could not end her life without assistance and was, thus, prevented from exercising a right enjoyed by others who were not similarly disabled. In applying a blanket ruling to her circumstances, the state, in contravention of the ruling in *Thlimmenos v. Greece*, (31) had without reasonable and objective justification, failed to treat differently persons whose situations were significantly divergent. While the government sought to explain its stance on the basis that the vulnerable required protection, Mrs. Pretty argued that she was neither vulnerable nor in need of protection and there was, hence, no justification for the difference of treatment in her case.

[25] By a tragic coincidence of timing the unfavourable treatment which Mrs. Pretty endured precisely because she required assistance with her efforts to commit suicide was drawn in stark contrast with the case of *Ms. B* decided by the Family Division of the English High Court at the same moment as Mrs. Pretty battled before the European Court. (32) Like Mrs. Pretty, Ms. B was a competent adult who, as a result of a devastating illness, had become tetraplegic and sought to end her life in a dignified and painless manner. Unlike Mrs. Pretty, though, she was kept alive by the use of a ventilator and so wished for this life-sustaining treatment to be withdrawn rather than for an active act of assistance to enable her to die. Following the House of Lords' momentous decision in *Bland*, (33) The High Court held that *Ms. B* was entitled to have her request respected in order to give full legal expression to her competence and personal autonomy, a decision which resulted shortly afterwards in her death. (34) Mrs. Pretty, on the other hand, with no ventilator to switch off, demonstrated in her courageous fight that the line between act and omission in these matters is finely (and arguably unjustifiably) drawn.

[26] The pull of Mrs. Pretty's argument based upon differential treatment of the disabled was, however, resisted by both national and European judges with no

violation of Article 14 being found. Taking a broad approach to the question Lord Bingham decided that Mrs. Pretty's contention that Section 2, Subsection 1 of the 1961 Act discriminated against the disabled by preventing them from exercising the right to commit suicide was unfounded. The law conferred no "right" to commit suicide, the legislation being designed merely to decriminalize the act rather than confer any positive right. (35) He argued further that the criminal law could not be criticized as discriminatory because it applied to all. It did not ordinarily distinguish between willing and unwilling victims (as the infamous case of the successful prosecution of consenting homosexual sadomasochists had made clear) (36) and any attempt to exonerate those who assisted the suicide of the non-vulnerable as opposed to the vulnerable would be impossible to administer fairly. (37) It is the situation of the vulnerable victim that also engaged the imagination of the European Court in its discussion of the applicability of Article 14. The Court found that while a difference in treatment might exist, this was based upon an objective and reasonable justification in order to avoid the "risk of abuse" of vulnerable persons who might otherwise be coerced into requesting an early termination of their life. (38)

[27] To the extent that respect for dignity requires the treatment of individuals in a non-discriminatory and non-selective manner, ensuring that everyone is deserving of equal respect, it might again be noted that there appears to be an assault upon Mrs. Pretty's personal dignity. Like the other Convention rights discussed above, however, Article 14 operates to protect the dignity of a class of persons rather than individual interests. Undoubtedly this appeal to the collective good runs the risk of paternalism in its desire to respect the dignity of an unspecified group at the expense of that of the individual obliged to endure a protracted and painful personal dying experience. (39) Yet, as pointed out by the conclusions of the House of Lords Select Committee on Medical Ethics in 1994, "dying is not only a personal or individual affair. The death of a person affects the lives of others, often in ways and to an extent which cannot be foreseen." (40) While this is of course true, the question still remains as to whether it is justifiable to ask of individuals that they continue their lives in truly unbearable circumstances in the interests of society as a whole.

[28] Furthermore, it is not impossible to see within Mrs. Pretty's call for death with dignity the paradoxical instrumentalization of individual rights in order to end the individual and isolated experience which death of the terminally ill seems presently to entail. Mrs. Pretty's desire to die in the manner of her choosing, with her family around her, points to a need for a sustained relationship to others in death as in life. The acknowledgment of this need for inter-personal connection in the dying process comes through clearly in the opinion of Lord Bingham in which he emphasized Mrs. Pretty's wish to act "with the support of her family" demonstrating the willingness of Mr. Pretty, her husband of 25 years and principal care-giver, to assist his wife in ending her suffering. (41) To the extent that dignity interests are respected by the capacity to enjoy and pursue personal relationships, it seems questionable whether these may be secured for some dying persons whose physical disabilities mean they cannot act like able-bodied persons, and suggests a need to rethink the current legal interpretation of the appropriate balance between pursuit of the collective and individual good life and death.

## **II . Sex Discrimination**

[29] The discussion of the discrimination issue in the Pretty case was limited to the distinction drawn between the disabled and able-bodied. No argument was put forward with regard to any other status, for example, Mrs. Pretty's gender. While this may seem, at first sight, to be a somewhat far-fetched suggestion – given that the same arguments regarding vulnerability of victims may be made out in the case of men requesting assistance with efforts to commit suicide - the issue deserves an airing simply in order to question whether it is mere coincidence that the cases of Mrs. Pretty, Ms. B, and Ms. Rodriguez all involved women. If it is not coincidence, then why should women in particular seek to shorten their lives in this way? And ultimately, is the refusal of their request a form of gender-based discrimination?

The answer to the first question is, of course, impossible to give in the absence of

empirical data on the gender breakdown of requests for assisted suicide. An intuitive guess that there is no coincidence here may, however, be hazarded in the light of debate centered upon the second question regarding the differential experiences that women and men have of death and dying. It has been argued by Hazel Biggs, for example, that while death is obviously a universal experience, women's relationship to it is different from men's for two key reasons relating to their roles as both caregivers and sufferers. (42) First, it is women rather than men who are most often primary care-givers for the dying. This may give them a more immediate experience of the difficulties associated with the dying process, culminating in their more vociferous call for the legalization of euthanasia. Secondly, women generally live longer than men and, having cared for their menfolk, are subsequently left to care for themselves as they grow older and more infirm. The desire to avoid death in a communal home, or to avoid the cost to their families, both economic and emotional, that their care may involve over a long period of time, may mean that more women will seek an early end to their life to avoid becoming a burden upon family and friends.

30] On the one hand, therefore, this might support a contention of indirect gender-based discrimination where assisted suicide is proscribed by law given that requests for assistance will more likely be made by, and refused to, women. On the other hand, one needs to look further at the motivation behind such requests. As Biggs suggests, the danger is that the endorsement of a right to die could easily slide into a duty to cease being a burden. (43) In the light of this assessment the need, identified by the House of Lords and by the European Court, to provide adequate legal safeguards to protect a vulnerable category of victims takes on a gendered dimension where it appears that these may be predominantly female. The risk of abuse and coercion in such circumstances is very real and, as suggested above, women may find themselves more frequently the object of such abuse where both they and their entourage come to view their lives as no longer of sufficient economic or social value.

## H. Conclusion

[31] The judicial construction given to the Convention rights in Mrs. Pretty's case is difficult to fault and as such a judgment in her favour was never a realistic possibility given the way in which those rights are currently posited and interpreted. Yet, the horror of her circumstances and ultimate painful and public death, has caused European society to reflect closely upon whether or not, in these circumstances, it is time for the law to be modified in response to medical advances and changing social perceptions of dying. It is clear that at the other end of the human life cycle – its beginnings - new reproductive and biotechnologies have demanded legal developments at both national and European levels to provide an alternative framework in which previously unthinkable questions of human fertilisation and embryology can be discussed. Is it not now likewise time to think the unthinkable with regard to the law on death and dying as people's lives are increasingly lengthened through medical intervention, as the dying process itself becomes more protracted and as the number of slow and painful deaths rises? In fact, the process of legal reform is already underway in Europe following the recent measures taken in the Netherlands to introduce a form of medically assisted suicide.

(44) Such developments are not without importance in the context of the margin of appreciation allowed to signatory states in their justification for refusing to allow assisted suicide. Bearing this in mind, and despite the lack of recognition of a right to die with dignity, the key assertion by the European Court in *Pretty* that respect for human dignity relates not only to respect for life in a general sense, but also to quality of life, sets down an important marker for the future. It suggests that it will be upon a re-evaluation of the present balance between individual and collective interests under Article 8, coupled possibly with a discrimination claim sustained under Article 14, that any future advances in the legal recognition of the rights of those seeking assistance to die in a dignified manner will be founded.

### End Notes:

(1) *Pretty v. Director of Public Prosecutions* [2001] 3 WLR 1598; [2002] 1 All ER 1; [2001] UKHL 61 (available at: <http://www.parliament.the-stationery-office.co.uk/pa/l200102/ljudgmt/jd011129/pretty-1.htm>.)

(2) *Pretty v. United Kingdom*, European Court of Human Rights, [Sect. 4], no. 2346/02, judgment of 29 April 2002. (Decision available at: <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=807092731&Notice=0&Noticemode=&RelatedMode=0>).

(3) The discretion of the DPP to consent to a prosecution for the offence of assisting suicide is exercised pursuant to Section 2, Subsection 4 of the Suicide Act of 1961. Mrs. Pretty's solicitor had written to the DPP asking that an undertaking be given not to prosecute Mr. Pretty. In a letter of 8 August 2001 the DPP replied that: "[s]uccessive Directors – and Attorneys General – have explained that they will not grant immunities that condone, require, or purport to authorize or permit the future commission of any criminal offence, no matter how exceptional the circumstances."

(4) Suicide itself is not a crime in English law. The criminal offence lies in assisting another. Section 2, Subsection 1 reads: "A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years."

(5) See, generally, J. Wadham and H. Mountfield, *Blackstone's Guide to the Human Rights Act 1998* (London: Blackstone Press, 1999).

(6) The orientation of Mrs. Pretty's case around an alleged violation of her Convention rights was of prime importance given that it was accepted on all sides that under the English common law Mrs. Pretty could not have succeeded. It is noted by Lord Bingham in the House of Lords that her claim was inconsistent with two fundamental principles of English law: first, the distinction between the lawful taking of one's own life by one's own act and the unlawful taking of life through the intervention of a third party (as per Hoffmann LJ in *Airedale NHS Trust v. Bland* [1993] AC 789, p. 831) and secondly, the distinction between the lawful cessation of life-saving or life-prolonging treatment and the unlawful taking of action lacking medical, therapeutic or palliative justification but intended solely to terminate life

(as per Lord Donaldson MR in *Re J (A Minor) (Wardship: Medical Treatment)* [1991] Fam 33, p. 46; and applied in Bland).

(7) *Pretty v. Director of Public Prosecutions*, *supra* n. 2, per Lord Bingham, para. 1.

(8) *Ibid.* The European Court's decision also goes some way towards recognising the sensitivity of assisted suicide as an ethical issue which has engaged public opinion and is vociferously contested on all sides, suggesting the need for rigorous democratic debate. Testimony to this is the fact that third-parties were given leave to intervene in the written procedure and the opposing views of the Voluntary Euthanasia Society and the Catholic Bishops' Conference of England and Wales are set out in paras. 25-31 of the judgment. Like the House of Lords, the European Court made reference also to the report of the House of Lords Select Committee on Medical Ethics (HL Paper 21-I, 1994) and to the Parliamentary Assembly of the Council of Europe's Recommendation 1418 (1999) on the protection of the human rights and dignity of the terminally ill and dying.

(9) *SW v. United Kingdom and CR v. United Kingdom*, nos. 20166/92 and 20190/92, judgments of 22 November 1995. In this pair of cases, dealing with the end of the marital rape exemption which had existed in the UK until the landmark decision of the House of Lords in *R v.R* [1991] 4 All ER 481, the European Court found that defendants convicted of the new offence could not rely on Article 7 of the Convention (the principle of non-retroactivity of the criminal law) in order to challenge their conviction as: '(...) the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity (...) above all, with the fundamental objectives of the Convention, the *very essence of which is respect for human dignity and human freedom*' (paras. 44 and 42 respectively)

(10) D. Oliver, *Common Values and the Public-Private Divide* London: Butterworths, 1999. On dignity as a legal value, see also D. Feldman, "Human Dignity as a Legal Value – Part I" [1999] PL 682-702; D. Feldman, "Human Dignity as a Legal Value – Part II" [2000] PL 61-76. Securing respect for dignity via the English common law is by way of contrast to the approach adopted in many other European countries where human dignity is specifically guaranteed in the

Constitution. See, for example, Article 1(1) of the German Basic Law of 1949: "Human dignity is inviolable. To respect and protect it is the duty of all state authority." Article 3(1) of the Italian Constitution of 1947: "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinions, personal and social conditions." and the decision of the French Constitutional Council no. 94-343-344 DC of 27 July 1994 *Bioethics* which lifted the principle of safeguarding human dignity from an interpretative reading of the preamble to the Constitution of 1946 (Decision available at: <http://www.conseil-constitutionnel.fr/decision/1994/94343dc.htm>).

(11) This guarantee is subject to a number of limited exceptions set out in the second paragraph of Article 2, none of which applied in Mrs. Pretty's case.

(12) As, for example, in *Keenan v. United Kingdom* [Sect. 3], no. 27229/95, judgment of 3 April 2001) where it was found that an obligation could arise for prison authorities to protect a prisoner who tried to take his own life.

(13) *Pretty v. Director of Public Prosecutions*, *supra* n. 2, per Lord Bingham, paras. 5 & 7.

(14) *Pretty v. United Kingdom*, *supra* n. 1, para. 39.

(15) For example, in the case of *Kudla v. Poland* [Grand Chamber], no. 30210/96, judgment of 26 October 2000, para. 94, it is stated that "under this provision [Article 3] the state must ensure that a person is detained in conditions which are compatible with respect for his human dignity..." Of incidental note too is the neat link made between respect for dignity and the avoidance of degradation which underpinned the French Constitutional Council's *Bioethics* decision no. 94-343-344 DC of 27 July 1994 in which safeguarding human dignity is interpreted as an objective of the preamble to the Constitution of 1946 set in place in order to counter those past regimes whose effect was to "*dégrader la personne humaine*." See, *supra* 10.

(16) Such as, for example, the state's obligations to protect the life and health of a person in custody (< I> n. 12); to ensure that individuals are not subjected to proscribed treatment at the hands of private individuals (as in *A v. United Kingdom*, no. 25599/94, judgment of 23 September 1998, where a nine year-old boy had been

repeatedly beaten by his mother's partner); and not to take direct action in relation to an individual which would involve the infliction of proscribed treatment upon him or her (as in *D v. United Kingdom*, no. 30240/96, judgment of 2 May 1997, in which an AIDS sufferer was threatened with removal from the UK to St Kitts where no effective medical or palliative treatment was available thus exposing the victim to a distressing death).

(17) *Pretty v. United Kingdom*, *supra* n. 1, para. 54.

(18) *X and Y v. The Netherlands*, no. 8978/80, judgment of 26 March 1985.

(19) *Millicic v. Croatia*, [Sect. 1], no. 53176/99, judgment of 7 February 2002.

(20) *B v. France*, no. 133431/87, judgment of 25 March 1992.

(21) *Dudgeon v. United Kingdom*, no. 75251/76, judgment of 22 October 1991.

(22) *Pretty v. United Kingdom*, *supra* n. 1, para. 65.

(23) *Ibid.*

(24) *Rodriguez v. The Attorney General of Canada* [1994] 2 LRC 136. The majority of the Supreme Court found that the prohibition on Mrs. Rodriguez from receiving assistance in suicide contributed to her distress and prevented her from managing her death, thus depriving her of autonomy under Section 7 of the Canadian Charter of Rights and Freedoms. This depravation was not, however, found to contravene the principles of fundamental justice (such as protecting life and preventing abuse of the vulnerable), which, on the facts, outweighed the interference in the Section 7 right.

(25) The idea of "bringing rights home" is reflected in the title of the Government's White Paper introducing the Human Rights Bill: *Rights Brought Home: The Human Rights Bill*, Cm 3782, 1997.

(26) The consideration given to extraterritorial precedent by the House of Lords and the European Court of Human Rights may be viewed as part of a growing trend towards the citation of international and foreign legal sources by domestic courts in their resolution of constitutional and human rights issues. See, for example, the US Supreme Court's reference to the position taken by the 'world community' regarding the execution of the mentally retarded in *Atkins v. Virginia* 122 S.Ct. 2242, 2249, fn.21 (2002), and Section 39, para. 1 of the South African Constitution 1996,

subsections (b) and (c) of which permit the South African judiciary to consider international and foreign law in the interpretation of any of the fundamental rights guaranteed in the Constitution (see further H. Mostert, *Does German Law Still Matter? A Few Remarks about the Relevance of Foreign Law in General and German Law in Particular in South African Legal Development with Regard to the Issue of Constructive Expropriation*, 3 GLJ No. 9, Sept. 2002, Public Law).

(27) *Pretty v. Director of Public Prosecutions*, *supra* n. 2, per Lord Bingham, para. 23.

(28) *Dudgeon v. United Kingdom*, *supra* n. 21, para. 43.

(29) *Pretty v. United Kingdom*, *supra* n. 1, para. 82.

(30) *Pretty v. Director of Public Prosecutions*, *supra* n. 2, per Lord Bingham, para. 31.

(31) *Thlimmenos v. Greece* [Grand Chamber], no. 34369/97, judgment of 6 April 2000.

(32) *Ms B v. An NHS Hospital Trust* judgment of 22 March 2002 (HC, Fam Div).

(33) *Airdale NHS Trust v. Bland* [1993] AC 789. The *Bland* decision clearly establishes that an individual may refuse or accept life-prolonging or life-preserving treatment and that the principle of self-determination requires that respect must be given to the wishes of the patient so that where treatment is refused, however unreasonable, this refusal must be respected even if the doctors do not consider that this is in the patient's best interests. As Lord Goff stated in this case (p. 864): "the principle of the sanctity of human life must yield to the principle of self-determination..."

(34) In giving weight to personal autonomy in this case, and declining to advance a more collective, paternalistic, vision of best interests Dame Butler-Sloss P. stated that: "a seriously disabled patient has the same rights as the fit person to respect for personal autonomy. There is a serious danger, exemplified in this case, of a benevolent paternalism which does not embrace recognition of the personal autonomy of the severely disabled patient." (*Ms B v. An NHS Hospital Trust*, *supra* n. 32, para. 94).

(35) *Pretty v. Director of Public Prosecutions*, *supra* n. 2, per Lord Bingham, para.

(36) *R v. Brown* [1993] 2 All ER 75 (HL); *Laskey, Jaggard and Brown v. United Kingdom*, nos. 21627/93, 21826/93, 21974/93, judgment of 19 February 1997 (ECtHR).

(37) *Pretty v. Director of Public Prosecutions*, supra n. 2, per Lord Bingham, para.

(38) *Pretty v. United Kingdom*, supra n. 1, para. 89.

(39) The paternalistic dimension to ensuring respect for human dignity is visible in the concept's development in other European jurisdictions, especially in France where, for example, it has been invoked to enable public authorities to prevent spectacles, such as dwarf-throwing competitions in the name of respecting the dignity of willing participants, spectators and the dwarf community as a whole (see S. Millns, "Dwarf-throwing and Human Dignity: A French Perspective", *CE décisions du 27 octobre 1995, Ville d'Aix-en-Provence, Commune de Morsang-Sur-Orge*, (1996) 18/3 JOURNAL OF SOCIAL WELFARE AND FAMILY LAW 375-380). The use of human dignity in this collectivist fashion constitutes a clear interference with individual personal autonomy and freedom of choice and has been described as allied to 'a form of legal moralism which treats autonomy as an aspect of human dignity but one which can be overridden by reference to the need to maintain respect for the dignity of whole human societies and the human race.' (D. Feldman, *supra* n. 10, p. 702.)

(40) HL Paper 21-I, 1994, para. 237.

(41) *Pretty v. Director of Public Prosecutions*, supra n. 2, para. 1. By way of contrast to the picture drawn of Mrs. Pretty's supportive family network is the description of Ms B who had no supportive family and expressed concern that, were she forced to continue to receive medical treatment, she may find herself on her own with carers or in a nursing home (*Ms B v. An NHS Hospital Trust*, supra n. 32, para. 61).

(42) H. Biggs, "I Don't Want to be a Burden! A Feminist Reflects on Women's Experiences of Death and Dying," in Sheldon S. and Thomson M. (eds.) *Feminist Perspectives on Health Care Law* (London: Cavendish Publishing, 1998) pp. 279-295.

(43) H. Biggs, *ibid.*, p.295.

**(44) Termination of Life on Request and Assisted Suicide (Review Procedures) Act  
2001**

Under Dutch Law assisted suicide and euthanasia are still criminal offences but may be decriminalized in certain circumstances at the patient's request subject to a number of 'due care criteria' or safeguards which, if not respected, will result in a prosecution of the assisting physician.

**Activity:**

Carefully analyze the facts, issues and arguments raised in the above case and find out to what extent the individual autonomy is abrogated in each of those grounds.

**Brain Storming!**

**Morality vs. Legality ...which one should prevail?**

**Rights of Individuals vs. Common Good...Which one is more precious?**

**Why can't absolute autonomy be respected?**

Autonomy is given a central place or primary status in the prevailing modern liberalism of contemporary society that legalized [physician-assisted suicide](#). 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.

**References:**

**Cases:**

*Pretty v. United Kingdom*, European Court of Human Rights, [Sect. 4], no. 2346/02, judgment of 29 April 2002. (Decision available at: <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=807092731&Notice=0&Noticemode=&RelatedMode=0>).

**Books and Other Materials:**

1. Andrew Ashworth, “Principles of Criminal Law” 5th edition, Oxford University Press, 2006
2. William. G, “Criminal Law” (2<sup>nd</sup> Ed.)
3. Jerome Hall, “Principles of Criminal Law”, (2<sup>nd</sup> Ed.)
4. George Krzecunowicz, “Statutory Interpretation In Ethiopia”, JEL. Vol. 2(1965)
5. Maxwell on Construction of Statutes (9<sup>th</sup> Ed.)
6. Maxwell on Interpretation Of Statutes (10<sup>th</sup> Ed.)
7. Arts. 2 and 4-10 of the Criminal Code of FDRE, 2004
8. Arts. 22 and 25 of the Constitution of FDRE, 1995

## **UNIT-III**

### **JURISDICTION OF THE ETHIOPIAN CRIMINAL CODE**

**(Arts 11-22 of The Criminal Code of FDRE, 2005)**

#### **INTRODUCTION**

This unit is intended to give the students a comprehensive picture of the extent, scope and application of the Criminal Code of Ethiopia. The unit makes the students understand the legal authority of the Criminal Courts of Ethiopia to try and punish crimes defined under the Code.

‘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.

### **Objectives:**

#### **By the end of this unit, students are expected to:**

- understand the scope and application of the Jurisdiction of the Criminal Courts of Ethiopia.
- appreciate the powers of the criminal Courts to try the crimes committed on the national territory of Ethiopia as well as the crimes committed outside the territory of Ethiopia.
- identify the implications of a very important concept of International Law i.e. extradition relating to surrender of criminals.

## **Section 1: Fundamental Principles Of Application Of Jurisdiction:**

Several distinct principles relating to the application of jurisdiction have received varying degrees of support from practice and opinion, and these will be examined individually.

### **➤ 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 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. Moreover, ***Eichmann case (1961, ILR 36, 5)*** The Israeli Courts were concerned, *inter alia* with charges of crimes against humanity arising from events before Israel appeared as a state. Again, the **Barbie case (Decisions of 1983 and 1984: ILR 78, 125)** the French Court of Cassation held that crimes against humanity were defined by French law by reference to international agreements and were not subject to statutory limitation. However, different views exist in this regard.

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.

## **1.1. 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
  - A. Territorial Jurisdiction
  - B. Extra-Territorial Jurisdiction.
2. Subsidiary Jurisdiction

### **1.1.1. 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.

#### **1.1.1.1. Territorial Application Of The Principal Jurisdiction**

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

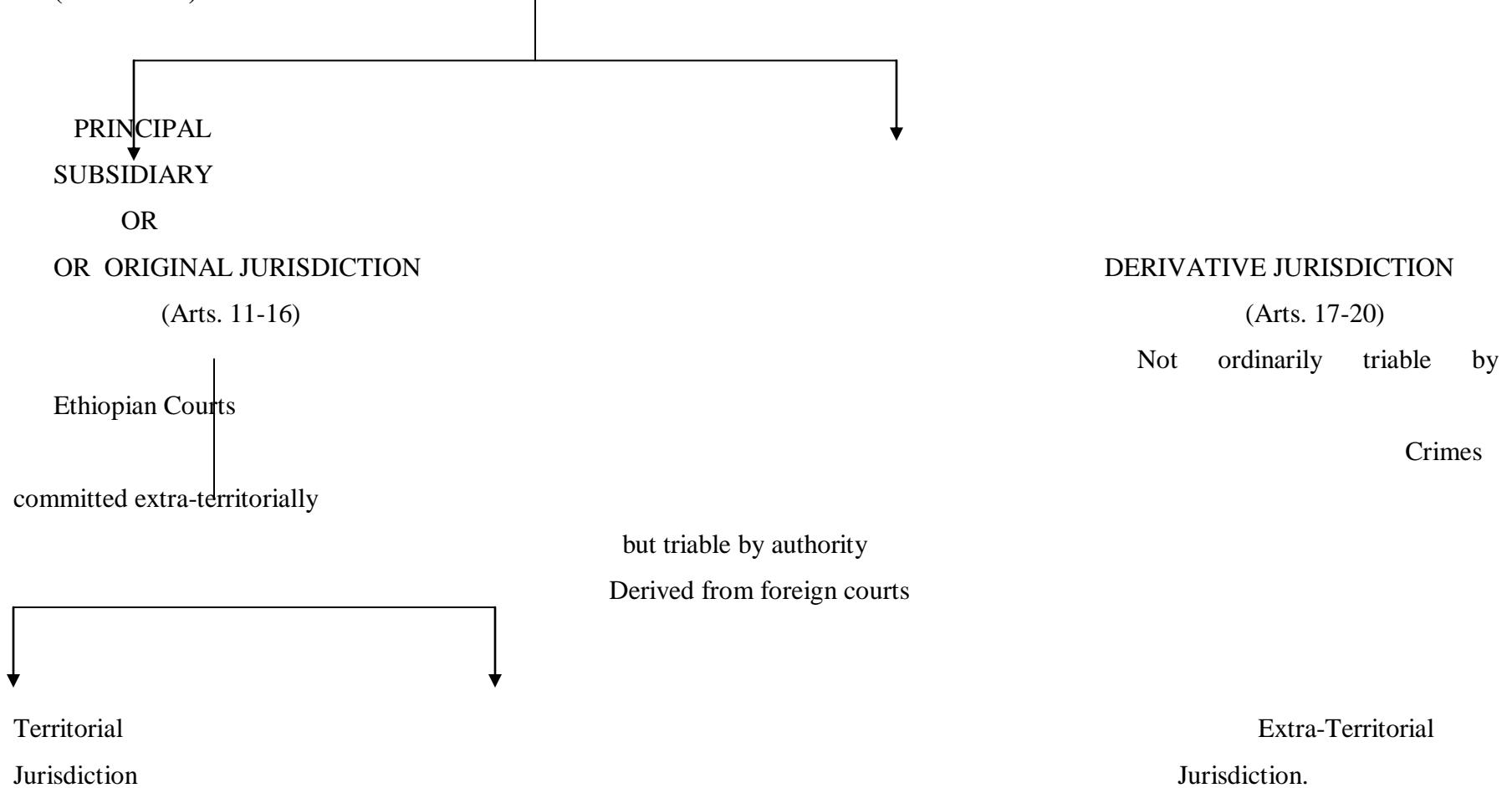
The principle of territoriality is laid down in Art. 11. According to this principle, crimes committed in a given country are triable by the courts and under the laws of such country which are known as ‘territorial laws’ of the country. Thus, within the meaning of Art. 11 when a crime is committed within 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 “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:

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*,

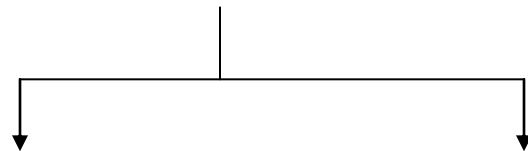
## **JURISDICTION OF CRIMINAL CODE OF FDRE, 2005**

**(Arts. 11-22)**



(Arts. 11 and 12)  
Crimes committed  
on the territory Ethiopia

(Arts. 13-16)  
Crimes committed  
outside the territory of Ethiopia



Crimes triable by  
Ethiopian courts  
(Art. 11)  
Normal case

Ethiopian courts, but can be tried in  
Foreign courts on delegation.

Crimes normally triable by  
(Art. 12) Special case.

- **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:**

There are some persons who may commit crimes in Ethiopia and nevertheless will not be subjected to the laws of Ethiopia nor be punished by the courts of Ethiopia. These persons are those who enjoy diplomatic immunity. 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.

- **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 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.

“Ships” form the part of the national territory based upon the principle that “a ship on High seas is considered to be ‘a floating island’ belonging to the country whose national flag she is flying”.

**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.

#### **B. 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.

#### **1.1.1.2. 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,

(Book III, Title I, Chapter I and Under Title V of the Special Part of the Criminal Code).

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:

- ✓ **The criminal must be found in Ethiopia,**
- ✓ **If he is not found in Ethiopia, his extradition shall be requested in accordance with Art. 11(3)**
- ✓ **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 Defence Forces” Art.15:**

The last case where Ethiopian courts may, on certain conditions, extend their principal jurisdiction extra-territorially is where a crime has been committed **in a foreign country** by a member of the Ethiopian Armed Forces. 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 Defence Forces. Sometimes even a person enlisted in the Defence 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 Defence 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 Defence 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.

### **1.1.2. 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 Defence 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 is 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.

- 4) As per Sub. Art (3) Prosecution under subsidiary jurisdiction shall be instituted only after consultation with the Minister of Justice.
- 5) 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 Art 12(3) apply here too with the necessary changes in points of detail.

### **1.2. 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."

Any way our present concern is to find out the place and time of commission of crime as well as attempt to commit a crime.

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

Art. 25 lays down the relevant rules relating to a completed crime having regard to three possible situations:

#### **a. 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.

#### **b. 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.

**Illustration:** Biruk administered poison in the food that was consumed by Nuruddin with an intention to kill him. Hours later Nuruddin took flight from Addis Ababa to Pakistan

and reached there the next morning. Nuruddin was suffering with severe pain in his stomach during his journey. After reaching Karachi he took some medical treatment but it was too late and he died in Pakistan.

In this case both in Addis Ababa, Ethiopia the place of performance of the act and Karachi of Pakistan i.e. the place where the result had ensued shall be considered as place of commission of the crime. Both Ethiopia and Pakistan can exercise their criminal jurisdiction over this matter. However, the second Para of Sub-Art. (3) makes it clear that for the purposes of prosecution, the jurisdiction of the place where the result was achieved is subsidiary to that of the place of commission.

### **c. 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;

**Illustration:** Dawit is a businessman. He goes around different places to enquire prices of the goods he deals in and purchases them wherever he finds the price reasonable. Dawit took his personal secretary Duru along with him to help him in his business transactions and keep account of his money. Duru taking advantage of his access to his

master's money kept stealing his money little by little through out the business trip which took a period of six months covering almost all the main business places in Ethiopia and Somalia. Dawit realized the fact that he had been robbed by his own secretary only after returning back to his main office in Addis Ababa. For the purposes of prosecution of Duru the time and place of commission of the crime shall be the time when and the place where one of those acts of stealing has been committed.

## **2. 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.

### **Review Questions:**

1. State and explain the fundamental principles relating to the application of laws of a country.
2. Discuss the authority of the Criminal Courts of Ethiopia to try the crimes committed extra-territorially.
3. Who are 'men of war'? What are the rules governing them in relation to the application of criminal jurisdiction of a country?

### **Brain Storming!**

Critically examine the Constitutional validity of provisions of Art 16 and 20 of the Criminal Code of FDRE, 2004.

**Exercise:**

**A**, an Italian national doing business in Rome with dishonest intention, made false representation to **B** Addis Ababa through letters and fax messages and telephonic talks that he would ship wheat to **B** on receipt of money. **B** sent the money in the hope of getting the supply of wheat which was never shipped. After waiting for some time **B** understood the fact that he has been cheated. Therefore, he lodged a complaint against **A** in Addis Ababa. While the case under investigation **A** happened to visit Addis Ababa and the police received the information about his arrival.

Can **A** be prosecuted in Ethiopia? Refer to the relevant provisions of law and decide.

**Section 2: Extradition:****Meaning of the term “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. Normally, the alleged crime has been committed within the territory or aboard a ship flying the flag of the requesting state (*R v Governor of Brixton Prison, ex p Minervini* (1959) 1 QB 155, (1958) 3 All ER 318), and normally it is within the territory of the surrendering state that the alleged criminal has taken refuge. Requests for extradition are usually made and answered through the diplomatic channel.

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.

(‘Territory’ can cover, for this purpose, also ships and aircrafts registered with the requesting state; Art 16 of the Tokyo Convention of 14 September 1963 on **Offences and Certain other Acts committed on Board Aircraft** says that, offences committed on board aircraft in flight to be treated for purposes of extradition as if committed also in country registration).

With the increasing rapidity and facility of international transport and communications, extradition began to assume prominence in the nineteenth century, although actually extradition arrangements date from the eighteenth century. Because of the negative or neutral attitude of customary international law on the subject, extradition was at first dealt with by bilateral treaties. These treaties, inasmuch as they affected the right of private citizens, required in their turn alterations to the laws and statutes of the states which had concluded them. Hence the general principle became established that without some formal authority either by treaty or by statute, fugitive criminals would not be surrendered nor would their surrender be requested.

There was at international law neither a duty to surrender, nor a duty not to surrender. For this reason, extradition was called by some writers a matter '*of imperfect obligation*' in the absence of treaty or statute, the grant of extradition depended purely on reciprocity or courtesy. (Reference should be made to *the European Convention of Extradition, 13 December 1957* (Council of Europe) as an illustration of a multilateral extradition treaty. On the necessity of a treaty to confer a right on a state to request the surrender of a fugitive from justice and to impose a correlative duty on the requested state to hand the fugitive over; see *Factor v Laubenheimer* 290 US 276 (1993) at 287. A bilateral extradition treaty should be liberally and pragmatically interpreted, e.g., as to the time –limit for adducing evidence to the local court; see **Belgian Government v Postlethwaite (1987) 2 All ER 985,HL.**)

As regards English municipal law, the special traditions of the common law conditioned the necessity for treaty and statute. At common law the Crown had no power to arrest a fugitive criminal who was a foreign subject and to surrender him to another state; furthermore, so far as the surrender of subjects of the crown was concerned, treaties as to extradition were deemed to derogate from the private law rights of English citizens, and required legislation before they could come into force in England. (See, Shearer 'Extradition Without Treaty', (1975) 49 ALJ 116 at 118.) Thus, from both points of view legislation was essential, and the solution adopted was to pass a general extradition statute-the Extradition Act 1870-which applies only in respect of countries with which an arrangement for the surrender of fugitive offenders has been concluded , and to which the Act itself has been applied by Order-in-Council.

International law concedes that the *grant of* and *procedure* as to extradition are most properly left to municipal law, and does not, for instance, preclude states from legislation so as to preclude the surrender by them of fugitives, if it appears that the request for extradition had been made in order to prosecute the fugitive on account of his race, religion, or political opinions, or if he may be prejudiced there by upon his eventual trial by the courts of the requesting state. 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*.

We shall now discuss each of these conditions.

## **2.1. 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.

## **2.2. 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 cumbrous 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.

The principle of non-extradition of criminals crystallized in the nineteenth century, a period of internal convulsions, when tolerant, liberal states such as Holland, Switzerland, and great Britain, insisted on their right to shelter political refugees. At the same time, it is not easy to define a ‘political crime’ although a clear case would be that where it is evident that the fugitive is to be punished for his politics rather than for the crime itself (Cf *R v Governor of Winson Green Prison, ex p Littlejohn* (1975) 3 All ER 208).

▪ **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, thereby excluding anarchist and terrorist acts from the category of ‘political crimes’.

In *R v Gevernor of Brixton Prison, ex p Kolczynski, [1955] QB 540*, the court favored and even more extended meaning, holding in effect that crimes committed in association with a political object (e.g. anti-communism), or with a view to avoiding political persecution or prosecution for political defaults, are ‘political crimes’, notwithstanding the absence of any intention to overthrow an established government. Whether an alleged crime is ‘political’ is a question to be determined by reference to the circumstances attending its alleged commission at the material time, and not in the light of the motives of those who have instituted the prosecution proceedings and the corresponding application for extradition.

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. The application of the rule to peculiar circumstances came before the United States Supreme Court in 1933 in the case of *Factor v Laubenheimer (290 US 276)*. There, proceedings were taken by the British authorities for the extradition of *Jacob Factor* on a charge of receiving in London money which he knew to have been fraudulently obtained. At the time extradition was applied for, *Factor* was residing in the state of Illinois, by the laws of which the offence charged was not an offence in Illinois. It was held by the Supreme

Court that this did not prevent extradition if, according to the criminal law generally of the United States, the offence was punishable; otherwise extradition might fail merely because the fugitive offender would succeed in finding in the country of refuge some province in which the offence charged was not punishable. 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. In Great Britain its application is a little uncertain; in *R v Corrigan[1931] 1KB527*, the Extradition Act was held to prevail over a Treaty of Extradition with France embodying the specialty principle, and it was ruled that the accused there could be tried for an crime for which he was not extradited, but one which was referable to the same facts as alleged in the extradition proceedings.

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

#### **2.3.1. 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.

#### **2.3.2. 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.

#### **2.4. 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).

2. Art. 21 (3) lays down that where a 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 Summary:**

Jurisdiction means the ‘legal competence of a particular court to hear a certain case or class of cases’. The power of the domestic criminal courts has to be clearly defined in order to avoid conflicts of jurisdictions. There may be negative conflicts of jurisdiction that arise when different courts deny the existence of jurisdiction, over the matter in question. In this case there is the possibility of criminal escaping punishment and positive conflict of Jurisdiction where different courts claim to have jurisdiction on the same crime; there is a risk that the criminal might be exposed to double jeopardy. These conflicts may arise at national as well as at international levels. The former type of conflicts is taken care of by the Criminal Procedure Code and the later type is the concern of the Criminal Code.

There are five popularly accepted principle of jurisdiction. They are the principle of territoriality, the principle of quasi-territoriality or the protective or security principle, the principle of active personality or the nationality principle, the principle of passive personality or the passive nationality principle, the principle of universality or the principle of universal jurisdiction. The Ethiopian Criminal Code incorporates them in the provisions relating to jurisdiction.

The jurisdiction of the Ethiopian Criminal Code may be studied under the head of principal jurisdiction where the Ethiopian Criminal Courts have the primary right to try a case. In case of any difficulty in trying such a case the right may be delegated to a foreign court which then tries the case on behalf of Ethiopian Courts. Under subsidiary jurisdiction the Ethiopian Courts derive authority to try a case from a foreign court. Obviously these are the cases in which the Ethiopian Courts don't have any direct or primary interest to try.

Territorial application of the principal jurisdiction extends to the crimes committed by any one on the land area of Ethiopia, in the bodies of water found within the national territory of Ethiopia and in the air above the national territory of Ethiopia. Extra territorial application primarily includes the crimes committed by any person in a foreign country against interests of Ethiopia, crimes committed by an Ethiopian enjoying immunity in a foreign country, crimes committed by a member of Ethiopian Defence Forces in a foreign Country.

Subsidiary jurisdiction of the Criminal Code applies to crimes committed by members of the Defence Forces against the ordinary law of a foreign country, 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, crimes committed in a foreign country against public health and morals, crimes committed abroad against an Ethiopian national or crimes committed by Ethiopians while abroad provided that the crime is punishable under both the laws and is grave enough to justify extradition.

‘Extradition’ is a political act which is done in pursuance of a treaty or some **ad-hoc arrangement** in which one state surrenders a person belonging to another state who has committed a crime within its territory. Requisition for extradition is made upon the determination of the domestic courts of the state.

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, he may not be extradited where the crime directly and principally concerns Ethiopia; she retains her right to prosecute foreign-criminal under its principal jurisdiction. An Ethiopian national having that status at the time of commission of the crime in a foreign territory or at the time of request for the extradition cannot be handed over to the requesting

state. However when such denial to surrender is made, he shall be tried by Ethiopian courts and under Ethiopia law.

Normally, a request for extradition may be acceded to only if the crime is an extraditable crime. It is a universally accepted international practice not to extradite in cases of political crimes. Whether or not a war crime is a political crime is a debatable question. The principle of double criminality and the principle of specificity are the other important rules governing extradition. The crime should be punishable according to the law both of the state of asylum and of the requesting state is the requirement of double criminality and as per rule of specificity, 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.

**Review Questions:**

1. Define *extradition*. What are the essential conditions of extradition according to international practice?
2. Explain the concept of extradition as has been adopted by the provisions of Criminal Law of Ethiopia.
3. What do you understand by the principles of double criminality and specificity?

**Critical Thinking!**

Do you agree with the principle of double criminality? For the application of extradition why should the alleged crime be punishable under the laws of the state of asylum too?

**Case Problem:**

‘A’ an Ethiopian citizen agrees with ‘B’ a foreigner living in Dubai to supply ‘Chat’ for the purpose of manufacturing a powerful narcotic drug that could be sold at a very high price. ‘B’ in turn agrees to send the narcotic drug and high amount of money to ‘A’. The agreement was concluded on 14<sup>th</sup> April 2004. ‘A’ supplied the

‘Chat’ and the said drug was successfully manufactured. After receiving the initial payment which was very attractive, ‘A’ went on supplying ‘Chat’ for a period of six months but did not receive anything in return neither money nor the drug. ‘A’ became furious and took a flight to Dubai, met ‘B’ there and demanded for his share of money and the drug. Due to some misunderstandings that developed during their arguments ‘A’ attacked ‘B’ and injured him very severely. The next day he returned to Ethiopia without the notice of his foreign partner. ‘B’ was hospitalized and was under treatment for a week but could not recover from the injuries. ‘B’ died. The Dubai Criminal Courts started investigation of the crime and found that the criminal was an Ethiopian and is now in Ethiopia.

Discuss all important issues relating to the trial and punishment of ‘A’.

## **References:**

### **Books and Other Materials:**

1. Philippe Graven, “An Introduction to Ethiopian Penal Law”, HSIU, Addis Ababa, 1965
2. Articles 11-21 of the Criminal Code of FDRE, 2004
3. Art. 2 of Constitution of Ethiopia
4. Art 104 of Criminal Procedure Code

## **UNIT-IV**

### **CONDITIONS OF CRIMINAL LIABILITY**

#### **Introduction:**

This chapter deals with the elements that constitute Criminal Liability in general and under Ethiopian Law in particular. It basically deals with the basic requirements of criminal liability.

These are the legal element of the crime, material element of the crime that deals with the conduct which may be of positive or negative. It will also be discussed about the mental element of the crime as requirement of guilt (intention or negligence) to constitute 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.

### **Objectives:**

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

- identify the essentials of the legal element.
- discuss the ingredients of the material element
- distinguish between the kinds and degrees of guilt for the mental element.
- analyze a given case so that they can label a person criminal or not.

## ❖ 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)

#### 1.1. 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:

These are: 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*'

➤ 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. Therefore, according to Prof Kenny, *actus reus* is such a result of human conduct as the law seeks to prevent. 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

This forms the material element of crime.

➤ Whether bringing about such a result or state of affairs is prohibited by law. This is the legal element of crime.

#### **1.1.1. 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 it 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

### **1.1.2. The Material Element:**

Material Element is also called the criminal act or *actus reus* which normally is a prerequisite 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”. If a criminal shoots at and kills a person, his “act” does not include the event but only involves the willed act of pointing the gun and pulling the trigger. The resultant deed is the “consequence of the act”, but not the act itself. The phrase “material ingredients” means facts surrounding the act, such as, the type of weapon used, place and time of commission of the offence, range of shooting, the part of the body of the victim hit by the bullet, etc. 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”.

This means, a crime should consist of either of the following:

- Commission of an act prohibited by law, or
- 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. For example, ‘A’ kills ‘B’ by stabbing him with a knife. The voluntary movements of A’s hand holding the knife is the activity which produced the result i.e. the death of ‘B’. The same voluntary activity might sometimes become necessary to produce some useful results like where a surgeon needs to cut open the body of a patient for performing a life saving surgery. Thus, the voluntary movements of the human beings cannot be prohibited but producing certain harmful results by such activity is prohibited. This means, in the above example, the voluntary movement of the hand with a knife is not the one that is prohibited but causing the death of a human being is. 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*.

### **Classification of Events Resulting from Active Conduct:**

#### **Events**



## **Unlawful Events**

1. Events resulting from acts

or

commanded by law.

Events prohibited by law

2. Events resulting from acts

*Actus reaus*

permitted by law.

3. Events resulting from acts

justified by law.

### **Lawful Events:**

➤ 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. Therefore, 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.

The injuries or even death caused in such exercise of right of self-defense is not punishable, subject to certain conditions.

➤ **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 behaviour more effectively than direct criminal prosecutions. Also, it would not only be burdensome but also impossible for the criminal justice system to enforce moral obligations.

The general rule is that [parents](#), legal guardians, spouses (see *R v Smith* (1979) CLR 251 where the wife died after giving birth to a stillborn child, delivered by her husband at home) and anyone who voluntarily agrees to care for another who is dependent because of age, illness or other infirmity, may incur a duty, at least until care can be handed over to someone else. In three cases, the duty was implied:

- ***R v Instan*** (1893) 1 QB 450, Instan lived with her aunt, who was suddenly taken ill and could no longer feed herself or call for help. She was convicted of manslaughter because she neither fed her aunt, nor called for medical help, even though she continued to stay in the house and ate her aunt's food.
- ***R v Stone & Dobinson*** (1977) QB 354. Stone and his mistress agreed to care for his sister who was suffering from [anorexia](#). As her condition deteriorated, she became bed-ridden but no help was summoned and she died. They were convicted of her manslaughter because they had accepted her into their home and so assumed a duty of care for her.

- **R v Gibbons & Proctor** (1918) 13 Cr App Rep 134. A father and his live in lover neglected his child by failing to feed him. The lover had taken on a duty of care for the child when moving into the house and was under an obligation to care for him.

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:

<b>“Actus reus” or the physical element of Crime</b>		
<b>Deed of Commission</b>	<b>Results of Omission</b>	
<b>Crimes of Commission “Acts”</b>	<b>Crimes of Omission “Failure”</b>	<b>Crimes of Commission by Omission “Refusal”</b>
These are characterized by positive behavior, i.e. by actively doing something to bring about the harmful ‘result’.	It is impossible to bring about these results by positive behavior. These are the results of negative conduct omitting to act expected of him.	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.

### **1.1.3. 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 thereof 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 provides 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). This is a well known principle of natural justice. 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,
2. Test of subjective standard,
3. Voluntariness of conduct, and
4. Foresight of consequences.

### **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 *means 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. For instance, 'X' is holding a knife and 'Y' seizes the arm of 'X' and by means of his greater physical strength causes the knife in the hand of 'X' to wound 'Z'. Here the movement of 'X' was not voluntary since it was not the result of any mental intention on his part. That is, the movement of his hand was not operated by his will. In fact, it was not the act of 'X' but the act of 'Y' who had seized his hand and caused the wound by overpowering him. Hence, 'X' is not liable for causing the wound. 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. In cases in which a man is able to show that his conduct whether in the form of action (commission) or of inaction (omission) was involuntary, he must not be held liable for any harmful result produced by it. What has been done is an '*actus reus*', but his defence is that he is not legally responsible for his *actus reus*. 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.

## **1.2. 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’:**

### **1.2.1. 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. For example, a man throws down another man from a high tower or a man cuts another’s throat, in these cases it is clear that he both foresees the victim’s death and also desires it. 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. It will be noted that 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. In fact, it may be a thing which he dislikes doing but he dislikes still more the consequences of not doing it i.e. to say he desires the lesser of the two evils and therefore, he has made up his mind to bring about the result or the consequence.

### **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 proceeds 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. The words “rash” and “rashness” have also been used to indicate the same attitude. 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 an 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 an crime who infringes law:

- with full knowledge and
- intent.

In fact, the terms full knowledge and intent apparently lack the requisite precision and clarity to represent the drafter's original French terms "la conscience" (awareness) and "la volente" (will or volition). 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. For example 'A', attacked by a wild animal, calls out 'B' to fire in order to save him, though with imminent hazard to himself. 'B', in response to A's request, fires and causes the death of 'A'. Here 'B' is not liable for A's death since B's act was not the intentional killing of "A", though 'B' knew that the act was likely to cause A's death. Therefore, "awareness" means the ability to foresee the nature, factual circumstances and consequence of one's act or omission. Another example could be of a surgeon who operates with the consent of the patient and is not liable for murder if the patient dies in the process of surgical treatment, since the surgeon has not intended to kill him, though he knew that the operation could be fatal. 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 if 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:**

These three terms are interrelated. 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. The terms intention and motive must be precisely distinguished. We may try to understand by an illustration. For instance, in beating his victim the person in his act of striking intends to cause him pain. Causing pain may be to satisfy his revenge or cripple him against combating with the accused in a race or merely to indicate his superior strength. Each of these interests is called the motive. It is this reason why he does the act. Intention is the foreknowledge of the act, coupled with the desire of it, such foreknowledge and desire being the cause of the act, in as much as they fulfill themselves through the operations of the will.

An act is intentional if, and as far as, it exists in fact, the idea realizing itself in the fact because of the desire by which it is accompanied.

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) as has been explained above, in detail. 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. To illustrate, if a driver, who is eager to avoid being late for an appointment, drives rashly exceeding the appropriate speed with an intention to reach his destination in time. Here for sure he could foresee the possibility of hitting a pedestrian on an overcrowded street, accepts the possible harm but still he proceeds with his course of conduct consciously taking the risk. Here indirect intention is said to exist in case he causes bodily injury, death or damage to property. 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.

### **1.2.2. 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.

What amounts to reasonable care is ‘a question of fact’ depending on the circumstances of each case.

Negligence means the failure to exercise care thereby 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 :**( Meaning and Distinction from Indirect Intention :)

Acting in disregard of possible consequences defines conscious type of negligence. In this form of negligence the criminal, like in the case of 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. Philippe Graven, gives the following illustration to clarify the point. ‘A’ is driving a car and ‘B’ his passenger, points to him that he drives too fast and might hit someone, to which the driver replies ‘you needn’t worry, I am a good driver’ ...

A moment later, ‘B’ again insists that the driver should slow down. ‘A’ then answers, “I’ve told you that I am a good driver. Anyway, it is 2 o’clock in the night, the police are asleep and no body will see us if something should happen.” There after, ‘A’ runs down a pedestrian who dies ----Had the accident taken place after--- the first statement ---- he had rejected the possibility of hitting someone (advertent negligence). But, after he made his second statement “it is virtually certain that he had accepted the possibility of causing a result,” there by entering into the realm of indirect intention.

- **Inadvertent Negligence: Meaning and Distinction from Advertent 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.

For example, where a man is charged with the duties of certain office, requiring skill or care and the question arises whether in the discharge of his functions he has exercised his duty to foresee or not, he must show that he has taken such care and exercised such skill as the duty reasonably demands for the due discharge of his professional duty. The degree of requisite care varies with the degree of danger which may result from want of care.

- **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**

Art. 58 Criminal Intention		Art. 59 Criminal Negligence	
Direct Intention	Indirect Intention	Advertent Negligence	In advertent Negligence
1. There is full knowledge i.e., awareness of consequences accompanied by with (intent).	There is awareness of consequences and unwillingness to renounce the course of conduct.	There is awareness of consequences but disregards the possibility	There should or could have been awareness of consequences but lack of consideration of the same
2. The foresight is certain or nearly certain as to the consequences.	The foresight is not certain but awareness of the possibility of the consequences is present.	There is awareness of possibility of consequences.	Failure to foresee the consequences.
3. There is desire for the consequences.	There is no desire for consequences but disregards and runs the risk of possible harm. i.e. accepts the occurrence of possible harm	Rejects the occurrence of the possible harm.	Lack of foresight i.e. failure to exercise care. Does not foresee at all.
4. Clear foresight of consequences.	Uncertain foresight	Criminal lack of foresight.	Imprudence

**Review Question:**

Read the following hypothetical case and provide answers based on the relevant laws.

1. Adamu maintained a stack of hay near the boundary of his own premises; that the hay was in such a state when put together, as to give rise to discussions on the probability of fire: that though there were conflicting opinions on the subject, yet during a period of five weeks, Adamu was repeatedly warned of his peril; that his stock was insured; and that upon one occasion, being advised to take the risk down to avoid all danger, he said “he would take every care to prevent the danger. He then made a chimney and took every necessary step to avoid the risk. In spite of all these efforts the risk burst into flames from a thunder strike; the flames communicated to Alemu’s barn and stables, and thence to the cottage that belongs to Daniel, which were entirely destroyed.

What is the state of mind of Alemu at the time of the damage caused upon Daniel’s property? Why?

• **Accident:**

• **Meaning of 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 defence 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 negated. 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.

**Illustration:** ‘A’ caused the death of ‘D’ by shooting an arrow under the *bona fide* belief that he was shooting the arrow at a bear which had entered into his field and was destroying his maize crop. Here death was the consequence of an accident as the accused neither intended nor knew that he was shooting at a person. He honestly believed that he was shooting the wild animal.

- **Act Done with Proper Care and Caution:**

**Illustration:** 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 fulfillment of this essential principle gives rise to difficulties since the concept of cause is impossible to be defined in such away that a specific result can in every case be automatically traced to specific behavior.

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.

There may be several causes bringing about one result of which the nearest possible cause affords a good ground for criminal liability. Under the modern conception of *mens rea* no hardship can result from any finely drawn investigation of causes, since the more remote the cause the greater the difficulty in proving that the accused person intended or realized (i.e. knew or foresaw) what the effect of it would be.

## **2.1 Tests to Establish the Relationship of Cause and Effect:**

Various tests have been suggested to enable the courts to decide whether alleged ‘act’ is the cause of the ‘result’ in question, of which the following are important ones:

- *Sine qua non* test
- Adequate or proximate cause test.

### **➤ Sine qua non Test or the Theory of Absolute Causation:**

Until very recently, some countries have applied this so-called sine qua non-test. ‘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”.

For example, if ‘A’ strikes ‘B’ and ‘B’ gets injured. ‘C’ drives ‘B’ to a doctor but the car crashes on the way and ‘B’ dies in the crash, ‘A’ will be held liable for B’s death. The test tries to explain that, had ‘A’ not wounded ‘B’ he would not have had to be driven to a doctor and would not have lost his life in the car accident.

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, such as ‘A’ and ‘C’ in the above illustration. However, criminal liability cannot be established through the sine qua non test quite clearly.

Therefore, another test has been evolved to establish ‘cause’ and ‘effect’ more distinctly.

➤ **Adequate or Proximate Cause Test:**

Basing on more common sense it can be clearly said in the above illustration that, though cause and effect relationship exists between A’s act of striking ‘B’ and the slight injury suffered by ‘B’, it cannot be extended to anything that may happen after striking and apply to B’s death. The striking alone could not result in B’s death and it is obviously the car accident and not the striking, which in this case is the “cause” of death.

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:

1. The criminal’s behavior that brought about the result, and
2. 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 favour of the Prosecution:**

In this instance, a chain of causation is deemed to exist between A’s act and B’s death. Here generally the presumption is probably meant to operate in favour 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.

## **2.2. 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:

- Existence of preceding causes,
- Existence of concurrent causes,
- Intervention of extraneous causes

- **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. To consider another example, 'C' who was suffering with high blood pressure problem met with a car accident while taking a morning walk. He sustained some minor injuries and was hospitalized. Shortly afterwards he died in the hospital. The cause for his death was extensive bleeding which could not be controlled due to his high blood pressure. Therefore, the person responsible for the accident can be held liable only for causing injuries by negligent driving but not for causing death. The condition of the victim here

i.e. his blood pressure is the one that had contributed to his death. The minor injuries he had suffered in the accident could not have caused his death but for the uncontrollable bleeding. Therefore, the causal relationship is broken here by the existence of a preceding cause.

- **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, whereas ‘B’ will alone be liable for C’s death. This is subject to be provisions of Art. 32 regarding co-offenders.

- **Intervening 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.

Thus, the chain of causation might be broken either by preceding causes, concurrent causes or by intervening causes altering the liability of the accused.

### **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.

### **2.3. 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:

#### **1. 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’.

#### **2. 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 some one 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

### **3. 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.

**R. vs. Hilton** (1838) 2 law. 214 (T. A. C) Transport Accident cases:

Facts: The prisoner, who was an in-charge of a steam Engine, had stopped the engine and gone away. During his absence, some unauthorized person has set the engine in motion and it has killed the deceased. He was indicted (charged) for manslaughter.

**Judgment:** The court held that the death was the consequence, not of the act of the prisoner but of the person who set the engine in motion after the accused had gone away.

Thus, “the defense of intervention of another” is successful and the prisoner was exonerated from liability. However, Prof. Kenny has pointed that the reasoning given in this case for the acquittal was not sound. In a similar situation presented before the court in a subsequent case **R vs. Reed** (1886) CCC. Sess. Pap. C. IV 171 (T. A. C) a sound reasoning was given for such acquittal. In this case a fireman in the London fire Brigade was absent from his post in charge of a fire escape, during his absence the deceased lost his life in fire. It was held that “the prisoner did not expect that any harm would result from his breach of duty.

***R vs. Lowe (1850) 3 C & K 123 (T. A. C)***

This case presented a contrasting situation from that of the other cases.

Facts: An engineer deserted his post at a colliery leaving in charge of the engine an ignorant boy. The boy in fact declared himself incompetent to manage the engine. In the absence of the prisoner, the boy failed to stop the engine and collier was killed as a result. The engineer was charged for manslaughter.

Judgment: The prisoner was held guilty of manslaughter, because he clearly knew the danger, which his dereliction of duty would create.

These cases show some variation of the doctrine of mens rea for the reasons that during the transitional period the courts failed in grasping the exact implications of the doctrine since they could not manage themselves to be completely free from the ancient principles of strict liability.

Unfortunately, even in recent cases sufficiently clear principles are not found in deciding “what chain of causation will in law be sufficient to establish criminal liability.” This is especially difficult in cases where the effect of medical treatment administered to the victim of an unlawful attack has to be assessed. Thus, it has been judicially declared that if a dangerous wound is caused and under the best medical advice, a surgical operation is performed which is the immediate cause of death; the person causing the wound is criminally responsible.

***R vs. Jordan (1956 (40) Cr. A pp R 152 :***

Facts: The appellant has been convicted of murder on evidence that he has stabbed the deceased who subsequently died in hospital from “Bronco-Pneumonia” following a penetrating abdominal wound. Application for leave to submit further medical evidence as to the cause of the death was granted in special circumstances of the case by the court of criminal appeal.

The court after hearing the new evidence quashed the conviction, since the new evidence disclosed that the death was caused not by the stab wound but by the mistaken administration of anti-biotic and intravenous injection of liquid.

The court observed that it is an acceptable principle of law that “death resulting from any normal treatment employed to deal with a felonious injury may be regarded as cause of the felonious injury”. However, the court did not think it necessary to formulate any definite test for the matters in future with regard to what is necessary to be proved, to establish “causal connection” between the death and the felonious injury. Further, the court felt that in the end it would have been a question of fact for the Jury depending on the following points:

1. What evidence they accepted as correct and
2. The view they took on that evidence.

#### **4. Where Victim's Own Conduct has Affected the Result:**

**Principle:** Although there is no definite test laid down by authority, it appears that the accused should be convicted so long as it is reasonably certain that the result of the conduct of the accused with which he is charged would have occurred:

- a) Even if nothing had been done subsequently by the victim i.e. the event would have occurred, irrespective of the conduct of the victim after the act responsible for the result has been committed, or
- b) The event did occur although it might have been prevented if the victim has taken some remedial action.

However, as is always possible in a criminal trial, the prisoner can be acquitted on the “benefit of doubt” if in the opinion of the Jury, it appears to be reasonable on the evidence.

#### **R. vs. Horsey (1862) 3**

Facts: The prisoner has set fire to a stack of straw. While the stack was burning the deceased was seen in the flames and his body was afterwards found in the stack yard.

There was no evidence of the identity of the deceased nor of how he came there nor that the accused had any idea that anyone would be there. In fact, the prisoner had tried to save the deceased. On these facts, the prisoner was indicted for murder.

Judgment: The Judge directed the Jury that, if they entertained any reasonable doubt to the affect that, the deceased might not have been there in the enclosure at the time when the accused set fire to the stack, but might have entered there afterwards, then the victim's own act intervened between the death and the act of the prisoner. In such a situation his death could not be the natural result of the accused's act; and in that view he ought to be acquitted.

An earlier case involving an act of the victim which was claimed to be an intervening fact which brought about the result, presented a different conclusion.

**R. vs. Wall** (1802) 28- St. Tr. 51

Facts: The prisoner Governor Wall ordered an illegal and brutal flogging upon a sergeant from which the man died after five days. There was evidence that in the military hospital in which the deceased has been placed after the flogging, a quantity of brandy had been supplied to him in accordance with the medical practice of the establishment. It was contended that, but for his drinking of brandy there would have been a chance of recovery.

Judgment: He was held guilty of homicide of the sergeant. It was observed that "when a man by violence, places another so close to death, and when the death occurs, it shall not be an excuse to say that it would not have occurred but for the mistreatment of himself. A homicide may be committed through unskillful treatment or misusage of himself may have accelerated the death of the deceased."

**R vs. Holland** (1841) 2 M &R 351 (T. A. C. ), presented even a stronger case on this principle.

Facts: The prisoner has wounded a man. According to the evidence, there was medical advice to get the wounded finger amputated. However, the deceased refused to submit himself for amputation and died subsequently. The prisoner was convicted for homicide in spite of the medical evidence that “had he submitted to the amputation his life would have been saved”.

***R vs. Martin* (1827) 3 C & P 211 (T. A. C)**

Facts: The prisoner was charged with manslaughter of a four-year child. The prisoner has held out a glass containing Gin to the little boy. The boy snatched the glass and drank nearly the whole of the liquor that brought about his death shortly after.

Judgment: The prisoner was acquitted holding that “the drinking of the Gin in that quantity was the act of the Child.” The reason given for the acquittal was not a sound one. According to Kenny, it would have been reasonable to hold that, the prisoner did not expect that his action would have such a fatal result. Because it is clear that if he had not offered the glass, the calamity would not have occurred.

**5. 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. For example, in the case of:

***R vs. Swindall and Osborne* (1864) 2 C& K 230 (T. A. C)**

Facts: The prisoners were driving horse drawn carts on the public road at a dangerous pace by encouraging each other. In the course of this, they ran over and killed a pedestrian.

Judgment: It was held that the defense of contributory negligence was not available to the prisoners. The victim's own negligence affords no such defense to the accused in criminal proceedings as it may do in a civil action. Further, it was observed, "it mattered not whether the deceased was deaf or drunk or negligent or in part contributed to his own death". However, there can be a situation produced by the carelessness of an injured man, in which there is no criminal liability at all to anyone. That is a case of an accident, which affords an absolute defense to the accused.

E.g. where a pedestrian without looking or giving any warning steps off a pavement and comes under the wheels of a passing vehicle. The facts of a particular case may present difficulty in such an assessment of liability.

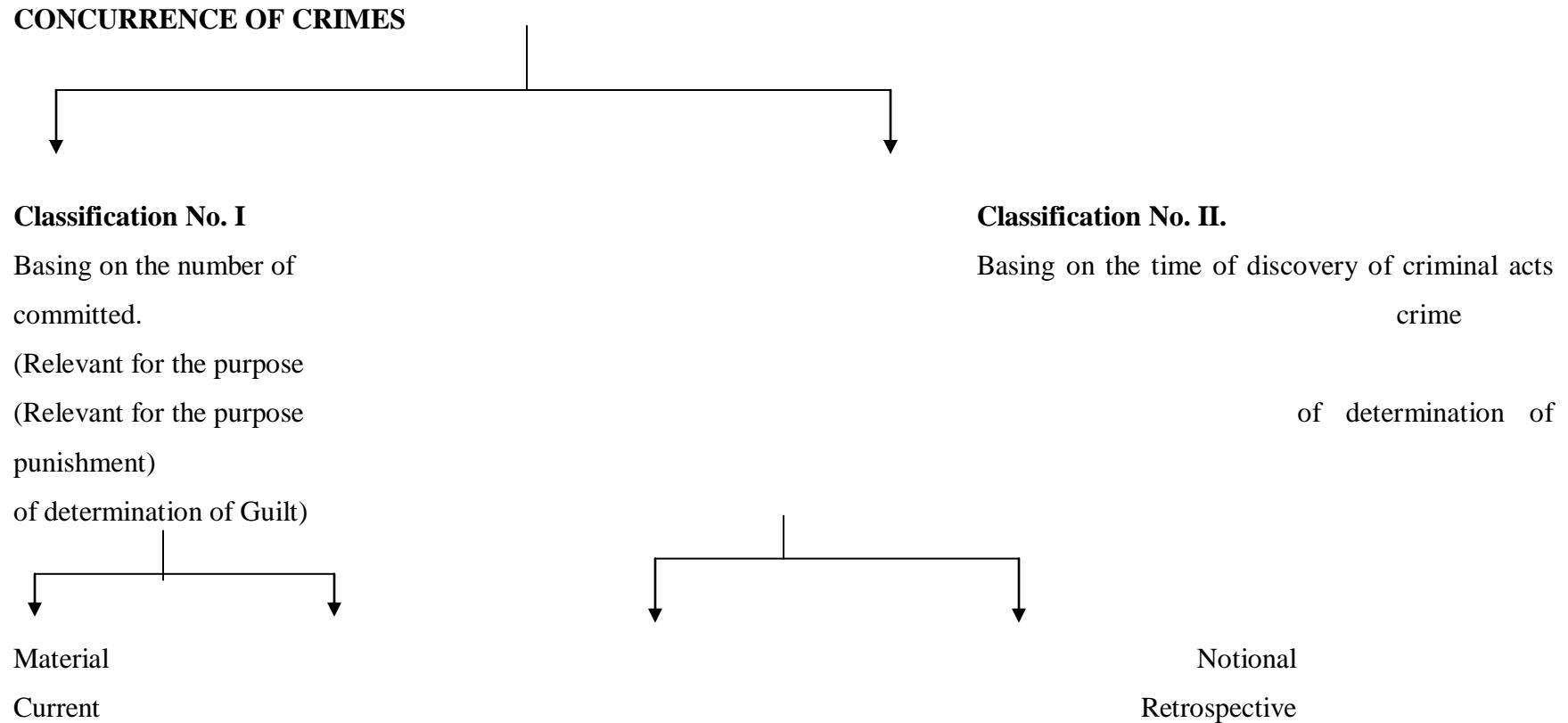
**6. Where the Participation is Superfluous:**

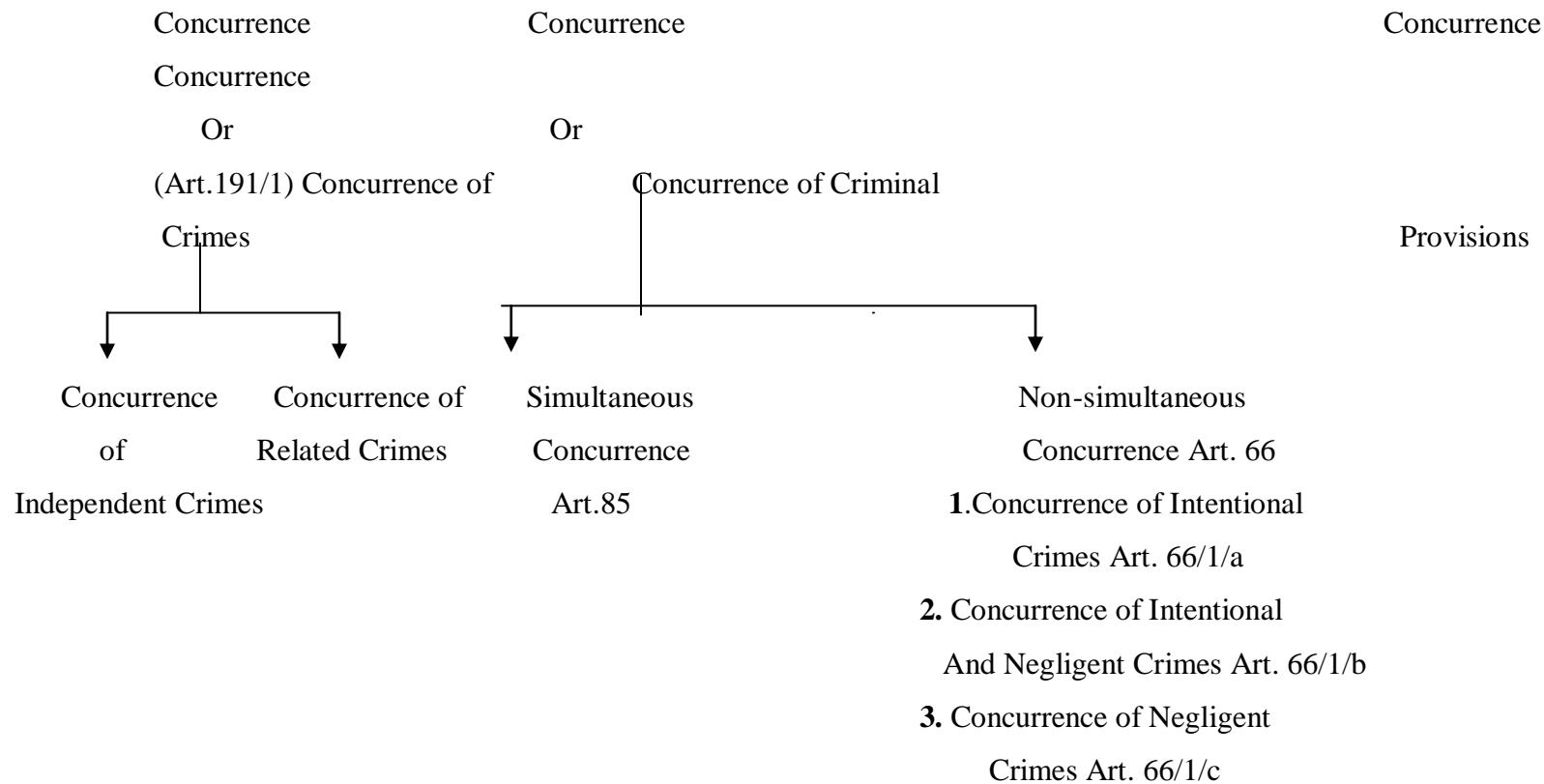
An intentional participation in a crime is not excused by the fact that it would have taken place irrespective of the co-operation of the accused. In such a circumstance, a man is involved in responsibility for the *actus reus* though his assistance in it was superfluous, and even though any opposition which he might have offered to it would have been quite 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.

### **3.1 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.

### **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.

This mechanism of ‘aggravation’ has two specific advantages:

1. It discards an unseasonable cumulative of punishments,
2. 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.

#### i. 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.

## **ii. 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.

### **iii. 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.

#### **Review Questions:**

Read the following the questions carefully and answer them with the help of relevant provisions of the law:

1. Mamo high-jacked the Ethiopian plane in 1992. A case was not brought against him since then until 1999. In 1996 the proclamation on the safety and security of aviation was enacted. Would the public prosecutor be able to bring an action against Abebe in 1999? Why or why not?
2. What would be your position in the question above if the proclamation on the safety and security of aviation is more beneficiary to Mamo than the Penal Code provision?
3. What do you think is the reason for the retrospective application of Penal Law in case it is beneficial to the defendant?

## **Jurisdiction and Periods of Limitation:**

As we have already discussed in chapter two of this course, jurisdiction deals with the persons subject to the Criminal Code of Ethiopia and to the Ethiopian Courts. Persons subject to the Criminal Code of Ethiopia are subject to the jurisdiction of the Ethiopian courts. Our concern here is the persons subject to the Ethiopian Criminal Law leaving the jurisdiction of courts to the Criminal Procedure Code. Please refer to the explanations on the relevant provisions pertaining Jurisdiction under the Criminal Code of Ethiopia.

## **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.

**Activity:**

Go through the following table and complete it by indicating the correct dates and the reasons under the respective column heading corresponding to each of the cases given.

No	List of Given Cases	Date when counting period of limitation begins	Date when period of limitation ends	Reason
1	Belete stole Tolosa's property on January12, 2006. He raped Tolosa's			

	daughter on February 1, 2004. Belete also caused bodily injury upon Tolosa on August 20, 2004.			
2	Ayele stabbed Kebede with a knife On March 4, 2004. The latter, however, died On March 15, 2005.			
3	Mohamed committed several crimes in order to destruct a military camp. Such offences were committed on five different days.			

#### **Section. 4. Corporate Criminal Liability**

Criminal law had long developed a mechanism as to how to respond to individual wrong doing. 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.

Criminal liability of corporations became one of the most debated topics of the 20<sup>th</sup> century. The debate became especially significant following the 1990s, when both the United States and Europe faced an alarming number of environmental, antitrust, fraud, food and drug, false statements, worker death, bribery, obstruction of justice, and financial crimes involving corporations. The most recent and prominent case in the United States has been the Enron scandal in which one of the largest accounting firms in the world, Arthur Andersen LLP, was charged with obstruction of justice (*Arthur Andersen LLP v. U.S.*, 544 U.S. 696 (2005)). McWane Inc., one of the world largest manufacturers of cast-iron pipes, has an extensive record of violations causing deaths. (David Barstow & Lowell Bergman, *Deaths on the Job, Slaps on the Wrist*, N.Y. Times, Jan. 10, 2003, at A1.) These corporate crimes resulted in great losses. The consequences that most directly affect our society are the enormous losses of money, jobs, and even lives. At the same time, the long-term effects of these crimes, such as the

damaging effects upon the environment or health, which may not severely affect us now, should not be underestimated.

The reaction to this corporate criminal phenomenon has been the creation of juridical regimes that could deter and punish corporate wrongdoing. Corporate misconduct has been addressed by civil, administrative, and criminal laws. At the present, most countries agree that corporations can be sanctioned under civil and administrative laws. However, the criminal liability of corporations has been more controversial. While several jurisdictions have accepted and applied the concept of corporate criminal liability under various models, other law systems have not been able or willing to incorporate it. Critics have voiced strong arguments against its efficiency and consistency with the principles of criminal law. At the same time, a large pool of partisans has vigorously defended corporate criminal liability.

#### **4.1.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.

The models of corporate liability developed by different countries vary significantly and none of them reflect all these goals perfectly. Although corporate criminal liability initially started by imitating the criminal liability of human beings, new models of criminal liability, such as ‘the aggregation’(USA) or ‘self-identity’/Identification(England and France) theories, have been developed to better fit the corporate structure and operation. The American system of corporate criminal liability has been the most developed and extensive system of corporate criminal liability created so far. The American model includes a large variety of criminal sanctions for corporations (such as fines, corporate probation, order of negative publicity, etc.) in attempt to effectively punish corporations when any employee commits a crime while acting within the scope of his or her employment and on behalf of the corporation. The most distinguishing and bold element of the American model of corporate criminal liability is the adoption of the *aggregation theory*. This theory provides that corporations can be held criminally liable based on the act of one employee and on the culpability of one or more other employees who, cumulatively, but not individually, met the requirements of *actus reus* and *mens rea* of the crime. Although this system meets the goals of retribution, rehabilitation, predictability, and clarity, it apparently has the tendency of being a bit over-deterring and costly.<sup>5</sup> It also has some significant spill-over effects on innocent shareholders and employees, and, some argue that, due to the adoption of the aggregation theory in particular, it lacks consistency with the traditional principles of criminal law.

The English and French models i.e., the identification test model, proved to be more restrictive mainly due to their requirement that the individuals acting on behalf of the corporation hold a high position or play a key function within the corporation’s decisional structure. Moreover, these systems refused to adopt the aggregation theory. Due to the contemporaneous tendency of corporations to fragment and delegate the power to decide and act, the prosecution of a significant number of crimes is prevented. Thus, although the requirements of clarity and consistency with the traditional principles of criminal law are met for the most part, these models seem to be under-deterring, less retributive,<sup>6</sup> and, overall, less efficient. Moreover, due to the lack of the

sanction of criminal probation the way it is instituted in U.S. and, in England, due to the lack of various other forms of sanctioning, the rehabilitative requirement is not adequately satisfied.

The development of the concept of corporate criminal liability in different countries reveals its important functions in our society. However, because corporate criminal liability is only at its inception, this area of law is open to continuous improvement. Only time and practice will tell what the best way of achieving the goals of corporate criminal liability are.

#### **4.2.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 labour 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.

#### **4.2.1. 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.

Most states use criminal and civil systems in parallel, making the political judgment on how infrequently to use the criminal law to maximize the publicity of those cases that are prosecuted. Some states enact specific legislation covering health and safety, and product safety issues which lay down general protections for the public and for the employees. The difficulty of proving a *mens rea* is avoided in the less serious offences by imposing absolute, strict liability, or vicarious liability which does not require proof

that the accused knew or could reasonably have known that its act was wrong, and which does not recognize any excuse of honest and reasonable mistake. But, most legislatures require some element of fault, either by way of an intention to commit the offence or recklessness resulting in the offence, or some knowledge of the relevant circumstances. Thus, companies are held liable when the acts and omissions, and the knowledge of the employees can be attributed to the corporation. This is usually filtered through an *identification, directing mind* or *alter ego* test which proves that the employee has sufficient status to be considered the company when acting.

#### **4.2.2. 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.

#### **4.3. 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

- 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.

### **4.4. 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 Summary:**

In This chapter presented and discussed the elements that constitute Criminal Liability in general and under Ethiopian Law in particular. It has also identified the basic requirements of criminal liability. 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 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

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. Preceding causes, concurrent causes and intervening causes are the circumstances that can break the chain of causation. There can be concurrence of crimes and concurrence of criminal provisions leading to aggravation of criminal punishment.

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 offences of strict liability.

Accident is a valid defence for criminal liability. In 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 defence for criminal liability.

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## **UNIT-V**

### **DEGREES IN THE COMMISSION OF CRIME**

#### **Introduction:**

Though several crimes occur on the spur of a moment, the path of crime is not necessarily a short one. Many acts may be done from the moment when the ‘intention’ is formed in the mind of the criminal till the moment when it materializes. Therefore, the question is what ‘stage’ should have been reached in the execution of a criminal design so that a person may be regarded as criminal? Arts. 26-30 lay down the principles relating to the liability of offenders in various stages of commission of the crime.

This chapter deals with 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. It also discusses about acts which may be done from the day when a criminal intent comes into being until the day it materializes. It will show what the boarder line to consider a certain situation as material element of the crime is and what is not. Other issues it discusses include preparatory acts, attempt, renunciation, active repentance, and impossible offence, special cases of attempt, and assessing sentence and causation.

#### **Objectives**

#### **By the end of this chapter students shall be able to:**

- identify the different stages in the commission of crime
- determine the degree of and role played by every one in the commission of an offence.
- dispose cases by applying the relevant provisions of the Penal Code.

## **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. This is the case when Assefa shot at Beyene and killed him. 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. The burning issue, therefore, is what degree should be reached in the carrying out of the criminal design in order to regard a person as having fulfilled the material element of the crime. What is the boarder line to consider a certain situation as material element of the crime and what is not? These and other issues will be discussed here under. These include Intention, preparatory acts, attempt, renunciation, active repentance, impossible offence and special cases of attempt.

### **1.1 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. If the distinction between morality and criminal law is to be preserved and if justice is to mean anything at all, the courts must be prohibited from, interfering so long as a person has not embarked upon a particular course of conduct. This prohibition exists in Art. 23 of the Criminal Code, which lays down that a crime, is not completed unless all its legal, material and moral ingredients are present.

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. For example, a person who has planned to rob a store may buy a pistol, survey the most “appropriate” time of action and arrange various facilities. Such preparations apparently involve external conduct. Yet, it is difficult and unfair to punish such acts because we cannot be certain about a person’s criminal intent unless the prospective criminal himself tells us. This uncertainty is inevitable because preparatory acts are “remote” from the ultimate harm and unequivocal design and the determination to carry it out.

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.

This definition encompasses all those situations where he/she from the moment that a person conceives the idea of committing a crime up to its consummation. This process includes formulation of intent to commit a crime. This intent may also be supported by external acts like collecting the means required to commit the offence and creating the conditions that may facilitate for the realization of the crime.

These 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. This can be further explained by the following examples shown hereunder:

- Belay, having determined to kill Abebe and having reflected his intention to his friend, decides to use a gun and, knowing that he has no gun goes to a black market and buys one. Belay cannot be said to have satisfied the material element of the crime for homicide because it is not clear for what purpose is the gun bought as buying of gun may have different purposes: harmful and innocent ones and there is no way of telling with reasonable certainty that the gun will be used for evil purposes. The buying is, therefore, equivocal and ambiguous.
- The same reasoning also applies to a person who buys a poison with the view of killing his enemy.
- The fact that Mamo invites Almaz to a hotel to kill her may amount to the creation of conditions for the commission of the offence but does not constitute the material element of homicide.
- The fact that Mohammed simply threatens Abara to kill him does not amount to the material element of homicide.
- The fact that Ali writes a letter to Dawit that he will kill him once in his life does not constitute the material element of homicide.

#### ➤ 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; or*
- b) They are expressly constituted a special crime by law by owing to their gravity or the general danger they entail".*

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.

There are two situations where *preparatory acts* are punishable.

#### **1. Where the Preparatory Acts Constitute a Crime in Themselves (Art 26/a):**

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.

#### **2. Where the Preparatory Acts Constitute a “Special Crime” by Owing to Their Gravity (Art 26/b):**

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.

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.

### **1.2 Attempt:**

Attempt is the second degree in the material element of the crime. 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. This is the case when Asfaw shot at Belay with the view of killing him but failed to achieve the target. In a nutshell, attempt includes three most important requirements to exist that include: intent, overt act, and failure to achieve the result.

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. For example if Abebe negligently causes bodily harm upon Kebede, he cannot be said to have attempted to kill him.

#### **1.2.1. 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 feel 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:**

Certain attempts are incapable of achieving the desired result. Such attempts involve situations where a criminal attempts “to commit a crime by means or against an object of such a nature that the commission of the crime was absolutely impossible”.

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

doctor's 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. Furthermore, 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. Yet, it is indeed difficult to interpret Article 29 otherwise.

#### **1.2.1. *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.

Example: "D" not knowing nor caring whether his wife (whom he left a year ago) is alive or dead, is about to go through, marriage with "C", but is prevented by his wife at the altar.... "D" intends the consequences, which are required for the crime of bigamy, but he is only reckless as to circumstances ... that the wife be alive .... Yet there seems to be no reason why he should not be guilty of attempt".

## **Section 2. Importance of Distinction between Preparation and Attempt:**

The fact that all attempts are punishable (Art. 27(2)) whereas all preparatory acts are not punishable (Art. 26), makes it essential to clearly distinguish between these two stages of crime.

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 movement 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.

## **2.1. Identification Of The Stage Of Attempt:**

One is said to have attempted a crime when he begins to commit the crime. Preparing to commit a crime does not amount to beginning the execution of the crime. Nevertheless, the demarcation point between preparation and the beginning of executing the crime is indeed difficult to draw. Criminal law does not give a clear-cut formula in this regard because the subjective conditions of the particular situation may lead to varying conclusions. Every case is to be judged according to the facts and circumstances of its own. However, 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 behaviour 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 aim, 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. Consider an illustrative Indian case.

***Abhayananandan Mishra v. State of Bihar, A.I.R. 1961 S.C. 1698.***

‘A’ applied to the Patna University for permission to appear at the M.A. Examination in English as a private candidate representing that he was a graduate and that he was teaching in a certain school. In support of his application, he attached certain experience certificate purporting to be from the Head Master of the School and the Inspector of Schools. The permission was granted. Later on it was found that he was neither a graduate nor a teacher and therefore, the permission was withdrawn. ‘A’ was held guilty of attempting to cheat.

The Supreme Court held that “the stage of preparation was complete when the accused prepared the application for submission to the university and the moment it was dispatched the offence of attempt was complete. In the opinion of the Court a person commits the offence of attempt to commit a particular crime when:

1. He intends to commit that offence, and
2. He having made preparations and with the intention to commit the offence does an act towards its commission.

Such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence”.

➤ ***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.

In *Malikiat Singh vs. State of Punjab*, the appellant a truck driver who was carrying food grains out of Punjab without a licence in violation of the Punjab (Export) Control Order, 1959, was stopped 14 miles away from the Punjab-Delhi border and was convicted for an attempt to contravene the said order. The Supreme Court, while allowing the appeal, held that, the act of carrying food grains did not amount to a criminal attempt. The Court said: “The test for determining whether the act of the appellant constituted an attempt or preparation is, whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress, the acts already done would be completely harmless. In the present case, it is quite possible that the appellants may have been warned that they had no licence to carry the food grains and they may have changed their minds at any place between the place of stopping the truck and the Delhi Punjab boundary and not have proceeded further in their journey”.

In relation to a crime of ‘Conspiracy’ the Calcutta High court opined in *People vs. Zamora*,(Cal.1976) that, “The requirement of an overt act before conspirators can be prosecuted and punished exists...to provide a locus poenitentiae an opportunity for the conspirators to reconsider, terminate the agreement, and thereby avoid punishment.”

#### ➤ 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.

### **2.2. Renunciation And Active Repentance:**

- Renunciation:**

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:

- 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;
- 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.

- **Active repentance:**

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).

**Review Questions:**

1. What is the reason for the non-retroactive application of criminal law in general and its retroactive application when it benefits the accused? (5 lines)
2. What does double jeopardy mean and what is the rule against it?

**Case Problems:**

1. Sisay and Getachew are merchants living in neighborhood in Woreda 2 of Addis Ababa. They often quarrel on a piece of land they share to display some goods they sell. Once as their quarrel grew serious Sisay fired his gun at Getachew with the intention of killing him but missed his target.

Determine the degree of liability of Sisay based on the relevant provisions of the Criminal Code of Ethiopia.

2. W/ro Mulu is a poor woman living in one of the slum areas in Addis Ababa. She lives in a far-from-decent house which is almost wretched with rats. One day, she decides to buy a poison to use it exterminate the rats, and she does. Just after her return from shopping (which included the buying of the poison), a certain debtor of hers called her on the telephone to tell her that he is with a big sum of money which he seeks to pay her. Taking this as a sign of Lady Luck being with her, she immediately rushes to the place she is appointed to be paid. It was told to her that she has not more than 5 minutes to collect the money. As she was rushing to collect the (said) money, the fact that she left the poison openly in front of her, now asleep, 5years old kid stroke her mind. She surrendered at first. "Oh, my God, my kid; he may take it and . . . oh!" she felt like, she has to return home and prevent the kid from taking the poison. But then she recognized that she has less than three minutes already. She chose to go shrugging, "Let him die, if he takes it within such duration. What can I do? I ought not to miss this opportunity to collect my long forgotten money." And so she went. When she came back home, she found the kid dead after consuming the poison.

Determine the state of mind of W/ro Mulu based on the relevant provisions of the Criminal Code of Ethiopia.

## **Unit Summary:**

In this chapter we have seen the various degrees in the commission of crime. These include preparatory acts, attempt, renunciation, active repentance, and impossible offence. We have also discussed the distinctions between each stages of committing crime and the legal effects at each stage. The material element of the crime may result in a completed or incomplete crime.

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. Most Criminal Laws including Ethiopian Criminal Code do not in principle punish preparatory acts. Punishing preparatory acts is therefore an exception than a rule under Ethiopian criminal law. 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.

An attempt is always punishable under the Criminal Code. 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. There are three different kinds of attempt namely, incomplete attempt, complete attempt and impossible attempt. Proof of the mental element of the accused is crucial for the punishment at the stage of an attempt. 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. 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.

## **References:**

### **Cases:**

- Haughton v. Smith (1973) 3 All E.R. 1109. England
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### **Books and Other Materials:**

1. Steven Lowenstein-“Materials for the Study of the Penal Law of Ethiopia” AAU, 1965
2. Philip Graven-“An Introduction to Ethiopian Law” Addis Ababa, 1965.
3. C.M.V Clarkson, and H.M Keating-“Criminal Law”, forth edition, 1999.
4. Arts.26- 31 of the Criminal Code of FDRE, 2004

## **UNIT- VI**

### **PARTICIPATION IN THE COMMISSION OF CRIME**

#### **Introduction:**

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.

This chapter deals with the degrees and roles played by different persons in the commission of the crime. A crime may be committed by one individual as in the case where Getachew steals a property from Solomon. It may also happen that a criminal offence may be committed by two or more persons as in the case where Abebe, Bogale, Abdela, and Chala commit robbery in the same or different capacity. This means, in other words, that it may well be the case but it is also very likely that at some stage either in the planning or commission of the crime other persons have become involved. It may also include the supply of information, advice; keep a look out or even instigating the crime. This is what is called participation.

There are different views on the criminal liability of persons who participate in the commission of an offence. Some hold the view that both principal offenders and accessories shall be liable to be tried, convicted and punished as if they had committed the crime themselves. This view is argument is based on the principle of eligibility for equal treatment that liability of secondary parties is dependent upon the principal offenders and the theory of participation that participation serves as potent evidence of an accomplice for instance associating himself or herself with the principal's criminal venture. Participation, which presupposes plurality of parties, is generally categorized into principal participation and secondary participation.

## **Objectives:**

### **At the end of this chapter students will be able to:**

- identify the degrees of participation.
- determine the role played by each person in the commission of an offence.
- distinguish between who takes part in the commission of an offence and who comes after the commission.
- determine the persons who require more severe treatment than others.

### **Section.1. Participation In Principal Capacity:**

Participation is defined differently in different legal systems. Some legal systems define it narrowly and only include those persons who involve themselves in the commission of the offence physically or personally. A person, therefore, is considered to be a principal offender if and only if he/she participates in the commission of the offence materially. If Alemu and Belay stabbed Chernet to death, they are principal offenders as they personally perform the offence on their own.

Some other legal systems, however, define it broadly not only to include material offenders but also those persons who take part in the commission of the offence either morally or indirectly. In any case, principal participation exists where those persons who do the act or acts constituting the offence or abstain from acting when they are bound to act. It is, therefore, the case that a person is considered to be the principal offender in homicide who stabs another by a knife; or he or she is the principal offender in an offence of theft if he or she snatches the bag from another. If the persons who involve themselves in the commission of the crime are more than two, they are still called principal criminals.

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).*

Participation in a crime is defined differently in different legal systems. Some legal systems define it narrowly so as to only include those persons who involve themselves in the commission of the crime physically or personally. A person, therefore, is considered to be a principal offender if and only if he/she participates in the commission of the offence materially. If Alemu and Belay stabbed Chernet to death, they are principal offenders as they personally performed the offence on their own.

## **1.1 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 Criminnal Code which states that “whosoever, by criminal negligence, causes the death of another....., is punishable with simple imprisonment or fine...”.

**Review Questions:**

1. Kebede, who is a butcher, was convicted of the offence of exposing for sale of meat which was unsound and unfit for human consumption. The meat in question was from a heifer which had been destroyed after becoming ill from eating yew leaves. Abebe, who is a veterinary surgeon, had negligently carried out an examination of the dead beast and had pronounced it sound and healthy as a result of which three people died. Determine the degree of participation of Kebede and Abebe towards the death of the three people.
2. Abebe and Kebede plan a robbery. Abebe will drive the gateway car while Kebede enters the house to steal money. It is agreed that Kebede should carry a bomb in order to threaten the occupiers should they arouse. Ayele, who is the occupier of the house, is awakened and comes down to investigate. Kebede immediately sent his hand to his pocket where the bomb exploded immediately time and killed Ayele.Determine the degree of participation and role played by Abebe and Kebede towards the death of Ayele.

**1.2 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.

Suppose that Worku organizes a group for the purpose of robbing a bank, decides the time and place of the crime, the means to be used in committing the same but stays at home while the crime is being committed. He can be considered as the moral criminal who facilitates the commission of the crime. He, however, cannot be taken as the material criminal of the robbery as he did not personally involve in the commission of the crime. He is also not an instigator as he himself decided and initiated the execution of the offence. It also happens that such parties to a crime may be two or more than two in number.

**Review Question:**

Ujulu, the boyfriend of Martha, who claimed to have been intimidated by Seifu, persuaded a group of friends to go with him to find the man, saying that they were going to find someone to hit. While they were looking for Seifu, Ujulu provided his friends with two pistols, a car, and a piece of advice about the time they should kill Seifu. Finally, they found Seifu and successfully achieved the criminal design.

What is the role played by Ujulu and his friends towards the death of Seifu?

**1.3. 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 to the persons listed below:

1. Compel another to commit a crime. This is the case when Tariku, under a gun point orders Fekadu to cause bodily injury upon.
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.

The same is also true for indirect criminal that they could be two or more towards the commission of a given crime or crimes.

### **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.

Suppose habitual criminals Mulugeta and Ababu organized Birhanu and Suleyman to kill Habtamu but who have never perpetrated such an act before, or involved in the crime. It is obvious that Mulugeta, Ababu Birhanu and Seligman are all liable of homicide. But the punishment may be different that it will be severe for Mulugeta and Aabu who are habitual criminals and less severe for Birhanu and Suleyman as it is their first time to commit a crime.

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.

#### **1.4. Co-criminals:**

##### **What happens if several persons involve in the commission of a crime together?**

This point has to do with co-offenders. 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.

From these Articles, it is possible to envisage that 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. For example, Amanuel, Bantirgu, Charew, and Dinku are co-offenders with conspiracy when they robbed Elfin after agreeing on their criminal design. In fact, the role played by the different persons in the robbery may be different. Zelalem, Yirga, and Zerfu shot Farah to death without having a prior discussion. These people can be considered as co-criminals without conspiracy.

#### **1.4.1. Co-Criminals in general Crimes and special Crimes**

Persons may also be categorized as 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 following instances can form good illustrations of crimes that can be committed by specified persons:

1. In desertion, it is required that the perpetrator be member of the military as per Article 288 of the Criminal Code which provides that “Any member of the defence Forces who, with intent to evade military service, quits his unit, post or military duties without proper authority, or fails to return to them after being absent with leave, is punishable with rigorous imprisonment not exceeding five years. 2) Where the crime is committed in time of emergency, general mobilization of war, the criminal is punishable with rigorous imprisonment from five years to 25 years or, in the gravest cases, with life imprisonment or death.
2. In rape-the person should be male to commit the same materially as per Article 620 which states that “whosoever compels a woman to submit to sexual intercourse outside wedlock, whether by the use of violence or grave intimidation, or after having rendered her unconscious or, incapable of resistance, is punishable with rigorous imprisonment from five to fifteen years.
3. In adultery-the person shall be married to involve himself in his principal capacity as a material offender as per Article 652 which provides that “a spouse bound by a union recognized under Civil Law who commits adultery, is punishable, upon complaint by the injured spouse, with simple imprisonment or fine.
4. In incest-the actor shall be relative of the other so as to be considered as a principal material offender in accordance with Article 654 of the Criminal Code which provides “performance of the sexual act, intentionally, between ascendant and descendant, between brother and sister, or between any persons whose marriage is forbidden by the relevant law on grounds of blood relationship is punishable, according to the circumstances and without prejudice to the deprivation of family

rights of the criminal, with simple imprisonment not less than three months, or with rigorous imprisonment not exceeding three years.

5. In corruption-the actor can be said to have committed the crime materially if he or she is a public servant as per Article 408 of the Criminal Code which reads as “any public servant who, directly or indirectly, seeks, receives or exacts a promise of an advantage for himself or another, in consideration for the performance or omission of an act, in violation of the duties proper to his office, is punishable with simple imprisonment for not less than one year, or rigorous imprisonment not exceeding ten years and fine not exceeding 20,000 Birr.

All other people who do not have the above respective qualifications cannot commit the respective crimes materially. But they can be held liable criminally being considered as co-criminals in a crime in their principal capacity either as moral or indirect parties in accordance with Article 33 of the Criminal Code. This is the case where a woman can be held criminally liable under Article 622 through Article 33 if she under a gun point forces a man to rape another woman.

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.

**Activity:**

Read the following cases and fill in the column by using ✓ mark under the right column headings.

No	List of Given Cases	Material	Moral	Indirect
1	Abebe, who is not a member of the military, promised 5000 birr to Bayuh, a military member to quit his membership and the latter did the same.			
2	A woman persuades a man to commit rape against another woman.			
3	A bachelor performs sexual intercourse with a married woman.			
4	A non-relative persuades another to perform sexual acts with his sister.			

## **Section.2. Participation In The Secondary Capacity:**

This refers to the involvement of persons in the commission of a crime in the second degree. 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.

## **2.1. 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.

## **2.2. 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).*

From this provision, the word accomplice is used to describe all persons who are accountable for crimes committed by another without considering whether they were or were not actually present at the time when and the place where the crime is committed. It may generally be said that a person participates in the commission of a crime in his or her secondary degree as an accomplice if he or she gives assistance to the principal criminal either before or during the commission of the crime with the intent thereby to promote or facilitate the commission of a crime. 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.

➤ **What are the legal effects of complicity?**

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.

### **2.3. 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 as shown in the following boxes:

When persons conspire to commit crimes against the state as per Article 257 (b) which provides, as:

**Make table**

**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 lose face from the others.

**2.4. 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.

One can see that the Ethiopian criminal law makes both the juridical person and its officials or employees who commit a crime criminally liable.

## **2.5. 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 subsection (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:**

It is dealt with under Article 39 of the Penal Code that reads as:

**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:

**Art. 254 Indirect Aid 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)

**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.)

**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.

**Case Problem:**

Kebede, who is a wealthy business man in Jimma, offered Abebe and Beletu 20,000 Birr if they kill Mekonnon whom Kebede suspects of having secret love affair with his wife. Abebe and Beletu who were very disparate to get the money offered approached Beletu, for advice on how best to execute their design; and Beletu accordingly advised the former that Mekonnon, should be poisoned while drinking in Alamaz's bar- which he often visits. Abebe and Beletu bought rat poison as advised and went to Alamaz's bar where they found Mekonnon drinking beer as usual. So, they sat beside him and poisoned his beer when he went out to telephone a friend. Mekonnon drank the beer and died immediately. Abebe and Beletu fled the scene and took refugee in one of their friend's (Mulu) house. Mulu was told that Abebe and Beletu poisoned Mekonnon to death. Hailu also kept silent after he knew that these people committed the offence.

Complete the following table by indicating the level of participation, liability and reasons for each.

Individual	Level of Participation	Liability	Reasons
Abebe			
Bekele			
Beletu			
Mulu			
Hailu			

## **Unit Summary:**

This unit we has discussed participation that deals with the involvement of two or more persons in the commission of the offence. These persons may take part either in their principal capacity as a material, moral or indirect offenders. They may also take part in the commission of the crime in their secondary capacity as an instigator or accomplice.

The unit also discusses learned that persons may take part in the commission of a crime either based on a pre existing agreement which is known as conspiracy or without it. Conspiracy, therefore, is a ground of aggravation of punishment even though it may constitute an independent offence when the law provides otherwise.

Accessories after the fact are those persons who do not participate in the crime but give help for the principal offender after the realization of the offence. Being an accessory after the fact gives rise to an independent crime.

Finally, it has discussed in this unit the cases where failure to report constitutes an independent crime by law when the law provides so even though it may not amount to participation.

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## MODEL EXAMINATION

### I. MULTIPLE CHOICE QUESTIONS: **5x2=10 MARKS**

- John approaches Job with a proposal that Job help John sneak into the Computer center at night, located in the main shopping complex of the Dire Dawa City, and pour acid on the computers rendering them useless. Job agrees to the idea but warns John that he gets very nervous and that probably he couldn't assist him during the actual break-in and property destruction. However, he agrees that he will purchase the acid and get it to John.
  1. At this stage the crime/s committed by John and Job is/are:
    - a. Conspiracy
    - b. Conspiracy and preparation to the crime intended
    - c. Attempt to the crime intended
    - d. None of the above
  2. In addition to the above facts, Job purchased the acid and handed it over to John:
    - a. The stage of attempt has already reached
    - b. The stage of attempt has not yet reached
    - c. There is still scope for the application of the *unequivocality* test
    - d. Both (b) and (c)
  3. After Job has supplied acid to John, we can establish his criminal liability as:
    - a. An instigator
    - b. Accomplice
    - c. Conspirator
    - d. None of the above
  4. Now, both John and Job proceeded to the shopping complex at 11:00Pm in the night and jumped over the compound wall in pursuance of their criminal intention. While Job was standing and watching and John was trying to open the window the security guards spotted them and tried to caught them

successfully. At this stage the following charges can be brought against them:

- a. Both of them can be charged for the attempt of the intended crime
  - b. Only John can be charged for the attempt
  - c. They are still in the preparatory stage because there is still time for repentance
  - d. The facts are insufficient to decide the stage of crime
5. If in the above case while John and Job were being chased by security guards, their friend Richard who was passing by in his car picks them up quickly and takes them to his home to give them shelter. Shortly afterwards, the police reach there and arrested all the three. On conviction the following will be their liabilities and punishments:
- a. Since John and Job are principal criminals both of them are punishable seriously
  - b. Only John is punishable as principal as Job was simply standing there and watching
  - c. In the absence of personal circumstances special to any of them all are punishable equally for the intended crime
  - d. Richard's punishment could be much less than that of the other two since he is only an accessory after the fact

**II. FILL IN THE BLANKS:****5x2=10 MARKS**

1. The main objectives of the Criminal Law are:

- a. \_\_\_\_\_
- b. \_\_\_\_\_
- c. \_\_\_\_\_
- d. \_\_\_\_\_

2. Following are the important ingredients of the principle of ***nullum crimen sine lege***:

- a. \_\_\_\_\_
- b. \_\_\_\_\_
- c. \_\_\_\_\_
- d. \_\_\_\_\_

3. The ‘Territorial Jurisdiction’ of Ethiopian Criminal Code includes the following:  
(Mention the relevant legal provisions)

- a. \_\_\_\_\_
  - (i) \_\_\_\_\_
  - (ii) \_\_\_\_\_
  - (iii) \_\_\_\_\_
- b. \_\_\_\_\_
- c. \_\_\_\_\_

4. These are the factors that can break the chain of ‘***causation***’:

- a. \_\_\_\_\_
- b. \_\_\_\_\_
- c. \_\_\_\_\_

5. As highlighted by Jean Graven, ***Fetha Negest*** included the following important modern principles of Criminal law:

- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

**III. PROBLEM NO. I****20 MARKS**

While walking down a rural road, Abel and Baker come upon Victor, obviously intoxicated, lying on railroad tracks running parallel to the road. Abel says, "Let him lie. Don't touch him," but Baker drags the man off the tracks onto the shoulder of the road. Abel and Baker go on their way. 15 minutes pass; a train comes by; Victor is not harmed, though he would have been killed if Baker had not moved him. 30 more minutes pass; Victor crawls onto the roadway in front of an oncoming truck; Victor is struck and killed because the driver is speeding and not paying attention. Discuss the liability of Abel and Baker for Victor's death.

- 1. What is *mens rea*? Explain the specific states of mind of Abe and Baker basing on the facts given above.**

**(10 Marks)**

- 2. What is 'causation of crime'? Explain whether or not causation could be established in the given case?**

**(10 Marks)****IV. PROBLEM NO. II****20 MARKS**

Andy and Bob decided to rob a grocery store. They borrowed Charlie's car. When Charlie asked what they wanted it for, Andy said, "to rob a grocery store." After Andy and Bob left Charlie had second thoughts and called the police. He told the police that Andy and Bob were going to rob a store and described his car. Because Charlie didn't know the intended location the police were unable to stop the robbery.

Bob gave Andy a loaded pistol and waited in the car while Andy entered a Convenient store and robbed the store of Bir.5000.00 by pointing the gun at clerk David. Andy also robbed a customer of Birr.200.00. As Andy was leaving the store, David, the clerk, tried to stop him then Andy shot and killed him.

**1. What are the crimes committed by Andy, Bob and Charlie? How do you Charge them? (10 Marks)**

**2. Identify the different kinds of participation in the given facts and explain their individual liabilities. (10 Marks)**

**V. Write an essay on the principle of ‘individualization of criminal justice’ as has been incorporated in the Criminal Code of Ethiopia. (10 Marks)**